JUDGMENT OF THE COURT (Second Chamber)

14 July 2005 *

In Case C-40/03 P,

APPEAL under Article 49 of the Statute of the Court of Justice, brought on 29 January 2003,

Rica Foods (Free Zone) NV, established in Oranjestad (Aruba), represented by G. van der Wal, advocaat,

appellant,

the other parties to the proceedings being:

Commission of the European Communities, represented by T. van Rijn, acting as Agent, with an address for service in Luxembourg,

defendant at first instance,

* Language of the case: Dutch.

Kingdom of the Netherlands, represented by H. Sevenster, acting as Agent, with an address for service in Luxembourg,

Kingdom of Spain, represented by N. Díaz Abad and D. Miguel Muñoz Pérez, acting as Agents, with an address for service in Luxembourg,

interveners at first instance,

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, R. Silva de Lapuerta, R. Schintgen (Rapporteur), G. Arestis and J. Klučka, Judges,

Advocate General: P. Léger,
Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 16 December 2004,

after hearing the Opinion of the Advocate General at the sitting on 17 February 2005,

gives the following

Judgment

1 By its appeal Rica Foods (Free Zone) NV ('Rica Foods') requests the Court to set aside the judgment of the Court of First Instance of the European Communities of 14 November 2002 in Joined Cases T-332/00 and T-350/00 *Rica Foods and Free Trade Foods* v *Commission* [2002] ECR II-4755 ('the judgment under appeal'), by which that court dismissed its action for annulment of Commission Regulation (EC) No 2081/2000 of 29 September 2000 providing for the continued application of safeguard measures for imports from the overseas countries and territories of sugar sector products with EC/OCT cumulation of origin (OJ 2000 L 246, p. 64) ('the contested regulation').

Legal framework

Common organisation of the markets in the sugar sector

2 By Regulation No 2038/1999 of 13 September 1999 on the common organisation of the markets in the sugar sector (OJ 1999 L 252, p. 1), the Council of the European Union consolidated Regulation (EEC) No 1785/81 of 30 June 1981, which had established that common organisation (OJ 1981 L 177, p. 4) and had been amended many times. The purpose of that organisation is to regulate the Community sugar market in order to increase employment and the standard of living among Community sugar producers.

3 Support for Community production through guaranteed prices is limited to national production quotas (A and B quotas) allocated by the Council under Regulation No 2038/1999 to each Member State, which then divides them amongst its producers. Quota B sugar ('B sugar') is subject to a higher production levy than quota A sugar ('A sugar'). Sugar produced in excess of the A and B quotas is termed 'C sugar' and cannot be sold within the European Community unless it is transferred to the A and B quotas for the following season.

4 Extra-Community exports apart from C sugar benefit from export refunds under Article 18 of Regulation No 2038/1999, to make up for the difference between the price on the Community market and the price on the world market.

5 The quantity of sugar which can benefit from an export refund and the total annual amount of refunds are governed by the World Trade Organisation (WTO) Agreements ('the WTO Agreements'), to which the Community is a party and which were approved by Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) (OJ 1994 L 336, p. 1). By the 2000/2001 marketing year at the latest, the quantity of sugar exported with refund and the total amount of refunds were to be limited to 1 273 500 tonnes and to EUR 499.1 million, which represents a reduction of 20% and 36% respectively in relation to the figures for the 1994/1995 marketing year.

Arrangements for association of the overseas countries and territories with the Community

6 Under Article 3(1)(s) EC the activities of the Community include the association of the overseas countries and territories (OCTs) 'in order to increase trade and promote jointly economic and social development'.

7 The Netherlands Antilles and Aruba form part of the OCTs.

8 The association of the OCTs with the Community is governed by Part Four of the EC Treaty.

9 The Council adopted on the basis of Article 136 of the EC Treaty (now, after amendment, Article 187 EC) several decisions concerning the association of the OCTs with the Community, including Council Decision 91/482/EEC of 25 July 1991 on the association of the overseas countries and territories with the European Economic Community (OJ 1991 L 263, p. 1), which, according to Article 240(1) thereof, is to apply for a period of 10 years from 1 March 1990.

10 Various provisions of Decision 91/482 were amended by Council Decision 97/803/EC of 24 November 1997 amending at mid-term Decision 91/482/EEC (OJ 1997 L 329, p. 50). Decision 91/482, as amended by Decision 97/803 ('the OCT Decision'), was extended until 28 February 2001 by Council Decision 2000/169/EC of 25 February 2000 (OJ 2000 L 55, p. 67).

11 Article 101(1) of the OCT Decision provides:

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

12 Article 102 of the same decision provides:

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

13 The first indent of Article 108(1) of that decision refers to Annex II thereto for a definition of the concept of originating products and the methods of administrative cooperation relating thereto. Under Article 1 of that annex a product is to be considered as originating in the OCTs, the Community or the African, Caribbean and Pacific States ('the ACP States') if it has been either wholly obtained or sufficiently processed there.

14 Article 3(3) of Annex II contains a list of types of working or processing which are insufficient to confer the status of originating products on products coming from the OCTs in particular.

15 Article 6(2) of that annex, however, contains so-called 'EC/OCT and the ACP/OCT cumulation of origin' rules. It provides:

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

16 Under Article 6(4) of Annex II the EC/OCT and ACP/OCT cumulation of origin rules apply to 'any working or processing carried out in the OCTs, including the operations listed in Article 3(3)'.

17 Decision 97/803 inserted into the OCT Decision inter alia Article 108b, paragraph 1 of which provides: '[t]he 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'. Decision 97/803 did not, however, limit the application of the EC/OCT cumulation of origin rule.

18 Article 109(1) of the OCT Decision authorises the Commission to take 'the necessary safeguard measures' when 'as a result of the application of this Decision, serious disturbances occur in a sector of the economy of the Community or 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'. Under Article 109(2) of that decision, the Commission must choose 'such measures as would least disturb the functioning of the association and the Community'. Furthermore, '[t]hese measures shall not exceed the limits of what is strictly necessary to remedy the difficulties that have arisen'.

The safeguard measures taken to counter imports of sugar and mixtures of sugar and cocoa benefiting from the EC/OCT cumulation of origin rule

19 Commission Regulation (EC) No 2423/1999 of 15 November 1999 introducing safeguard measures in respect of sugar falling within CN code 1701 and mixtures of sugar and cocoa falling within CN codes 1806 10 30 and 1806 10 90 originating in the overseas countries and territories (OJ 1999 L 294, p. 11) was adopted on the basis of Article 109 of the OCT Decision.

20 By that regulation, applicable until 29 February 2000, the Commission made imports of sugar qualifying for EC/OCT cumulation of origin subject to a system of minimum prices and made imports of mixtures of sugar and cocoa ('mixtures') originating in the OCTs subject to the Community surveillance laid down in Article 308d of Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code (OJ 1993 L 253, p. 1).

21 Commission Regulation (EC) No 465/2000 of 29 February 2000 introducing safeguard measures for imports from the overseas countries and territories of sugar sector products with EC/OCT cumulation of origin was also adopted on the basis of Article 109 of the OCT Decision (OJ 2000 L 56, p. 39). That regulation limited the EC/OCT cumulation of origin rule to 3 340 tonnes of sugar for products falling within CN codes 1701, 1806 10 30 and 1806 10 90 for the period from 1 March 2000 to 30 September 2000.

22 On 29 September 2000 the Commission adopted the contested regulation also on the basis of Article 109 of the OCT Decision.

23 The first, fourth, fifth and sixth recitals in the preamble to the contested regulation read as follows:

'(1) The Commission has noted that imports of sugar (CN code 1701) and of mixtures of sugar and cocoa falling within CN codes 1806 10 30 and 1806 10 90 originating in the [OCTs] increased greatly between 1997 and 1999, particularly those imports with EC-OCT cumulation of origin, which increased from zero

tonnes in 1996 to more than 53 000 tonnes in 1999. Such products are imported into the Community free of import duties and are admitted without quantity limits in accordance with Article 101(1) of the OCT Decision.

...

(4) In the past few years difficulties have arisen on the Community sugar market, a market in surplus. Sugar consumption is constant at some 12.8 million tonnes per year, while production under quota is around 14.3 million tonnes per year. Any imports of sugar into the Community therefore involve a corresponding quantity of Community sugar which cannot be sold on that market having to be exported. Refunds for that sugar, within the limit of certain quotas are charged to the Community budget (currently at around EUR 520/tonne). However, exports with refund are limited in volume by the Agreement on Agriculture concluded as part of the Uruguay round and have been reduced from 1 555 600 tonnes for the 1995/96 marketing year to 1 273 500 tonnes for the 2000/01 marketing year.

(5) The operation of the COM in sugar may be greatly destabilised by these difficulties. For the 2000/01 marketing year, the Commission decided to reduce Community producers quotas by some 500 000 tonnes ... . Any further import of sugar or products with a high sugar content from the OCT will mean a greater reduction in the quota for Community producers and a greater guaranteed income loss for them.

(6) As a result of these continuing difficulties, there is a risk that a sector of Community activity will deteriorate.

...'

24 Article 1 of the contested regulation provides:

'For products falling within tariff headings CN 1701, 1806 10 30 and 1806 10 90, EC/OCT cumulation of origin as referred to in Article 6 of Annex II to [the OCT Decision] shall be permitted for a quantity of 4 848 tonnes of sugar during the period of validity of this Regulation.'

For products other than unprocessed sugar, the sugar content of the imported product shall be taken into account for the purposes of complying with that limit.'

25 The eighth recital in the preamble to the contested regulation indicates that the Commission decided on that quota of 4 848 tonnes taking into account 'that figure representing the sum of the highest annual volumes of imports of the products in question recorded in the three years preceding 1999, the year in which imports recorded a sharp rise. In determining the quantities of sugar to be taken into consideration, the Commission takes note of the position adopted by the President of the Court of First Instance in his rulings of 12 July and 8 August 2000 in Cases T-94/00 R, T-110/00 R and T-159/00 R, without, however, recognising it as justified. Consequently, in order to avoid unnecessary procedures and solely for the purposes of adopting these safeguard measures, the Commission, for sugar falling within CN code 1701 and for 1997, bases itself on the figure of 10 372.2 tonnes for the total imports of sugar from the OCT with EC-OCT and ACP-OCT cumulation of origin, as recorded by Eurostat'.

26 Under Article 2 of the contested regulation, imports of the products referred to in Article 1 are to be subject to the issue of an import licence, which is to be issued in accordance with the rules contained in Articles 2 to 6 of 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), which are to apply mutatis mutandis.

27 Lastly, under Article 3 thereof, the contested regulation, which entered into force on 1 March 2000, is applicable from 1 October 2000 to 28 February 2001.

Procedure before the Court of First Instance and the judgment under appeal

28 By applications lodged at the Registry of the Court of First Instance on 27 October and 20 November 2000 respectively, Rica Foods and one other company ('the applicants'), which are sugar processing undertakings established in the OCTs (Aruba and the Netherlands Antilles) brought actions, first, for the annulment of the contested regulation and, secondly, for damages allegedly suffered as a result of the adoption of that regulation (Joined Cases T-332/00 and T-350/00).

29 By orders of 15 March and 30 April 2001 of the President of the Third Chamber of the Court of First Instance, the Kingdom of the Netherlands was granted leave to intervene in support of the form of order sought by Rica Foods, and the Kingdom of Spain was granted leave to intervene in support of the form of order sought by the Commission in Joined Cases T-332/00 and T-350/00.

30 In support of its action, Rica Foods relied in particular on three pleas in law alleging infringement of Article 109(1) of the OCT Decision, of the principle of proportionality and of the preferential status of the OCTs under the Treaty.

31 By the judgment under appeal, the Court of First Instance, after joining the actions, dismissed them as unfounded.

32 In relation in particular to the three aforementioned pleas in law, the Court of First Instance ruled as follows.

The plea alleging infringement of Article 109(1) of the OCT Decision

33 The Court of First Instance observed that the Community institutions have a wide discretion in the application of Article 109 of the OCT Decision. In cases involving such a discretion the Community Court must restrict itself to considering whether the exercise of that discretion contains a manifest error or constitutes a misuse of power or whether the Community institutions clearly exceeded the bounds of their discretion (Case C-110/97 *Netherlands* v *Council* [2001] ECR I-8763, paragraph 61 and case-law cited therein) (paragraphs 66 and 67 of the judgment under appeal).

34 In the case before it, the Court of First Instance found that the safeguard measure in question came within the second hypothesis described in Article 109(1) of the OCT Decision. It also confirmed the correctness of the Commission's statements, inter alia in the fourth recital in the preamble to the contested regulation, justifying the adoption of that measure, according to which, due to the surplus on the market, any additional tonnes of sugar imported would lead to an increase in subsidised exports which, in turn, would be likely to be in conflict with the ceilings provided for by the WTO Agreements (paragraphs 75 to 86 of the judgment under appeal). It found that those factors, taken together, established that there were difficulties within the meaning of that provision (paragraphs 89 to 103 of that judgment).

35 Next, the Court of First Instance found that the Commission could have reasonably taken the view, as evidenced by the fifth recital in the preamble to the contested regulation, that the increased imports of sugar and mixtures under the EC/OCT cumulation of origin rule might greatly destabilise the common organisation of the markets in sugar (paragraphs 104 to 141 of the judgment).

The plea alleging infringement of the principle of proportionality

36 Several arguments were put forward by the applicants.

37 First, the Council, when it adopted Decision 91/482, should have taken account of the fact that imports of agricultural products from the OCTs into the Community might lead to additional expenditure chargeable to the budget for the common agricultural policy. The growth in imports is the direct consequence of the OCT Decision.

38 The Court of First Instance found that the fact that an increase in imports was already foreseeable in 1991 was irrelevant for determining whether the measure adopted in February 2000 constituted an appropriate and proportionate response to remedy the difficulties that had arisen within the meaning of Article 109(2) of the OCT Decision (paragraph 147 of the judgment under appeal).

39 Second, the applicants submitted that the Commission had disregarded the temporary nature of the safeguard measure in question.

40 On this point, the Court of First Instance noted the wide discretion which the Community institutions have in the application of Article 109 of the OCT Decision and found that the contested regulation, applicable from 1 October 2000 to 28 February 2001, 'which limited duty-free access to the Community market for sugar originating in the OCTs, within limits compatible with the situation on that market, whilst retaining preferential treatment for that product in a manner consistent with the objectives of the OCT Decision ..., was a suitable instrument for attaining the objective sought by the Commission and did not go beyond what was necessary to do so' (paragraphs 151 to 153 of the judgment under appeal).

41 Third, the applicants complained that the Commission had not stated in the contested regulation the reasons why the introduction of a minimum price, such as that imposed by Regulation No 2423/1999, was no longer considered appropriate for attaining the objective pursued.

42 The Court of First Instance stated in this regard that the applicants had not established 'that the Commission, by restricting imports into the Community of sugar or mixtures qualifying for EC/OCT cumulation of origin to 4 848 tonnes for the period during which the contested regulation was in force, adopted measures that were manifestly inappropriate or that it carried out a manifestly erroneous assessment of the information available to it at the time when the contested regulation was adopted' and found that, in any event, 'Regulation No 2423/1999 did not have the effect of reducing imports of sugar under the EC/OCT cumulation of origin regime, which [cast] doubt on the effectiveness of the measure introduced by the latter regulation, that is to say, a minimum import price for the product concerned' (paragraphs 156 and 157 of the judgment under appeal).

43 Fourth, the applicants maintained that the introduction of a ceiling of 4 848 tonnes of sugar for a period of five months infringed the principle of proportionality because imports made in 1999 were excluded from the calculation of the import quota, the figure used was incomprehensible, and the import quota was too low to allow for profitable exploitation of even one sugar processing factory.

44 On that point, the Court of First Instance found that the Commission, which has to reconcile divergent interests, could reasonably fix, as evidenced by the ninth recital in the preamble to the contested regulation, the quota of 4 848 tonnes on the basis of the highest annual volumes of imports of the products in question recorded in the three years preceding 1999, in the light of the exponential rise in imports of sugar and mixtures into the Community under the EC/OCT cumulation of origin regime in 1999, which created a risk of deterioration in the Community sugar sector (paragraphs 164 to 174 of the judgment under appeal).

45 Lastly, the applicants maintained that Article 2(3) of the contested regulation, which provides that 'applications for import licences shall be accompanied by a copy of the export licence', infringes the principle of proportionality.

46 The Court of First Instance rejected that argument on the grounds that 'that condition makes it possible to ensure that import applications made in the context of the contested regulation relate to sugar which actually qualifies for EC/OCT cumulation of origin' (paragraph 176 of the judgment under appeal).

The plea relating to infringement of the preferential status of products originating in the OCTs

47 On this point the Court of First Instance found that it cannot be inferred from the mere adoption of a safeguard measure under Article 109 of the OCT Decision that the preferential status of products originating in the OCTs has been infringed, provided that that measure is such as to iron out or reduce the difficulties which have arisen. It also found that the contested regulation does not impose any ceiling on imports of sugar originating in the OCTs under the ordinary rules of origin, if such production were to exist (paragraphs 182 to 190 of the judgment under appeal).

The appeal

48 Rica Foods claims that the Court should:

— declare its appeal to be admissible;

— set aside the judgment under appeal and allow its claims put forward at first instance.

49 The Commission contends that the Court should:

— dismiss the appeal as unfounded;

— order the appellant to pay the costs.

50 The Spanish Government contends that the Court should dismiss the appeal and order the appellant to pay the costs.

51 In support of its appeal, Rica Foods puts forward five pleas in law:

— infringement of Article 109(1) of the OCT Decision, in that the Court of First Instance found that the Community institutions have a wide discretion in the application of that provision;

— infringement of the obligation to state reasons;

— infringement of Article 109(1) of the OCT Decision in that the Court of First Instance wrongly found that the circumstances relied on by the Commission to justify the adoption of the safeguard measure in question were 'difficulties' and 'deterioration' within the meaning of that provision;

— infringement of Article 109(2) of the OCT Decision;

— infringement of the preferential status of the OCTs.

The first plea, relating to infringement of Article 109(1) of the OCT Decision and to the scope of the Community institutions' discretion

52 By its first plea, Rica Foods complains that the Court of First Instance misconstrued the scope of Article 109(1) of the OCT Decision by finding, in paragraph 66 of the judgment under appeal, that the Commission has a wide discretion in the application of that provision. Since that provision is an exception to the principle laid down in Article 101(1) of that same decision, which provides that products originating in the OCTs are to be imported into the Community free of import duty, it should have been interpreted narrowly.

53 It must be observed that it is settled case-law of the Court that the Community institutions have been given a wide discretion in the application of Article 109 of the OCT Decision (see, to that effect, Case C-390/95 P *Antillean Rice Mills and Others* v *Commission* [1999] ECR I-769, paragraph 48; Case C-110/97 *Netherlands* v *Council*, paragraph 61, and Case C-301/97 *Netherlands* v *Council* [2001] ECR I-8853, paragraph 73).

54 In those circumstances, the Community Courts must restrict themselves to considering whether the exercise of that discretion contains a manifest error or constitutes a misuse of power or whether the Community institutions clearly exceeded the bounds of their discretion (see *Antillean Rice Mills*, paragraph 48; Case C-110/97 *Netherlands* v *Council*, paragraph 62, and Case C-301/97 *Netherlands* v *Council*, paragraph 74).

55 The depth of the Court's review must be limited in particular where, as in the present case, the Community institutions have to reconcile divergent interests and thus select options within the context of the policy choices which are their own responsibility (see, to that effect, Case C-17/98 *Emesa Sugar* [2000] ECR I-675, paragraph 53).

56 Accordingly, it is evident that the Court of First Instance correctly interpreted Article 109(1) of the OCT Decision in paragraphs 66 and 67 of the judgment under appeal.

57 The status of that provision as an exception, which flows from its very nature, does not in any way diminish the discretion which the Commission has when it has the

difficult task of reconciling divergent interests within the context of the policy choices which are its own responsibility.

58 Consequently, the first plea must be dismissed as unfounded.

The second plea, relating to infringement of the obligation to state reasons

59 By its second plea, Rica Foods submits that the judgment under appeal is vitiated by a failure to state reasons in that the Court of First Instance based its ruling on wrong or incomprehensible considerations, namely that:

— any additional imports of sugar from the OCTs under the EC/OCT cumulation of origin rule would increase the surplus of sugar on the Community market;

— those additional imports would entail additional expenditure for the Community budget.

60 First, as to the grounds of the judgment under appeal finding that imports of sugar under the EC/OCT cumulation of origin rule would increase the surplus of sugar on

the Community market, it is settled case-law that the Court of Justice has no jurisdiction to establish the facts or, in principle, to examine the evidence which the Court of First Instance accepted in support of those facts. Provided that the evidence has been properly obtained and the general principles of law and the rules of procedure in relation to the burden of proof and the taking of evidence have been observed, it is for the Court of First Instance alone to assess the value which should be attached to the evidence produced to it (see, inter alia, Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417, paragraph 24). Save where the clear sense of the evidence has been distorted, that appraisal does not therefore constitute a point of law which is subject as such to review by the Court of Justice (see, inter alia, Case C-8/95 P *New Holland Ford* v *Commission* [1998] ECR I-3175, paragraph 26; Joined Cases C-24/01 P and C-25/01 P *Glencore and Compagnie Continentale* v *Commission* [2002] ECR I-10119, paragraph 65; and Case C-122/01 P *T. Port* v *Commission* [2003] ECR I-4261, paragraph 27).

61 In the present case, the Court of First Instance found:

— in paragraph 79 of the judgment under appeal, on the basis of the evidence at its disposal in the file, that there was a surplus on the Community sugar market;

— in paragraph 80 of the judgment, that the Community was under an obligation to import a certain quantity of sugar from non-member countries under the WTO Agreements; and

— in paragraph 81 of the judgment, that, in those circumstances, 'if the production of Community sugar is not reduced, any additional imports of sugar under the

EC/OCT cumulation of origin regime will increase the amount of surplus sugar on the Community market and will lead to an increase in subsidised exports'.

62 The Court of First Instance infers from this, in paragraph 82 of the judgment under appeal, that 'the Commission was quite right in stating ... that any imports into the Community therefore involve a corresponding quantity of Community sugar which cannot be sold on that market having to be exported'.

63 It must be held that the Court of First Instance's assessment of the increase in the surplus on the Community market is a finding of fact which cannot be the subject-matter of an appeal, and, as noted by the Advocate General in paragraph 59 of his Opinion, the appellant has not even submitted, much less proven, that the Court of First Instance had distorted the clear sense of the evidence before it.

64 Second, as regards the alleged additional expenditure for the Community budget caused by the sugar imports qualifying for EC/OCT cumulation of origin, Rica Foods states that the export refunds for A and B sugars are financed entirely by the producers through contributions which are passed on to consumers, so that the disputed imports have no impact on the Community budget.

65 Suffice it to note that, in paragraphs 99 to 101 of the judgment under appeal, the Court of First Instance did not in any way consider that the disputed imports would lead to additional expenditure for the Community budget. In fact, after having:

— noted, in paragraph 99 of the judgment under appeal, that 'the difficulties mentioned in the contested regulation are the fact that imports of sugar or mixtures qualifying for EC/OCT cumulation of origin increased greatly, the surplus on the Community sugar market giving rise to subsidised exports, and the obligations arising under the WTO Agreements', and

— found, in paragraph 100 of the judgment, that 'in view of the surplus on the Community market, imported sugar of OCT origin will be substituted for Community sugar, which must be exported in order to maintain the delicate balance of the common organisation of the markets',

the Court of First Instance held, in paragraph 101 of the judgment, that 'even if exports of Community sugar are to a large extent financed by the Community sugar industry and hence by the consumer, ... the WTO Agreements limit export subsidies irrespective of who ultimately bears the cost of those subsidies, and that each additional import aggravates the situation on a market which is already in surplus'.

66 In the light of all of the foregoing considerations, the second plea must be rejected.

The third plea, relating to infringement of Article 109(1) of the OCT Decision and relating to the concept of 'difficulties' and 'deterioration' within the meaning of that provision

67 By its third plea, Rica Foods maintains that the Court of First Instance wrongly found that the circumstances relied on by the Commission to justify the adoption of the contested regulation safeguard measure in question, namely increased imports into the Community of sugar and mixtures with EC/OCT cumulation of origin, the surplus Community production in the European market in sugar, the obligations under the WTO Agreements and the consequences for the common organisation of the market in sugar, constituted 'difficulties' and 'deterioration' within the meaning of Article 109(1) of the OCT Decision.

68 Rica Foods submits, first, that the Court of First Instance distorted the reasons put forward by the Commission in finding, in paragraph 89 of the judgment under appeal, that the Commission had never claimed that each of the difficulties it had identified could on its own justify the adoption of a safeguard measure, but that, on the contrary, they were closely linked.

69 It must be observed that a reading of the first, fourth and fifth recitals in the preamble to the contested regulation shows that the Commission considered that the combination of various factors, namely increases in the disputed imports, the surplus on the Community market and the restriction of export refunds as a result of the WTO Agreements, had caused difficulties within the meaning of Article 109 (1) of the OCT Decision. Accordingly, it cannot be claimed that the Court of First Instance distorted the reasons put forward by the Commission in support of the safeguard measure in question.

70 Second, Rica Foods maintains that it was foreseeable and even desired by the Community legislature that the OCT Decision lead to increases in the disputed

imports. Moreover, the alleged 'difficulties' and 'deterioration' relied on by the Commission and accepted by the Court of First Instance were already present when Decision 91/482 was adopted and, in any event, when it was amended in 1997. Not only had there been a surplus within the context of the common organisation of the market in sugar since 1968, but new production and imports had been authorised since then on various occasions.

71 In those circumstances, the Court of First Instance could not have found those factors to be 'difficulties' which risked causing 'deterioration in a sector of the Community's activity' within the meaning of Article 109(1) of the OCT Decision.

72 It must be observed that in paragraph 91 of the judgment under appeal, the Court of First Instance found that imports into the Community of sugar and mixtures with EC/OCT cumulation of origin had increased greatly since 1997, that is, after Decision 91/482 had been adopted in 1991 or even after it had been amended in 1997.

73 Moreover, even if it were established that that considerable increase had been foreseeable or even desired by the Community when Decision 91/482 was adopted, as the Advocate General observes in paragraph 81 of his Opinion, this could not prevent the Commission from finding that that increase, in the light of the surplus Community production and the obligations under the WTO Agreements, constituted a source of 'difficulties' within the meaning of Article 109(1) of the OCT Decision.

74 Accordingly, in confirming the Commission's position in paragraph 91 et seq. of the judgment under appeal, the Court of First Instance did not disregard the scope of Article 109(1) of the OCT Decision.

75 Third, Rica Foods maintains that, contrary to the Court of First Instance's ruling in paragraph 106 of the judgment under appeal, a reduction in the production quotas caused by the disputed imports has not affected the incomes of Community producers. In fact, the only effect of such a reduction is to encourage Community producers to cultivate other crops which also come within a guaranteed agricultural scheme.

76 It must be held that, even if the opportunities for Community producers to turn to other crops were such as to cast doubt on the Court of First Instance's assessment, in paragraphs 104 to 140 of the judgment under appeal, of the existence of deterioration or a risk of deterioration in a sector of the Community's activity, it suffices to find that Rica Foods did not adduce any evidence before the Court of First Instance in support of its assertions and that, accordingly, the latter was correct in not taking account of them.

77 Lastly, Rica Foods submits that the quantities of sugar and mixtures imported from the OCTs, which in 1999 accounted for 0.32% (for sugar) and 0.102% (for mixtures) of Community production, could not present a serious risk of disturbance in the common organisation of the market in sugar. By accepting the opposite proposition, the Court of First Instance committed an error of law.

78 The Court notes, as it stated in paragraph 56 of *Emesa Sugar*, that as early as 1997 Community production of beet sugar exceeded the quantity consumed in the Community, cane sugar was imported from the ACP States to cater for specific demand for that product, and the Community was under an obligation to import a

certain quantity of sugar from non-member countries under the WTO Agreements. Moreover, the Community was also required to subsidise sugar exports by granting export refunds within the limits laid down in those agreements. In those circumstances and in the light of the increasing growth in imports of sugar originating in the OCTs since 1997, the Commission was entitled to take the view, as the Court of First Instance rightly held in paragraphs 93 to 96 of the judgment under appeal, that any additional quantity of sugar reaching the Community market, even if minimal compared with Community production, would have obliged the Community to increase the amount of the export subsidies, within the limits mentioned above, or to reduce the quotas of European producers, and that those measures, which were contrary to the objectives of the common agricultural policy, would have disturbed the common organisation of the market in sugar, the balance of which was already precarious.

79 In the light of all the foregoing considerations, the third plea must be rejected.

The fourth plea, relating to infringement of Article 109(2) of the OCT Decision

80 By its fourth plea, Rica Foods complains that the Court of First Instance ruled in paragraphs 142 to 177 of the judgment under appeal that the Commission had not infringed the principle of proportionality laid down in Article 109(2) of the OCT Decision by limiting imports of sugar and mixtures with EC/OCT cumulation of origin to 4 848 tonnes.

81 The Commission was unable to justify, having regard to the interests it was seeking to protect, the level at which the disputed imports were limited. That level was

negligible compared to Community production, imports or exports and quite insufficient to offer the sugar industries in the OCTs reasonable prospects for the future. By failing to recognise the arbitrary and unreasonable nature of the quantitative restriction imposed, which was unrelated to the alleged difficulties and deterioration relied on, the Court of First Instance disregarded the principle of proportionality.

82 Article 109(2) of the OCT Decision reads as follows:

'[P]riority shall be given to such measures as would least disturb the functioning of the association and the Community. These measures shall not exceed the limits of what is strictly necessary to remedy the difficulties that have arisen.'

83 As the Court of First Instance stated in paragraph 143 of the judgment under appeal, the principle of proportionality, which is one of the general principles of Community law, requires that measures adopted by Community institutions do not exceed the limits of what is appropriate and necessary in order to attain the legitimate objectives pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued (Case C-331/88 *Fedesa and Others* [1990] ECR I-4023, paragraph 13; Joined Cases C-133/93, C-300/93 and C-362/93 *Crispoltoni and Others* [1994] ECR I-4863, paragraph 41; *Antillean Rice Mills*, paragraph 52; and Case C-189/01 *Jippes and Others* [2001] ECR I-5689, paragraph 81).

84 As regards judicial review of compliance with that principle, bearing in mind the wide discretionary power enjoyed by the Commission in particular in matters concerning safeguard measures, as the Court of First Instance observed in paragraph 150 of the judgment under appeal, the legality of a measure adopted in that sphere can be affected only if the measure is manifestly inappropriate in terms of the objective which the competent institution is seeking to pursue (Case C-301/97 *Netherlands* v *Council*, paragraph 145; *Fedesa*, paragraph 14; *Crispoltoni*, paragraph 42; and *Jippes*, paragraph 82).

85 In paragraph 152 of the judgment under appeal, the Court of First Instance held that 'it was reasonable for the Commission to consider that difficulties involving the risk that a sector of Community activity would deteriorate did exist at the time when the contested regulation was adopted'. It went on to state in paragraph 156 that the applicants 'have not established that the Commission, by restricting imports into the Community of sugar or mixtures qualifying for EC/OCT cumulation of origin to 4 848 tonnes for the period during which the contested regulation was in force, adopted measures that were manifestly inappropriate or that it carried out a manifestly erroneous assessment of the information available to it at the time when the contested regulation was adopted'.

86 As regards in particular the disputed quota, the eighth recital in the preamble to the contested regulation states that that figure represents 'the sum of the highest annual volumes of imports of the products in question recorded in the three years preceding 1999, the year in which imports recorded a sharp rise'. After examining, in paragraphs 165 to 166 of the judgment under appeal, the statistics drawn up by the Statistical Office of the European Communities (Eurostat) and the figures put forward by the Commission, the Court of First Instance found, in paragraph 168, that it was reasonable for the Commission to discount 1999 as a reference year for calculating that quota. Such a finding of fact cannot be called into question on appeal if there has been no distortion of the evidence adduced before the Court of First Instance.

87 The Court of First Instance added, in paragraph 173 of the judgment under appeal, that 'the Commission took into account the interests of the OCT sugar producers by not fully suspending imports of sugar under the EC/OCT cumulation of origin regime' and that 'it established the quota of 4 848 tonnes in Article 1 of the contested regulation on the basis of the highest level of imports of sugar and mixtures during the period 1996-1998'.

88 It must be observed that Rica Foods has not adduced any evidence to establish that, in making those findings, the Court of First Instance disregarded the principle of proportionality, in the light of the limits on judicial review in an area where the Commission has the difficult task of reconciling divergent interests.

89 Accordingly, the fourth plea must also be rejected.

The fifth plea, relating to infringement of the preferential status of the OCTs

90 By its fifth plea, Rica Foods maintains that, by failing, in paragraphs 178 to 191 of the judgment under appeal, to take account of the significant difference in treatment introduced by the safeguard measure between, on the one hand, imports of products originating in ACP States and most favoured nations and even certain other third countries and, on the other, imports of products originating in the OCTs, the Court of First Instance infringed their preferential status.

91 However, it is clear, from a reading of paragraphs 178 to 190 of the judgment under appeal, that the Court of First Instance did take account of Rica Foods' line of argument, because it stated why the contested regulation did not place the ACP countries and third countries in a competitive position which was more advantageous than that of the OCTs.

92 In particular, in paragraph 183 of the judgment under appeal, the Court of First Instance states that Article 109 of the OCT Decision expressly authorises the Commission to take safeguard measures in the situations to which it refers. The fact that the Commission adopted such a measure in respect of certain products originating in the OCTs does not undermine the preferential status which products originating in those countries enjoy under Article 101(1) of the OCT Decision. A safeguard measure is, by its very nature, exceptional and temporary.

93 Furthermore, as stated by the Court of First Instance in paragraph 185 of the judgment under appeal, the contested regulation concerns only sugar and mixtures imported under the EC/OCT cumulation of origin regime. It does not impose any ceiling on imports of sugar originating in the OCTs under the ordinary rules of origin, if such production were to exist.

94 In its appeal, Rica Foods does not state why the Court of First Instance's reasoning, as recapitulated here, is vitiated by an error of law.

95 Since the fifth plea cannot be accepted either, the appeal must be dismissed.

Costs

96 Under Article 69(2) of the Rules of Procedure, which applies to appeals by virtue of Article 118, the unsuccessful party is to be ordered to pay the costs, if they have been asked for in the successful party's pleadings. Since the Commission has asked for costs and Rica Foods has been unsuccessful, it must be ordered to pay the costs. The Kingdom of the Netherlands and the Kingdom of Spain must be ordered to bear their own costs, pursuant to Article 69(4) of the Rules of Procedure, which applies to appeals by virtue of Article 118.

On those grounds, the Court (Second Chamber) hereby:

1. **Dismisses the appeal;**

2. **Orders Rica Foods (Free Zone) NV to pay the costs;**

3. **Orders the Kingdom of the Netherlands and the Kingdom of Spain to bear their own costs.**

[Signatures]