OPINION OF ADVOCATE GENERAL JACOBS
delivered on 10 November 1993 *

My Lords,

1. In this case, the Parliament again challenges an act of the Council on the ground that, by adopting it on the wrong legal basis, the Council has infringed the Parliament's prerogatives. The act in issue is Financial Regulation No 91/491/EEC of 29 July 1991 applicable to development finance cooperation under the Fourth ACP-EEC Convention [1] ('the contested act'). The Parliament's application raises the important issue whether the European Development Fund should form part of the general budget of the European Communities.

Background to the dispute

2. The Fourth ACP-EEC Convention ('the Convention') was concluded at Lomé on 15 December 1989 between, on the one hand, the Community and the Member States and, on the other hand, 68 African, Caribbean and Pacific Ocean States (the ACP States). [2] It was approved on behalf of the European Economic Community and the European Coal and Steel Community by a Decision of the Council and the Commission of 25 February 1991. [3] With regard to the European Economic Community, it was concluded on the basis of Article 238 of the Treaty. It came into force on 1 September 1991.

3. According to Article 1, the fundamental objective of the Convention is to provide for cooperation between the Community and the ACP States in order to promote and expedite the economic, cultural, and social development of the ACP States. Article 1 also states that the contracting parties seek to create, with a view to a more just and balanced international economic order, a model for relations between developed and developing States.

4. Title III (Articles 220-327) of Part Three of the Convention is entitled 'Development Finance Cooperation'. The ultimate objectives of that cooperation are to promote the

* Original language: English.

1 — OJ 1991 L 266, p. 1.

2 — OJ 1991 L 229, p. 3. In addition to the original signatories, Namibia acceded to the Convention in 1990.

3 — Decision 91/400/ECSC, EEC, OJ 1991 L 229, p. 1.

long-term social, cultural and economic development of the ACP States and to help raise the standard of living of their peoples through the provision of adequate financial resources and appropriate technical assistance. [4] To that end, development finance cooperation is to be provided on highly concessional terms. [5] Within the framework of the Convention, development finance cooperation covers *inter alia* capital projects and programmes, sectoral and general import support programmes, budgetary support to alleviate domestic financial constraints, support for measures which contribute to attenuate the debt burden and balance of payments problems and technical cooperation programmes. [6] Provision is also made for support from the Community for structural adjustment programmes in the ACP States. [7]

5. The overall amount of the Community's financial assistance is set at ECU 12 000 million for a period of five years commencing on 1 March 1990. [8] Most of that sum is to be allocated to the ACP States in the form of grants.

6. On 16 July 1990, the representatives of the Governments of the Member States meeting within the Council adopted an Internal Agreement on the financing and administration of Community aid under the Convention [9] ('the Internal Agreement'). Article 1 of the Internal Agreement provides for the setting up of a seventh European Development Fund ('the Fund') by the Member States. Article 1 also specifies the contribution to the Fund of each Member State. Article 32 provides as follows:

'The provisions for implementing this Agreement shall be the subject of a Financial Regulation adopted, upon the entry into force of the Convention, by the Council, acting by the qualified majority laid down in Article 21 (4), on the basis of a Commission draft, after an opinion has been delivered by the [European Investment] Bank on the provisions of concern to it and by the Court of Auditors established under Article 206 of the Treaty.'

The qualified majority provided for in Article 21 (4) is based on a system of weighted voting which reflects the contribution of each Member State to the Fund and which is different from that provided for in Article 148 (2) of the Treaty.

4 — Article 220, paragraphs (a) and (b).

5 — Article 221, paragraph (b).

6 — Article 224.

7 — Articles 243 to 250.

8 — See Article 231 of the Convention and Article 1 (1) of the Financial Protocol to the Convention, OJ 1991 L 229, p. 133.

9 — OJ 1991 L 229, p. 288.

7. In accordance with Article 32 of the Internal Agreement, the Commission submitted to the Council a draft financial regulation in June 1990 and modifications to that draft in October 1990. By a letter of 26 October 1990, the Council requested the Parliament's opinion on the Commission's modified draft. By a resolution of 14 December 1990 [10] the Parliament contested the legal basis on which the Commission's draft was submitted. It took the view that the proposed Financial Regulation should be adopted on the basis of Article 209 of the Treaty and that it should take the form of a regulation within the meaning of Article 189 of the Treaty. It called on the Commission to act accordingly. By a resolution of 14 May 1991, [11] the Parliament rejected the Commission's draft on the ground that it infringed the provisions of the Treaty, in particular Articles 199 and 209, and requested the Commission to submit a new draft taking into account the general Financial Regulation. [12] The Council did not follow the Parliament's opinion. Instead, it adopted the contested act on the basis of the Internal Agreement.

8. The contested act is divided into six titles. Title I (Articles 1-7) provides for the contributions of the Member States to the Fund and lays down general principles with regard to payments from the Fund. Title II (Articles 8-43) provides for the management of the Fund. It lays down rules concerning the revenue of the Fund, the commitment, validation, authorization and payment of expenditure of the Fund, the accounts of the Fund and the responsibility of financial officers. Title III (Articles 44-60) provides for the implementing measures and Title IV (Articles 61-68) lays down the duties of the executive agents. Title V (Articles 69-77) specifies the rules for the presentation and auditing of accounts and Title VI (Articles 78-79) contains the final provisions.

9. The Parliament claims that the contested act was adopted on the wrong legal basis. It argues that the expenditure concerning the development aid provided for by the Convention is Community expenditure. The measure ought therefore to have been adopted pursuant to Article 209 of the Treaty, which states as follows:

'The Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament and obtaining the opinion of the Court of Auditors, shall:

(a) make Financial Regulations specifying in particular the procedure to be adopted for establishing and implementing the budget and for presenting and auditing accounts ...'.

10 — OJ 1991 C 19, p. 588.

11 — OJ 1991 C 158, p. 28.

12 — Financial Regulation applicable to the general budget of the European Communities, see updated text in OJ 1991 C 80, p. 1.

10. The Parliament argues that according to Article 199 of the Treaty, which lays down the principle of the unity of the Community budget, all items of revenue and expenditure of the Community must be shown in the budget. It claims that an exception to that principle may be introduced only by the Community legislature acting within the limits of its powers. It cannot be introduced validly by the Internal Agreement.

11. It will be remembered that the Parliament may bring an action for annulment against an act of the Council or of the Commission provided that two conditions are fulfilled: the action seeks only to safeguard the Parliament's prerogatives and it is founded only on submissions alleging the infringement of those prerogatives: see Case C-70/88 *Parliament* v *Council* (Chernobyl case). [13]

12. The Parliament states that by failing to adopt the contested act under Article 209, which provides for the consultation of the Parliament, the Council violated its prerogatives. In its application, the Parliament states that it fully supports the granting of development aid to the ACP States in accordance with the provisions of the Convention and that its objection concerns exclusively the procedure which was followed for implementing that aid.

13. The dispute which has given rise to these proceedings is not a new one. The financial provisions of the four Lomé Conventions (as well as of the Yaoundé Conventions which preceded them) were implemented by means of a European Development Fund. [14] Such a Fund was set up for each convention by an internal agreement of the Member States. The Parliament requested the inclusion of the European Development Fund in the budget for the first time in 1973: see Parliament resolution of 14 February 1973, paragraph 7. [15] It has since repeated that request several times but without success. The Council's refusal to incorporate in the budget the fifth European Development Fund, which was established in connection with the Second Lomé Convention, was one of the reasons which led the Parliament to reject the draft budget for the 1980 financial year.

14. The Commission, which has not intervened in these proceedings, has also recommended that the European Development Fund should form part of the Community budget. [16] The Court of Auditors has pro-

13 — [1990] ECR I-2041, paragraph 27.

14 — For a general discussion of the European Development Fund, see D. Strasser, *The Finances of Europe*, Luxembourg, 1992, pp. 44-45, pp. 109 et seq.

15 — OJ 1973 C 14, p. 25.

16 — See COM (79) 4, 10 January 1979.

moted the same cause. In its opinion on the draft financial regulation applicable to the fifth European Development Fund, it stated: [17]

'... the financial operations of the EDF are in fact Community expenditure since they pursue the same development objectives as all the other measures in the general budget for the benefit of associated or non-associated countries, are managed by Community bodies and are subject to the power of discharge of the Parliament;

... by reason of the fact that the expenditure of the EDF is Community expenditure, regard must be had to the principle of the unity of Community expenditure and ... this principle is impaired when the activities connected with the implementation of Community policy on development cooperation in favour of ACP countries employ instruments which are different from those applied to all the other measures for the benefit of developing countries, governed by the Financial Regulation of 21 December 1977 applicable to the general budget of the European Communities ...'.

17 — OJ 1981 C 45, p. 3.

15. The Member States have, however, consistently rejected the idea of incorporating the European Development Fund into the Community budget. In the negotiations leading to the conclusion of the Treaty on European Union, the Commission proposed an amendment to Article 199 of the Treaty, according to which Article 199 would state that all items of revenue and expenditure, including those relating to the European Development Fund, must be shown in the Community budget. That amendment was not adopted. On the contrary, the Final Act accompanying the Treaty on European Union includes a declaration on the European Development Fund, which reads as follows:

'The Conference agrees that the European Development Fund will continue to be financed by national contributions in accordance with the current provisions.'

16. At the oral hearing, the Council explained why the Member States prefer to finance the development aid to the ACP States by direct contributions rather than to incorporate it in the Community budget. According to the Council, the setting up of a European Development Fund enables the development aid to the ACP States granted under the successive Lomé Conventions to be coordinated with the development assistance policy followed by the individual Member States. Certain Member States grant

development assistance to the ACP States and other developing countries on a bilateral basis. In some cases, the provision of such assistance reflects historical links between individual Member States and certain developing countries. The contribution of each Member State to the Fund as provided for in Article 1 of the Internal Agreement takes into account the bilateral development aid advanced by Member States. That would not be possible if the aid to the ACP States provided for by the Convention were part of the Community budget. Further, the Council states that the financing of the aid provided for by the Convention by direct contributions outside the Community budget is preferable from the point of view of the Community. The contributions of the Member States to the European Development Fund are additional to, and do not form part of, the Community's own resources. In a case such as that of the 1984 financial year, where the Commission's draft budget reached the legal ceiling of the Community's own resources, the importance of financing the development aid to the ACP States by direct contributions outside the Community budget becomes obvious.

17. It should be noted that, although the Fund is not part of the budget, expenditure incurred thereby does not escape the supervisory control of the Parliament and of the Court of Auditors. Under Article 33 of the Internal Agreement, at the end of each financial year the Commission must adopt the revenue and expenditure account and the balance sheet of the Fund. Article 33 also provides that, without prejudice to the control and discharge procedure laid down in the Statute of the European Investment Bank which applies to operations financed by the Fund resources managed by the Bank, the operations financed by the Fund are subject to the supervisory powers of the Court of Auditors. The discharge for the financial management of the Fund must be given to the Commission by the Parliament on the recommendation of the Council acting with the qualified majority laid down in Article 21 (4) of the Internal Agreement. The functions of the Court of Auditors and of the Parliament in that context are laid down in more detail in Title V of the contested act.

Admissibility of the application

18. By a separate application, the Council requested the Court to reject the Parliament's application as inadmissible without going into the substance of the case. The Council claims that the application must be rejected as inadmissible on two grounds: first, on the ground that the contested act is not a reviewable act within the meaning of Article 173 of the Treaty; secondly, on the ground that the prerogatives of the Parliament have not been infringed.

19. In a case where the Parliament alleges an infringement of its prerogatives, there is

some uncertainty, not yet resolved in the case-law, how far the grounds relied upon raise issues of admissibility and how far they raise issues of substance. [18] Since the Court has decided to examine the issues of admissibility and substance jointly, the distinction is of little practical significance in the present case. In my view, the position, put shortly, is that if the Parliament's prerogatives have not been infringed, then an action is unfounded; if the measure is one where the Parliament's prerogatives do not arise, and therefore cannot be infringed, then the action is inadmissible.

20. The Council's first claim clearly raises an issue of admissibility. The Council concedes that the contested act is an act of the Council and not an act of the Member States. It argues, however, that the contested act was not adopted on the basis of the Treaty but on the basis of a capacity conferred upon it by Article 32 of the Internal Agreement. Since the contested act was adopted outside the Treaty, it is not a Community act and, *a fortiori*, it is not a financial regulation within the meaning of Article 209 of the Treaty.

21. In any event, the Council claims that in adopting the contested act it did not infringe the Parliament's prerogatives. If the contested act had been adopted under Article 209 of the Treaty, as the Parliament claims that it should have been adopted, the Council would have been under an obligation to consult the Parliament. Although Article 32 of the Internal Agreement does not provide for the consultation of the Parliament, the Council did ask for the Parliament's opinion before adopting the contested act and the Parliament gave its opinion. It follows that the Parliament exercised its consultative function and that its prerogatives have not been infringed.

22. The Spanish Government, which has intervened in support of the Council, also claims that the Parliament's application is inadmissible on the basis of arguments similar to those submitted by the Council.

23. I will consider first the argument that the prerogatives of the Parliament have not been infringed on the ground that the Parliament was in any event consulted with regard to the contested act.

24. It cannot be denied that, where consultation is provided for by the Treaty, a failure to consult infringes the prerogatives of the Par-

18 — See Case C-70/88 *Parliament v Council*, paragraph 31 and Joined Cases C-181/91 and C-248/91 *Parliament* v *Council* (*Bangladesh* case), judgment of 30 June 1993, [1993] ECR I-3685, paragraph 32.

liament. The Court has held that the Parliament's prerogatives include participation in the legislative process of the Community. [19] With regard to the requirement of consultation, in particular, the Court has stated that it allows the Parliament to play a part in the legislative process and gives to the Parliament a power which represents an essential factor in the institutional balance intended by the Treaty: Case 138/79 *Roquette Frères* v *Council*. [20] In the same case, the Court held that failure to consult the Parliament, when consultation is provided for by the Treaty, constitutes breach of an essential procedural requirement.

25. It follows that if the Council adopts an act on a legal basis which does not provide for the prior consultation of the Parliament whereas the act concerned should have been adopted under a provision of the Treaty which provides for such consultation, the Council effectively refuses to recognize that the Parliament has the right to be consulted with regard to the adoption of that act. It seems to me that that is in itself an infringement of the Parliament's prerogatives. It makes no difference that the Council requests the Parliament to submit its views and takes such views into account when submitted. Compliance with the procedures provided for by the Treaty is not at the discretion of the enacting institution. It does not suffice that the Council does as a matter of grace what it is required to do as a matter of obligation. That view is necessary in order to ensure that the institutional balance required by the Treaty is fully respected. The Court has also held that the rules regarding the manner in which the Community institutions arrive at their decisions are laid down in the Treaty and are not at the disposal of the Member States or of the institutions themselves. [21]

26. Further, it is not correct to say, as the Council and the Spanish Government submit, that the legal effects of a compulsory consultation are identical to those of an optional one. First, as already stated, failure to consult the Parliament when consultation is required by the Treaty constitutes a breach of an essential procedural requirement. The omission of a purely optional consultation would not infringe an essential procedural requirement. Secondly, where consultation is required by the Treaty, both the Council and the Parliament are under certain obligations. This is not necessarily the case where consultation takes place only as a result of the Council's initiative.

27. Where consultation is compulsory, the Council must consider the opinion of the Parliament with a receptive mind and pay

19 — Case C-70/88 *Parliament* v *Council*, paragraph 28 of the judgment.

20 — [1980] ECR 3333, paragraph 33 of the judgment. See also Case 139/79 *Maizena* v *Council* [1980] ECR 3393.

21 — Case 68/86 *United Kingdom* v *Council* [1988] ECR 855, paragraph 38.

due regard to the recommendations included therein. It must endeavour to exhaust 'all the possibilities of obtaining the preliminary opinion of the Parliament'. [22] It follows that the Council must grant to the Parliament the time which is necessary for it to study the Commission's proposal and express an informed view. It may be necessary for the Council to request the Parliament's opinion more than once on the same measure, since the Court has held that, in principle, a fresh consultation is required whenever the text finally adopted departs in its very essence from the text on which the Parliament has already been consulted. [23] By contrast, where consultation of the Parliament is not required by the Treaty but takes place on the Council's own initiative, the Council will not be under similar obligations.

28. Similar considerations apply with regard to the Parliament. The Parliament's participation in the legislative process is not to be seen only as a prerogative but also as a responsibility with which the Parliament is entrusted and which it cannot waive. Where consultation is required, there is a duty upon the Parliament to look carefully at the Commission's proposal and pay due regard to the issues involved.

29. It follows that consultation, where it is required by the Treaty, gives rise to duties both on the part of the Council and on the part of the Parliament. This may not necessarily be the case with regard to optional consultation. Two consequences follow from that. First, the Parliament is entitled to know whether its opinion is requested by the Council out of an obligation or merely at the Council's election. Secondly, the possibility cannot be excluded that the compulsory or optional nature of the consultation may have an effect on the attitude of the participating institutions which may in turn have an effect on the outcome of the legislative process. For example, the optional or compulsory nature of the consultation may influence the approach of the Parliament or the weight which the Council attaches to the Parliament's opinion. It is not correct to say, therefore, that a compulsory consultation does not give to the Parliament a greater possibility of influencing the legislative process than an optional one.

30. I conclude that if it were accepted that the correct legal basis of the contested act was Article 209 of the Treaty, which provides for the prior consultation of the Parliament, the adoption of the contested act on a legal basis which does not provide for such consultation would constitute an infringement of the Parliament's prerogatives even though the Parliament was asked for, and gave, its opinion. It follows that the issue whether the prerogatives of the Parliament have been

22 — See *Roquette Frères* v *Council*, paragraph 36.

23 — Case C-65/90 *Parliament* v *Council* [1992] ECR I-4593, paragraph 16.

infringed is linked to the issue whether the contested act should have been adopted under Article 209 of the Treaty.

31. The other objection to admissibility, i. e. that the contested act is not an act subject to review under Article 173, is also linked to the substance of the case.

32. The contested act was adopted outside the framework of the Treaty but it can readily be accepted that that is not in itself sufficient to place it beyond the scope of Article 173. Otherwise, it would be open to the Community institutions or to the Member States to circumvent the requirements of Community law by adopting outside the framework of the Treaty acts which should properly be adopted on the basis of the Treaty and in accordance with the procedures specified therein. To ensure observance of the rule of law, the Court has held that annulment proceedings may be brought in relation to all measures adopted by the institutions, whatever their nature or form, which are intended to have legal effects: see Case 22/70 *Commission* v *Council* (*ERTA* case). [24] The Court has even held that the fact that an act is adopted as a decision of the Member States meeting in Council is not sufficient to place it beyond the reach of Article 173, if it is in reality an act of the Council: see Joined Cases C-181/91 and C-248/91 *Parliament* v *Council*, judgment of 30 June 1993 (*Bangladesh* case). *A fortiori*, in the present case, where it is not disputed that the act concerned is an act of the Council, the Court is entitled to look at the content and the effects of the act, as well as the framework within which it was adopted, with a view to determining whether it is an act subject to judicial review.

33. Since I have concluded that both objections to admissibility are linked to the substance of the case, I turn to examine the arguments of the parties with regard to the substance, which raises the issue of the correct legal basis of the contested act.

34. It will be remembered that the core of the Parliament's reasoning is that the development aid to the ACP States provided for by the Convention is Community expenditure and consequently that the rules concerning its implementation should be adopted on the basis of Article 209 of the Treaty. The Council and the Spanish Government dispute that view. It is therefore necessary to examine whether the development aid to the ACP States should properly be regarded as Community expenditure or as expenditure of the Member States.

24 — [1971] ECR 263.

The development aid to the ACP States

35. Before examining in more detail the arguments of the parties, it will be helpful to discuss briefly the case-law of the Court concerning the external competence of the Community.

36. Certain provisions of the Treaty provide expressly for the conclusion of international agreements by the Community. Thus, Article 113 of the Treaty provides that the common commercial policy shall be based on uniform principles, *inter alia*, in regard to the conclusion of tariff and trade agreements. Article 238, on the basis of which the Convention was adopted, states that the Community may conclude with a third State, a union of States or an international organization agreements establishing an association involving reciprocal rights and obligations, common action and special procedures.

37. The Court has held, however, that competence to enter into international commitments may not only arise from an express attribution by the Treaty but may also flow implicitly from its provisions. In particular, whenever Community law has created for the institutions of the Community powers within its internal system for the purpose of attaining a specific objective, the Community has authority to enter into the international commitments necessary for the attainment of that objective even in the absence of an express provision in that connection. [25]

38. The Community's competence to enter into an international agreement may be exclusive or concurrent with that of the Member States. The exclusive nature of the Community's competence may arise from a provision of the Treaty, as in the case of the common commercial policy under Article 113 of the Treaty. [26] It may also depend on the scope of the measures which have been adopted by the Community institutions for the application of the provisions of the Treaty: see Opinion 2/91 of 19 March 1993 on *Convention No 170 of the International Labour Organization concerning safety in the use of chemicals at work*. [27]

39. In *ERTA*, the Court held that each time the Community, with a view to implement-

25 — Opinion 1/76 on *the draft Agreement establishing a European laying-up fund for inland waterway vessels* [1977] ECR 741, paragraph 3.

26 — Opinion 1/75 [1975] ECR 1355 at pp. 1363-1364. See also Case 41/76 *Donckerwolcke* v *Procureur de la République* [1976] ECR 1921, paragraph 32.

27 — Opinion 2/91 ([1993] ECR I-1061), paragraphs 8-9.

ing a common policy envisaged by the Treaty, adopts provisions laying down common rules, the Member States no longer have the right to undertake obligations with third countries which affect those rules or alter their scope. [28] The judgment of the Court in *ERTA* was taken further in Opinion 2/91. In that Opinion, the Court held that the pre-emptive effect of Community law is not restricted to the case where the Community has adopted rules within the framework of a common policy. Member States are also precluded from entering into international commitments containing rules capable of affecting, or altering the scope of, existing Community measures in areas falling outside common policies. [29]

40. With regard to development aid to the ACP States, there is nothing in the Treaty, or in provisions adopted by the Community institutions pursuant to the Treaty, which points to the conclusion that the Community's competence is exclusive. In the absence of any indication to the contrary, it can be accepted that the Community and the Member States share competence in that field. It follows that not only the Community but also the Member States, acting individually or collectively, may enter into international agreements to provide development aid to the ACP States.

41. There is a further consideration which supports the view that the competence of the Community in the field of development aid to the ACP States is concurrent with that of the Member States. The title of the Convention concerning development finance cooperation contains provisions with regard to emergency assistance. [30] Under Article 254, emergency assistance shall be accorded to ACP States faced with serious economic and social difficulties of an exceptional nature resulting from natural disasters or extraordinary circumstances having comparable effects. That assistance, therefore, has essentially a humanitarian character. In the *Bangladesh* case, the Court stated that in the realm of humanitarian aid the competence of the Community is not exclusive and that the Member States are not prohibited from exercising collectively their competence in that field. [31]

42. The Parliament concedes that in an area where the Community and the Member States enjoy concurrent competence, either the Community or the Member States may act. It argues, however, that once the Community exercises its competence, the Member States may no longer exercise theirs. In

28 — Case 22/70 *Commission* v *Council*, paragraphs 17 and 22.

29 — Opinion 2/91, paragraphs 10-11.

30 — Articles 254 to 257.

31 — Joined Cases C-181/91 and C-248/91 *Parliament* v *Council*, paragraph 16.

the Parliament's view, the exercise by the Community of its competence in a specific field has as a consequence that the Member States lose their competence to act in that field.

43. According to the Parliament, since under the Convention the Community undertook the obligation to provide development aid to the ACP States, the Member States are precluded from acting in that field. In support of its arguments, the Parliament refers to the judgments of the Court in Case 804/79 *Commission* v *United Kingdom*, [32] which related to Article 102 of the 1972 Act of Accession, and in *ERTA*.

44. If the Parliament's reasoning were accepted, it would follow that it is not possible for the Community and the Member States to act jointly for the purposes of granting development aid to the ACP States and also that it is not possible for the Member States to undertake directly the financial burdens arising from the Convention. In my view, however, that reasoning cannot be accepted.

45. The cases to which the Parliament refers do not support the argument that, where the Community and the Member States enjoy concurrent competence, the exercise by the Community of its competence necessarily prohibits the Member States from acting.

46. The crucial difference between *Commission* v *United Kingdom* and the present case is that that case concerned an area where the competence of the Community was 'total and definitive' and not one where competence is shared between the Community and the Member States. There is nothing in the judgment of the Court in *Commission* v *United Kingdom* to suggest that where the Community exercises its competence in an area which falls within the concurrent competence of the Community and the Member States, the Member States are necessarily prohibited from exercising theirs.

47. Nor is the view of the Parliament supported by the judgment of the Court in *ERTA*. In *ERTA*, as in Opinion 2/91, the Court was concerned with the relationship

32 — [1981] ECR 1045.

between the internal and the external competences of the Community. That relationship is not in issue in this case. If the Member States undertook the obligation to provide development aid to the ACP States, that would not affect any internal rules adopted by the Community.

48. It is clear that once the Community enters into an international agreement the subject-matter of which falls within the concurrent competence of the Community and the Member States, the Member States are under certain obligations which emanate from Article 5 of the Treaty. In particular, the Member States must facilitate the fulfilment of the Community's obligations arising out of the agreement and may not act unilaterally in a way which could compromise their duty to proceed by common action within the framework of the agreement.

49. It may also be accepted, on the basis of the judgment of the Court in *ERTA* and its ruling in Opinion 2/91, that, once the Community enters into an international agreement, the Member States are precluded from doing anything capable of affecting that agreement or altering its scope. The exact limits of the duty imposed on the Member States in that context cannot be laid down in the abstract but depend on the agreement in question. As the Council pointed out at the oral hearing, in the field of development aid to third States, the risk that action undertaken by the Member States may have adverse consequences on action undertaken by the Community is much less than it is in other areas such as that of social policy.

50. It cannot be accepted, however, that, as the Parliament contended especially at the oral hearing, once the Community undertakes an obligation by entering into an international agreement, the Member States are necessarily excluded from undertaking that obligation jointly with the Community. As a general rule, in an area where the Community and the Member States enjoy concurrent competence, they may exercise their competences concurrently by undertaking joint action and joint obligations *vis-à-vis* third parties.

51. The view that it is possible for the Community and the Member States to act jointly in an area where they enjoy concurrent competence is also supported by the judgment of the Court in the *Bangladesh* case. In that case, the Court made it clear that it is possible for the Member States to provide the necessary funds to finance humanitarian aid and for the Commission to undertake the coordination of that aid.

52. Reference may also be made in this context to the Treaty on European Union although it was not in force at the material time. The Treaty on European Union adds a new Title to Part Three of the EC Treaty entitled 'Development Cooperation' (Title XVII). Article 130u, first paragraph, provides that Community policy in the sphere of development cooperation shall be complementary to the policies pursued by the Member States. Article 130x states as follows:

'1. The Community and the Member States shall coordinate their policies on development cooperation and shall consult each other on their aid programmes, including in [*sic*] international organizations and during international conferences. They may undertake joint action. Member States shall contribute if necessary to the implementation of Community aid programmes.

2. The Commission may take any useful initiative to promote the coordination referred to in paragraph 1.'

It is clear therefore that under those provisions development policy falls within the concurrent competence of the Community and the Member States.

53. I conclude that it is possible for the Community and the Member States to undertake jointly the obligation to provide development aid to the ACP States. I also conclude that, since the Community and the Member States enjoy concurrent competence in that field, it is possible for them to agree that the funds necessary to finance the development aid will be provided directly by the Member States outside the Community budget.

54. It will be remembered, however, that, according to the Court of Auditors, one of the reasons why the financial operations of the European Development Fund constitute Community expenditure and must be included in the Community budget is that they pursue the same development objectives as other measures in the budget for the benefit of associated or non-associated countries. [33] According to a similar argument, the European Development Fund should be included in the budget because the expenditure to finance technical and financial cooperation with the Mediterranean countries, which is of the same nature as the expend-

33 — See above, paragraph 14.

iture to finance the aid provided for by the Convention, was included in the Community budget with effect from 1978. [34]

55. Those arguments cannot be accepted. Since in the field of development aid the Community and the Member States enjoy concurrent competence, they are free to undertake joint action and to agree that the necessary expenditure will be undertaken directly by the Member States outside the Community budget. The fact that expenditure to finance development aid has been included in the budget in the past does not mean that such expenditure must always be included in the budget.

56. The conclusion that it is possible for the Member States to provide directly the funds necessary to finance the development aid provided for by the Convention is confirmed by the ruling of the Court in Opinion 1/78 *on the draft Agreement on Natural Rubber*. [35] In that Opinion, the Court was concerned with the compatibility with the Treaty of the draft International Agreement on Natural Rubber, which was the subject of negotiations in the United Nations Conference on Trade and Development (UNACTAD). According to the Commission, the draft agreement came within the Community's exclusive competence. The Council claimed that the draft agreement fell partly within the competence of the Community and partly within the competence of the Member States and that it should therefore be adopted as a mixed agreement.

57. The Court took the view that, by reason of its subject-matter and its objectives, the draft agreement fell within the scope of Article 113 of the Treaty concerning the common commercial policy. However, in view of the fact that at that stage of the negotiations the issue whether the agreement would be financed by the Community budget or directly by the Member States had not been settled, the Court left open the question whether the Community enjoyed exclusive competence to conclude it. The Court held that if the burden of financing the buffer stock which was to be set up by the draft agreement fell upon the Community budget, the Community would enjoy exclusive competence. By contrast, if it fell directly on the Member States, they would enjoy concurrent competence. Until that issue was resolved, the Member States could participate in the negotiation of the draft agreement. The Court came to that conclusion on the ground that the financial provisions of the agreement occupied a central role in its structure. [36] Consequently, where the financial provisions of an agreement occupy a central position in its structure, it is possible to determine whether the Community has

34 — See G. Isaac, *Les Institutions Communautaires, Juris Classeur de droit européen*, November 1990, fascicule 250, paragraph 27.

35 — [1979] ECR 2871.

36 — Opinion 1/78, paragraph 55.

exclusive competence or whether the Member States enjoy concurrent competence to conclude that agreement precisely on the basis of whether the Member States are willing to undertake directly the financial obligations arising from its provisions.

58. It also follows from Opinion 1/78 that, where the financial provisions of an agreement occupy a central position in its structure, it is possible for the Member States to undertake directly the financial burdens arising from the agreement even if the agreement falls in a domain in which the Community normally enjoys exclusive competence. *A fortiori*, the Member States may undertake the financial burdens arising from an agreement, the subject-matter of which falls in a domain where the Community's competence is concurrent with that of the Member States.

59. The ruling of the Court in Opinion 1/78 is not incompatible with the exclusive nature of the Community's competence in the field of the common commercial policy. The Community's competence remains exclusive in that the Member States are prohibited from unilaterally undertaking international obligations so as to ensure that their own interests are separately satisfied in external relations, at the risk of compromising the effective defence of the common interests of the Community. As the Court has held: [37]

'The "internal" and "external" measures adopted by the Community within the framework of the common commercial policy do not necessarily involve, in order to ensure their compatibility with the Treaty, a transfer to the institutions of the Community of the obligations and financial burdens which they may involve: such measures are solely concerned to substitute for the unilateral action of the Member States, in the field under consideration, a common action based upon uniform principles on behalf of the whole of the Community.'

The case-law of the Court thus confirms that the issue whether the Community's competence to conclude an agreement is exclusive or concurrent with that of the Member States does not necessarily determine the issue whether the Community or the Member States are responsible for undertaking the financial burdens arising from that agreement.

60. There can be little doubt that the provisions on development finance cooperation play a pivotal role in the structure of the

37 — Opinion 1/75 on *the draft Understanding on a Local Cost Standard*, p. 1364.

Convention. The provision of development aid to the ACP States is essential to facilitate the objectives of the Convention and constitutes one of the cornerstones of ACP-EEC cooperation. It follows, on the basis of the ruling of the Court in Opinion 1/78, that it is possible for the Member States to provide directly, outside the Community budget, the funds necessary to finance the development aid to the ACP States provided for by the Convention.

61. According to the Parliament, however, it can be inferred from the text and the spirit of the Convention that the obligation to provide financial aid to the ACP States is an obligation undertaken exclusively by the Community. In its written observations and in the course of the oral hearing, the Parliament placed much reliance on that argument.

62. The Parliament refers to the preamble to the Convention which identifies as separate contracting parties the Member States, the Community and the ACP States. It argues that throughout its operative provisions and its final clauses the Convention distinguishes clearly between the obligations undertaken by the Community and those undertaken by the Member States. The Parliament concludes that by virtue of the Convention, the Community has undertaken *vis-à-vis* the ACP States obligations of international law distinct from those undertaken by the Member States.

63. According to the Parliament, it emerges from Article 231 of the Convention which refers to 'the Community's financial assistance' and from Article 1 of the Financial Protocol which uses the same language that the obligation to provide financial assistance to the ACP States is an obligation undertaken only by the Community and not by the Member States. The ACP States can only require the Community, and not the Member States directly, to provide that assistance.

64. The Council argues that the use of the term 'Community' in Article 231 should not be taken to mean the Community to the exclusion of the Member States but rather to contrast the Community of the one part, which comprises the Community and the Member States, with the ACP States of the other part. In its reply, the Parliament argues that the term 'Community' is never used in the Convention to encompass the Member States. It refers to various provisions of the Convention and concludes that where the authors of the Convention intended to refer both to the Community and to the Member States, they did so expressly or used the term 'Contracting Party'.

65. Opinion 1/78, according to the Parliament, concerned the possibilities of financing an agreement before the agreement was con-

cluded; the ruling of the Court does not apply to the present case where under the terms of the Convention the Community has undertaken the obligation to provide the aid.

66. I understand the Parliament's argument to mean that where, under a mixed agreement, the obligation to provide aid is undertaken only by the Community and not by the Member States, the Member States may not undertake to finance that aid by direct contributions outside the Community budget.

67. I do not find that argument persuasive. In my view, at least where the Community and the Member States enjoy concurrent competence to provide financial assistance to third States, the fact that the Community alone has undertaken a treaty obligation to provide that assistance does not in itself determine that the expenditure necessary to finance it is Community expenditure and must be included in the Community budget. As long as the Member States enjoy the freedom to undertake directly the financial burdens arising from an international agreement to which both the Community and the Member States are parties, there is no reason why that freedom should be curtailed by the fact that it has been agreed that the Community only will be contractually liable *vis-à-vis* the other party to the agreement.

68. In any event, I do not share the Parliament's view that, according to the language and the spirit of the Convention, the obligation to provide the aid burdens the Community alone.

69. The Convention was concluded as a mixed agreement (i. e. by the Community and its Member States jointly) and has essentially a bilateral character. This is made clear in Article 1, which states that the Convention is concluded between the Community and its Member States, of the one part, and the ACP States, of the other part. Under a mixed agreement the Community and the Member States are jointly liable unless the provisions of the agreement point to the opposite conclusion. [38]

70. It is true that Title III of Part Three of the Convention refers to 'the Community's financial assistance', but that need not be taken to indicate that the Community as

38 — See E. Stein, 'External relations of the European Community: Structure and Process' in *Collected Courses of the Academy of European Law*, 1990, Vol I Book 1, EUI, p. 162; C. Tomuschat, 'Liability for Mixed Agreements' in D. O'Keeffe and H. G. Schermers, *Mixed Agreements*, Leiden, 1983, p. 130.

opposed to the Member States has undertaken the obligation to provide the assistance. As the Council submits, the term 'Community' may be used in this context to mean both the Community and the Member States.

71. That interpretation is supported by Article 223, which provides that in the context of development finance cooperation, unless otherwise provided in the Convention, all decisions requiring the approval of 'either Contracting Party' shall be approved, or deemed approved, within 60 days of notification. If it were true, as the Parliament contends, that the obligation to provide the aid burdens only the Community, Article 223 should not have made reference to 'either Contracting Party' which means, on the one side, the Community and the Member States and, on the other side, the ACP States. Instead it should have made reference to the Community and to the ACP States.

72. I note that neither the Convention nor the Financial Protocol specifies how the aid will be financed. In my view, the fact that the Member States have agreed to provide directly the funds necessary to finance the aid is in itself a very strong indication that they have undertaken a joint obligation with the Community under the Convention.

73. That interpretation is confirmed by considering the Convention from the point of view of the ACP States. The fact that the method of the financing of the aid as well as the provisions concerning its administration were left to the Community and the Member States to decide without the participation of the ACP States points to the conclusion that the intention of the contracting parties was that the Community and the Member States would undertake a joint obligation to provide the aid, the method of financing of that aid being a matter internal to the Community.

74. It should also be noted that the Convention is the most recent of a series of conventions where similar financial arrangements were made. As already stated, the Member States undertook to provide directly the funds necessary to finance the development aid provided for by the successive Yaoundé and Lomé Conventions. That also supports the conclusion that the Member States have undertaken a joint obligation with the Community to provide the development aid under the Convention.

75. I am not persuaded therefore that the reference to 'the Community's financial assistance' in the Convention means that the obligation to provide the assistance burdens the Community alone. If the contracting par-

ties had intended to impose that obligation on the Community alone, to the exclusion of the Member States, they would have made that clear in the Convention.

76. There is no doubt that the aid to the ACP States provided for by the Convention is Community aid in that it is offered under the auspices of the Community. In that respect, it should be contrasted with bilateral aid granted by the Member States to the ACP States. Articles 17 and 19 of the Internal Agreement contain provisions which seek to ensure coordination and improve complementarity between the aid granted by the Community and the bilateral aid granted by the Member States. That is not to say, however, that the aid provided for by the Convention may not be financed by direct contributions of the Member States outside the Community budget.

77. I have concluded that the development aid provided for by the Convention is not Community expenditure and that it does not need to be part of the budget. It follows that it was not necessary to adopt the contested act under Article 209 of the Treaty, which provides for the prior consultation of the Parliament. Contrary to what the Parliament argues, therefore, no question arises of its prerogatives having been infringed. The Parliament's application is therefore inadmissible. On that view, it is not necessary to examine the other issue of admissibility, i. e. whether the contested act is a reviewable act. For the purposes of completeness, however, I will examine that issue.

The nature of the contested act

78. It will be remembered that, according to the Council and to the Spanish Government, the contested act is not a reviewable act because it was not adopted on the basis of the powers conferred upon the Council by the Treaty but on the basis of a power conferred upon it by the Member States.

79. The Parliament disputes that view. It argues that the Council may not act outside the framework of the Treaty on the basis of a mandate conferred upon it by the Member States. Alternatively, it argues that, by reason of its substance and its form, the contested act presents all the characteristics of a Community act. If it were accepted that the Council could act outside the framework of the Treaty, the contested act should be annulled because it was adopted by a method and in a form foreign to its nature.

80. I will examine first the issue whether the Council had the power to adopt the contested act on the basis of the Internal Agreement. I will then discuss the nature of the contested act.

81. It is not correct to say, as the Parliament argues in its written submissions, that a Community institution may never act on the basis of a mandate conferred upon it by the Member States. In the *Bangladesh* case, the Court held that the Commission was not precluded from undertaking the coordination of collective action decided by the Member States. [39] The action in issue in that case was the administration of humanitarian aid granted to Bangladesh by a decision of the Member States meeting in Council.

82. As the Council points out, there are other cases also where the Member States authorize a Community institution to act on their behalf in an area which falls within their competence. Considerations of expediency make such a practice desirable. Thus, in the case of mixed agreements, the Member States mandate the Commission to negotiate with the other party to the agreement on their behalf and under their control in relation to any parts of the agreement which fall, or appear to fall, within their exclusive competence. The Commission also undertook the negotiations on behalf of the Member States in agreements for the accession of new States to the Community in accordance with Article 237 of the Treaty, although the Treaty made no provision for the Commission to undertake that task. In the sphere of European Political Cooperation provided for in Article 30 of the Single European Act, the Council often played a role conferred upon it not by that article, but by the Member States.

83. Nor does it follow from Article 4 (1) of the Treaty, on which the Parliament placed much reliance in its written submissions, that a Community institution may never act on the mandate of the Member States. Article 4 (1) provides that each Community institution shall act within the limits of the powers conferred upon it by the Treaty. Its main objective is to define the constitutional position of the Community institutions *vis-à-vis* that of the Member States. It makes clear that the Community institutions do not have inherent powers but only those which, expressly or by implication, are conferred upon them by the Treaty. Powers which are not thus conferred upon them lie with the Member States. It follows from Article 4 (1) that a Community institution may not encroach upon the competence of the Member States nor may it act in such a way as to evade the requirements of the Treaty. It is not the purpose of that provision, however, to rule out the possibility of a Community institution undertaking functions on the mandate of the Member States.

84. It is therefore possible for a Community institution to undertake on behalf of the

39 — Joined Cases C-181/91 and C-248/91 *Parliament* v *Council*, paragraph 20.

Member States certain functions outside the framework of the Treaty provided that such functions, and the way in which it performs them, are compatible with its Treaty obligations. Whether that is the case is subject to the control of the Court.

85. As a general rule, a distinction can perhaps be drawn between executive functions and legislative functions. It will be easier to accept that a Community institution may undertake an executive function on the mandate of the Member States, such as to coordinate action decided by the Member States or to represent their collective interests *vis-à-vis* third countries, than to accept that a Community institution, especially the Council, may undertake a legislative function on the mandate of the Member States. That is because the Council is the main legislative organ of the Community and, as a general rule, it may not operate in a legislative capacity on the mandate of the Member States in parallel with its legislative function under the Treaty. Such action might have the result that the procedures provided for in the Treaty were evaded, and might also cause confusion with regard to the nature of the acts adopted by the Council.

86. In the present case, however, I take the view that it was possible for the Council to adopt the contested act on the basis of the Internal Agreement. As we have seen, the purpose of the contested act is to lay down detailed rules with regard to the administration of the development aid to the ACP States provided for in the Convention. In my view, it was possible for the Council to adopt the contested act, given that the Convention is a mixed agreement and that the contested act falls within an area where the Community and the Member States enjoy concurrent competences. The Court has held that, where an agreement is concluded in an area where competence is shared between the Community and the Member States, negotiation and implementation of the agreement require joint action by the Community and the Member States. [40]

87. In the implementation of the Convention the Member States act in close contact with the Community institutions. Under the Internal Agreement, the Commission bears primary responsibility for administering the Fund and for implementing the aid policy defined by the Council. [41] The Convention is accompanied by an Internal Agreement on the measures and procedures required for its implementation [42] which, like the Internal Agreement on the basis of which the contested act was adopted, is an act of the representatives of the Governments of the Member States meeting in Council. Article 1 provides that the Council is to adopt unanimously, after consulting the Commission,

40 — Opinion 2/91 of 19 March 1993 *on Convention No 170 of the International Labour Organization concerning safety in the use of chemicals at work*, paragraph 12.

41 — See Articles 10 and 11 of the Internal Agreement.

42 — OJ 1991 L 229, p. 301.

the common position to be supported by the representatives of the Community in the Council of ACP-EEC Ministers, when it considers matters for which the Member States are competent.

88. It is clear therefore that a central role in the implementation of the Convention is performed by the Council and by the Commission, which act in a dual capacity: as Community institutions and as, effectively, delegates of the Member States. This is necessary in view of the fact that the Convention has been concluded in the form of a mixed agreement. The adoption of the contested act is an integral part of the consequential action which needs to be taken for the implementation of the Convention. It would be difficult to question the Council's power to enact the contested act without questioning the overall participation of the Council and of the Commission in the implementation of the Convention.

89. I conclude therefore that it is compatible with the Treaty for the Council to adopt the contested act on the basis of the Internal Agreement. I turn now to examine the nature of the contested act.

90. It is clear that the contested act is not a regulation within the meaning of Article 189 of the Treaty. It was not adopted on the basis of a Treaty provision but on the basis of the Internal Agreement which is a decision of the representatives of the Governments of the Member States. Moreover, it was adopted by the qualified majority provided for in Article 21 (4) of the Internal Agreement which is different from that provided for in Article 148 (2) of the Treaty.

91. It is equally clear however that the contested act shares many of the characteristics of a Community act. The following considerations point to that conclusion:

(a) The contested act was adopted by the Council and not by the representatives of the Member States meeting in Council.

(b) Other Community bodies were involved in the adoption of the contested act. In accordance with Article 32 of the Internal Agreement, the Council acted on the basis of a draft submitted by the Commission and after obtaining the opinion of the Court of Auditors and of the European Investment Bank. The opinion of the Parliament was also sought.

(c) The contested act is intended to produce legal effects. It lays down a binding course of conduct for the Community institutions and for the Member States.

(d) The form of the contested act partly resembles that of a Community act. It is entitled 'Financial Regulation' and is published in the Legislation series of the Official Journal — but in the section headed 'Acts whose publication is not obligatory'. Its preamble opens with the phrase 'Having regard to the Treaty establishing the European Community' — but, contrary to the normal Community practice, does not refer to any specific Treaty provision.

92. In the light of its content and its form and also in the light of the context in which it was adopted, it seems to me that the contested act has a hybrid character which reflects the mixed nature of the Convention. Although it was adopted by the Council acting on the mandate of the Member States, it does not lie wholly outside the Community legal order. It is better regarded as a *sui generis* act which, as already stated, the Council was entitled to adopt for the purposes of implementing the financial provisions of the Convention. I do not accept the argument of the Parliament that the contested act was adopted by a method and in a form foreign to its nature. The fact that it presents certain of the characteristics of a Community act is justified in the present case by its hybrid character.

93. I conclude that the contested act was not adopted on the basis of the powers conferred upon the Council by the Treaty but on the basis of a power conferred on it outside the Treaty by the Member States. Such an act can be reviewed by the Court only where it can be contended that the act was incompatible with the Council's obligations under the Treaty, which is not the case here.

Conclusion

94. I am therefore of the opinion that:

(1) the action should be dismissed;

(2) the Parliament should be ordered to pay the costs of the Council; Spain, as intervener, should bear its own costs.