



## Reports of Cases

JUDGMENT OF THE COURT (Grand Chamber)

26 November 2014\*

(Actions for annulment — Decision 2012/19/EU — Legal basis — Article 43(2) and (3) TFEU — Bilateral agreement authorising utilisation of the surplus of allowable catch — Choice of the third country that the European Union authorises to utilise living resources — Exclusive economic zone — Policy decision — Fixing fishing opportunities)

In Joined Cases C-103/12 and C-165/12,

ACTIONS for annulment under Article 263 TFEU, brought on 24 February and 3 April 2012 respectively,

**European Parliament**, represented by L.G. Knudsen, I. Liukkonen and I. Díez Parra, acting as Agents (C-103/12),

**European Commission**, represented by A. Bouquet and E. Paasivirta, acting as Agents, with an address for service in Luxembourg (C-165/12),

applicants,

v

**Council of the European Union**, represented by A. Westerhof Löfflerová and A. de Gregorio Merino, acting as Agents,

defendant,

supported by:

**Czech Republic**, represented by M. Smolek, E. Ruffer and D. Hadroušek, acting as Agents,

**Kingdom of Spain**, represented by N. Díaz Abad, acting as Agent,

**French Republic**, represented by G. de Bergues, D. Colas and N. Rouam, acting as Agents,

**Republic of Poland**, represented by B. Majczyna and M. Szpunar, acting as Agents,

interveners,

\* Language of the case: French.

THE COURT (Grand Chamber),

composed of V. Skouris, President, K. Lenaerts, Vice-President, R. Silva de Lapuerta, M. Ilešič, L. Bay Larsen, Presidents of Chambers, A. Rosas, A. Borg Barthet, J. Malenovský (Rapporteur), C. Toader, C.G. Fernlund and J.L. da Cruz Vilaça, Judges,

Advocate General: E. Sharpston,

Registrar: V. Tourrès, Administrator,

having regard to the written procedure and further to the hearing on 19 November 2013,

after hearing the Opinion of the Advocate General at the sitting on 15 May 2014,

gives the following

### Judgment

- 1 By their applications, the European Parliament and the European Commission seek the annulment of Council Decision 2012/19/EU of 16 December 2011 on the approval, on behalf of the European Union, of the Declaration on the granting of fishing opportunities in EU waters to fishing vessels flying the flag of the Bolivarian Republic of Venezuela in the exclusive economic zone off the coast of French Guiana (OJ 2012 L 6, p. 8; ‘the contested decision’).

#### Legal context

##### *International law*

- 2 The United Nations Convention on the Law of the Sea, signed at Montego Bay on 10 December 1982 (‘UNCLOS’) came into force on 16 November 1994. It was approved on behalf of the European Community by Council Decision 98/392/EC of 23 March 1998 (OJ 1998 L 179, p. 1).
- 3 The Bolivarian Republic of Venezuela is not a contracting party to that convention.
- 4 Articles 55 to 75 UNCLOS are contained in Part V thereof, entitled ‘Exclusive economic zone’.
- 5 Article 55 UNCLOS provides:

‘The exclusive economic zone is an area beyond and adjacent to the territorial sea, subject to the specific legal regime established in this Part, under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of this Convention.’

- 6 According to Article 56(1) UNCLOS:

‘In the exclusive economic zone, the coastal State has:

- (a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil ...

...’

- 7 Article 61(1) UNCLOS provides that '[t]he coastal State shall determine the allowable catch of the living resources in its exclusive economic area'.
- 8 Article 62 UNCLOS, entitled 'Utilisation of living resources', provides in paragraphs 1 to 4:
1. The coastal State shall promote the objective of optimum utilisation of the living resources in the exclusive economic zone without prejudice to Article 61.
  2. The coastal State shall determine its capacity to harvest the living resources of the exclusive economic zone. Where the coastal State does not have the capacity to harvest the entire allowable catch, it shall, through agreements or other arrangements and pursuant to the terms, conditions, laws and regulations referred to in paragraph 4, give other States access to the surplus of the allowable catch, having particular regard to the provisions of Articles 69 and 70, especially in relation to the developing States mentioned therein.
  3. In giving access to other States to its exclusive economic zone under this article, the coastal State shall take into account all relevant factors, including, inter alia, the significance of the living resources of the area to the economy of the coastal State concerned and its other national interests, the provisions of Articles 69 and 70, the requirements of developing States in the subregion or region in harvesting part of the surplus and the need to minimise economic dislocation in States whose nationals have habitually fished in the zone or which have made substantial efforts in research and identification of stocks.
  4. Nationals of other States fishing in the exclusive economic zone shall comply with the conservation measures and with the other terms and conditions established in the laws and regulations of the coastal State. These laws and regulations shall be consistent with this Convention ...'

*EU law*

- 9 Council Regulation (EC) No 1006/2008 of 29 September 2008 concerning authorisations for fishing activities of Community fishing vessels outside Community waters and the access of third country vessels to Community waters, amending Regulations (EEC) No 2847/93 and (EC) No 1627/94 and repealing Regulation (EC) No 3317/94 (OJ 2008 L 286, p. 33), provides in Article 18(1)(a) thereof, that '[t]hird country fishing vessels are entitled to ... engage in fishing activities in [EU] waters provided that they have been issued with a fishing authorisation ...'
- 10 Article 21(a) of that regulation provides that '[t]he Commission shall only issue a fishing authorisation for third country fishing vessels ... which are eligible for a fishing authorisation under the agreement concerned and, where appropriate, are included in the list of vessels notified to carry out fishing activities under that agreement'.
- 11 Under Article 22 of that regulation:
- 'Third country fishing vessels for which a fishing authorisation has been issued in accordance with this Chapter shall comply with the provisions of the [common fisheries policy] concerning the conservation and control measures and other provisions governing fishing by [EU] fishing vessels in the fishing zone in which they operate, and the provisions laid down in the agreement concerned.'
- 12 By regulations concerning the total allowable catches and quotas, the Council of the European Union fixes annually the fishing opportunities available in EU waters and, to EU vessels, in certain non-EU waters.

- 13 One such regulation is Council Regulation (EU) No 44/2012 of 17 January 2012 fixing for 2012 the fishing opportunities available in EU waters and, to EU vessels, in certain non-EU waters for certain fish stocks and groups of fish stocks which are subject to international negotiations or agreements (OJ 2012 L 25, p. 55).
- 14 Article 36(1) of that regulation provides that '[t]he maximum number of fishing authorisations for third-country vessels fishing in EU waters is laid down in Annex VIII'.
- 15 That annex fixes at 45 the number of fishing authorisations applicable to vessels flying the flag of Venezuela in respect of the waters off the coast of the overseas department of French Guiana (France). The footnote to that annex, relating to the Bolivarian Republic of Venezuela, further specifies that '[t]o issue those fishing authorisations, proof must be produced that a valid contract exists between the ship owner applying for the fishing authorisation and a processing undertaking situated in ... French Guiana, and that it includes an obligation to land at least 75% of all snapper catches from the vessel concerned in that department so that they may be processed in that undertaking's plant. ...'

### **Background to the dispute**

- 16 On 30 September 1977, the Council adopted Council Regulation (EEC) No 2159/77 amending Regulation (EEC) No 1014/77 laying down certain interim measures for the conservation and management of fishery resources applicable to vessels flying the flag of certain non-member countries in the 200-mile zone off the coast of the French department of [Guiana] (OJ 1977 L 250, p. 15). By that regulation, the Council authorised vessels flying the flag of Venezuela to fish within the exclusive economic zone off the coast of French Guiana ('the exclusive economic zone of French Guiana').
- 17 That authorisation was renewed periodically by regulations concerning the total allowable catches and quotas, which granted such fishing opportunities despite the fact that no international fisheries agreement had been concluded with the Bolivarian Republic of Venezuela.
- 18 The Commission considered that that situation constituted a legal gap and that, in the light of Article 21(a) of Regulation No 1006/2008, it represented an obstacle to granting fishing authorisations as regards the exclusive economic zone of French Guiana to vessels flying the flag of Venezuela. Consequently, it adopted, on 7 January 2011, a proposal for a Council decision on access by fishing vessels flying the flag of the Bolivarian Republic of Venezuela to the exclusive economic zone off the coast of the French department of [Guiana] (COM(2010) 807). That proposal sought to establish a legal basis in international law for those vessels' activities in that zone. The Commission proposed that the decision be adopted on the basis of Article 43(2) TFEU in conjunction with Article 218(6)(a)(v) TFEU.
- 19 After examining that proposal, the Council decided that the legal basis of the decision to be adopted should be changed to Article 43(3) TFEU in conjunction with Article 218(6)(b) TFEU.
- 20 In accordance with those provisions, the Council sent a request for an opinion to the Parliament.
- 21 The Parliament, contesting the choice of legal basis, suggested to the Council that it change that basis and submit to the Parliament a new proposal founded on the legal basis initially proposed by the Commission.

22 The Council refused to change the legal basis of the decision to be adopted and sent two requests for urgent treatment to the Parliament, by letters of 28 October and 1 December 2011. The Parliament rejected those requests on 15 November and 13 December 2011, respectively. On each occasion, it indicated that it did not oppose the substance of that decision, but that it considered that its legal basis was incorrect.

23 On 16 December 2011, the Council adopted the contested decision — without waiting for the opinion of the Parliament — on the basis of Articles 43(3) TFEU and 218(6)(b) TFEU.

24 Article 1 of the contested decision states:

‘The Declaration addressed to the Bolivarian Republic of Venezuela on the granting of fishing opportunities in EU waters to fishing vessels flying the flag of the Bolivarian Republic of Venezuela in the exclusive economic zone ... of French Guiana [“the declaration at issue”] is hereby approved on behalf of the European Union.’

25 That declaration, which was attached to the contested decision, is worded as follows:

‘1. The European Union shall issue fishing authorisations to a limited number of fishing vessels flying the flag of the Bolivarian Republic of Venezuela to fish in the part of the exclusive economic zone ... of French Guiana that lies more than 12 nautical miles from the base lines, subject to the conditions set out in this Declaration.

2. In accordance with Article 22 of [Regulation No 1006/2008], the authorised fishing vessels flying the flag of the Bolivarian Republic of Venezuela shall, when fishing in the zone referred to in paragraph 1, comply with the provisions of the European Union common fisheries policy concerning the conservation and control measures and other European Union provisions governing fishing activities in that zone.

3. More particularly, authorised fishing vessels flying the flag of the Bolivarian Republic of Venezuela shall comply with any relevant EU rules or regulations specifying, inter alia, the fish stocks that may be targeted, the maximum number of authorised fishing vessels and the proportion of catches to be landed into ports in French Guiana.

4. Without prejudice to the withdrawal of authorisations granted to individual fishing vessels flying the flag of the Bolivarian Republic of Venezuela on grounds of their failure to comply with any relevant EU rules or regulations, the European Union may at any time withdraw, by way of unilateral declaration, the specific undertaking expressed in this Declaration to grant fishing opportunities.’

26 On 16 December 2011, the Council sent the declaration at issue to the Bolivarian Republic of Venezuela, which acknowledged receipt of it on the same day.

27 On 17 January 2012, the Council adopted Regulation No 44/2012, the legal basis of which is Article 43(3) TFEU.

28 By a note of 30 January 2012, the Bolivarian Republic of Venezuela requested information from the Council as to whether the Parliament’s intention to contest the validity of the contested decision could affect the fishing activities of vessels flying the flag of Venezuela in the exclusive economic zone of French Guiana.

- 29 On 20 March 2012, the Bolivarian Republic of Venezuela sent to the Commission, through the competent French authorities, applications for fishing authorisations for vessels flying the flag of Venezuela in that zone, accompanied by contracts concluded with processing undertakings situated in French Guiana.
- 30 On 26 March 2012, the Commission adopted Decision C(2012) 2162, whereby it authorised 38 vessels flying the flag of Venezuela, listed in the annex to that decision, to fish in the exclusive economic zone of French Guiana. In accordance with Article 2 thereof, that decision was notified to the Bolivarian Republic of Venezuela, as the flag State, and to the French Republic, as the coastal State of that zone.
- 31 On 24 February and 3 April 2012, respectively, the Parliament and the Commission brought the present actions.
- 32 By order of the President of the Court of 2 May 2012, Cases C-103/12 and C-165/12 were joined for the purposes of the written and oral procedure and of the judgment.
- 33 By order of the President of the Court of 29 August 2012, the Czech Republic, the Kingdom of Spain, the French Republic and the Republic of Poland were granted leave to intervene in support of the forms of order sought by the Council.

### **The actions**

- 34 In case C-103/12, the Parliament relies on two pleas in law. By its first plea in law, it argues that the contested decision is founded on an incorrect legal basis. By its second plea in law, it claims, in the alternative, that that decision was adopted on the basis of an incorrect procedural provision.
- 35 In Case C-165/12, the Commission raises three pleas in law, the first of which is composed of three parts. In the first and second parts of the first plea in law, the Commission argues that the legal basis of the contested decision is incorrect. According to the first part, the Council erred in equating the declaration at issue to an external action fixing fishing opportunities. According to the second part, the Council erred in considering that the ships flying the flag of Venezuela are subject to the provisions of the common fisheries policy as a result of that external action fixing fishing opportunities. By the third part of its first plea in law, the Commission alleges a failure to state adequate reasons for the contested decision. By its second plea in law, it claims that the Council did not respect the Parliament's institutional prerogatives. By its third plea in law, the Commission alleges that the Council distorted its proposal for a decision of 7 January 2011.

### *Arguments of the parties*

- 36 By the Parliament's first plea in law and the Commission's first and second pleas in law, those institutions claim that the Council erred in adopting the contested decision on the basis of Articles 43(3) and 218(6)(b) TFEU and not on Article 43(2) TFEU in conjunction with Article 218(6)(a)(v) TFEU.
- 37 The Parliament and the Commission submit, in the first place, that Article 43(3) TFEU is an exception to the general legal basis laid down in Article 43(2) TFEU, with the result that Article 43(3) TFEU must, like any exception to a rule, be interpreted narrowly as regards its scope. Thus, only measures that expressly concern the fixing and allocation of specific fishing opportunities may be adopted on the basis of Article 43(3) TFEU. Those fishing opportunities will necessarily be quantified fishing rights. A measure must therefore be adopted on the basis of Article 43(2) TFEU if it pursues an objective pertaining to the common fisheries policy other than the mere granting of fishing opportunities in quantitative and geographic terms.



- 38 That is the case as regards the contested decision and the declaration at issue. By the latter, the European Union undertook to issue fishing authorisations to vessels flying the flag of Venezuela, while requiring that the operators concerned comply with the provisions adopted by the European Union concerning the conservation of fisheries resources and that they land a part of their catches in French Guiana. Such access conditions are therefore intended to ensure that the objectives of the common fisheries policy are achieved, with the result that the aim and content of that decision are connected to the objectives of that policy, and go beyond the mere fixing and allocation of fishing opportunities within the meaning of Article 43(3) TFEU.
- 39 In the second place, the Parliament and the Commission submit that a distinction must be made between the access to waters for the purpose of fishing and the access to the fisheries resources through the granting of specific fishing opportunities in those waters (respectively, ‘access to waters’ and ‘access to resources’). Where the European Union wishes, under the common fisheries policy, to give third country operators access to its waters and to the resources therein, a two-step regulatory framework is implemented. First, access is granted to the third country by means of an international agreement in accordance with the procedure laid down in Article 218(6)(a)(v) TFEU. Secondly, fishing opportunities are granted by the Council under Article 43(3) TFEU.
- 40 In the present case, the declaration at issue must be regarded as part of the first step since, by that declaration, the European Union granted access to waters, but did not grant specific fishing opportunities to vessels flying the flag of Venezuela. Those fishing opportunities were fixed after the adoption of that declaration, being fixed by the Council, for 2012, by Regulation No 44/2012.
- 41 The Council, supported by the Czech Republic, the Kingdom of Spain, the French Republic and the Republic of Poland, submits that the contested decision was correctly based on Article 43(3) TFEU, in conjunction with Article 218(6)(b) TFEU.
- 42 The Council and those Member States submit, first, that the distinction between access to waters and access to resources is artificial. The declaration at issue could not grant access to EU waters without granting, at the same time, access to resources.
- 43 Secondly, the concept of ‘fishing opportunities’, within the meaning of Article 43(3) TFEU also covers fishing authorisations. It is clear from merely reading the contested decision that it concerns the granting of fishing authorisations. Thus, the aim and content of the declaration at issue consisted in granting fishing opportunities to vessels flying the flag of Venezuela and not in granting access to EU waters.
- 44 Thirdly, the scope of Article 43(3) TFEU allows the adoption of measures which are not limited to fixing fishing opportunities in quantitative terms. That interpretation is in accordance with both the letter and spirit of Article 43(3) TFEU, since that provision allows the Council to adopt all measures ‘on’ the fixing and allocation of fishing opportunities.
- 45 In the present case, although the contested decision itself does not grant those opportunities in quantitative terms, it constitutes such a measure. It creates an international title for the fixing and allocation of fishing opportunities at the level of the European Union’s internal rules, since, by that decision, the European Union indicates to the Bolivarian Republic of Venezuela its continued readiness to grant fishing opportunities to vessels flying the flag of Venezuela.
- 46 Fourthly, the content of the contested decision does not go beyond the scope of Article 43(3) TFEU. Paragraphs 2 and 3 of the declaration at issue are intended merely to note the pre-existing rules with which the vessels of third countries must comply in EU waters. Those two provisions are declaratory in that they do not give rise to any new right or obligation for those vessels. Likewise, the right to withdraw fishing authorisations granted to the vessels concerned, referred to in paragraph 4 of that declaration, is a measure relating to the fixing and allocation of fishing opportunities.

## Findings of the Court

- 47 By the Parliament's first plea in law and the first and second parts of the Commission's first plea in law, those institutions claim that the Council chose an incorrect legal basis, in founding the contested decision on Article 43(3) TFEU, in conjunction with Article 218(6)(b) TFEU, and not on Article 43(2) TFEU, in conjunction with Article 218(6)(a)(v) TFEU.
- 48 As regards the wording of Article 43 TFEU, first, it can be seen from Article 43(2) TFEU that the competent EU institutions, acting in accordance with the ordinary legislative procedure, are to adopt the provisions necessary for the pursuit of the common agricultural policy and the common fisheries policy.
- 49 Secondly, it can be seen from Article 43(3) TFEU, read in conjunction with Article 43(2) thereof, that measures on, inter alia, the fixing and allocation of fishing opportunities are not regarded, in themselves, as falling within the category of provisions necessary for the pursuit of the common fisheries policy within the meaning of Article 43(2) and are not subject to the ordinary legislative procedure.
- 50 The adoption of the provisions referred to in Article 43(2) TFEU necessarily presupposes an assessment of whether they are 'necessary' for the pursuit of the objectives of the common policies governed by the FEU Treaty, with the result that it entails a policy decision that must be reserved to the EU legislature. By contrast, the adoption of measures on the fixing and allocation of fishing opportunities, in accordance with Article 43(3) TFEU, does not require such an assessment since such measures are of a primarily technical nature and are intended to be taken in order to implement provisions adopted on the basis of Article 43(2).
- 51 First of all, it must be noted that, in accordance with the Court's settled case-law, the choice of the legal basis for an EU measure must rest on objective factors amenable to judicial review, which include the aim and content of that measure (judgments in *Parliament v Council*, C-130/10, EU:C:2012:472, paragraph 42, and *United Kingdom v Council*, C-431/11, EU:C:2013:589, paragraph 44).
- 52 In the present case, the only object of the contested decision is to approve the declaration at issue. In those circumstances, it is necessary to examine the legal basis of that decision having regard to the aim and content of the declaration at issue.
- 53 As regards the content of the declaration at issue, the European Union indicated to the Bolivarian Republic of Venezuela, in paragraph 1 of that declaration, that it would grant fishing authorisations in respect of the exclusive economic zone of French Guiana to a limited number of fishing vessels flying the flag of Venezuela.
- 54 In paragraphs 2 and 3 of the declaration at issue, the European Union made the issuing of such authorisations subject to the condition that the vessels flying the Venezuela flag authorised to fish in that zone comply with the provisions of the EU common fisheries policy concerning the conservation and control measures and with other EU provisions governing fishing activities in that zone.
- 55 As regards the aim of the contested decision, it is necessary to take into account the context established by UNCLOS, which provides for the international system of the exclusive economic zone. That convention, which is binding on the European Union, provides a framework for the European Union's policy choices in relation to that zone and determines, inter alia, the legal instruments and forms available to it in making those choices.



- 56 It can be seen from Article 55 UNCLOS that the exclusive economic zone is subject to a specific legal regime, under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of that convention.
- 57 According to Article 56(1)(a) UNCLOS, the coastal State has the right to utilise the living resources in its exclusive economic zone. Where it does not have the capacity to harvest the entire allowable catch, it is required, under Article 62(2) of that convention, to give other States access to the surplus of the allowable catch.
- 58 The coastal State has some discretion in carrying out that obligation. It may choose, subject to the requirements laid down in Article 62(3) UNCLOS, the States that it authorises to utilise that surplus. Moreover, the coastal State is to take into account certain factors, namely the significance of the living resources of the area to its economy and its other national interests, the requirements of developing States in the region concerned and the need to minimise economic dislocation in States whose nationals have habitually fished in the zone or which have made substantial efforts in research and identification of stocks.
- 59 In addition, Article 62(2) UNCLOS requires that the coastal State give other States access to the surplus of the allowable catch ‘through agreements or other arrangements’. It is therefore for the coastal State to come to an agreement with the States concerned. The relations between the coastal State and the other States reflect their reciprocal rights and obligations, as referred to in paragraph 57 above, with the result that the coastal State cannot impose its conditions unilaterally.
- 60 The specific responsibility of the coastal State for the utilisation of the living resources in its exclusive economic zone means that it is usually for that State to send an offer targeted at certain other interested States, which are then free to accept or not, or indeed, as the case may be, to request that changes be made to the offer.
- 61 At the end of that process, the expression of the concurrence of wills of the coastal State and the interested State constitutes an agreement as provided for in Article 62(2) UNCLOS, given that, in international law, whether such an agreement is formally established in a single document or in two or more related written instruments is irrelevant (see, to that effect, Opinion 1/13, EU:C:2014:2303, paragraph 37).
- 62 The agreement between the coastal State and the interested State sets out reciprocal rights and obligations which give concrete expression to those referred to in paragraph 57 of the present judgment. In that context, in particular, it can be seen from Article 62(4) UNCLOS that nationals of States other than the coastal State fishing in the latter’s exclusive economic zone are to comply with the conservation measures and with the other terms and conditions established in the laws and regulations of the coastal State.
- 63 Since individuals do not in principle enjoy an independent legal position under UNCLOS, it is for each interested State to take, as regards the vessels which fly its flag, all measures necessary to protect the interests of the coastal State (see, to that effect, judgment in *Intertanko and Others*, C-308/06, EU:C:2008:312, paragraphs 59 to 62).
- 64 It follows that the interested State must undertake vis-à-vis the coastal State — in consideration of its participation in the utilisation of the living resources in the coastal State’s exclusive economic zone — to ensure that the vessels that fly its flag comply with the measures that the coastal State has adopted in respect of that zone.
- 65 Such an undertaking, given by means of an agreement or other arrangement concluded with the coastal State, is all the more necessary where the interested State is not a contracting party to UNCLOS and is therefore not bound by Article 62(4) of that convention

- 66 Once the agreement or arrangement between the interested State and the coastal State has been concluded, the latter may implement it through specific domestic law rules and measures, adopted in accordance with the provisions of UNCLOS and applied in accordance with that bilateral agreement.
- 67 In the light of the considerations set out in paragraphs 56 to 66 of the present judgment, it is necessary to examine, first of all, whether the declaration at issue is a constituent element of an agreement, within the meaning of Article 62(2) UNCLOS.
- 68 In the light of what is indicated in paragraph 60 above, the declaration at issue must be regarded as an offer made by the European Union, on behalf of the coastal State concerned, to the Bolivarian Republic of Venezuela, whereby the European Union proposes to the latter that it utilise part of the surplus of the allowable catch in the exclusive economic zone of French Guiana, subject to certain specific conditions, including the condition that it ensure that vessels flying its flag and fishing in that zone comply with the provisions of the European Union's common fisheries policy applicable to that zone.
- 69 The declaration at issue was sent to the Bolivarian Republic of Venezuela, which acknowledged receipt of it and reacted in two ways. First, it made formal applications to the European Union for fishing authorisations in respect of the exclusive economic zone of French Guiana for vessels flying its flag, attaching to those applications contracts with processing undertakings situated in French Guiana, as required by paragraph 3 of the declaration at issue in conjunction with the footnote in Annex VIII to Regulation No 44/2012. Secondly, that State expressed its concerns regarding the potential calling into question of that declaration, seeking information from the Council as to whether the Parliament's intention to challenge the validity of the contested decision was liable to affect the fishing activities of vessels flying the flag of Venezuela in that zone.
- 70 Thus, by adopting that course of action, it is apparent that the Bolivarian Republic of Venezuela regarded the declaration at issue as an offer to utilise, under the conditions specified in that document, part of the surplus of the allowable catch in the exclusive economic zone of French Guiana, to which it was asked to respond.
- 71 In that respect, by sending to the European Union — following the offer that had been made to it — specific applications for fishing authorisations and by refraining, when making those applications, from expressing any reservations as regards the conditions of that offer, the Bolivarian Republic of Venezuela must be regarded as having accepted that offer.
- 72 In those circumstances, the conduct of that State must be deemed to constitute acceptance of the offer made to it by the European Union by means of the declaration at issue.
- 73 Having regard to the foregoing, the declaration at issue made by the European Union and its acceptance by the Bolivarian Republic of Venezuela must be regarded, taken together, as an agreement concluded between those two parties concerning the authorisation to utilise, under the specific conditions set out in that declaration, part of the surplus of the allowable catch in the exclusive economic zone of French Guiana.
- 74 Next, it is necessary to examine, in the light of the foregoing analysis of the content and aim of the declaration at issue, whether that declaration constitutes a measure falling within an area of competence reserved to the EU legislature or whether it is a mere technical implementing measure, as referred to in paragraph 50 of the present judgment.
- 75 In that respect, it must be pointed out that, irrespective of its title and of certain terms used in the declaration at issue, the objective of that declaration is not to ensure 'the fixing and allocation of fishing opportunities', within the meaning of Article 43(3) TFEU, but rather, as can be seen from

paragraph 68 of the present judgment, to offer the Bolivarian Republic of Venezuela the opportunity to participate in the utilisation of living resources in the exclusive economic zone of French Guiana, under the conditions laid down by the European Union.

- 76 In the assessment which must precede such an offer, the competent institutions of the European Union must first of all take into account aspects of bilateral policy. Then, having regard to the specific responsibility of the European Union – acting on behalf of the coastal State – for the utilisation of living resources in the latter’s exclusive economic zone, those institutions assess whether the interested State is capable of ensuring that the ships flying its flag respect the conditions to which such utilisation is subject, such as, inter alia, compliance with the provisions of the European Union’s common fisheries policy applicable in the zone concerned. Lastly, the EU institutions take into consideration the factors referred to in paragraph 58 of the present judgment, which require the assessment of various aspects characterising the situation of States in the region concerned and, at the very least, that of the interested State.
- 77 In addition, it can be seen from recital 3 in the preamble to the contested decision, and from paragraphs 1 to 3 of the declaration at issue, that the purpose of that declaration is not only to grant to the Bolivarian Republic of Venezuela, in principle, the opportunity to participate in the utilisation of living resources in the exclusive economic zone of French Guiana, but that, as noted in paragraph 54 above, it also makes the grant of that opportunity subject to compliance with the provisions of the EU common fisheries policy concerning conservation and control measures and with other EU provisions governing fishing activities in that zone, such as EU rules or regulations specifying, inter alia, the fish stocks that may be targeted, the maximum number of authorised fishing vessels and the proportion of catches to be landed into ports in French Guiana.
- 78 Thus, the purpose of the declaration at issue is to establish a general framework, with a view to authorising fishing vessels flying the flag of Venezuela to fish in that zone, which was subsequently clarified by Article 36(1) and Annex VIII to Regulation No 44/2012, by Article 34(1) and Annex VIII to Council Regulation (EU) No 40/2013 of 21 January 2013 fixing for 2013 the fishing opportunities available in EU waters and, to EU vessels, in certain non-EU waters for certain fish stocks and groups of fish stocks which are subject to international negotiations or agreements (OJ 2013 L 23, p. 54), and by Article 40(1) and Annex VIII to Council Regulation (EU) No 43/2014 of 20 January 2014 fixing for 2014 the fishing opportunities for certain fish stocks and groups of fish stocks, applicable in Union waters and, to Union vessels, in certain non-Union waters (OJ 2014 L 24, p. 1). In that regard, it must be pointed out that those regulations were all adopted on the basis of Article 43(3) TFEU.
- 79 It follows that the offer made to the Bolivarian Republic of Venezuela is not a technical or implementing measure but, on the contrary, a measure which entails the adoption of an autonomous decision which must be made having regard to the policy interests of the European Union pursued through its common policies, in particular its common fisheries policy.
- 80 The declaration at issue therefore falls within an area of competence in which the decision-making power lies with the EU legislature.
- 81 In those circumstances, the contested decision falls within the scope of Article 43(2) TFEU, not Article 43(3) TFEU.
- 82 Lastly, it is necessary to determine which provision of the FEU Treaty lays down the procedure in accordance with which the contested decision should have been adopted.
- 83 Given that the declaration at issue, which was approved by the contested decision, is a constituent element of an international agreement (see paragraph 73 of the present judgment), that declaration falls within the scope of Article 218 TFEU. That article governs the negotiation and the conclusion of agreements between the European Union and third countries or international organisations, the

expression ‘agreement’, in accordance with the case-law, being understood in a general sense to indicate any undertaking entered into by entities subject to international law which has binding force, whatever its formal designation (see, to that effect, Opinion 1/75, EU:C:1975:145, p. 1360, Opinion 2/92, EU:C:1995:83, paragraph 8, and judgment in *France v Commission*, C-327/91, EU:C:1994:305, paragraph 27).

- 84 Furthermore, it must be noted that Article 218(6)(a)(v) TFEU lays down the procedure applicable in the case of agreements covering areas to which the ordinary legislative procedure applies. Since Article 43(2) TFEU — on the basis of which the contested decision should have been adopted — provides for precisely such a procedure, that decision should have been adopted on the basis of Article 218(6)(a)(v) TFEU.
- 85 Having regard to the foregoing, the contested decision, which approved the declaration at issue on behalf of the European Union, should have been adopted on the basis of Article 43(2) TFEU in conjunction with Article 218(6)(a)(v) TFEU, not Article 43(3) TFEU in conjunction with Article 218(6)(b) TFEU.
- 86 In those circumstances, the Parliament’s first plea in law and the first and second parts of the Commission’s first plea in law must be upheld.
- 87 Consequently, the contested decision must be annulled and it is not necessary to examine the other pleas in law raised by the Parliament and the Commission in their actions.

#### **The request to maintain temporarily the effects of the contested decision**

- 88 The Council and the Commission, supported in that respect by the Czech Republic, the Kingdom of Spain and the French Republic, ask the Court, in the event that it annuls the contested decision, to maintain its effects until a new decision is adopted. The Parliament has indicated that it does not oppose that request being granted.
- 89 Under the second paragraph of Article 264 TFEU the Court may, if it considers this necessary, state which of the effects of the act which it has declared void are to be considered as definitive.
- 90 In that respect, it is clear from the Court’s case-law that, on grounds of legal certainty, the effects of such an act may be maintained, in particular where the immediate effects of its annulment would give rise to serious negative consequences for the persons concerned and where the lawfulness of the act in question is contested, not because of its aim or content, but on grounds of lack of competence or infringement of an essential procedural requirement. Those grounds include, in particular, the ground that an incorrect legal basis was used for the contested act (see, to that effect, judgments in *Parliament v Council*, C-414/04, EU:C:2006:742, paragraph 59; *Parliament and Denmark v Commission*, C-14/06 and C-295/06, EU:C:2008:176, paragraph 86; and *Parliament v Council*, C-490/10, EU:C:2012:525, paragraphs 91 and 92).
- 91 In the present case, it can be seen from recital 2 in the preamble to the contested decision that, by authorising the Bolivarian Republic of Venezuela to utilise the surplus of the allowable catch in the exclusive economic zone of French Guiana, that decision intends to ensure the continuity of landings in French Guiana by vessels flying the flag of Venezuela, since the processing industry based in French Guiana depends on those landings. The annulment with immediate effect of that decision would be liable to affect that continuity by giving rise to serious negative consequences for the economic operators concerned.

- 92 In those circumstances, there are important grounds of legal certainty justifying the grant by the Court of the request that the effects of the contested decision be maintained. Moreover, it must be noted that neither the Parliament nor the Commission have contested the lawfulness of that decision because of its aim or content, with the result that there is no obstacle in that respect to prevent the Court from ordering that the effects of the contested decision be maintained.
- 93 Accordingly, the effects of that decision should be maintained until the entry into force, within a reasonable period of time after the date of the present judgment, of a new decision adopted on the proper legal basis, namely Article 43(2) TFEU, in conjunction with Article 218(6)(a)(v) TFEU.

### **Costs**

- 94 Under Article 138(1) 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 Parliament and the Council have applied for costs and the Council has been unsuccessful, the latter must be ordered to pay the costs. In accordance with Article 140(1) of the Rules of Procedure, the Czech Republic, the Kingdom of Spain, the French Republic and the Republic of Poland, which intervened in the present proceedings, must bear their own costs.

On those grounds, the Court (Grand Chamber) hereby:

1. **Annuls Council Decision 2012/19/EU of 16 December 2011 on the approval, on behalf of the European Union, of the Declaration on the granting of fishing opportunities in EU waters to fishing vessels flying the flag of the Bolivarian Republic of Venezuela in the exclusive economic zone off the coast of French Guiana;**
2. **Maintains the effects of Decision 2012/19 until the entry into force, within a reasonable period of time after the date of the present judgment, of a new decision based on the appropriate legal basis, namely Article 43(2) TFEU, in conjunction with Article 218(6)(a)(v) TFEU;**
3. **Orders the Council of the European Union to pay the costs;**
4. **Orders the Czech Republic, the Kingdom of Spain, the French Republic and the Republic of Poland to bear their own costs.**

[Signatures]