

Judgment of the Court of Justice, Commission v Conseil, case C-25/94 (19 March 1996)

Caption: In this judgment, the Court of Justice rules on the Commission's power to exercise the right to vote, on behalf of the European Community, in the United Nations Food and Agriculture Organisation (FAO). The FAO is an international organisation which has admitted the Community as a member, alongside its Member States, and which has provided for a system of alternative exercise of the rights attaching to membership on the basis of who is entitled to exercise that power.

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Case C-25/94**Commission of the European Communities v Council of the European Union**

(FAO — Fishery agreement — Right to vote — Member States — Community)

Summary of the Judgment

1. Council — Permanent Representatives Committee — Own powers — None — Implementing powers — Scope (EC Treaty, Arts 145 and 151(1))

2. Actions for annulment of measures — Actionable measures — Definition — Measures having binding legal effects — Council decision giving the Member States the right to vote in the Food and Agriculture Organization for the adoption of an international agreement (EC Treaty, Art. 173)

3. Community law — Interpretation — Acts of the institutions — Statement of the Council entered in its minutes — Whether to be taken into consideration — Not permissible in the absence of any reference to it in the act itself

4. International agreements — Agreement falling partly within the competence of the Community and partly within that of the Member States — Need for close cooperation between the Member States and the Community institutions — Arrangement between the Council and the Commission concerning the right to vote in an international organization — Arrangement providing for voting rights to be exercised by the Commission in areas essentially within the exclusive competence of the Community — Council decision giving the Member States the right to vote for the adoption of an agreement to promote compliance with international conservation and management measures by fishing vessels on the high seas — Breach of the arrangement — Unlawful

1. The Permanent Representatives' Committee is not an institution of the Communities upon which the Treaty confers powers of its own but an auxiliary body of the Council, for which it carries out preparation and implementation work, as is clear from Article 145 of the Treaty, which provides that the Council shall have power to take decisions, and from Article 151(1), which provides that Coreper is responsible for preparing the work of the Council and for carrying out the tasks assigned to it by the Council.

Since Coreper's function of carrying out the tasks assigned to it by the Council does not give it the power to take decisions which belongs, under the Treaty, to the Council, a decision giving the Member States the right to vote in an international organization for the adoption of an agreement cannot be ascribed to Coreper or regarded as confirming a previous Coreper decision.

2. A decision of the Council giving the Member States the right to vote in the United Nations Food and Agriculture Organization for the adoption of an agreement to promote compliance with international conservation and management measures by fishing vessels on the high seas constitutes an act having legal effects and thus one against which an action for annulment may be brought under Article 173 of the Treaty.

As regards relations between the Community and the Member States, between the institutions of the Community and between the Community and its Member States on the one hand and other subjects of international law, especially the said organization and its Member States, on the other, that decision had legal consequences which preclude it from being regarded as a matter purely of procedure or protocol.

3. A statement entered in the minutes of the Council meeting at which a decision was taken cannot be used for the purpose of determining the scope of that decision where no reference is made to the content of that statement in the text of the decision in question, and therefore has no legal significance.

4. Where, in implementation of the obligation of close cooperation between the Member States and the Community institutions which flows from the requirement of unity in the international representation of the Community, the Council and the Commission have entered into an arrangement which they intended as a binding commitment towards each other and under which, once a common position is established, the Commission is to exercise the right to vote in the United Nations Food and Agriculture Organization in areas falling essentially within the exclusive competence of the Community, a decision of the Council giving the Member States the right to vote for the adoption of an agreement to promote compliance with international conservation and management measures by fishing vessels on the high seas must be annulled because it is in breach of that arrangement; the subject-matter of such an agreement falls essentially within the exclusive competence of the Community as regards conservation of the biological resources of the sea.

[...]

JUDGMENT OF THE COURT
19 March 1996 *

In Case C-25/94,

Commission of the European Communities, represented by Jörn Sack, Legal Adviser, acting as Agent, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

applicant,

v

Council of the European Union, represented by Rüdiger Bandilla, Director of its Legal Service, and Felix van Craeynest, Legal Adviser, acting as Agents, with an address for service in Luxembourg at the office of Bruno Eynard, Director-General of the Legal Affairs Directorate of the European Investment Bank, 100 Boulevard Konrad Adenauer,

defendant,

supported by

United Kingdom of Great Britain and Northern Ireland, represented by John E. Collins, of the Treasury Solicitor's Department, acting as Agent, and by Richard Plender QC, with an address for service in Luxembourg at the British Embassy, 14 Boulevard Roosevelt,

intervener,

APPLICATION for annulment of the decision of the 'Fisheries' Council of 22 November 1993 giving the Member States the right to vote in the United Nations Food and Agriculture Organization for the adoption of the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas,

THE COURT,

composed of: G. C. Rodríguez Iglesias, President, J.-P. Puissochet and G. Hirsch (Presidents of Chambers), G. F. Mancini, F. A. Schockweiler (Rapporteur), J. C. Moitinho de Almeida, P. J. G. Kapteyn, C. Gulmann, J. L. Murray, H. Ragnemalm and L. Sevón, Judges,

Advocate General: F. G. Jacobs,

Registrar: D. Louterman-Hubeau, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 27 June 1995,

after hearing the Opinion of the Advocate General at the sitting on 26 October 1995,

gives the following

Judgment

1 By application lodged at the Court Registry on 24 January 1994, the Commission of the European Communities brought an action under Article 173 of the EC Treaty for annulment of the decision of the 'Fisheries' Council of 22 November 1993 giving the Member States the right to vote in the United Nations Food and Agriculture Organization ('the FAO') for the adoption of the Agreement to Promote Compliance

with International Conservation and Management Measures by Fishing Vessels on the High Seas ('the Agreement').

2 By decision of 26 November 1991, taken under Article II(3) and (5) of its Constitution, relating to membership by a regional economic integration organization, the FAO admitted the European Economic Community as a member, alongside its Member States.

3 Pursuant to Article II(5) of the Constitution, and Rule XLIV of the General Rules, of the FAO, the Community made a declaration specifying that it had exclusive competence in, *inter alia*, all matters concerning fisheries aimed at protecting fishing grounds and conserving the biological resources of the sea.

4 As regards the rights attaching to membership, Rule XLI(2) and (3) of the General Rules of the FAO provides for a system of alternative exercise as between the Member Organization and its own Member States, as follows:

'2. Before any meeting of the Organization the Member Organization or its Member States shall indicate which, as between the Member Organization and its Member States, has competence ... and which, as between the Member Organization and its Member States, shall exercise the right to vote in respect of each particular agenda item.

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

5 On 19 December 1991, the Council and the Commission concluded an arrangement 'regarding preparation for FAO meetings, statements and voting' ('the Arrangement').

6 The Arrangement sets up a coordination procedure between the Commission and the Member States to decide on the exercise of responsibilities or on statements on a particular point.

Sections 1.12 and 1.13 of the Arrangement provide:

'1.12 In the absence of an agreement between the Commission and the Member States ..., the matter will be decided according to the procedure provided for in the Treaty and the agreed practice. In the absence of agreement on this basis, the matter will be referred to the Permanent Representatives Committee ["Coreper"].

1.13 Decisions referred to in 1.12 are without prejudice to the respective competences of the Community and its Member States.'

7 The relevant provisions of the rules on statements and voting in FAO meetings are in Section 2. Section 2.1 to 2.3 stipulates as follows:

'2.1 Where an agenda item deals with matters of exclusive Community competence, the Commission shall speak and vote for the Community.

2.2 Where an agenda item deals with matters of national competence, Member States shall speak and vote.

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

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

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

8 A draft 'Agreement on the Flagging of Vessels Fishing on the High Seas to Promote Compliance with Internationally Agreed Conservation and Management Measures' was drawn up within the FAO.

9 Because registration of vessels lies within the Member States' competence, the Commission proposed to the Council that the shared-competence formula be used for the adoption of that agreement. It none the less proposed a vote by the Community, since the thrust of the agreement fell within the area of conservation and management of fishery resources, for which the Community had competence.

10 Whilst the Commission and the Member States acknowledged that this was a matter for shared competence, they disagreed over the question of the right to vote.

11 On 16 March 1993, in accordance with the Arrangement, Coreper decided that the Member States should vote. An indication to that effect was sent to the FAO by the General Secretariat of the Council, in preparation for the 103rd FAO Council meeting in June 1993.

12 As a result of negotiations at that meeting, the clauses relating to registration and flagging were removed from the draft agreement.

13 A new draft, subsequently entitled 'Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas', was drawn up. That draft introduces a system of authorization for fishing on the high seas by the flag State, with a view to ensuring that international conservation and management rules are respected.

14 On 24 September 1993, the Commission again proposed to the Member States that the shared-competence formula, with the Community having the right to vote, should be used for the adoption of that draft Agreement.

15 On 21 October 1993, as no agreement had been reached, Coreper considered that the indication to be sent to the FAO should state 'shared competence — Member State vote'.

16 That indication was transmitted by the Commission to the FAO before the 104th FAO Council meeting, held from 2 to 5 November 1993, and the 27th FAO Conference meeting, held from 6 to 25 November 1993, at which the draft Agreement was to be adopted.

17 At the meeting of the 'Fisheries' Council of 22 November 1993, the Commission asked the Council to

approve the following declaration:

‘The Council notes that the draft Agreement submitted to the Conference for adoption covers the conservation and management of fishery resources on the high seas by means of a licensing system and no longer through rules on the attribution or changing of flags as originally envisaged.

In the circumstances, the draft Agreement, which also contains a number of provisions to aid developing countries, is essentially, if not wholly, a matter of the exclusive competence of the Community and should normally have been approved on the Community’s behalf by a Commission vote.

In future, and depending upon each case, matters of this nature should be dealt with in accordance with section 2.1 or 2.3, second indent, of the FAO Arrangement ...’

18 According to the minutes of that meeting, the Council ‘confirmed Coreper’s decision’ and ‘rejected the statement suggested by the Commission’.

19 ‘Noting that the substantive questions of competence and exercise of voting rights in matters coming under the future Agreement had not been settled’, the Council also asked Coreper ‘to reconsider the question of voting in due course’.

20 The text of the draft Agreement was adopted by the FAO Conference on 24 November 1993, with the Member States of the Community voting in favour.

Admissibility

21 The Council, supported by the United Kingdom, raises an objection as to admissibility.

22 The Council submits that the question of the right to vote was settled definitively by Coreper on 21 October 1993 in accordance with the Arrangement. At its meeting on 22 November 1993, the Council merely refused to overturn the Coreper decision but did not adopt an act within the meaning of Article 173 of the Treaty. Even if it were to be assumed that the Council did adopt a formal decision, that decision would be a confirmation of Coreper’s previous decision.

23 The Commission’s counter-argument is that Coreper is responsible for preparing the work of the Council and that its decisions do not become final until they have been approved by the Council. The Arrangement does not prevent a matter from being referred to the Council in the event of disagreement between the Commission and the Member States.

24 The Court notes that Article 145 of the Treaty provides that the Council shall have power to take decisions.

25 Article 151(1), which forms part of the section relating to the Council, provides that Coreper is responsible for preparing the work of the Council and for carrying out the tasks assigned to it by the Council.

26 It is clear from those provisions that Coreper is not an institution of the Communities upon which the Treaty confers powers of its own but an auxiliary body of the Council, for which it carries out preparation and implementation work.

27 Coreper’s function of carrying out the tasks assigned to it by the Council does not give it the power to take decisions which belongs, under the Treaty, to the Council.

28 It follows that Coreper could not adopt, on 21 October 1993, a decision on the right to vote and that the Council's vote on 22 November 1993 cannot therefore be regarded as confirming a previous Coreper decision.

29 With regard to the Council's argument that it did not adopt an act within the meaning of Article 173 of the Treaty, it must be borne in mind that an action for annulment must be available in the case of all measures adopted by the institutions, whatever their nature or form, which are intended to have legal effects (see, in particular, Case 22/70 *Commission v Council* [1971] ECR 263, the 'ERTA' case, paragraph 42).

30 The Council maintains in this regard that any decision that may have been taken was a matter purely of procedure or protocol and was incapable of affecting the rights of the Commission or the allocation of competence as between the Community and the Member States.

31 The Commission replies that the Council's decision definitively deprives the Community of its right to vote for the adoption of the draft Agreement. When the decision was taken, the FAO Conference had still not completed its deliberations, so it had an effect on the exercise of the Community's competence within the FAO. Finally, the Council's decision and the fact that the Member States voted misled other States as to the competence of the Community.

32 The Council's vote has legal effects in several regards.

33 First, it recognized the Member States, and not the Community, as having the right to participate in the definitive adoption of the Agreement, which is an essential stage in the procedure for concluding an international treaty negotiated in the context of an international organization, in accordance with Article 9 of the Vienna Convention of 23 May 1969 on the Law of Treaties. By recognizing the Member States' power of final decision over the content of the Agreement, the Council's vote affected the Community's rights attaching to its membership of the FAO.

34 Secondly, under section 2.3 of the Arrangement, that vote prevented the Commission from presenting the common position, allowing it to speak only to support and/or add to the Presidency statement. Since the content of the Agreement could still be changed until the time when the text was adopted, the fact that the right to vote was given to the Member States prevented the Community from having any effective say in the deliberations which would precede the final decision on the text of the Agreement.

35 Thirdly, by virtue of the Arrangement, the fact that the Member States voted in accordance with the common position gave other States and the FAO the impression that the thrust of the Agreement did not fall within the exclusive competence of the Community.

36 It is clear from Rule XLI(2) of the General Rules of the FAO that the exercise of the right to vote on an agenda item indicates which, as between the Member Organization and its Member States, has competence in respect of the matter concerned. The fact that the right to vote is exercised by the Member States thus has effects as regards competence to implement the Agreement and to conclude subsequent agreements on the same question.

37 The Council's vote therefore had legal effects as regards relations between the Community and the Member States, between the institutions of the Community and, finally, between the Community and its Member States on the one hand and other subjects of international law, especially the FAO and its Member States, on the other. It is thus an act within the meaning of Article 173 of the Treaty.

38 That finding is not affected by the statement, entered in the minutes of the Council meeting, to the effect that the substantive questions of competence and exercise of voting rights in matters coming under the future Agreement have not been settled. Such a statement cannot be used for the purpose of determining the scope of the Council's decision where no reference is made to the content of that statement in the text of the decision in question and therefore has no legal significance (see Case C-292/89 *The Queen v Immigration Appeal Tribunal*, ex parte *Antonissen* [1991] ECR I-745, paragraph 18).

39 The objection of inadmissibility must therefore be dismissed.

Substance

40 The parties do not dispute that there is shared competence and an agreement on a common position but disagree as to whether the Agreement submitted for adoption by the FAO Conference concerns an issue whose main thrust lies in an area within the exclusive competence of the Community.

41 The Community has the internal power to take any measure for the conservation of the biological resources of the sea (Joined Cases 3/76, 4/76 and 6/76 *Kramer and Others* [1976] ECR 1279).

42 It is settled law that it follows from the very duties and powers which Community law has established and assigned to the institutions of the Community on the internal level that the Community has authority to enter into international commitments for the conservation of the resources of the sea (*Kramer and Others*, paragraph 33).

43 In the declaration of competence which it sent to the FAO on acquiring membership, the Community therefore stated that it had exclusive competence in all matters concerning fisheries which are aimed at protecting fishing grounds and conserving the biological resources of the sea.

44 It has also been consistently held that, as regards the high seas, the Community has the same regulatory powers, in areas falling within its authority, as are recognized under international law to the State whose flag the vessel flies or in which it is registered (Case C-405/92 *Mondiet v Islais* [1993] ECR I-6133, paragraph 12).

45 In the present case, when the Council adopted the contested decision, the essential object of the draft Agreement submitted for adoption by the Conference of the FAO was compliance with international conservation and management measures by fishing vessels on the high seas; it no longer contained the provisions on flagging on which the Council based its conclusion that the thrust of the Agreement did not lie in an area within the exclusive competence of the Community.

46 The Council is wrong in maintaining that the functions of licences to fish on the high seas, issued by Member States subject to compliance with conservation and management measures, are comparable to those of authorizations to fly a particular flag. As the Commission has stressed, fishing licences are a traditional means of managing fishing resources which, *inter alia*, give fishing vessels access to waters and resources and thus differ fundamentally from the general conditions which the Member States may lay down, under international law, in allowing ships of all categories to fly their flags.

47 As for the provisions relating to the imposition of possibly penal sanctions or to assistance for developing countries which, according to the Council, fall within the competence of the Member States, these do not, in any event, appear to occupy a prominent position in the draft Agreement.

48 It must be remembered that where it is apparent that the subject-matter of an agreement or convention falls partly within the competence of the Community and partly within that of its Member States, it is essential to ensure close cooperation between the Member States and the Community institutions, both in the process of negotiation and conclusion and in the fulfilment of the commitments entered into. That obligation to cooperate flows from the requirement of unity in the international representation of the Community (Ruling 1/78 [1978] ECR 2151, paragraphs 34 to 36, Opinion 2/91 [1993] ECR I-1061, paragraph 36, and Opinion 1/94 [1994] ECR I-5267, paragraph 108). The Community institutions and the Member States must take all necessary steps to ensure the best possible cooperation in that regard (Opinion 2/91, paragraph 38).

49 In the present case, section 2.3 of the Arrangement between the Council and the Commission represents fulfilment of that duty of cooperation between the Community and its Member States within the FAO. It is clear, moreover, from the terms of the Arrangement, that the two institutions intended to enter into a binding

commitment towards each other. Nor has the Council contested its effect at any moment in the proceedings.

50 Consequently, by concluding that the draft Agreement concerned an issue whose thrust did not lie in an area within the exclusive competence of the Community and accordingly giving the Member States the right to vote for the adoption of that draft, the Council acted in breach of section 2.3 of the Arrangement which it was required to observe.

51 The Council's decision of 22 November 1993 must therefore be annulled.

Costs

52 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the Council has been unsuccessful, it must be ordered to pay the costs. In accordance with Article 69(4) of the Rules of Procedure, the United Kingdom, which has intervened in the proceedings, must bear its own costs.

On those grounds,

THE COURT

hereby:

1. Annuls the decision of the 'Fisheries' Council of 22 November 1993 giving the Member States the right to vote in the United Nations Food and Agriculture Organization for the adoption of the Agreement to promote compliance with international conservation and management measures by fishing vessels on the high seas;
2. Orders the Council to bear the costs;
3. Orders the United Kingdom to bear its own costs.

Rodríguez Iglesias
Puissochet
Hirsch
Mancini
Schockweiler
Moitinho de Almeida
Kapteyn
Gulmann
Murray
Ragnemalm
Sevón

Delivered in open court in Luxembourg on 19 March 1996

R. Grass
Registrar

G. C. Rodríguez Iglesias
President

* Language of the case: French.