JUDGMENT OF THE COURT

18 April 2002 *

In Joined Cases C-61/96, C-132/97, C-45/98, C-27/99, C-81/00 and C-22/01,

Kingdom of Spain, represented by R. Silva de Lapuerta, acting as Agent, with an address for service in Luxembourg,

applicant,

v

Council of the European Union, represented by J. Carbery and G.-L. Ramos Ruano, acting as Agents, with an address for service in Luxembourg,

defendant,

* Language of the case: Spanish.

supported by

Commission of the European Communities, represented by T. van Rijn and J. Guerra Fernández, acting as Agents, and, subsequently, T. van Rijn and J. Guerra Fernández, abogado, with an address for service in Luxembourg,

intervener,

APPLICATION for:

— in Case C-61/96, annulment of the point concerning anchovy in the Annex to 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 1996 and certain conditions under which they may be fished (OJ 1995 L 330, p. 1);

— in Case C-132/97, annulment of 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 (OJ 1997 L 66, p. 1);

— in Case C-45/98, annulment of 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 (OJ 1998 L 12, p. 1);

— in Case C-27/99, annulment of 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 (OJ 1999 L 13, p. 1);

— in Case C-81/00, annulment of the point concerning anchovy as regards 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 (OJ 1999 L 341, p. 1); and

— in Case C-22/01, annulment of the point concerning anchovy as regards 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 (OJ 2000 L 334, p. 1),

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, P. Jann, F. Macken and N. Colneric (Rapporteur) (Presidents of Chambers), D.A.O. Edward, M. Wathelet, R. Schintgen, V. Skouris and J.N. Cunha Rodrigues, Judges,

Advocate General: S. Alber,

Registrar: H. von Holstein, Deputy Registrar,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 25 September 2001,

after hearing the Opinion of the Advocate General at the sitting on 13 November 2001,

gives the following

Judgment

1 By applications lodged at the Court Registry on 6 March 1996 in Case C-61/96, 27 March 1997 in Case C-132/97, 24 February 1998 in Case C-45/98,

5 February 1999 in Case C-27/99, 7 March 2000 in Case C-81/00 and 18 January 2001 in Case C-22/01, the Kingdom of Spain applied to the Court pursuant to the first paragraph of Article 173 of the EC Treaty (now, after amendment, the first paragraph of Article 230 EC) for:

— in Case C-61/96, annulment of the point concerning anchovy in the Annex to 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 1996 and certain conditions under which they may be fished (OJ 1995 L 330, p. 1);

— in Case C-132/97, annulment of 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 (OJ 1997 L 66, p. 1);

— in Case C-45/98, annulment of 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 (OJ 1998 L 12, p. 1);

— in Case C-27/99, annulment of 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 (OJ 1999 L 13, p. 1);

— in Case C-81/00, annulment of the point concerning anchovy as regards 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 (OJ 1999 L 341, p. 1); and

— in Case C-22/01, annulment of the point concerning anchovy as regards 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 (OJ 2000 L 334, p. 1).

2 By orders of the President of the Court of 12 September 1996, 15 September 1997, 13 July 1998, 10 June 1999 and 6 July 2000, the Commission of the European Communities was granted leave to intervene in support of the Council of the European Union in Cases C-61/96, C-132/97, C-45/98, C-27/99 and C-81/00.

3 By decisions of 2 May 1996, 12 May 1997, 16 March 1998 and 8 March 1999, the President of the Court ordered proceedings to be stayed in Cases C-61/96, C-132/97, C-45/98 and C-27/99 until the Court's decision in Case C-179/95. On 5 October 1999 the Court delivered its judgment in Case C-179/95 *Spain* v *Council* [1999] ECR I-6475. Asked, by letter of 7 October 1999, to state

whether, in view of that judgment, it wished to continue with its actions, the Kingdom of Spain replied, by letter lodged at the Court Registry on 21 October 1999, that it did wish to do so.

4 By order of the President of the Court of 13 December 1999, Cases C-61/96, C-132/97, C-45/98 and C-27/99 were joined for the purposes of the written and oral procedure and the judgment. By orders of the President of the Court of 26 January 2001 and 25 June 2001, Joined Cases C-61/96, C-132/97, C-45/98 and C-27/99, Case C-81/00 and Case C-22/01 were joined for the purposes of the oral procedure and the judgment.

Legal background

The total allowable catches

5 Article 161(1)(f) of the Act concerning the conditions of accession of the Kingdom of Spain and the Portuguese Republic and the adjustments to the Treaties (OJ 1985 L 302, p. 23, hereinafter 'the Act of Accession') allocated 90% of the total allowable catches (hereinafter 'TACs') for anchovy in International Council for the Exploitation of the Sea (hereinafter 'ICES') area VIII to Spain and 10% to France. Further, pursuant to the principle of the relative stability of each Member State's fishing activities for each of the fish stocks concerned (hereinafter 'the principle of relative stability') laid down in Article 4(1) of Council Regulation (EEC) No 170/83 of 25 January 1983 establishing a Community

system for the conservation and management of fishery resources (OJ 1983 L 24, p. 1), the substance of which is restated in Article 8(4) of Council Regulation (EEC) No 3760/92 of 20 December 1992 establishing a Community system for fisheries and aquaculture (OJ 1992 L 389, p. 1), the anchovy TAC in ICES areas IX and x and in the Committee for Eastern Central Atlantic Fisheries (hereinafter 'CECAF') area 34.1.1 was divided between Spain and Portugal, approximately 48% being allocated to Spain and 52% to Portugal.

6 Regulation No 3760/92 was adopted on the basis of Article 43 of the EC Treaty (now, after amendment, Article 37 EC). Article 4 of that regulation provides:

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

...

(b) limit exploitation rates;

(c) set quantitative limits on catches;

...'

7 Article 8(1) of Regulation No 3760/92 provides that, 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.

8 Under Article 8(4)(i) and (ii) of Regulation No 3760/92, the Council, acting by qualified majority on a proposal from the Commission, is to determine for each fishery or group of fisheries, on a case-by-case basis, the TAC and/or total allowable fishing effort, where appropriate on a multi-annual basis and to 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.

9 It was on the basis of Article 8(4) of Regulation No 3760/92 that Regulations Nos 3074/95, 390/97, 45/98, 48/1999, 2742/1999 and 2848/2000 fixed the TACs for certain fish stocks for 1996, 1997, 1998, 1999, 2000 and 2001 respectively.

10 With regard to ICES area VIII, each of the regulations fixed a TAC for anchovy of 33 000 tonnes divided as to 29 700 tonnes for Spain and 3 300 tonnes for France, with no distinction being drawn according to where fish were caught. It should be noted that although, in the original version, Regulation No 2742/1999 provided for a TAC of 16 000 tonnes divided as to 14 400 tonnes for Spain and 1 600 tonnes for France, that regulation, as amended by Council Regulation (EC) No 1446/2000 of 16 June 2000 (OJ 2000 L 163, p. 3), also fixed a TAC of 33 000 tonnes.

11 For ICES areas IX and X, CECAF 34.1.1, for the years 1996 to 1998, the 13th heading in the Annex to Regulation No 3074/95, the 14th heading in Annex I to Regulation No 390/97 and the 15th heading in Annex I to Regulation No 45/98 each fixed a TAC for anchovy of 12 000 tonnes divided as to 5 740 tonnes for Spain and as to 6 260 tonnes for Portugal. For 1999 the 15th heading in Annex I to Regulation No 48/1999 fixed a TAC for anchovy of 13 000 tonnes divided as to 6 220 tonnes for Spain and as to 6 780 tonnes for Portugal. Lastly, for the years 2000 and 2001, the 9th heading in Annex I D to Regulation No 2742/1999 and the 9th heading in Annex I D to Regulation No 2848/2000 each fixed a TAC for anchovy of 10 000 tonnes divided as to 4 780 tonnes for Spain and as to 5 220 tonnes for Portugal.

12 It was stated that the quotas for anchovy allocated to Spain and Portugal in ICES areas IX and X, CECAF 34.1.1, could be fished only in waters under the sovereignty or within the jurisdiction of the Member State concerned, or in international waters of the zone concerned, subject, however, to the provisions concerning quota swaps, that is to say the exception provided for in note 3 to the provisions of Regulations Nos 3074/95, 390/97, 45/98 and 48/1999 referred to in the previous paragraph, and in note 2 to the provisions of Regulations Nos 2742/1999 and 2848/2000 also referred to in the previous paragraph.

The quota exchanges

13 Under Article 9(1) of Regulation No 3760/92, Member States may, after notifying the Commission, exchange all or part of the fishing availabilities allocated to them.

14 Council Regulation (EC) No 685/95 of 27 March 1995 on the management of the fishing effort relating to certain Community fishing areas and resources (OJ 1995 L 71, p. 5) was adopted on the basis of Article 43 of the Treaty. Under Article 11(1), the Member States concerned are to exchange fishing possibilities allocated to them under the conditions referred to in Annex IV, point 1.

15 Under point 1.,1.1. of that Annex:

'Exchanges between France and Portugal will be tacitly renewable for the 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;

...'.

16 With regard to the TAC for anchovy for ICES area IX, X, CECAF 34.1.1, the 13th heading in the Annex to Regulation No 3074/95, the 14th heading in Annex I to Regulation No 390/97 and the 15th heading in Annex I to Regulations No 45/98 and 48/1999 state in note 3 that, in derogation from the rule that the quota for anchovy allocated in that area may be fished only in the waters under the sovereignty or within the jurisdiction of the Member State concerned, or in international waters of the zone concerned, 'up to 5 008 tonnes [of the Portuguese quota] may be fished in waters of ICES sub-area VIII under the sovereignty or within the jurisdiction of France'.

17 Similarly the 9th heading in Annex I D to Regulation No 2742/1999 states, in note 2, that 'up to 3 000 tonnes [of the Portuguese quota] may be fished in waters of ICES sub-area VIII under the sovereignty or within the jurisdiction of France'.

18 Lastly, the 9th heading in Annex I D to Regulation No 2848/2000 states, in note 2, that 'up to 80% [of the Portuguese quota] may be fished in waters of ICES sub-area VIII under the sovereignty or within the jurisdiction of France', which represents 4 176 tonnes.

19 The Kingdom of Spain's applications in Cases C-61/96, C-132/97, C-45/98 and C-27/99 must, given their grounds, be understood as seeking the annulment of note 3 to the 13th heading in the Annex to Regulation No 3074/95, the 14th heading in Annex I to Regulation No 390/97 and the 15th heading in Annex I to Regulations Nos 45/98 and 48/1999. Its applications in Cases C-81/00 and C-22/01 seek the annulment of note 2 to the 9th heading of Annex I D to Regulations Nos 2742/1999 and 2848/2000. These notes will be referred to below collectively as 'the contested provisions'.

Admissibility

20 The Council contends that the Kingdom of Spain's applications in Cases C-61/96, C-132/97, C-45/98 and C-27/99 are inadmissible, on the ground that those applications and that in Case C-179/95, which was dismissed in the judgment in Case C-179/95 *Spain* v *Council*, are between the same parties, seek the same result and are based on the same pleas in law. That contention, the Council claims, is corroborated by the decisions of the President of the Court ordering, pursuant to Article 82a(1), first subparagraph, under (b), of the Rules of Procedure, that proceedings be stayed in Cases C-61/96, C-132/97, C-45/98 and C-27/99 until the Court had given judgment in Case C-179/95. At the hearing the Council also contended that the applications of the Kingdom of Spain in Cases C-81/00 and C-22/01 were inadmissible on the same ground.

21 The Commission maintains that the only act producing binding legal effects as regards the exchange of quotas between France and Portugal is Regulation No 685/95, which settled the common management of anchovy stock in ICES areas VIII and IX and fixed the procedures, scope and duration of the exchange agreement between those two Member States. The later regulations confined themselves to fixing annually TACs and quotas in application of the joint management of stocks and exchanges decided upon by the Community legislature in Regulation No 685/95. The regulations at issue are therefore confirmatory acts which, under the case-law of the Court, are not open to challenge after the period prescribed for bringing an action against the initial act has expired or when the legality of that act has already been upheld.

22 In the Commission's submission, since the only act that is truly open to challenge is Regulation No 685/95 and since the Court, in its judgment in Case C-179/95

Spain v *Council,* did not uphold the pleas alleging that that regulation was invalid, the Kingdom of Spain's applications are inadmissible.

23 In that connection, as regards, first, the objection of inadmissibility raised by the Council, it must be borne in mind that, in an action for annulment pursuant to Article 173 of the Treaty, its admissibility must be assessed by reference to the situation prevailing at the time when it was lodged (see Case 50/84 *Bensider and Others* v *Commission* [1984] ECR 3991, paragraph 8). Since the applications in Cases C-61/96, C-132/97, C-45/98 and C-27/99 were lodged before delivery of the judgment in Case C-179/95 *Spain* v *Council*, they cannot be held to be inadmissible on the ground that that judgment has rendered the issue *res judicata*.

24 As regards the applications in Cases C-81/00 and C-22/01, in an action founded on Article 173 of the Treaty, the act whose annulment is sought constitutes an essential component of the subject-matter of the action. The applications in Cases C-81/00 and C-22/01 seek the annulment of regulations other than those whose validity was examined in Case C-179/95 *Spain* v *Council*. In that connection, it is irrelevant that the tonnage at which a TAC is fixed stays the same from one year to the next because, under the terms of Article 4 of Regulation No 3760/92, TACs are to be drawn up afresh every year in the light of the scientific analyses available and, in particular, of the report by the Scientific, Technical and Economic Committee for Fisheries. The argument that the subject-matter of the actions is the same must therefore be rejected.

25 The objection of inadmissibility raised by the Council is therefore unfounded.

26 As regards, secondly, the objection of inadmissibility raised by the Commission, it should be noted that the contested provisions are intended to implement Annex IV, point 1.,1.1., to Regulation No 685/95. Although that annex provides for exchanges to be renewed for the period 1995 to 2002, the regulations containing the contested provisions fix anew each year the TACs and quotas for anchovy applicable in ICES areas VIII and IX. Accordingly, without prejudice to the question whether the case-law of the Court on confirmatory acts applies equally to regulations, Regulations Nos 3074/95, 390/97, 45/98, 48/1999, 2742/1999 and 2848/2000 cannot, in any case, be regarded as confirmatory acts.

27 It follows from the foregoing that all the applications of the Kingdom of Spain are admissible.

Substance

28 In Cases C-61/96, C-132/97, C-45/98 and C-27/99, the Spanish Government has put forward several pleas in support of its applications. Following the judgment in Case C-179/95 *Spain* v *Council*, the Spanish Government expressly withdrew all its pleas except that alleging a breach of the principle of relative stability, which, it claims, constitutes an infringement of Regulation No 3760/92. However, in Cases C-81/00 and C-22/01, the Spanish Government puts forward, in addition to that first plea, a second plea alleging a breach of the obligation to ensure rational and responsible management of resources, which, it claims, also constitutes an infringement of Regulation No 3760/92.

The plea alleging breach of the principle of relative stability

Arguments of the parties

29 The Spanish Government points out that one of the mechanisms established by Regulation No 3760/92 to ensure conservation of fishery resources is to limit catches of threatened species and distribute the authorised volumes of catches between the Member States in accordance with the principle of relative stability.

30 Relative stability must be assured, for each Member State, for each of the stocks considered, that is to say for fish of a certain species in a given geographical area. Therefore the principle of relative stability guarantees that the Kingdom of Spain will retain its percentage of 90% of the anchovy stock in ICES area VIII.

31 The Spanish Government submits that, in adopting the contested provisions, the Council increased the TAC and redistributed the anchovy quota in ICES area VIII without taking account of the principle of relative stability. In ICES area VIII, a new anchovy quota of 5 008 tonnes between 1996 and 1999, 3 000 tonnes in 2000 and 4 176 tonnes in 2001 was allocated to a Member State, Portugal, which had never had a quota there, in breach of the obligation to preserve the percentage shares laid down for each of the two Member States between which the stock was divided, namely Spain and France.

32 If the Council had increased the anchovy quota in ICES area VIII in the usual way, that is by adopting a new TAC on the basis of fresh scientific and technical studies, the new TAC would have been distributed according to percentages guaranteed to each Member State under the principle of relative stability, so that Spain would have obtained the quota of the new TAC to which it would have been entitled had its percentage share been maintained.

33 The Spanish Government maintains that there cannot be any justification for the contested provisions. Contrary to what the Court held in paragraph 51 of Case C-179/95 *Spain* v *Council*, there is no common TAC for ICES areas VIII and IX but rather two distinct TACs, one for ICES area VIII, the other for ICES area IX. Convincing evidence for this is to be found in the annexes to the contested regulations.

34 The Council replies that the Court has, in its judgment in Case C-179/95 *Spain* v *Council*, already rejected the plea alleging breach of the principle of relative stability. At paragraphs 53 and 54 of that judgment, the Court held that the Council's allocation of 90% of the anchovy TAC in ICES area VIII to Spain was compatible with the principle of relative stability.

35 The Council points out that Article 9 of Regulation No 3760/92 authorises the Member States to exchange quotas. Portugal and France agreed to such an exchange. Moreover, Regulation No 685/95 provides, in Article 11(1), that the Member States concerned are to exchange fishing possibilities allocated to them under the conditions referred to in Annex IV, point 1., of that regulation, which

provides that exchanges between France and Portugal will be tacitly renewable for the period 1995 to 2002. For that reason Regulation No 685/95 has not ceased to produce its effects.

36 The Council explains that it was obliged to fix a TAC for anchovy for ICES area VIII, in order to allocate 90% to Spain, and another TAC for anchovy for ICES areas IX and X, in order to divide it between Spain and Portugal in accordance with the principle of relative stability. Adding the two TACs together would have made it impossible to respect the rights conferred on Spain under Article 161(1)(f) of the Act of Accession. The Council contends that it was not possible to amend the agreement contained in the Act of Accession unless Spain was prepared to sacrifice part of its rights so that a higher quota could be given to France. There are therefore two separate, but jointly managed, TACs.

37 The Commission states, first, that the common management of the TACs for anchovy in ICES areas VIII and IX has not changed the division of the quotas between the Member States concerned, the fishing entitlement of each being exactly the same. Next, the possibility of concluding agreements concerning the exchange of quotas is provided by Articles 8(4)(ii) and 9 of Regulation No 3760/92. Lastly, relaxing the principle of relative stability cannot be unlawful in view of the fact that it results from Regulation No 685/95. That regulation was adopted on the basis of Article 43 of the Treaty, in other words on the same legal basis as was used for Regulations Nos 170/83 and 3760/92 which set out that principle. As a special measure it therefore takes precedence over general measures. By Regulation No 685/95 the Council decided, in full knowledge of the facts, to relax to a certain extent the principle of relative stability.

Findings of the Court

38 The first point to note is that the principle of relative stability was laid down in Regulation No 170/83 and then restated in Regulation No 3760/92. Article 4(1) of Regulation No 170/83 provided that '[t]he volume of the catches available... shall be distributed between the Member States in a manner which assures each Member State relative stability of fishing activities for each of the stocks considered'. Article 8(4)(ii) of Regulation No 3760/92, for its part, provides that the Council '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'. Despite the differences in their wording, those two provisions cannot be interpreted differently, so that the 'fishing opportunities' which are to be distributed by the Council in compliance with the principle of relative stability must be understood as comprising the entire volume of the catches available.

39 For the purposes of applying the principle of relative stability, the fishing opportunities for each fish stock, defined as fish of a particular species located within a specified geographical area (see Joined Cases C-63/90 and C-67/90 *Portugal and Spain* v *Council* [1992] ECR I-5073, paragraph 28), must be assessed separately. It follows from Article 8(4)(ii) of Regulation No 3760/92 that relative stability of fishing activities must be assured to each Member State 'for each of the stocks concerned'.

40 The stability of fishing activities is relative in the sense that it means the maintenance of a fixed percentage of the volume of the catches available for each of the stocks concerned — a volume which itself is likely to change — and not the guarantee of a fixed quantity of catches (see, in particular, Case 46/86 *Romkes* [1987] ECR 2671, paragraph 17, and Joined Cases C-63/90 and C-67/90 *Portugal and Spain* v *Council*, paragraph 28).

41 The principle of relative stability could be circumvented if the actual fishing opportunities in a specific geographical area for which a TAC had been fixed could be increased by means of an authorisation to fish in that area for part of the TAC fixed for that same species for another area. The consequence of this would be that for the first area the distribution of fishing opportunities would be different from the distribution of the TAC fixed for that area.

42 In this case Portugal, which has an anchovy quota in ICES area IX, was authorised, with a view to a subsequent transfer to France, to fish for part of that quota in the waters of ICES area VIII which are under the sovereignty or jurisdiction of France, namely for 5 008 tonnes in 1996 to 1999, 3 000 tonnes in 2000 and 4 176 tonnes in 2001. That practice increased the anchovy fishing opportunities in ICES area VIII. Therefore, during all those years, Spain, although it had actually been allocated 90% of the anchovy TAC for ICES sub-area VIII, nevertheless did not obtain 90% of the anchovy fishing opportunities in that area.

43 The Commission's argument that the fishing possibilities for each Member State remain exactly the same is not relevant since, in terms of the distribution of actual fishing opportunities, that distribution was altered in ICES area VIII to the detriment of Spain.

44 The contested provisions cannot be justified by Article 11(1), read in conjunction with point 1.,1.1., second paragraph, (i) of Annex IV to Regulation No 685/95, the latter provision providing that once 'a common TAC' for anchovy is 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'.

45 The finding in paragraphs 51 and 52 of Case C-179/95 *Spain* v *Council* that the transfer to France of Portugal's fishing opportunities was carried out under a common TAC covering ICES areas VIII and IX turns out to be incorrect. In order to meet the condition that a common TAC for anchovy be fixed for ICES areas VIII and IX, a condition to which the exchange of fishing opportunities between Portugal and France is made subject by point 1.,1.1., second paragraph, (ii) of Annex IV to Regulation No 685/95, it would have been necessary for the Council to fix a single TAC for anchovy for ICES area VIII and ICES areas IX, X, CECAF 34.1.1, which it did not do, as it admits in its pleadings. The purported common management of two distinct TACs, as contended by the Council, cannot satisfy that condition. Moreover, it is not disputed in this case that the two TACs relate to two stocks that are biologically differentiated.

46 Since the condition laid down in point 1.,1.1., second paragraph, (i) of Annex IV to Regulation No 685/95, namely the fixing of a common TAC, was not satisfied, the argument that relaxing the principle of relative stability is not unlawful as it results from a regulation — Regulation No 685/95 — adopted on the same legal basis as the regulation setting out the principle of relative stability — Regulation No 3760/92 — is irrelevant.

47 Nor can the contested provisions be justified by Articles 8(4)(ii) and 9(1) of Regulation No 3760/92, which provide for the conclusion of agreements relating to quota swaps. Article 8(4)(ii) states expressly that a request from the Member States directly concerned is necessary before account may be taken of such a swap by the Council. In the present case no such request was made by Spain, which is nevertheless directly concerned since the exchange of quotas resulted in an increase in the fishing opportunities for anchovy in ICES area VIII. As far as Article 9(1) is concerned, it must be observed that an exchange of fishing opportunities as provided for by the article presupposes that those opportunities

have previously been allocated in accordance with the principle of relative stability. That was not the case for the years 1996 to 2001, as is clear from paragraph 42 of this judgment.

48 It must therefore be held that the contested provisions are contrary to the principle of relative stability and consequently must be annulled.

Plea alleging breach of the principle of rational and responsible exploitation of living aquatic resources

49 In view of the fact the applicant's plea alleging breach of the principle of relative stability is well founded, there is no need to examine the plea alleging breach of the principle of rational and responsible exploitation of living aquatic resources.

Costs

50 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Kingdom of Spain has applied for costs and the Council has been unsuccessful, the Council must be ordered to pay the costs. Pursuant to the first paragraph of Article 69(4), the Commission, which intervened in these proceedings, must bear its own costs.

On those grounds,

THE COURT

hereby:

1. Annuls note 3 to the 13th heading concerning anchovy in the Annex to 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 1996 and certain conditions under which they may be fished;

2. Annuls note 3 to the 14th heading 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;

3. Annuls note 3 to the 15th heading 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;

4. Annuls note 3 to the 15th heading 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;

5. Annuls note 2 to the 9th heading concerning anchovy 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;

6. Annuls note 2 to the 9th heading concerning anchovy 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;

7. Orders the Council of the European Union to pay the costs;

8. Orders the Commission of the European Communities to bear its own costs.

Rodríguez Iglesias	Jann	Macken
Colneric	Edward	Wathelet
Schintgen	Skouris	Cunha Rodrigues

Delivered in open court in Luxembourg on 18 April 2002.

R. Grass

Registrar

G.C. Rodríguez Iglesias

President