OPINION OF ADVOCATE GENERAL ALBER

delivered on 13 November 2001 [1]

I — Introduction

1. The present proceedings concern the extent to which the anchovy catches in certain fishing areas known as ICES areas (ICES = International Council for the Exploration of the Sea), which the Council fixed annually by six regulations for 1996 to 2001, are lawful. In particular, they concern the compatibility of the regulations with the principle of relative stability. Under that principle, regard must be had not only to the stocks of the species concerned, but also to the needs of regions where local populations are especially dependent on fisheries and related activities.

2. The six regulations authorise Portugal and France to exchange anchovy fishing opportunities in such a way that part of the quota initially allocated to Portugal for ICES areas IX, X, CECAF 34.1.1, which lie to the west and south-west of the Iberian Peninsula, is transferred to France for fishing in another, adjacent area, ICES area VIII, which is in the Bay of Biscay. In the first-named areas 48% of the quota is allocated to Spain and 52% to Portugal and in the last-named area 90% is allocated to Spain and 10% to France.

3. By judgment of 5 October 1999 in Case C-179/95, the Court dismissed Spain's action against the same provisions governing anchovy fishing in ICES area VIII, on that occasion for 1995. [2] Spain was of the opinion that the quota exchange in 1995 ultimately led to an increase in the quota in area VIII, which was unlawful because it jeopardised relative stability. If an increase in the catch in area VIII had been possible and had that increase had taken place in a lawful manner, Spain should also, in its opinion, have received a higher quota since it was entitled to a 90% share of the catch for that area. Spain is of the opinion that the catch should not have been increased, because the anchovy in the two areas belong to different, separate stocks, a fact

1 — Original language: German.

2 — *Spain* v *Council* [1999] ECR I-6475.

acknowledged by the Council's fixing of two different volumes of catches and not an overall volume.

4. By letter of 14 October 1999, Spain declared that it regarded the proceedings in the present Cases C-61/96, C-132/97, C-45/98 and C-27/99, which concern the corresponding provisions for the years 1996 to 1999, as having been only partly disposed of by the judgment in Case C-179/95. As far as the plea in law of breach of the principle of relative stability was concerned, that judgment was not conclusive. In that respect, therefore, those proceedings must be continued. They are supplemented by two actions concerning the corresponding provisions for 2000 and 2001, Cases C-81/00 and C-22/01, in which the further plea in law of breach of the obligation to ensure rational and responsible exploitation of resources is again advanced. That plea also was already put forward in Case C-179/95.

II — Legal framework and facts

(1) *The essential features of the fisheries policy*

5. The Community's policy in the sphere of the conservation and management of fishery resources is based on the annual fixing of total allowable catches (or 'TACs', derived from the English term or from the French term 'totaux admissibles des captures'). This is done according to fish species and fishing zones on the basis of scientific analyses. The TACs are distributed as quotas among the Member States.

6. That policy continues the prevailing tradition in the management of fisheries, as it stood when the common fisheries policy was laid down by Council Regulation (EEC) No 170/83 of 25 January 1983 establishing a Community system for the conservation and management of fishery resources [3] ('Regulation No 170/83'). Regulation No 170/83 was later replaced by Council Regulation (EEC) No 3760/92 of 20 December 1992 establishing a Community system for fisheries and aquaculture [4] ('Regulation No 3760/92').

7. Regulation No 3760/92 deals with the fundamental issues concerning the fisheries sector in the Community. It establishes the following measures, for each fishery or group of fisheries: establishment of zones in which fishing activities are prohibited or restricted, limitation of exploitation rates, setting of quantitative limits on catches, limitation of time spent at sea taking account, where appropriate, of the remoteness of the fishing waters, fixing of the number and type of fishing vessels authorised to fish, laying down of technical

3 — OJ 1983 L 24, p. 1.
4 — OJ 1992 L 389, p. 1.

measures regarding fishing gear and its method of use, setting of a minimum size or weight of individuals that may be caught, and establishment of incentives, including those of an economic nature, to promote more selective fishing, and so on.

8. That regulation repeatedly invokes the principle of relative stability with which the present proceedings are primarily concerned. That principle assures the Member States a fixed percentage share of the fishing opportunities, [5] but not fixed quantities of fish, for marketable species. [6]

9. That principle has its origins in the 1970s. On 3 November 1976, following the extension of exclusive economic zones to 200 nautical miles and the associated loss of Member States' fishing potential off the coasts of non-member countries, which occurred in the mid-1970s, the Council adopted the 'Hague Resolution'. Annex VII to that resolution introduced a system known as the 'Hague Preferences' for Irish and United Kingdom coastal fisheries. In that system, the Council recognised that, in the application of the common fisheries policy, account should also be taken of the particular vital needs of other economically disadvantaged coastal regions where the local populations are particularly dependent upon fisheries and related industries. [7] As a result of the Council declaration of 30 May 1980 on the common fisheries policy, [8] the principle of relative stability was enshrined in the earlier Regulation No 170/83. The fifth to seventh recitals in the preamble to that regulation are identical in wording to the 12th to 14th recitals of Regulation No 3760/92. [9] [10]

10. The 12th to 14th recitals in the preamble to Regulation No 3760/92 define the principle of relative stability as follows:

'Whereas conservation and management of resources must contribute to a greater stability of fishing activities and must be appraised on the basis of a reference allocation reflecting the orientations given by the Council;

Whereas, in other respects, that stability, given the temporary biological situation of stocks, must safeguard the particular needs of regions where local populations are

5 — See the judgment in Case 46/86 *Romkes* v *Officier van Justitie* [1987] ECR 2671, paragraph 17.

6 — Joined Cases C-63/90 and C-67/90 *Portugal and Spain* v *Council* [1992] ECR I-5073, paragraph 28.

7 — Only Annex I of the Hague Resolution was published, and that not until 1981. However, the text of Annex VII is reproduced in the judgment in Case C-4/96 *NIFPO and Northern Ireland Fishermen's Federation* [1998] ECR I-681, paragraph 4.

8 — OJ 1980 C 158, p. 2.

9 — Cited in point 6.

10 — For details of the historical background, see the Opinion of Advocate General Pergola in Case C-4/96 *NIFPO and Northern Ireland Fishermen's Federation* [1998] ECR I-681, points 4 to 20.

especially dependent on fisheries and related activities as decided by the Council in its resolution of 3 November 1976, and in particular Annex VII thereto;

Whereas, therefore, it is in this sense that the notion of relative stability aimed at must be understood'.

(2) *The fixing of catches and quotas*

11. Council Regulation (EEC) No 172/83 of 25 January 1983 fixing, for certain fish stocks and groups of fish stocks occurring in the Community's fishing zone, total allowable catches for 1982, the share of these catches available to the Community, the allocation of that share between the Member States and the conditions under which the total allowable catches may be fished [11] was adopted on the basis of Article 11 of Regulation No 170/83. For the first time it allocated to the Member States fixed quotas for particular species in particular areas. The allocation key used has subsequently continued to be applied unaltered. [12]

12. Under Article 161 of the Act concerning the conditions of accession of the Kingdom of Spain and the Portuguese Republic and the adjustments to the Treaties (hereinafter 'the Act of Accession'), [13] Spain was granted a TAC share of 90% (and France 10%) for anchovy in ICES area VIII. Pursuant to Article 162 of the Act of Accession, an adjustment of that arrangement was to be adopted before 31 December 1993 in accordance with the procedure laid down in Article 43 of the EEC Treaty. It was to take effect on 1 January 1996.

13. That adjustment was made with the adoption of Council Regulation (EC) No 1275/94 of 30 May 1994 on adjustments to the arrangements in the fisheries chapters of the Act of Accession of Spain and Portugal [14] (hereinafter 'Regulation No 1275/94'). Under Article 3(1) of that regulation, the Council is to adopt, in accordance with Articles 4 and 8 of Regulation No 3760/92, the measures laying down the conditions of access to the zones and resources subject to specific rules pursuant to Article 161 of the Act of Accession. Under Article 3(2), those measures were to take account of the principle of relative stability.

14. Article 4 of Regulation No 3760/92 provides as follows:

'1. In order to ensure the rational and responsible exploitation of resources on a

11 — OJ 1983 L 24, p. 30.

12 — See the Opinion of Advocate General La Pergola in *NIFPO and Northern Ireland Fishermen's Federation*, cited in footnote 10, point 19, and the judgment in the same case (cited in footnote 7, paragraph 12).

13 — OJ 1985 L 302, p. 1.

14 — OJ 1994 L 140, p. 1.

sustainable basis, the Council, acting, except where otherwise provided, in accordance with the procedure laid down in Article 43 of the Treaty, shall establish Community measures laying down the conditions of access to waters and resources and of the pursuit of exploitation activities. These measures shall be drawn up in the light of the available biological, socio-economic and technical analyses and in particular of the reports drawn up by the Committee provided for in Article 16.

2. These provisions may, in particular, include measures for each fishery or group of fisheries to:

(a) establish zones in which fishing activities are prohibited or restricted;

(b) limit exploitation rates;

(c) set quantitative limits on catches;

(d) limit time spent at sea taking account, where appropriate, of the remoteness of the fishing waters;

...'

Article 8 provides:

'1. In accordance with Article 4, the exploitation rate may be regulated by restricting for the period concerned the volume of catches authorised and, if necessary, the fishing effort. In cases where a limitation of catches is not appropriate, the exploitation rate may be regulated solely by a restriction of the fishing effort.

2. ...

3. ...

4. The Council, acting by qualified majority on a proposal from the Commission:

(i) shall determine for each fishery or group of fisheries, on a case-by-case basis, the total allowable catch and/or total allowable fishing effort, where appropriate on a multiannual basis. These shall be based on the management objectives and strategies where they have been established in accordance with paragraph 3;

(ii) shall distribute the fishing opportunities between Member States in such a way as to assure each Member State relative stability of fishing activities for each of the stocks concerned; however, following a request from the Member States directly concerned, account may be taken of the development of mini-quotas and regular quota swaps since 1983, with due regard to the overall balance of shares;

(iii) ...

(iv) ...

(v) ...'

(3) *The regulation of quota exchanges*

15. Article 9(1) of Regulation No 3760/92 provides:

'1. Member States may, after notifying the Commission, exchange all or part of the fishing availabilities allocated to them.'

16. In compliance with Article 3 of Regulation No 1275/94, the Council adopted Regulation (EC) No 685/95 of 27 March 1995 on the management of the fishing effort relating to certain Community fishing areas and resources. [15] In the first to third recitals in the preamble, that regulation refers to Regulations Nos 3760/92, 1275/94 and the principle of relative stability.

17. Article 11(1) of Regulation No 685/95 provides:

'1. In accordance with Article 9 of Regulation (EEC) No 3760/92, the Member States concerned shall exchange fishing possibilities allocated to them under the conditions referred to in Annex IV point 1.'

Point 1 in Annex IV lays down:

'Measures concerning the exchange of certain fishing possibilities and certain authorised catch limits

1. Exchanges of fishing possibilities

1.1. Exchanges between France and Portugal will be tacitly renewable for the

15 — OJ 1995 L 71, p. 5.

period 1995 to 2002, subject to the possibility of annual amendment of the conditions thereof by each Member State at the time of the annual fixing of TACs and quotas.

Exchanges concern the following TACs:

(i) a common TAC for anchovy being fixed for ICES areas VIII and IX, 80% of Portugal's fishing possibilities will be transferred every year to France. Quantities must be fished exclusively in waters under the sovereignty or jurisdiction of France;

...'

18. Only four days later, on 31 March 1995, the Council adopted Regulation (EC) No 746/95 of 31 March 1995 amending Regulation (EC) No 3362/94 [16] fixing, for certain fish stocks and groups of fish stocks, the total allowable catches for 1995 and certain conditions under which they may be fished. [17] Under that measure, Portugal was for the first time allowed to fish in ICES area VIII a certain part of the anchovy catch quota allocated to it for ICES area IX.

(4) *The measures at issue in the present case*

19. In Case C-179/95 Spain obtained a review of the lawfulness of Regulations Nos 746/95 and 685/95. By its judgment of 5 October 1999, the Court dismissed that action on the grounds that the principle of relative stability and the obligation to provide for the rational and responsible exploitation of living marine aquatic resources were not infringed by the two contested regulations. [18]

20. The regulations at issue in the present proceedings were also adopted on the basis of Article 8(4) of Regulation No 3760/92. They are:

— Council Regulation (EC) No 3074/95 of 22 December 1995 fixing, for certain fish stocks and groups of fish stocks, the total allowable catches for

16 — OJ 1994 L 363, p. 1.

17 — OJ 1995 L 74, p. 1.

18 — *Spain* v *Council*, cited in footnote 2.

1996 and certain conditions under which they may be fished [19] ('Regulation No 3074/95'),

— Council Regulation (EC) No 390/97 of 20 December 1996 fixing, for certain fish stocks and groups of fish stocks, the total allowable catches for 1997 and certain conditions under which they may be fished [20] ('Regulation No 390/97'),

— Council Regulation (EC) No 45/98 of 19 December 1997 fixing, for certain fish stocks and groups of fish stocks, the total allowable catches for 1998 and certain conditions under which they may be fished [21] ('Regulation No 45/98'),

— Council Regulation (EC) No 48/1999 of 18 December 1998 fixing, for certain fish stocks and groups of fish stocks, the total allowable catches for 1999 and certain conditions under which they may be fished [22] ('Regulation No 48/1999'),

— Council Regulation (EC) No 2742/1999 of 17 December 1999 fixing for 2000 the fishing opportunities and associated conditions for certain fish stocks and groups of fish stocks, applicable in Community waters and, for Community vessels, in waters where limitations in catch are required and amending Regulation (EC) No 66/98 [23] ('Regulation No 2742/1999') and

— Council Regulation (EC) No 2848/2000 of 15 December 2000 fixing for 2001 the fishing opportunities and associated conditions for certain fish stocks and groups of fish stocks, applicable in Community waters and, for Community vessels, in waters where limitations in catch are required [24] ('Regulation No 2848/2000').

21. Those regulations fixed the total allowable catches for 1996 to 2001. The Annex to Regulation No 3074/95, Annexes I to Regulations Nos 390/97, 45/98 and 48/1999 and Annexes ID to Regulations Nos 2742/1999 and 2848/2000 all identified a separate TAC for anchovy, both for ICES area VIII and for ICES area IX. In area VIII, 90% of the available TAC was allocated to Spain and the remaining 10% to France in all years. In area IX, 48% of the available TAC was allocated to Spain and 52% to Portugal in all years. Of that

19 — OJ 1995 L 330, p. 1.
20 — OJ 1997 L 66, p. 1.
21 — OJ 1998 L 12, p. 1.
22 — OJ 1999 L 13, p. 1.
23 — OJ 1999 L 341, p. 1.
24 — OJ 2000 L 334, p. 1.

52%, according to note (3)[25] or (2),[26] in each year from 1996 to 1999 5 008 tonnes,[27] in 2000 a total of 3 000 tonnes[28] and in 2001 a total of 80% of 5 220 tonnes, that is, 4 176 tonnes,[29] were allowed to be fished in ICES area VIII under the sovereignty or jurisdiction of France.

22. In each year from 1996 to 1999 a precautionary TAC was fixed for both areas. In 2000 and 2001, an analytical TAC was fixed for ICES area VIII and a precautionary TAC for ICES area IX. Pursuant to Article 1 of Council Regulation (EC) No 847/96 of 6 May 1996 introducing additional conditions for year-to-year management of TACs and quotas,[30] '[p]recautionary TACs shall apply to stocks for which no scientifically-based evaluation of fishing possibilities is available specifically for the year in which the TACs are to be set; analytical TACs shall apply otherwise'.

23. The TAC for ICES area VIII was 33 000 tonnes in all years. For 2000, however, on the basis of scientific reports, a TAC of only 16 000 tonnes was initially fixed, but in June 2000 this was increased to 33 000 tonnes again on the basis of new scientific estimates.[31]

24. The TAC in ICES area IX was fixed at 12 000 tonnes in 1996, 1997 and 1998, at 13 000 tonnes in 1999 and at 10 000 tonnes in both 2000 and 2001.

III — Forms of order sought by the parties

25. Spain claims that the Court should:

(1) — in Case C-61/96, annul the point concerning anchovy in the Annex to Regulation No 3074/95,

— in Case C-132/97, annul the point concerning anchovy in the Annex[32] to Regulation No 390/97,

25 — Regulations Nos 3074/95, 390/97 and 45/98.

26 — Regulations Nos 48/1999, 2742/1999 and 2848/2000.

27 — Regulations Nos 3074/95, 390/97, 45/98 and 48/1999.

28 — Regulation No 2742/1999. Portugal's quota was 5 220 tonnes.

29 — Regulation No 2848/2000. Portugal's quota was 5 220 tonnes. Unlike previous years, this regulation provides that 80% of that quota may be fished in area VIII. That percentage is equivalent to 4 176 tonnes.

30 — OJ 1996 L 115, p. 3.

31 — Council Regulation (EC) No 1446/2000 of 16 June 2000 amending Regulation (EC) No 2742/1999 fixing for 2000 the fishing opportunities and associated conditions for certain fish stocks and groups of fish stocks, applicable in Community waters and, for Community vessels, in waters where limitations in catch are required (OJ 2000 L 163, p. 3).

32 — This should, more accurately, read 'Annex I' since Regulation No 390/97 has several annexes.

— in Case C-45/98, annul the point concerning anchovy in Annex I to Regulation No 45/98,

— in Case C-27/99, annul the point concerning anchovy in Annex I to Regulation No 48/1999,

— in Case C-81/00, annul note (2) relating to stocks of 'Anchovy, Zone: IX, X, CECAF 34.1.1' in Annex ID to Regulation No 2742/1999, and

— in Case C-22/01, annul note (2) relating to stocks of 'Anchovy, Zone: IX, X, CECAF 34.1.1' (Community waters) in Annex ID to Regulation No 2848/2000;

(2) in all the cases, order the Council to pay the costs.

26. The Council claims that the Court should:

(1) dismiss the applications as inadmissible,

(2) in the alternative, dismiss the applications as unfounded,

(3) in Cases C-81/00 and C-22/01, confirm the principles on which the judgment of the Court in Case C-179/95 *Spain* v *Council* was based and which upheld the lawfulness of the quota exchange between Portugal and France in 1995,

(4) in all the cases, order Spain to pay the costs.

27. The Commission, which has intervened in support of the Council in all the cases except Case C-22/01, claims, in Cases C-61/96, C-132/97, C-45/98, C-27/99 and C-81/00, that the Court should:

(1) dismiss the applications as inadmissible,

(2) in the alternative, dismiss the applications as unfounded,

(3) order Spain to pay the costs.

IV — Arguments of the parties and assessment

A — *Admissibility of the actions*

(1) Arguments of the parties

28. The Council takes the view that the actions in Cases C-61/96, C-132/97, C-45/98 and C-27/99 are inadmissible. At the hearing, it extended that objection to include Cases C-81/00 and C-22/01, the admissibility of which it had not challenged in the written procedure.

29. It maintains that the actions are between the same parties, have the same purpose and are based on the same pleas in law as in Case C-179/95. They are identical to Case C-179/95 in so far as the provision concerning anchovy fishing in ICES area VIII, which is contained in the annexes to the contested regulations, is identical to those in Regulation No 746/95, including the disputed note (3) which the Court declared lawful in its judgment in Case C-179/95. The admissibility of the actions is therefore precluded by the authority of *res judicata* attaching to the judgment in Case C-179/95. The view that the proceedings have the same subject-matter is supported by the decisions of the President of the Court of 3 May 1996, 15 May 1997, 16 March 1998 and 8 March 1999 staying the proceedings in Cases C-61/96, C-132/97, C-45/98 and C-27/99 pending delivery of the judgment in Case C-179/95.

30. The Commission likewise considers those actions inadmissible. Spain is challenging only the annual fixing of the total allowable catches. However, those total allowable catches are merely the confirmation of the quota exchange established in Regulation No 685/95. The lawfulness of that exchange was confirmed in the judgment in Case C-179/95. In the Commission's opinion, only Regulation No 685/95 and the last phrase of subparagraph (i) of the second paragraph of point 1(1.1) of Annex IV thereto produce legal effects. That regulation and it alone lays down provisions on the common management of the anchovy stocks in ICES areas VIII and IX and on the detailed rules, scope and duration of the quota exchange between France and Portugal. The subsequent regulations, which fix the annual total allowable catches, merely confirm the application of common management of the anchovy stocks and of the quota exchange and calculate in tonnes the percentages already fixed in Regulation No 685/95. The contested provisions spell out in detail the logical consequence of Regulation No 685/95 without adding any new elements. The judgment in Case C-179/95 decided with the authority of *res judicata* on the lawfulness of that regulation, and in particular its compatibility with the principle of relative stability.

31. The Spanish Government, on the other hand, considers the actions admissible. It is of the view that the judgment in Case C-179/95 did not answer conclusively the question whether the principle of relative stability was infringed. Moreover, the present cases concern Regulations Nos 3074/95, 390/97, 45/98, 48/1999, 2742/1999 and 2848/2000, which were not the subject-matter of Case C-179/95. To declare the present actions inadmissible would amount to refusing judicial review in the case of a legislative provision with a specific, temporally-limited scope, on the ground that a provision with analogous content but a different temporal scope has been declared lawful. Dismissal of the actions as inadmissible would also infringe Spain's legal status as a privileged applicant. Article 230 EC makes the admissibility of its action subject only to the condition that the time-limit for instituting proceedings is complied with.

(2) Assessment

32. It is settled case-law that the authority of *res judicata* attaching to a judgment can constitute a bar to the admissibility of an action only if both actions are between the same parties, have the same purpose and are based on the same submissions. [33]

33. The parties in Cases C-61/96, C-132/97, C-45/98, C-27/99, C-81/00 and C-22/01 are the same as in Case C-179/95, namely Spain (as applicant) and the Council (as defendant). The actions are also based on the same submissions. Following Spain's partial discontinuance by letter of 14 October 1999, they concern the compatibility of the contested regulations with the principle of relative stability. The action in Case C-179/95 was also based *inter alia* on that submission. The question is to what extent the actions have the same purpose as the action in Case C-179/95.

34. Each action contests a different regulation and seeks its partial annulment in so far as it regulates anchovy fishing in ICES area VIII. Each of those acts has a different temporal scope. They relate to the successive years from 1996 to 2000. The action in Case C-179/95 concerned a regulation for 1995. Since, according to settled case-law, the act whose annulment is sought is an essential element in defining the subject-matter of an action, [34] and since different acts are being contested in the actions to be assessed here, there are good grounds for considering those actions admissible.

35. The Council goes a step further in its reasoning. It concerns itself not only with the act contested in each case, but also with

33 — Judgment in Joined Cases 172/83 and 226/83 *Hoogovens Groep* v *Commission* [1985] ECR 2831, paragraph 9, order in Joined Cases 159/84, 267/84, 12/85 and 264/85 *Ainsworth and Others* v *Commission* [1987] ECR 1579, paragraph 3, and judgment in Joined Cases 358/85 and 51/86 *France* v *Parliament* [1988] ECR 4821, paragraph 12; judgments of the Court of First Instance in Case T-28/89 *Maindiaux and Others* v *Economic and Social Committee* [1990] ECR II-59, paragraph 23, and Joined Cases T-177/94 and T-377/94 *Altmann and Casson* v *Commission* [1996] ECR II-2041, paragraph 50.

34 — Judgment of the Court of First Instance in Case T-162/94 *NMB France and Others* v *Commission* [1996] ECR II-427, paragraphs 37 to 39, and order of the Court of First Instance in Case T-26/96 *Lopes* v *Court of Justice* [1996] ECR-SC II-1357, paragraphs 14 to 16.

its content. Since the contested provisions on anchovy fishing in ICES area VIII contained in Regulations Nos 3074/95, 390/97, 45/98, 48/1999 and 2742/1999 are identical in each case to those in Regulation No 746/95, the Council considers the actions inadmissible.

36. On the other hand, however, it should be noted that Regulation No 48/1999 fixed a TAC of 13 000 tonnes for ICES area IX, that is, 1 000 tonnes more than in the previous years. In 2000 and 2001 also, different quantities were fixed from those for 1995. Regulation No 2742/1999 fixed a TAC of 16 000 tonnes for ICES area VIII, which was then increased to 33 000 tonnes by Regulation No 1446/2000. [35] For the first time this was an analytical TAC, to which the provisions of Articles 3 and 4 of Council Regulation (EC) No 847/96 of 6 May 1996 introducing additional conditions for year-to-year management of TACs and quotas [36] were declared inapplicable, whereas Article 5 of that regulation was declared applicable. For ICES area IX, a TAC of 10 000 was fixed, of which 5 220 tonnes were allocated to Portugal. It was allowed to fish 3 000 tonnes, that is less than 80%, of that allocation in ICES area VIII within the jurisdiction of France. In this respect also, these are provisions which differ from those of previous years. Regulation No 2848/2000 again fixed a TAC of 33 000 tonnes for ICES area VIII, again as an analytical TAC. For ICES area IX a quantity of 10 000 tonnes was fixed, of which 5 220 tonnes were allocated to Portugal. For the first time it was provided that 80% of that allocation could be fished in ICES area VIII within the jurisdiction of France. Thus for the first time a percentage instead of a quantity in tonnes was fixed for the quota exchange. As those examples show, the fact that the figures from 1995 to 1999 were identical is more a matter of coincidence.

37. The decision on the admissibility of the actions cannot depend on the fact that, without legal necessity, an identical set of provisions was adopted for the years from 1996 to 1999 to that adopted for 1995. In that respect, the regulations adopted for 2000 and 2001 prove that they each constitute a new set of provisions which is applicable to a specific period and is independent in its legal validity of the provisions adopted in other years. This suggests that the actions have different purposes and must therefore be considered admissible.

38. The Commission points out that the quota exchanges between Portugal and France were established in Regulation No 685/95. That regulation provides that exchanges will be tacitly renewable for the period 1995 to 2002. The question is whether Regulations Nos 746/95, 3074/95, 390/97, 45/98, 48/1999, 2742/1999 and 2848/2000 are therefore to be regarded as identical sets of provisions.

35 — OJ 2000 L 163, p. 3.
36 — OJ 1996 L 115, p. 3.

39. Such a supposition is difficult to reconcile with the wording of Regulation No 685/95. That regulation reserves to France and Portugal the right to amend the conditions of the quota exchange at the time of the annual fixing of TACs and quotas. Regulation No 685/95 expressly makes the exchange subject to annual renewal and, in certain circumstances, adjustment. In that respect, the provision in question starts from the assumption that a new set of provisions will be adopted annually. This likewise supports the admissibility of the actions.

40. However, the Commission's argument that the fundamental rules dealing with the quota exchanges are already laid down in Regulation No 685/95 must be upheld. That is why it takes the view that contested Regulations No 3074/95, No 390/97, No 45/98, No 48/1999 and No 2742/1999 merely confirm the quota exchanges agreed in Regulation No 685/95, which was declared lawful in the judgment in Case C-179/95.

41. On the other hand, it should be pointed out that, in its actions in Cases C-61/96, C-132/97, C-45/98, C-27/99, C-81/00 and C-22/01, in contrast to the action in Case C-179/95, Spain is no longer challenging the lawfulness of Regulation No 685/95. Consequently, in that respect there is no overlap or even identity of purpose between the actions.

42. The Commission's reasoning is based on the assumption that the contested Regulations Nos 3074/95, 390/97, 45/98, 48/1999, 2742/1999 and 2848/2000 contain no substantive independent rules. As far as the common management of anchovy stocks and the quota exchanges are concerned, the Commission considers those regulations to be acts confirming Regulation No 685/95.

43. However, against that it must be said that Regulation No 685/95 does not contain a complete set of provisions. On the contrary, it needs expanding on. On the one hand, it merely confers authority on France and Portugal to renew the quota exchanges. It neither provides for exchange nor deals with the question whether the permitted renewal is to take place. Both matters remain subject to the adoption of further provisions. The quota exchanges between Portugal and France, which are at issue here, are based on an arrangement concluded at the Council meeting on 22 December 1994. That is clear from the third and fourth recitals in the preamble to Regulation No 746/95. The renewal of those exchanges, which was authorised in Regulation No 685/95, took place for 1995 in Annex I to Regulation No 746/95. Under 'Species: Anchovy', the contested note (3) was included for zone IX, X, CECAF 34.1.1, allowing up to 5 008 tonnes of the precautionary TAC of 6 260 tonnes allocated to Portugal for that zone to be fished in the waters of ICES area VIII under the sovereignty or within the jurisdiction of France. Finally, the provisions in Regulation No 685/95 are also incomplete in that the quota exchanges in question are

made subject to the condition precedent that a common TAC for anchovy is fixed for ICES areas VIII and IX ('a common TAC for anchovy being fixed...'). It follows that not even the common management of the anchovy stocks in ICES areas VIII and IX is dealt with comprehensively in Regulation No 685/95. In that respect, reference is made here to yet a further set of provisions.

44. In the light of the incompleteness of the provisions in Regulation No 685/95, it falls to Regulations Nos 3074/95, 390/97, 45/98, 48/1999, 2742/1999 and 2848/2000 to deal with a multiplicity of substantive matters. They fix the level of the TAC for each individual ICES area and fish species and allocate quotas for each such species among the Member States. Moreover, they lay down the provision contested by Spain that a certain part of the catch allocated to Portugal in ICES area IX may be fished in waters of ICES area VIII under the sovereignty or within the jurisdiction of France. Whether this should be seen as fixing a common TAC for anchovy in ICES areas VIII and IX, and whether the condition laid down in Regulation No 685/95 has thus been fulfilled, is a question which goes to the substance of the actions. For the purpose of examining the admissibility, it is sufficient to note that that is the situation which Spain is challenging by its various actions. It is a situation which is regulated afresh each year with the fixing of the relevant TAC and the granting of authorisation for Portugal to fish a certain quantity of that TAC, which is allocated to it for Area IX, in Area VIII.

45. The quota exchanges are not expressly dealt with in the annual regulations. However, the fact that the arrangement recurred annually may constitute evidence of the tacit renewal of the quota exchange, mentioned in Regulation No 685/95.

46. Only taken together with those annual specific regulations can the content of the provisions in Annex IV to Regulation No 685/95 be said to be complete. That also suggests that the actions should be considered admissible.

47. The foregoing observations lead to the question regarding the extent to which account must be taken of the link, as described above, between the content of the provisions in Regulations Nos 3074/95, 390/97, 45/98, 48/1999, 2742/1999 and 2848/2000 and that of Regulation No 685/95. According to the case-law, the principle of *res judicata* extends only to the matters of fact and law actually or necessarily settled by a judicial decision. [37] In that respect, it should be borne in mind that the question regarding the compatibility of Regulation No 685/95 with Community law was definitively settled by the judgment in Case C-179/95.

48. However, unlike in the proceedings in Case C-179/95, in the present proceedings

37 — Case C-281/89 *Italy* v *Commission* [1991] ECR I-347.

Spain is no longer contesting Regulation No 685/95. In that respect, the authority of *res judicata* attaching to the judgment in Case C-179/95 does not constitute a bar to the admissibility of the actions in the present cases. However, account must be taken of that judgment in considering the merits of the present actions in so far as the content of Regulation No 685/95 is material.

49. In conclusion, it must therefore be held that the actions in Cases C-61/96, C-132/97, C-45/98, C-27/99, C-81/00 and C-22/01 are not identical in purpose to the action in Case C-179/95. Accordingly, the authority of *res judicata* attaching to the judgment in Case C-179/95 does not constitute a bar to the admissibility of those actions.

B — *Merits of the actions*

(1) Observance of the principle of relative stability

50. In considering the merits of the actions, the plea in law based on infringement of the principle of relative stability, which is put forward in all the cases, must be examined first.

(a) Arguments of the parties

51. Spain is of the opinion that the contested regulations effectively allocate to Portugal an (exchangeable) anchovy quota in ICES area VIII even though it has never held quotas there. That is contrary to the principle of relative stability under which the Council was obliged, when distributing the catch quotas in ICES area VIII, to maintain the percentages fixed for Spain and France, between which the anchovy stock in ICES area VIII had always been shared; that is to say, it should have allocated 90% of the TAC to Spain and 10% to France.

52. The Council is of the view that the principle of relative stability was not infringed. It points out that there are other cases where Member States are allowed to fish certain quotas in areas adjacent to those allocated to them, in order to ensure better utilisation of the quotas. Those exchanges likewise relate to biologically distinct fish stocks and their lawfulness has never been challenged. Spain itself avails itself of such a quota exchange in respect of the fish species megrim and monkfish between areas VI and VII.

53. The Council confirms that the anchovy stocks in ICES areas VIII and IX are two

biologically distinct stocks. Nevertheless, it does not consider that the fixing of two TACs, as has in fact taken place, is really necessary since neither stock is jeopardised and from 1996 to 1999 only precautionary TACs were fixed. There are no legal obstacles to the common management of those two TACs. It was only on account of the relevant provision in Article 161 of the Act of Accession that two separate TACs were fixed for ICES areas VIII and IX.

54. By fixing a separate TAC for ICES area VIII and allocating 90% of that TAC to Spain, the Council observed the relevant provision in Article 161 of the Act of Accession and the principle of relative stability. In allowing Portugal to fish part of its quota allocated for area IX in ICES area VIII and to exchange it with France, it merely used its margin of discretion in order to achieve the objective of integrating Spain and Portugal into the common fisheries policy.

55. The Council also points out that the principle of relative stability established in Article 8(4)(ii) of Regulation No 3760/92 does allow adjustments to catches, in particular through the exchange of quotas as practised since 1983. The Council submits that the condition that due regard must be had to the overall balance of shares in this context was fulfilled in the case of Portugal's quota transfer. In support of that assertion, it refers to a combined total of the catch quotas distributed in ICES areas VIII and IX.

56. The Commission likewise considers that the principle of relative stability was not infringed. Both TACs for ICES areas VIII and IX were managed in common. However, that made no difference to the distribution of the quotas of the Member States concerned: Spain, Portugal and France. The Commission, too, bases its assessment in this regard on an aggregate view of the quotas distributed for both areas.

57. The quota exchange which Spain contests is expressly authorised under the provisions of Articles 8 and 9 of Regulation No 3760/92. Moreover, the common management of both TACs does achieve an overall balance of shares.

58. Finally, the Commission views the adoption of Regulation No 685/95 as a relaxation of the principle of relative stability. In that respect, the Council made use of the wide discretion which it enjoys in the context of decisions in the field of agricultural policy.

(b) Assessment

59. This plea in law raises the question whether the principle of relative stability was infringed by the fact that Portugal was authorised, in the contested Regulations Nos 3074/95, 390/97, 45/98, 48/1999, 2742/1999 and 2848/2000, to fish part of its anchovy quota allocated for ICES area IX in ICES area VIII.

60. The principle of relative stability assures the Member States a fixed percentage share of the fishing opportunities for marketable species. [38] This refers to a particular species of fish within a specified area. [39] As explained in the account of the legal framework, the principle in question has its origin in Annex VII to the 'Hague Resolution' of 3 November 1976. As a result of the Council declaration of 30 May 1980 on the common fisheries policy, [40] the principle of relative stability became enshrined in Regulation No 170/83 and ultimately in Regulation No 3760/92. [41] [42]

61. It is clear from the definition in the 12th to 14th recitals in the preamble to Regulation No 3760/92 that the allocation of fishing opportunities under the common fisheries policy is based on three criteria: the extent of traditional fishing activity, the particular needs of regions where local populations are especially dependent on fisheries and related activities, and above all the prevailing biological situation of the stocks.

62. Stability is relative since it guarantees only entitlement to a percentage of the available TAC, but not entitlement to a fixed catch. [43] On the contrary, the catch is variable. That follows from the requirement to take account of the biological situation of the stock concerned. Stability does not always allow the same catch. Moreover, it is dependent on the share of the total allowable catch which falls to the Community. Only that share, which in part is established within the framework of international organisations, is passed on as a quota to the Member States.

63. In the present proceedings, Spain is not interested in obtaining a specific quantity of anchovy which it would like to catch in ICES area VIII, as the Council believes. It is

38 — *Romkes*, cited in footnote 5, paragraph 17. Confirmed in *Portugal and Spain* v *Council*, cited in footnote 6, paragraph 28.

39 — *Portugal and Spain* v *Council*, cited in footnote 6, paragraph 28.

40 — OJ 1980 C 158, p. 2.

41 — Cited in point 6.

42 — For details of the historical background, see the Opinion of Advocate General La Pergola in *NIFPO and Northern Ireland Fishermen's Federation*, cited in footnote 7, paragraphs 4 to 20.

43 — *Portugal and Spain* v *Council*, cited in footnote 6, paragraph 28.

interested in securing its share of the quantity of anchovy made available for fishing in ICES area VIII.

64. The Act of Accession of 1985 granted Spain a 90% share and France a 10% share for anchovy in ICES area VIII. Pursuant to Regulations Nos 1275/94 and 685/95, those shares are taken into account in the annual allocation of quotas in accordance with the procedure laid down in Article 8 of Regulation No 3760/92. The quotas allocated to the Member States are then expressed in tonnes.

65. In the context of the present proceedings, the question which must now be considered is whether that percentage allocation is maintained in Regulations Nos 3074/95, 390/97, 45/98, 48/1999, 2742/2000 and 2848/2000, or whether it is infringed by the fact that Portugal is allowed, in note (3) or (2), to fish part of its quota allocated for ICES area IX in ICES area VIII. That would be the case if the provisions in question meant that Spain no longer received 90% of the total allowable catch in ICES area VIII and if that adjustment was not justified by a quota exchange allowed under Article 8(4) and Article 9 of Regulation No 3760/92.

66. The first ground for rejecting the view that the principle of relative stability was infringed is that that principle does not guarantee an absolute volume of catches, but only a share of the catches. That share may be affected by an exchange of quotas, as is expressly provided for in Article 9 of Regulation No 3760/92. It may also be affected by the authorisation of quota transfers from the area of allocation to adjacent areas, as was granted in the present case in respect of Portugal's anchovy fishing and as has also been provided for in respect of herring, hake, blue whiting, mackerel and monkfish since the adoption of Regulation No 3074/95. As the recitals in the preambles to the regulations indicate, those quota transfers took place 'in order to ensure a better exploitation of the quotas'. [44] The transfer of the quota allocated to Portugal for ICES area IX to ICES area VIII is therefore not an isolated case, as the Council rightly points out. It took place against the background of a quota exchange agreed between Portugal and France in December 1994 and documented in Annex IV to Regulation No 685/95.

67. A second ground for rejecting the view that the principle of relative stability was infringed is the fact that Spain's overall share in ICES areas VIII and IX taken together was not reduced, either proportionately or quantitatively, by authorisation of the quota transfer. [45] The Council and the Commission expressly draw atten-

44 — See, for example, the 14th recital in the preamble to Regulation No 3074/95.

45 — See Case C-179/95, cited in footnote 2, paragraph 52.

tion to this point. In the final analysis, 90% of the total allowable catch for ICES area VIII was in fact allocated to Spain. [46]

68. On the other hand, the view that there was a breach of the principle of relative stability is supported by the fact that authorisation of the quota transfer increased the catch in ICES area VIII from 33 000 tonnes to 38 008 tonnes between 1996 and 1999, to 36 000 tonnes in 2000 and to 37 176 tonnes in 2001. If Spain's entitlement to 90% of the total allowable catch is applied to the total anchovy catch allowed in ICES area VIII by the authorisation to transfer quotas, then it must be held that Spain was not granted 90% of that catch.

69. The answer to the question raised here thus depends on the choice of the point of reference to which the 90% share to be granted to Spain relates. If that percentage is applied to the authorised catch, including the quota transfer, then Spain's rights were infringed. If, on the other hand, it is applied to the TAC allocated for ICES area VIII, then Spain's right to 90% of that TAC was not infringed. Nor was it infringed if there is assumed to be a common TAC for areas VIII and IX, or at least common management of the two TACs fixed for those areas, as is suggested by the Council and the Commission.

70. That leads to the question whether authorisation of the quota transfer in favour of Portugal, as granted in the disputed note (3) or (2), can be seen as fixing a common TAC for anchovy fishing in ICES areas VIII and IX or at least as establishing a common management of those TACs. Such an understanding is supported by the fact that the two areas are adjacent to one another. Such an understanding of the authorisation would also respect the rights of Spain which, as observed above, suffers no disadvantage if its quotas for ICES areas VIII and IX are considered together. Moreover, it should be pointed out that Article 11 in conjunction with point 1.1(i) in Annex IV to Regulation No 685/95 expressly makes the quota exchange at issue here subject to the condition that a common TAC for anchovy is fixed for ICES areas VIII and IX.

71. However, such an understanding of the quota transfer authorisation is precluded by the fact that in all cases the contested regulations allocate two separate TACs for ICES areas VIII and IX. The Spanish Government correctly draws attention to this point. If it was intended to assume a common TAC for those areas, the obvious course of action would have been to fix only one TAC. As the Council itself submits, however, it was legally prevented

46 — See the judgment in *Spain* v *Council*, cited in footnote 2, paragraph 53.

from so doing by Article 161 of the Act of Accession.

72. Nor can that drawback be remedied by assuming a common management of both TACs. That is because the decisive factor in determining the question raised here is the fact that it is contrary to the criteria on which the fixing of TACs is based to assume that authorising a quota transfer amounts to fixing a common TAC or establishing a common management of two TACs. According to the 13th recital in the preamble to Regulation No 3760/92, regard must be had to the biological situation of the stock concerned and to the needs of regions where local populations are especially dependent on fisheries and related activities. It is common ground that the anchovy stocks in ICES areas VIII and IX are two biologically distinct stocks. That fact alone precludes the assumption of a common TAC or a common management of two TACs, because there is no common scientific basis for such an assumption.

73. Nor, similarly, is the Council's argument that the TACs in question are merely precautionary TACs of any assistance. In 2000 and 2001, analytical TACs were fixed for ICES area VIII, whereas precautionary TACs continued to be fixed for ICES area IX. This underlines the biological distinctness of the two stocks and the impossibility of managing them jointly. Any other approach would be contrary to Article 4(1) of Regulation No 3760/92, pursuant to which the management of fishery resources is to take place *inter alia* in the light of the available biological analyses and reports.

74. Moreover, the interests of the Spanish population which is dependent on anchovy fishing in ICES area VIII are not sufficiently taken into account if the authorised total catch is increased without at the same time increasing the share to which Spain is entitled. That loss cannot simply be offset by the simultaneous gain to the Spanish population which is dependent on anchovy fishing in ICES area IX, which lies off the Galician and Portuguese coast and where, as a result of the quota transfer, there is less fishing. Authorisation of the quota transfer cannot therefore be viewed either as fixing a common TAC for ICES areas VIII and IX or as establishing a common management of those areas.

75. Although in principle it is therefore contrary to the principle of relative stability to authorise Portugal to fish part of its quota allocated for ICES area IX in ICES area VIII, it must also be examined whether such authorisation might not constitute a modification of that principle, as permitted by the second clause of Article 8(4)(ii). Under that provision, when quotas are distributed, '... following a request from the Member States directly concerned, account may be taken of the development

of mini-quotas and regular quota swaps since 1983, with due regard to the overall balance of shares;...'.

76. If ICES areas VIII and IX are considered together, as proposed by the Council and the Commission, it is clear that Spain's overall share of the anchovy catches is not adversely affected by Portugal's quota transfer. In that respect, the view could be taken that the rules have due regard to an overall balance of shares.

77. Nevertheless, application of the provision cited in point 75 is precluded simply by the fact that Spain did not consent to the quota transfer, let alone request it, as required by that provision. A request made by Portugal and France alone, such as could be inferred from the agreed quota exchange, is not sufficient. That is because, as observed above, the quota transfer concerns Spain inasmuch as it alters the overall quantity that can be fished in ICES area VIII without Spain being able to exert any influence in that regard. Yet Spain's rights under Article 161 of the Accession Treaty, as they are recognised in Regulations Nos 1275/94, 685/95 and the regulations adopted on the basis of Article 8 of Regulation No 3760/92 are affected. Spain should therefore be regarded as a 'Member State... concerned' for the purposes of the second clause of Article 8(4)(ii) of Regulation No 3760/92. The procedural conditions for the application of that provision are therefore not satisfied.

78. Nor, however, are the substantive conditions fulfilled either. The rules in question concern the distribution of quotas within the limits of the total allowable catch. However, the quotas have specifically not been amended under the contested regulations. The Council and the Commission expressly draw attention to this point. Portugal was not allocated a quota in ICES area VIII. It was merely authorised to fish part of its quota allocated for ICES area IX in ICES area VIII. That was merely transferring a quota, not introducing a quota for Portugal in ICES area VIII. In that respect, the rules contained in note (3) or (2) in the contested regulations cannot be interpreted as a modification of the principle of relative stability or of the quota distribution effected on the basis of that principle under Article 8(4)(ii) of Regulation No 3760/92. It must therefore be concluded that those rules infringe the principle of relative stability.

79. That conclusion is not precluded by the *res judicata* authority attaching to the judgment in Case C-179/95. That judgment relates to Regulations Nos 685/95 and 746/95. As observed when considering admissibility, Regulation No 685/95 does not lay down a comprehensive set of provisions on the quota transfer at issue here. The quota exchange between Portugal and France, which is documented in Annex IV to that regulation, does on the other hand presuppose that there is fishing availability for Portugal in ICES area VIII. However, that availability is only created by the disputed note (3) or (2) in Regulations Nos 3074/95, 390/97, 45/98, 48/1999, 2742/1999 and 2848/2000, that is, in connection with the annual fixing of the TAC. The provisions in question are thus wholly separate legal rules which must not only be separately contestable. They must also be fully amenable to review and such reviews must not be precluded by the *res judicata* authority attaching to judgments concerning parallel rules which cover a different period of time.

80. I therefore conclude that the authorisation for Portugal to transfer its quota, which it was granted for anchovy fishing in ICES area IX, to ICES area VIII infringes the principle of relative stability since it results in Spain not being allocated 90% of the allowable catch for anchovy in ICES area VIII. To that extent, the contested regulations must therefore be annulled.

(2) Observance of the principle of rational and responsible exploitation of resources

81. The plea in law concerning observance of the principle of rational and responsible exploitation of resources was originally put forward in all the actions. By letter of 14 October 1999, Spain withdrew that plea in Cases C-61/96, C-132/97, C-45/98 and C-27/99, but put it forward once again in the actions in Cases C-81/00 and C-22/01. I shall therefore examine it below.

(a) Arguments of the parties

82. Spain is of the view that the contested provisions infringe the principle of rational and responsible exploitation of resources inasmuch as they increase the TAC for ICES area VIII, which is fixed on the basis of scientific analyses, by the quantity which Portugal is authorised to catch in that zone. This leads to an excessive exploitation of fishery resources which has no scientific basis. As the drastic limitation of the TAC in 2000 by Regulation No 2742/1999 shows, the anchovy stock in ICES area VIII is jeopardised by such overfishing. In order for France to be lawfully allocated the 4 600 tonnes, the total allowable catch in that

area would have had to be increased to 46 000 tonnes. However, that would have amounted to an excessive exploitation of resources. A total of 37 176 tonnes was made available for fishing in ICES area VIII in 2001.

83. The Council counters that argument by saying that it halved the TAC for 2000 when scientific reports indicated that the anchovy stock in ICES area VIII was jeopardised. Only when it became possible, on the basis of new analyses, to regard the stock as safe was the TAC increased to the level of previous years. For the rest, it refers to the judgment in Case C-179/95 in which the Court held that Spain had failed to adduce sufficient evidence to show that the principle of rational and responsible exploitation of resources had been infringed.

84. The Commission, too, is of the opinion that Spain has failed to adduce any concrete evidence to show that the anchovy stock in ICES area VIII was jeopardised by the contested regulations. In any case, when there were indications of a decline in the anchovy stock in ICES area VIII, the Council immediately fixed a lower TAC for 2000. Only when new estimates became available, indicating that the stock was no longer at risk, was the TAC increased to the previous level again. For the rest, the Commission refers to the wide discretion which the Council enjoys in the context of agricultural policy.

(b) Assessment

85. The second recital in the preamble to Regulation No 3760/92 contains a declaration of the importance of rational and responsible exploitation of living aquatic resources. Article 2(2) provides that the purpose of the regulation is the establishment of a framework for the conservation and protection of resources. In particular, pursuant to Article 4(1) of the regulation, Community measures laying down the conditions of access to waters and resources and of the pursuit of exploitation activities are to be established in order to ensure the rational and responsible exploitation of resources on a sustainable basis. Those measures are therefore to be drawn up in the light of the available biological, socio-economic and technical analyses and of the reports drawn up by the Scientific, Technical and Economic Committee for Fisheries established in Article 16 of the regulation.

86. However, in the proceedings in Cases C-81/00 and C-22/01, in which Spain puts forward this plea in law, no evidence has been adduced which would support the conclusion that, by adopting the contested provisions, the Council infringed the principle of rational and responsible exploitation of fishery resources.

87. In the context of fisheries policy, the Council has wide discretion in the evaluation of complex economic situations. That includes the fixing of TACs and adopting of rules in connection with them. Judicial review is confined to examining whether there has been a manifest error or misuse of powers in the exercise of that discretion or whether the bounds of that discretion have clearly been exceeded. [47]

88. There is no evidence of such a misuse of powers. As the Council and the Commission have submitted, the TAC for anchovy fishing in ICES area VIII was even halved in 2000 after reports became available which indicated that the stock was at risk. Only when further reports became available, which did not confirm that risk, was the TAC again increased to the level of previous years. That clearly shows that the Council was guided in its decision by the available scientific analyses. Spain has not put forward any evidence to show that those analyses were incorrect or that the Council otherwise acted on the basis of incorrect facts.

47 — *NIFPO and Northern Ireland Fishermen's Federation*, cited in footnote 7, paragraphs 41 and 42.

89. The authorisation given to Portugal to fish part of its quota allocated for ICES area IX in ICES area VIII likewise does not constitute a misuse of powers. Spain has not adduced any factors, and in particular has not produced any scientific analyses, which support the assertion that that authorisation led to overfishing in ICES area VIII. The fact that a TAC of 33 000 tonnes was fixed annually for that area and that it even constituted, at least in 2000 and 2001, an analytical TAC and not merely, as in previous years, a precautionary TAC, does not support Spain's argument. On the contrary, it suggests that, at the permitted rate of exploitation, that is, including the quota transfer which Portugal was authorised to make, the stock was not jeopardised. The second plea in law should therefore be rejected.

V — Costs

90. In accordance with Article 69(2) of the Rules of Procedure, the unsuccessful party must be ordered to pay the costs if they have been applied for in the successful party's pleadings. Spain has applied for the Council to be ordered to pay the costs. Since the Council has been unsuccessful, it must be ordered to pay the costs. Pursuant to Article 69(4) of the Rules of Procedure, the Commission must bear its own costs.

VI — Conclusion

91. I therefore propose that the Court rule as follows:

(1) (a) in Case C-61/96, annul the point concerning anchovy in the Annex to Council Regulation (EC) No 3074/95 fixing, for certain fish stocks and groups of fish stocks, the total allowable catches for 1996 and certain conditions under which they may be fished;

(b) in Case C-132/97, annul the point concerning anchovy in Annex I to Council Regulation (EC) No 390/97 of 20 December 1996 fixing, for certain fish stocks and groups of fish stocks, the total allowable catches for 1997 and certain conditions under which they may be fished;

(c) in Case C-45/98, annul the point concerning anchovy in Annex I to Council Regulation (EC) No 45/98 of 19 December 1997 fixing, for certain fish stocks and groups of fish stocks, the total allowable catches for 1998 and certain conditions under which they may be fished;

(d) in Case C-27/99, annul the point concerning anchovy in Annex I to Council Regulation (EC) No 48/1999 of 18 December 1998 fixing, for

certain fish stocks and groups of fish stocks, the total allowable catches for 1999 and certain conditions under which they may be fished;

(e) in Case C-81/00, annul note (2) relating to stocks of 'Anchovy, Zone: IX, X, CECAF 34.1.1', in Annex I D to Council Regulation (EC) No 2742/1999 of 17 December 1999 fixing for 2000 the fishing opportunities and associated conditions for certain fish stocks and groups of fish stocks, applicable in Community waters and, for Community vessels, in waters where limitations in catch are required and amending Regulation (EC) No 66/98;

(f) in Case C-22/01, annul note (2) relating to stocks of 'Anchovy, Zone: IX, X, CECAF 34.1.1' (Community waters), in Annex I D to Council Regulation (EC) No 2848/2000 of 15 December 2000 fixing for 2001 the fishing opportunities and associated conditions for certain fish stocks and groups of fish stocks, applicable in Community waters and, for Community vessels, in waters where limitations in catch are required.

(2) order the Council to pay the costs and the Commission to bear its own costs.