ORDER OF THE PRESIDENT OF THE COURT OF FIRST INSTANCE
30 April 1999 *

In Case T-44/98 R II,

Emesa Sugar (Free Zone) NV, a company incorporated under the law of Aruba, established at Oranjestad, Aruba, represented by Gerard van der Wal, Advocate with a right of audience before the Hoge Raad der Nederlanden, with an address for service in Luxembourg at the Chambers of Aloyse May, 31 Grand-Rue,

applicant,

supported by

Government of Aruba, represented by Pierre V.F. Bos and Marco M. Slotboom, of the Rotterdam Bar, with an address for service in Luxembourg at the Chambers of Loesch and Wolter, II Rue Goethe,

intervener,

v

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

defendant,

* Language of the case: Dutch.

supported by

Council of the European Union, represented by Jürgen Huber and Guus Houttouin, Legal Advisers, acting as Agents, with an address for service in Luxembourg at the office of Alessandro Morbilli, Manager of the Legal Affairs Directorate of the European Investment Bank, 100 Boulevard Konrad Adenauer,

Kingdom of Spain, represented by Mónica López-Monis Gallego, Abogado del Estado, of the State Legal Service for matters before the Court of Justice of the European Communities, acting as Agent, with an address for service in Luxembourg at the Spanish Embassy, 4-6 Boulevard Emmanuel Servais,

and by

French Republic, represented by Claude Chavance, Secretary for Foreign Affairs, acting as Agent, with an address for service in Luxembourg at the French Embassy, 8B Boulevard Joseph II,

interveners,

APPLICATION, first, for suspension of the operation of the Commission Decision of 23 December 1997 (VI/51329) rejecting a request by the applicant for the issue of import licences in respect of sugar products until the Court gives a ruling on the substance of the case and, second, for interim measures prohibiting the Commission from applying, during the same period, the provisions 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) and/or Article 108b of 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), as amended, in so far as those provisions have the effect of limiting the importation into the Community of sugar from the overseas countries and territories,

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

makes the following

Order

Legal context

1 The island of Aruba is one of the overseas countries and territories ('OCTs') associated with the Community. Association of the OCTs with the Community is regulated by Part Four of the EC Treaty and by 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, 'the OCT decision'), adopted pursuant to the second paragraph of Article 136 of the Treaty.

2 The second paragraph of Article 131 of the Treaty provides as follows:

'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.'

3 One of the objectives of association of the OCTs with the Community is, according to Article 132(1) of the Treaty, to ensure that 'Member States [...] apply to their trade with the [OCTs] the same treatment as they accord each other pursuant to this Treaty'.

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

5 The original version of Article 101(1) of the OCT decision reads as follows:

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

6 Article 102 of the same decision provided as follows:

'The Community shall not apply to imports of products originating in the OCTs any quantitative restriction or measure having equivalent effect.'

7 Article 108(1), first indent, of the OCT decision refers to Annex II thereto ('Annex II') for the definition of the concept of originating products and the methods of administrative cooperation relating thereto.

8 Under Article 1 of Annex II, a product is considered to originate in the OCTs, the Community or the African, Caribbean and Pacific States ('ACP States') if it has been either wholly obtained or sufficiently worked or processed there.

9 Article 6(2) of the same annex provides that, when products wholly obtained in the Community or in the ACP States undergo working or processing in the OCTs, they are to be considered as having been wholly obtained in the OCTs. Under this rule, known as 'ACP/OCT cumulation of origin', sugar originating in the ACP States which has undergone some degree of working or processing in the OCTs can be imported into the Community free of customs duties.

10 Article 240(1) of the OCT decision states that the decision is to apply for a period of ten years from 1 March 1990. However, Article 240(3)(a) and (b) provides that before the end of the first five years the Council, acting unanimously on a proposal from the Commission, is, in addition to the financial assistance from the Community for the second five-year period, to establish, where necessary, any amendments to the OCT decision following notification to the Commission by the relevant authorities of the OCTs or proposed by the Commission in the light of its own experience or as a result of amendments under negotiation between the Community and the ACP States.

11 In a communication to the Council on the amendment at mid-term of the association of the OCTs with the European Community (document COM(94) 538 final, 21 December 1994), the Commission recommended various adjustments to the association.

12 On 16 February 1996 it presented to the Council a proposal for a Council decision amending at mid-term the OCT decision (COM(95) 739 final, OJ 1996 C 139, p. 1). In the sixth recital of the proposal the Commission stated that the introduction under the OCT decision of free access for all products originating in

the OCTs and the maintenance of cumulation for ACP and OCT originating products had given rise to the risk of conflict between two Community policy objectives, namely the development of the OCTs and the common agricultural policy.

13 On 24 November 1997 the Council adopted Decision 97/803/EC amending at mid-term the OCT decision (OJ 1997 L 329, p. 50, 'Decision 97/803').

14 The seventh recital of Decision 97/803 is worded as follows

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

15 For that purpose Decision 97/803 added Articles 108a and 108b to the OCT decision, allowing the ACP/OCT cumulation of origin for rice and sugar respectively, for a specified annual quantity.

16 Accordingly Article 108b(1) and (2) of the OCT decision reads as follows:

'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.'

17 Decision 97/803 also amended Articles 101(1) and 102 of the OCT decision, which now read as follows:

'Article 101

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

...

Article 102

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

18 Decision 97/803 entered into force on 30 November 1997, in accordance with Article 2 thereof.

19 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, 'the implementing regulation'). Although this regulation entered into force on 19 December 1997, it did not take effect until 1 January 1998.

20 Transitional arrangements were laid down by the third paragraph of Article 8 of the implementing regulation which provides:

'Import licences applied for between 10 and 31 December 1997 shall be issued by the competent authorities of the Member States, after prior authorisation has been granted by the Commission departments, in the order in which the applications are submitted and for quantities not exceeding the total maximum of 3 000 tonnes for the Community.'

Facts and procedure

21 In April 1997 the applicant began to operate a sugar factory on the island of Aruba and to export to the Community sugar qualifying as an ACP/OCT originating product ('OCT-origin sugar'). The last shipment of OCT-origin sugar exported from Aruba left the island on 3 November 1997. During the period April-November 1997 the applicant exported 7 516 tonnes of OCT-origin sugar to the Community.

22 As sugar is not produced in Aruba, the applicant purchases white sugar from cane sugar refineries in ACP States. The purchased sugar is transported to Aruba, where it undergoes working and processing operations, after which the product is considered finished. These operations consist in purifying the sugar, milling it (which means bringing it to the grade required by the customer's specifications) and packaging it. The applicant states that its factory has a minimum processing capacity of 34 000 tonnes of sugar per year.

23 On 1 December 1997 the applicant brought an action for interim relief against the Netherlands State, the Hoofdproductschap voor Akkerbouwproducten and the Aruban authorities, seeking to prohibit them from giving effect to Decision 97/803.

In essence, the applicant sought an order from the President of the Court of First Instance of The Hague prohibiting the defendants from subjecting imports of OCT-origin sugar into the Netherlands to conditions other than those laid down by the OCT decision in the version in force up to 30 November 1997. By order of 19 December 1997, the national court granted the application for interim relief in relation to the Aruban authorities until the Court of Justice, to which a reference had been made pursuant to Article 177 of the Treaty, replied to the questions set out in the order for reference. The case now pending before the Court of Justice, registered under number C-17/98, raises the question of the validity of Decision 97/803, particularly in so far as it adds Article 108b to the OCT decision. In contrast, the applications against the Netherlands State and the Hoofdproductschap voor Akkerbouwproducten were dismissed as inadmissible.

24 On 19 December 1997 the applicant, pursuant to the third paragraph of Article 8 of the implementing regulation, submitted to the competent national authority an application for the issue of import licences for 3 010 tonnes of OCT-origin sugar. The application was forwarded to the Commission on 22 December 1997.

25 By decision of 23 December 1997 (VI/51329, 'the contested decision') addressed to the competent national authority, the Commission rejected the application as inadmissible on the ground that it related to a quantity greater than the maximum specified by the third paragraph of Article 8 of the implementing regulation.

26 By application lodged at the Court Registry on 10 March 1998, the applicant initated proceedings pursuant to the fourth paragraph of Article 173 of the Treaty for the annulment of the contested decision.

27 By a separate document lodged at the Court Registry on 10 April 1998, the applicant also initiated the present proceedings for interim measures pursuant to Articles 185 and 186 of the Treaty.

28 The Commission submitted written observations on the application for interim measures on 5 May 1998.

29 By applications lodged at the Court Registry on 23 April, 13 May and 12 June 1998 respectively, the Kingdom of Spain, the Council and the French Republic applied for leave to intervene in the proceedings in support of the form of order sought by the defendant. By orders of 12 May, 25 May and 16 June 1998 respectively the President of the Court of First Instance allowed those applications.

30 By application lodged at the Court Registry on 8 May 1998, the Government of Aruba applied for leave to intervene in the proceedings in support of the form of order sought by the applicant.

31 By letter lodged at the Court Registry on 12 May 1998, the applicant stated that it did not oppose the application in question. The Commission lodged no observations on the application within the time allowed for the purpose.

32 By telefax of 27 May 1998 the Court Registry requested the Government of Aruba to attend the hearing, but did not state a view on the application for leave to intervene. A copy of the application for interim measures was served on the Government, together with the Commission's observations.

33 The parties presented oral argument before the Court on 22 June 1998.

34 By order of 14 August 1998 in Case T-44/98 R *Emesa Sugar* v *Commission* [1998] ECR II-3079, the President of the Court granted the Government of Aruba leave to intervene and dismissed that application for interim measures.

35 On appeal on a point of law by the applicant, the abovementioned order was annulled by order of the President of the Court of Justice of 17 December 1998 in Case C-364/98 P(R) *Emesa Sugar* v *Commission* [1998] ECR I-8815, which referred the matter back to the Court of First Instance. In particular, the order of the Court of Justice states that 'the contested order is mistaken in law in so far as, in the context of examining only the urgency of the measures sought, it establishes a connection between the existence of a power of assessment of the Council and the degree of urgency to be proved as a condition for the grant of an interim measure' (paragraph 48).

36 Following the reference back to the Court of First Instance, the applicant and the Commission submitted their written observations on 18 and 29 January 1999 respectively. The Government of Aruba and the Council also submitted their observations at the Court Registry on 15 February 1999.

37 The parties gave written replies to the questions put to them by the judge hearing the application for interim measures.

38 The parties presented oral argument before the Court on 17 March 1999.

39 At the hearing the applicant was asked to produce expeditiously a document containing certain precise figures and also the applicant's contract with its sugar supplier in Trinidad and Tobago. Information was sent by the applicant to the Court Registry on 26 March 1999, received on 29 March and immediately passed to the other parties.

40 By letters of 29 and 31 March 1999, the Council and the Commission respectively set out their observations on the information provided by the applicant. These observations were passed to the other parties.

41 By letter of 31 March 1999, the applicant indicated that it disagreed with a point in the Council's observations of 29 March.

Law

42 Under the combined provisions of Articles 185 and 186 of the Treaty and Article 4 of Council Decision 88/591/ECSC, EEC, Euratom of 24 October 1988 establishing a Court of First Instance of the European Communities (OJ 1988 L 319, p. 1), as amended by Council Decision 93/350/ECSC, EEC, Euratom of 8 June 1993 (OJ 1993 L 144, p. 21), the Court may, it if considers that circumstances so require, order that application of a contested act be suspended or prescribe any other necessary interim measures.

43 Article 104(2) of the Rules of Procedure provides that applications for interim measures must state the circumstances giving rise to urgency and the pleas of fact and law establishing a prima facie case for the interim measures applied for. According to settled case-law, the Court is also to balance the interests at stake (order of the Court of Justice in Case C-180/96 R *United Kingdom* v *Commission* [1996] ECR I-3903, paragraph 44). The measures sought must also be provisional inasmuch as they must not prejudge the points of law or fact in issue or neutralise in advance the effects of the decision subsequently to be given in the main action (order of the President of the Court of Justice in Case C-110/97 R *Netherlands* v *Council* [1997] ECR I-1795, paragraph 24).

44 It is necessary to consider whether these conditions are fulfilled in the present case.

Prima facie case

Arguments of the parties

45 The applicant raised an objection of illegality against Decision 97/803 and the implementing regulation.

46 It puts forward five pleas in law in support of that objection, as directed against Decision 97/803.

47 In the context of the first plea, to the effect that there has been interference with an alleged 'locking mechanism', the applicant argues that the legality of the OCT decision, as amended, must be assessed in the light of the objectives listed in Article 3(r) and of the provisions of Articles 131 and 132 of the Treaty. In particular, according to the applicant, the objective set out in Article 132(1) imposes on the Community an obligation to attain that objective (see the Opinion of Advocate General Alber in Case C-390/95 P *Antillean Rice Mills* v *Commission* [1999] ECR I-769, point 54). The successive OCT decisions require the Community to improve gradually access to the Community market for products from the OCTs until the market is completely open, so as to attain the objective of Article 132(1).

48 The implementation of the association arrangements between the OCTs and the Community, described in Part Four of the Treaty, is a dynamic and progressive process (see the judgments in Joined Cases T-480/93 and T-483/93 *Antillean Rice Mills* v *Commission* [1995] ECR II-2305, paragraph 92, and Case C-310/95 *Road Air* [1997] ECR I-2229, paragraph 40).

49 It follows that the Council cannot go back on facilities successively established for trade between the Community and the OCTs, particularly the opening-up of trade in agricultural products and the ACP/OCT cumulation of origin, if those measures accorded with the objective of Article 132(1) of the Treaty. A locking mechanism, which is a natural consequence of the principle of respect for existing Community law (see the judgments in Case 22/70 *Commission* v *Council* [1971] ECR 263; Case 804/79 *Commission* v *United Kingdom* [1981] ECR 1045, and Case C-340/89 *Vlassopoulou* [1991] ECR I-2357), precludes further restrictions on such trade.

50 In the present case, the applicant observes that the new Article 108b and Article 6 of Annex II, as amended, of the OCT decision impose a quantitative restriction on the importation of OCT-origin sugar. Such a restriction, which is structural and permanent, is incompatible with the association arrangements defined by Part Four of the Treaty and the locking mechanism which it establishes.

51 The applicant adds that Article 136 of the Treaty required the Council to take decisions on the basis of 'the principles set out in [the] Treaty' and of 'the experience acquired' (see the judgment of the Court of First Instance in the *Antillean Rice Mills* cases, cited above, paragraph 92). In this connection, the Government of Aruba, intervening in support of the applicant, stresses that this is 'experience acquired through the Council's previous decisions' (see the *Road Air* judgment, cited above, paragraph 40) and that the addition of Article 108b to the OCT decision does not take account of that experience.

52 All the principles set out in the Treaty should be taken into account in contributing to strengthening the association of the OCTs in order to increase trade and promote jointly economic and social development. To reconcile this obligation of the Community with other objectives of the Treaty, such as the establishment of a common policy in the sphere of agriculture, the Council ought to have exercised its power in such a way as not to affect adversely the experience acquired in the process of association of the OCTs with the Community.

53 Unilateral restrictions on trade between the Community and the OCTs can be imposed only by measures which are temporary and strictly necessary (see the Opinion of Advocate General Alber in Case C-390/95 P *Antillean Rice Mills*, cited above), such as the safeguard measures provided for by Article 109 of the OCT decision, which enable the Community to react to a limited extent to any difficulties arising as a result of free access for agricultural products (see the judgment of the Court of First Instance in the *Antillean Rice Mills* cases, cited above, paragraphs 93 and 94).

54 To permit the Council to reverse the process of setting up a free trade area in return for concessions in areas such as the freedom of establishment or the mutual recognition of diplomas would conflict with the essential objective of Part Four of the Treaty, which is the development of the OCTs by setting up a free-trade area.

55 In its second plea in law, the applicant claims that the addition of Article 108b(1) and (2) by Decision 97/803 is incompatible with the principle of proportionality.

56 First, it has not been shown that the maximum volume of imports of OCT-origin sugar of between 100 000 and 150 000 tonnes would cause such damage to the interests of the Community that, having regard to the Community's task under Article 3(r) and Part Four of the Treaty, the Council had to impose a structural limitation on such imports by restricting them to 3 000 tonnes per year and exclude milling from the working or processing operations deemed sufficient for sugar to be considered of OCT origin under the ACP/OCT cumulation of origin rule. Even assuming that the Council had power to introduce a structural restriction, the restriction had to be reasonable and compatible with the interests of the OCTs and not go beyond what was necessary to protect the interests of the Community.

57 Second, it has likewise not been shown that the structural restriction imposed by Article 108b of the OCT decision is necessary and that the application of Article 109 of the decision could not have provided sufficient protection for the interests of the Community.

58 Third, it has not been shown either that, having regard to the special position of the OCTs under the Treaty, the Community interest could not be protected by measures which are more moderate and less stringent.

59 Fourth, structural measures should not have been adopted before temporary, limited measures were taken.

60 Fifth, as there was no specific threat of disruption of the market, a structural restriction should not have been applied with the aim of preventing the financial burdens which imports of OCT-origin sugar could have entailed for the Community.

61 Sixth, in view of the preference given to the OCTs over the ACP countries (see the Opinion of Advocate General La Pergola in Case C-106/97 *Dutch Antillean Dairy Industry and Others* not yet published) and in view of the preferential scheme for sugar imports into the Community from the ACP States and certain non-member countries in spite of the structural surplus on the Community market, it would be unacceptable to restrict imports of OCT-origin sugar. Since 1973 the ACP countries have exported to the Community more than 1.3 million tonnes of sugar. In 1995 this volume was increased by a supplementary quota, known as 'special purpose sugar', of 385 000 tonnes. Since 1986, non-member countries, in particular Cuba and Brazil, have been given a 'most-favoured nation' quota of 128 000 tonnes. The applicant also indicates that customs duties on numerous products covered by CN Codes 1702 and 1703 were reduced to 0 and 16% respectively by Council Regulation (EC) No 1706/98 of 20 July 1998 on the arrangements applicable to agricultural products and goods resulting from

the processing of agricultural products originating in the ACP States and repealing Regulation (EEC) No 715/90 (OJ 1998 L 215, p. 12).

62 In connection with this plea, the applicant considers that, having regard to the subsidy scheme applied by the Community, no account should be taken of the possibility that imports of OCT-origin sugar may involve the Community budget in additional expenditure in the form of export refunds. The applicant denies that imports of OCT-origin sugar necessitate a reduction in production quotas in the Community, particularly by reason of the Community's obligation concerning the gradual reduction of the volume of sugar exports with refunds, which the Community has undertaken in the framework of the GATT (General Agreement on Tariffs and Trade)/WTO (World Trade Organisation). On this point the applicant states, with supporting figures, that the Commission's claim that the Community sugar market is in balance is incorrect because the supply of sugar in the Community, which includes Community production and preferential imports, is structurally greater than demand.

63 The applicant then describes, firstly, the effects which imports of OCT-origin sugar have on the Community's obligations arising from the CXL list drawn up following the conclusion of the negotiations under Article XXIV:6 of the GATT (see Council Regulation (EC) No 1095/96 of 18 June 1996 concerning the implementation of the concessions shown on the CXL list drawn up following the conclusion of the negotiations under Article XXIV:6 of the GATT (OJ 1996 L 146, p. 1)) ('CXL list') and, secondly, the consequences which those imports are said to have on the areas under sugar beet in the Community.

64 With regard to the Community concessions in the sector of agriculture, set out in Part Four, Section II of the CXL list, they require a gradual reduction in Community exports of subsidised sugar between 1995 and 2001. The reference quantity, 1 612 000 tonnes in 1995, must be reduced to 1 272 500 tonnes per year for the 2000/2001 marketing year.

65 However, 3 400 000 tonnes were exported with refunds in the first three years, whereas the CXL list authorised 4 477 500 tonnes. The Commission itself quantified the additional 'margin' at 1 120 000 tonnes (order of the President of the Court of First Instance in Case T-229/97 R *CEFS* v *Council* [1997] ECR II-1649). Therefore, even if the volume of OCT-origin sugar imports were to result in an equivalent quantity being exported, this would not affect the obligations arising from the CXL list for the period up to 2000/2001. The applicant points out that the sugar beet harvest in autumn 1998 was very poor, particularly in the Netherlands and Belgium, so that sugar production in the 1998/99 marketing year did not reach the expected level.

66 With regard to reducing the areas growing sugar beet, the applicant contends that, even if imports of OCT-origin sugar were to entail a reduction in the production of A sugar and B sugar in the Community, because of the obligations arising from the CXL list, the reduction would not justify cutting the volume of OCT-origin imports of sugar to 3 000 tonnes. If imports of OCT-origin sugar were between 100 000 and 150 000 tonnes, that would entail a reduction in area of 11 000 to 16 000 hectares (i.e. 0.7% to 1% of the total area). The applicant adds that the area under sugar beet in the European Union fluctuated considerably in the period 1975-1995.

67 The third plea in law is that the Council was not competent *ratione temporis* to adopt Decision 97/803. As Article 240(3) of the OCT decision provides that the Council may amend the decision before the end of the first five years of the total period of validity, the amendments should have been made before 1 March 1995. However, the Council did not succeed in amending the OCT decision before that date or thereafter, on the basis of the proposal submitted to it by the Commission on 21 December 1994. The applicant concludes from this that the Council had no power to amend the OCT decision after 1 March 1995. This view of the legal situation is, it claims, confirmed by the judgments of the Court of Justice in Case 148/77 *Hansen* [1978] ECR 1787 and Case C-430/92 *Netherlands* v *Commission* [1994] ECR I-5197.

68 The fourth plea in law is that the principle of legal certainty has been infringed. The extensive amendment of the OCT decision, particularly with regard to the importation of OCT-origin sugar into the Community, infringes that principle because no period was allowed and no transitional measures were adopted to safeguard the interests of the applicant and of undertakings existing at that date, although the Community had repeated its calls for undertakings to use the favourable trading arrangements set up in the interest of the OCTs. In addition, on the basis of the antecedents of Decision 97/803, the applicant denies that it carried out investments while aware that restrictions could be imposed on imports of OCT-origin sugar.

69 In the context of the fifth plea in law, alleging insufficient reasons, the applicant contends that the reason given for Decision 97/803, namely that there is serious disruption on the Community market for certain products, for which safeguard measures have already been adopted on a number of occasions, cannot justify in law the quantitative restriction on OCT-origin sugar. Moreover, the reasons stated for the decision do not show what criteria were applied by the Commission in setting the quota of 3 000 tonnes of OCT-origin sugar, nor why the working and processing operations deemed sufficient to confer the status of OCT-originating products under Article 108b(2) of the OCT decision are limited to forming sugar lumps and colouring.

70 The applicant puts forward four pleas in support of the objection of illegality as directed against the implementing regulation. However, as the illegality of Decision 97/803 would also mean that the regulation adopted to implement it is unlawful, the applicant's submissions are put forward only on an alternative basis.

71 In its first plea, the applicant contends that it is unlawful to make imports of OCT-origin sugar subject to the issue of an import licence.

72 Even assuming that imports of OCT-origin sugar were validly made subject to the issue of an import licence, the applicant contends, in its second plea, that the implementing regulation is unlawful because the conditions for the issue of import licences for sugar products are more stringent if those products originate from the OCTs than if they are from ACP countries. These requirements disregard the special situation of the OCTs by comparison with that of non-member countries.

73 In the third plea in law, the applicant disputes the date of entry into force of the implementing regulation, Article 8 of which provides that it is applicable from 1 January 1998.

74 Finally, in the fourth plea, the applicant contends that the implementing regulation infringed Articles VIII and XIII(2)(c) of the GATT as well as the agreement on procedures for import licences (WTO-GATT 1994) (OJ 1994 L 336, p. 151), 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). The applicant observes that, in trade with the OCTs, the Community should observe those international agreements, which could be relied upon by the Member States pursuant to Article 228(7) of the Treaty.

75 The applicant's submissions are endorsed by the Government of Aruba in its written and oral observations presented in support of the form of order sought by the applicant.

76 The Commission contends that a prima facie case for the interim measures applied for has not been made out.

77 First, it contends that the supposed locking mechanism cannot be applied to each separate element of the association between the OCTs and the Community. Under Article 136 of the Treaty, the Council has a discretion to lay down the conditions of association. For this purpose it must take account of the experience acquired and of the principles set out in the Treaty. Therefore, although the Council must have regard to the purpose of association, as described in Articles 131 and 132 of the Treaty, it must also ensure that the conditions of association are consistent with the other principles of the Treaty. Consequently it may be compelled to curtail the concessions which it has granted in the framework of the association because it appears that those concessions jeopardise, or may jeopardise, the aims of the common agricultural policy. In the present case, Decision 97/803 shows the problems which could be caused by strict application of the cumulation-of-origin rule in Article 6 of Annex II to the OCT decision for the common organisation of the market in sugar.

78 The Council, intervening in support of the form of order sought by the Commission, contends that the second paragraph of Article 136 of the Treaty confers upon it a discretion to lay down the provisions necessary for the attainment of the objectives of the association (see the *Road Air* judgment, cited above). This discretion enables it to determine the working or processing operations which are sufficient to confer an OCT origin on a product (see the judgment in *Netherlands* v *Commission*, cited above, paragraph 3), provided that such rules do not run counter to the main purpose of the association set out in Article 131 of the Treaty, that is to say, the promotion of the economic and social development of the OCTs. The Council could also impose restrictions, such as those in Article 108b of the OCT decision, on the movement of goods between the OCTs and the Community. The dynamic and progressive nature of the process does not preclude taking a step backwards in a particular area of association with the OCTs and a step forward in other areas, provided of course that the measures as a whole do not run counter to the main purpose of association. On this point the Council contends that, as there is no common agricultural policy between the OCTs and the Community, restrictions on the movement of agricultural products could still be imposed.

79 The Commission argues, secondly, that the contested measure does not go beyond what is strictly necessary to prevent disruption of the common organisation of the market in sugar. As the Community sugar market is in a state of equilibrium,

unlimited access for OCT-origin sugar would entail the risk of an increase in exports for which refunds would have to be allowed. Such exports would, firstly, entail additional expenditure charged to the Community budget and, secondly, conflict with the Community's obligations in the framework of the WTO to reduce exports of products for which refunds are granted and to reduce the total amount of refunds paid. Furthermore, the said measure does not go beyond what is necessary because the amount of the quota was set on the basis of the quantity imported in 1996. With regard to the Community's obligations in the framework of the WTO, the Commission observes that the 'operating margin' found in the course of exports in 1995/96 and 1996/97, i.e. 998 200 tonnes, can be used only up to and including the marketing year 1999/2000. Finally, in reply to the applicant's argument concerning the poor sugar beet harvest in the Netherlands and Belgium in autumn 1998, the Commission contends that it will probably not affect the volume of subsidised exports because only the level of production of C sugar will be reduced.

80 In its statement in intervention, the Council contends that disruption in the Community market for rice alone cannot bar the Community legislature from preventing disruption in other markets. There is likely to be considerable growth in the working or processing capacity of the Netherlands Antilles, Aruba and the other OCTs. In particular, in a market which has structural surpluses the Council considers it quite possible that unlimited authorisation of the ACP/OCT cumulation of origin may result in the Community having to grant substantial export refunds. Additional imports from the OCTs would mean that the Community has to allow more export refunds, unless the Community sugar harvest is particularly disastrous. The present production capacity of the Netherlands Antilles and Aruba entails annual export refunds for a maximum of 150 000 tonnes. At the time when the contested measures were adopted, there was a very real risk that the maximum laid down by the CXL list would quickly be reached. Moreover, the annual quantity specified in Article 108b(1) of the OCT decision was determined on the basis of the actual imports from the OCTs in 1996.

81 The Council adds that Article 108b(2) of the OCT decision provides that forming sugar lumps or colouring are to be considered as sufficient to confer on sugar the status of an OCT-originating product, in accordance with Article 6(2) and (4) of Annex II to the OCT decision, whereas, according to Article 3(3) of the same Annex, such working or processing is not sufficient to alter the origin of the product. In Article 108b(2) the Council indicated, by means of one example of the working or processing of sugar in the OCTs, the working or processing operations which were generally 'insufficient', without excluding the possibility of other operations, which were not mentioned, being insufficient to confer the status of OCT-originating product provided for by Article 6 of Annex II to the OCT decision.

82 Thirdly, the Commission rejects the plea alleging that the Council was not competent *ratione temporis* by referring to the order of the President of the Court of 2 March 1998 in Case T-310/97 R *Netherlands Antilles* v *Council* [1998] ECR II-455, in which a similar plea was dismissed.

83 Fourth, the principle of legal certainty or protection of legitimate expectation has not been infringed either. The applicant could not expect the trade rules laid down by the OCT decision to remain unchanged because Article 240(3) of the decision itself expressly provides for the possibility of amendment. Furthermore, when the applicant began production operations, it knew, or ought to have known, that amendment of the OCT decision was imminent and that such amendment could entail the removal or the restriction of application of the OCT cumulation-of-origin rule. In this context it refers to the Commission's proposal COM(95) 739 of 14 February 1996 and the compromise proposed by the Irish presidency of the Council on 27 November 1996. In these circumstances it considers that a prudent businessman would not have carried out such large-scale investments.

84 Fifth and last, Decision 97/803, particularly the seventh recital, meets the requirements laid down by case-law with regard to the statement of reasons. The reasons which led to the adoption of this measure, namely the incompatibility between the aim of promoting trade with the OCTs and the objective of the

common agricultural policy, as well as the need to prevent disruption of the sugar market, are set out briefly but clearly.

85 With regard to the requirement for an import licence in trade between the OCTs and the Community, the Commission contends that the Council is not prevented, by the exclusive effect of Part Four of the Treaty, from imposing such a requirement, as it did in Article 13 of Council Regulation (EEC) No 1785/81 of 30 June 1981 on the common organisation of the markets in the sugar sector (OJ 1981 L 177, p. 4, 'Regulation No 1785/81'). The provisions of Part Four of the Treaty cannot be interpreted as meaning that the Council or the Commission is prohibited from adopting measures, apart from those provided for by the OCT decision, imposing certain conditions on imports into the Community of products from the OCTs. The only limitation to which the institutions are subject arises from compliance with the provisions of the OCT decision.

86 In the present case, there can be no question of infringement of the provisions of the OCT decision. The fact that Articles 102 and 103 of the decision are comparable with Articles 30 and 36 of the Treaty does not mean that the case-law of the Court of Justice relating to the latter is automatically applicable to the former (see, to the same effect, the judgment in Case 270/80 *Polydor* [1982] ECR 329, paragraph 15 et seq.).

87 Finally, the Commission and the Council take the view that the agreement establishing the World Trade Organisation, including Articles VIII and XIII of the GATT 1994, the agreement on procedures for import licences and the decision concerning notification procedures cannot be pleaded directly before Community and national courts.

88 The submissions of the Commission and the Council are endorsed by the Kingdom of Spain in its oral submissions presented in support of the form of order sought by the Commission.

89 For its part, the French Republic contends in essence that the Community market in sugar has a large surplus and therefore any imports over and above the quota for the ACP countries necessarily entails an increase in the expenditure charged to the Community budget.

Findings of the President

90 The applicant submits primarily that the contested decision is unlawful on the ground that it was adopted pursuant to acts which it claims are unlawful, namely the implementing regulation and Decision 97/803. The applicant argues in substance that that decision goes beyond the limits of the Council's discretion under Article 136 of the Treaty and infringes the principle of proportionality in that it limits the ACP/OCT cumulation of origin to an annual quantity of 3 000 tonnes of sugar.

91 To determine, first, whether the Council prima facie exceeded the powers conferred upon it by the Treaty by including in the OCT decision a measure to restrict imports of OCT-origin sugar into the Community, it is necessary to call to mind the principles governing the association arrangements between the OCTs and the Community, as set out in the Treaty.

92 The OCTs with which certain Member States maintain special relations are linked to the Community under association arrangements governed by Part Four of the Treaty (see the judgment of the Court of First Instance and the *Antillean Rice Mills* case, cited above, paragraph 91). Association of the OCTs with the Community is to be achieved by a dynamic and progressive process which may necessitate the adoption of a number of measures in order to attain all the objectives mentioned in Article 132 of the Treaty, having regard to the experience acquired through the Council's previous decisions (see the judgments of the Court of Justice in the *Road Air* case, cited above, paragraph 40, and the *Antillean Rice Mills* case, cited above, paragraph 36). It follows that, although the OCTs are countries and territories which have special links with the Community, they do not, however, form part of the Community, and the free movement of goods

between the OCTs and the Community does not exist without restriction at this stage by virtue of Article 132 of the Treaty (see the judgment of the Court of Justice in the *Antillean Rice Mills* case, cited above, paragraph 36).

93 The second paragraph of Article 136 authorises the Council to adopt decisions concerning the association 'on the basis of the principles set out in this Treaty'. It follows that when the Council adopts OCT decisions under that article, it must take account not only of the principles in Part Four of the Treaty, but also of the other principles of Community law, including those relating to the common agricultural policy (see the judgment of the Court of First Instance in the *Antillean Rice Mills* case, cited above, paragraph 93, and that of the Court of Justice in the *Antillean Rice Mills* case, cited above, paragraph 37).

94 That conclusion is, moreover, consistent with Articles 3(r) and 131 of the Treaty, which provide that the Community is to promote the economic and social development of the OCTs, but without that promotion implying an obligation to accord them privileged treatment (see the judgment of the Court of Justice in the *Antillean Rice Mills* case, cited above, paragraph 38).

95 In the light of these considerations, the Court of First Instance and the Court of Justice have held that a safeguard clause and its application to agricultural products originating in the OCTs are not excluded in the context of the second paragraph of Article 136 of the Treaty (see the judgment of the Court of First Instance in the *Antillean Rice Mills* case, cited above, paragraph 95, and that of the Court of Justice in the *Antillean Rice Mills* case, cited above, paragraph 39).

96 The question arising in the present case is whether the Council could still adopt a measure constituting a restriction of a permanent, structural nature on sugar imports from the OCTs by reason of a 'risk of conflict between two Community policy objectives, namely the development of the OCTs and the common agricultural policy' (seventh recital in the preamble to Decision 97/803), although in the original version of the OCT decision the Council had granted those same sugar products free access to the Community market.

97 The President of the Court considers that, in a legislative context such as that in point in the present case, it cannot be concluded prima facie that the Council had no power to impose a restriction on sugar imports from the OCTs by adding Article 108b to the OCT decision.

98 The Council's obligation to lay down provisions under Article 136 of the Treaty on the basis of the principles of the Treaty means that it may, where appropriate, take the measures necessary to prevent the aim of the development of the OCTs from conflicting with the objective common agricultural policy. As the Court of Justice has held that the promotion of the OCTs does not entail an obligation to give them preferential treatment, reconciling the objective of the development of the OCTs with the common agricultural policy may justify the adoption by the Council of a measure restricting trade between the OCTs and the Community. However, such a measure, whether of a specific, short-term nature for the purposes of Article 109 of the OCT decision or of a structural, permanent nature for the purposes of Article 108b, must in any event be necessary and proportionate to the objective pursued. In the present case, the objective is to prevent disruption of the Community sugar market which could give rise to the importation of large quantities of OCT-origin sugar.

99 Furthermore, the President considers that the Council was not mistaken in law in finding that the experience acquired as a result of previous decisions, which it must take into account when adopting a new decision under Article 136 of the Treaty, must be assessed as a whole, that is to say, taking account of every aspect of the economic and social development of the OCTs as a whole. It therefore falls to the Council to ensure that every new OCT decision contributes, in the light of all the experience acquired, to the objectives set out in Articles 3(r), 131 and 132 of the Treaty. Consequently it cannot be complained that the Council failed to assess any particular experience acquired, such as that of the arrangements for free access for OCT-origin sugar to the Community market, irrespective of other experience.

100 As the possibility of adopting a measure restricting imports of a particular product is not prima facie prohibited as such by the Treaty, it cannot be said that

the pursuit of the aims of the association, as set out in Part Four of the Treaty, is hindered by the mere adoption of that measure.

101 Next, in determining whether, as the applicant claims, the measure introducing a restriction on imports is consistent with the principle of proportionality, it must be ascertained whether the means employed by that measure are prima facie suitable for attaining the objective pursued and do not go manifestly beyond what is strictly necessary in order to do so.

102 According to Decision 97/803, the measure restricting imports of OCT-origin sugar to 3 000 tonnes per year aims to prevent disruption of the Community sugar market (paragraph 14 above). On this point the Commission and the Council argue that unlimited imports of such sugar into the Community would be likely to entail a rise in subsidised exports from Member States of the Community to non -member countries, which would lead to additional expenditure for the Community budget and could cause difficulties in ensuring the fulfilment of the Community's obligations.

103 The President finds, first, that it cannot be denied that this measure appears suitable for achieving its purpose in so far as it reduces imports of OCT-origin sugar to a quantity corresponding to 0.02% of the Community production of A and B sugar.

104 Next, regarding the question whether the measure goes manifestly further than is strictly necessary for the attainment of that objective, it must be observed that, in exercising its discretion, the Council had to reconcile the requirements connected with the prevention of disruption of the Community sugar market with the requirements connected with the liberalisation of imports into the Community of OCT-origin sugar. Article 108b of the OCT decision therefore had to prevent difficulties which could arise on the Community market in the event of the unlimited importation of OCT-origin sugar, while at the same time interfering as

little as possible with the functioning of the association of the OCTs with the Community.

105 Firstly, it must be observed that at the hearing the Council agreed, without being contradicted by the Commission, that the importation of 15 000 tonnes of OCT-origin sugar per year, although five times more than that specified by Article 108b of the OCT decision (3 000 tonnes), did not entail a risk of disruption of the Community sugar market.

106 Secondly, the Commission and the Council justify the quantity of 3 000 tonnes by the need to fulfil the Community's obligations in the sector of agriculture in the form of the concessions set out in Part Four, Section II, of the CXL list, as these require a gradual reduction, between 1995 and 2001, in the Community's subsidised exports of sugar.

107 Even assuming that any quantity of OCT-origin sugar imported into the Community must give rise to the subsidised export of the same quantity of sugar from the Community, it must be observed that in the present case the Community would not be compelled to reduce production quotas in the Community merely by reason of such imports, in order to fulfil its international obligations relating to subsidised exports. According to the report of the Nederlandse Economisch Institut annexed to the applicant's application, the maximum volume of OCT-origin sugar imports, as laid down before the adoption of Decision 97/803, was estimated at between 100 000 and 150 000 tonnes per year. Moreover, according to the CXL list, the quantity of sugar exported in 1995 with refunds, which was used as the reference quantity, namely 1 612 000 tonnes, is to be reduced to 1 273 500 tonnes per year for the marketing year 2000/2001. However, even accepting the Commission's figures for 1995 and 1996 alone, 2 056 600 tonnes were exported with export refunds, whereas 3 054 800 tonnes were authorised by the CXL list. It follows that the quantities resulting for those two years, which can still be used up to the year 2000, total 998 200 tonnes, which is considerably more than the maximum annual volume which imports of OCT-origin sugar could have attained, namely 150 000 tonnes.

108 Thirdly, the applicant denies that any quantity of OCT-origin sugar exceeding 3 000 tonnes imported into the Community must automatically give rise to the subsidised export of the same quantity of sugar from the Community. The applicant points out, without being contradicted by the Commission or the Council, that fluctuations in annual production levels and in the cultivated areas under sugar beet can be observed on the Community sugar market. However, the possibility could not be ruled out that a fall in the annual production of sugar, particularly by reason of weather conditions leading to a poor harvest of beet, might exceed 3 000 tonnes. In that situation, without there being any need to take account of the Community rules applying to A, B or C sugar, imports of OCT-origin sugar exceeding 3 000 tonnes cannot create any disruption on the Community market because the quantity imported does not exceed the quantity not produced by Community producers.

109 By adopting the restriction on the importation of sugar, the Council had also to take into consideration the requirements connected with the liberalisation of imports of OCT-origin sugar into the Community.

110 On this point it must be observed, first, that the quota of 3 000 tonnes laid down by Article 108b of the OCT decision is a virtually absolute obstacle to any exports of OCT-origin sugar to the Community. The applicant's annual working and processing capacity is 34 000 tonnes and the maximum volume of OCT-origin sugar imports, as specified before the adoption of Decision 97/803, was estimated as between 100 000 and 150 000 tonnes per year. Furthermore, the Commission agreed in its written observations that the sugar-price level on the world market prevents the applicant from selling the sugar which it has worked and processed on any market other than that of the Community.

111 Next, it must be observed that, as the file shows, for the marketing year 1997/98 the quantity of sugar available on the Community market was 15.9 million tonnes, without taking account of sugar produced in the Community in excess of the production quotas (C sugar). The Community production of beet sugar limited by production quotas, in accordance with Regulation No 1785/81 (A

sugar and B sugar), was 14.3 million tonnes, the quantity of cane sugar imported from ACP States, in accordance with Article 3 of Protocol No 8 of the Fourth ACP-EC Convention, signed in Lomé on 15 December 1989 (OJ 1999 L 229, p. 1), was 1.3 million tonnes, and imports authorised from certain other non-member countries under agreements concluded in the framework of the WTO amounted to 0.3 million tonnes.

112 As the applicant claims, it cannot prima facie be excluded that, by setting such a low quota for imports of OCT-origin sugar into the Community when the volume of sugar imports from the ACP and other non-member countries remains high, Article 108b of the OCT decision favoured sugar imports from those countries to the disadvantage of imports of OCT-origin sugar and that, by disregarding the order of priority imposed by the Treaty, the Council went further than was strictly necessary for preventing disruption of the Community sugar market.

113 In the light of these considerations, the President of the Court finds that it cannot prima facie be excluded that the level of protection resulting from the imposition of the said quota exceeds what is necessary for attaining the Council's stated objective, and does so in a way that could cause it to incur the censure of the Community judicature.

114 Consequently, and without there being any need to examine the other pleas and arguments, it must be found that there is considerable force in the plea alleging breach of the principle of proportionality and that the requirement of a prima facie case is satisfied.

Urgency

Arguments of the parties

115 The applicant contends that suspension of operation of the contested decision is necessary to prevent serious and irreparable damage to it. In the orders made on 17 October (Case 97/1405) and 19 December 1997 (Case 97/1657) the President of the Arrondissementsrechtbank (District Court), The Hague found that the applicant was 'threatened by serious and totally irreparable damage'.

116 The operation of Decision 97/803, of the implementing regulation and of the contested decision has already led to the cessation of the applicant's trading operations in Aruba. The final consignment of sugar milled by the applicant was exported to the Community on 3 November 1997. It is impossible to sell its sugar on the world market. In this connection, the applicant states that in 1997 the net profit margin on the sale of 7 500 tonnes of sugar in the Community was USD 28 per tonne. As the price of sugar on the world market is much lower than the price prevailing in the Community, it would be impossible to sell it at a sufficient profit outside the Community market.

117 The cessation of the applicant's business has led to the dismantling of its factory because the machines were 'mothballed'.

118 The applicant's entire workforce was dismissed in November and December 1998, as shown by a statement by its accountants.

119 As it has no source of income, the applicant concludes that it is technically insolvent and that this situation renders the prospect of the grant of any additional loan facilities illusory.

120 The applicant adds that several debts totalling USD 469 288 are due and payable and there is a real possibility that it will be declared insolvent if a petition is lodged by one of its creditors under Aruban insolvency law. The financial year which ended on 31 December 1998 resulted in an operating loss of USD 421 950.

121 The applicant submits that the judge hearing an application for interim measures must determine whether, if the measures sought are not granted, the party concerned may suffer damage which cannot be made good when a decision is given in the main action. In the present case, the applicant claims that, as it is threatened with insolvency (order in Joined Cases T-231/94 R, T-232/94 R and T-234/94 R *Transacciones Marítimas and Others* v *Commission* [1994] ECR II-885, paragraph 42) or, at least, has to bear an exceptionally heavy financial burden pending a judgment on the merits in the main proceedings (order in Case T-156/94 R *Aristrain* v *Commission* [1994] ECR II-715, paragraph 33), the test of urgency must be regarded as satisfied.

122 The Government of Aruba supports the applicant's submissions.

123 The Commission argues that the applicant has not proved that the condition of urgency has been satisfied.

124 In particular, the applicant had not proved that the implementation of the contested decision would have irreversible effects on the applicant which could not be remedied after a judgment annulling the contested decision.

125 The Commission adds that the alleged damage is purely financial. It cannot therefore be regarded as irreparable because financial compensation could be awarded at a later date.

126 In any event, the applicant's financial statements as at 31 May 1998 and 31 December 1998 do not permit an overall assessment of its true financial situation. Moreover, the Commission suggests that a possibility of financial support from associated or related companies until the Court gives judgment in the main proceedings cannot be ruled out. The whole of the applicant's share capital is in fact held by a company which is itself wholly controlled by Emesa Corporation, of New York, all of whose shares are held by a single natural person. Emesa Corporation has personal and/or financial links with Emesa Brazil, it has a substantial turnover and it is where that person worked for several years.

127 The Council adds that the situation of the creditors, who have hitherto refrained from petitioning for the applicant to be declared insolvent, will remain unchanged if the application for interim measures is dismissed.

Findings of the President

128 It has been consistently held that the urgency of an application for interim measures must be assessed in relation to the necessity for an interim order to prevent serious and irreparable damage to the party applying for those measures. It is for the party seeking suspension of the operation of a contested decision to prove that it cannot wait for the outcome of the main proceedings without suffering damage that would entail serious and irreparable consequences (see the order of the President of the Court of First Instance in Joined Cases T-79/95 R and T-80/95 R *SNCF and British Railways* v *Commission* [1995] ECR II-1433, paragraph 36).

129 It must first be observed that, in the light of the certified statements produced by the applicant, the Commission and the Council stated at the hearing that they wished to withdraw the submission that the possibility of financial support from the Emesa company in Brazil until delivery of the judgment was given on conclusion of the main proceedings could not be ruled out.

130 Second, it must be observed that the refusal of the import licences requested by the applicant is dated 23 December 1997 and the last consignment of sugar was exported to the Community on 3 November 1997. Furthermore, it is common ground that the applicant cannot sell sugar on any market other than that of the Community because of the price level of the raw material. The contested acts have therefore compelled it to cease operations completely.

131 As the financial statements produced by the applicant show, the 1998 financial year resulted in a loss of USD 421 950 and the total debts due and payable as at 31 December 1998 were USD 469 288. Under these circumstances, the applicant is in a financial situation threatening its very existence because there is a real risk of being declared insolvent (order in the joined cases of *Transacciones Marítimas and Others* v *Commission*, cited above, paragraph 42, and orders of 23 May 1990 in Joined Cases C-51/90 R and C-59/90 R *Cosmos-Tank* v *Commission* [1990] ECR I-2167, paragraph 24, and *Netherlands* v *Commission*, cited above, paragraph 38). For that reason alone, the applicant is suffering serious damage which may become irreparable if the operation of the contested acts is not suspended (see, to that effect, the order in Case 152/88 R *Sofrimport* v *Commission* [1988] ECR 2931, paragraph 32), so that the urgency of the measures appears to be unquestionable.

132 In view of this legal and factual situation, the President of the Court must also balance the interests which are involved.

The balance of interests

Arguments of the parties

133 During the written and oral stages of the procedure, in replies to written questions put to them by the President of the Court and in letters which they lodged at the Court Registry, the applicant, on the one hand, and the Council and the Commission, on the other, discussed the terms and conditions of the interim measures which could be adopted by way of an order, in a manner such that the order would safeguard the applicant's interests provisionally and protect so far as possible those of the Community, including the Community's financial interests and those of the sugar refineries in the Member States.

134 Taking account of these opposing interests, the parties agreed before the President of the Court (so far as the Council and the Commission were concerned, only in so far as the President finds that the requirements relating to a prima facie case and to urgency are met) that the applicant could, during the period commencing on the date of signature of this order, export OCT-origin milled sugar to the Community on the basis of Article 6 of Annex II to the OCT decision, in accordance with the conditions laid down by that decision in the version prior to the entry into force of Decision 97/803 and subject to the following conditions and restrictions:

— the authorised imports will be subject to the provisions applying prior to the entry into force of Decision 97/803 and, in particular, the obligation to obtain an import licence in accordance with Article 5(1) of Commission Regulation (EEC) No 3719/88 of 16 November 1988 laying down common detailed rules for the application of the system of import and export licences and advance fixing certificates for agricultural products (OJ 1988 L 331, p. 1), the obligation to obtain an EUR-1 certificate and the obligation to furnish security of 3 euro per tonne, which will be released if the goods are imported in conformity with the import licence;

— the maximum quantity authorised for importation will be 7 500 tonnes for a period of six months commencing on the date of the order;

— the OCT-origin sugar imported into the Community will be sold at a price at least equal to the intervention price referred to in Article 3(1)(a) of Regulation No 1785/81, as amended;

— the applicant may export OCT-origin sugar on the condition that security is furnished in the form of a bank guarantee for a sum of USD 28 per tonne of sugar which it wishes to export in accordance with the order. Such security must be provided not later than the date on which the sugar is presented to the customs authorities for declaration and must cover the tonnage presented. It is also agreed that the amount of the security to be provided per tonne of sugar shall be increased or reduced:

  — depending on any rise or fall in the intervention price referred to in Article 3(1)(a) of Regulation No 1785/81, as amended,

  — depending on any rise or fall in the guaranteed price referred to in Article 5(4) of Protocol No 8 of the Fourth ACP-EC Convention signed in Lomé on 15 December 1989;

— the total amount of the security will be released to the applicant or the Community, depending on whether the applicant's plea that Article 108b of the OCT decision is unlawful proves to have been well founded;

— during the period of validity of the interim measure ordered, the applicant will not apply for and will not use in any way import licences referred to in the implementing regulation.

135 It also follows from the agreement that the applicant may, subject to a maximum of 7 500 tonnes of sugar and during the period commencing on the date of signature of the order, export to the Community the OCT-origin sugar referred to in the order which is delivered to it free on board (FOB) before the end of the period of validity of the interim measure, in accordance with the provisions of this order.

136 However, the conditions for renewing the measure ordered for each six-month period following the first period and the date from which the interim measure ceases to apply are still under discussion between the parties. Nevertheless, they agree that delivery of the judgment of the Court of Justice in Case C-17/98 in the course of the first six-month period will necessitate a new order of the President of the Court of First Instance, the terms of which will depend on the findings of the Court of Justice on the legality of the provisions of Decision 97/803.

Findings of the President

137 It is settled case-law that the comparison made by the judge hearing an application for interim measures, when weighing up the respective interests, necessarily requires him to consider whether, if the contested act were annulled by the Court, this would make it possible to reverse the situation that would be brought about by the immediate implementation of that act and conversely whether suspension of the operation of the act would be such as to prevent it from being fully effective should the main application be dismissed (order in Joined Cases 76/89 R, 77/89 R and 91/89 R *RTE and Others* [1989] ECR 1141, paragraph 15).

138 In the present case, the application, first, for suspension of the operation of the contested decision until the Court gives a ruling on the substance of the case and, second, for an order restraining the Commission from applying, during the same period, the provisions of the implementing regulation and/or Article 108b of the OCT decision seeks in reality the unqualified suspension of Article 108b of the OCT decision, the implementing regulation and the contested decision. To order suspension as applied for would frustrate, during the period of validity of the interim order, the restriction of imports in proportion as OCT-origin sugar products are freely exported to the Community by the applicant or by any other undertaking in any of the OCTs. Furthermore, as there is a structural surplus on the Community sugar market, unlimited imports of OCT-origin sugar free of a levy of any kind could entail a certain increase in the volume of exports qualifying for export refunds and, consequently, an increase in the costs borne by the Community. It follows that the grant of the interim measures requested could have irreversible consequences.

139 Conversely, application of the restriction on imports would very probably lead to the applicant's insolvency, so that a ruling by the Court of Justice in Case C-17/98 that Article 108b of the OCT decision is invalid or a judgment of the Court of First Instance in the main proceedings annulling that provision would not enable the applicant to resume its working and processing operations because it would have ceased to exist.

140 In this context it must be observed that the Council, without being contradicted by the Commission, acknowledged at the hearing that OCT-origin sugar imports of 15 000 tonnes per year do not entail a risk of disrupting the Community sugar market.

141 As the requirement of a prima facie case is satisfied and the urgency of the measures sought is unquestionable, it must be concluded that effective provisional judicial protection justifies an order for the suspension of Article 108b of the OCT decision as well as the suspension of the implementing regulation and of the contested decision, provided however that the effects of suspension are limited to the applicant alone and that suspension is made subject

to conditions as to the quantity of OCT-origin sugar which can be imported into the Community, the import procedures and the duration of validity of the measures.

142 On this point, the President of the Court considers that the interests of the applicant and those of the Community are safeguarded by the agreement concluded by the parties in the context of the proceedings for interim measures and subsequently placed before the Court. Under Article 107(3) of the Rules of Procedure, however, the President must fix the date on which the interim measure is to lapse.

143 The principles of legality and foreseeability necessary for any import transaction in respect of a product which has been worked and processed make it necessary to authorise the importation into the Community of 7 500 tonnes of sugar milled by the applicant over a period of six months commencing on the date of signature of this order.

144 If, however, during those six months the Court of Justice gives judgment in Case C-17/98 and finds that the provisions of the OCT decision restricting the importation of OCT-origin sugar into the Community are not invalid, the President of the Court of First Instance will request the parties to the present proceedings to submit their observations on the said judgment and will, by way of order, prescribe the further steps to be taken in these proceedings.

145 If, on the other hand, the Court of Justice finds that the provisions of the OCT decision restricting the importation of OCT-origin sugar into the Community are invalid, the present order will continue in force until the expiry of the six-month period, unless the Court of First Instance gives judgment in the case in the main proceedings, registered under number T-44/98.

146 Subject to the delivery of judgment by the Court of Justice in Case C-17/98 during the six-month period commencing on the date of signature of the order in the present case and subject to the consequences which that judgment may have for the present proceedings (paragraphs 144 and 145 above), the importation of a quantity of sugar to be specified will be authorised, for a further period, by way of an order which the applicant, acting in good time, will apply to the President of the Court of First Instance to make not later than two months before the expiry of the six-month period. If a new order is made, the President will, in particular, fix the date on which the new measures ordered are to lapse.

On those grounds,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE

hereby orders:

1. **The operation of Article 108b of Council Decision 91/482/EEC of 25 July 1991 on the association of the overseas countries and territories with the European Economic Community, 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, and of the Commission Decision of 23 December 1997 (VI/51329), is suspended in relation to Emesa Sugar (Free Zone) NV.**

2. **Emesa Sugar (Free Zone) NV is authorised to export to the Community milled sugar originating in the overseas countries and territories (OCTs),**

within the meaning of Article 6 of Annex II to Decision 91/482, and in accordance with the conditions set out in that decision, as in force up to 30 November 1997, subject to the following conditions and restrictions:

— the authorised imports will be subject to the provisions of Decision 91/482 applying prior to the entry into force of Council Decision 97/803/EC of 24 November 1997 amending at mid-term Decision 91/482 and, in particular, to the obligation to obtain an import licence in accordance with Article 5(1) of Commission Regulation (EEC) No 3719/88 of 16 November 1988 laying down common detailed rules for the application of the system of import and export licences and advance fixing certificates for agricultural products, the obligation to obtain an EUR-1 certificate and the obligation to furnish security of 3 euro per tonne, which will be released if the goods are imported in conformity with the import licence;

— the maximum quantity authorised for importation will be 7 500 tonnes for a period of six months commencing on the date of signature of this order;

— the OCT-origin sugar imported into the Community will be sold at a price at least equal to the intervention price referred to in Article 3(1)(a) of Council Regulation (EEC) No 1785/81 of 30 June 1981 on the common organisation of the markets in the sugar sector;

— the applicant may export the OCT-origin sugar on the condition that security is furnished in the form of a bank guarantee for a sum of USD 28

per tonne of sugar which it wishes to export in accordance with the present order. Such security must be provided not later than the date on which the sugar is presented to the customs authorities for declaration and must cover the tonnage presented. The amount of the security to be provided per tonne of sugar shall be increased or reduced:

— depending on any rise or fall in the intervention price referred to by Article 3(1)(a) of Regulation No 1785/81;

— depending on any rise or fall in the guaranteed price referred to by Article 5(4) of Protocol No 8 of the Fourth ACP-EC Convention signed in Lomé on 15 December 1989.

The reference point for the reduction or increase in the amount of the security shall be the intervention price or the guaranteed price on the date of signature of this order.

— the total amount of the security provided shall be released, on order of the President of the Court, for the benefit of the Community if the Court of Justice rules, during the six-month period commencing on the date of signature of this order, that Article 108b is not invalid in the judgment to be given in Case C-17/98;

— during the period of validity of the interim measure ordered, Emesa Sugar (Free Zone) NV shall not be entitled to lodge an application for an import

licence under 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.

3. If the judgment of the Court of Justice in Case C-17/98 is delivered within the six months following the date of signature of this order:

— the present proceedings for interim measures (registered under number T-44/98 R II) will be resumed if the Court of Justice does not rule that Article 108b of the OCT decision is invalid and the parties will be requested to submit their written observations on the judgment of the Court of Justice. The further steps which the President of the Court of First Instance proposes to prescribe in the present proceedings will be set out in a new order; however, Emesa Sugar (Free Zone) NV may continue to export to the Community the sugar which is delivered to it free on board (FOB) before the date on which the judgment of the Court of Justice is delivered, (i) subject to a maximum of 7 500 tonnes, (ii) during the six-month period commencing on the date of signature of this order and (iii) in accordance with the conditions set out under point 2 above;

— this order shall continue to have effect until the end of the six-month period if the Court of Justice rules that Article 108b of the OCT decision is invalid and if the Court of First Instance has not given judgment in the case in the main proceedings (registered under number T-44/98).

4. Subject to the delivery of judgment by the Court of Justice in Case C-17/98 before the end of the first six-month period referred to in this order, the importation into the Community of a quantity of OCT-origin sugar to be

specified shall be authorised for a further period by way of an order which Emesa Sugar (Free Zone) NV, acting in good time, will apply to the President of the Court of First Instance to make two months before the expiry of the first six-month period.

5. The costs are reserved.

Luxembourg, 30 April 1999.

H. Jung

Registrar

B. Vesterdorf

President