JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber)
6 December 2001 *

In Case T-43/98,

Emesa Sugar (Free Zone) NV, established in Oranjestad (Aruba), represented by G. van der Wal, lawyer, with an address for service in Luxembourg,

applicant,

v

Council of the European Union, represented by J. Huber and G. Houttuin, acting as Agents,

defendant,

supported by

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

* Language of the case: Dutch.

by

Kingdom of Spain, represented by M. López-Monís Gallego and R. Silva de Lapuerta, acting as Agents, with an address for service in Luxembourg,

and by

French Republic, represented by K. Rispal-Bellanger, acting as Agent, with an address for service in Luxembourg,

interveners,

APPLICATION for annulment of Council Decision 97/803/EC of 24 November 1997 amending at mid-term Decision 91/482/EEC on the association of the overseas countries and territories with the European Economic Community (OJ 1997 L 329, p. 50), and an application for compensation,

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Third Chamber),

composed of: J. Azizi, President, K. Lenaerts and M. Jaeger, Judges,

Registrar: J. Plingers, Administrator,

having regard to the written procedure and further to the hearing on 15 May 2001,

gives the following

Judgment

The relevant provisions

1 Under Article 3(r) of the EC Treaty (now, after amendment, Article 3(1)(s) EC), the activities of the Community are to include the association of overseas countries and territories ('the OCTs') 'in order to increase trade and promote jointly economic and social development'.

2 Aruba is one of the OCTs.

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

4 Pursuant to the second and third paragraphs of Article 131 of the EC Treaty (now, after amendment, the second and third paragraphs of Article 182 EC):

'The purpose of association shall be to promote the economic and social development of the countries and territories and to establish close economic relations between them and the Community as a whole.

In accordance with the principles set out in the Preamble to this Treaty, association shall serve primarily to further the interests and prosperity of the inhabitants of these countries and territories in order to lead them to the economic, social and cultural development to which they aspire.'

5 To that end, Article 132 of the EC Treaty (now Article 183 EC) sets out a number of objectives, which include the application by the Member States 'to their trade with [those] countries and territories [of] the same treatment as they accord each other pursuant to this Treaty'.

6 Article 133(1) of the EC Treaty (now, after amendment, Article 184(1) EC) provides that customs duties on imports into the Member States of goods originating in the OCTs are to be completely abolished in conformity with the progressive abolition of customs duties between Member States in accordance with the provisions of the Treaty.

7 According to Article 136 of the EC Treaty (now, after amendment, Article 187 EC):

'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.'

8 On the basis of the second paragraph of Article 136 of the Treaty, on 25 February 1964 the Council adopted Decision 64/349/EEC on the association of the OCTs with the European Economic Community (*Journal Officiel* 1964, 93, p. 1472). That decision was intended to replace, as from 1 June 1964 (the date of the entry into force of the internal agreement on the financing and management of Community aid signed in Yaoundé on 20 July 1963), the Implementing Convention on the association of the overseas countries and territories with the European Economic Community, annexed to the Treaty and concluded for a period of five years.

9 Following several decisions relating to the same subject, the Council adopted 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, 'the OCT Decision') which, by virtue of Article 240(1) thereof, is to be applicable for a period of 10 years from 1 March 1990. Article 240(3)(a) and (b) provides, however, that before the end of the first five years, the Council, acting unanimously on a proposal from the Commission, is to establish, where necessary, in addition to Community financial assistance, any amendments to be made for the next five-year period to the association of the OCTs with the Community. Thus it was that the Council adopted Decision 97/803/EC of 24 November 1997 amending at mid-term the OCT Decision (OJ 1997 L 329, p. 50, 'the contested decision').

10 In its original version, Article 101(1) of the OCT Decision provided:

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

11 Article 102 of the same decision provided:

'The Community shall not apply to imports of products originating in the OCT any quantitative restrictions or measures having equivalent effect.'

12 The first indent of Article 108(1) of the OCT Decision refers to Annex II thereto ('Annex II') for definition of the concept of originating products and the methods of administrative cooperation relating thereto. Under Article 1 of Annex II, 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 worked or processed there.

13 Article 3(3) of Annex II lists a number of operations that are to be considered as insufficient working or processing to confer the status of OCT originating products.

14 Article 6(2) of Annex II states:

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

15 By virtue of Article 6(4) of Annex II, the rule cited above, the 'ACP/OCT cumulation of origin' rule, is to apply 'to any working or processing carried out in the OCT, including the operations listed in Article 3(3)'.

16 The contested decision confined the application of the ACP/OCT cumulation of origin rule in respect of sugar from the OCT.

17 In the seventh recital in the preamble to the contested decision, the Council explains:

'[T]he introduction pursuant to [the OCT] Decision 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;... 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'.

18 To that end, the contested decision inserted into the OCT decision, *inter alia*, Article 108b which allows the ACP/OCT cumulation of origin for a fixed annual quantity of sugar. Article 108b provides:

'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'.

Facts and procedure

19 The applicant, which was formed on 6 February 1997, has operated a sugar factory on the island of Aruba since April 1997 and exports sugar to the Community. According to Emesa, its factory has a minimum processing capacity of 34 000 tonnes a year. Since Aruba produces no sugar, the applicant buys white sugar from cane-sugar refineries established in ACP States. After purchase, the sugar is taken to Aruba where, before being exported to the Community, it is worked and processed in order to make it qualify for ACP/OCT cumulation of origin.

20 Those were the circumstances in which, by application lodged at the Registry of the Court of First Instance on 10 March 1998, Emesa brought these proceedings, seeking annulment of the contested decision and damages.

21 By separate document lodged at the Registry of the Court of First Instance on 10 April 1998, Emesa also applied, pursuant to Article 185 of the EC Treaty (now Article 242 EC), for the application of Article 1(28), (30), (32) and (60) of the contested decision to be suspended until the Court of First Instance should have given judgment on the substance and, in the alternative, for appropriate interim measures.

22 By order of 14 August 1998 in Case T-43/98 R *Emesa Sugar* v *Council* [1998] ECR II-3055, the President of the Court of First Instance dismissed those applications.

23 By applications lodged at the Registry of the Court of First Instance on 7 May, 4 June and 15 June 1998 respectively, the Kingdom of Spain, the Commission and the French Republic sought leave to intervene, pursuant to Article 115 of the Rules of Procedure of the Court of First Instance, in support of the forms of order sought by the Council. Leave was given to the Kingdom of Spain by order of 7 July 1998 and to the Commission and the French Republic by orders of 9 July

1998. The Kingdom of Spain and the Commission submitted statements in intervention on 20 November 1998 and 22 December 1998 respectively and the main parties were requested to submit their observations on those statements.

24 On appeal brought by the applicant, the order in *Emesa Sugar* v *Council*, cited in paragraph 22 above, was annulled 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), and the case was referred back to the Court of First Instance for judgment.

25 The President of the Court of First Instance granted interim measures in Case T-44/98 R II (orders of the President of the Court of First Instance of 30 April 1999 in Case T-44/98 R II *Emesa Sugar* v *Commission* [1999] ECR II-1427, and of 29 September 1999 in Case T-44/98 R II *Emesa Sugar* v *Commission* [1999] ECR II-2815). Because of those interim measures it was held that there was no need to give a decision in Case T-43/98 R II (order of the President of the Court of First Instance of 6 April 2000 in Case T-43/98 R II *Emesa Sugar* v *Council*, not published in the ECR).

26 The President of the Arrondissementsrechtbank te 's-Gravenhage (District Court, The Hague) requested the Court to give a preliminary ruling pursuant to Article 177 of the EC Treaty (now Article 234 EC) on the validity of the contested decision (Case C-17/98 *Emesa Sugar* [2000] ECR I-675).

27 By order of 11 February 1999 the Court of First Instance stayed the present proceedings until the Court of Justice should have given final judgment in Case C-17/98.

28 In its judgment of 8 February 2000 in Case C-17/98 *Emesa Sugar* ('*Emesa*'), the Court of Justice ruled that examination of the questions referred had disclosed no factor of such a kind as to affect the validity of the contested decision.

29 By letter of 29 February 2000, the parties were requested to submit their observations on the continuation of proceedings in the instant case.

30 In its letter of 31 March 2000, the applicant claimed that *Emesa* was based on errors of fact. In addition, the judgment was given in breach of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms since, during the proceedings before the Court of Justice, Emesa was unable to submit observations on the Opinion of the Advocate General. The applicant has requested the Court of First Instance to follow the written procedure and to request the parties to submit observations on the merits of the judgment in *Emesa*.

31 In letters dated 29 March and 24 March 2000 respectively, the Council and the Commission maintained that the action had become purposeless, having regard to the fact that in *Emesa* the Court of Justice had confirmed the validity of the contested decision.

32 By letter of 24 May 2000 the applicant was requested to submit further pleadings relating to *Emesa*. On 9 October 2000 the applicant lodged that document, on which the Council and the Commission submitted their observations in statements dated 21 February 2001.

33 On hearing the Report of the Judge-Rapporteur, the Court of First Instance (Third Chamber) decided to open the oral procedure. By way of measures of organisation of procedure, provided for in Article 64 of the Rules of Procedure, certain written questions were addressed to the parties, and they replied within the time allowed.

34 The parties presented oral argument and answered questions put to them by the Court at the hearing in open court of 15 May 2001.

Forms of order sought by the parties

35 The applicant claims that the Court should:

— annul the contested decision or, at least, annul it in so far as, first, it amends Articles 101, 102 and 108 of the OCT decision and Article 6 of Annex II thereto and, second, it inserts a new Article 108b into the OCT Decision (Article 1(27) to (32) of the contested decision);

— find that the Community is responsible for the loss suffered by Emesa as a result of the fact that imports of sugar from the OCT into the Community have been prevented or restricted since 1 December 1997 as a consequence of the contested decision;

— order the parties to reach closer agreement as to the extent of Emesa's loss and, failing such agreement, order proceedings to be continued within a period to be specified by the Court in order to determine the extent of the loss or, at least, order the Community to pay the amount of the loss as provisionally estimated in the application and which still remains to be definitively fixed or, in the further alternative, order the Community to make good the loss in such amount as the Court may consider equitable, together with default interest;

— order the Council to pay the costs.

36 The Council contends that the Court should:

— dismiss as inadmissible or, alternatively, as unfounded the claim for annulment;

— dismiss as unfounded the claim for damages;

— order the applicant to pay the costs;

— if the Court should declare Article 1(27) to (32) of the contested decision null and void, explain which effects of the contested decision are to be preserved until it makes its decision in accordance with the judgment given in the case in point.

37 The Commission contends that the Court should:

— dismiss the claim for annulment as inadmissible or, at least, as unfounded;

— dismiss the claim for damages;

— order the applicant to pay the costs.

38 The Kingdom of Spain contends that the Court should:

— dismiss the application;

— order the applicant to pay the costs.

Admissibility of the claim for annulment

Arguments of the parties

39 The Council and the Commission challenge the admissibility of the claim for annulment. The contested decision is, in their view, a legislative measure of general scope applicable to all traders concerned. In any event, the contested decision is not of individual concern to the applicant within the meaning of the fourth paragraph of Article 173 of the EC Treaty (now, after amendment, the fourth paragraph of Article 230 EC).

40 The applicant counters by saying that the contested decision is a decision within the meaning of the fourth paragraph of Article 173 of the Treaty. It adds that it is directly and individually concerned, within the meaning of that provision, by the

contested decision or, at the very least, by those of its provisions which amended Articles 101, 102 and 108 of the OCT Decision and Article 6 of Annex II and inserted a new Article 108b in that decision.

41 The applicant maintains that it is directly concerned since the contested decision — or at least those of its provisions referred to in the previous paragraph — leaves no discretion to the national authorities of the Member States responsible for applying it. Emesa is, moreover, individually concerned by the contested decision, or by those provisions mentioned above, because it is placed in a situation which distinguishes it from any other undertaking (Case C-309/89 *Codorniu* v *Council* [1994] ECR I-1853). It claims to be the only OCT sugar producer which clearly showed itself to be an interested party during the administrative procedure which preceded the adoption of the contested decision.

42 Next, the applicant points out that it is one of a very small number of sugar businesses which are established in the OCTs and the situation of which ought to have been examined by the Council before it amended the OCT Decision. It points out that it has made considerable investments and entered into long-term commitments with sugar suppliers in the ACP States (see judgment of the Court of Justice in Case 11/82 *Piraiki-Patraiki and Others* v *Commission* [1985] ECR 207, paragraph 28, and of the Court of First Instance in Joined Cases T-480/93 and T-483/93 *Antillean Rice Mills and Others* v *Commission* [1995] ECR II-2305, paragraph 74). In a letter of 18 December 1997 Mr Fischler himself, a member of the Commission, acknowledged that the amendments to the OCT Decision had been adopted as an alternative solution to the protective measures which could have been adopted on the basis of Article 109 of the OCT Decision. In the circumstances the Council ought to have taken the applicant's interest into consideration (*Antillean Rice Mills*, cited above, paragraphs 76 and 77). If the Community had formally adopted safeguard measures, it would have had to take into account the possible consequences for undertakings established in the OCTs. In the applicant's submission, the formal difference which distinguishes safeguard measures from a structural restriction does not entail any difference with regard to the extent to which the Community must take into consideration the interests of undertakings established in the OCTs.

43 The applicant maintains that the Community's duty to take account of the consequences of the act it proposes to adopt for the situation of certain persons may be inferred, in a general manner, from the preamble to the Treaty, from the Charter of the United Nations and from the third paragraph of Article 131 of the Treaty.

44 The applicant then points out that the quantitative restriction imposed by the contested decision on imports of sugar from the OCTs and the limitation of the kinds of working or processing capable of conferring OCT origin by application of the ACP/OCT cumulation of origin rule are a direct threat to its existence and its commercial activities. At the hearing it emphasised that it was, at the time the contested decision was adopted, the only sugar business established in Aruba. It believes its situation to be comparable to that of the applicant in the case giving rise to the judgment of the Court of Justice in Case C-358/89 *Extramet Industrie* v *Council* [1991] ECR I-2501.

45 Finally, referring to the judgment of the Court of First Instance in Case T-135/96 *UEAPME* v *Council* [1998] ECR II-2335, paragraph 89, the applicant is of the view that the contested decision escaped all democratic scrutiny. There was no consultation of either the European Parliament or the OCTs. That being so, the Council ought to have taken into consideration the OCTs' particular circumstances (*UEAPME* v *Council*, cited above, paragraph 90).

Findings of the Court

46 Although the contested decision is called a 'decision', it is of general application since it applies to all the traders concerned, taken as a whole. The fact that Article 108b, added to the OCT Decision pursuant to the contested decision, particularly affects the applicant by limiting the imports of sugar into the Community which may be eligible for ACP/OCT cumulation of origin does not call into question the legislative nature of the contested decision, inasmuch as the

provision in question is addressed to all undertakings involved in exporting sugar from the OCT to the Community. It should, to that end, be borne in mind that the fact it is possible to determine more or less precisely the identities of the traders to whom an act applies, at a given moment, is not sufficient to call into question the legislative nature of the act, as long as it is established that such application takes effect by virtue of an objective legal or factual situation defined by the measure in question in relation to its purpose (*Codorniu* v *Council*, cited above at paragraph 41, paragraph 18, and *Antillean Rice Mills and Others* v *Commission*, cited above at paragraph 42, paragraph 65).

47 However, the fact that the contested measures are legislative by nature does not prevent them from being of direct and individual concern to certain natural and legal persons for the purposes of the fourth paragraph of Article 173 of the Treaty (*Codorniu* v *Council*, cited above at paragraph 41, paragraph 19, and *Antillean Rice Mills and Others* v *Commission*, cited above at paragraph 42, paragraph 66).

48 The Court finds that the contested decision is of direct concern to the applicant since it leaves no discretion to the national authorities of the Member States responsible for its application (*Antillean Rice Mills and Others* v *Commission*, cited above at paragraph 42, paragraph 63).

49 As regards the question whether the contested decision is of individual concern to the applicant, it must be borne in mind that, for it to be possible for a measure of general application to be of individual concern to a natural or legal person, the latter must be affected by the measure at issue by virtue of certain attributes which are peculiar to that person or circumstances must exist in which that person is differentiated from all other persons (judgment of the Court of Justice in Case 25/62 *Plaumann* v *Commission* [1963] ECR 107; orders of the Court of First Instance of 30 September 1997 in Case T-122/96 *Federolio* v *Commission* [1997] ECR II-1559, paragraph 59, and of 29 April 1999 in Case T-120/98 *Alce* v *Commission* [1999] ECR II-1395, paragraph 19).

50 The fact that the contested decision affects the applicant's economic activity is not sufficient to differentiate it, within the meaning of the fourth paragraph of Article 173 of the Treaty, from any other trader, since it is in an objectively determined situation comparable with that of any other undertaking which might now or at some time in the future be established in one of the OCTs and which is or might become active on the sugar market (see the order in *Federolio* v *Commission*, cited above at paragraph 49, paragraph 67). The applicant has itself claimed in its application (paragraph 207) that at the time when the decision was adopted there were two or three other sugar businesses in the OCTs (in particular in Curaçao). Furthermore, it explained at the hearing that a new sugar business, Rica Foods, had set itself up in Aruba after the contested decision was adopted. That being so, the applicant has not adduced evidence to show that it suffered exceptional damage such as to differentiate it from any other trader within the meaning of *Extramet Industrie* v *Council*, cited at paragraph 44 above.

51 The applicant maintains that the Council was required by law to consider its special position before adopting the contested decision.

52 It ought to be borne in mind that where a Community institution is, by virtue of specific provisions, under a duty to take account of the consequences of a measure which it envisages adopting for the situation of certain individuals, that fact distinguishes them individually (*Piraiki-Patraiki* v *Commission*, cited at paragraph 42 above, paragraphs 28 to 31, Case C-152/88 *Sofrimport* v *Commission* [1990] ECR I-2477, paragraphs 11 to 13, and *Antillean Rice Mills and Others* v *Commission*, cited above at paragraph 42, paragraph 67).

53 The fact nevertheless remains that, when the contested decision was adopted, there was no provision of Community law which required the Council to take account of the applicant's special position. It must be emphasised that the contested decision cannot be considered to be a safeguard measure falling within the scope of Article 109 of the OCT Decision (see paragraphs 107 to 112 below). The duty which that provision imposes on an institution taking safeguard measures, namely, to take into consideration the specific situation of the

undertakings concerned (*Antillean Rice Mills and Others* v *Commission*, cited above at paragraph 42, paragraph 72), does not apply to the circumstances of this case. In any event, it is to be noted that the proposal for a Council decision amending at mid-term the OCT Decision (OJ 1996 C 139, p. 1) was presented to the Council by the Commission on 16 February 1996 and that that proposal from the start envisaged the total abolition of the ACP/OCT cumulation of origin rule for sugar from the ACP States (see paragraph 94 below). Even if it had so desired, the Commission could not have taken into consideration the applicant's special situation since at that period the applicant, which was formed on 6 February 1997, did not exist.

54 The fact that the applicant has made investments and concluded supply contracts is referable to the economic decision it has made in the light of its own commercial interests (order of the Court of First Instance of 30 January 2001 in Case T-49/00 *Iposea* v *Commission* [2001] ECR II-163, p. 34). Such a situation, which arises out of the normal activity of any undertaking active in sugar processing, is not capable of differentiating the applicant for the purposes of the fourth paragraph of Article 173 of the Treaty.

55 As regards the applicant's participation in the procedure preceding the adoption of the contested decision, it must be pointed out that no provision of Community law required the Council, in reviewing the OCT Decision, to follow a procedure during which the applicant would have the right to be heard. Accordingly, the interventions referred to by the applicants cannot confer on them standing to bring proceedings under the fourth paragraph of Article 173 of the Treaty (Joined Cases T-38/99 to T-50/99 *Sociedade Agrícola dos Arinhos and Others* v *Commission* [2001] ECR II-585, paragraph 48).

56 Lastly, the fact that the contested decision escaped all democratic scrutiny cannot give rise to non-application of the rules for admissibility laid down in the fourth paragraph of Article 173 of the Treaty (see, to that effect, the order of the Court of Justice in Case C-345/00 P *FNAB and Others* v *Council* [2001] ECR I-3811, paragraph 40).

57 On the basis of all the foregoing, the claim for annulment must be declared inadmissible.

The claim for compensation

Preliminary observations

58 The applicant maintains that the infringements of Community law specified in its grounds for annulment have caused it damage and caused the Community to incur non-contractual liability.

59 It should be borne in mind that as regards the non-contractual liability of the Community a right to reparation is acknowledged where three cumulative conditions are met: the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious, and there must be a direct causal link between the breach of the obligation resting on the Community and the damage sustained by the injured parties (see, to that effect, Case C-352/98 P *Bergaderm and Goupil* v *Commission* [2000] ECR I-5291, paragraph 42).

60 It must therefore be considered whether the grounds of annulment in the application refer to infringements of rules of law conferring rights on individuals.

61 The applicant puts forward five pleas in law in support of its claim for annulment. The first alleges failure to maintain the 'locking mechanism' by means of which the advantages conferred on the OCTs as their association with

the Community proceeds in stages can no longer be challenged by the Community. The second alleges breach of the principle of proportionality. The third alleges infringement of Article 240 of the OCT Decision and the fourth breach of the principle of legal certainty and of the principle of protection of legitimate expectations. Finally, the fifth plea in law alleges infringement of Article 190 of the EC Treaty (now Article 253 EC).

62 The applicant does not even claim that the alleged infringements of Community law in the third and fifth pleas in law concern rules of law which confer rights on individuals. It merely argues in its application (paragraph 180) that the 'locking mechanism' (first plea in law), the principle of proportionality (second plea in law) and the principle of legal certainty or the principle of protection of legitimate expectations (fourth plea) do constitute such rules.

63 With regard to the fifth plea, it has been held that infringement of Article 190 of the Treaty was not sufficient for the Community to incur non-contractual liability (judgments of the Court of Justice in Case 106/81 *Kind* v *EEC* [1982] ECR 2885, paragraph 14, and Case C-119/88 *AERPO and Others* v *Commission* [1990] ECR I-2189, paragraph 20, and judgment of the Court of First Instance in Case T-489/93 *Unifruit Hellas* v *Commission* [1994] ECR II-1201, paragraph 41). As regards the third plea, alleging infringement of Article 240 of the OCT Decision in that the Council was no longer, by virtue of that provision, competent *ratione temporis* to adopt the contested decision, it is hard to imagine that that provision could constitute a rule of law which conferred rights on individuals (see, to that effect, Case C-282/90 *Vreugdenhil* v *Commission* [1992] ECR I-1937, paragraphs 20 to 25). In any event, the Court has ruled in *Emesa* (paragraph 33) that the contested decision had not been adopted in breach of Article 240 of the OCT Decision and the applicant has not submitted any observations on that passage in the Court's judgment in its supplementary observations of 9 October 2000.

64 By contrast, the principle of proportionality referred to in the second plea (*Unifruit Hellas*, cited at paragraph 63 above, paragraph 42), and the principle of protection of legitimate expectations referred to in the fourth plea (Joined Cases

C-104/89 and C-37/90 *Mulder and Others* v *Council and Commission* [1992] ECR I-3061, paragraph 15), do constitute rules of law conferring rights on individuals. As regards the 'locking mechanism' which is the subject of the first plea, it will first be necessary to consider whether a principle of Community law is involved and then, if appropriate, to establish whether it is a rule of law which confers rights on individuals.

65 It follows that only the first, second and fourth pleas in law in the application need be examined in connection with the claim for damages.

The plea alleging failure to maintain the 'locking mechanism'

66 The applicant claims that the provisions of Part Four of the Treaty, in particular Articles 132, 133 and 136 thereof, in conjunction with the *acquis communautaire* formed by successive OCT Decisions, prescribe a 'locking mechanism'. That principle prevents the advantages already given to the OCTs in the staged implementation of association from being compromised by a subsequent decision of the Community.

67 In *Emesa* (paragraphs 38 and 39), the Court held:

'38 It should be noted that although the dynamic and progressive process characterising the association of the OCTs with the Community requires that account be taken by the Council of the experience acquired as a result of its earlier decisions, the fact nevertheless remains... that the Council, when adopting measures under the second paragraph of Article 136 of the Treaty, must take account both of the principles set out in Part Four of the Treaty and of the other principles of Community law, including those relating to the common agricultural policy.

39 In weighing the various objectives laid down by the Treaty, whilst taking overall account of the experience acquired as a result of its earlier decisions, the Council, which enjoys for that purpose a considerable margin of discretion reflecting the political responsibilities entrusted to it by [Articles 40 (now, after amendment, Article 34 EC), 41 and 42 (now Articles 35 EC and 36 EC), and 43 (now, after amendment, Article 37 EC) of the EC Treaty and 136 of the EC Treaty] may be prompted, in case of need, to curtail certain advantages previously granted to the OCTs.'

68 It follows that there is no absolute 'locking mechanism or principle' in the relationship between the OCTs and the Community. The Council may be prompted, 'in case of need', to curtail certain advantages previously granted to the OCTs (*Emesa*, paragraph 39).

69 It is clear that, on the basis of the evidence in the file before it, the Court of Justice examined whether in the circumstances of the case the Council could reasonably have considered, after weighing the objectives of the OCT association against those of the common agricultural policy, that it was necessary to restrict the application of the ACP/OCT cumulation of origin rule.

70 The Court held as follows in *Emesa* (paragraphs 40 to 42):

'40 In this case, it is common ground that the reduction to 3 000 tonnes a year of the quantity of sugar which may qualify for ACP/OCT cumulation of origin constitutes a restriction as compared with the OCT Decision. However, provided it is established that the application of the rule on cumulation of origin in the sugar sector was liable to lead to significant disturbances in the functioning of a common market organisation..., the Council, after weighing the objectives of association of the OCTs against those of the common

agricultural policy, was entitled to adopt, in compliance with the principles of Community law circumscribing its margin of discretion, any measure capable of bringing to an end or mitigating such disturbances, including the removal or limitation of advantages previously granted to the OCTs.

41 That is particularly true... where the advantages in question are of an extraordinary nature, having regard to the rules on the functioning of the Community market. 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 falls into that category.

42 Moreover, the review of the OCT Decision did not merely bring about restrictions or limitations as compared with the rules previously in force since, as the Commission has stated without being contradicted, various advantages were granted to the OCTs regarding establishment within the Community (Articles 232 and 233a of the amended OCT Decision), mutual recognition of professional qualifications (Article 233b) and access to Community programmes (Article 233c). Furthermore, Community financial aid for the OCTs was increased by 21% (Article 154a).'

71 It is apparent from that passage in *Emesa* that the Court considers that, in the circumstances of that case, the Council was not only entitled to restrict the application of the ACP/OCT cumulation of origin rule, as it did, but that it could also perfectly well have removed that advantage entirely in respect of sugar from the OCTs.

72 None the less, according to the applicant, the Court acknowledged in paragraphs 40 to 42 of the judgment that, even 'in case of need' (*Emesa*, paragraph 39), the

Council could reduce an advantage previously granted to the OCTs only if the advantage in question was of an extraordinary kind and if its loss was compensated by benefits conferred in other areas. The ACP/OCT cumulation of origin rule is, in its submission, in no way extraordinary. The allegedly exceptional nature of that rule must be assessed, not 'in relation to the rules governing the operation of the Community market' but in relation to the normal rules of origin, the various rules governing imports and the privileged position of the OCTs. In addition, the applicant takes issue with the fact that the Court has not considered whether benefits in other areas really did offset the crippling of the OCT sugar industry caused by the contested decision.

73 In so far as the applicant does not even claim that the Court of Justice based its assessment on inaccurate or incomplete information, it is not for the Court of First Instance to call that assessment in question.

74 Furthermore, it should be noted that the applicant's line of argument is based on a misreading of paragraphs 40 to 42 of *Emesa*. The Court of Justice did not in fact hold that the Council could reduce an advantage previously granted to the OCTs only if the advantage in question was of an extraordinary kind and if its loss was compensated by benefits in other areas. The judgment makes it clear that the Council was entitled to reduce, and even to remove, an advantage previously granted to the OCTs, in this instance the application of the ACP/OCT cumulation of origin rule, since 'application of [that] rule... in the sugar sector was liable to lead to significant disturbances in the functioning of a common market organisation...' (paragraph 40 of the judgment).

75 In order to emphasise that the contested decision was justified and fair, the Court adds that the advantage granted was in any event of an extraordinary nature and that the Council did confer various benefits in other areas in the contested decision (*Emesa*, paragraphs 41 and 42).

76 However, nowhere in *Emesa* does the Court of Justice mention 'compensation'. In paragraph 42 of that judgment the Court refers to 'various advantages [which] were granted to the OCTs', without the applicant denying the existence of those advantages.

77 As regards the question whether the ACP/OCT cumulation of origin rule confers an extraordinary advantage on OCT traders, it must be borne in mind that, in accordance with the ordinary rules of origin, a product is to be considered as originating in a country if it has been either wholly obtained or sufficiently worked or processed there (Articles 4 and 5 of Council Regulation (EEC) No 802/68 of 27 June 1968 on the common definition of the concept of the origin of goods (OJ, English Special Edition 1968 (I), p. 165), and Articles 1 to 3 of Annex II).

78 The parties agree that the sugar exported by the applicant is not wholly obtained in the OCTs. It is, in fact, sugar imported from ACP countries. Moreover, it is not denied that the sugar exported by the applicant is not sufficiently worked or processed in Aruba for the product in question to acquire OCT origin under the ordinary rules of origin.

79 It is only by virtue of the ACP/OCT cumulation of origin rule that the sugar exported by the applicant may be considered to be sugar originating in the OCT. Exceptionally, under that rule, even minimal working or processing — even those operations expressly mentioned in Article 3(3) of Annex II as being considered to be insufficient to confer the status of OCT originating products — carried out on products originating in ACP countries confers OCT origin on the products concerned. Since goods which qualify for ACT/OCT cumulation of origin may be imported into the Community free of customs duty, it must be considered that that rule confers, as the Court of Justice emphasised, an advantage of an extraordinary nature on OCT traders (*Emesa*, paragraph 41).

80 In connection with the first plea in law, the applicant further maintains that the Council infringed Article 133(1) of the Treaty by restricting to 3 000 tonnes the amount of sugar imported which qualifies for ACP/OCT cumulation of origin. The ceiling mentioned in Article 108b(1) of the OCT Decision, as amended, constitutes a quantitative restriction prohibited by that provision. In addition, even if the system set up by the OCT Decision did damage other Community interests, the Council is required by the second paragraph of Article 136 of the Treaty to respect the 'experience acquired'.

81 It must be observed that the Court of Justice has already rejected that argument in *Emesa* in the following terms:

'45 Without its being necessary to dispose of the question whether the tariff quota laid down in Article 108b of the amended OCT Decision may be regarded as a quantitative restriction or the question whether ACP/OCT cumulation rules confer on the goods in question an OCT origin for the purpose of applying the import rules laid down in Article 133(1) of the Treaty, it should be noted that the products concerned can be imported in excess of the quota only against payment of customs duties.

46 However, Article 133(1) of the Treaty provides that customs duties on imports from the OCTs into the Community are to be completely abolished "in conformity with the progressive abolition of customs duties between Member States in accordance with the provisions of this Treaty".

47 In that connection, it should be observed, as the Commission has done, that, as far as trade in sugar is concerned, dismantling of the intra-Community customs tariff came about only after the creation of a common organisation

of the market in sugar, which led to the simultaneous establishment of a common external tariff and determination of a minimum price applicable in all the Member States, with the aim, in particular, of eliminating distortions of competition. Thus, in the absence of any common agricultural policy as between the OCTs and the Community, measures designed to prevent distortions of competition or disturbance of the Community market, which may take the form of a tariff quota, cannot, merely because of their adoption, be regarded as contrary to Article 133(1) of the Treaty.

48 As to whether the tariff quota fixed by Article 108b of the amended OCT Decision is compatible with the second paragraph of Article 136 of the Treaty, it need merely be observed that that provision states expressly that the Council is to act "on the basis of the experience acquired and of the principles set out in this Treaty". As the Court held in *Antillean Rice Mills,* cited above, paragraph 37, those principles include the ones relating to the common agricultural policy.

49 Consequently, the Council cannot be criticised for having taken into account, in implementing the second paragraph of Article 136 of the Treaty, the requirements of the common agricultural policy.

50 It follows from the foregoing that the validity of the measure provided for in Article 108b of the OCT Decision cannot be called in question in the light of Article 133(1) and the second paragraph of Article 136 of the Treaty on the ground that it fixed a quota for sugar imports under the ACP/OCT cumulation of origin rules.'

82 It follows that the first plea in law must be rejected in its entirety.

83 Without there being any need to rule on the question whether the first plea involves a rule of law conferring rights on individuals, it must be stated that consideration of the plea has not revealed the existence of any action on the part of the Community which could have caused the latter to incur liability.

The plea alleging breach of the principle of legal certainty and the principle of protection of legitimate expectations

84 The applicant claims that the contested decision infringes the principles of legal certainty and of protection of legitimate expectations. It notes that, by introducing Article 108b(1) into the OCT Decision, the Council limited to 3 000 tonnes a year the amount of sugar imported which could be eligible for ACP/OCT cumulation of origin. The applicant could not have expected any such alteration to the OCT Decision. It points out that the OCT Decision had been adopted for a period of 10 years and that, under Article 240(3), the only amendment provided for was to be effected by 1 March 1995. Moreover, according to the applicant, any amendment could be made only for the purposes of the objective set out in Article 132(1) of the Treaty.

85 The applicant also argues that general principles of Community law require the Council to take account of the interests of undertakings which have made investments and developed activities on the basis of the rules of law in force (Case 90/77 *Stimming* v *Commission* [1978] ECR 995; Case 84/78 *Tomadini* [1979] ECR 1801; Case 120/86 *Mulder* [1988] ECR 2321, and Case C-368/89 *Crispoltoni* [1991] ECR I-3695).

86 The Court observes, first, that the Council, when adopting measures under the second paragraph of Article 136 of the Treaty, must take account both of the principles set out in Part Four of the Treaty, in particular those set out in

Article 132 of the Treaty, and of the other principles of Community law, including those relating to the common agricultural policy (*Emesa*, paragraph 38). It must also be borne in mind that the Council, which has a broad discretion when weighing the objectives of the association of the OCTs against those of the common agricultural policy (*Emesa*, paragraphs 39 and 53), is entitled to reduce or even remove an advantage previously granted to the OCTs where its application is liable to lead to significant disturbances in the functioning of a common market organisation (*Emesa*, paragraph 40).

87 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 (Case C-372/96 *Pontillo* [1998] ECR I-5091, paragraphs 22 and 23, and *Emesa*, paragraph 34).

88 A trader exercising due care ought therefore to have foreseen that the OCT Decision could be amended and that an amendment could, in some circumstances, mean the removal or restriction of advantages previously granted to the OCTs. That analysis is all the more inescapable as the advantages concerned are of an extraordinary nature (*Emesa*, paragraphs 40 and 41). In addition, the Council was not required by any provision of Community law to take account of the interests of undertakings already present on the market (see, to that effect, Case C-280/93 *Germany* v *Council* [1994] ECR I-4973, paragraph 79).

89 The applicant cannot base such argument on Article 240(3) of the OCT Decision which provides that, before the end of the first five years, the Council is to establish, where necessary, any amendments to be made to the provisions governing the association between the OCTs and the Community. That provision cannot deprive the Council of its competence, conferred directly by the Treaty, to amend the acts which it has adopted under Article 136 thereof in order to attain all the objectives set out in Article 132 of the Treaty (*Emesa*, paragraph 33).

90 The applicant then observes that its decision to set up a sugar factory in Aruba was taken only after liaison in 1995 and 1996 with the Aruba authorities and the Permanent Representation of the Kingdom of the Netherlands to the European Union.

91 The applicant maintains that it could not have foreseen that the Council would impose quantitative restrictions on imports of sugar eligible for ACP/OCT cumulation of origin. It dwells on the point that the decision-making procedure within the Council is not public. It was only in July 1997 that it was informed by the Aruba authorities of the subject-matter of the discussions.

92 The Court finds, however, that the applicant has put forward no evidence to demonstrate that the Community institutions gave it any specific assurance entitling it reasonably to expect that the then current ACP/OCT cumulation of origin system would be maintained for the sugar which it contemplated exporting.

93 On the contrary, as the Court of Justice rightly stated in *Emesa*, 'it is clear from the documents before the Court that, when... making investments in Aruba, [the applicant] was in possession of sufficient information to enable it, as a normally diligent trader, to foresee that the [liberal] rules allowing cumulation of origin might be made more restrictive' (paragraph 36). The Court notes that 'the Commission proposal [96/C 139/01] was published in the *Official Journal of the European Communities* of 10 May 1996, that is to say nearly a year before Emesa started production in Aruba' (paragraph 36).

94 Proposal 96/C 139/01, to which the Court referred, provided for abolition of the ACP/OCT cumulation of origin rule in respect of, *inter alia*, sugar from ACP States. As regards Annex II, the Commission proposed a new Article 6 which

would provide that the ACP/OCT cumulation of origin rule was 'not to apply to the products falling within Chapters 1 to 24 of the Harmonised System if the products... originate in an ACP State'. Sugar is mentioned in Chapter 17 of the Harmonised System.

95 It follows that Proposal 96/C 139/01, published in May 1996, that is to say, about nine months before the applicant was created and eleven months before it began producing sugar (see paragraph 19 above), made provision for the introduction of a system yet more restrictive for the applicant than that in Article 108b(1) of the amended OCT Decision, which permits ACP/OCT cumulation of origin for 3 000 tonnes of sugar a year.

96 Finally, the applicant claims that the contested decision infringes the principle of protection of legitimate expectations because it makes no provision for a transitional period or transitional rules for activities under way in the OCTs at the time the OCT Decision was reviewed. In the circumstances, there is no overriding public interest to justify the fact that the review of the OCT Decision did not entail transitional measures (Case C-183/95 *Affish* [1997] ECR I-4315, paragraph 57).

97 The Court has held that the Council was not required by any provision of Community law to take account of the interests of undertakings already present on the market (see paragraph 88 above).

98 Next, the Court finds that the applicant does not even claim to have had, at the time the contested decision was adopted, a cargo of sugar in transit to the Community which it might legitimately believe it ought to have been possible to import into the Community without restriction (see, to that effect, *Sofrimport*, cited in paragraph 52 above, paragraphs 16 to 21, and Case T-267/94 *Oleifici Italiani* v *Commission* [1997] ECR II-1239, paragraphs 38 to 40).

99 Furthermore, on 17 December 1997 the Commission adopted Regulation (EC) No 2553/97 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). Article 8 of that regulation makes it clear that Article 108b(1) of the OCT Decision, as amended, was not to apply until 1 January 1998 and that import licences requested between 10 December 1997 and 31 December 1997 would be issued up to a quantity of 3 000 tonnes. In addition, it is not disputed that applications for import licences lodged before 10 December 1997 were satisfied in full.

100 It follows, therefore, that for a month there existed a transitional scheme which was, moreover, generous in that, for the 21 days from 10 to 31 December 1997, an 'annual' quantity of 3 000 tonnes eligible for ACP/OCT cumulation of origin could be imported.

101 The allegation that there was no transitional regime must also, therefore, be rejected.

102 It follows from all the foregoing that the plea alleging infringement of the principles of legal certainty and of protection of legitimate expectations must be rejected. Nor, therefore, has consideration of this plea revealed any infringement by the Community of a rule of law conferring rights on individuals.

The plea alleging breach of the principle of proportionality

103 In the first place, the applicant maintains that the Council is under a duty to reconcile the various objectives set out in Article 3 of the Treaty, but without giving priority to the common agricultural policy (judgment in Case 68/86 *United*

Kingdom v *Council* [1988] ECR 855, paragraph 12, and order in Case C-180/96 R *United Kingdom* v *Commission* [1996] ECR I-3903, paragraph 63). In the circumstances of this case, the Council has infringed the principle of proportionality by giving priority to the common agricultural policy at the expense of the interests of the OCTs.

104 in *Emesa*, the Court of Justice held that the Council, 'when adopting measures under the second paragraph of Article 136 of the Treaty, must take account both of the principles set out in Part Four of the Treaty and of the other principles of Community law, including those relating to the common agricultural policy' (paragraph 38), and that 'in weighing the various objectives laid down by the Treaty,... the Council... may be prompted, in case of need, to curtail certain advantages previously granted to the OCTs' (paragraph 39).

105 The argument must therefore be dismissed. The Court will subsequently consider whether the Council has not committed a manifest error in its assessment of the 'need' to restrict imports of sugar qualifying under the ACP/OCT cumulation of origin rule (see paragraphs 117 to 150 below).

106 In the second place, the applicant claims that Article 108b(1) of the OCT Decision, as amended, involves a structural limitation on sugar imported from the OCT into the Community. That provision limits to 3 000 tonnes the amount of sugar originating in the OCTs which may be imported into the Community with an attribution of OCT origin after being worked or processed within the meaning of Article 6 of Annex II. According to the applicant, only provisional restrictive measures on the basis of Article 109 of the OCT Decision may be taken in respect of imports from the OCTs, provided that those measures 'limit... only exceptionally, partially and temporarily' the freedom to import products from the OCTs into the Community (Case C-430/92 *Netherlands* v *Commission* [1994] ECR I-5197; Case C-310/95 *Road Air* [1997] ECR I-2229, paragraphs 40 to 41, and *Antillean Rice Mills*, cited in paragraph 42 above, paragraph 95).

107 It is, nevertheless, clear from *Emesa* (paragraph 40) that the Council is entitled to make structural reductions in an advantage previously granted to the OCTs, in this case the application of the ACP/OCT cumulation of origin rule in the sugar sector if it is established that 'application of [that] rule in [that] sector [is] liable to lead to significant disturbances in the functioning of a common market organisation...'. The Court will consider later whether the Council's evaluation of the risk entailed for the common organisation of the sugar market by the ACP/OCT cumulation of origin rule was not vitiated by manifest error (see paragraphs 117 to 150 below).

108 In the third place, the applicant observes that Mr Fischler's letter of 18 December 1997 to his legal representative and the letter of 9 June 1997 from Mr Soubestre of the Commission to the Permanent Representation of the Kingdom of the Netherlands show that the structural restriction under Article 108b(1) of the OCT Decision, as amended, was imposed as an alternative solution. In its view, a structural restriction adopted instead of a safeguard measure must at least satisfy the same criteria as the measures provided for by Article 109 of the OCT Decision. It would be wrong for a definitive structural restriction to be more readily acceptable than a safeguard measure. It submits that in the circumstances of this case the conditions for the adoption of a safeguard measure pursuant to Article 109 of the OCT Decision have not been satisfied.

109 The Court, however, finds that the two letters of the Commission referred to by the applicant do not support the latter's arguments.

110 First, in the letter signed by Mr Soubestre, the Commission rejects a proposal made by the Netherlands authorities, which had suggested a system of minimum export prices for sugar from the OCTs and an alignment of the safeguard measure procedure with the applicable World Trade Organisation (WTO) rules. It is not, however, in any way apparent from that letter that the structural restriction subsequently imposed by the Council in the contested decision amounted to a safeguard measure in disguise.

111 Second, Mr Fischler's letter of 18 December 1997 is a reply to a letter from the applicant's legal representative in which the latter had set out the reasons for which it was not necessary to adopt safeguard measures in respect of sugar from the OCTs. Mr Fischler agrees with that construction. He explains that the Commission is of the view that, because the contested decision has been adopted, 'safeguard measures seem, for the time being, unnecessary'. He does not in any way claim, however, that the contested decision is an alternative solution adopted instead of a safeguard measure. The letter demonstrates only that the structural solution provided in the contested decision put an end to the disturbances on the Community market with the result that there is no need to adopt safeguard measures.

112 The two letters quoted by the applicant do not, therefore, show that the restriction of ACP/OCT cumulation of origin imposed by Article 108b(1) of the amended OCT Decision constitutes a disguised safeguard measure or an alternative solution adopted instead of such a measure.

113 In any event, the Court has held in *Emesa* that 'the measure contained in Article 108b(1) of the amended OCT Decision does not constitute a safeguard measure designed to cope, on an exceptional and temporary basis, with the emergence of exceptional difficulties which the trade conditions normally applicable cannot obviate, but amends the ordinary regime itself in accordance with the same criteria as those observed for the adoption of the OCT Decision' and that, accordingly, 'the conditions for the adoption of safeguard measures under Article 109 of the OCT Decision... are not relevant in assessing the validity of [the contested] decision' (paragraph 61 of the judgment). The Court concluded that '[c]onsequently, when adopting Article 108b of the amended OCT Decision, the Council was not required to comply with the particular requirements linked to the adoption of safeguard measures under Article 109 of the OCT Decision' (paragraph 62).

114 The third argument must therefore also be rejected.

115 In the fourth place, the applicant maintains that Article 108b(2) of the amended OCT Decision is incompatible with the principle of proportionality inasmuch as sugar-milling is excluded from the working or processing operations considered sufficient for ACP/OCT cumulation of origin to be conferred. It points out that, under Article 108b(2) of the amended OCT Decision, sugar colouring, which is less significant in terms of working or processing than milling, is sufficient to confer the status of OCT-originating product.

116 That argument, however, is based on an incorrect reading of the contested decision. As the Court of Justice pointed out in *Emesa* (paragraphs 59 and 60), 'Article 108b(2) merely mentions two examples of operations which may be regarded as sufficient to confer the status of OCT-originating products and does not give an exhaustive list', with the result that the applicant has 'no basis for claiming that [that] [a]rticle removed milling from the operations which may be taken into account for the purpose of allowing cumulation of origin'.

117 That argument too must therefore be rejected.

118 In the fifth place, the applicant maintains that the state of the Community sugar market did not require the limitation of imports of sugar with ACP/OCT cumulation of origin to 3 000 tonnes a year.

119 In this connection, the Court of Justice held in *Emesa*:

'53 It should be borne in mind that in a sphere such as this, in which the Community institutions have a broad discretion, the lawfulness of a measure can be affected only if the measure is manifestly inappropriate having regard

to the objective pursued. The Court's review must be limited in particular if the Council has to reconcile divergent interests and thus select options within the context of the policy choices which are its own responsibility (see Case C-280/93 *Germany* v *Council* [1994] ECR I-4973, paragraphs 90 and 91; Case C-44/94 *Fishermen's Organisations and Others* [1995] ECR I-3115, paragraph 37; and Case C-150/94 *United Kingdom* v *Council* [1998] ECR I-7235, paragraph 87).

54 ... [T]he introduction of the quota fixed by Article 108b of the amended OCT Decision cannot be considered, in this context, to have manifestly exceeded what was necessary to attain the objectives pursued by the Council.

55 In that connection it is clear from the seventh recital in the preamble to Decision 97/803 that the Council introduced Article 108b, first, because it formed the view that "free access for all products originating in the OCTs and the maintenance of cumulation for ACP and OCT originating products" had given rise to the "risk of conflict" between the objectives of Community policy in relation to the development of the OCTs and those of the common agricultural policy and, second, to take account of the fact that "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".

56 It is clear from the documents before the Court that at the date of Decision 97/803, first, Community production of beet sugar exceeded the quantity consumed in the Community; in addition 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 WTO agreements. Second, the Community was also required to subsidise sugar exports by granting export refunds, within the limits laid down in the WTO agreements. In those circumstances, the Council

was entitled to take the view that any additional quantity of sugar reaching the Community market, even if minimal compared with Community production, would have obliged the Community institutions to increase the amount of the export subsidies, within the limits mentioned above, or to reduce the quotas of European producers, which would have disturbed the common organisation of the market in sugar, the balance of which was precarious, and would have been contrary to the objectives of the common agricultural policy.

57 Furthermore, it is clear both from the order for reference and from the figures given by the Council and the Commission that the annual quota of 3 000 tonnes is not lower than the level of traditional imports of sugar from the OCTs, a product which the latter do not themselves produce. Moreover, since the goods from the ACP States have only a limited value added to them within the OCTs, the industry affected by Decision 97/803 could make only a limited contribution to their development. Furthermore, the possibility could not be excluded that unlimited application of the cumulation of origin rule might entail a risk of artificial diversion of products from the ACP States to the OCTs with a view to gaining access to the Community market for sugar in quantities exceeding those for which those States enjoyed, by agreement, guaranteed duty-free access to that market.

58 Consequently, the measure relating to imports of sugar covered by the ACP/OCT cumulation of origin rule contained in Article 108b(1) of the amended OCT Decision cannot be regarded as contrary to the principle of proportionality.'

120 In its observations of 9 October 2000 the applicant is sharply critical of that passage in the judgment.

121 With regard, first, to paragraph 55 of *Emesa*, the applicant maintains that the Court took the assertions in the seventh recital in the preamble to the contested decision as the starting-point of its own findings, without questioning whether those assertions were correct.

122 That argument must be dismissed. Review of the legality of an act implies that the reasons for that act are taken into consideration. In order to assess whether the Council had not infringed the principle of proportionality, the Court thus set out, in paragraph 55 of its judgment, the reasons put forward by the Council in the contested decision for maintaining the limitation of imports of sugar covered by ACP/OCT cumulation of origin. The Court did not, however, treat the Council's assertions as established facts. Rather, in paragraphs 56 and 57 of the judgment, it considered whether the assertions in the seventh recital in the preamble to the contested decision were not in fact based on manifest errors of assessment which, according to the Court, they were not.

123 The applicant then claims that the Court made factual errors in paragraph 55 of *Emesa* which undermined the conclusion that the contested decision did not infringe the principle of proportionality.

124 The applicant explains, to that end, that before the contested decision was adopted sugar covered by ACP/OCT cumulation of origin had never been the subject of safeguard measures. In addition, it submits that it is wrong to claim that 'certain products' were affected by safeguard measures. In fact, OCT rice alone was the subject of such measures.

125 The fact remains, however, that neither the Council in the seventh recital in the preamble to the contested decision nor the Court of Justice in *Emesa* has claimed that the Community had ever taken safeguard measures in the past to limit imports of sugar. The seventh recital in the preamble to the contested decision must be understood to mean that, like 'serious disruption on the Community market for certain products subject to a common organisation of the market

[which] has led on a number of occasions to the adoption of safeguard measures', disruption was also to be feared so far as sugar was concerned. Such disruption, according to the Council, justified the structural measure adopted and the Court, in *Emesa*, agreed with that assessment.

126 Furthermore, even if only OCT-originating rice had been subjected to safeguard measures in the past, the Council committed no manifest error of assessment in referring to the adoption of safeguard measures in respect of 'certain products'. For example, the safeguard measure which gave rise to the judgment in *Antillean Rice Mills and Others* v *Commission*, cited in paragraph 42 above, concerned various products, namely the various kinds of rice under Codes CN 1006 30 21 to 1006 30 48. Besides, Article 108b(1) of the amended OCT Decision, which ostensibly applies to one product only, namely sugar, in fact also concerns various products, namely 'products falling under tariff headings HS 1701, 1702, 1703 and 1704'.

127 With regard to paragraph 56 of *Emesa*, the applicant alleges that the Court has made errors of fact in that passage of the judgment also.

128 However, when questioned on this point at the hearing, the applicant explained that it was challenging the Court's evaluation of the facts and not the accuracy of those facts.

129 The applicant observes that the Court based its assessment of the need for and the proportionality of the limitation of imports of sugar covered by ACP/OCT cumulation of origin on three factors: first, surplus Community sugar-beet production in relation to the quantity consumed in the Community at the date of the contested decision; second, the existence of a significant quantity of preferential sugar imports and, third, the obligations imposed by the agreements concluded within the WTO ('the WTO agreements').

130 According to the applicant, surplus production is structural and has always existed, even when the OCT Decision was adopted in 1991. It is therefore wrong to claim, as the Court did in paragraph 56 of *Emesa*, that a precarious balance had been achieved on the Community market in sugar. Furthermore, preferential imports had always increased without the Community finding it necessary until 2000 or 2001 to reduce its own production. That attitude can be explained by the fact that the common organisation of the market makes use of a self-financing system the cost of which is borne by consumers.

131 According to the applicant, it is a mistake to suppose that imports of OCT-origin sugar give rise to exports of the same quantity of sugar with refunds. In its view, there is no system of communicating vessels between the two, as the Commission and Council have acknowledged (order of 30 April 1999 in *Emesa Sugar* v *Commission*, cited in paragraph 25 above).

132 It is also incorrect, according to Emesa, to suppose that imports of OCT-origin sugar which, in due course, amount to a maximum of 100 000 to 150 000 tonnes a year, constitute a problem in connection with the obligations imposed on the Community by the WTO agreements. It submits that the Commission also acknowledged, during the procedure for interim relief, that the Community exported a quantity of sugar with refunds less than that authorised by the WTO agreements. That additional margin comes to 1 120 000 tonnes for the marketing years 1995/1996 to 1997/1998 (order of the President of the Court of First Instance of 8 October 1997 in Case T-229/97 R *CEFS* v *Council* [1997] ECR II-1649). According to the Commission's calculations, that margin was 998 200 tonnes on 1 July 1997 (order of 30 April 1999 in *Emesa Sugar* v *Commission*, cited in paragraph 25 above, paragraph 107). For the marketing year 2000/2001 it still exceeded 400 000 tonnes. The insignificant volume of imports from the OCT could not, therefore, have prevented the Community from complying with its obligations under the WTO agreements, at least until the marketing year 2000/2001. The applicant further maintains that OCT-origin sugar can be

included in the category of ACP sugar where it cumulates the two origins. It is preferential sugar which is not covered by the undertakings entered into by the Community under the WTO agreements (see note at the foot of page 1 of Schedule CXL).

133 The applicant submits that the real problem for the Community sugar industry is structural overproduction. In the past, it had never been considered that that overproduction, which has existed at least since 1973, made it necessary to limit preferential imports of sugar into the Community. It was therefore disproportionate for the contested decision to reduce imports of OCT-origin sugar to 3 000 tonnes in 1997 when those imports barely amounted to 10 000 tonnes and when the Community had, at that time, an additional export margin of approximately 1 million tonnes under the WTO agreements. The applicant observes that when, in 1999, imports of sugar of OCT origin, on account of ACP/OCT cumulation of origin, exceeded 50 000 tonnes, the Community did not even find it necessary to impose quantitative restrictions, but imposed minimum prices.

134 The Court observes, first, that the Court of Justice held, in paragraph 40 of *Emesa*, on the basis of the assessment of the situation in the sugar sector which it carried out in paragraph 56, in particular, that the Council was entitled to consider it necessary to limit the extent of the ACP/OCT cumulation of origin rule for sugar where the application of that advantage 'in [that] sector was liable to lead to significant disturbances in the functioning of a common market organisation'.

135 Since it is not for the Court of First Instance to challenge the findings made by the Court of Justice on the basis of facts the substantive accuracy of which is not at issue (see paragraph 128 above), the applicant's arguments relating to paragraph 56 of *Emesa* — and concerning in particular the question whether the Council did not commit a manifest error of assessment in finding in 1997 that the unrestricted application of the ACP/OCT cumulation of origin rule 'was liable to lead to significant disturbances in the functioning of a common market organisation' — will be considered solely for the sake of completeness.

136 It must first of all be observed that the parties agree that when the contested decision was adopted the Community sugar price was double the world market price. In answer to a written question asked by the Court of First Instance, the applicant stated that no import duty is payable in Aruba on sugar bought in an ACP country. Since ACP origin sugar processed in the OCT is, by application of the ACP/OCT cumulation of origin rule, eligible for OCT origin and is, on that basis, exempt from customs duty in the Community, the considerable difference between the world and the Community sugar prices created, when the contested decision was adopted, a real danger of an increase in exports to the Community of sugar qualifying for ACP/OCT cumulation of origin.

137 Thus, when in 1996 exports to the Community of sugar qualifying for ACP/OCT cumulation of origin were less than 3 000 tonnes, the applicant itself foresaw that, if the contested decision had not been adopted, exports would have reached 100 000 to 150 000 tonnes in the years to come. Furthermore, that assessment did not even take into account potential exports, but was based on the production of the two undertakings then existing and of two other undertakings which were to have commenced activity at the time the contested decision was adopted (see NEI report, p. 85, paragraph 6.5). None the less, given the sizeable difference between the world and the Community sugar prices, it is more than likely that other companies would have come onto the same market if the Council had not restricted the application of the ACP/OCT cumulation of origin rule for sugar.

138 Moreover, as the Court of Justice pointed out in paragraph 57 of *Emesa*, when the contested decision was adopted, there existed a real danger 'of artificial diversion of products from the ACP States to the OCTs with a view to gaining access to the Community market for sugar in quantities exceeding those for which those States enjoyed, by agreement, guaranteed duty-free access to that market'. It must here be pointed out that, under the ACP/OCT cumulation of origin rule, mere processing operations (even those which are never normally such as to confer OCT origin) suffice for ACP products to be deemed to be OCT products and for it to be possible for them to enter the Community market free of import duty.

139 On the basis of the foregoing, it must be concluded that, when the contested decision was adopted, there was a real danger of a significant increase in exports of sugar with ACP/OCT cumulation of origin to the Community.

140 As regards the question whether the imminent increase in exports threatened to disturb the common organisation of the sugar market, it must be observed that the applicant does not dispute the factual statements in paragraph 56 of *Emesa*, namely, that 'Community production of beet sugar exceeded the quantity consumed in the Community'; that, in addition, 'the Community was under an obligation to import a certain quantity of sugar from non-member countries under WTO agreements', and that, furthermore, 'cane sugar was imported from the ACP States to cater for specific demand for that product'. Given the high level of the Community price compared to the world price, 'the Community was also required to subsidise sugar exports by granting export refunds, within the limits laid down by the WTO agreements'.

141 With regard to the applicant's argument that overproduction of sugar in the Community is structural and has existed since 1991 when the ACP/OCT cumulation of origin rule was adopted, it must be pointed out that sugar is not the only product to which that rule applies. On the contrary, it is a general advantage applicable to any product processed in the OCT. Where the application of such an advantage causes or threatens to cause disturbances in a particular sector, the Community is entitled to take *ad hoc* or structural measures to deal with the problem.

142 According to the Court of Justice, 'the Council was entitled to take the view that any additional quantity of sugar reaching the Community market, even if minimal compared with Community production, would have obliged the Community institutions to increase the amount of the export subsidies, within the limits [of the WTO agreements], or to reduce the quotas of European

producers, which would have disturbed the common organisation of the market in sugar, the balance of which was precarious, and would have been contrary to the objectives of the common agricultural policy' (*Emesa*, paragraph 56).

143 The applicant calls in question that assessment of the facts. In its submission, there was no real danger of disturbance of the Community sugar market.

144 Nevertheless, if, on the Community market for sugar, where a system of protected prices operates, supply already outstrips demand, it is not unreasonable to suppose that any increase in supply through imports is likely to cause disturbances. In order to maintain the precarious balance on the market — which is more truly a controlled unbalance since balance can be attained only by means of subsidised exports — it will be necessary either to lower the intervention price considerably in order to curb imports and increase demand, or to reduce Community production and/or increase exports which, given the difference between Community and world prices, must be subsidised.

145 In light of the imminent danger of a significant increase in imports of sugar into the Community created by the ACP/OCT cumulation of origin rule (see paragraph 139 above), it was possible for the Council, after weighing the interests of the OCTs against those of the common agricultural policy, reasonably to decide to restrict the application of that rule in order to curb imports from the OCT of that product to which only a legal fiction could attribute an OCT origin.

146 With regard to the applicant's argument that the Community exports a smaller quantity of sugar with refunds than that permitted under the WTO agreements, it must be observed that neither the Council nor the Commission has maintained that the reason for the restriction of duty-free imports under Article 108b(1) of

the OCT Decision was the fact that, because of the WTO agreements, the Community could no longer increase the amount of its subsidised sugar exports.

147 It must be observed that the WTO agreements, and in particular Schedule CXL, lay down a limit for subsidised sugar exports. They do not, however, impose any obligation to exhaust the quantity allocated. The aim of the WTO agreements is in fact gradually to reduce subsidised exports.

148 It cannot, therefore, be considered that the Council infringed the principle of proportionality in deciding to restrict imports of sugar qualifying for ACP/OCT cumulation of origin, even if the additional exports which might have been triggered by those imports remained below the ceiling fixed by the WTO agreements.

149 The applicant further explains that an increase in imports of sugar qualifying for ACP/OCT cumulation of origin need not have any effect on Community production. It observes that in recent years Community production has always remained below the production quotas fixed by the Community.

150 It ought, however, to be noted that throughout the proceedings the applicant has emphasised the structural overproduction on the Community market. At the hearing, it again referred to the Special Report No 20/2000 of the Court of Auditors concerning the management of the common organisation of the market for sugar (OJ 2001 C 50, p. 1), which shows that in 1997 that overproduction was in the region of 2 million tonnes. Consequently, irrespective of whether the production quotas had been exhausted, it is reasonable to consider that the Community market for sugar, on which supply greatly outstrips demand, would

have been disturbed if imports of sugar had increased significantly as a result of the application of the ACP/OCT cumulation of origin rule.

151 It must accordingly be concluded that the Council might reasonably consider it to be necessary to restrict imports of sugar qualifying for ACP/OCT cumulation of origin in order to protect the stability of the common market for sugar.

152 It must next be considered whether, in limiting the application of the ACP/OCT cumulation of origin rule to 3 000 tonnes, the Council has not breached the principle of proportionality.

153 It must, however, be stated that in *Emesa*, the Court of Justice held that the ceiling imposed by Article 108b(1) of the amended OCT Decision, that is to say, the restriction of imports covered by the ACP/OCT cumulation of origin to 3 000 tonnes a year, could not be regarded as contrary to the principle of proportionality. In this connection, it refers, in paragraph 57 of that judgment, in particular, to the fact that 'the annual quota of 3 000 tonnes is not lower than the level of traditional imports of sugar from the OCTs, a product which the latter do not themselves produce', that the industry affected by the contested decision 'could make only a limited contribution to their development', and that 'unlimited application of the cumulation of origin rule might entail a risk of artificial diversion of products from the ACP States to the OCTs with a view to gaining access to the Community market for sugar in quantities exceeding those for which those States enjoyed, by agreement, guaranteed duty-free access to that market'.

154 In its observations of 9 October 2000 the applicant criticises that passage of *Emesa* also. In so far as the arguments put forward by the applicant relate only to the Court's findings based on uncontested facts, they will be considered purely for the sake of completeness (see paragraph 135 above).

155 The applicant lays stress upon the fact that there are no traditional sugar imports from the OCTs. The sugar industry started up because of the ACP/OCT cumulation of origin rule. In 1996 exports amounted to less than 3 000 tonnes since the undertakings concerned were not yet fully operational. In those circumstances, justifying a quota of 3 000 tonnes by referring to traditional imports, as the Court of Justice did in paragraph 57 of *Emesa*, is incomprehensible. The applicant points out that a quantity of 3 000 tonnes is less than its monthly production. It observes that the President of the Court of First Instance held, in his order of 30 April 1999, in Case T-44/98 R II *Emesa Sugar* v *Commission*, cited in paragraph 25, above, that a volume of 15 000 tonnes a year of imported OCT-origin sugar was necessary to ensure that it survived. Even if it was necessary to restrict imports of sugar qualifying for ACP/OCT cumulation of origin, the applicant maintains that the Council ought to have taken account, in the contested decision, of the interests of the undertakings then in existence in the sugar sector in the OCTs and to have set a quota at a level which would have enabled those undertakings to remain on the market. To that effect, it refers to the approach adopted by the Council in respect of other products, in particular isoglucose and inulin.

156 The Court of First Instance finds, first, that the applicant itself acknowledges that there is no sugar production in the OCTs. In any event, even if there were, it would not be affected by the contested decision since it would, being production wholly obtained in the OCTs within the meaning of Article 2 of Annex II, possess OCT origin.

157 As regards sugar 'processed' in the OCTs, it must be observed that, in accordance with the ordinary rules of origin (see paragraph 77 above), sugar which is sufficiently processed is considered as a product with OCT origin which may enter the Community free of duty without quantitative restriction.

158 By adding Article 108b(1) to the OCT Decision, the Council did no more than set a ceiling for imports of sugar qualifying for ACP/OCT cumulation of origin, that

is to say, sugar originating in the ACP States and processed in the OCTs, which would not usually suffice to give it OCT origin, but that sugar is nevertheless regarded as being of such origin as a result of a legal fiction.

159 The Council set the ceiling provided for by Article 108b(1) of the amended OCT decision at a level approximately equal to that of exports of sugar qualifying for ACP/OCT cumulation of origin at the time the contested decision was adopted.

160 The applicant confirms that in the year before the contested decision was adopted the quantity of exports to the Community of sugar cumulating ACP/OCT origin was 2 310 tonnes. In the first six months of 1997 it was, according to the applicant, 1 404.3 tonnes. It follows that the Council did not act unreasonably when, in November 1997, it restricted the application of the ACP/OCT cumulation of origin rule for sugar to 3 000 tonnes a year.

161 As regards the argument that the Community institutions ought to have taken into account the fact that the OCT sugar industry was then just starting up, it must be observed that the ACP/OCT cumulation rule has been in existence since the OCT Decision was adopted in 1991. The applicant was not formed until 6 February 1997, at a time when the Commission had already proposed to the Council the total abolition of the ACP/OCT cumulation of origin rule in respect of sugar (see paragraph 94, above).

162 Next, if the applicant's survival really did depend on the continuance of the ACP/OCT cumulation of origin rule, as the applicant claims, the investment made

must be regarded as utterly foolhardy. The ACP/OCT cumulation of origin rule is exceptional and its abolition in respect of sugar had been announced before the applicant was formed.

163 At the hearing, the applicant again stressed the fact that for the whole of 1997 sugar imports came to only 10 000 tonnes. Since such a quantity could not disturb the Community sugar market, the fixing of the ceiling provided for by Article 108b(1) of the amended OCT Decision is, in the applicant's submission, quite unreasonable.

164 It must, however, be observed that the applicant itself maintains, on the basis of an assessment which does not even take account of potential exports, that if the contested decision had not been adopted, exports of sugar qualifying for ACP/OCT cumulation of origin would have risen to 100 000 to 150 000 tonnes a year (see paragraph 137 above). As has already been stated, the Council could with reason consider that such a quantity was liable to cause disturbance on the Community sugar market (see paragraphs 144 and 145 above).

165 The applicant also criticises the statement made by the Court of Justice in paragraph 57 of *Emesa* to the effect that since 'the goods from the ACP States have only a limited value added to them within the OCTs, the industry affected by Decision 97/803 could make only a limited contribution to [the] development [of the OCTs]'.

166 None the less, it cannot seriously be denied that those processes which, according to the ordinary rules of origin, confer OCT origin on a product, add more intrinsic value to it than processes qualifying for ACP/OCT cumulation of origin, which are simple processes. Furthermore, the latter do not generally create much

employment. It must therefore be considered that the significance of the industry affected by the contested decision could make only a limited contribution to the development of the OCTs.

167 The applicant next observes that, in contrast to what the Court of Justice asserted in paragraph 57 of *Emesa*, there is no reason to believe that there was any artificial diversion of products from the ACP States at the time the contested decision was adopted.

168 Nevertheless, as stated in paragraph 138 above, the danger of such diversion was genuine, given the difference between the Community sugar price and the world market sugar price.

169 Finally, the applicant is indignant that imports of sugar from the OCTs should be treated less favourably than imports from ACP states or non-member countries. It points out that preferential imports of sugar from ACP states and non-member countries amount to 1.7 million tonnes. Those imports are subsidised by the EAGGF to the sum of EUR 0.8 milliard a year. That amount is much greater than the cost of any potential subsidisation of exports of sugar from the OCTs. The applicant lays emphasis again on the fact that the OCTs rank highest of all the countries with which the European Union maintains privileged relations. Goods from the OCTs ought therefore to enjoy a privileged position.

170 That argument is based on a false premiss. Goods from the OCTs enjoy and will continue to enjoy total exemption from customs duties. The Council has restricted to 3 000 tonnes the application of the ACP/OCT cumulation of origin rule which, by means of a legal fiction, attributes an OCT origin to goods which are, essentially, ACP goods.

171 It follows from all the foregoing considerations that the plea in law alleging breach of the principle of proportionality must also be rejected.

172 Since consideration of the pleas supporting the claim for annulment has not produced evidence to show breach of any rule of law conferring rights on individuals and since there is no need to consider the two other conditions for the incurring of non-contractual liability by the Community, it must be held that the claim for compensation cannot be upheld.

173 It follows that the application must be dismissed in its entirety.

Costs

174 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful, it must be ordered to pay the costs, including the costs incurred in connection with the proceedings for interim relief, as applied for by the Council.

175 In accordance with Article 87(4) of those Rules, the Commission, the Kingdom of Spain and the French Republic, which have intervened in support of the forms of order sought by the Council, are to pay their own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber)

hereby:

1. **Dismisses the application;**

2. **Orders the applicant to bear, in addition to its own costs, the costs incurred by the Council, including those incurred in connection with the proceedings for interim relief;**

3. **Orders the interveners to pay their own costs.**

Azizi Lenaerts Jaeger

Delivered in open court in Luxembourg on 6 December 2001.

H. Jung
Registrar

M. Jaeger
President