OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER
delivered on 1 June 1999 *

I — Introduction

1. This reference for a preliminary ruling from the President of the Arrondissementsrechtbank te 's-Gravenhage (District Court, The Hague) concerns the validity of the amendment made by the Council to the scheme of association between the European Community and the overseas countries and territories ('the OCTs'). This scheme, which was established for a period of ten years by Decision 91/482/EEC of 25 July 1991 [1] ('Decision 91/482' or 'the OCT Decision'), was greatly amended, during the period of its application, by the adoption of Decision 97/803/EC of 24 November 1997 [2] ('Decision 97/803' or 'the reviewing Decision'), which affected, among other things, the possibility of exporting sugar to the Community from the OCTs.

2. The various questions on which a preliminary ruling is sought were raised in the context of interlocutory proceedings brought by the Dutch company Emesa Sugar (Free Zone) NV ('Emesa') against the authorities of the Netherlands State and of the Caribbean island of Aruba, which is one of the OCTs. In essence, Emesa sought the non-application of the provisions of the reviewing Decision, so that sugar imports from Aruba could continue to be governed by the OCT Decision.

3. The main proceedings form part of a whole 'battery' [3] of actions brought by Emesa and other economic operators and by the authorities of Aruba and the Netherlands Antilles both before the national courts and the Court of First Instance of

* Original language: Spanish.

1 — Council Decision 91/482 of 25 July 1991 on the association of the overseas countries and territories with the European Economic Community (OJ 1991 L 263, p. 1; corrigendum published in OJ 1993 L 15, p. 33).

2 — Council Decision 97/803 of 24 November 1997 amending at mid-term Decision 91/482 on the association of the overseas countries and territories with the European Economic Community (OJ 1997 L 329, p. 50).

3 — The French Government speaks of 'legal warfare'.

the European Communities [4] with the object of preventing the application of Decision 97/803. In addition, the Court of Justice is dealing with a similar question on which a preliminary ruling has been requested by the same Netherlands District Court. [5]

4. The background of the present case is the difficulty which the Community legislature has in reconciling the requirements of the common agricultural policy, in particular those arising from the common organisation of the market in sugar, with the aims of preferential trade treatment and promoting the development of the OCTs, laid down in Part Four of the EC Treaty on the OCTs. In particular, the Court is asked to give a ruling on whether there is in Community law a principle which would preclude the withdrawal or restriction of advantages, once they have been granted to the OCTs under the scheme of association ('locking principle').

II — Facts

5. The company Emesa Sugar (Free Zone) NV was formed on 6 February 1997 with capital originating from the United States-Brazilian Emesa Group. As early as April of the same year Emesa began its sugar-processing activity on the island of Aruba. This self-governing dependency of the Kingdom of the Netherlands is, as I have already said, one of the OCTs listed in Annex IV to the EC Treaty.

6. Since sugar is not produced on Aruba, the plaintiff company in the main proceedings obtains the necessary raw material for its business from cane sugar refineries in Trinidad and Tobago, which is one of the African, Caribbean and Pacific States ('the ACP States'). The sugar obtained in this

4 — The proceedings in Case T-310/97 *Netherlands Antilles* v *Council*, concerning an application for the annulment of Decision 97/803, were suspended by order of 16 November 1998 pending judgment in the present case. The application for interim measures in that case for the suspension of the operation of various provisions of the said decision was dismissed by order of the President of the Court of First Instance of 2 March 1998 (T-310/97 R [1998] ECR II-455), upheld on appeal by order of the President of the Court of Justice of 25 June 1998 (Case C-158/98 P(R) [1998] ECR I-4147). Similar applications for annulment were lodged by Aruba against the Council (Case T-36/98) and by Emesa against the Council and the Commission (Cases T-43/98 and T-44/98). In all three cases orders were also made for a stay of the proceedings pending the outcome of the present case. The application for interim measures in Case T-43/98 was dismissed by order of the President of the Court of First Instance of 14 August 1998 (Case T-43/98 R [1998] ECR II-3055), although that order was then set aside on appeal by order of the President of the Court of Justice of 17 December 1998 (Case C-363/98 P(R) *Emesa Sugar* v *Council* [1998] ECR I-8787). In Case T-44/98 Emesa also challenged, on an interim basis, the Commission's refusal to issue a sugar import licence under the conditions in force prior to the reviewing Decision. That application was also dismissed by the President of the Court of First Instance by order of 14 August 1998 (Case T-44/98 R), which was set aside on appeal by order of the President of the Court of Justice of 17 December 1998 (Case C-364/98 P(R) *Emesa Sugar* v *Commission* [1998] ECR I-8815). On 30 April 1999 the President of the Court of First Instance made a new order granting the interim suspension, subject to certain conditions, of the operation of Article 108b of the decision, authorising Emesa to export 7 500 tonnes of sugar to the Community over a period of six months. Finally, proceedings in Joined Cases T-52/98 and T-53/98 *Netherlands Antilles* v *Commission* and Case T-54/98 *Aruba* v *Commission* were also stayed, by order of 11 February 1999.

5 — Case C-380/97 *Emesa Sugar* v *Kingdom of the Netherlands, Staat der Nederlanden, Netherlands Antilles and Aruba*, in which proceedings were stayed by order of 5 December 1997.

way is subjected by Emesa to cleaning, grading or milling, [6] and packaging operations. According to Emesa, its annual production capacity is at least 34 000 tonnes of sugar.

7. Under Article 6(2) and (3) of Annex II to the OCT Decision, concerning what has become known as the 'ACP/OCT cumulation of origin' (see point 24 below), the operations mentioned in the previous paragraph are sufficient for the sugar to be considered as originating in an OCT and thereby to gain free access to the Community market. Since the price of sugar in the European Union is three times the world market price, [7] it is easy to see the commercial attraction of the operation outlined above.

8. Emesa's attempts to prevent, by means of legal proceedings, the participation of the Kingdom of the Netherlands in the review of the OCT Decision were frustrated by the judgment of the Gerechtshof te 's-Gravenhage (Regional Court of Appeal, The Hague) of 20 November 1997. That judgment, against which an appeal has been lodged, set aside two orders, granting Emesa's applications, of the court which has referred the present questions.

9. In the context of those proceedings, by order of 4 November 1997, the President of the Arrondissementsrechtbank te 's-Gravenhage referred to the Court of Justice a question concerning the power of national courts to prevent the participation of the authorities of a Member State in the adoption of Community acts. [8] The Netherlands State has appealed against that order for reference.

10. Decision 97/803, which was adopted by the Council on 24 November 1997 and which came into force on 1 December 1997, limits to 3 000 tonnes per year the quantity of sugar which may be imported into the Community duty-free under the 'ACP/OCT cumulation of origin' regime. The decision thus put an end to the situation described in the previous paragraph, with serious consequences for Emesa's economic objectives because, according to Emesa itself, the quota of 3 000 tonnes of sugar per year hardly represents one month's production.

11. After Decision 97/803 had been adopted, Emesa lodged before the President of the Arrondissementsrechtbank te 's-Gravenhage the application for interim measures which has given rise to the present proceedings. Emesa sought an order prohibiting the State from applying to Emesa's sugar any new import duties or charges, the Hoofdproductschap voor Akkerbouwproducten (Central Board for

6 — By means of this operation the sugar is given the degree of fineness specified by the customer.

7 — According to an investigation carried out by the Erasmus University for the Kingdom of the Netherlands, the Netherlands Antilles and Aruba.

8 — Case C-380/97, cited in footnote 5.

Agricultural Products, 'the HPA') from refusing to grant import licences for the same product and, finally, Aruba from refusing to issue Emesa the corresponding EUR.1 certificates. EUR.1 certificates are goods movement documents issued by the customs authorities of the OCTs in order to prove the origin of products. [9]

Nevertheless, in the order for reference itself, the Netherlands court declared the application inadmissible for want of the court's substantive jurisdiction, since it was directed against the Netherlands State (Staat der Nederlanden) and the HPA, and regarded it as admissible only in relation to Aruba. As a result, the subject-matter of the main proceedings is limited to Emesa's application, which was granted in the same order, for an order prohibiting the competent authorities of the island of Aruba from refusing to issue the EUR.1 certificate for sugar produced by the applicant on the ground that such refusal would not have been possible under Decision 91/482.

9 — Article 12 of Annex II to the OCT decision provides as follows:

'1. Evidence of originating status of products, within the meaning of this annex, shall be given by a movement certificate EUR.1, a specimen of which appears in Annex 4 to this annex.

2. A movement certificate EUR.1 may be issued only where it can serve as the documentary evidence required for the purpose of implementing the Decision.

3. A movement certificate EUR.1 shall be issued only on application having been made in writing by the exporter or, on his responsibility, by his authorised representative. Such application shall be made on a form, a specimen of which appears in Annex 4 to this annex, which shall be completed in accordance with this annex.

...

6. The movement certificate EUR.1 shall be issued by the customs authorities of the exporting country or territory, if the goods can be considered "originating products" within the meaning of this annex.

...'.

III — The questions referred for a preliminary ruling

12. Under those circumstances, the President of the Arrondissementsrechtbank decided to refer the following questions to the Court of Justice of the European Communities for a preliminary ruling:

'1. Is the mid-term amendment of the OCT Decision on 1 December 1997 by Council Decision 97/803/EC of 24 November 1997 (OJ 1997 L 329, p. 50) proportionate, more specifically the insertion of Article 108b(1) and deletion of "milling" as a relevant method of processing for the purposes of origin?

2. Is it acceptable for the restrictive consequences of that Council decision — more specifically the insertion of Article 108b(1) and deletion of "milling" as a relevant method of processing for the purposes of origin — to be (far) more serious than would have been the case had recourse been had to safeguard measures pursuant to Article 109 of the OCT Decision?

3. Is it compatible with the EC Treaty, in particular Part IV thereof, for a Council decision of the kind referred to in the second paragraph of Article 136 of the Treaty (in the present case, Deci-

sion 97/803/EC) to include quantitative restrictions on imports or measures having equivalent effect?

4. Is the answer to the third question different

(a) if those restrictions or measures are in the form of tariff quotas or limitations to the provisions relating to origin or a combination of the two

or

(b) if the provisions in question comprise safeguard measures or not?

5. Does it follow from the EC Treaty, in particular Part IV thereof, that for the purposes of the second paragraph of Article 136, the experience acquired — in the form of measures favourable to the OCTs — may not subsequently be reviewed or annulled to the detriment of the OCTs?

6. If that is indeed the case, are the Council decisions at issue therefore void and can individuals then rely on that in proceedings before the national court?

7. To what extent must the 1991 OCT decision (91/482, OJ 1991 L 263, p. 1; corrigendum in OJ 1993 L 15, p. 33) be deemed to apply without amendment during the ten-year period referred to in Article 240(1) thereof, given that the Council did not amend that decision before the expiry of the first (period of) five years referred to in Article 240(3) thereof?

8. Is the Council's amending Decision (97/803/EC) contrary to Article 133(1) of the EC Treaty?

9. Is Council Decision 97/803 valid, having regard to the expectations aroused by the information brochure (DE 76) distributed by the Commission in October 1993, given that, at page 16, the brochure states that the period of validity of the Sixth OCT Decision is now ten (previously five) years?

10. Is Article 108b, which was inserted on 1 December 1997, so unworkable that it must be deemed to be invalid?

11. Does the national court have jurisdiction, in circumstances such as those described in Joined Cases C-143/88 and C-92/89 *Zuckerfabrik Süderdithmarschen and Others* and subsequent cases, to adopt an interim measure in advance, in the event of an imminent breach of Community law by a non-Community enforcement body designated by Community law, in order to prevent that breach?

12. On the assumption that the answer to Question 11 is in the affirmative and that assessment of the circumstances referred to in Question 11 is a matter for the Court of Justice, rather than the national court, are the circumstances described in this judgment at points 3.9 to 3.11 inclusive [exclusion of milling and introduction of quantitative restrictions, serious and irreparable harm to Emesa and consideration of the Community interest] such as to justify a measure of the kind referred to in Question 11?'

IV — The relevant Community legislation

The EC Treaty

13. In regulating the territorial scope of the EC Treaty, paragraph 3 of Article 227 of the EC Treaty (now, after amendment, Article 299 EC) includes in that scope the OCTs listed in Annex IV which are the subject of 'the special arrangements for association set out in Part Four of this Treaty'. Since 1964 those OCTs [10] have included the Netherlands Antilles.

14. Article 3(r) of the EC Treaty (now, after amendment, Article 3 EC) provides that the activities of the Community are to include, as provided in the Treaty and in accordance with the timetable set out therein, 'the association of the overseas countries and territories in order to increase trade and promote jointly economic and social development'.

15. Part Four of the Treaty is entitled 'Association of the Overseas Countries and Territories'. According to Article 131 (now, after amendment, Article 182 EC), the purpose of association is to promote the economic and social development of the OCTs and to establish close economic relations between them and the Community as a whole.

10 — According to the present description, 'overseas countries of the Kingdom of the Netherlands', which include Aruba and the Netherlands Antilles properly so-called.

16. Article 132 of the EC Treaty (now Article 183 EC) states that:

'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.

...'

17. Article 133 of the EC Treaty (now, after amendment, Article 184 EC) provides as follows:

'1. Customs duties on imports into the Member States of goods originating in the countries and territories shall be completely abolished in conformity with the progressive abolition of customs duties between Member States in accordance with the provisions of this Treaty.

2. Customs duties on imports into each country or territory from Member States or from the other countries or territories shall be progressively abolished in accordance with the provisions of Articles 12, 13, 14, 15 and 17.

...'

18. Finally, Article 136 of the EC Treaty (now, after amendment Article 187 EC) states:

'For an initial period of five years after the entry into force of this Treaty, the details of and procedure for the association of the countries and territories with the Community shall be determined by an Implementing Convention annexed to this Treaty.

Before the Convention referred to in the preceding paragraph expires, 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.'

Decision 91/482

19. For the 10-year period 1990–99 the Council adopted Decision 91/482 which, in accordance with Article 241 thereof, came

into force on 20 September 1991. Under Article 240(1) thereof, the decision was to be applicable for a period of 10 years 'from 1 March 1990'.[11] Article 240(3) thereof provides as follows:

'3. Before the end of the first five years, the Council, acting unanimously on a proposal from the Commission, shall, in addition to the financial assistance referred to in Article 154(1), establish:

(a) where necessary, any amendments to provisions following notification to the Commission by the relevant authorities of the OCT not later than 10 months before expiry of this five-year period;

(b) where necessary, any amendments proposed by the Commission in the light of its own experience or as a result of amendments under negotiation between the Community and the ACP States;

(c) any transitional measures necessary as a result of the amendments made under subparagraphs (a) and (b) until their entry into force.

...'

20. Under Article 101 of Decision 91/482, before it was amended as described below:

'1. Products originating in the OCT shall be imported into the Community free of customs duties and charges having equivalent effect.

2. Products not originating in the OCT but which are in free circulation in an OCT and are re-exported as such to the Community shall be accepted for import into the Community free of customs duties and charges having equivalent effect providing that they:

— have paid, in the OCT concerned, customs duties or charges having equivalent effect of a level equal to, or higher than, the customs duties applicable in the Community on import of these same products originating in third countries eligible for the most-favoured-nation clause,

11 — For the problems of retrospective effect created by this provision, see points 24 to 43 of my Opinion in *Road Air*, which are referred to in paragraph 47 of the judgment of the Court of Justice in that case (C-310/95 *Road Air* [1997] ECR I-2229).

— have not been the subject of an exemption from, or a refund of, in whole or in part, customs duties or charges having equivalent effect,

— are accompanied by an export certificate.

...'.

21. Article 108(1), first indent, of Decision 91/482 states:

'— the concept of originating products and the methods of administrative cooperation relating thereto are laid down in Annex II'.

22. With regard to the specific origin criteria of OCT products, Article 1 of Annex II provides that:

'For the purpose of implementing the trade cooperation provisions of the Decision, a product shall be considered to be originating in the OCT, the Community or the ACP States if it has been either wholly obtained or sufficiently worked or processed there.'

23. Article 3(3) of that annex contains a list of working and processing operations which are deemed insufficient for the product to be considered as originating in an OCT.

24. Article 6(2) and (3) of Annex II lays down the 'cumulation of origin' system under which:

'2. When products wholly obtained in the Community or in the ACP States undergo working or processing in the OCT, they shall be considered as having been wholly obtained in the OCT.

3. Working and processing carried out in the Community or in the ACP States shall

be considered as having been carried out in the OCT when the materials undergo working or processing in the OCT.

...'

Decision 97/803

25. When Decision 97/803 entered into force, it inserted, in accordance with Article 32 thereof, a new Article 108b in Decision 91/482, paragraphs 1 and 2 of which provide:

'1. The ACP/OCT cumulation of origin referred to in Article 6 of Annex II shall be allowed for an annual quantity of 3 000 tonnes of sugar ...

2. For the purposes of implementing the ACP/OCT cumulation rules referred to in paragraph 1, forming sugar lumps or colouring shall be considered as sufficient to confer the status of OCT-originating products'.

26. Decision 97/803 also made a slight change to the wording of Article 101(1) of Decision 91/482:

'1. Products originating in the OCTs shall be imported into the Community free of import duty.'

27. Finally, Article 102 was replaced by the following:

'Without prejudice to Articles ... and 108b, the Community shall not apply to imports of products originating in the OCTs any quantitative restrictions or measures having equivalent effect.'

V — The arrangements for trade between the OCTs and the Community

28. In the Opinion which I delivered in *Road Air* [12] I had occasion to point out that, in order to determine the legal conditions governing relations between the OCTs and the Community, it was important above all to ascertain the extent to which each of the provisions of the Treaty could be applied to them, having regard to the provisions of Part Four of the Treaty. [13]

29. The general reply to this question given by the Court of Justice can be found in the judgment in *Leplat*: '[t]hat association [of the OCTs with the Community] is the subject of arrangements defined in Part Four of the Treaty (Articles 131 to 136), with the result that, failing express reference, the general provisions of the Treaty do not apply to the [OCTs]'. [14]

30. Consequently the association of the OCTs with the Community does not mean that the whole of Community law, [15] primary and secondary, applies to them directly and automatically. On the contrary, it is necessary in each case to establish, in the light of Part Four of the EC Treaty, which Community provisions are applicable to them and to what extent.

31. The Court's reply confirmed that the interpretation of the provisions in question did not preclude the levying of customs duties, but this would have to be done in accordance with the provisions of Decision 91/482, which had been validly adopted by the Council pursuant to the power conferred upon it by Article 136 of the Treaty.

32. Similarly, in *Antillean Rice Mills*, [16] the Court stated that, although the OCTs have special links with the Community, they do not form part of it and free movement of goods between the OCTs and the Community does not exist unrestrictedly at this stage.

12 — Cited in footnote 11.

13 — The *Road Air* case concerned the question whether the provisions of Part Four of the EEC Treaty prevented, at the material date (June 1991), the levying of customs duties on the importation into the Community of goods originating from a non-member State which were in free circulation in the Netherlands Antilles.

14 — Case C-260/90 *Leplat* [1992] ECR I-643, paragraph 10.

15 — In paragraph 62 of Opinion 1/78 [1979] ECR 2871, and paragraph 17 of Opinion 1/94 [1994] ECR I-5267, the Court of Justice, referring to the OCTs, confirmed that they are dependent territories of Member States but are outside the scope of Community law.

16 — Case C-390/95 P *Antillean Rice Mills and Others* v *Commission* [1999] ECR I-769, paragraph 36.

33. The legal principles on the basis of which that reply was given are, in brief, as follows:

(a) The OCTs do not form part of the customs territory of the Community, and their trade with the Community is not treated in the same way as trade between Member States. In the latter case transactions are intra-Community transactions, whereas those between the OCTs and the Community are true imports.

(b) Article 133(1) of the EC Treaty (now, after amendment, Article 184(1) EC) does not apply to products which, after being imported into those countries and territories, are then re-exported to one of the Member States.

(c) Another interpretation — like that which requires, with regard to products of that kind, that the OCTs be granted conditions similar to those which the Member States accord each other — would be that 'the OCTS would form part of the common customs area, a result which goes far beyond what was envisaged by the Treaty'. [17]

17 — *Road Air*, cited in footnote 11, paragraph 34.

(d) In any case it is necessary to abide by the provisions of the decisions adopted by the Council for the period in question on the basis of Article 136 of the Treaty.

VI — Re-ordering of the questions

34. To facilitate discussion of the questions from the national court, I shall group them together in the following logical order:

(a) Inadmissibility of the questions referred (preliminary question).

(b) Possibility of reviewing the OCT Decision after the first five years of its application (Questions 7 and 9).

(c) Irreversibility of the progress achieved under Article 136 of the EC Treaty (now, after amendment, Article 187 EC) (Questions 5 and 6).

(d) Validity of quantitative restrictions in the light of Article 133(1) of the EC

Treaty (now, after amendment, Article 184(1) EC) and Article 136 of the Treaty (Questions 3, 4 and 8).

(e) Proportionality of the introduction of the quota and the alleged deletion of milling as a sufficient method of processing (Questions 1, 2 and 10).

(f) [Unworkable nature of Article 108b (Question 10)

(g)] Adoption of interim measures (Questions 11 and 12).

point 110 et seq. below). Since the application for suspension directed against the Netherlands authorities has been ruled inadmissible, the subject-matter of the main proceedings has been reduced to the interim order requiring Aruba to continue to issue EUR.1 certificates of origin without taking account of the provisions of the reviewing Decision. Since that decision makes no changes whatever with regard to those certificates, the question whether it is valid or not in the light of Community law (which is the subject of the question referred) can have no effect at all on the order for suspension in the main proceedings.

However, the Council and the Commission agree that, quite apart from the subject-matter of the present case, the Community public interest and, in particular, the need for legal certainty require a rapid decision by the Court of Justice on whether Decision 97/803 is valid.

VII — Replies to the questions

A — *Preliminary question: inadmissibility of the questions referred*

35. The Council and the Commission have raised the possible inadmissibility of the questions referred on account of their lack of relevance to the main proceedings (see

Bearing in mind these considerations, and the fact that the proceedings in the other cases in which the validity of that decision has been questioned have been suspended pending the outcome of the present case (see footnotes 4 and 5), I also am of the opinion that it would be in the interest of the proper administration of justice to give rapid replies to the questions which have now been referred.

B — *The possibility of reviewing the OCT Decision during its period of application (Questions 7 and 9)*

36. By its seventh question, the national court raises the problem of whether the Council may make mid-term amendments after the end of the five-year period (on 1 March 1995) referred to in Article 240(3) of the OCT Decision, but within the ten-year period of applicability laid down in Article 240(1) (see point 19 above).

37. Emesa and Aruba submit that the period allowed for review in Article 240(3) of the OCT Decision must be construed as a mandatory time-limit, in the sense that there is no possibility of amendment once the period has expired, save for the exceptional safeguard measures which might be adopted under Article 109. Therefore the Council had no competence *ratione temporis* to adopt the reviewing Decision two-and-a-half years after the final date.

38. The observations of the various Member States and institutions which have intervened in the proceedings are in almost perfect agreement on both the effect and the actual terms of the reply which should be given to this question.

39. For the Council and the Commission, the authorisation in Article 240(3) of the OCT Decision is a classic example of the many provisions in Community legislation which permit the review of measures in force so as to be able to respond to current developments, one example being the system laid down by the various Lomé Conventions.

40. The Spanish Government observed that the five-year period referred to in Article 240(3) had the object of ensuring that any review of the OCT decision in relation to the common organisation of the markets in agricultural products take account of the recalculation of financial assistance from the Community, which had been fixed for only five years (Article 154 of the OCT Decision). It was also intended to enable any review to coincide with the review of the Fourth Lomé Convention, so that the common organisation of the markets would benefit from the improvements arising from the mid-term review of the said Convention. Furthermore, the Spanish Government does not share the view that the Council may have had no competence *ratione temporis* to adopt Decision 97/803. That would be to misconstrue Article 240(3), without taking into account the Council's purpose in inserting that review clause.

41. According to the Italian Government, the words 'before the end of the first five years' in Article 240(3) cannot be taken to mean an unalterable period after which no amendments whatever could be made. If

that were so, it would mean that the OCT Decision had to be regarded as an inflexible instrument, disregarding its true *ratio*. On the contrary, that period should be understood as an 'encouragement' to act in the light of all the measures already applied.

42. I agree with each and every one of the viewpoints hitherto expressed, which I adopt. The five-year time-limit which the Council imposed on itself in the OCT Decision for carrying out its mid-term review does not deprive it of its legislative power once the five years have elapsed. On this point the situation in this case clearly differs from that in *Hansen* [18] upon which the parties to the main proceedings rely. The time-limit in that case was a mandatory time-limit imposed on the Council by the former Article 227(2) of the Treaty.

43. Furthermore, even if Article 240(3) of the OCT Decision did not exist, that is to say, if that decision did not provide for any mid-term review, the Council would be authorised to amend the Decision at any time because its competence in this connection derives directly from Article 136 of the Treaty and not from the successive decisions adopted by the Council itself pursuant to that article.

44. In short, therefore, the Council's legislative power in this matter is limited, not by the provisions of the OCT Decision, but, more specifically, by the ultimate attainment of the political objectives set out in Article 132 of the Treaty and, in general, by the fact that the Council's acts are subject to the requirement of legality, in which the general principles of law play a predominant part.

45. In relation to the progressive attainment of those objectives, the Court of Justice found, in *Road Air*, that Article 136 confers on the Council a considerable degree of discretion to adopt the provisions needed for attainment of the objectives of the association with the OCTs. [19] The Court added that '[a]ssociation of the OCTs 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'. [20]

46. Regarding the limits imposed on the Council's work by the general principles of law, in the present context special attention should be given to the protection of legitimate expectations, which I shall discuss below.

18 — Case 148/77 *Hansen* [1978] ECR 1787.

19 — *Road Air*, cited in footnote 11, paragraph 39.

20 — Ibid., paragraph 40.

47. Therefore I consider that the Council was fully entitled to review the OCT Decision when it did.

48. By its ninth question, the Netherlands court raises the issue of the validity of Decision 97/803 having regard to the hopes raised by brochure No DE 76 [21] distributed by the Commission in October 1993, which stated that the period of applicability of the OCT Decision was 10 years.

49. In reply to this question, it could be argued, firstly, that a brochure can under no circumstances serve as a basis for legitimate hopes on the part of a businessman preparing to make a large economic investment. It is inconceivable that even the least diligent administrator, when carrying out an investment project, should take into account only the information contained in a publicly distributed document which has no legal status whatever.

50. It is also a fact that the brochure in question was distributed before the reviewing Decision was adopted and before the expiry of the five-year period referred to in Article 240(3) of the OCT Decision. At that time the information in the brochure coincided with the then provisions of the OCT Decision. A publicly distributed document does not create greater rights than those which may be based on the legislative measure on which it purports to give information. Therefore the question from the national court is reduced to the expectations, meriting legal protection, which Emesa was entitled to have with regard to the maintenance in force of the cumulation of origin rules laid down in the OCT Decision.

51. As the Court has repeatedly observed, 'whilst the protection of legitimate expectations is one of the fundamental principles of the Community, traders cannot have a legitimate expectation that an existing situation which is capable of being altered by the Community institutions in the exercise of their discretion will be maintained; this is particularly true in an area such as the common organisation of the markets whose purpose involves constant adjustments to meet changes in the economic situation.' [22] If this applies generally, it applies with greater force where the trader concerned takes financial risks when he is well aware of the possibility of a change in the legal rules in question.

52. In the present case, there is no doubt that, at the time when it first made investments in Aruba, Emesa had sufficient information to enable it reasonably to foresee that the rules allowing cumulation of origin would undergo amendment. As the Council rightly points out in its obser-

21 — Entitled *'The European Community and the Overseas Countries and Territories'*.

22 — See, in particular, Case C-372/96 *Pontillo* [1998] ECR I-5091, paragraphs 22 and 23.

vations, that is clear from the statements of Emesa's own legal representatives in Case T-43/98. [23] According to them, it had been known at least since November 1996 that the Council was studying an Irish compromise proposal consisting precisely in limiting to 3 000 tonnes per year the quantity of sugar which could be imported into the Community under the ACP/OCT cumulation of origin rules.

53. Under those circumstances, I do not think the applicant company can avail itself of the protection which would be merited by legitimate expectations that the preferential arrangements for sugar imports were to continue.

C — *The irreversibility of the progress achieved under Article 136 of the Treaty (Questions 5 and 6)*

54. By its fifth question, the national court raises the problem of whether the advantages conferred upon the OCTs are in principle reversible having regard to Article 136. The sixth question, concerning the effects of such irreversibility, has to be considered only if those advantages cannot be withdrawn.

55. The parties to the main proceedings agree that what they refer to as a 'locking' or 'blocking' mechanism exists under Part Four of the Treaty. This mechanism is said to prevent the Community institutions from adopting measures which would entail a permanent curtailment of the rights or privileges granted to the OCTs in each of the preceding decisions. The provisions of those decisions are said to mark a point of inflexibility or of no-return, so that any subsequent decision curtailing such rights or privileges must be deemed to be contrary to the Treaty and individuals could plead directly that it is invalid.

56. The President of the Arrondissementsrechtbank appears to take this position. In the order for reference he mentions the report delivered by a committee of experts at the request of the Netherlands authorities, according to which the abovementioned locking mechanism is implied in Article 132(1) of the Treaty. The wording of that article is precise and unconditional and it could only imply an obligation to achieve a specific result on the part of the Community. The national court 'does not consider that view to have been seriously challenged. It seems to be plausible. Even in the context of the gradual establishment of the common market itself, various Treaty provisions expressly stated (during the transitional period) that in moving towards a truly common market, Member States were not permitted to introduce any new barriers to trade between them; that is the so-called standstill clause'.

23 — Cited in footnote 4. See paragraph 26 of the application for interim measures.

57. Nevertheless, according to the opinion which I share with all the representatives of the Member States and the Community institutions which have intervened in the proceedings, there is no foundation for the locking theory in the general terms in which it is formulated. The fact that the dynamic process of association of the OCTs with the Community requires ever-greater global integration does not mean that the Council cannot, in certain matters, reinterpret downwards a particular facility previously granted to the OCTs. This applies particularly where the advantage in question has been established only on a provisional basis, because of its exceptional nature and the characteristics of the Community market. That is the case here with regard to the rule which allows certain products from the ACP States, after certain operations have been carried out, to be classified as being of OCT origin.

58. The fiction upon which the cumulation of origin rules are based was adopted at the time by the Council without its being entirely aware — and it probably could not have been aware — of the consequences which it could entail. There are precedents for comparable provisional situations. In *Germany* v *Council*,[24] the Federal Government argued that the Protocol on the customs quota for imports of bananas formed an integral part of the Treaty and therefore any amendment to the Protocol must be made in accordance with the conditions laid down by the then Article 236. The Court found that it was correct that the Protocol formed an integral part of the Treaty since it was annexed to the implementing Convention on the Association of the OCTs with the Community. However, the Court added that the Protocol was adopted as a transitional measure pending standardisation of the conditions for importing bananas into the common market.

59. The provisional or, if preferred, transitional nature of the measures which the Council may adopt in such circumstances is not disrespectful of the rights and expectations of the OCTs or of individuals, particularly where the stability of a system of trade privileges depends on whether it is compatible with other Community objectives which are also enshrined in the Treaty, such as the proper functioning of a common market organisation in accordance with Article 33 EC Treaty (formerly Article 39 of the EC Treaty). Therefore when it was found that the cumulation of origin in the sugar sector could cause significant disturbances to the already delicate balance of the common market organisation in question, the Council was not only formally entitled, but also obliged by the Treaty itself to take action against those intolerable effects of the OCT Decision.

60. Consequently the Council fulfilled its duty in analysing the 'experience acquired' from the OCT Decision in the light of 'the principles set out in this Treaty' (Article 136). The results of that analysis could have led to the maintenance or the withdrawal of the measure, or to the restriction of its effects. Likewise, the Council could have considered altering the common market organisation for sugar. The important

24 — Case C-280/93 *Germany* v *Council* [1994] ECR I-4973.

point was that any measure should be in keeping with the principles of the Treaty which, together with the promotion of trade with the OCTs, include the maintenance of a common agricultural policy.

61. In the present case the Council chose to reduce the quantity of sugar eligible for the privilege of ACP/OCT cumulation of origin to 3 000 tonnes a year, enough to cover amply the traditional imports of sugar from the OCTs. I shall refer to the situation in the Community market for sugar when I deal with the question of proportionality.

62. However, the reviewing Decision does not contain only restrictions or limitations. It also established various advantages in different fields of the association: better opportunities for the establishment of inhabitants of the OCTs in the Community (Articles 232 and 233a), advances in the mutual recognition of qualifications (Article 233b) and an opportunity for access to various Community programmes (Article 233c). In addition, Community financial aid to the OCTs was increased by 21%. In brief, I do not think, considering the reviewing Decision as a whole, that it must necessarily be concluded that the OCT scheme of association was amended downwards, [25] and in any case such amendment might have been perfectly legitimate, in the light of what was said above.

63. As I observed in my Opinion in *Road Air*, '[i]t must be borne in mind that each of the OCT Decisions represents a cohesive legislative whole, the various components of which cannot be analysed in isolation. Specifically, the abolition of tariff duties must be linked with another series of measures which, to a greater or lesser degree, promote the economic and social development of the OCTs'. [26]

64. Therefore I cannot find any cogent arguments for concluding that, where a preferential rule of origin in the framework of the association of the OCTs has shown itself capable, at least potentially, of causing significant disturbances in the functioning of a common market organisation, the Council is obliged by the Treaty to uphold that rule for ever.

25 — Particularly when account is taken of the probably modest contribution to the economic development of the OCTs which may arise from the low added value represented by the industrial operations in this case (see footnote 38).

26 — [1997] ECR I-2250, point 95.

D — *The validity of quantitative restrictions in the light of Articles 133(1) and 136 of the Treaty (Questions 3, 4 and 8)*

65. Article 133(1) provides for the progressive abolition of customs duties on imports of goods originating in the OCTs (see point 17 above).

66. Firstly, unlike the Council, I consider that Article 108b of the reviewing Decision imposed an actual quantitative restriction on trade with the OCTs. As the Commission observes, although the importation of a particular product is legally possible over and above the fixed quota, the duties payable usually make it economically impractical. This applies to products subject to a common market organisation and for which there are surpluses in the Community.

67. On the other hand, what I am uncertain of is whether the quantitative restriction in this case was applied to 'goods originating in the countries and territories' within the meaning of Article 133. This may hold the key to all the questions referred to the Court in this case: the legal assessment of the provisions in Article 6(2) and (3) of Annex II to the OCT Decision and Article 108b of the reviewing Decision. However, as I shall show below, the answer will probably be the same whether the problem is approached from the technical viewpoint of customs or from the viewpoint of trade policy.

68. The concept of 'origin of a product', which is not defined in the Treaties, nevertheless has a minimum content given to it by the meaning of the words themselves. Wine made from Rioja grapes which has been made, matured and bottled in Spain is unquestionably a product of Spanish origin. This core meaning of the concept [27] — which applies also where the goods have undergone a manifestly minor processing operation elsewhere — must be sheltered from any intervention by the legislature because it constitutes one of the creations of the law of property. Then, the discretion which the legislature still has regarding the definition of the term inevitably changes the rules of origin into technical legal instruments serving political aims. There is nothing unlawful in using what are really customs parameters for the orientation of the Community's trade policy, for example. Accordingly, in the context of the common agricultural policy, fiscal measures are frequently used for the purpose of market regulation. [28]

27 — Which is defined, in relation to intra-Community trade, in Article 4 of Council Regulation (EEC) No 802/68 of 27 June 1968 on the common definition of the concept of origin of goods (OJ English Special Edition 1968 (I), p. 165) and, in relation to the OCTs, in Article 2 of Annex II to the OCT decision.

28 — For the legal nature of the additional levy on milk and milk products, see the Opinion I delivered in Case C-186/96 *Demand* [1998] ECR I-8529, points 36 to 44.

69. This means that, for purposes of custom control, of course, there is nothing to prevent the legislature from allowing as the place of origin of certain goods a place where they could not have originated from an economic point of view, because of the small amount of added value. By acting in this way, the legislature is not claiming to designate the origin of the goods in question, but is using a legal fiction which permits certain kinds of goods to receive — usually preferential — treatment *such as that which is given* to goods of a particular origin.

70. The ACP/OCT cumulation rules must be seen in this way, since they confer a certificate of OCT origin on goods from the ACPs after minimum working in one of the OCTs, so that they can be given favourable treatment *as if they were* OCT goods. It is not for nothing that Article 6(2) and (3) of Annex II to the OCT Decision state that '[w]hen products wholly obtained in the Community or in the ACP States undergo working or processing in the OCT, *they shall be considered* as having been wholly obtained in the OCT', or '[w]orking and processing carried out in the Community or in the ACP States *shall be considered* as having been carried out in the OCT when the materials undergo working or processing in the OCT'. [29]

71. To sum up, I consider that the ACP/OCT cumulation of origin rules are a means of preferential trade treatment and, as such, are completely outside the provisions of Article 133(1) of the Treaty and are subject only to the attainment of the aims set out in Articles 131 and 132 of the Treaty.

72. If, notwithstanding the reasoning above, the Court took the view that the addition of Article 108b is equivalent to the imposition of a customs duty on goods *originating* from the OCTs, the validity of that provision should not necessarily be questioned for that reason either. The favourable treatment laid down by the Treaty for the importation of goods of OCT origin must be put in place in the same way as that in which it was gradually introduced between the Member States. This is the meaning to be given to Article 133(1) when it provides that 'customs duties shall be completely abolished *in conformity with the progressive abolition of customs duties between Member States in accordance with the provisions of this Treaty*'. [30] Similarly, Article 132(1) of the Treaty states that one of the objectives of association is that Member States are to apply to their trade with the OCTs *the same treatment as they accord each other pursuant to the Treaty*.

73. Therefore it must be concluded that, in the field in question in this case, that is the

29 — Emphasis added.

30 — Emphasis added.

legal framework of trade in sugar, the dismantling of the intra-Community tariff took place only by means of the establishment of a common market organisation for that product. One of the characteristics of such an organisation — as of many others — is the simultaneous establishment of a common external tariff and determination of a minimum price applicable in all the Member States. The possibility of benefiting from the cumulation of origin rules, combined with the maintenance of the autonomy of the OCTs for customs purposes, put the OCTs in a much more advantageous position than that of any Member State so that, to avoid disruption of the Community market, the Council was compelled to make the necessary corrections. In other words, any comparative injustice which may be alleged to exist as between the process of liberalisation of the trade in sugar between the Member States and that which should be introduced in the relations between the Community and the OCTs is deceptive unless the previous establishment, at Community level, of the corresponding common organisation is taken into account. From that viewpoint, even if the quantitative restriction at issue had been applied to goods originating from the OCTs, such restriction would not have infringed Article 133(1) since the procedure employed by the Member States for the gradual abolition of customs duties which used to apply between them was not followed.

74. I therefore conclude that Article 133(1) of the Treaty provides no basis for challenging the validity of the quantitative restriction imposed by the reviewing Decision and, in particular, by Article 108b thereof, on imports of sugar governed by the ACP/OCT cumulation of origin rules.

75. The third and fourth questions of the Netherlands court concern the possible incompatibility of the quantitative restriction at issue with the EC Treaty, particularly the second paragraph of Article 136. The national court does not state, however, wherein such incompatibility might lie.

76. Article 136 authorises the Council, in very wide terms, to determine the detail of and procedure for the association of the OCTs with the Community. In doing so, the Council must, according to the same article, be guided by the experience acquired and the principles set out in the Treaty.

77. That is precisely what the Council did when, in view of the risk of disruption of the Community market created by potentially unlimited imports of sugar under the cumulation rules, it imposed a tariff quota on that product in order to preserve part of the common agricultural policy which is undoubtedly one of the elements of the Treaty (Article 3(e)). The seventh recital in the preamble to Decision 97/803 sets out with a rare degree of clarity the reasons

which led the Council to proceed as it did. [31]

78. The Court has had occasion to stress the legitimacy of this course of action. Accordingly, in *Antillean Rice Mills*, [32] it pointed out that 'the second paragraph of Article 136 authorises the Council to adopt decisions concerning the association on the basis of the principles set out in the Treaty. It follows that when the Council adopts OCT decisions under that article, it must take account not only of the principles in Part Four of the Treaty, but also of the other principles of Community law, including those relating to the common agricultural policy'. The Court added that '[t]hat conclusion is, moreover, consistent with Article 3(r) and Article 131 of the Treaty, which provide that the Community is to promote the economic and social development of the OCTs, but without that promotion implying an obligation to give them privileged treatment.' [33]

79. With regard to the means chosen for implementing its objectives, it must be remembered that, in so far as this question will not be considered in connection with observance of the principle of proportionality, the Community legislature has, in matters concerning the common agricultural policy, a broad discretion which corresponds to the political responsibilities given to it by Articles 40 to 43 of the EC Treaty (now, after amendment, Articles 34 EC to 37 EC) [34]

80. Consequently, in the measures adopted by the Council I see nothing which could constitute an infringement of the power conferred upon it by Article 136.

E — *The proportionality of the introduction of the quota and the alleged deletion of milling as a sufficient method of processing (Questions 1 and 2)*

81. The following points discuss whether paragraph 1 (imposition of the quota) and paragraph 2 (alleged deletion of milling) of Article 108b of the reviewing Decision are compatible with the rules on proportionality (first question) and with the limits laid down in Article 109 in relation to the adoption of safeguard measures (second question).

31 — 'Whereas the introduction pursuant to Decision 91/482/EEC of free access for all products originating in the OCTs and the maintenance of cumulation for ACP and OCT originating products has given rise to the risk of conflict between two Community policy objectives, namely the development of the OCTs and the common agricultural policy; whereas serious disruption on the Community market for certain products subject to a common organisation of the market has led on a number of occasions to the adoption of safeguard measures; whereas 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'.

32 — Cited in footnote 16, paragraph 37.

33 — Ibid., paragraph 38.

34 — See *Germany* v *Council*, cited in footnote 24, paragraph 89.

(i) The principle of proportionality in general

82. The principle of proportionality requires that, where a measure is taken to prohibit or restrict economic activity, it must be appropriate and necessary in order to attain the objectives pursued; that, where a choice must be made between several measures, recourse must be had to the least onerous and, finally, that the disadvantages caused should not be disproportionate to the aims pursued. In the case of the exercise of a discretionary power by legislative means, the measure adopted should not be manifestly inappropriate, having regard to the objectives pursued. [35]

83. In situations where measures have to be adopted which may appear contradictory in relation to the attainment of the objectives laid down by the Treaties, the Court of Justice has allowed the Community institutions a broad discretion. In these cases the Court acknowledges that the institutions are best placed to assess and weigh up the different conflicting interests. In *Fishermen's Organisations and Others* the Court observed that it had consistently held that 'in pursuing the objectives of the common agricultural policy, the Community institutions must secure the permanent harmonisation made necessary by any conflicts between those objectives taken individually and, where necessary, give any one of them temporary priority in order to satisfy the demands of the economic factors or conditions in view of which their decisions are made'. [36]

84. In exercising its power of assessment, the institution in question must subject the means which it proposes to adopt to a 'reasonableness' test, in the double sense that the means must be 'reasonably' likely to bring about the objectives and that the detriment or harm caused by the measure must be 'reasonably' tolerable, that is to say, it must not be disproportionate to the benefit to the public in general. [37]

(ii) The introduction of the quota

85. The preamble to the reviewing Decision shows that the Council amended the OCT Decision after finding that free access to the Community for products originating in the OCTs and the maintenance of the ACP/OCT cumulation of origin rules entailed a serious risk of conflict between the Community policy objectives relating

35 — See Case C-150/94 *United Kingdom* v *Council* [1998] ECR I-7235, paragraph 74, which confirms a long line of previous judgments.

36 — Case C-44/94 *Fishermen's Organisations and Others* [1995] ECR I-3115, paragraph 37. See also *Germany* v *Council*, cited above, paragraph 47.

37 — See T.C. Hartley, *The Foundations of European Community Law*, Oxford 1994, p. 155.

to the development of the OCTs and the objectives of the common agricultural policy.

86. It is easy to see the potential extent of this risk of conflict. Figures produced by the Commission, which have not been challenged, show that the European market for sugar is now precariously balanced. As a result of the imposition of quotas, Community production of beet sugar is 13.4 million tonnes, which is more than the quantity of sugar consumed in the Community, that is to say, approximately 12.7 million tonnes. Furthermore, the Community imports 1.3 million tonnes of cane sugar from the ACPs in order to meet the specific demand for that variety. In addition, by reason of agreements concluded within the World Trade Organisation (WTO), the Community has an obligation to authorise the importation of 400 000 tonnes of sugar from non-member countries.

As the total demand for sugar in the Community is less than the supply, some of the sugar available is set aside for export. However, as there is a considerable difference between prices on the world market and that in the Community (the Community price is almost three times the world market price), export sales must be subsidised by means of export refunds, which are at present at the rate of 470 euros per tonne. The maximum amount of sugar available for subsidised exports has also been the subject of agreements within the WTO. In the next few years the said maximum is to be reduced by 20%.

87. Finally, it is a fact that the OCTs do not produce sugar themselves. They merely process sugar originating from the ACPs, and do so with little added value. [38]

88. In the present case the Council has done no more than weigh up the different factors in play and has then immediately adopted a decision to resolve a conflict between two important objectives of Community policy. In view of the situation on the Community market for sugar, I do not think it can be said that the Council's solution was disproportionate. The abovementioned figures show that in reality there is a surplus on the Community market and that a balance is achieved only by means of subsidised exports. Any additional quantity of sugar which entered the market would have compelled the Community institutions either to increase the amount of export subsidies (within the abovementioned limits) or to reduce the quotas of European producers. In either case, the result would be serious disruption of the common organisation of the sugar market, contrary to the objectives of the common agricultural policy.

38 — As the Commission representative pointed out at the hearing, the most important processes which are necessary before sugar can be supplied to the public are carried out in Trinidad and Tobago, and not on the island of Aruba.

The quota of 3 000 tonnes per annum is ample for respecting the traditional imports of a product[39] which can be deemed to originate from the OCTs only by virtue of the legal fiction of the cumulation rule.

89. The Council's decision seems on the one hand to be reasonably suitable, if not ideal, for safeguarding the stability of the common sugar organisation. On the other hand, the damage caused to the economies of the OCTs is reasonably tolerable in so far as imports are still allowed in the traditional quantities and, in any case, the industry affected makes little contribution to the development of the OCTs.

90. Therefore I conclude that the quantitative restriction on imports of sugar under the ACP/OCT cumulation of origin rules, laid down in Article 108b(1) of Decision 97/803, observes the principle of proportionality.

(iii) The deletion of milling

91. With regard to the alleged deletion of 'milling' as a processing operation relevant for the purpose of the attribution of origin, I shall merely set out the interpretation of Article 108b(2) of the reviewing Decision adopted by the Council and the Commission. According to that provision:

'2. For the purposes of implementing the ACP/OCT cumulation of origin rules referred to in paragraph 1, forming sugar lumps or colouring shall be considered as sufficient to confer the status of OCT-originating products'.

92. Both the Commission, which drew up the draft decision, and the Council, which gave it legal force by adopting it, agree that Article 108b(2) merely gives two examples of operations which may be used as a basis for the ACP/OCT cumulation of origin and it does not claim to be exhaustive. According to both institutions, the object of the provision is to dispel certain doubts by stating that those two types of operations are included on the list of working and processing operations in Article 3(3) of Annex II to the OCT Decision, that is to say, those which are not sufficient to confer the status of originating products (see point 23 above).

93. In these circumstances it cannot be said that Article 108b(2) deleted 'milling' as a relevant operation for the purpose of the

39 — In 1996 these imports totalled 2 310 tonnes, according to the Eurostat figures cited by the Council.

attribution of origin. On the other hand, it is possible to deplore the poor quality of the legislative technique used in drafting it. If the Council intended only to describe the operations of forming sugar lumps and of colouring as 'insufficient' for the above-mentioned purpose, it should have done so expressly or at least have offered an explanation in the preamble.

(iv) The extent of the restrictive effect of Article 108b in relation to safeguard measures

94. In the second question the Netherlands court seeks to ascertain whether it is acceptable for measures such as the imposition of a quota or the deletion of 'milling' to have far more restrictive consequences than would have been the case if safeguard measures authorised by Article 109 of the OCT Decision had been taken.

95. So far as the alleged deletion of milling is concerned, I refer to what was said under the previous heading.

96. For the rest, the quantitative restriction imposed by Article 108b(1) must be regarded as a structural measure and not merely a short-term one. Therefore its function and the justification for it are quite different from those of safeguard measures under Article 109. Therefore its effects may be greater than those of safeguard measures, since they relate to different situations provided for by the legislature.

97. Safeguard measures are by nature limited in time and constitute exceptions to the normal trade rules. Article 108b of the Decision, by contrast, forms part of the said ordinary rules and it must be assessed in that context. The preamble to the Decision explains the reasons justifying it in clear terms which show that it would not have been sufficient to resort exclusively to provisional solutions in order to resolve permanent problems:

'... serious disruption on the Community market for certain products subject to a common organisation of the market has led on a number of occasions to the adoption of safeguard measures; ... 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'.

98. Moreover, the safeguard measures under Article 109 and the imposition under Article 108b of a quota for ACP/OCT cumulation of origin sugar, are based on, and governed by, different criteria. Whereas Article 109 lays down objective criteria for the adoption of safeguard measures (serious disturbances in a sector of the economy of the Community or Member States, a risk to external financial stability, difficulties which may result in a deterioration of the Community's activity), Article 108b fits into a scheme of freedom of political action.

99. Consequently there is no reason to think that the principles applicable to safeguard measures should also apply to the normal regulatory framework in which they have been incorporated. Therefore there is no reason to limit the effects of Article 108b of the Decision in the same way as those of the exceptional safeguard measures.

F — *The unworkable nature of Article 108b (Question 10)*

100. The national court also asks whether Article 108b is so unworkable that it is not legally valid, but does not state the reasons which give rise to these doubts. However, it appears from Aruba's submissions in the main proceedings that the 'unworkability' of the article stems from the fact that the authorities of each OCT have no means of their own of knowing when the limit of 3 000 tonnes of sugar, which applies to imports from all the OCTs (in relation to which the ACP/OCT cumulation of origin is laid down), is exceeded and therefore they cannot issue or refuse the corresponding certificates of origin in each particular case.

101. In any case it cannot be said that the provision is invalid. Firstly, on grounds of principle: the validity of legislation is never subject to the greater or lesser difficulty of applying it, Article 108b merely sets the substantive limits for the ACP/OCT cumulation of origin, without reference to the procedural problems which may arise in applying them.

Secondly, because on 19 December 1997 the Commission adopted Regulation (EC) No 2553/97,[40] the object of which is described by the second recital in the preamble thereto as follows: 'the rules for issuing import licences for the products referred to in Article 108b of Decision 91/482/EEC should be laid down with a view to permitting imports of the quantities provided for in that decision and the controls necessary'.

40 — Commission Regulation (EC) No 2553/97 of 17 December 1997 on rules for issuing import licences for certain products covered by CN codes 1701, 1702, 1703 and 1704 and qualifying as ACP/OCT originating products (OJ 1997 L 349, p. 26).

G — *The adoption of interim measures (Questions 11 and 12)*

102. In the eleventh question the Netherlands court seeks to ascertain whether a national court has jurisdiction to adopt interim measures *vis-à-vis* a non-Community body in order to prevent a breach of Community law.

103. I share entirely the Commission's view that the question raises issues of national jurisdiction. Nevertheless, I have a few brief observations to make.

104. To begin with, the national court with jurisdiction to adopt interim measures in accordance with its domestic law may, subject to the conditions laid down by the case-law of the Court of Justice, [41] order them in relation to all the acts by which the public authorities falling within its jurisdiction apply provisions of Community law.

41 — According to the Court of Justice, 'the interim legal protection which Community law ensures for individuals before national courts must remain the same, irrespective of whether they contest the compatibility of national legal provisions with Community law or the validity of secondary Community law, in view of the fact that the dispute in both cases is based on Community law itself': Joined Cases C-143/88 and C-92/89 *Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest* [1991] ECR I-415, paragraph 20.

105. The national court in the present case is hearing a case concerning an OCT and is required to give a ruling on the legality of a Community act. I presume that the said court has jurisdiction and is entitled to determine the matter, just as it has given decisions in relation to the various actions and claims which have so far been brought in connection with Emesa. Under these circumstances — and unless the legal rules linking the island of Aruba with the Kingdom of the Netherlands provide otherwise — it seems clear to me that the court in question must apply the same criteria as it would apply if the same question arose in relation to a Member State. Consequently the reply to the eleventh question, in the abstract terms in which it is worded, is in the affirmative.

106. The reply to be given to the twelfth question is a different matter. By this question, the national court is asking the Court of Justice to rule on whether it would be appropriate for the national court to adopt interim measures in the present case. I presume that the interim measures in question would include the suspension of the application of Article 108b. As justification for this, the national court refers to the serious and absolutely irreparable damage which the imposition of the annual quota would cause Emesa, with the immediate closure of the plant and the social difficulties which that would entail.

107. In the *Zuckerfabrik Süderdithmarschen* judgment cited above, the Court

of Justice stated that a national court can order the suspension of a Community act or a national administrative measure based on a Community act only if all the following conditions are fulfilled:

— if that court entertains serious doubts as to the validity of the Community measure and, should the question of the validity of the contested measure not already have been brought before the Court of Justice, itself refers that question to the Court of Justice;

— if there is urgency and a threat of serious and irreparable damage to the applicant;

— and if the national court takes due account of the Community's interests. [42]

108. As I said previously, of the circumstances mentioned by the Netherlands court in its order for reference, the only one which should be examined is the risk of certain damage to the applicant in the main proceedings. The considerations concerning a potential conflict between the objectives of the scheme of association with the OCTs and the maintenance of the common agricultural policy (which, contrary to what the national court appears to believe, goes further than purely economic aspects) have already been discussed in connection with the validity of fixing a quota in the light of Articles 133(1) and 136 of the Treaty (Questions 3, 4 and 8). For its part, the importance which should be attached to the reduced impact of sugar imports from the OCTs, having regard to the volume of sugar production in the European Union, was studied in connection with the proportionality of introducing the quota (Questions 1 and 2).

109. For the reasons which I shall go on to give, I do not think it necessary to establish whether the second of the requirements set out by the case-law is fulfilled, that is to say, that the application for suspension of the Community act be urgent and that, if the plant is closed, Emesa may suffer serious, irreparable damage.

First, it is clear from all that I have said that I have found no reason for questioning the validity of the reviewing Decision. *A fortiori*, I do not think that 'serious doubts' in this respect are justified.

Secondly, it also follows from my reasoning concerning observance of the principle of proportionality that I do not consider that

42 — *Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest*, cited in footnote 41, paragraph 14 *et seq.*

the weighing-up by the Community legislature of the interests involved led to manifestly unreasonable results. Quite the contrary: I took the view that the solution adopted was appropriate for attaining the objectives determined and proportionate in relation to the means used.

Consequently, I do not think that, in the circumstances of the present case, the first and third requirements set out above, which are necessary for the national court to be able to contemplate the suspension of a Community act are fulfilled.

110. Nevertheless, so far as the interim measures actually adopted by the national court are concerned, my objection is of a very different nature. The injunction directed at Aruba is neither relevant in the context of the present proceedings nor appropriate for affecting the suspension at issue.

111. The reason is that, in the absence of substantive jurisdiction, the national court had to rule that the application for interim measures was inadmissible in so far as it was directed against the Netherlands State and the HPA, and admissible only in relation to Aruba (see point 11 above). The *petitio* of the main proceedings was thus reduced to Emesa's application for an order prohibiting the competent authorities of the island of Aruba from refusing to issue the EUR.1 certificate for sugar processed by the applicant on the ground that such refusal would not have been possible under Decision 91/482.

112. The suspension in question is not connected with the validity or otherwise of Decision 97/803, but with the issue of EUR.1 certificates by the customs authorities of the OCTs, which is governed by Title II of Annex II to the OCT Decision, the validity of which has not been questioned in these proceedings. Even were it possible to argue that, if the reviewing Decision were invalid, that could affect the legality of acts such as the OCT Decision itself, which are closely linked to the act challenged in the main proceedings, it must be recognised that the reviewing Decision has in no way affected the obligation of the OCT authorities to issue EUR.1 certificates in the prescribed circumstances. The task of checking compliance with the quota of 3 000 tonnes per annum, in accordance with Regulation No 2553/97, falls to the authorities of the importing States, not those of the OCTs. Consequently the interim measure of suspension, the necessity for which in law is the subject of the question from the national court, is of no assistance at all.

Conclusion

113. Therefore I suggest that the Court reply as follows to the questions referred by the President of the Arrondissementsrechtbank te 's-Gravenhage:

(1) Examination of the questions submitted has revealed no grounds for finding that 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, and in particular Article 108b thereof, is invalid.

(2) A national court with jurisdiction to adopt interim measures under its domestic law may, subject to the conditions laid down by the case-law of the Court of Justice of the European Communities, order them in relation to the acts by which the public authorities falling within its jurisdiction apply provisions of Community law.

(3) In the present case, the interim measure adopted by the national court is not justified by the circumstances described.