ORDER OF THE PRESIDENT OF THE COURT

25 June 1998 *

In Case C-159/98 P(R),

Government of the Netherlands Antilles, represented by P. V. F. Bos and M. M. Slotboom, of the Rotterdam Bar, with an address for service in Luxembourg at the Chambers of M. Loesch, 11 Rue Goethe,

appellant,

APPEAL against the order of the President of the Court of First Instance of the European Communities of 2 March 1998 in Case T-310/97 R *Government of the Netherlands Antilles* v *Council* [1998] ECR II-455, seeking

— to have that order set aside, to have the application of Article 1(31) and (32) — concerning respectively rice and sugar which is worked or processed in the Netherlands Antilles — of Council Decision 97/803/EC of 24 November 1997 amending at mid-term Decision 91/482/EEC on the association of the overseas countries and territories with the European Economic Community (OJ 1997 L 329, p. 50) suspended, subject to the condition that the Netherlands Antilles preserve or introduce minimum export prices for the products

* Language of the case: English.

referred to in those paragraphs at a level equal to or higher than the intervention prices within the Community, and to have the Council ordered to pay the costs,

or, in the alternative,

— to have the order set aside, the case referred back to the Court of First Instance to rule afresh and the Council ordered to pay the costs,

the other parties to the proceedings being:

Council of the European Union, represented by J. Huber and G. Houttuin, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of A. Morbilli, Director-General of the Legal Affairs Directorate of the European Investment Bank, 100 Boulevard Konrad Adenauer,

defendant at first instance,

supported by

Commission of the European Communities, represented by T. van Rijn, Legal Adviser, and X. Lewis, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of C. Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

Italian Republic, represented by Professor U. Leanza, Head of the Legal Service in the Ministry of Foreign Affairs, acting as Agent, assisted by F. Quadri, Avvocato dello Stato, with an address for service in Luxembourg at the Italian Embassy, 5 Rue Marie-Adélaïde,

interveners at first instance,

and

Kingdom of Spain, represented by N. Díaz Abad, Abogado del Estado, of the State Legal Service, acting as Agent, with an address for service in Luxembourg at the Spanish Embassy, 4-6 Boulevard E. Servais,

intervener on appeal,

THE PRESIDENT OF THE COURT,

after hearing the Advocate General, S. Alber,

makes the following

Order

1 By application lodged at the Court Registry on 24 April 1998, the Government of the Netherlands Antilles brought an appeal under the second paragraph of Article 50 of the EC Statute of the Court of Justice against the order of the President of the Court of First Instance of 2 March 1998 in Case T-310/97 R *Government of the Netherlands Antilles* v *Council* [1998] ECR II-455 ('the order under appeal' or 'the order'), rejecting its application for interim measures.

2 The Government of the Netherlands Antilles seeks to have the order under appeal set aside and, principally, to have the application of Article 1(31) and (32) — concerning respectively rice and sugar which is worked or processed in the Netherlands Antilles — of Council Decision 97/803/EC of 24 November 1997 amending at mid-term Decision 91/482/EEC on the association of the overseas countries and territories with the European Economic Community (OJ 1997 L 329, p. 50; 'the contested decision') suspended, subject to the condition that the Netherlands Antilles preserve or introduce minimum export prices for the products referred to in those paragraphs at a level equal to or higher than the intervention prices within the Community, or, in the alternative, to have the case referred back to the Court of First Instance to rule afresh.

3 By application lodged at the Court Registry on 30 April 1998, the Kingdom of Spain sought leave to intervene in the present interlocutory proceedings in support of the validity of the order under appeal.

4 By letter of 7 May 1998, the appellant objected to the intervention of the Kingdom of Spain. It argued that, unlike the Treaties of Accession of the Kingdom of Denmark, of Ireland and of the United Kingdom of Great Britain and Northern Ireland — which were ratified for the whole of the territory of the Netherlands — the Treaties of Accession of the Hellenic Republic, the Kingdom of Spain, the Portuguese Republic, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden were explicitly ratified by the Kingdom of the Netherlands exclusively for the European territory of that Kingdom. The appellant concludes that, as regards the Netherlands Antilles, the Kingdom of Spain cannot be regarded as a Member State for the purposes of Article 227(1) of the EC Treaty. The Kingdom of Spain's application to intervene in an action brought by the Government of the Netherlands Antilles should therefore not be allowed as of right.

5 It need merely be noted in that regard that the first paragraph of Article 37 of the EC Statute of the Court of Justice provides that 'Member States and institutions of the Community may intervene in cases before the Court'. There is thus no

limitation imposed on the right of Member States to intervene in cases before the Court, and in particular none that is based on the status of the parties to the dispute or on its subject-matter.

6 Without there being any need to examine further the basis on which they repose, it is thus clear that the objections raised by the appellant are quite irrelevant to any consideration of a Member State's right to intervene.

7 Pursuant to the first paragraph of Article 37 of the EC Statute of the Court of Justice, the Kingdom of Spain must be granted leave to intervene.

8 By documents lodged at the Registry on 14 and 15 May 1998, the Council, the Commission, the Italian Republic and the Kingdom of Spain submitted their written observations to the Court.

Legal background, facts and procedure

9 The legal and factual background to the dispute is set out in the order under appeal, in the following terms:

'1 The Netherlands Antilles form part of the overseas countries and territories ("OCTs") associated with the Community. Article 3(r) of the EC Treaty states the association of the OCTs in order to increase trade and promote jointly economic and social development to be one of the objectives of the Treaty.

The association of the OCTs with the Community is governed by Part Four of the EC 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 The OCT Decision is applicable, by virtue of Article 240(1) thereof, for a period of 10 years from 1 March 1990. Under Article 240(3)(a) and (b), before the end of the first five years, the Council, acting unanimously on a proposal from the Commission, is to establish, where necessary, in addition to the Community's financial assistance for the second five years, any amendments to the OCT Decision desired by the relevant authorities of the OCTs or proposed by the Commission either in the light of its own experience or as a result of amendments under negotiation between the Community and the African, Caribbean and Pacific (ACP) States.

3 As stated in the order in Case T-179/97 R *Netherlands Antilles* v *Council* [1997] ECR II-1297, at paragraph 3, the Community produces a surplus of semi-long grain, or Japonica, rice. There is a deficit, however, in Indica rice, which accounts for only 20% of Community production. In that context, the Council has adopted a number of measures to promote the cultivation of Indica rice by Community producers.

4 Undertakings established in the OCTs compete with undertakings established in non-member countries or ACP countries as regards imports of Indica rice into the Community. Imports of rice from ACP countries are subject to a tariff quota of 125 000 tonnes on which the customs duty is 50%. In excess of that quota, customs duty is levied at 100%, as it is for imports from other non-member countries.

5 After harvesting, rice is husked and then polished in several stages. Brown rice, from which the husk has been removed, is processed into semi-milled rice by removal of some or all of the outer layers of the pericarp. Milled rice, which has been fully processed, is obtained by removal of the whole of the pericarp.

6 Article 6(2) of Annex II to the OCT Decision, which concerns, *inter alia*, the definition of the concept of "originating products", provides that when products wholly obtained in the ACP States undergo working or processing in the OCTs, they are to be considered as having been wholly obtained in the OCTs.

7 As a result, the processing of brown rice originating in ACP countries into semi-milled rice in the Netherlands Antilles is sufficient for it to be regarded as originating in the Netherlands Antilles under the rules laid down in Annex II to the OCT Decision. On the basis of that rule of cumulation of origins, rice processed in that way may therefore be imported into the Community free of customs duty.

8 Article 133(1) of the Treaty provides that customs duties on imports into the Member States of goods originating in the OCTs are to be completely abolished in conformity with the abolition of customs duties between Member States in accordance with the Treaty. Article 101(1) of the OCT Decision provides that products originating in the OCTs are to be imported into the Community free of customs duties and charges having equivalent effect. Under Article 102 thereof, the Community is not to apply to imports of products originating in the OCTs any quantitative restrictions or measures having equivalent effect.

9 By way of derogation from the principles set out in those articles, Article 109(1) of the OCT Decision empowers the Commission to take the necessary 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 jeopardised, or if difficulties arise which may result in a deterioration in a sector of the Community's activity or in a region of the Community".

10 The Commission and the Council have adopted a number of safeguard measures under Article 109 of the OCT Decision. In Decision 93/127/EEC of 25 February 1993 (OJ 1993 L 50, p. 27), amended by Decision 93/211/EEC of 13 April 1993 (OJ 1993 L 90, p. 36), the Commission introduced and then relaxed a minimum price for imports of rice originating in the Netherlands Antilles. The Council subsequently adopted Regulations (EC) No 304/97 of 17 February 1997 and No 1036/97 of 2 June 1997 introducing safeguard measures in respect of imports of rice originating in the [overseas countries and territories] (OJ 1997 L 51, p. 1, and L 151, p. 8, respectively). Those two regulations laid down a tariff quota limiting imports of rice originating in OCTs other than Montserrat and the Turks and Caicos Islands to 36 728 tonnes from 1 January to 30 April 1997 and to 56 180 tonnes from 1 May to 30 November 1997.

11 In addition, pursuant to Article 240(3) of the OCT Decision, the Commission sent the Council a communication on the mid-term review of the association of the OCTs with the Community (COM(94) 538 final of 21 December 1994), recommending various adjustments to that decision which took account, as far as was possible, of the desires expressed by the OCTs and of the experience gained by the Commission over the first five years of implementing the OCT Decision. To deal with the "clash between two Community policies — OCT development and maintenance of guarantees given to producers under the common market organisations —", the Commission proposed the creation of machinery enabling it to set reference prices for imports. It reserved the right, however, to supplement that machinery by amendments, where necessary, to the OCT rules of origin in respect of ACP/OCT cumulation and the minimal working required to obtain OCT origin.

12 On 16 February 1996, the Commission submitted to the Council a proposal for a decision amending at mid-term the OCT Decision (OJ 1996 C 139, p. 1). In the sixth and seventh recitals in the preamble of that proposal, the Commission stated that free access for all products originating in the OCTs and the maintenance of cumulation for ACP and OCT originating products had given rise to the risk of conflict between two Community policy objectives, namely the development of the OCTs and the common agricultural policy. It proposed that fresh disruption on the Community markets for certain products subject to a common organisation of the market should be prevented by, in particular, the exclusion of cumulation for agricultural products, coupled with greater flexibility as regards derogations.

13 Transcending the differing considerations as to whether the rule on cumulation of origins should be abolished or alternative solutions, such as maintaining that rule but adding a minimum price system, should be adopted, the Council amended the OCT Decision on the basis of Article 240(3) by adopting, on 24 November 1997, [the contested decision].

14 In that decision, the Council again points out the risk of conflict between the objectives of the development of the OCTs and of the common agricultural policy arising out of the maintenance of the cumulation of ACP and OCT origins referred to in Article 6 of Annex II to the OCT Decision (see paragraphs 6 and 7 above). In the seventh recital in the preamble, it stresses that "fresh disruption should be avoided by taking measures to create a framework conducive to regular trade flows and at the same time compatible with the common agricultural policy". To that end, it inserts the new Articles 108a and 108b into the OCT Decision, allowing cumulation of ACP and OCT origins for rice and sugar respectively, within a certain tariff quota.

15 For rice, in accordance with Article 108a(1), that quota is to be 160 000 tonnes, including the tariff quota for rice originating in the ACP States provided for in the fourth Lomé Convention. An initial issue of import licences for a quantity of 35 000 tonnes is to be made to the OCTs in January each year. Further

imports may be made up to the total limit of 160 000 tonnes in so far as the ACP States do not actually use their direct export possibilities under the quota provided for in the Lomé Convention. Under Article 108a(2), the Commission is empowered to increase the total quota of 160 000 tonnes by 20 000 tonnes if it finds that such an increase will not disrupt the Community market.

16 For sugar, Article 108b allows cumulation of ACP and OCT origins for an annual quantity of 3 000 tonnes.

17 For the purposes of implementing the cumulation rules set out above, milling or semi-milling operations for rice, and forming lumps or colouring for sugar, are to be considered as sufficient to confer the status of OCT-originating products, according to Articles 108a(4) and 108b respectively.'

10 By application lodged at the Registry of the Court of First Instance on 9 December 1997, the Government of the Netherlands Antilles sought annulment of the contested decision.

11 By separate document lodged at the Registry of the Court of First Instance on 10 December 1997, it further sought suspension, under Articles 185 and 186 of the Treaty, of the application of Article 1(31) and (32) of the contested decision, concerning respectively rice and sugar which is worked or processed in the Netherlands Antilles, subject to the condition that the Netherlands Antilles preserve or introduce minimum export prices for the products referred to in those paragraphs at a level equal to or higher than the intervention prices within the Community.

The order under appeal

12 In the order under appeal, the President of the Court of First Instance dismissed the application for interim measures.

13 First, however, he found the application admissible, then proceeded to assess the urgency of the measures sought and the balance of interests before considering whether there was a prima facie case.

Urgency and balance of interests

14 With regard to urgency and the balance of interests, the President of the Court of First Instance noted that the tariff quotas in issue had been introduced in order to avert the risk of conflict between the objective of the development of the OCTs and that of the common agricultural policy, specifically with a view to maintaining Community imports of rice and sugar originating in the OCTs within limits compatible with the equilibrium of the Community market, given that the opportunities for developing such imports were considerable (paragraphs 55 to 58 of the order under appeal).

15 As regards the fixing of minimum export prices, which the appellant had put forward as a condition for granting the suspension which it sought, he noted that there was no guarantee that any minimum price would make it possible to avert further disruption on the Community markets and would not, during the course of the main proceedings, produce certain definitive effects likely to deprive the contested decision of its effectiveness (paragraph 61 of the order).

16 He further considered that, other than in a situation of obvious urgency, he could not, without running the risk of encroaching upon the Council's power of assessment, override that institution's assessment as to the choice of the most appropriate measure to prevent disruption on the Community markets for rice and sugar,

whilst still taking account of the requirements imposed by the association of the OCTs with the Community, and thus held that the appellant's request could not be granted unless the urgency of the measures sought appeared undeniable (paragraphs 64 and 65 of the order).

17 Starting from that premiss, he proceeded, in paragraphs 66 to 77 of his order, to examine the effects of the contested decision on the situation of the Netherlands Antilles, with a view to assessing the urgency of the suspension sought.

18 His examination dealt in turn with the rice sector, the sugar sector and the overall economic development of the Netherlands Antilles.

19 With regard to the rice sector, he considered that the Government of the Netherlands Antilles had not established the existence of the alleged risk of closure of most of the rice mills operating in its territory. In arriving at that conclusion, he found that, prima facie and contrary to the appellant's assertions, the contested decision would not in fact have the alleged effect of limiting OCT rice exports to the Community to 35 000 tonnes per year, with the remainder being imported directly from ACP countries. He took the view that, in order to avoid customs duties, it would be in the interest of the ACP countries to give preference to exports to the Community via the OCTs up to the limit of the 160 000-tonne quota defined in the contested decision. Furthermore, the imposition of an annual tariff quota of 160 000 tonnes entailed only a reduction of the order of 22% in comparison with rice exports during the years prior to the application of safeguard measures. Finally, those safeguard measures did not appear to have led to the closure of a large proportion of the rice mills established in the Netherlands Antilles (paragraphs 67 to 70 of the order under appeal).

20 With regard to the sugar sector, the President of the Court of First Instance found that the appellant had not adduced any evidence as to the place occupied by such

activities in the Netherlands Antilles economy and that the application of the contested decision would only entail a reduction in exports of the order of 14% in comparison with 1996 (paragraph 71 of the order).

21 Finally, with regard to the economic development of the Netherlands Antilles, he found that the appellant's argument failed to take account of the fact that the contested tariff quotas would entail only a small reduction in exports to the Community, that it was based on mere forecasts as to the development of rice and sugar exports and, finally, that it was unsupported by any specific evidence from which it might be assumed that the alleged damage could be irreversible (paragraphs 73 to 75 of the order).

22 In conclusion, he held that the condition relating to urgency was not satisfied in the circumstances.

Prima facie case

23 With regard to the question whether there was a prima facie case for allowing the application for interim measures, it appears from the order under appeal that the Government of the Netherlands Antilles had put forward a single plea in law, alleging the Council's lack of competence *ratione temporis* to adopt the contested decision after the expiry of the time-limit laid down in Article 240(3) of the OCT Decision (paragraph 78 of the order). That plea in law did not appear to the President of the Court of First Instance prima facie to be well founded. Referring to Case 148/77 *Hansen* v *Hauptzollamt Flensburg* [1978] ECR 1787, paragraph 10, he considered that, prima facie, that provision of the OCT Decision was to be interpreted as constituting no more than a guideline. He further stated that the five-year period in question here did not, prima facie, have the same legal effect as the

procedural time-limit provided for in Article 30(8) of Annex II to the OCT Decision, which was the provision in issue in Case C-430/92 *Netherlands* v *Commission* [1994] ECR I-5197 (paragraphs 80 to 85 of the order).

24 Having thus found that the Government of the Netherlands Antilles had not established the existence of a risk of serious and irreparable harm and that the single plea in law put forward to challenge the contested decision did not appear prima facie to be well founded, the President of the Court of First Instance dismissed the application for interim measures.

25 Since the parties' written observations contain all the information needed for a ruling on the appeal, there is no need to hear oral argument.

Admissibility of the appeal

26 The Council, the Kingdom of Spain and the Italian Republic all submit that the appeal is inadmissible. They differ, however, in their reasons for that submission.

27 The Council argues that suspension of application of a measure may be granted only if four conditions are all met: it must be justified, prima facie, in fact and in law; it must be urgent; the balance of interests must incline in its favour; and it must be provisional inasmuch as it must not prejudge the points of law or fact in issue or neutralise in advance the effects of the judgment subsequently to be given in the main action.

28 In the present instance, however, the appellant has failed to challenge the assessment of the President of the Court of First Instance with regard to the fourth condition — that the order must not neutralise in advance the effects of the judgment subsequently to be given — even though at paragraph 65 of the order under appeal he stressed the need to take account of 'the risk that the Community's interests may be irreversibly affected if the interim measure sought is granted'. The Council therefore submits that the appeal must be held to be inadmissible.

29 That argument cannot be upheld.

30 It is true that, at paragraph 61 of the order under appeal, the President of the Court of First Instance stated that there was no guarantee that 'a minimum price, if laid down to replace the contested tariff quotas, ... would not, during the course of the main proceedings, produce certain definitive effects likely to deprive the contested decision of its effectiveness'.

31 It is not, however, possible to deduce from that, as the Council does, that he decided that the suspension sought was not of a sufficiently provisional nature. It is clear merely that there did not appear to him to be any 'guarantee' in that regard.

32 In any event, it is clear that in most interlocutory proceedings, the decision to grant or to refuse suspension of application of a measure as sought is likely to produce, to a certain extent, certain definitive effects, and it is for the judge hearing an application for interim suspension to weigh up the risks attaching to each of the possible solutions (see, to similar effect, Case C-393/96 P(R) *Antonissen* v *Council and Commission* [1997] ECR I-441, paragraph 40).

33 Assessment of whether the suspension sought is provisional in nature thus cannot, in principle, be separated from that of the balance of interests; the fact that no plea relating specifically to that condition has been put forward in appeal therefore cannot render the appeal inadmissible in its entirety where, as here, the way in which the balance of interests was assessed in the order under appeal is in fact challenged.

34 The Kingdom of Spain submits that all the pleas put forward in appeal either call into question the assessment of the facts by the President of the Court of First Instance or raise issues relating to the merits which can only be decided upon in the context of the main action.

35 Given the number and variety of the pleas and arguments put forward by the appellant, it is more appropriate to examine those aspects of the admissibility of the appeal in the context of the analysis of each of the pleas in appeal, as it is not possible to find the appeal inadmissible in its entirety without closer consideration.

36 Finally, the Italian Republic also submits that the appeal is inadmissible without, however, putting forward any specific arguments in support of that conclusion. It merely states that it supports the objection to the admissibility of the main action raised by the Council at first instance.

37 Here, it need merely be noted that the arguments put forward by the Council at first instance, which were dismissed in paragraphs 30 to 38 of the order under appeal, examining the admissibility of the application for interim measures, cannot provide any grounds for holding the appeal inadmissible.

38 The appeal must therefore be held to be admissible.

The pleas put forward in appeal

39 The appellant puts forward three pleas in its present appeal. As the first relates to the final part of that order, concerning the absence of a prima facie case, the second and third pleas, which relate to urgency and the balance of interests, should be examined first.

The second plea: urgency

Arguments of the parties

40 The second plea in appeal comprises two alternative submissions seeking to establish that the President of the Court of First Instance did not make a correct assessment of the condition relating to urgency.

41 In the first of those submissions, the appellant argues that it is clear from the wording of the order under appeal that, with regard to the question of serious and irreparable harm, its essential claim relating to the irreversible loss of time suffered by the Netherlands Antilles in their macroeconomic development was ignored. Given the time needed to complete the proceedings in the main action, the appellant had argued before the President of the Court of First Instance that the contested decision would make it impossible to realise the projected economic and social development by 1 March 2000, when the OCT Decision expires. He, however, wrongly confined himself, in particular at paragraph 75 of his order, to assessing the alleged damage on the basis of volumes of trade and the situation of the rice and sugar industries.

42 The Council considers that to accept such reasoning based on an irreversible loss of time would lead to the absurd situation that damage which by its very nature is linked to the passage of time can never be the subject of financial compensation because time cannot be restored.

43 In addition, in the submission of the Council and the Commission, the appellant cannot criticise the President of the Court of First Instance for having given detailed consideration to volumes of trade and the situation of the rice and sugar industries, since it had itself insisted on that aspect. It is, moreover, in the Commission's view, irrelevant whether the alleged harm is viewed in terms of trade flows in rice and sugar or of the overall development of the Netherlands Antilles economy.

44 In the second submission made under its second plea, the appellant argues that, even if it was not wrong to determine the alleged damage by reference to volumes of trade and the situation of the rice and sugar industries in the Netherlands Antilles, the serious and irreparable nature of the harm was none the less incorrectly dealt with in the order under appeal, for three reasons.

45 First, as regards the sugar sector, it is clear from paragraphs 71 and 72 of the order that the expectations of infant industries in the OCTs were disregarded in the contested decision. The appellant considers that, since one of the purposes of Article 133(3) of the EC Treaty is specifically to protect infant industries in the OCTs, failure to take those expectations into account is in itself sufficient automatically to establish the existence of serious and irreparable harm to the Netherlands Antilles.

46 Second, in his examination of the condition relating to urgency, the President of the Court of First Instance did not apply the same standards when assessing the

interests of the common agricultural policy as he did when assessing those of the association of the OCTs, thus contravening Article 132(1) of the EC Treaty. In particular, more weight was given to protection of Community rice and sugar, which account for only 0.5% of the Community's GDP (gross domestic product), than to the harm to the Netherlands Antilles, affecting 0.9% of their GDP.

47 Third, as regards the rice industry, there are two errors in the reasoning underpinning the conclusion, in paragraph 70 of the order under appeal, that it had not been established that immediate application of the contested decision was likely to lead to the closure of most of the rice mills in the Netherlands Antilles.

48 In the first place, the order makes no mention of the existence of Commission Regulation (EC) No 2603/97 of 16 December 1997 laying down the detailed implementing rules for imports of rice originating in the ACP countries or the overseas countries and territories (OCT) (OJ 1997 L 351, p. 22), adopted in implementation of the contested decision. Under that new and restrictive system, operators may import a total of 35 000 tonnes of rice into the Community from the OCTs from January onwards, while the balance of 125 000 tonnes may be imported at the end of the year free of customs duty, provided that the ACP countries have not exported that amount directly into the Community. The appellant states that, in comparison with the advantage of a zero rate of customs duty, it is too expensive and commercially too risky to store rice until the end of the year, so that ACP rice producers are compelled to export directly to the Community rather than via the OCTs. The Commission admitted as much in its written observations to the Court of First Instance, from which it appears that 41 688 tonnes of rice had already been imported directly into the Community from the ACP countries in January 1998. The President of the Court of First Instance was therefore wrong to consider, in paragraph 68 of his order, that ACP rice producers preferred to export their products via the OCTs.

49 In the second place, in paragraph 69 of his order, the President of the Court of First Instance took no account of the findings set out in the report of the Netherlands Economic Institute, submitted by the appellant to the Court of First

Instance, to the effect that, even if the Netherlands Antilles were to obtain the bulk of the 160 000-tonne rice quota, rice processing and trading activities in the Netherlands Antilles would have to be reduced by at least 44%. The fact that the rice industry there did not suffer bankruptcy in 1997, despite the adoption of safeguard measures limiting exports, is not significant, because those were temporary measures not entailing any permanent, structural change to the situation.

50 In response to that second submission made under the second plea, the Council and the Commission emphasise that, as was pointed out by the President of the Court of First Instance, the rule that damage of a financial nature is not in principle irreparable (paragraph 66 of the order under appeal) falls to be applied in the present case (paragraph 75 of the order).

51 Both institutions also submit that the arguments put forward in that context are for the most part inadmissible in so far as they challenge the assessment of the facts by the President of the Court of First Instance.

Findings

52 With regard to the first submission made under the second plea in appeal, it must be noted that, contrary to the appellant's assertions, it is explicitly clear from paragraphs 73 to 75 of the order under appeal that the President of the Court of First Instance did examine its arguments concerning the economic development of the Netherlands Antilles in the period leading up to the year 2000.

53 More specifically, he considered that the figures which the appellant had put forward with regard to that economic development did not take account of what he had found to be the true impact of the contested decision on exports of rice and sugar from the Netherlands Antilles to the Community. He further found that, in the absence of any evidence of a foreseeable structural effect on the rice and sugar industry, it had not been established that the damage was irreversible.

54 It is thus clear from the order under appeal that, with regard to the economic development of the Netherlands Antilles, the President of the Court of First Instance found that the damage was neither as serious as alleged nor apparently irreversible.

55 The appellant's challenge to those findings on the ground that he should have given greater weight to the fact that the time lost for the macroeconomic development of the Netherlands Antilles could not be restored amounts to calling into question the assessments of fact on which the order under appeal is based.

56 However, under Article 51 of the EC Statute of the Court of Justice which applies equally to appeals brought under the second paragraph of Article 50 of that Statute, an appeal is limited to points of law and may lie only on grounds of lack of competence of the Court of First Instance, a breach of procedure before it or infringement of Community law by it (Case C-148/96 P(R) *Goldstein* v *Commission* [1996] ECR I-3883, paragraph 22, and Case C-268/96 P(R) *SCK and FNK* v *Commission* [1996] ECR I-4971, paragraphs 43 and 44).

57 The first submission under the second plea in appeal must therefore be rejected as in part inadmissible and in part unfounded.

58 Nor is there anything in the appellant's arguments in its second submission under that plea which discloses any error in law on the part of the President of the Court of First Instance.

59 The first argument, alleging breach of Article 133(3) of the Treaty, must be rejected.

60 It presupposes that the refusal to grant the suspension sought will lead to the closure of an infant industry in the Netherlands Antilles, which amounts to calling into question the assessments of fact in the order under appeal. To that extent, therefore, it must be rejected, for the reasons set out in paragraph 56 above.

61 Furthermore, even if, as the appellant alleges, the closure of an infant industry in the OCTs were to be deemed inevitably to constitute a breach of Article 133(3) of the Treaty, such a breach would not thereby constitute, *per se* and automatically, serious and irreparable harm.

62 A breach, if any, of a Treaty provision, whilst it may affect the validity of the contested decision, cannot in principle be sufficient on its own to establish that any damage caused is serious and irreparable.

63 The second argument, that the President of the Court of First Instance did not apply the same standards when assessing the interests of the common agricultural policy as he did when assessing those of the association of the OCTs, seeks to challenge the assessment of the facts on which he based his refusal to grant interim measures. It must therefore be rejected, for the reasons set out in paragraph 56 above.

64 Nor is the third argument, concerning the situation of the rice sector, capable of demonstrating that the order under appeal is vitiated by an error in law.

65 In claiming that the President of the Court of First Instance ignored Regulation No 2603/97, the appellant is in fact seeking to challenge his findings of fact with regard to the economic situation of operators in the ACP countries. That argument must therefore be rejected, for the reasons set out in paragraph 56 above.

66 The appellant also claims that he ignored the conclusions of the report of the Netherlands Economic Institute, to the effect that rice processing and trading activities in the Netherlands Antilles would have to be reduced by at least 44% following the adoption of the contested decision.

67 That contention may be understood as alleging that the President of the Court of First Instance either ignored the evidence put forward by the appellant or failed to provide proper reasoning for his order on that point.

68 If the allegation is that evidence was ignored, it must be borne in mind that, in appeal proceedings, the Court of Justice does not in principle have jurisdiction to examine evidence which the Court of First Instance has accepted in support of its findings or assessments of the facts. Where the general principles of law and rules of procedure governing the burden of proof and the taking of evidence have been observed, it is for the Court of First Instance alone to assess the weight to be attributed to the evidence produced (see, to that effect, Case C-136/92 P *Commission* v *Brazzelli Lualdi and Others* [1994] ECR I-1981, paragraph 66, and Case C-30/96 P *Abello and Others* v *Commission* [1998] ECR I-377, paragraph 53).

69 To the extent that the claim is merely that the President of the Court of First Instance did not explicitly evaluate a specific item of evidence, therefore, the appellant's allegation must be rejected.

70 Viewed as an allegation that the order is not properly reasoned on this point, the appellant's argument must also be rejected. A judge hearing an application for interim measures cannot be required to reply explicitly to all the points of fact and law raised in the course of the interlocutory proceedings. It is sufficient that the reasons given validly justify that order in the light of the circumstances of the case and enable the Court of Justice to exercise its powers of review (*SCK and FNK* v *Commission*, cited above, paragraph 52, and Case C-248/97 P(R) *Chaves Fonseca Ferrão* v *OHIM* [1997] ECR I-4729, paragraph 20).

71 In the present case, the President of the Court of First Instance clearly set out his assessment of that aspect of the situation at paragraph 69 of the order under appeal.

72 His reference to the experience of the safeguard measures introduced in 1997, which did not seem to have led to the closure of a large proportion of the rice mills established in the Netherlands Antilles, appears to be entirely relevant. In the context of the interlocutory proceedings, he did not have to consider the permanent nature of the contested decision but merely to assess the effects it was likely to entail pending the conclusion of the proceedings on the main action. He was thus quite entitled to refer to the known effects of previous temporary measures.

73 The second submission under the second plea must therefore be rejected as in part inadmissible and in part unfounded.

74 For all of those reasons, the second plea in appeal must be dismissed.

The third plea: failure to take account of the interests of the Netherlands Antilles

Arguments of the parties

75 The third plea put forward in support of the appeal relates principally to the reasoning which introduces paragraphs 55 to 65 of the order under appeal, as summarised in paragraphs 14 to 16 above, on the basis of which the President of the Court of First Instance concluded that, in view not only of the risk that the Community's interests might be irreversibly affected if the interim measure sought were granted but also of the Council's power of assessment when reconciling the objectives of the common agricultural policy and of the association of the OCTs with the Community, the appellant's application could not be granted unless the urgency of the measures sought appeared undeniable.

76 Four submissions are made under this third plea in appeal.

77 In its first submission, the appellant argues that, contrary to what is assumed in paragraphs 55 to 58 of the order under appeal, the Council is not authorised to avert a risk of conflict between two Treaty objectives — namely the development of the OCTs and the common agricultural policy — by introducing tariff quotas. Four arguments are put forward under this head.

78 First, the risk of conflict does not arise directly out of the Treaty but was created artificially by the Community, which failed to take account

of Articles 132(1) and 133(1) when establishing the common agricultural policy.

79 Second, the President of the Court of First Instance improperly assumed that there was in fact disruption on the Community markets for rice and sugar.

80 As regards the rice market, he should, first of all, have taken into account the positions expressed by certain parties to other cases pending before the Court of Justice and the Court of First Instance. He should further have examined properly the evidence made available to him, in particular the Netherlands Economic Institute report. Finally, he misinterpreted the Italian Government's statement that the market price for Indica rice in the Community was currently 93% of the intervention price; given the existence of safeguard measures in 1997, that statement proves that what affects the price of Community rice is not imports from the OCTs.

81 As regards the sugar market, paragraphs 55 to 58 of the order under appeal do not contain any consideration establishing the existence of an imbalance.

82 Third, the appellant denies that it stated at the hearing of the parties — as it is said to have done in the last sentence of paragraph 55 of the order under appeal — that 'at the end of the period of application of two successive safeguard measures over the first 11 months of 1997, the economic situation had not changed and the risk of conflict had become more serious, so that it was necessary to adopt a long-term solution'.

83 Fourth, the appellant denies the assertion made in paragraph 58 of the order under appeal, that it 'seems to be common ground that processing in the OCTs of rice or sugar from ACP countries, enabling those products to benefit from OCT origin, is a relatively simple industrial process not requiring costly plant' and that 'that circumstance thus favours the development of rice or sugar exports from the Netherlands Antilles to the Community'. It cites the high investment costs of rice and sugar mills and the findings in the report of the Netherlands Economic Institute to the effect that the rice export potential of the OCTs to the Community could not exceed its 1996 level.

84 In the second submission under its third plea, the appellant claims that the President of the Court of First Instance wrongly assumed, in paragraph 55 et seq. of his order, that the Council was entitled to introduce tariff quotas on trade with the OCTs. It advances three arguments in support of that contention.

85 First, paragraph 55 runs counter to Article 133(1) of the Treaty, which prohibits tariff quotas on rice and sugar originating in the OCTs. Since the end of the transitional period, customs duties and charges having equivalent effect on imports into the Community of products originating in the OCTs have been prohibited.

86 Second, the measures contained in the contested decision, if they are to be regarded as quantitative restrictions or measures having equivalent effect, have been prohibited since the end of the transitional period in respect of imports from the OCTs into the Community. Paragraph 55 of the order thus wrongly presumes that the Council is empowered to introduce such measures.

87 Third, the assumption made by the President of the Court of First Instance that the Council has the power to introduce tariff quotas or quantitative restrictions or measures of equivalent effect is clearly incompatible with the case-law of both the Court of First Instance and the Court of Justice. The appellant refers to Joined Cases T-480/93 and T-483/93 *Antillean Rice Mills and Others* v *Commission* [1995] ECR II-2305 and to Case C-310/95 *Road Air* v *Inspecteur der Invoerrechten en Accijnzen* [1997] ECR I-2229) which, it submits, established the principle of an irreversible 'OCT *acquis*'.

88 In its third submission under its third plea, the appellant argues that the President of the Court of First Instance could not authorise the Council to impose tariff quotas on rice merely because Community rice producers who had been encouraged to produce Indica rice found themselves in difficulty. By doing so, he treated the interests of the OCTs, which derive directly from the Treaty, as subordinate to aspects of the common agricultural policy defined in secondary legislation.

89 In the fourth submission made under its third plea, the appellant argues that the President of the Court of First Instance could not consider, as he did at paragraph 61 of his order, that there was no guarantee that a minimum price, if laid down, would make it possible to avert further disruption. In the first place, he completely ignored both the existence and the comprehensive nature of the Netherlands Antilles minimum price measure. Secondly, contrary to what is stated in paragraph 60 of the order, the appellant did challenge the Council's arguments relating to the difficulties involved in such a minimum price measure, referring in particular to certain correspondence between the Permanent Representation of the Netherlands and the Commission. Thirdly, the appellant points out that similar measures proposed by non-member countries are accepted as alternatives to the imposition of anti-dumping duties. Finally, in the event of any difficulty with a minimum price system, recourse to safeguard measures would have remained available and the President of the Court of First Instance could also have varied or cancelled any interim measures ordered.

90 The Council contends that the first three submissions made under the third plea concern not the urgency of the measures sought and the balance of interests but

the validity of the contested decision; they relate to pleas in law which the appellant had raised in its main action for annulment before the Court of First Instance, but not when seeking to establish a prima facie case in its application for interim measures. They should therefore be dismissed as inadmissible.

91 With regard to the fourth submission, the Council draws attention to paragraph 64 of the order under appeal, in which it is stated that, irrespective of any difficulties involved in a minimum price system, the President of the Court of First Instance could not in principle override the Council's assessment.

92 The Commission makes specific observations regarding each of the four submissions made under the third plea.

93 As regards the risk of conflict between two Treaty objectives, referred to in the first of those submissions, the Commission considers, first, that the President of the Court of First Instance did not express any view as to the Council's powers but merely described the contents of the contested decision; next, that the existence of disruption on the Community markets concerned was not assumed by the President of the Court of First Instance but deduced from his examination of the evidence, which cannot be called into question in an appeal; and that the fourth argument advanced by the appellant directly challenges the assessments of fact made at first instance.

94 The Commission, like the Council, considers that the second submission made under the third plea, relating to the Council's power to introduce tariff quotas in trade with the OCTs, is inadmissible inasmuch as it raises an issue as to the prima facie case which was not raised before the President of the Court of First Instance.

95 With regard to the third submission made under the third plea, the Commission contends that the President of the Court of First Instance made no evaluation as to the validity of the approach taken by the Council in balancing the interests of the OCTs and those of the common agricultural policy — an evaluation which would have addressed the question of the prima facie case had the appellant sought it. It is clear from the order under appeal that the President of the Court of First Instance merely weighed up whether the balance of interests inclined in favour of granting the interim measures or not.

96 Finally, the Commission considers that the fourth submission made under the third plea seeks a review of the facts as found in the order under appeal and is thus inadmissible.

Findings

97 The first argument raised in the first submission and the second and third submissions made under the third plea in appeal relate to arguments advanced in the main action to challenge the validity of the contested decision.

98 However, since it is clear from the order under appeal that the appellant did not rely on those submissions to establish a prima facie case for its application for interim measures, the President of the Court of First Instance cannot be criticised for not having taken them into account when weighing up the interests of the Community against those of the appellant.

99 As regards the third argument raised in the first submission made under the third plea, challenging the attribution of certain statements to the appellant by the President of the Court of First Instance, it need merely be pointed out that, in any event, that aspect did not play a decisive role in his reasoning.

100 Finally, in the second and fourth arguments raised in the first submission and in the fourth submission made under the third plea, the appellant seeks to call into question the assessment of the facts and evidence by the President of the Court of First Instance, which is not permissible in appeal proceedings, for the reasons stated in paragraphs 56 and 68 above.

101 The third plea in appeal must therefore be dismissed.

The first plea: prima facie case

Arguments

102 As regards the finding that there was no prima facie case for the interim measures sought, the appellant submits that the order under appeal is vitiated by five errors.

103 First, since the issue raised in the single plea in law put forward in the interlocutory proceedings was also at the same time the subject-matter of two requests for preliminary rulings, the President of the Court of First Instance should have taken into account the serious doubts expressed by the national courts in those cases.

104 Second, the interpretation given in the order under appeal to Article 240(3) of the OCT Decision is manifestly inconsistent with the ordinary meaning to be given to the terms of that provision, under which the five-year time-limit is binding.

105 Third, that interpretation is also clearly wrong in view of the context of that provision within the OCT Decision.

106 Fourth, the interpretation given in the order under appeal is manifestly inconsistent with the objectives of the OCT Decision regarding development, since it deprives the OCTs and companies wishing to invest in them of the legal certainty which is essential for both microeconomic and macroeconomic development.

107 Fifth, the appellant challenges the interpretation given in the order under appeal to the judgments in *Hansen* v *Hauptzollamt Flensburg* and *Netherlands* v *Commission*, cited above.

Findings

108 Here, it need merely be pointed out that the application for interim measures was dismissed in this case not only on the ground that no prima facie case had been made but also because the appellant had not established the existence of serious and irreparable harm such as to justify suspending application of the contested decision.

109 More specifically, the reasoning in the order under appeal relating to the issue of a prima facie case is in fact supererogatory, inasmuch as the President of the Court of First Instance found, separately and as distinct from his consideration of whether there was a prima facie case, that the condition relating to urgency was not satisfied.

110 However, the second and third pleas in appeal have not disclosed the existence of any error in law in the assessment of that latter condition.

111 The plea relating to the prima facie case, which does not call into question the lack of urgency of the measures sought, therefore cannot form grounds for setting aside, even partially, the order under appeal (*SCK and FNK*, cited above, paragraph 31; *Chaves Fonseca Ferrão*, cited above, paragraph 18, and Case C-43/98 P(R) *Camar* v *Commission and Council* [1998] ECR I-1815, paragraph 40). It need thus not be examined.

112 In the light of all the foregoing considerations, the appeal must be dismissed.

Costs

113 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the appellant has been unsuccessful, it must be ordered to pay the costs of the present proceedings.

114 The Commission, the Italian Republic and the Kingdom of Spain, as interveners, must bear their own costs in accordance with Article 69(4) of the Rules of Procedure.

On those grounds,

THE PRESIDENT OF THE COURT

hereby orders:

1. The appeal is dismissed.

2. The Government of the Netherlands Antilles shall pay the costs.

3. The Commission, the Italian Republic and the Kingdom of Spain shall bear their own costs.

Luxembourg, 25 June 1998.

R. Grass

Registrar

G. C. Rodríguez Iglesias

President