OPINION OF ADVOCATE GENERAL JACOBS

delivered on 26 October 1995 *

1. In this case the Commission applies for the annulment of a decision of the Council of 22 November 1993 concerning a draft international agreement designed to promote compliance with international conservation and management measures by fishing vessels on the high seas ('the Agreement'). The Agreement was negotiated in the framework of the United Nations Food and Agriculture Organization ('FAO'). By its decision the Council confirmed a previous decision of the Committee of Permanent Representatives ('Coreper') to the effect that the Community was not to vote in the FAO Conference (the main body of the FAO) on the adoption of the Agreement, but that the Member States were to vote. The Commission now takes the view that the Agreement comes within the Community's exclusive competence and that the Council's decision was therefore unlawful.

2. This case is a further instance of inter-institutional controversies on the scope of the Community's external competence. It will be remembered that in the proceedings leading to Opinion 1/94 [1] the Commission referred to the manner in which the Community and the Member States are represented in the FAO as being inadequate and unsatisfactory. Thus it may be inferred that the Commission regards this as a test case with regard to the representation of the Community in international organizations.

3. The Council lodged a preliminary objection to the admissibility of the action pursuant to Article 91(1) of the Court's Rules of Procedure. It states that the decision in issue is not an act subject to judicial review or, alternatively, that the Commission did not bring its case within the two-month period prescribed by the fifth paragraph of Article 173 of the Treaty. On 14 June 1994 the Court decided to join the objection to the substance of the case. As will be seen, issues of admissibility and substance are closely linked in this case.

4. Before discussing the issues raised I will first describe the way in which the Community and the Member States are represented in the FAO. I will then turn to the negotiation, adoption and contents of the Agreement.

* Original language: English.

1 — Opinion 1/94 on *The Agreement establishing the World Trade Organization* [1994] ECR I-5267.

The Community and the Member States in the FAO

5. The FAO is a specialized agency of the United Nations dealing, as its name indicates, with questions of food and agricultural policy.

6. In view of the important role played by the Community in those fields exploratory talks were held with the FAO Secretariat on a possible accession of the Community, leading to official negotiations which were opened on 1 February 1991. Those negotiations were successful, and on 26 November 1991 the FAO Conference admitted the European Economic Community (as it then was) as a Member Organization.

7. For that purpose certain amendments to the FAO Constitution were required. The relevant provision is Article II, which in its amended form reads partly as follows:

'1. ...

2. ...

3. The Conference may by a two-thirds majority of the votes cast, provided that a majority of the Member Nations of the Organization is present, decide to admit as a Member of the Organization any regional economic integration organization meeting the criteria set out in paragraph 4 of this Article, which has submitted an application for membership and a declaration made in a formal instrument that it will accept the obligations of the Constitution as in force at the time of admission. Subject to paragraph 8 of this Article, references to Member Nations under this Constitution shall include Member Organizations, except as otherwise expressly provided.

4. To be eligible to apply for membership of the Organization under paragraph 3 of this Article, a regional economic integration organization must be one constituted by sovereign States, a majority of which are Member Nations of the Organization, and to which its Member States have transferred

competence over a range of matters within the purview of the Organization, including the authority to make decisions binding on its Member States in respect of those matters.

5. Each regional economic integration organization applying for membership of the Organization shall, at the time of such application, submit a declaration of competence specifying the matters in respect of which competence has been transferred to it by its Member States.

6. Member States of a Member Organization shall be presumed to retain competence over all matters in respect of which transfers of competence have not been specifically declared or notified to the Organization.

7. Any change regarding the distribution of competence between the Member Organization and its Member States shall be notified by the Member Organization or its Member States to the Director-General, who shall circulate such information to the other Member Nations of the Organization.

8. A Member Organization shall exercise membership rights on an alternative basis with its Member States that are Member Nations of the Organization in the areas of their respective competences and in accordance with rules set down by the Conference.

9. Except as otherwise provided in this Article, a Member Organization shall have the right to participate in matters within its competence in any meeting of the Organization, including any meeting of the Council or other body, other than bodies of restricted membership referred to below, in which any of its Member States are entitled to participate. A Member Organization shall not be eligible for election or designation to any such body, nor shall it be eligible for election or designation to any body established jointly with other organizations. A Member Organization shall not have the right to participate in bodies of restricted membership specified in the rules adopted by the Conference.

10. Except as otherwise provided in this Constitution or in rules set down by the Conference, and Article III paragraph 4 notwithstanding, a Member Organization may exercise on matters within its competence, in any meeting of the Organization in which it is entitled to participate, a number of votes equal to the number of its Member States which are entitled to vote in such a meeting. Whenever a Member Organization exercises its right to vote, its Member States shall not exercise theirs, and conversely.

11. ...'

8. The United Kingdom, which intervened in support of the Council, reports that those amendments to the FAO Constitution constituted an important precedent and a significant achievement, and that they were not secured without difficulty. The Council and the United Kingdom say that some of the other Member Nations feared that the work of the Organization might be impeded by disputes between Member States of the Community and its institutions over the attribution of competence. Such disquiet is said to explain the requirement in Article II(5) of a declaration of competence. [2]

9. The Community made such a declaration of competence on the occasion of its accession to the FAO. According to that declaration, briefly summarized, the Community has exclusive competence in the field of commercial policy, in accordance with Article 113 of the Treaty, and in the field of fisheries as regards conservation measures, in accordance with Article 102 of the Act of Accession of 1972; the Community has non-exclusive competence in the areas of development cooperation, research and technological development, protection of the environment, agriculture, approximation of legislation, and a number of other areas of Community activity (transport, economic and social policy).

10. The General Rules of the FAO were moreover amended so as to provide for the representation of Member Organizations and of their Member States. Under section D of those Rules, entitled 'Member Organizations', the following provisions were inserted as Rule XLI:

'Competence

(1) Any Member Nation of the Organization may request a Member Organization or its Member States to provide information as to which, as between the Member Organization and its Member States, has competence in respect of any specific question. The Member Organization or the Member States concerned shall provide this information on such request.

(2) Before any meeting of the Organization the Member Organization or its Member States shall indicate which, as between the Member Organization and its Member States, has competence in respect of any specific question to be considered in the

2 — See also Antonio Tavares de Pinho, 'L'admission de la Communauté économique européenne comme membre de l'Organisation des Nations unies pour l'alimentation et l'agriculture (FAO)', *RMCUE* (1993), pp. 656 to 673; Rachel Frid, 'The European Community — A Member of a Specialized Agency of the United Nations', *EJIL* (1993), pp. 239 to 255.

meeting and which, as between the Member Organization and its Member States, shall exercise the right to vote in respect of each particular agenda item.

(3) In cases where an agenda item covers both matters in respect of which competence has been transferred to the Member Organization and matters which lie within the competence of its Member States, both the Member Organization and its Member States may participate in the discussions. In such cases the meeting, in arriving at its decisions, shall take into account only the intervention of the party which has the right to vote.'

11. At the internal Community level the Council and the Commission worked out an arrangement, dated 19 December 1991, laying down rules and procedures for a smooth coordination of the activities of the Community and its Member States in the FAO (the 'Arrangement'). That Arrangement provides for coordination meetings at various levels, for mechanisms ensuring an adequate flow of information, for rules on interventions and voting at FAO meetings, and for rules on participation in drafting committees. Some of those provisions are particularly significant for the present case.

12. Section 1.11 of the Arrangement provides that, in preparation for the coordination meetings, the Commission shall communicate to the Member States its proposals concerning (a) the exercise of responsibilities on a particular issue and (b) interventions on a particular issue. Section 1.12 provides that, if no agreement is reached between the Commission and the Member States on those proposals, the question shall be settled in accordance with the rules and procedures of the Treaty and in accordance with agreed practice. If no agreement is reached on that basis the question is submitted to Coreper. Section 1.13 states that decisions referred to in Section 1.12 are without prejudice to the respective competences of the Community and its Member States.

13. Section 2 lays down the rules on interventions and voting. Section 2.1 provides that where an item on the agenda concerns an area of exclusive Community competence the Commission is to take the floor and vote. Section 2.2 provides that where an item on the agenda concerns an area of national competence the Member States take the floor and vote. Section 2.3 deals with cases of shared competence:

'Where an agenda item deals with matters containing elements both of Member State and of Community competence, the aim will be to achieve a common position by consensus. If a common position can be achieved:

— the Presidency shall express the common position when the thrust of the issue lies

in an area outside the exclusive competence of the Community. Member States and the Commission may speak to support and/or to add to the Presidency statement. Member States will vote in accordance with the common position.

— the Commission shall express the common position when the thrust of the issue lies in an area within the exclusive competence of the Community. Member States may speak to support and/or add to the Commission's statement. The Commission will vote in accordance with the common position.'

If a common position cannot be reached the Member States are free to intervene and vote (Section 2.4).

14. The Commission emphasizes in its application that, if the Community's accession to the FAO is to be useful, it is necessary that those procedures are correctly applied; otherwise the Community risks being relegated to the status of an observer with the right to speak, which used to be its position before accession. The Commission also points to the necessity to observe the general declaration of competence made to the FAO. [3]

3 — See paragraph 9 above.

The negotiation of the Agreement

15. The problem of conservation of fish resources is well-known. The Community is a party to several conventions or regional arrangements dealing with that problem, and has adopted several regulations in the matter. It appears however that conservation measures are difficult to enforce. One practice giving rise to such problems of enforcement is the practice of changing the flag of fishing vessels so as to circumvent conservation measures. As regards fishing on the high seas only the flag State is capable of enforcing conservation measures, and where vessels fly the flag of a State which has not adopted such measures enforcement often becomes impossible. [4]

16. The need for measures aimed at discouraging such practices was voiced at several international conferences, and in November 1992, during its 102nd Session, the FAO Council asked the FAO Secretariat to organize the negotiation of an international agreement designed to address the problem. A first draft of an 'Agreement on the flagging of vessels fishing on the high seas to promote compliance with internationally agreed conservation and management measures' was prepared by an informal expert group in February 1993. A Commission

4 — See e. g. the facts of Case C-286/90 *Poulsen and Diva Navigation* [1992] ECR I-6019.

expert participated in the work of that group. The draft was subsequently revised at a number of formal meetings at various FAO levels. [5]

17. First the FAO Committee on Fisheries discussed it at its meeting of 15 to 19 March 1993. The Commission states in its application that even at that time it took the view that the draft Agreement came within the Community's exclusive competence. The Commission none the less proposed to inform the FAO in advance of the meeting that the Agreement was a matter of shared competence, but that the Community would vote. The reference to shared competence was inspired by the Commission's awareness of the sensitivity of the competence question, particularly since the draft Agreement contained provisions on registration of fishing vessels and on the allocation of flag, which are generally considered to fall within the competence of the Member States. While maintaining the reference to shared competence, Coreper decided to attribute the right to vote to the Member States. The Commission regarded that decision as a serious violation of the rules of the Treaty and of the Arrangement, and refused to send the indication of competence to the FAO. It was sent through the services of the General Secretariat of the Council and of the Danish Presidency.

18. The draft Agreement was again discussed at the 103rd Session of the FAO Council, held from 15 to 25 June 1993. The Commission again proposed to send an indication to the FAO stating 'shared competence — Community vote', but Coreper again decided to attribute the right to vote to the Member States. The General Secretariat of the Council sent the indication to the FAO. The Commission states in its application that at that stage of the negotiation there were already signs that the provisions on flagging were not going to be included in the Agreement. The Commission also mentions that it envisaged bringing the competence dispute before the Council, but it limited itself to making a statement on the scope of the Community's competence in the area of fisheries at the Council meeting (Fisheries) of 24 June 1993.

19. The negotiations continued informally on the occasion of the UN Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks held in New York in July 1993. A general consensus on the text of the Agreement was then reached. The text was subsequently revised by the FAO Committee on Constitutional and Legal Matters (October 1993) and by the FAO Council (104th Session, 2 to 5 November 1993), with a view to being formally approved by the 27th Session of the FAO Conference (6 to 25 November 1993). Article XIV of the FAO Constitution provides that the FAO Conference may adopt conventions and agreements by a two-thirds majority.

5 — On the background of the Agreement, its negotiation and contents see generally Gerald Moore, 'Un nouvel accord de la FAO pour contrôler la pêche en haute mer', *Espaces et ressources maritimes* (1993), No 7, pp. 62 to 68.

20. In the versions of the draft Agreement submitted to the FAO Council and the FAO Conference there were no provisions on flagging. Although the Commission says that it therefore took the view that the draft Agreement came within the Community's exclusive competence, again it proposed to send an indication of competence to the FAO Council and the FAO Conference stating 'shared competence — Community vote', in view of the fact that the issue of flagging could re-emerge at the final stage of the negotiations. However on 21 October 1993 Coreper again modified the Commission's proposal, attributing the right to vote to the Member States. The Commission then made clear that it would put the issue on the agenda of the Council meeting of 22 November 1993, but did transmit to the FAO the indication of competence as decided by Coreper in advance of the FAO Council meeting (starting on 2 November) and of the FAO Conference meeting (starting on 6 November). Coreper re-examined the issue on 12 November, without changing its decision.

21. At the Council meeting of 22 November the Commission asked the Council to approve a statement according to which the draft Agreement came essentially, if not entirely, within the Community's exclusive competence, and that it ought to have been approved by way of a Community vote. The statement also provided that in the future similar cases would have to be dealt with according to Section 2.1 or Section 2.3, as appropriate, of the Arrangement. [6] The Council refused to adopt that statement and confirmed the decision of Coreper of 21 October. The Commission then declared that the attribution of the right to vote to the Member States was likely to mislead the other FAO Members as regards the division of competences between the Community and the Member States, and that it was contrary to the Arrangement. The Commission also stated that it might bring the dispute before the Court of Justice. The Council took note of those statements, considered that the questions of substance concerning the division of competences and the right to vote in relation to the draft Agreement were not settled and asked Coreper to re-examine those questions.

22. On 24 November 1993 the text of the draft Agreement was approved at the FAO Conference by a unanimous vote including the 12 votes of the Member States. By application to the Court dated 20 January 1994 the Commission sought the annulment of the Council decision of 22 November 1993.

The Agreement

23. The Commission has in the meantime proposed that the Community should accede to the 'Agreement to promote compliance with international conservation and management measures by fishing vessels on the high

6 — Paragraph 13 above.

seas'. [7] According to its preamble the Agreement is based on the recognition of the right to engage in fishing on the high seas and on the duty incumbent on all States to take measures for the conservation of the living resources of the high seas. The preamble further recalls several international commitments and declarations, and calls upon States which do not participate in fisheries organizations or arrangements to join or enter into understandings with such organizations or with parties to such organizations or arrangements with a view to achieving compliance with international conservation and management measures. In the preamble the parties further express their consciousness of the duties of every State to exercise effectively its jurisdiction and control over vessels flying its flag. They state that:

'the practice of flagging or reflagging fishing vessels as a means of avoiding compliance with international conservation and management measures for living marine resources, and the failure of flag States to fulfil their responsibilities with respect to fishing vessels entitled to fly their flag, are among the factors that seriously undermine the effectiveness of such measures'.

They also state that:

'the objective of this Agreement can be achieved through specifying flag States' responsibility in respect of fishing vessels entitled to fly their flags and operating on the high seas, including the authorization by the flag State of such operations, as well as through strengthened international cooperation and increased transparency through the exchange of information on high seas fishing'.

24. Article I of the Agreement lays down a number of definitions. Article II essentially provides that the Agreement applies to all fishing vessels that are used or intended for fishing on the high seas, and specifies the possible exemptions to that rule.

25. Article III deals with the responsibility of the flag State, one of the principal elements of the Agreement. [8] Each party shall take the necessary measures to ensure that fishing vessels entitled to fly its flag do not engage in any activity that undermines the effectiveness of international conservation and management measures (Article III(1)(a)). No party shall allow any such fishing vessel to be used for fishing on the high seas unless it has been authorized to be so used by the appropriate authority or authorities, and a

7 — Proposal for a Council Decision on accession of the EC to the Agreement to promote compliance with international conservation and management measures by fishing vessels on the high seas, COM(94) 331 final, OJ 1994 C 229, p. 10.

8 — Cf. Moore, op. cit., note 5, p. 65.

fishing vessel so authorized shall fish in accordance with the conditions of the authorization (Article III(2)). The parties should satisfy themselves that they are able, taking into account the links that exist between them and the fishing vessel concerned, to exercise effectively their responsibilities (Article III(3)). Where a fishing vessel ceases to be entitled to fly the flag of a party, the authorization to fish on the high seas granted by that party shall be deemed to have been cancelled (Article III(4)). Article III(5) essentially provides that unless certain conditions are fulfilled no party shall authorize any fishing vessel previously registered in the territory of another party that has undermined the effectiveness of international conservation and management measures to be used for fishing on the high seas. Article III(6) concerns the marking of fishing vessels. Article III(7) requires each party to ensure that each fishing vessel entitled to fly its flag shall provide it with such information on its operations as may be necessary to enable the party to fulfil its obligations under the Agreement. Lastly, Article III(8), to which the Council pays particular attention in its defence, reads:

'Each Party shall take enforcement measures in respect of fishing vessels entitled to fly its flag which act in contravention of the provisions of this Agreement, including, where appropriate, making the contravention of such provisions an offence under national legislation. Sanctions applicable in respect of such contraventions shall be of sufficient gravity as to be effective in securing compliance with the requirements of this Agreement and to deprive offenders of the benefits accruing from their illegal activities. Such sanctions shall, for serious offences, include refusal, suspension or withdrawal of the authorization to fish on the high seas.'

26. The second principal objective of the Agreement is to ensure international cooperation and adequate circulation of information on fishing operations on the high seas. [9] Each party shall maintain a record of fishing vessels entitled to fly its flag and authorized to be used for fishing on the high seas (Article IV). The parties shall cooperate and in particular exchange information relating to activities of fishing vessels in order to assist the flag State in identifying those fishing vessels flying its flag reported to have engaged in activities undermining international conservation and management measures (Article V(1)). The parties shall also cooperate in undertaking investigatory measures when a fishing vessel is voluntarily in the port of a party other than its flag State (Article V(2)). They shall enter into cooperative agreements or arrangements of mutual assistance on a global, regional, subregional or bilateral basis so as to promote the achievement of the objectives of the Agreement (Article V(3)). Furthermore, Article VI lays down detailed requirements concerning the kinds of information to be made available to the FAO.

9 — Ibid., note 8.

27. Article VII deals with cooperation with developing countries. The parties shall provide assistance to parties that are developing countries in order to assist them in fulfilling their obligations under the Agreement. Article VIII governs relations with non-parties. Article IX concerns the settlement of disputes.

28. Among the final provisions Article X on acceptance is the most significant for the purpose of this case. The Agreement is open to acceptance by any FAO Member or Associate Member, and by any non-member State that is a member of the United Nations (Article X(1)). On acceptance by regional economic integration organizations the article provides:

'4. When a regional economic integration organization becomes a Party to this Agreement, such regional economic organization shall, in accordance with the provisions of Article II(7) of the FAO Constitution, as appropriate, notify such modifications or clarifications to its declaration of competence submitted pursuant to Article II(5) of the FAO Constitution as may be necessary in light of its acceptance of this Agreement. Any Party to this Agreement may, at any time, request a regional economic integration organization that is a Party to this Agreement to provide information as to which, as between the regional economic integration organization and its Member States, is responsible for the implementation of any particular matter covered by this Agreement. The regional economic integration organization shall provide this information within a reasonable time.'

29. The Agreement will enter into force as from the date of receipt by the FAO Director-General of the 25th instrument of acceptance (Article XI(1)).

30. At this point it may be useful to highlight some of the differences between the final Agreement and earlier drafts.

31. The first draft made by a group of experts and discussed by the FAO Committee on Fisheries in March 1993 was entitled 'Agreement on the flagging of vessels fishing on the high seas to promote compliance with internationally agreed conservation and management measures'. Article III of that draft dealt with registration of fishing vessels, requiring each party to maintain a register of fishing vessels and not to delete or register vessels where there were grounds for believing that those vessels were or would be used to undermine the effectiveness of internationally agreed conservation and management measures. Article IV of the draft dealt with allocation of flag. It essentially provided that no party should accord any fishing vessel the right to fly its flag unless it was satisfied (a) that there existed a genuine link between the vessel and the party concerned, and (b) that the vessel did not have the right to fly the flag of another State.

32. In the draft submitted to the FAO Council and Conference in November 1993 those provisions on registration and

flagging were not included. It was clear from the beginning of the negotiations that it would be impossible to obtain consensus on an agreement containing such provisions. [10] That was also the negotiating position of the Community and its Member States. There is none the less agreement between the parties to this dispute that the question of flagging could have re-emerged in the final negotiations of November 1993, and indeed it seems that the Peruvian delegation attempted, unsuccessfully, to reintroduce a provision on flagging. It is worth noting that the official agenda of the FAO Council and Conference meetings of November 1993 still referred to the draft Agreement as an agreement on the flagging of vessels fishing on the high seas, although in the actual draft which was submitted the title had already been replaced by the definitive title of the Agreement. It is also worth noting that the draft submitted to those meetings, as last revised by the FAO Committee on Constitutional and Legal Matters in October 1993, is almost word for word the same as the final text of the Agreement, showing that at the FAO Council and Conference meetings of November 1993 virtually no last-minute amendments were made.

The arguments on admissibility

33. The Council takes the view that the Commission's application is inadmissible. It argues that the Council decision in issue is not an act producing legal effects, and is therefore not open to annulment under Article 173 of the Treaty.

34. The Council is of the view that the legal nature of the decisions of Coreper and of the Council has to be assessed on the basis of the Arrangement. That Arrangement is purely internal. It does not have the aim (and neither would it be capable) of modifying the division of powers between the Community and its Member States. Such an essentially pragmatic arrangement is indispensable because the Treaty rules on the negotiation of international agreements are not applicable as such in the activities of the FAO. The Council refers to Opinion 2/91 where the Court held that where an agreement comes within the shared competence of the Community and its Member States common action is required. [11] The Arrangement corresponds to that requirement.

35. Against that background the Council submits three objections to the admissibility of the present application.

10 — Cf. Moore, op. cit., note 5, p. 64.

11 — Opinion 2/91 on *Convention No 170 of the ILO* [1993] ECR I-1061, paragraph 12.

36. First, the Council, the Commission and the Member States acted in conformity with the Arrangement. They conducted the negotiations on the Agreement on the basis of a common position, and it was only the issue of voting which, in the absence of consensus, had to be decided by Coreper, in accordance with the rules of the Arrangement. The decision taken by Coreper on 21 October 1993 was definitive, and confirmation of that decision by the Council was both unnecessary and impossible. The Arrangement does not provide for an appeal to the Council because it is a pragmatic arrangement, because the decisions are of a procedural or even ceremonial nature, and because of constraints of time-table.

37. Second, Coreper decision did not affect any rights the Commission may hold; nor did it modify the division of competences between the Community and its Member States. The Arrangement places all questions concerning participation in the workings of the FAO in a pragmatic framework. The Commission has accepted that framework. The decision of Coreper is not a decision taken *in lieu* or in the name of the Council and produces no effects in relation to the position of the Commission in the institutional balance as laid down in the Treaty. If the Commission took the view that the Agreement came within the exclusive competence of the Community, it could have asked for the Council's authorization to conduct the negotiations under Article 228 of the Treaty. However, it was recognized by all sides that the Agreement was a matter of shared competence. The negotiations were conducted on the basis of a common position, which at the final stage included a positive vote on the part of the Community and its Member States. Whether that vote was to be cast by the Commission or by the representatives of the Member States was a question of procedure or even protocol, which did not have any legal effects on the position of the Community or of the Commission in the FAO. The question of competence will only arise when it has to be decided whether the Community will accept the Agreement.

38. Third, the Council debate of 22 November 1993 was purely political. The declaration which the Commission proposed that the Council should make had no basis in a legal act, and could therefore have no legal significance. [12] If however the Court were to take the view that the vote cast in the Council was a 'deliberation', the Council argues that it merely confirmed the decision of Coreper. It is established case-law that an act which merely confirms a previous act does not change the character of the latter. The Commission should therefore have brought an action for annulment against the decision of Coreper of 21 October 1993 within the two-month period prescribed by Article 173 of the Treaty. [13] Moreover, the vote within the Council was partly a vote by the representatives of the Member States, since it concerned an issue not coming within the exclusive competence of the Community. Lastly, on 22 November 1993 the Council considered that the question of competence was to be further examined by Coreper.

12 — Case C-292/89 *Antonissen* [1991] ECR I-745, paragraphs 17 and 18 of the judgment.

13 — Reference is made to Joined Cases 166 and 200/86 *Irish Cement* v *Commission* [1988] ECR 6473.

39. The United Kingdom Government supports the Council in its submissions on admissibility. It argues that the Council's decision did not produce legal effects on the relations between the Community and the FAO and that it did not produce legal effects on the relationship between the institutions of the Community and the Member States.

40. As regards in particular the lack of legal effects on the relations between the Community and the FAO, the United Kingdom Government essentially argues that the Council's vote of 22 November 1993 did not and could not alter the voting procedures applied within the FAO Council or the FAO Conference at their meetings of November 1993. The General Rules of the FAO require the Community to make the requisite indication of competence in advance of all meetings. They do not contemplate that such an indication may be altered after the beginning of the meeting. For the FAO, therefore, the voting procedure to be followed by the Community and its Member States at the FAO Council and Conference meetings of November 1993 was settled by the indication of competence communicated by the Commission in advance of those meetings. The Council's vote of 22 November 1993 could not alter the legal effects produced by the Commission's previous notification.

41. The Commission replies that the legal effects of the contested decision are undeniable. The Agreement was adopted by the FAO Conference on 24 November 1993, whereas the Council decided on 22 November that the Community would not vote on that adoption. The Community was therefore definitively deprived of its right to vote on the adoption of an agreement coming within its competence. It is true that Coreper had already decided on 21 October that the Member States were to vote, and that that decision was communicated to the FAO before the November meetings. However, Coreper is one of the working organs of the Council, and its decision was confirmed by the Council on 22 November. The latter decision could still determine the voting procedure on 24 November. The vote cast by the 12 Member States, subsequent to a decision of the Council which disregarded the declaration of competence made to the FAO, has misled third States as to the scope of the Community's competence.

42. The Commission also maintains that it had no choice but to bring the competence issue before the Council. It denies that such a course of action is excluded under the Arrangement. The Council moreover did not dispute its competence to take a decision. Under Article 151(1) of the Treaty Coreper 'shall be responsible for preparing the work of the Council ...', which shows that a decision by Coreper only becomes definitive when it is approved by the Council. For the purpose of bringing an action for annulment under Article 173 of the Treaty it was indispensable to obtain a definitive Council decision. The two-month period for bringing the action therefore only started to run when the Council took that decision.

Analysis of the admissibility

43. It is well established that all measures which have legal effects are reviewable under Article 173 of the Treaty. In *Commission* v *Council* (the 'ERTA' case) the Court held: [14]

'Since the only matters excluded from the scope of the action for annulment open to the Member States and the institutions are "recommendations or opinions" — which by the final paragraph of Article 189 are declared to have no binding force — Article 173 treats as acts open to review by the Court all measures adopted by the institutions which are intended to have legal force.'

44. The 'ERTA' case is to some extent comparable to the present case. It involved Council deliberations which were concerned partly to determine the objectives of the negotiations on the ERTA (European Road Transport Agreement) and partly to determine the negotiating procedure to be followed. [15] The Council had settled on a negotiating position and had decided that the negotiations should be carried on and concluded by the Member States, and not by the Community. The Court first established the Community's capacity to conclude international agreements, and subsequently found that the Community had exclusive competence to negotiate and conclude the ERTA. It examined the nature of the Council proceedings, stating (a) that in so far as they concerned the objectives of the negotiation the proceedings were designed to lay down a course of action binding on both the institutions and the Member States and (b) that in the part of its conclusions relating to the negotiating procedure the Council adopted provisions which were capable of derogating in certain circumstances from the procedure laid down by the Treaty regarding negotiations with third countries and the conclusion of agreements. [16] The Court concluded that the proceedings 'had definite legal effects both on relations between the Community and the Member States and on the relationship between institutions'. [17]

45. The 'ERTA' case shows that it is necessary to take a broad view of admissibility. The concept of a measure having legal effects should be understood as including any definition by the Council of its position which may affect the Community's external competence. [18] That is necessary in order to ensure observance of the rule of law, a fundamental requirement frequently emphasized in the Court's case-law.

14 — Case 22/70 [1971] ECR 263, paragraph 39 of the judgment.
15 — Ibid., see paragraphs 45 to 48 of the judgment.
16 — Ibid., paragraphs 53 and 54 of the judgment.
17 — Ibid., paragraph 55 of the judgment.
18 — See Case C-327/91 *France* v *Commission* [1994] ECR I-3641, paragraph 16 of the judgment.

46. I have difficulty therefore in accepting the Council's submission that the definitive decision in this case was taken by Coreper, since on that view Article 173 of the Treaty, which provides for review of acts of the Council, not of Coreper, would seem to preclude judicial review. But it is in any event questionable whether Coreper should be regarded as having the power to take decisions having legal effects, the functions of Coreper being limited, according to Article 151 of the Treaty, to 'preparing the work of the Council' and to 'carrying out the tasks assigned to it by the Council'.

47. Coreper certainly exercises a central role in the Community decision-making process. [19] But since its functions under the Treaty are limited as set out above, it seems clear that it has no formal decision-making powers of its own, even if in practice it is Coreper which adopts the text of a measure which is then rubber-stamped by the Council. And the Council has no power under the Treaty to delegate its own authority to Coreper. Coreper is different in that respect from the committees of ministers' deputies established in certain organizations such as the Council of Europe — committees which may exercise powers in the same fields and having the same force as decisions of the ministers themselves. [20]

48. If however Coreper purported to take a decision having legal effects, then such a decision must in my view be open to challenge under Article 173 of the Treaty. That consequence follows plainly from the need to ensure observance of the rule of law. [21] I might add that any such challenge would be likely to succeed on the substance, precisely because Coreper will be held to have had no power to adopt the measure in question. But even if the Coreper decision could itself be challenged, it seems to me that a Council decision confirming a Coreper decision would not be immune to challenge. Under the Treaty it is the Council decision, not the Coreper decision, which produces legal effects. Consequently a challenge to the Council decision could not be treated as inadmissible on the ground that it merely confirms an earlier decision of Coreper or that the challenge is out of time because the time-limit for challenging the earlier decision has expired.

49. Similarly, I do not accept the argument that it is now too late to remedy the situation, on the ground that the vote has taken place and the Agreement has been adopted. Judicial review cannot be excluded because the act challenged cannot be undone — in this case because, as counsel for the United Kingdom put it at the hearing, 'the meeting is over'. If the act in question was unlawful, it must be open to review by the Court.

19 — See Anne Rigaux, Comité des Représentants Permanents, in *Répertoire de Droit Communautaire*, Dalloz, 1992 and bibliography there cited.

20 — See Emmanuel Decaux, *Jurisclasseur Europe*, fasc. 6100, point 55 (1989).

21 — See Joined Cases C-181/91 and C-248/91 *Parliament* v *Council and Commission* [1993] ECR I-3685, paragraphs 11 to 14 of the judgment.

Review cannot be excluded simply on grounds of a *fait accompli*.

50. I would therefore not reject the application as inadmissible on any of the grounds so far considered, and would be reluctant to reject the application as inadmissible at all if there were a genuine dispute of substance between the parties. If there were such a dispute, the Court should rule on it and should not be precluded from doing so by objections of an excessively technical and formalistic character. However the true problem in this case arises in my view from the fact that there is no genuine dispute of substance between the parties and that the difference between them is of a formal kind only.

51. It is unnecessary in my view to examine the question whether the contested measure was capable of having legal effects. The 'ERTA' case may suggest that it was capable of having such effects, but in the present case any such effects are entirely hypothetical. It may be noted in passing that in the 'ERTA' case the main issue was that of competence to conclude the agreement. (Indeed the Commission's action in challenging the deliberations of the Council under Article 173 of the Treaty might at that time have been thought the only way to raise the issue, because it was not then established that issues of competence could be brought before the Court under Article 228 of the Treaty. [22]) Here however the Council's decision is without prejudice to the issue of competence to conclude (i. e. become a party to) the Agreement, as is emphasized both by the decision itself [23] and by the terms of the Arrangement. [24] That issue will only be settled when a decision is taken on whether the Agreement should be concluded by the Community or by the Member States, or by both.

52. It is significant also that in the 'ERTA' case there might have been a difference in the outcome of the negotiations if the Council had asked the Commission to negotiate. In the present case it is common ground that there would have been no difference in the outcome if Coreper (or the Council) had taken a different decision on voting. At the FAO Conference the Member States voted in accordance with the commonly agreed position, as the Community would have done. It is not suggested that any of the Member States acted to the detriment of the Community's interest. If on 22 November 1993 the Council had agreed to adopt the statement suggested by the Commission, the voting on the Agreement would not have undergone any change. Likewise the text of the Agreement would have been exactly the

22 — That was only established in Opinion 1/75 on the *Understanding on a Local Cost Standard* [1975] ECR 1355, at p. 1360.

23 — See the last sentence of paragraph 21 above.

24 — See Section 1.13 of the Arrangement, cited at paragraph 12 above.

same as the present text. Even if the Council had decided (which the Commission did not propose) that the Commission was to vote for the Community, and even if the FAO had accepted an alteration of the indication of competence, it seems that the outcome of the voting would not have been different and the text of the Agreement would have been exactly the same. If the Court were to annul the Council's decision, that would have no practical consequences. The ruling might, it is true, be relevant for other, future cases. Even that is uncertain, since the solution in each case must depend on its particular circumstances. In any event, even if the decision were relevant for future cases, that is in my view not sufficient for the action to be admissible.

53. It seems clear that, for its action to be admissible, the Commission must have some real, direct interest in the outcome of the present case, and not merely a desire to obtain a decision from the Court which might be relevant in other cases in the future. It is true that it is often said that when bringing an action before the Court the Community institutions (and the Member States) do not need to show an 'interest', sometimes called a 'legal' interest, in the result of a case in order to make the action admissible. But that cannot be taken to mean that actions can be brought in the absence of a genuine dispute. [25] Courts will not generally adjudicate in the absence of a dispute. Even in proceedings under Article 177 of the Treaty, where it is in principle for the national court which makes a reference to decide whether a ruling by the Court of Justice is necessary, the Court of Justice has held that it is not its function to rule on hypothetical questions, and it has occasionally declined jurisdiction on that ground. [26] In direct actions, involving contentious proceedings between the parties, the question does indeed arise whether the applicant, even if it is a Community institution, has an interest in bringing proceedings. That is so even with infringement proceedings brought by the Commission under Article 169 of the Treaty against a Member State. Although the Court stated in *Commission* v *France* [27] that the Commission 'does not have to show the existence of a legal interest', that means only that the Commission does not have to establish a specific interest of its own in obtaining a ruling on the particular infringement. [28] The existence of an interest is however often in issue in such proceedings. If for example before the commencement of proceedings before the Court the Member State complies with the Commission's reasoned opinion, the Commission may nevertheless proceed with the action, but it may do so precisely because it has an interest in doing so: [29] namely to ensure that Community law is properly administered and applied, [30] or to establish the Member State's liability towards other Member States, the Community or private persons. [31]

25 — See Lasok, *The European Court of Justice: Practice and Procedure* (2nd ed. 1994) p. 196 ff., and especially pp. 200 to 201.

26 — See e. g. Case C-83/91 *Meilicke* [1992] ECR I-4871.

27 — Case 167/73 [1974] ECR 359, paragraph 15 of the judgment.

28 — See Lasok, op. cit., p. 201.

29 — Case 95/77 *Commission* v *Netherlands* [1978] ECR 863 per Advocate General Reischl at p. 874.

30 — Case 26/69 *Commission* v *France* [1970] ECR 565.

31 — Case 39/72 *Commission* v *Italy* [1973] ECR 101; Case 240/86 *Commission* v *Greece* [1988] ECR 1835, paragraph 14 of the judgment.

54. Similar considerations apply in my view to actions brought by the Commission under Article 173 of the Treaty. If the Council has acted unlawfully the Commission may bring proceedings without establishing a specific interest of its own in the outcome of the case. In that sense the Commission does not have to show an interest. [32] But it must be able to allege some genuine illegality with some actual consequences. The Court should not be asked for advisory opinions under Article 173 for the purpose of resolving difficulties which might arise in other cases in the future. [33] 'The applicant must ... prove that he has an interest in making his application, which is an essential and fundamental prerequisite for any legal proceedings.' [34]

55. That there is no real dispute in the present case is illustrated by the Commission's own conduct. The Commission did not propose that the Council should alter the indication of competence at its meeting of 22 November 1993. That is clear from the terms of the declaration proposed by the Commission, which were as follows:

'The Council finds that the draft agreement submitted to the Conference for adoption concerns the conservation and management of fishing resources on the high seas, by means of a licence regime and no longer by regulation of the allocation or changing of the flag as initially envisaged.

In these circumstances this draft agreement, which also includes certain provisions on assistance to developing countries, falls essentially, if not totally, within the exclusive competence of the Community and ought normally to have been approved in the Community's name by a vote of the Commission.

In future, cases of this kind will have to be dealt with according to Section 2.1 or Section 2.3, as appropriate, of the FAO Arrangement.'

Thus the Commission essentially proposed that the Council should state that the Agreement ought to have been approved by a Community vote, not that the Council should decide that the Agreement should be approved by a Community vote; and that in the future similar cases would have to be

32 — See Case 45/86 *Commission* v *Council* [1987] ECR 1493, paragraph 3 of the judgment.

33 — See the Opinion of Advocate General Lenz in Case 45/86 *Commission* v *Council*, above note 32, paragraphs 24 to 42.

34 — Case 206/89 R *S* v *Commission* [1989] ECR 2841, paragraph 8 of the order.

decided according to the rules of the Arrangement providing for interventions and voting by the Community. That the Commission's proposal was intended for the future rather than to change the decision in issue is particularly clear from the tense of the proposed statement: the draft agreement 'ought normally to have been approved'.

56. It must also be borne in mind that, throughout the negotiations on the Agreement, the Commission agreed with the indication of shared competence. It never suggested that the negotiation should be treated in accordance with Section 2.1 of the Arrangement, concerning areas of exclusive Community competence. Even at the Council meeting of 22 November it only stated that the Agreement came at least essentially within the Community's exclusive competence. The Council and the United Kingdom Government are therefore right to emphasize that there was no disagreement on the substance.

57. That does not mean that review by the Court is excluded in all cases concerning the Community's participation in the activities of the FAO, or of other international organizations of which it is a member. If for example the Council were to decide that the Member States should vote on a matter exclusively within the Community's competence, then that decision would be reviewable. The Commission did not suggest however that the Agreement came entirely within the Community's exclusive competence, and it cannot contend that now. Even where competence is shared, a decision on voting might still be reviewable if for example it were claimed that voting by Member States would adversely affect the Community's interest on a question of substance. There is however no need to resolve that issue here since the Commission does not seek to rely on any effect on the outcome of the process.

58. The Commission seeks to rely essentially on the suggestion that other members of the FAO would be misled. But any other members who were sufficiently interested can be presumed to be aware of the impossibility (for reasons which I explain below) of changing the indication of competence in midstream. They can also be presumed to be aware of the fact that the Arrangement and its application are without prejudice to the question who should become a party to the Agreement, and thus to the issue of competence. Certainly they would be aware that a vote by the Member States did not exclude the Community from becoming a party: indeed the Agreement, although voted on by the Member States and not by the Community, provides that the Community may become a party to it. [35]

35 — See Article X(4) of the Agreement, set out in paragraph 28 above.

59. In conclusion, therefore, the position throughout the negotiations was that it was agreed on all sides that Section 2.3 of the Arrangement applied. Moreover there was no dispute on the substance of the draft Agreement. There was a common position, and the same common position would have been supported by the Community or the Member States, whichever had the vote. Both the Community and the Member States were obliged to support the common position. The Commission at no time sought to alter the indication of competence. It sought only to obtain a statement of principle from the Council which might have been relevant for future cases. Moreover the draft Agreement as adopted preserved the possibility of the Community exercising exclusive competence in becoming party to the Agreement. It follows that the decision in issue was not in fact contested by the Commission at the time, and moreover that that decision, which related only to a particular vote in the course of the negotiations, had no bearing on any issue of substance between the parties. It seems clear therefore that the present case discloses no genuine dispute between the parties.

60. It may nevertheless in any event be of interest to examine briefly the questions of substance; moreover in my view an examination of the substance confirms the conclusion which I have reached on admissibility.

The substance

61. The Commission claims that the Council could not attribute the right to vote on the adoption of the Agreement to the Member States. That claim raises the following question. Is that Council decision, confirming the earlier decision of Coreper, to be reviewed on the basis of a fully-fledged examination of the Community's competence to conclude the Agreement, in its final form? I think not. It is obviously not possible for the Community institutions to carry out such an examination at every stage in the process of a negotiation such as the one in issue. It is obvious also that organizing the representation of the Community and the Member States in the FAO requires the adoption of practical arrangements on procedural questions. Because of the constraints on the participation of the Community and its Member States in the FAO, the Arrangement is of necessity pragmatic. In the light of those constraints, the objectives which the Member Nations of the FAO sought to achieve when making provision for the Community as a Member Organization would be frustrated if frequent challenges to a particular indication of competence were allowed. It is clear that if all indications of competence sent to the FAO were open to review there is a risk that the Community's participation in the activities of the FAO would become unworkable. There has to be some provisional allocation of competence which does not prejudge the ultimate allocation of competence or the decision on who concludes an agreement. The latter point is explicitly stated in the Arrangement and was confirmed by the Council on 22 November 1993.

62. The issue of substance in the present case is therefore the following: who at the time of the contested decision should have voted in the light of all the circumstances then prevailing, taking into account the terms of the Arrangement, the context of a continuing negotiating process within the FAO, the text of the Agreement as it then stood at that stage of the negotiation, and the possibility that it might still be amended.

63. I will first briefly examine the Court's case-law on the Community's competence in the matters covered by the Agreement and by the negotiations. I will then examine whether the provisional allocation of competence decided by Coreper and the Council was justifiable.

64. It is established case-law that the Community has exclusive competence for adopting measures for the conservation of the resources of the sea. In *Commission* v *United Kingdom* the Court stated: [36]

'... since the expiration on 1 January 1979 of the transitional period laid down by Article 102 of the Act of Accession, power to adopt, as part of the common fisheries policy, measures relating to the conservation of the resources of the sea has belonged fully and definitively to the Community.

Member States are therefore no longer entitled to exercise any power of their own in the matter of conservation measures in the waters under their jurisdiction. The adoption of such measures, with the restrictions which they imply as regards fishing activities, is a matter, as from that date, of Community law. As the Commission has rightly pointed out, the resources to which the fishermen of the Member States have an equal right of access must henceforth be subject to the rules of Community law.'

65. The Court had already held in *Kramer* that the Community was competent in respect of conservation measures on the high seas. The Court stated that the only way to ensure the conservation of the biological resources of the sea both effectively and equitably was through a system of rules binding on all the States concerned, including non-member countries. [37] In *Mondiet* the Court recalled its established case-law that, as regards fishing on the high seas, the Community has the same rule-making power as that held in accordance with international

36 — Case 804/79 [1981] ECR 1045, paragraphs 17 and 18 of the judgment.

37 — Joined Cases 3/76, 4/76 and 6/76 [1976] ECR 1279, paragraphs 30 to 33 of the judgment.

law by the flag State or the State where the ship is registered. [38] And in *Commission* v *Spain* [39] the Court held that:

'the Community has the power to take conservation measures both independently and in the form of contractual commitments with non-member countries or under the auspices of international organizations'.

66. The position is different however on the registration and flagging of fishing vessels. In *Pesca Valentia* v *Minister for Fisheries and Forestry* Irish legislation concerning registration was in issue. The Court held: [40]

'... national rules requiring a minimum proportion of the crews of fishing vessels of the Member State concerned to be EEC nationals are not, either by virtue of their subject-matter or by virtue of their purpose, measures relating to the conservation of fishery resources, since the application of such a measure cannot in itself have any effect on those resources. Consequently, Article 102 of the Act of Accession may not be read as prohibiting the Member States from adopting a measure such as that contained in the Irish legislation at issue in the main proceedings'.

67. In *Factortame and Others* the Court confirmed the above principle and went on to state: [41]

'... as Community law stands at present, it is for the Member States to determine, in accordance with the general rules of international law, the conditions which must be fulfilled in order for a vessel to be registered in their registers and granted the right to fly their flag, but, in exercising that power, the Member States must comply with the rules of Community law'.

68. It can thus be seen that the negotiation of the Agreement covered on the one hand matters which are within the Community's exclusive competence (conservation of the resources of the sea) and on the other hand matters within national competence (registration of vessels and the right to fly the flag of a Member State). It would therefore seem

38 — Case C-405/92 [1993] ECR I-6133, paragraph 12 of the judgment.

39 — Case C-258/89 [1991] ECR I-3977, paragraph 9 of the judgment.

40 — Case 223/86 [1988] ECR 83, paragraph 11 of the judgment.

41 — Case C-221/89 [1991] ECR I-3905, paragraph 17 of the judgment.

that the indication of shared competence, which the Commission also accepted, was correct.

69. It is true that the final text of the Agreement contains little on registration and flagging. But the parties to this dispute agree that it was not excluded, even at the final round of negotiations, that the flagging issue could re-emerge. At the time of deciding on the indication of competence it was therefore legitimate to take account of the flagging dimension of the negotiation.

70. The Arrangement provides that in matters of shared competence the aim will be to achieve a common position by consensus. In the case of the Agreement such a common position was indeed reached. The Arrangement further provides that the common position may be expressed either by the Presidency of the Council or by the Commission, depending on whether the 'thrust of the issue' lies in an area of national competence or of exclusive Community competence. In the present case the first option was chosen, with the Member States voting on the Agreement.

71. When the Community and the Member States exercise shared competence they are obliged to cooperate. That obligation is one instance of the obligations flowing from Article 5 of the Treaty. In Opinion 1/94 on the Agreement establishing the World Trade Organization the Court recalled that: [42]

'... where it is apparent that the subject-matter of an agreement or convention falls in part within the competence of the Community and in part within that of the Member States, it is essential to ensure close cooperation between the Member States and the Community institutions, both in the process of negotiation and conclusion and in the fulfilment of the commitments entered into. That obligation to cooperate flows from the requirement of unity in the international representation of the Community ...'.

72. In the present case however it is by no means suggested that there was a breach of the obligation of cooperation on the part of any of the Community institutions or on the part of any of the Member States. The terms of the Arrangement, which are obviously intended to provide a structure for that cooperation, were observed. The Commission agreed with the indication of shared competence, and only dissented as regards the question of voting. A common position was reached and was acted upon by the Member States.

42 — Cited at note 1, paragraph 108. See also Ruling 1/78 [1978] ECR 2151, paragraphs 34 to 36 and Opinion 2/91, cited at note 11, paragraph 36.

73. On the question of voting in areas of shared competence the Arrangement may not provide a definite answer for all cases. Voting by the Community depends on whether the 'thrust of the issue' lies within the exclusive competence of the Community. If that is not the case the Member States are to vote. In cases such as the present it may however be difficult to define competence in terms of the 'thrust of the issue'.

74. Although the point was not raised by the Commission, and was therefore not discussed by the parties, it could perhaps be argued that even when the subject-matter of the vote comes only partially within the Community's exclusive competence the right to vote should be attributed to the Community. It may be doubtful whether in cases of partial exclusivity the Council has the discretion to attribute the right to vote either to the Community or to the Member States. Exclusive Community competence, which is exceptional, may as a rule only be exercised by the Community, except where that is materially impossible, as for example in an international organization of which the Community is not a member. In the FAO the Community is now fully equipped to exercise that competence. However, where there is national competence on other aspects of the proposed agreement, the Community should not of course exercise its right to vote without first reaching a common position with all the Member States. That is further proof of the fact that the act of voting will often be merely procedural and that the vital issue is whether a common position can be reached or not.

75. On the facts of the present case it has not therefore been established in my view that the Council's decision should be annulled. However, the considerations just mentioned also reinforce my view that the present application should not be examined on the substance but should be rejected as inadmissible.

Conclusion

76. Accordingly, I am of the opinion that the Court should:

(1) dismiss the application;

(2) order the Commission to bear the costs of the Council;

(3) order the United Kingdom as intervener to bear its own costs.