# JUDGMENT OF THE COURT OF FIRST INSTANCE
(Fourth Chamber, Extended Composition)

14 September 1995 *

In Joined Cases T-480/93 and T-483/93,

**Antillean Rice Mills NV**, a company governed by Netherlands Antilles law, established in Bonaire, Netherlands Antilles, and

**Trading & Shipping Co. Ter Beek BV**, a company governed by Netherlands law, established in Amsterdam,

represented by Paul Glazener and Winfred Knibbeler, of the Rotterdam Bar, with an address for service in Luxembourg at the Chambers of Marc Loesch, 11 Rue Goethe,

and

**European Rice Brokers AVV**, a company governed by Aruba law, established in Oranjestad, Aruba,

* Language of the case: Dutch.

**Alesie Curaçao NV**, a company governed by Netherlands Antilles law, established in Willemstad, Curaçao, Netherlands Antilles, and

**Guyana Investments AVV**, a company governed by Aruba law, established in Oranjestad, Aruba,

represented by Johan Pel, of the Amsterdam Bar, with an address for service in Luxembourg at the Chambers of Luc Frieden, 62 Avenue Guillaume,

applicants,

v

**Commission of the European Communities**, represented by Étienne Lasnet and Thomas van Rijn, Legal Advisers, and Marc van der Woude, of the Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of the Legal Service, Wagner Centre, Kirchberg,

defendant,

supported by

**Council of the European Union,** represented by Guus Houttuin, of the Legal Service, acting as Agent, with an address for service in Luxembourg at the office of Bruno Eynard, Manager of the Legal Directorate of the European Investment Bank, 100 Boulevard Konrad Adenauer,

**French Republic,** represented by Edwige Belliard, Deputy Director in the Directorate for Legal Affairs in the Ministry of Foreign Affairs, Catherine de Salins, Assistant Director in the same directorate, and Claude Chavance, Secretary in the Ministry of Foreign Affairs, with an address for service in Luxembourg at the French Embassy, 9 Boulevard Prince Henri, and

**Italian Republic,** represented by Danilo Del Gaizo, Avvocato dello Stato, with an address for service in Luxembourg at the Italian Embassy, 5 Rue Marie-Adélaïde,

interveners,

APPLICATION for the annulment of Commission Decision 93/127/EEC of 25 February 1993 introducing safeguard measures in respect of rice originating in the Netherlands Antilles (OJ 1993 L 50, p. 27) and of Commission Decision 93/211/EEC of 13 April 1993 modifying Decision 93/127 (OJ 1993 L 90, p. 36), and for an order that the Commission make good the damage which the applicants consider they have suffered and may yet suffer as a result of the adoption of those decisions,

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES
(Fourth Chamber, Extended Composition),

composed of: K. Lenaerts, President, R. Schintgen, C. P. Briët, R. García-Valdecasas and C. W. Bellamy, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 24 March 1995,

gives the following

## Judgment

### Factual background to the dispute

*Legal framework*

1 The Netherlands Antilles form part of the overseas countries and territories ('OCT') associated with the European Economic Community. The association of the OCT with the Community is governed by Part Four of the EEC Treaty and by Council Decision 91/482/EEC of 25 July 1991 (OJ 1991 L 263, p. 1, 'the OCT Decision'), which was adopted pursuant to the second paragraph of Article 136 of the Treaty.

2 Article 133(1) of the Treaty provides that customs duties on imports into the Member States of goods originating in the OCT 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. Article 101(1) of the OCT Decision provides that products originating in the OCT are to be imported into the Community free of customs duties and charges having equivalent effect. Article 101(2) stipulates, further, that products not originating in the OCT but which are in free circulation in an OCT and are reexported as such to the Community are to be accepted for import into the Community free of customs duties and taxes having an equivalent effect providing that they have paid, in the OCT concerned, customs duties or taxes having equivalent effect of a level equal to, or higher than, the customs duties applicable in the Community on import of those same products originating in third countries eligible for the most-favoured-nation clause, that they have not been the subject of an exemption from, or a refund of, in whole or in part, customs duties or taxes having an equivalent effect, and that they are accompanied by an export certificate.

3 The first indent of Article 108(1) of the OCT Decision refers to Annex II to that decision for the definition of the concept of originating products and the methods of administrative cooperation relating thereto.

4 Under Article 1 of that Annex II, a product is to be considered as originating in an OCT, in the Community or in an African, Caribbean or Pacific ('ACP') State if it has been either wholly obtained or sufficiently worked or processed there.

5 Under Article 2(1)(b) of Annex II, 'vegetable products harvested' in an OCT, the Community or an ACP State are deemed to be wholly obtained there.

6 According to Article 3(1) of Annex II, non-originating materials are considered to be sufficiently worked or processed when the product obtained is classified in a tariff heading which is different from those in which all the non-originating materials used in its manufacture are classified.

7 Finally, Article 6(2) of Annex II provides that when products wholly obtained in the Community or in the ACP States undergo working or processing in the OCT, they are to be considered to have been wholly obtained in the OCT.

8 Since 1967, there has been a common organization of the market in rice, currently governed by Council Regulation (EEC) No 1418/76 of 21 June 1976 on the common organization of the market in rice (OJ 1976 L 166, p. 1), which includes intervention prices for paddy rice, export refunds and import levies. Those levies vary according to the country of origin. As regards the ACP States, a reduced levy rate is charged up to a tariff quota of 125 000 tonnes of husked rice and 20 000 tonnes of broken rice.

9 In addition, Council Regulation (EEC) No 3878/87 of 18 December 1987 on the production aid for certain varieties of rice (OJ 1987 L 365, p. 3) encourages the cultivation of Indica rice by Community producers. Council Regulation (EEC) No 3763/91 of 16 December 1991 introducing specific measures in respect of certain agricultural products for the French overseas departments (OJ 1991 L 356, p. 1) was adopted with the aim of promoting the cultivation of rice in French Guiana and supporting the disposal and marketing of that rice in Guadeloupe and Martinique, all three being French overseas departments. In that regard, it must be borne in mind that, under Article 227(2) of the Treaty, the rules relating to the free movement of goods and to the common agricultural policy, with the exception of Article 40(4) are applicable to the French overseas departments which — for those purposes — form an integral part of the Community.

*The factual context*

1. *The Community market in rice*

10 There are three main varieties of rice: round grain, semi-long grain and long grain. In the Community, only semi-long grain (or Japonica) rice, consumed mainly in the southern Member States, and long grain (or Indica) rice, consumed mainly in the northern Member States, are of any importance.

11 Spain, France and Italy are the only Member States of the Community in which rice is cultivated. That production is essentially of Japonica rice and provides a surplus. The aim of Regulation No 3878/87 (see paragraph 9 above) is to promote Community production of Indica rice.

12 Before they can be consumed, the various varieties of rice must be processed. After harvesting, the rice is husked and then polished in several stages.

13 The unit value of the rice increases at each stage of processing. The stage of processing is therefore always indicated together with the price or the tax levied on the rice. In general, four stages of processing are distinguished:

— paddy rice, as harvested, not yet fit for consumption;

— brown rice, from which the husk has been removed, fit for consumption but also capable of further processing;

— semi-milled rice, from which part of the pericarp has been removed, a semi-finished product which is generally sold with a view to further processing rather than for consumption; since part of the pericarp remains on the rice, it is generally less perishable than milled rice;

— milled rice, which has been fully processed and from which the whole of both the husk and the pericarp have been removed.

14 Paddy rice may be processed into milled rice in one or more stages. Paddy rice, brown rice and semi-milled rice may therefore serve as raw materials for producers of milled rice. Before processing, the rice may also be parboiled. In that case, paddy rice is steeped in hot water under pressure then steamed and dried, and only later husked and milled. The final product is designated parboiled rice; it is drier and more nutritive than milled rice.

15 Community production of long grain milled rice amounts to approximately 25% of total Community consumption. The remaining 75% come from non-member countries, essentially the United States of America and Thailand.

2. *The Netherlands Antilles rice trade*

16 The applicants in Case T-480/93 are Antillean Rice Mills NV ('ARM') and Trading & Shipping Co. Ter Beek NV ('Ter Beek'). ARM processes, in the Netherlands Antilles, brown rice imported from Surinam and Guyana into semi-milled rice. Ter Beek deals particularly in buying and selling rice; in that capacity, it imports brown rice from Surinam and Guyana into the Netherlands Antilles for processing into semi-milled rice by ARM and exports semi-milled rice from the Netherlands Antilles to the Community.

17 The applicants in Case T-483/93 are European Rice Brokers AVV ('ERB'), Alesie Curaçao NV ('Alesie') and Guyana Investments AVV ('Guyana Investments'). ERB trades in rice; in that capacity, it buys rice itself or through an intermediary in Surinam and Guyana and exports to the Community semi-milled rice processed in the Netherlands Antilles by Alesie, which also ships the rice in ERB's name and on its behalf. Finally, Guyana Investments — which is a sister company of ERB — purchases paddy rice in Guyana and processes it into brown rice which it sells to ERB.

3. *Background to the dispute*

18 Before the Commission introduced the safeguard measures with which this dispute is concerned, it had on two occasions objected to rice from the Netherlands Antilles ('Antillean rice') imported into the Community being exempted from the import levy. On the first occasion, shortly after imports commenced in early 1992, the Commission considered that Article 101 of the OCT Decision did not provide for an exemption in the case of agricultural products. Following detailed consultation between the Commission and the Netherlands Government, which had made representations to it, the Commission abandoned that interpretation. On the second occasion, during the summer of 1992, the Commission argued that the processing carried out on the rice in the Netherlands Antilles was not sufficient for the semi-milled rice exported to be regarded as originating in the Netherlands Antilles under the rules on origin laid down in Article 6(2) of Annex II to the OCT Decision (see paragraph 7 above). The Netherlands Government again intervened and as a result the Commission abandoned that point of view.

19 By letter of 28 October 1992, the French Government asked the Commission to take a safeguard measure with regard to rice from the OCT, pursuant to Article 109 of the OCT Decision. It produced additional information in support of that request by letter of 14 December 1992.

20 By letter of 27 November 1992, the Italian Government made a similar request.

21 On 21 December 1992, the Advisory Committee on Safeguard Measures met informally to discuss the measures envisaged by the Commission. That meeting was preparatory to the official consultation provided for in Article 1(3) of Annex IV to the OCT Decision.

22 On 23 December 1992, the Commission decided, under Article 1(2) of Annex IV to the OCT Decision, to introduce safeguard measures. On the same day, Commission officials met representatives of the Netherlands Government to discuss the measures envisaged.

23 By letter of 23 December 1992, the Commission asked the members of the Advisory Committee on Safeguard Measures to give their written opinion on the measures which it envisaged taking.

24 On 11 January 1993, the Advisory Committee met at the request of the Netherlands representative, who had objected to the matter being dealt with by written procedure. During the deliberations, it transpired that seven Member States were in favour of the measures envisaged, one Member State opposed them, one Member State reserved its position and three Member States were not represented.

25 By letter of the same date, the Netherlands Government proposed, as a compromise, that a relative minimum price should be fixed at 120% of the levy on long grain brown rice imported into the Community from non-member countries, together with an absolute minimum price of USD 710 per tonne.

26 On 12 January 1993, a further meeting was held at the request of the Netherlands Government between its representative and officials of the Commission. Representatives of the undertakings concerned also took part in that meeting, at which the representative of the Netherlands Government proposed that the Netherlands authorities should fix a minimum import price to be calculated in such a way as to maintain Community preference while at the same time according more favourable treatment to rice originating in the OCT than to rice originating elsewhere. Specifically, that relative minimum price would be fixed at 120% of the levy on imported long grain brown rice, with an absolute minimum price of USD 710. In that connection, however, the Commission claims that the proposal made at the meeting was based not on the levy on brown rice but on that on semi-milled rice.

27 On 14 January 1993, the Minister for Finance of the Netherlands Antilles made an order fixing a relative minimum price equivalent to 120% of the levy on long grain semi-milled rice imported into the Community, with an absolute minimum price of USD 710, for exports of semi-milled rice.

28 By letters of 14 January 1993 from the Minister-President of the Netherlands Antilles and of 15 January 1993 from the Permanent Representative of the Netherlands (see Annexes 2 and 3 to the rejoinder in both Case T-480/93 and Case T-483/93), the Commission was informed that a minimum export price had been fixed at 120% of the import levy on semi-milled rice.

29 On 25 February 1993, the Commission adopted Decision 93/127/EEC introducing safeguard measures in respect of rice originating in the Netherlands Antilles (OJ 1993 L 50, p. 27). Under Article 1(1) of that decision, 'semi-milled rice ... originating in the Netherlands Antilles may be released for free circulation free of import duties, provided the customs value is not less than a [relative] minimum price equivalent to 120% of the levy applying to semi-milled rice in accordance with Council Regulation (EEC) No 1418/76'. Article 1(2) provided that the minimum price obtained pursuant to paragraph 1 could not be less than an absolute minimum price (a 'floor price') equivalent to ECU 546 per tonne of semi-milled rice. That paragraph further provided that the absolute minimum price was to be increased

each month by ECU 3.5 per tonne from 1 March 1993. There was only one difference between the safeguard measure adopted by the Commission and that introduced by Ministerial Order in the Netherlands Antilles: the absolute minimum price was fixed at a higher level (ECU 546 or USD 775.26 per tonne, plus a monthly increase of ECU 3.5 per tonne from 1 March 1993).

30 On 1 March 1993, pursuant to Article 1(5) of Annex IV to the OCT Decision, the Netherlands Government referred the Commission's decision to the Council and asked it to rescind the measure.

31 On 8 March 1993, the Council examined the safeguard measure decided on by the Commission but did not adopt a different decision. According to the applicants, at that meeting the Commission proposed to reexamine the decision in question.

32 On 16 March 1993, a meeting was held between Commission officials and representatives of the Netherlands, French and Italian Governments.

33 On 2 April 1993, the Advisory Committee on Safeguard Measures met again. The Commission submitted to it a draft decision amending Decision 93/127. Four Member States approved that text, three Member States raised objections, two Member States reserved their position and three Member States were not represented.

34 On 13 April 1993, the Commission adopted Decision 93/211/EEC modifying Decision 93/127 (OJ 1993 L 90, p. 36). That decision set the absolute minimum price at ECU 550 (or USD 801.19) per tonne and suppressed both the relative minimum price (120% of the levy on long grain semi-milled rice) and the monthly increases.

35 On 16 June 1993, the Commission adopted Decision 93/356/EEC repealing Decision 93/127 (OJ 1993 L 147, p. 28).

## Procedure

36 By application lodged at the Registry of the Court of Justice on 10 May 1993, the applicants ARM and Ter Beek brought an action registered as Case C-271/93.

37 By application lodged at the Registry of the Court of Justice on 14 May 1993, the applicants ERB, Alesie and Guyana Investments brought an action registered as Case C-281/93.

38 On 3 August, 13 September and 23 September 1993 respectively, the Council, the French Republic and the Italian Republic lodged applications at the Registry of the Court of Justice for leave to intervene in support of the defendant.

39 By order of 27 September 1993, in accordance with Article 3 of Council Decision 88/591/ECSC, EEC, Euratom of 24 October 1988 establishing a Court of First Instance of the European Communities (OJ 1988 L 319, p. 1), as amended by Council Decision 93/350/Euratom, ECSC, EEC of 8 June 1993 (OJ 1993 L 144, p. 21), the Court of Justice transferred the present cases to the Court of First Instance, where they were registered as Cases T-480/93 and T-483/93.

40 By orders of 23 November 1993, the President of the First Chamber of the Court of First Instance granted the applications for leave to intervene in support of the defendant.

41 In its reply, ARM withdrew its claims for compensation.

42 By letter of 17 June 1994, after the closing of the written procedure, the applicants in Case T-483/93 sought leave from the Court to lodge further documents and to increase the amount of compensation claimed by USD 248 234. The Commission and the French Republic objected.

43 By letters of 28 July 1994 in Case T-480/93 and 2 August 1994 in Case T-483/93, the applicants further requested that a letter from the Permanent Representative of the Kingdom of the Netherlands be lodged with the Court. They produced that letter as an annex to the answers which they provided to the written questions put by the Court prior to the hearing.

44 By order of the President of the Fourth Chamber (Extended Composition) of 26 January 1995, Cases T-480/93 and T-483/93 were joined.

45 Upon hearing the report of the Judge-Rapporteur, the Court (Fourth Chamber, Extended Composition) decided to open the oral procedure without any preparatory inquiry. As a measure of organization of the procedure under Article 64 of the Rules of Procedure, the parties were, however, asked to reply in writing to certain questions before the hearing.

46 The parties presented oral argument and answered the Court's oral questions at the hearing which took place in open court on 24 March 1995.

## Forms of order sought

47 In Case T-480/93, the applicants claim that the Court should:

— annul Decisions 93/127 and 93/211, cited above;

— order the Community to make good the damage suffered by Ter Beek, assessed at USD 566 044.20;

— order the Commission to bear the costs.

48 In Case T-483/93, the applicants claim that the Court should:

— annul Decisions 93/127 and 93/211, cited above;

— order the Community to make good the damage suffered by the applicants, assessed at USD 8 562 000, to which should be added USD 248 234;

— order the Commission to bear the costs.

The Commission, supported by the French Republic and the Italian Republic, contends that the Court should:

— declare the claims for annulment inadmissible or dismiss them as unfounded;

— dismiss the claims for compensation as unfounded;

— order the applicants to bear the costs.

The Council contends that the Court should:

— declare that in the present case there is nothing which affects the validity of Article 109 of the OCT Decision.

**Pleas in law and arguments of the parties**

49 The applicants put forward six pleas in law in support of their claims for annulment. The first plea alleges that Article 109 of the OCT Decision, on which the contested safeguard measure is based, is unlawful inasmuch as it empowers the Commission to take safeguard measures under conditions not provided for in the Treaty. The second plea alleges an infringement of Article 109(1) of the OCT Decision in that the Commission introduced safeguard measures at a time when the conditions for their introduction were not met. The third plea alleges an infringement of Article 109(2) of the OCT Decision in that the safeguard measures introduced go beyond what is necessary to dispose of the alleged threat of disturbance or deterioration in a sector of the Community's activity or in a region of the Community. The fourth plea alleges an infringement of Articles 132(1) and 133(1) of the

Treaty and of Article 101(1) of the OCT Decision in that making exemption from customs duties on imports dependent upon the observance of minimum prices amounts to the imposition of a 'conditional' charge having equivalent effect. The fifth plea alleges an infringement of Article 131 of the Treaty in that the Commission failed to take sufficient account of the aims of the association of the OCT. The last plea alleges a breach of the principle that measures must be drawn up with care and an infringement of Article 190 of the Treaty in that the Commission failed, either completely or adequately, both to examine the market situation and to state sufficient reasons for the safeguard measures.

50 In support of their claims for compensation, the applicants allege that the Commission acted unlawfully in adopting the contested decisions and that those decisions caused them direct damage.

*The claims for annulment*

A — *Admissibility*

Arguments of the parties

51 The Commission, supported by the interveners, raises an objection of inadmissibility. The contested decisions, since they are of general scope and produce effects on the whole of a sector of activity, affect the applicants only in the same way as any other trader who is or may in the future be in the same situation. They are thus measures which apply to objectively determined situations and produce legal effects with respect to categories of persons envisaged in the abstract. The applicants cannot, therefore, be individually concerned. The limited number of undertakings operating in that sector and the fact that their number and identities can be determined — matters of pure chance in the Commission's view — cannot lead to

a different conclusion (Case 38/64 *Getreide-Import* v *Commission* [1965] ECR 203 and Case 123/77 *UNICME* v *Council* [1978] ECR 845).

52 Nor, the Commission adds, may the applicants rely on the judgment in Case 11/82 *Piraiki-Patraiki* v *Commission* [1985] ECR 207, inasmuch as the applicants in that case had challenged an individual decision addressed to a single Member State, whereas the present case concerns a general decision addressed to all the Member States.

53 The Commission does, however, concede that the applicants Ter Beek in Case T-480/93 and ERB and Guyana Investments in Case T-483/93 might be individually concerned by the first decision if it were established that they had entered into contracts for the delivery of Antillean semi-milled rice and in execution thereof had shipped a number of consignments at the time when the first decision entered into force. However, the Commission stresses that account must also be taken in that regard of the fact that the decision in issue to a large extent did no more than take over the provisions of the measure taken by the Government of the Netherlands Antilles, which had already been in force since 14 January 1993.

54 Finally, the Commission denies that the applicants have an interest in seeking the annulment of the decisions in issue since the first decision, which was modified by the second, was repealed on 16 June 1993, thus rendering the action devoid of purpose (Case C-123/92 *Lezzi* v *Commission* [1993] ECR I-809).

55 The applicants reply that the claim for annulment is admissible because the decisions, addressed to the Member States (see Article 5 of Decision 93/127 and Article 2 of Decision 93/211), are of direct and individual concern to them. The decisions are of direct concern to them because they do not leave the Member States any discretion as to the minimum price imposed or the products on which it is imposed. They are of individual concern to them because of the circumstances in which, in the words of the judgment in Case 25/62 *Plaumann* v *Commission* [1963] ECR 95,

they are differentiated from all other persons. The five applicants in both cases consider that the duty to give priority to such measures as would cause the least disturbance, laid down in Article 109(2) of the OCT Decision, implies that the Commission must inquire into the factual circumstances and into the negative effects which the safeguard measures might have on the economy of the OCT and on the undertakings concerned (see, by way of analogy, the interpretation given by the Court of Justice to Article 130(3) of the Act of Accession of the Hellenic Republic in *Piraiki-Patraiki*, cited above). The applicants therefore form part of the closed circle of undertakings whose situation the Commission should have examined before taking the safeguard measures and are thus individually concerned by the contested decisions. They also submit that, if the Commission is under such an obligation, the undertakings concerned are entitled to bring an action on the strength of any failure to comply with it.

56 The applicants ARM in Case T-480/93 and Alesie in Case T-483/93 further submit that it is clear that the decisions are of direct and individual concern to them in the way recognized in the *Piraiki-Patraiki* judgment, both from the fact that the Commission knew that they were the only undertakings which had invested specifically in the processing of brown rice from ACP States into semi-milled rice in order to take advantage of the opportunity of exporting it to the Community free of import levies under Article 101(1) of the OCT Decision, since it knew their identities and has had regular contacts with them, and from the fact that their production was paralysed by the safeguard measures because of the absence of outlets outside the Community.

57 The applicants Ter Beek in Case T-480/93 and ERB and Guyana Investments in Case T-483/93 add that they had entered into contracts for the delivery of semi-milled rice which had not yet been carried out or were in the process of being carried out when the first decision was adopted and that they had already shipped rice, even if it had not yet been sold. They thus belong to the limited and closed category of undertakings affected by the first decision because they could no longer

carry out the contracts into which they had entered or, at least, could no longer carry them out on the terms agreed. The Commission should have been aware of that special situation, given the time which elapsed between the French Government's first request and the adoption of the safeguard measure and given the resources at the Commission's disposal (see *Piraiki-Patraiki*, cited above, and Case 152/88 *Sofrimport* v *Commission* [1990] ECR I-2477, paragraph 12).

58 Finally, the applicants submit that even though the contested decisions have been repealed they still have an interest in seeing those decisions declared unlawful as long as that unlawfulness has not been recognized.

Findings of the Court

— Whether the applicants have an interest in bringing the action

59 It is settled law that a claim for annulment is not admissible unless the applicant has an interest in seeing the contested measure annulled (see, most recently, Case T-46/92 *Scottish Football Association* v *Commission* [1994] ECR II-1039, paragraph 14). Such an interest can be present only if the annulment of the measure is of itself capable of having legal consequences (see Case 53/85 *AKZO Chemie* v *Commission* [1986] ECR 1965, paragraph 21).

60 In that regard, it must be borne in mind that, under Article 176 of the Treaty, an institution whose act has been declared void is required to take the necessary measures to comply with the judgment. Those measures do not concern the elimination of the act as such from the Community legal order, since that is the very essence of its annulment by the Court. They involve, rather, the removal of the effects of the illegalities found in the judgment annulling the act. The annulment of an act which has already been implemented or which has in the mean

time been repealed from a certain date is thus still capable of having legal consequences. Such annulment places a duty on the institution concerned to take the necessary measures to comply with the judgment. The institution may thus be required to take adequate steps to restore the applicant to its original situation or to avoid the adoption of an identical measure (see Case 92/78 *Simmenthal* v *Commission* [1979] ECR 777, paragraph 32; *AKZO Chemie*, cited above, paragraph 21; and Case 207/86 *Apesco* v *Commission* [1988] ECR 2151, paragraph 16).

61 Furthermore, the *Lezzi* case, on which the Commission seeks to base one of its arguments, is distinguishable from the present case. Here, contrary to what was found in *Lezzi*, the decisions modifying Decision 93/127 and repealing the modified decision do not amount to a simple repeal thereof (see *Lezzi*, paragraphs 8 to 10), since they had no retroactive effect.

62 It follows that the applicants have retained their interest in seeking the annulment of the contested decisions.

— Whether the applicants are directly concerned

63 The Court considers that the contested decisions are of direct concern to the applicants because they no longer left any discretion to the Member States as to the imposition or level of the minimum price in issue.

— Whether the applicants are individually concerned

64 Under the second paragraph of Article 173 of the EEC Treaty, any natural or legal person may, under the conditions laid down in the first paragraph thereof, institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former.

65 In the present case, although the measures contested are 'decisions' addressed to the Member States, they are legislative by nature inasmuch as they apply to all the traders concerned, taken as a whole. It has consistently been held that the fact that the identities of the traders to whom such measures apply was known to the Commission at the time they were adopted is not sufficient to call into question their legislative nature, 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 (see, most recently, Joined Cases C-15/91 and C-108/91 *Buckl and Others* v *Commission* [1992] ECR I-6061, paragraph 25; Case C-213/91 *Abertal and Others* v *Commission* [1993] ECR I-3177, paragraph 17; Case C-309/89 *Codorniu* v *Council* [1994] ECR I-1853, paragraph 18; Case T-476/93 *FRSEA and FNSEA* v *Council* [1993] ECR II-1187, paragraph 19; and Case T-472/93 *Campo Ebro Industrial and Others* v *Council* [1995] ECR II-421, paragraph 32).

66 However, the fact that the contested measures are legislative by nature does not prevent them from being of individual concern to some of the traders concerned (Joined Cases 239 and 275/82 *Allied Corporation* v *Commission* [1984] ECR 1005, paragraph 11; Case 53/83 *Allied Corporation* v *Council* [1985] ECR 1621, paragraph 4; Case C-358/89 *Extramet Industrie* v *Council* [1991] ECR I-2501, paragraph 13; and *Codorniu*, cited above, paragraph 19). In order for a general measure adopted by a Community institution to be regarded as of individual concern to traders, it must affect their legal position because of a factual situation which differentiates them from all other persons and distinguishes them individually in the same way as a person to whom it is addressed (see *Plaumann*, cited above,

at p. 107; *Codorniu*, paragraph 20; Case C-257/93 *Van Parijs and Others* v *Council* [1993] ECR I-3335, paragraph 9; Case T-489/93 *Unifruit Hellas* v *Commission* [1994] ECR II-1201, paragraph 21; and *FRSEA and FNSEA*, cited above, paragraph 20).

67 In that regard, it has been held that where the Commission 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* and *Sofrimport*, cited above).

68 In the present case, the contested measures were adopted on the basis of Article 109 of the OCT Decision, the terms of which are substantially the same as those of Article 130 of the Act of Accession of the Hellenic Republic, on the basis of which the decision in issue in *Piraiki-Patraiki* was adopted. Article 130(3) of the Act of Accession of the Hellenic Republic provides: 'The measures authorized under paragraph 2 may involve derogations from the rules of the EEC Treaty and of this Act to such an extent and for such periods as are strictly necessary in order to attain the objectives referred to in paragraph 1. Priority shall be given to such measures as will least disturb the functioning of the common market.' Article 109(2) of the OCT Decision provides: 'For the purpose of implementing paragraph 1, priority shall be given to such measures as would least disturb the functioning of the association and the Community. These measures shall not exceed the limit of what is strictly necessary to remedy the difficulties that have arisen.'

69 Article 130(3) of the Act of Accession of the Hellenic Republic was interpreted by the Court of Justice in paragraph 28 of its judgment in *Piraiki-Patraiki* as requiring the Commission, 'in so far as the circumstances of the case permit ... [to] inquire into the negative effects which its decision might have on the economy of [the Member State with regard to which the protective measure is requested] as well as

on the undertakings concerned' in order to ascertain whether the measure which it envisages adopting meets the conditions laid down in that article.

70 This Court considers that Article 109(2) of the OCT Decision must be interpreted — not only because of the similarity of its terms with those of Article 130(3) of the Act of Accession of the Hellenic Republic but also because the purpose of the two provisions is the same, namely to define the level at which the Community may adopt protective or safeguard measures — as meaning that when the Commission envisages taking safeguard measures on the basis of that provision it must, in so far as circumstances permit, inquire into the negative effects which its decision might have on the economy of the OCT in question as well as on the undertakings concerned.

71 That interpretation of Article 109(2) of the OCT Decision is all the more compelling in that the rules governing imports into the Community of goods from the OCT are more liberal than the rules formerly in force as between the Hellenic Republic and the other Member States. Articles 25 and 29 of the Act of Accession allowed the continued levying of customs duties and charges having equivalent effect during the transitional period, whereas Article 133 of the Treaty and Articles 101 and 102 of the OCT Decision required, at the time when the contested measures were adopted, the complete abolition of customs duties and charges having equivalent effect on imports into the Community of products originating in the OCT.

72 Since, therefore, the adoption of safeguard measures on the basis of Article 109 of the OCT Decision restricts a freedom to import which is more broadly defined than that established by the Act of Accession, the Commission's obligation to take into consideration the specific situation of the undertakings concerned when it proposes to lay down derogations from that freedom was even stronger in the present case than in the context of the Act of Accession.

73 In order to determine whether the applicants belong to a limited class of traders whose legal position is affected because of a factual situation which differentiates them from all other persons and distinguishes them individually in the same way as a person to whom a measure is addressed (see the judgments in *Plaumann* and *Piraiki-Patraiki*, paragraph 28), it is therefore necessary to consider whether they are 'concerned' within the meaning of that latter judgment.

74 In paragraph 28 of *Piraiki-Patraiki* judgment, it is stated that in determining the 'undertakings concerned', the Commission must 'also' consider 'the contracts which those undertakings ... have already entered into and whose execution will be wholly or partially prevented' by the measure in issue. By its use of the word 'also', that judgment shows that the existence of such contracts is not the only factor capable of defining the limited class of undertakings concerned but that other factors may also be used for that purpose.

75 In this instance, the applicants Ter Beek in Case T-480/93 and ERB in Case T-483/93 have adduced proof that they had shipments of rice in transit to the Community when the first decision, which the second decision merely amended, was adopted, that they took part with the other applicants in the meeting on 12 January 1993 between the Netherlands Permanent Representative's office and the Commission and that the Commission was therefore aware of their particular situation.

76 In those factual circumstances, Ter Beek and ERB may be considered to be undertakings concerned by the measure. Even though no obligation to take account of the situation of goods in transit appears as such in Article 109(2) of the OCT Decision, as was the case with Article 3(3) of Council Regulation (EEC) No 2707/72 of 19 December 1972 laying down the conditions for applying protective measures for fruit and vegetables (OJ, English Special Edition 1972 (28 to

30 December), p. 3), in issue in *Sofrimport*, such an obligation is necessarily entailed by Article 109(2) of the OCT Decision by reason of the specific interest which undertakings have in protecting their goods in transit against the effects of a safeguard measure, in so far as such undertakings are identified or identifiable before the Commission adopts a decision. That was the case here for the applicants who had submitted their views to the Commission at the meeting on 12 January 1993.

77 Nor, moreover, may the Commission claim that the *Piraiki-Patraiki* judgment is not relevant as a precedent because the measure contested in that case was addressed only to a single Member State whereas the decisions contested here are addressed to all the Member States. What matters is not the number of Member States in which the safeguard measure applies but the protection enjoyed under Community law by the country or territory, and by the undertakings concerned, against which the safeguard measure is authorized or adopted. On that point, the present case is no different from the *Piraiki-Patraiki* case.

78 It follows that the applicants Ter Beek in Case T-480/93 and ERB in Case T-483/93 are individually concerned by the contested decisions.

79 Since both Case T-480/93 and Case T-483/93 each involve a single application, there is no need to consider whether the applicant ARM in Case T-480/93 or the applicants Alesie and Guyana Investments in Case T-483/93 are entitled to bring proceedings (see Case C-313/90 *CIRFS and Others* v *Commission* [1993] ECR I-1125, paragraph 31).

80 It follows from all the foregoing that the objection of inadmissibility raised by the Commission must be dismissed.

B — *Substance*

First plea in law: Illegality of the legal basis for the contested decisions

— Arguments of the parties

81 The applicants maintain that the contested decisions are unlawful inasmuch as their legal basis is a provision which is itself unlawful, namely Article 109 of the OCT Decision, according to which the Commission may take safeguard measures if as a result of the application of that Decision 'serious disturbances occur in a sector of the economy of the Community or of one or more of its Member States, or their external financial stability is jeopardized, or if difficulties arise which may result in a deterioration in a sector of the Community's activity or in a region of the Community'. They claim that such an authorization to take safeguard measures in circumstances not provided for in Article 134 of the Treaty is contrary to the provisions of the Treaty.

82 The applicants stress that the Council cannot extend the tenor of Article 134 of the Treaty by a general decision adopted on the basis of Article 136. Articles 131 to 135 of the Treaty not only set out the aims pursued by the association of the OCT but also create rights and obligations from which the Council may not derogate, even in decisions which it adopts on the basis of the second paragraph of Article 136, unless express provision has been made for derogating measures, as in the Protocol concerning imports into the European Economic Community of petroleum products refined in the Netherlands Antilles, inserted into a protocol annexed to the Treaty, in Article 132(5) of the Treaty, which makes the provisions laid down in the chapter relating to the right of establishment applicable subject to any special provisions laid down pursuant to Article 136, in Article 133(3) of the Treaty, which authorizes the OCT to levy customs duties, or in Article 1 of the Protocol on special arrangements for Greenland, annexed to the Treaty. They argue that if the second paragraph of Article 136 of the Treaty had allowed the Council generally to derogate from Articles 131 to 135 of the Treaty, such explicit derogations would not have been necessary.

83 The applicants further emphasize that in Case 91/78 *Hansen* v *Hauptzollamt Flensburg* [1979] ECR 935, paragraph 22, the Court of Justice held that the association of the OCT was intended to extend to the countries and territories associated with the Community and to the products originating in such countries and territories the rules relating to the free movement of goods within the Community. They add that it is clear from the judgment in Joined Cases 80/77 and 81/77 *Commissionnaires Réunis* v *Receveur des Douanes* [1978] ECR 927, paragraph 19, that the objectives of free movement and of the common agricultural policy should not be set one against the other but combined, with the principle of free movement prevailing. The objectives of the association are not subsidiary to those of the common agricultural policy pursued, in the present case, by the common organization of the market in rice. In the absence of any precedence of the latter justifying a derogation from the rules of free movement of goods originating in the OCT, the only permissible exceptions to that free movement are those explicitly provided for in the Treaty.

84 The Commission replies that Article 136 of the Treaty gives the Council a broad discretion to adapt the rules governing the association of the OCT in accordance with the development of close economic relations between the OCT and the Community as a whole and with the economic, social and cultural development of the OCT. The Council may therefore, without infringing the principles of the association expressed in the provisions of Part Four of the Treaty, insert a safeguard clause such as that embodied in Article 109 of the OCT Decision. Such a clause is compatible with Article 134 of the Treaty, which is not to be interpreted rigidly and literally but in a way which takes account of the fact that it was adopted before the common organizations of the agricultural markets were set up and tariff barriers between the Member States abolished.

85 The Council, as intervener, considers that the relevant question is not whether Article 109 of the OCT Decision complies with Article 134 of the Treaty but whether it complies with Article 136, the legal basis on which it was adopted.

86 In that regard, the Council states, first, that it is necessary to define the scope of the words 'on the basis of the experience acquired and of the principles set out in

this Treaty', used in Article 136 to define the limits of its powers. The fact that the Council is to adopt a decision relating to the association of the OCT 'on the basis of the experience acquired' implies that it must take into consideration the experience acquired in the application of previous decisions and relations with the ACP States, whereas the 'principles laid down in this Treaty' are not merely those set out in Article 131 but also include the principles enshrined in Articles 1 to 7 of the Treaty, together with the objectives of the common agricultural policy or the general principles recognized in the case-law, such as the principle of Community preference (Case 5/67 *Beus* v *Hauptzollamt München* [1968] ECR 83, at p. 97 and 98; Case C-46/89 *SICA and SIPEFEL* v *Commission* [1990] ECR I-3621, paragraph 29).

87 In reply to that argument, the applicants submit that the 'experience acquired' to be taken into consideration cannot concern relations with the ACP States, since that would be to disregard the privileged position to be accorded to the OCT over that of the ACP States. They further point out that the principle of Community preference cannot prevail as against products from the OCT, since such products have been placed on the same footing as Community products by Article 132(1) of the Treaty.

88 Secondly, the Council maintains that, within the limits set out above, it has a broad discretion to adopt decisions relating to the association of the OCT provided that it respects the essential aim of that association, namely to ensure that such decisions, taken globally, further the interests and the development of the OCT. Certain individual provisions of those decisions may thus occasionally allow the interests of the Community's common agricultural policy to prevail over those of the OCT. In the present case, Article 109 of the OCT Decision meets all the requirements of Article 136 of the Treaty and is thus not illegal. That approach was confirmed by Advocate General Jacobs in his Opinion in Case C-260/90 *Leplat* v *French Polynesia* [1992] ECR I-643.

89 The applicants reply that Article 3(k) of the EEC Treaty, now Article 3(r) of the EC Treaty, according to which the aim of the association of the OCT is to 'increase trade', precludes a Council decision relating to the arrangements applicable to the OCT from curtailing trade between the OCT and the Community, even if that decision were to further the development of the OCT. They further point out that Advocate General Jacobs, in his Opinion cited above, stressed the requirement that any limit placed by the Council on the powers of the OCT to impose customs duties must be properly reasoned. The decision in issue, however, contains no reasoning justifying the possibility of taking safeguard measures.

— Findings of the Court

90 This plea in law raises the question whether the Council was entitled to insert a safeguard clause in a decision relating to the association of the OCT with the Community, taken under the second paragraph of Article 136 of the Treaty.

91 The OCT with which certain Member States maintain special relations are linked to the Community under association arrangements governed by Part Four of the Treaty. Therefore, although the OCT admittedly enjoy a more favourable status than do other countries associated with the Community, they are none the less not members of it. The OCT do not participate in the common agricultural policy, and the aim of the system of free movement of goods between the OCT and the Community under Part Four of the Treaty is not to establish an internal market of the kind set up by the Treaty between the Member States.

92 The implementation of the association arrangements between the OCT and the Community described in Articles 131 to 135 of the Treaty is, moreover, a dynamic process the detailed rules for the application of which were, under Article 136 of the Treaty, to be defined, following the expiry of an implementing convention

covering the initial period of five years, by a decision of the Council, acting unanimously, taken on the basis of 'the principles set out in this Treaty' and of 'the experience acquired'.

93 It must be stressed that the reference to the 'principles set out in this Treaty' is not merely to the principles set out in Part Four of the Treaty but to all the principles set out in the Treaty, in particular those listed in Part One, entitled 'Principles'. Implementing decisions adopted by the Council on the basis of the second paragraph of Article 136 of the Treaty must therefore serve to strengthen the association of the OCT in order to increase trade and to promote jointly economic and social development (Article 3(k) of the EEC Treaty) without, however, hindering the adoption of a common policy in the sphere of agriculture (Article 3(d) of the EEC Treaty). It is therefore for the Council to reconcile the various Treaty principles (see, by way of analogy, Case 5/73 *Balkan-Import-Export* v *Hauptzollamt Berlin-Packhof* [1973] ECR 1091, paragraph 29; Case 10/73 *Rewe-Zentral* v *Hauptzollamt Kehl* [1973] ECR 1175, paragraph 20; Case 37/83 *Rewe-Zentrale* v *Landwirtschaftskammer Rheinland* [1984] ECR 1229, paragraphs 18 to 20; and Case 195/87 *Cehave* v *Hoofdproduktschap voor Akkerbouwprodukten* [1989] ECR 2199, paragraph 21).

94 When making the choices necessary in that regard, the Council must also take account of the 'experience acquired' in order to bring the association arrangements constantly more closely in line with the objectives set out in Part Four of the Treaty (see Case C-430/92 *Netherlands* v *Commission* [1994] ECR I-5197, paragraph 22). It did just that when it adopted the successive decisions relating to the association of the OCT with the Community. Thus, as soon as imports of products from the OCT were exempted from customs duties, a safeguard clause in favour of the Community was inserted into the implementing decision (Article 15(2) of Council Decision 70/549/EEC of 29 September 1970, OJ, English Special Edition, Second Series I(2), p. 164). More particularly, imports of agricultural products from the OCT have always been subject to specific arrangements providing a progressive liberalization of the importation of such products into the Community while at the

same time protecting the implementation of the common agricultural policy and the principle of Community preference (see the second paragraph of Article 10 of Council Decision 64/349/EEC of 25 February 1964 (Journal Officiel 1964 L 93, p. 1474); Article 2(2) of Council Decision 70/549/EEC of 29 September 1970 (OJ, English Special Edition, Second Series I(2), p. 164); Articles 2(2) and 3(2) of, and Article 4 of Annex III to, Council Decision 76/568/EEC of 29 June 1976 (OJ 1976 L 176, p. 8); Articles 3(2) and 4(2) of, and Article 5 of Annex III to, Council Decision 80/1186/EEC of 16 December 1980 (OJ 1980 L 361, p. 1); Articles 70(2) and 71(2) of, and Article 5 of Annex III to, Council Decision 86/283/EEC of 30 June 1986 (OJ 1986 L 175, p. 1); all the above decisions relating to the association of the overseas countries and territories with the European Economic Community). It was thus not until the OCT Decision was adopted on 25 July 1991 that agricultural products originating in the OCT were placed on the same footing as other products and were able to enjoy, for the first time in the process of association of the OCT with the Community, the same free access to the Community market as all other products, namely exemption from customs duties subject only to the possible application of the safeguard clause provided for in Article 109 of the OCT Decision. The OCT Decision therefore represented an important step forward in enacting for the first time as a principle that there should be free access to the Community for agricultural products originating in the OCT, even if it also made that access subject, necessarily also for the first time, to a general safeguard clause in order to enable the Community to react to a limited extent to difficulties arising on the Community market as a result of free access thereto for products originating in the OCT. The fact that the rules governing agricultural products originating in the OCT evolved in that manner is therefore inconsistent neither with the preamble to nor with Article 131 of the Treaty in so far as it promotes the economic and social development of the OCT and the establishment of close economic relations between them and the Community as a whole.

95 It follows from all the foregoing that the Council was entitled, on the basis of the second paragraph of Article 136 of the Treaty and with a view to reconciling the principles of the association of the OCT with the Community and those of the common agricultural policy, to insert into the OCT Decision a safeguard clause authorizing, *inter alia*, restrictions on the freedom to import agricultural products originating in the OCT if such imports give rise to serious disturbances in a sector of the economy of the Community or one or more of its Member States, or jeopardize their external financial stability, or if difficulties arise which may result in a

deterioration in a sector of the Community's activity or in a region of the Community. In making that choice, which limits only exceptionally, partially and temporarily the freedom to import products from the OCT into the Community, the Council did not go beyond the bounds of its discretionary power under the second paragraph of Article 136 of the Treaty.

96 That conclusion is not called into question either by Article 134 of the Treaty or by any other provisions of the Treaty or of any protocols having the same rank, providing for specific exceptions to the arrangements governing the association of the OCT, as the applicants claim (see paragraph 83 above). The general scope of the Council's obligation under the second paragraph of Article 136 of the Treaty, namely to define the detailed rules for the implementation of the association having regard to all the principles set out in the Treaty, is not curtailed by those provisions, whose only purpose is to regulate specific situations. It does not appear from any of those provisions that the authors of the Treaty intended, by adopting them, to affect the scope of the second paragraph of Article 136 of the Treaty.

97 The first plea in law must therefore be rejected.

Second plea: Infringement of Article 109(1) of the OCT Decision

— Arguments of the parties

98 The applicants point out that, although Article 109(1) of the OCT Decision authorizes the adoption of safeguard measures, such measures cannot be envisaged unless, as a result of the application of that Decision, serious disturbances occur in a sector of the economy of the Community or of one or more of its Member States, or their external financial stability is jeopardized, or unless difficulties arise which may result in a deterioration in a sector of the Community's activity or in a region

of the Community. In their view, imports of semi-milled rice from the Netherlands Antilles were and are not likely ever to cause disturbances in the rice-growing sector in the Community.

99 They state, first, that Community rice was in a favourable position when the contested decisions entered into force. That favourable position, illustrated by a rise in prices in February 1993, following a drop during the last quarter of 1992 (USD 778.17 in February 1993, USD 724.62 in December 1992 and USD 859.38 in September 1992 for long grain milled rice with 5% broken rice of Community origin), was due both to a shortage caused by drought in Spain and to a devaluation of the Italian lira, encouraging traders to buy. That shortage and the favourable position of Community rice persisted, so that by March 1993 no quantities of Community rice were available. There was thus no disturbance to or threat of a deterioration in the rice-growing sector in the Community of such a kind as to justify the safeguard measures.

100 Secondly, the applicants state that it was impossible for imports of Antillean semi-milled rice to cause any disturbance to or threat of a deterioration in the rice-growing sector in the Community. Imports of Antillean semi-milled rice is limited by two factors. First, such imports are only possible to the extent that the demand for long grain milled rice cannot be covered by Community production itself, because the Community price is lower than the Netherlands Antilles price. They cannot, therefore, give rise to any pressure on the price of Community rice (see below, section 1). Secondly, the quantities of rice imported from the Netherlands Antilles can never exceed the available surplus from the ACP States and that surplus has never in the past exceeded the tariff quota which the Community has laid down for those countries. The quantity of rice available for processing from semi-milled into milled rice cannot, therefore, increase (see below, section 2).

1. Price levels

101 The applicants maintain that it is necessary to compare the price of milled rice of Community origin with the price of milled rice produced from Antillean semi-milled rice. That is the only means of comparing the price of Antillean rice with that of Community rice, since there is no semi-milled rice of Community origin and the Netherlands Antilles do not export milled rice. Producers of Community milled rice buy only paddy rice in order to avoid having to produce milled rice in two stages (paddy rice — semi-milled rice, and semi-milled rice — milled rice), since such a process is more costly. For that same reason, the only conceivable market disturbance would concern milled rice: a drop in the price of Antillean semi-milled rice could cause a drop in the price of milled rice, which could in turn lead to a drop in the price of Community-produced paddy rice.

102 The applicants maintain that, in order to obtain the price of milled rice produced from Antillean rice, the cost of processing using a given method must be added to the price of Antillean semi-milled rice.

103 They point out that the price of milled rice produced from Antillean semi-milled rice was USD 200 higher than that of milled rice of Community origin. They thus infer that, at the price at which semi-milled rice originating in the Netherlands Antilles was available on the market at the material time, the price of milled rice produced from that semi-milled rice could not in any event compete with the price of milled rice of Community origin. At such price levels, imports of Antillean rice were only possible when there was no more Community rice available. Consequently, such imports could not have caused a drop in Community prices likely in turn to hinder the varietal conversion of rice production in the Community sought by Regulation No 3878/87.70% of Indica rice is, moreover, parboiled rice which, they assert, is of higher quality and more expensive, and is not interchangeable with Antillean rice.

104 Finally, the applicants deny that the level of prices for Antillean rice provided them with an excessive profit margin allowing them to bring down their prices. Even if that had been the case, impugning their motives in that way could not be enough to justify the adoption of safeguard measures, particularly since no such considerations were stated among the reasons given for the contested decisions.

105 The Commission replies that the prices to be compared are those for semi-milled and not milled rice. That is the only level at which competition takes place, since the 'consumers' of the rice affected by the contested measures are Community rice mills producing milled rice. Those mills can also use Community paddy rice or imported brown rice. Competition thus takes place between the various raw materials used by Community rice mills. However, since Community producers do not provide semi-milled rice, it is necessary to extrapolate a price for Community semi-milled rice from those for Community paddy rice and intervention buying.

106 According to the Commission, such a comparison shows that, until the Netherlands Antilles authorities introduced a minimum price, the price of Community semi-milled rice (USD 767.48 per tonne) was appreciably higher than that of Antillean semi-milled rice (USD 700 per tonne). That differential meant that Community rice producers had to choose either to lower their prices or to store their rice until the situation improved. As a result, there was a drop in the price of Community-produced paddy rice in comparison with the previous year. Prices for Spanish rice dropped to 85.18%, and for Italian rice to 91.82%, of the intervention price (see annex 5 to the defence). The price of Community-produced paddy rice only increased once the safeguard measures had been announced in February 1993.

107 The Commission further casts doubt on the accuracy of the prices used by the applicants in support of their submission. It adds that the applicants cannot complain that it has used extrapolated figures, since they do the same (see annex 7

to the application in Case T-480/93 and annex 8 to the application in Case T-483/93). It also challenges the relevance of the factors on which the applicants base their market analysis, particularly since those factors postdate the adoption of the safeguard measure. The question is whether the assessment made when the measure was adopted was reasonable at that time. Those factors, moreover, cover the whole market, concerning essentially Japonica rice, whereas the present case relates to Indica rice.

108 The Commission maintains that the price differential found was threatening the programme of varietal conversion from the cultivation of Japonica rice (of which the Community produces a surplus) to that of Indica rice (in which there is a deficit), set up by Regulation No 3878/87, since that programme presupposes that producers will be assured of outlets for their Indica rice at prices guaranteed by the fixing of an intervention price. A fall in prices thus gives rise not only to serious budgetary consequences for the Community as a result of the need to make massive intervention purchases but also, in the long term, to producers going back to Japonica rice, thus increasing interventions and export refunds.

109 The Commission also wonders how the applicants can state in their reply that Antillean milled rice and milled rice of Community origin are interchangeable only to a limited extent because 70% of milled rice of Community origin consists of parboiled rice. It states that the argument is irrelevant since parboiling is a process carried out by the rice mills and not by producers of paddy rice.

110 The Commission stresses, finally, that the price of brown rice from Surinam is so much lower (USD 400) than that of Community rice that the applicants have a wide margin of manoeuvre to determine the price of their rice on the Community market by adjusting their profit margins.

111 The parties are further in disagreement as to the method of 'converting' the prices given.

2. The quantities of semi-milled rice imported

112 The applicants point out that the export capacity of the ACP States is very limited. They cite as proof the fact that such exports have never exceeded the Community tariff quota of 125 000 tonnes and that the quantity offered on the Community market has not increased.

113 They consider, therefore, that the ACP States are faced with the choice of either exporting their brown rice directly to the Community or exporting it to the Netherlands Antilles. Imports of Antillean semi-milled rice produced from brown rice originating in the ACP States, far from being in addition to direct imports of brown rice from those States, are thus a substitute for those imports. Under Article 6(2) of Annex II to the OCT Decision (see paragraph 7 above), rice processed in the Netherlands Antilles is not treated as originating in the OCT unless imported from the ACP States. Since only rice originating in the OCT enjoys, under Article 133 of the Treaty and Article 101(1) of the OCT Decision, exemption from customs duties and charges having equivalent effect, Antillean semi-milled rice imported into the Community must necessarily have been produced from rice from an ACP State. The only ACP States with surplus rice production are Surinam and Guyana.

114 The applicants point out that it is very much in the interest of the ACP States to export their rice production to the Netherlands Antilles, where they are paid a higher price than if they exported directly to the Community where their rice is in competition with American rice. Since there is only a very limited surplus rice production in the ACP States, they would be unable to maintain levels of exports to the Community while at the same time exporting rice to the Netherlands Antilles. According to the applicants, the combined imports of rice from the Netherlands

Antilles and the ACP States in 1992 (95 855 tonnes, of which 40 830 were of ACP origin and 58 042 of Antillean origin) were of the same order as the imports of rice from the ACP States in 1990 (83 857 tonnes) and 1991 (94 373 tonnes).

115 The Commission states in reply that, from the point of view of the Community, it is not immaterial whether surplus rice production from the ACP States is exported directly to the Community or via the Netherlands Antilles in so far as, on the one hand, it is subject to an admittedly small levy and to a limitation on quantity whereas, on the other, there is no levy or limitation on quantity. There is thus a danger that the whole of the ACP States' surplus production might be imported into the Community free of any levy or tariff quota, via the Netherlands Antilles. In its rejoinder, it points out that the ACP States' tariff quota of 125 000 tonnes of rice was exceeded in 1993, when combined imports from the ACP States and the Netherlands Antilles amounted to 179 154 tonnes. Again, from September to December 1992, imports of Antillean rice amounted to the equivalent of 27 019 tonnes of milled rice, or 11% of the Community's production.

116 The Commission concludes that such an increase of imports free of the levy was bound to lead to a drop in prices on the Community market.

3. The danger to the Poseidom programme

117 The applicants maintain that, contrary to the affirmations in the preamble to the first of the contested decisions, the safeguard measures cannot be justified by the alleged danger to the Poseidom programme to promote the sale of rice produced in French Guiana to Guadeloupe and Martinique. They have never exported rice to Guadeloupe or Martinique or had the intention of doing so, having more than sufficient outlets in the Community. That situation is confirmed, they say, in the letter

of the French Government of 14 December 1992 (see paragraph 19 above) and in a report from the Commission to the Council of 25 November 1993 (COM(93) 555 final), on the implementation of the trading arrangements, recording that no Antillean rice was imported into the French overseas departments.

118 The Commission and the French Republic, as intervener, reply that the specific Community measures granting aid for the production of rice in French Guiana and its marketing in Guadeloupe and Martinique (Article 3(2) and (3) of Regulation No 3673/91 — see paragraph 9 above) could be hampered by imports of rice from the Netherlands Antilles at lower prices. The fragility of the market for rice in those two departments, which could be upset merely by the importation at any moment of a single ship's cargo, precludes any corrective measure which, whatever its form, would be bound to take effect too late. Only a preventive safeguard measure, therefore, can be effective. The Commission adds, however, that when it took its decision it considered that argument important but not preponderant.

— Findings of the Court

119 It must be determined whether, on the basis of the information available to it when it adopted the contested decisions, the Commission could reasonably conclude that the conditions for applying Article 109(1) of the OCT Decision were met.

120 Article 109(1) of the OCT Decision provides that the Commission 'may' take or authorize safeguard measures either 'if, as a result of the application of [the OCT] Decision, serious disturbances occur in a sector of the economy of the Community or one or more of its Member States, or their external financial stability is

jeopardized' or 'if difficulties arise which may result in a deterioration in a sector of the Community's activity or in a region of the Community'.

121 It is clear from that provision that only one of the conditions laid down need be met in order to introduce safeguard measures. If one of the conditions is met, however, the Commission is not required to adopt a safeguard measure but merely to decide in that regard.

122 Within the field of application of Article 109 of the OCT Decision, therefore, the Commission enjoys broad discretion not merely as regards the existence of the conditions justifying the adoption of a safeguard measure but also as to whether a safeguard measure should be adopted or not. In cases involving such discretion, this Court must confine itself to considering whether the exercise of that discretion contains a manifest error or constitutes a misuse of power or whether the Commission clearly exceeded the bounds of its discretion (*Piraiki-Patraiki*, cited above, paragraph 40).

123 As regards the first decision, it is clear from its wording, from the various documents before the Court and from the Commission's statements at the hearing that the Commission took various parameters into consideration before concluding that it was necessary to adopt safeguard measures.

124 First, it found that the price of Community paddy rice which, like Antillean semi-milled rice, can be used as a raw material by Community producers of milled rice dropped appreciably between October 1992 and January 1993 and rose again in February 1993. According to the figures provided by the Commission (annex V to its reply to the Court's tenth written question), the price for Spanish paddy rice was USD 365 per tonne in January 1993, its lowest level during the 1992-1993 marketing year, as against USD 470 per tonne in October 1992; for Italian rice, the price was USD 402 per tonne in December 1992, as against USD 452 per tonne in

October 1992. In February 1993, the price of Spanish rice was USD 420 per tonne and of Italian rice USD 497 per tonne. The trend shown in those figures is similar to that for Community milled rice which, according to the figures produced by the applicants (application in Case T-480/93, paragraph 54, and in Case T-483/93, paragraph 82), was USD 724.26 per tonne in December 1992, as against USD 859.38 per tonne in September 1992, but rose again to USD 778.17 per tonne in February 1993, when traders were expecting safeguard measures (see Weekly Rice Market News, Vol. 74, No 5, 26 January 1993, annex 2 to annex 9 to the application in Case T-480/93, reporting rumours that safeguard measures might be adopted). The Court considers that the prices given by the Commission are reliable because they were obtained from a commodities market. Despite the fact that the applicants have expressed doubts as to the extent of the drop in prices for that type of rice, they have not succeeded in disproving the existence of that drop which is, moreover, also apparent from the figures cited in paragraph 54 of the application in Case T-480/93 and paragraph 82 of the application in Case T-483/93.

125 In reply to a question from the Court, furthermore, the applicants reserved the right to challenge the prices given by the Commission after carrying out additional checks with independent merchants, but have not made any subsequent comment on that point, thus further buttressing the credibility of the information given by the Commission.

126 Nor can the applicants derive any argument from a considerable fall in intervention stocks in order to deny that the price of Community Indica paddy rice could have fallen below the intervention price. The figures which they cite in their applications and in their replies to the written questions put by the Court relate to intervention stocks of Japonica and not Indica rice, as the Commission pointed out at paragraph 24 of its defence, without being contradicted by the applicants.

127 Secondly, the Commission observed that approximately 27 000 tonnes of rice — the equivalent of 11% of the Community production of paddy rice — were imported from the Netherlands Antilles between September and December 1992.

That figure is not challenged by the applicants. An even higher figure, moreover — 36 161 tonnes — is shown in the tables in annex 16 to the application both in Case T-480/93 and in Case T-483/93, which relate to the issue of import licences and show, moreover, that there were no imports of rice from the Netherlands Antilles during the first half of 1992.

128 On the basis of those figures — a considerable fall in the price of Community paddy rice, coupled with a considerable increase in imports of Antillean semi-milled rice, a competing product — the Commission was entitled to find that difficulties had arisen, within the meaning of Article 109(1) of the OCT Decision, which might result in a deterioration in the Indica rice growing sector in the Community and that safeguard measures could therefore be implemented.

129 It is further to be noted that the Commission also took into consideration other additional factors to find that Antillean rice was offered at an appreciably lower price than Community rice could be offered at the relevant stage of processing, namely semi-milled, a fact which the applicants no longer challenge.

130 The Court considers that the Commission did not commit any manifest error of assessment by comparing the two raw materials at that stage. First, its choice to do so demonstrates the Commission's diligence in comparing the two products concerned at the same stage of processing. In addition, since Antillean rice is offered on the Community market as semi-milled rice, it was reasonable for the Commission to compare the two products in competition at that level and to calculate for that purpose a theoretical price for Community semi-milled rice. With regard to that price, the Court considers that the applicants have not succeeded in refuting the calculations put forward by the Commission, since they have confined themselves to alleging that the processing and additional costs were too high or challenging the conversion rate used as between the various levels of processing, without submitting any proof of those allegations (see paragraph 29 of the reply in Case

T-480/93, paragraph 30 of the reply in Case T-483/93 and the parties' answers to question 10 of the Court). Finally, the applicants cannot complain that the Commission calculated a theoretical price for Community semi-milled rice, since the comparison which they themselves propose is also based on the calculation of a theoretical price, that of milled rice produced from Antillean semi-milled rice (see annex 7 to the application in Case T-480/93 and annex 8 to the application in Case T-483/93).

131 The Commission therefore rightly found that there was a considerable difference between the price for Community rice and that for Antillean rice, which might have caused the collapse in the price of Community rice between September 1992 and January 1993.

132 The Commission was also entitled to refer to the risk that exports of Antillean rice to the French overseas departments might jeopardize the Poseidom programme for the marketing in Guadeloupe and Martinique of rice harvested in French Guiana. Provided that the risk is sufficiently real if such exports take place, it is immaterial that they had not yet actually taken place when the first measure was adopted. Here, the applicants have not challenged the Commission's statement that the rice market in those two departments was so fragile that it could be upset merely by the importation of a single ship's cargo. Since such a cargo could be imported at any moment, any corrective measure was bound to be too late. Only a preventive safeguard measure, therefore, could be effective.

133 The second decision, it must first be pointed out, merely amends Article 1 of the first decision and appreciably moderates its tenor by simply fixing a markedly lower absolute minimum price than that laid down in the first decision. By adopting that second decision, therefore, the Commission did not lay down a new safeguard measure of independent scope but merely attenuated the arrangements laid

down in an existing safeguard measure. It was not therefore obliged to reconsider at that stage whether safeguard measures could be adopted in principle, as it had had to do before adopting the first decision.

134 It was, moreover, and in any event, reasonable for the Commission to consider that, despite the improvement in the competitive situation as regards rice in April 1993, it was still necessary to protect Community rice growing by maintaining a safeguard measure. The sowing season for rice begins in April. It was therefore important, in order to avoid a return to the cultivation of Japonica rice, already in surplus production, that Community growers' confidence in future price trends for Indica rice should not be shaken. In that regard, it is irrelevant that at that time Community paddy rice was in shortage and its price higher. Because the measure in issue, maintaining the level of Community production of Indica rice, was a preventive one, what mattered was not the situation prevailing when the decision was adopted but the way in which Community growers might expect that situation to develop. The situation was not in fact such as to lead growers to believe that any further collapse in the price of Community rice would be avoided, whereas they could be reassured if a safeguard measure were maintained, inasmuch as it showed the Commission's determination to continue to support the cultivation of Indica rice in the Community and thereby neutralize the risk of a major drop in its price. When it adapted its safeguard measure to a new situation, therefore, the Commission did not clearly exceed the bounds of its discretion under Article 109(1) of the OCT Decision.

135 It follows from all the foregoing that the second plea must be rejected.

Third plea in law: Infringement of Article 109(2) of the OCT Decision.

136 The applicants maintain that both the contested decisions failed to comply with Article 109(2) of the OCT Decision, which provides: 'For the purpose of implementing paragraph 1, priority shall be given to such measures as would least

disturb the functioning of the association and the Community. These measures shall not exceed the limits of what is strictly necessary to remedy the difficulties that have arisen.' Both the contested decisions, however, the applicants claim, go well beyond what is necessary to eliminate a possible disturbance or threat of deterioration in the Community rice-growing sector.

— The first decision

1. Arguments of the parties

137 The applicants state that the relative minimum price fixed by the first decision at 120% of the levy on semi-milled rice prevented the sale of Antillean rice and excluded it from the market. The applicants' investments in the Netherlands Antilles were thus jeopardized, causing a disturbance of the association of the OCT with the Community. Those ill effects were excessive with regard to the intended aim of eliminating the disturbance or threat of deterioration in the Community rice market. The decision was, moreover, adopted in breach of the 'principle of a hierarchy of preferences' inasmuch as the minimum price imposed on Antillean rice was higher than the price of rice from non-member countries, thus placing rice from the OCT in a less favourable position than rice from the ACP States or the United States. The safeguard measure thus protected not only Community rice-growing but also imports of rice from non-member countries.

138 The Commission stresses, first, that it preferred to fix a minimum price rather than reintroduce the import levy temporarily because it was convinced that such a measure would fully satisfy the interests of Community producers and have a lesser effect on the processing industry in the Netherlands Antilles.

139 Secondly, it points out that a safeguard measure must be effective and that the only way to eliminate the disturbance of rice growing in the Community was to impose a minimum price for Antillean rice capable of offsetting the competitive handicap of Community rice. The Commission acknowledges, however, that the relative minimum price made Antillean rice more expensive than rice from non-member countries.

2. Findings of the Court

140 This plea in law raises the question whether, in taking the contested measures, the Commission failed to comply with the principle of proportionality expressed in Article 109(2) of the OCT Decision.

141 The aim of Article 109 of the OCT Decision is solely to remedy difficulties encountered in a sector of the economy of the Community or to prevent such difficulties from arising. In order to achieve that aim, Article 109(2) authorizes only safeguard measures which are 'strictly necessary'. A safeguard measure which has at the same time the effect of protecting a sector of the economy of a non-member country therefore goes beyond the aim which Article 109 of the OCT Decision seeks to achieve and is thus not 'strictly necessary' within the meaning of Article 109(2).

142 It is common ground that Article 1(1) of Decision 93/127 of 25 February 1993, by fixing the relative minimum price at 120% of the levy on semi-milled rice, rendered Antillean rice more expensive on the Community market than rice from non-member countries such as the United States or the ACP countries (see the order shown in the table in paragraph 31 of the application in Case T-480/93 and paragraph 55 of the application in Case T-483/93, not challenged by the Commission,

defence paragraph 38). Nor, therefore, did that provision comply with the order of preferences established in favour of Community products and in favour of products originating in the OCT.

143 Consequently, by placing ACP rice and American rice in a more favourable competitive position on the Community market than Antillean rice, Article 1(1) of the decision of 25 February 1993 goes beyond what was strictly necessary to remedy the difficulties caused for the marketing of Community rice by imports of Antillean rice. That provision therefore infringes Article 109(2) of the OCT Decision and must therefore be annulled.

— The second decision

1. Arguments of the parties

144 The applicants maintain that the adoption of the second decision also infringed Article 109(2) of the OCT Decision inasmuch as the absolute minimum price which it imposes goes beyond what is necessary to eliminate the disturbance or threat of deterioration to rice growing in the Community.

145 They claim that that price was appreciably higher than the price of Community rice and only slightly lower than the price of rice from ACP States. Since the safeguard measures were intended to protect the cultivation of Community rice, the price of Community rice must be compared with the absolute minimum price imposed on Antillean rice in order to determine whether those measures respect the principle of proportionality. Antillean rice in fact remained in an unfavourable competitive position, even in comparison with rice from the United States if the higher quality of American rice is taken into account.

146 The applicants ask, moreover, why the second decision continued to impose an absolute minimum price. The Commission's explanations in its defence are inconsistent in that regard, in that they refer both to a request for a correction from the Netherlands Government and to market conditions as justification for attenuating the measure imposed, whereas making a correction does not have the same implications as attenuating a safeguard measure.

147 The applicants add that, in any event, the implementation of the contested decisions has had serious financial consequences, which again renders them disproportionate, because customs authorities require the lodging of a security equivalent to the levy on semi-milled rice from non-member countries, whereas the Commission could have imposed other measures less onerous for the applicants.

148 The Commission replies that the level of the minimum price in the second decision was proportionate, since only an absolute minimum price was imposed, thus considerably improving the competitive position of Antillean rice, as may be seen from the recovery of imports in April.

2. Findings of the Court

149 The Court notes, first, that the absolute minimum price of ECU 550 per tonne imposed by Article 1 of the said decision made Antillean rice more expensive than Community rice but cheaper than rice from ACP countries or the United States. The same order of prices can be seen both from the table shown in paragraph 35 of the application in Case T-480/93 and in paragraph 61 of the application in Case T-483/93 and from the Commission's calculations set out in paragraph 42 of the defence in both cases.

150 Secondly, it appears from annex 23 to the reply in Case T-480/93 and annex 24 to the reply in Case T-483/93 that 8 400 tonnes of Antillean rice were imported into the Community in April 1993. That was the third largest quantity imported in one month between September 1992 and May 1993, and those imports very probably took place within a period of approximately two weeks following the entry into force of the second decision, which was adopted on 13 April 1993 and published in the *Official Journal of the European Communities* on 14 April 1993.

151 In the light of those circumstances, the applicants have therefore not established either that the Commission exceeded the bounds of its discretion by fixing the absolute minimum price at ECU 550 per tonne in the second decision or that that measure went beyond what was strictly necessary to remedy the difficulties which had arisen for the cultivation of Indica rice in the Community within the meaning of Article 109(2) of the OCT Decision. The second decision placed Antillean rice in an unfavourable competitive position in relation only to Community rice. In particular, the extensive imports of Antillean rice during the latter half of April 1993 proves that the price differential between Antillean and American rice was sufficient to offset the higher quality of the latter.

152 As regards the argument that the decision is in any event disproportionate because its implementation by the customs authorities, who require a security equivalent to the levy on semi-milled rice, gives rise to serious financial consequences, the Court considers that, even if that is the case, it is not a necessary consequence of the contested decision but merely a course of action followed by national customs authorities. The fact that a national implementing measure may be disproportionate does not, however, imply that the Community decision implemented is also disproportionate. Nor does this Court have jurisdiction to determine whether a national implementing measure complies with the principle of proportionality. That question is a matter for the national courts before which the applicants could have brought proceedings.

153 It follows from all the foregoing that the second decision is consistent with Article 109(2) of the OCT decision and that the third plea in law must therefore be rejected in so far as it relates to the second decision.

Fourth plea in law: Infringement of Articles 132(1) and 133(1) of the Treaty and of Article 101(1) of the OCT Decision

— Arguments of the parties

154 The applicants maintain that the fact that the exemption from customs duties on imports was subjected to compliance with minimum prices constitutes a 'conditional' charge having equivalent effect applicable to products originating in an OCT. Like customs duties, such a charge having equivalent effect is prohibited by Articles 132(1) and 133(1) of the Treaty, as the Court of Justice stated in its judgment in *Leplat*, cited above, and by Article 101 of the OCT Decision.

155 The Commission challenges that allegation and stresses that the measure in issue is not a conditional charge having equivalent effect but a minimum price and that Article 109 of the OCT Decision leaves a certain margin of discretion as to the choice of measures to be taken.

— Findings of the Court

156 It has consistently been held that any pecuniary charge, however small, whatever its designation or mode of application, which is imposed unilaterally on national or foreign goods by reason of the fact that they cross a frontier, and which is not

a customs duty in the strict sense, constitutes a charge having an effect equivalent to a customs duty within the meaning of Articles 9 and 12 of the Treaty (see Joined Cases 2 and 3/69 *Diamantarbeiders* v *Brachfeld* [1969] ECR 211, paragraph 18, and, most recently, Case C-426/92 *Germany* v *Deutsches Milch-Kontor* [1994] ECR I-2757, paragraph 50).

157 In the present case, no levy is imposed by reason of the fact that Antillean rice crosses the external frontiers of the Community when it is imported. It is only if the minimum selling price is not observed that a levy equivalent to that applicable to semi-milled rice from a non-member country must be charged. The origin of such an obligation lies not in the crossing of the frontier but in the failure to observe the minimum price imposed. It cannot, therefore, be regarded as a charge having equivalent effect of the kind prohibited by the provisions on which the applicants rely with regard to the present plea.

158 In so far as the applicants claim that the requirement to pay a security equivalent to the levy on semi-milled rice from a non-member country constitutes a charge having equivalent effect, it must be borne in mind that that requirement does not flow from the contested decisions but is the result of decisions of the national authorities (see paragraph 152 above). It cannot therefore in any event constitute a ground for the annulment of the contested decisions.

Fifth plea in law: Infringement of Article 131 of the Treaty and of the OCT Decision

— Arguments of the parties

159 The applicants claim that in adopting the contested safeguard measures the Commission failed to respect the purpose of the association of the OCT with the Community as set out in Article 131 of the Treaty, namely to promote the economic

and social development of the OCT, to establish close economic relations between them and the Community as a whole and to further the interests and prosperity of the inhabitants of the OCT in order to lead them to the economic, social and cultural development to which they aspire. The Commission failed to take into account the considerable investments made by the applicants, substantially contributing to the achievement of the purposes of the association.

160 The Commission replies that this plea belongs with the first plea in law since, if it were upheld, it would become impossible to adopt any safeguard measure, whereas Article 109 of the OCT Decision explicitly provides for the possibility of adopting such measures.

161 It states, however, in the alternative, that the aims pursued by the association must be weighed up against other interests, such as those of the common agricultural policy or the French overseas departments.

— Findings of the Court

162 This plea belongs with the first plea in law. Since it has been held with regard to the first plea that the possibility of adopting safeguard measures against imports of products from the OCT is consistent with the Treaty, that necessarily means that the adoption of such measures does not prevent the pursuit of the aims of the association, as set out in Article 131. It follows that, for the same reasons as set out above (paragraphs 90 to 97) the present plea must also be rejected.

Sixth plea in law: Breach of the principle that measures must be drawn up with care and infringement of Article 190 of the Treaty

— Arguments of the parties

163 The applicants claim that the Commission committed a breach of the principle that measures must be drawn up with care because it did not sufficiently consider whether it was necessary to adopt the safeguard measures or what consequences those measures would have on the economy of the Netherlands Antilles and the undertakings concerned.

164 They state that that lack of diligence forms a breach of the obligation laid down in Article 190 of the Treaty. In the present case, the statement of the reasons on which the two decisions were based should have been particularly explicit and complete, since they derogate from the free movement of goods between the Community and the OCT. But on six points the reasoning given in the first decision is unsubstantiated and/or incomprehensible, and the second decision obscures yet further the reasoning of the first. Those six points relate to the comparison of prices, the risks run by the common agricultural policy and by rice production in French Guiana, the risk of increased imports of Antillean rice and the alleged (threat of) disturbance or deterioration.

165 They claim, furthermore, that the statement of reasons in the second decision is incompatible with that given in the first. Since the second decision constitutes an extension of the first, the absolute minimum price which it lays down should have been fixed on the basis of the same criteria as those used to determine the relative minimum price in the first decision, namely the intervention price for and/or the cost of production of Community rice. The applicants note that the absolute minimum price fixed by the second decision is ECU 170 per tonne lower than the relative minimum price fixed in the first decision. They infer that the reason for that difference must lie in a drop either in the intervention price or in the cost of production of Community rice.

166 The applicants point out that, far from falling, the intervention price increased between the adoption of the first decision and that of the second. The reason for the lowering of the minimum price (the absolute minimum price in the second decision as compared with the relative minimum price in the first) must therefore lie in a drop in production costs of sufficient magnitude to offset both the drop in the intervention price and the drop of ECU 170 of the relative minimum price fixed in the first decision.

167 The applicants conclude either that the first decision is based on a manifest error of assessment which led the Commission to fix much too high a relative minimum price or that the second decision is based on factors of which neither they nor the Court have been made aware.

168 Nor, in the applicants' view, does the statement of reasons given in the second decision explain why the safeguard measure should be applicable until 31 August 1993.

169 The Commission does not reply specifically to this plea in law but refers to its arguments relating to the justification for the contested decisions.

— Findings of the Court

170 It has consistently been held that the question whether the statement of the reasons on which a measure is based is sufficient must be assessed with regard not only to its wording but also to the context in which the measure was adopted (Case C-350/88 *Delacre and Others* v *Commission* [1990] ECR I-395, paragraph 16; Case T-26/90 *Finsider* v *Commission* [1992] ECR II-1789, paragraph 70).

171 Both before the adoption of the first decision and between the two decisions, there were repeated contacts between the applicants and the Commission, either directly or indirectly through the office of the Permanent Representative of the Netherlands (see paragraph 33 of the application in Case T-480/93 and paragraph 57 of the application in Case T-483/93, which mention the meeting of 12 January 1993 referred to above, the submission of a written complaint against the safeguard measure after 8 March 1993, a visit to the Commission by the applicants' representatives on 31 March 1993 and contacts by telephone with Commission staff on a number of occasions). The question whether the statement of the reasons on which the contested decisions are based is sufficient must be assessed in the light of those circumstances.

172 The first five criticisms levelled at the statement of reasons in the first decision coincide, essentially, with the pleas in law examined above. The Court's examination of those pleas shows, in particular, that the applicants had at their disposal all the information necessary to decide whether the decision was justified and that this Court has been able to review the legality of that decision in a normal manner on the basis of that information (see Case 108/81 *Amylum* v *Council* [1982] ECR 3107, paragraph 19; Joined Cases 96 to 102, 104, 105, 108 and 110/82 *IAZ and Others* v *Commission* [1983] ECR 3369, paragraph 37; Case 185/83 *University of Groningen* v *Inspecteur der Invoerrechten en Accijnzen, Groningen* [1984] ECR 3623, paragraph 38; and *Delacre*, cited above, paragraph 15).

173 Furthermore, the applicants' main complaint as regards the statement of reasons in the second decision is that it does not explain the considerable difference between the respective minimum prices imposed by the first and second decisions. Since this Court has held that the relative minimum price imposed by the first decision was disproportionate, the statement of reasons given in the first decision to support the fixing of that price is no longer valid. It follows that the alleged inconsistency between the statement of reasons in the first decision and that given in the second arises not out of inadequate reasoning in the second decision but from the contents of the first decision and that there can therefore be no question of contradiction in the statement of reasons.

174 As regards the alleged failure to state the reasons for the initial duration of the safeguard measure, it is enough to point out that, as is clear from Article 3 of Regulation No 1418/76, the rice marketing year ends on 31 August.

175 This plea in law must therefore be rejected.

*The claims for damages*

176 It has consistently been held that the Community may be held liable on the basis of Article 215 of the Treaty only if a number of conditions are satisfied, comprising actual damage, a causal link between the damage claimed and the conduct alleged against the institutions, and the illegality of such conduct (see Case 4/69 *Lüttecke* v *Commission* [1971] ECR 325, paragraph 10). In the present case, the scope of the claim for damages must be limited to the question whether the Commission rendered the Community liable by fixing too high a relative minimum price in the first decision, contrary to Article 109(2) of the OCT Decision, since in the context of the claim for annulment that was held to be the only instance of illegal conduct. That limitation of the scope of the claim for damages further implies that only the damage alleged to have been caused by the first decision may be taken into account.

A — *Fault*

177 As regards the standard applicable when assessing the necessary degree of fault, it has consistently been held that where the act in question is a legislative measure involving a choice of economic policy, the Community cannot incur liability unless a sufficiently serious breach of a superior rule of law for the protection of the individual has occurred (see Case 5/71 *Zuckerfabrik Schöppenstedt* v *Council* [1971]

ECR 975, paragraph 11, and Case T-120/89 *Stahlwerke Peine-Salzgitter* v *Commission* [1991] ECR II-279, paragraph 74). It must therefore be considered whether the first decision was a legislative measure involving a choice of economic policy in order to determine the degree of fault necessary for the Community to incur non-contractual liability.

178 In the present case, the applicants point out that the contested decisions are of direct and individual concern to them and cannot, therefore, be considered to be legislative measures (*Zuckerfabrik Schöppenstedt*, cited above; see also the Opinion of Advocate General VerLoren van Themaat in Case 59/84 *Tezi* v *Commission* [1986] ECR 887, at p. 914).

179 The Commission, however, considers that the contested decisions are legislative measures undeniably involving choices of economic policy and that the stricter test should be used for determining liability.

180 In that regard, the Court finds that the obligation of complying with a minimum selling price applies in general to any trader who may import Antillean rice into the Community. It is clear, furthermore, from Article 109(2) of the OCT Decision that the Commission enjoys broad discretion in that regard inasmuch as, under that provision, the Commission may take safeguard measures whenever certain criteria are met. The adoption of safeguard measures therefore implies a choice on the part of the Commission and that choice falls, in this case, within the spheres of the common agricultural policy and the association of the OCT. The Community cannot, therefore, incur liability unless a sufficiently serious breach of a superior rule of law for the protection of the individual has occurred (*Zuckerfabrik Schöppenstedt*, paragraph 11).

181 That conclusion is not called into question by the fact that, in the context of the claim for annulment, the Court held that the applicants were individually concerned by the first decision. It must be borne in mind that 'the action provided for under Articles 178 and 215 of the Treaty was introduced as an autonomous form of action, with a particular purpose to fulfil within the system of actions and subject to conditions on its use dictated by its specific purpose' (*Van Parijs and Others*, cited above, paragraph 14).

182 In that regard, it must be stated that it is not possible to apply in respect of the same measure, the result of a choice made by a Community institution by virtue of its discretionary power, different rules regarding liability for the purposes of a claim for damages depending on whether or not the applicant is individually concerned by that measure for the purposes of a related claim for annulment.

183 A finding in the context of a claim for annulment that an applicant is individually concerned by the contested measure, implying that that measure constitutes in that regard a decision for the applicant in question, does not preclude the same measure from being considered to be a legislative measure in the context of a claim for damages (see, in that regard, the judgment in *Sofrimport*, cited above, paragraphs 25 and 26, where the Court of Justice, having accepted that the applicant was individually concerned, nevertheless applied the standard for liability in the case of legislative measures).

184 The fact that a person is individually concerned is the result, moreover, only of certain attributes which are peculiar to him or of a factual situation which differentiates him from all other persons. Those circumstances are relevant only when determining the admissibility of a claim for annulment and are not dependent on the Community institution which adopted the measure. They should not, therefore, be decisive with regard to the rules applied with regard to liability.

185 Finally, in the context of an action for annulment, the Court of Justice has consistently held that a measure which is legislative by nature and by virtue of its sphere of application, in that it applies to the traders concerned in general, may be of

individual concern to some of them (*Codorniu*, cited above, paragraph 19). Even though such a measure may be regarded as a decision with regard to the applicants in question when determining the admissibility of the action for annulment, its legislative nature does not thereby cease to exist, since its intrinsic nature and sphere of application are not modified by that assessment.

186 It must therefore be determined whether the illegality of the first decision, as found by this Court, may be categorized as a sufficiently serious breach of a superior rule of law for the protection of the individual.

Arguments of the parties

187 The applicants assert that the threefold condition of a sufficiently serious breach of a superior rule of law for the protection of the individual is met. First, they stress that in the context of their claims for annulment they invoked an infringement of Article 109 of the OCT Decision. Secondly, they consider that the principle of proportionality, embodied in Article 109(2) of the OCT Decision, is a superior rule protecting their interests. Thirdly, they claim that the third plea in law put forward in support of their claims for annulment shows that the Commission committed a sufficiently serious breach of those provisions because, if it had taken the trouble to consider objectively whether the conditions for adopting a safeguard measure were met, it could easily have avoided the mistaken assessment of the situation which it made in imposing such measures.

188 The Commission considers that it cannot be held liable even if it acted unlawfully in taking the contested safeguard measures. It submits first, that a sufficiently serious breach has not been established. For there to be such a violation in the exercise of a discretionary power, it must have manifestly and gravely disregarded the limits on the exercise of its powers (Joined Cases 83 and 94/76, 4, 15 and 40/77 *HNL* v *Council and Commission* [1978] ECR 1209, paragraph 6). Here, however, the only

fault which the Commission is alleged to have committed — and which it denies — is to have incorrectly assessed, or drawn the wrong conclusions from, a complex economic situation. Such a 'fault' can in no event be regarded as manifestly and gravely disregarding the limits on the exercise of its discretionary power. The Commission further denies any violation of a superior rule of law for the protection of the individual, since Article 109 of the OCT Decision protects only sectors of the economy of the Community.

Findings of the Court

189 The Court considers, first, that the principle of proportionality, embodied in Article 109(2) of the OCT Decision, is a superior principle of law for the protection of the individual (Case 281/84 *Zuckerfabrik Bedburg* v *Council and Commission* [1987] ECR 49, paragraphs 35 to 38). The fact that that provision authorizes only safeguard measures which are strictly necessary to remedy the difficulties which have arisen means that it is intended to protect the interests of individuals.

190 It must therefore next be determined whether the act of fixing a minimum price for Antillean rice at a level such that it became more expensive than rice from non-member countries constitutes a sufficiently serious breach of that principle and whether it constitutes a manifest and grave disregard of the limits on the exercise of the powers of the Commission (*HNL*, cited above, paragraph 6; Joined Cases C-104/89 and C-37/90 *Mulder and Others* v *Commission* [1992] ECR I-3061, paragraph 12) in the implementation of the common agricultural policy and of Article 109 of the OCT Decision, a task in which the Commission enjoys a broad discretionary power.

191 On that point, it must first be noted that on 14 January 1993 the Minister for Finance of the Netherlands Antilles fixed a minimum export price equivalent to

120% of the levy on semi-milled rice, which corresponds to the relative minimum price imposed by the Commission in its first decision. It follows that in that first decision the Commission did no more — at least with regard to the point in issue — than reproduce the tenor of the measure adopted by the competent authorities of the OCT concerned. It thus confined itself to adding a Community penalty system to the measure in question.

192 Furthermore, at the meeting of 12 January 1993, for which it is common ground that no minutes exist, the parties discussed the possibility of replacing the adoption of a Community measure by that of a unilateral measure by the Government of the Netherlands Antilles (see the letter of the Permanent Representative of the Netherlands of 11 January 1993 reproduced in annex 1 to annex 9 to the application in Case T-480/93, which mentions in that regard a minimum price of 120% of the levy on brown rice). The Commission has claimed before the Court that it considered that price too low and insisted that it should be raised (paragraph 21 of the rejoinder). That was the situation when it was informed, by letters of 14 January 1993 from the Minister-President of the Netherlands Antilles and of 15 January 1993 from the Permanent Representative of the Netherlands (see annexes 2 and 3 to the rejoinder in both cases), of the imposition of a minimum export price equivalent to 120% of the levy on semi-milled rice, without there being any mention of the possibility that that measure might contain a mistake.

193 It was not, moreover, until 8 March 1993 (see the letter from the Permanent Representative of the Netherlands of 22 July 1994, produced as an annex to the applicants' replies to the written questions put by the Court), that the Commission was informed at a meeting of the Council that the Netherlands Antilles measure was based on a mistake. Furthermore, it is common ground that between 14 January 1993, when the unilateral measure of the Minister for Finance of the Netherlands Antilles came into force, and 25 February 1993, the date of the Commission's decision, the applicants made no approach to the Commission to point out the existence of that mistake and the fact that because of it the measure was not applied, even though they knew that the said measure was intended to render the adoption of a safeguard measure by the Commission superfluous.

194 It follows from all the foregoing that the Commission, when adopting the first decision, referred in good faith to the measure taken by the Government of the Netherlands Antilles, without having been warned by the parties directly concerned, such as the applicants, of the mistake affecting that measure. The applicants therefore contributed to the Commission's ignorance in that regard. Consequently, the Commission did not manifestly and gravely disregard the limits on the exercise of its powers nor, therefore, did it commit a sufficiently serious breach of the principle of proportionality, a superior principle of law.

B — *The damage*

Arguments of the parties

195 The applicants Ter Beek in Case T-480/93 and ERB and Guyana Investments in Case T-483/93 maintain that the damage caused by the first decision arises from the fact that it made it impossible to sell Antillean rice. For rice which was in transit when it came into force, the first decision entailed warehousing and insurance costs, a drop in value as a result of prolonged warehousing, loss of interest and general overheads. For rice which they had already sold but not delivered, they may have to pay compensation to the buyers who did not receive it. Finally, they have lost the income which could have been generated by the sale and processing of the rice.

196 Alesie claims to have lost earnings as a result of a drop in its sales.

197 In its reply, Ter Beek, applicant in Case T-480/93, assesses the damage incurred to date at USD 566 044.20.

198 In their reply, the applicants in Case T-483/93 estimated that the damage suffered amounted to a total of USD 8 562 000. By letter of 17 June 1994, they requested leave to produce further evidence and increase the amount of damages claimed by USD 248 234.

199 The Commission replies that it is impossible to verify the exact amount of the damage which the applicants claim to have suffered, because the evidence which they have produced to prove it is insufficiently precise. As regards the further evidence produced by the applicants in a letter of 17 June 1994, the Commission, supported by the French Government, asked the Court by letter of 20 July 1994 not to take that evidence into consideration and to find the request for leave to increase the amount of damages claimed inadmissible. The French Government pointed out that the amount claimed in that letter did not correspond to the amount shown in the table appended thereto.

Findings of the Court

200 The Court of Justice has consistently held that 'individuals may be required, in the sectors coming within the economic policy of the Community, to accept within reasonable limits certain harmful effects on their economic interests as a result of a legislative measure without being able to obtain compensation from public funds even if that measure has been declared null and void' (*HNL*, cited above, paragraph 6; see also *Mulder*, cited above, paragraph 13).

201 In the present case, the alleged damage to be taken into consideration by the Court relates essentially to cargoes of Antillean rice which arrived in a Community port during the period of application of the first decision, in that they incurred various expenses connected with their warehousing during that period. This Court has held that the second decision is not vitiated by any illegality, so that any fault alleged necessarily came to an end when that decision was adopted on 13 April 1993. As

from that date, moreover, imports and thus sales of Antillean rice within the Community recovered dramatically (see again annex 23 to the reply in Case T-480/93 and annex 24 to the reply in Case T-483/93).

202 It appears from the documents before the Court that three cargoes belonging to Ter Beek (applicant in Case T-480/93) were involved during that period, namely those shipped on board the 'Agnès', which sailed on 12 February 1993 and arrived on 6 March 1993 (1 216.8 tonnes), the 'Erria', which sailed on 18 February 1993 and arrived on 10 March 1993 (1 072.5 tonnes), and the 'Combi Trader', which sailed after 9 March 1993 (when the bill of lading was issued) and arrived on 31 March 1993 (2 421.4 tonnes). The cargoes in issue in Case T-483/93 are those shipped on board the 'Munte', which sailed on 14 February 1993 and arrived on 7 March 1993 (2 633 tonnes), the 'Wind Ocean', which sailed on 25 February 1993 and arrived on 18 March 1993 (4 175 tonnes), and the 'Aquila', which sailed on 11 March 1993 and arrived on 30 March 1993 (3 239 tonnes).

203 The periods of warehousing and possible delay in selling the rice come, respectively, to 38 days (for the 'Agnès'), 34 days (for the 'Erria') and 13 days (for the 'Combi Trader'); and to 37 days (for the 'Munte'), 26 days (for the 'Wind Ocean') and 14 days (for the 'Aquila').

204 Such periods of warehousing are not, however, unusual. The applicants in Case T-483/93 have explained to the Court that cargoes of rice are sold either while they are still at sea or after they have arrived at a Community port. In the latter case, the rice is warehoused until it is delivered to a buyer. Such warehousing is thus normal, even in the absence of any safeguard measure taken by the Community, as may be seen from the table produced (as annex 20 to the reply) by the applicants in Case T-483/93. That table shows that the cargo of 750 tonnes of rice carried on board the 'Green Tiger', which arrived in Rotterdam on 3 January 1993, had still not been sold by 25 February 1993, 53 days later, and that the cargo of 1 100 tonnes

of rice carried on board the 'Henderika Klein', which arrived in Rotterdam on 10 February 1993, had still not been sold by 25 February 1993, 15 days later. The Court therefore considers that the periods of warehousing and possible resultant delay in selling the rice were not necessarily made any longer as a result of the first decision.

205 The same applies to Ter Beek, applicant in Case T-480/93, which, although it has stated that its cargoes of rice were generally sold on their arrival in a Community port, has not pointed to any specific delivery to any buyer as having had to be delayed as a result of the entry into force of the first decision. In the absence of any concrete evidence submitted to the Court in that regard, it is not possible to conclude that Ter Beek, either, has suffered any loss going beyond the harmful effects on its economic interests which any trader must accept when they are caused by a legislative measure, even if that measure has been declared null and void (*HNL*, paragraph 6).

206 It must further be added that sales started up again in large quantities as from the middle of April (annex 23 to the reply in Case T-483/93 and annex 24 to the reply in Case T-483/93), on a market characterized, according to the applicants themselves, by a shortage of Community rice and a rise in prices, from which the applicants must have benefited.

207 In addition and in any event, even if the applicants have suffered a certain amount of damage as a result of the application of the first decision, that damage was in no way unforeseeable, so that they could have taken precautions against it. All the vessels cited sailed from the Netherlands Antilles during the period when the adoption of the first decision was being prepared and when the applicants were duly involved in that preparation. The third vessel cited in each case even sailed after the

adoption of the first decision. Even if the Community market was the only outlet available to the applicants because of the level of prices which — as a result of the common agricultural policy — was appreciably higher than that on the world market, it is clear from several of the papers before the Court that the applicants cannot have been unaware of the risk that the Community advantage from which they could benefit fully for the first time since the adoption of the OCT Decision might be withdrawn from them one day. In the Weekly Rice Market Report of 9 June 1992 (Vol. 73 No 24), it is stated that 'importers report problems with shipments of Surinam and Guyana brown LG via the (Dutch) Antilles route. At this stage it is not yet clear whether the problems are with sufficient carrier space or that the route is considered increasingly risky for the sellers in ... of (possible) actions by the EC Commission to close this route-gap' (annex 2 to annex 9 to the application in Case T-480/93), and in the Weekly Rice Market Report of 4 August 1992 (Vol. 73 No 32), it is reported that 'the situation with Surinam rice via so-called Curaçao-Route is completely unchanged. Sellers are still trying to enter the market without paying levies, but buyers prefer to await Commission investigation' (annex 2 to annex 9 to the application in Case T-480/93). Moreover, in several contracts for the sale of Antillean rice which the applicants produced as an annex to their answer to a written question put by the Court, clauses have been inserted providing that the contract terms would be renegotiated if the legal rules governing the importation were to be modified after the conclusion of the contract. The applicants' argument to the effect that those clauses referred merely to the eventuality of a new OCT Decision being adopted cannot be accepted. Since the last OCT Decision had been adopted in 1991, a new decision should not be adopted before 1996 at the earliest, under Article 136 of the Treaty. The Court therefore considers that those clauses referred to a possible modification of the rules governing imports of Antillean rice into the Community as a result of the introduction of safeguard measures.

208 It follows from all the foregoing that neither the fault nor the damage alleged by the applicants are such as to cause the Community to incur non-contractual liability. The claims for damages must therefore be dismissed.

## Costs

209 Under Article 87(3) of the Rules of Procedure of the Court of First Instance, the Court may order that the costs be shared where each party succeeds on some and fails on other heads. Since the Commission has been unsuccessful on some of its heads of claim, it must be ordered to bear its own costs and one third of the applicants' costs. Since the applicants have been unsuccessful on some of their heads of claim and the Commission has asked for them to be ordered to pay the costs, they must be ordered to bear two thirds of their own costs. In accordance with the first subparagraph of Article 87(4) of the Rules of Procedure, the interveners must bear their own costs.

On those grounds,

THE COURT OF FIRST INSTANCE
(Fourth Chamber, Extended Composition)

hereby:

**1. Annuls Article 1(1) of Commission Decision 93/127/EEC of 25 February 1993 introducing safeguard measures in respect of rice originating in the Netherlands Antilles;**

**2. Dismisses the remainder of the applications;**

**3. Orders the Commission to bear its own costs and one third of the applicants' costs, the applicants to bear two thirds of their own costs and the interveners to bear their own costs.**

Lenaerts Schintgen Briët

García-Valdecasas Bellamy

Delivered in open court in Luxembourg on 14 September 1995.

H. Jung K. Lenaerts

Registrar President