

On those grounds,

THE COURT,

in answer to the questions referred to it by the arbitrator in the dispute between Nordsee Deutsche Hochseefischerei GmbH, on the one hand, and Reederei Mond Hochseefischerei Nordstern AG & Co. KG and Reederei Friedrich Busse Hochseefischerei Nordstern AG & Co. KG, on the other hand, by a decision of 22 April 1981, hereby rules:

The Court has no jurisdiction to give a ruling on the questions referred to it by the arbitrator.

Bosco	Touffait	Due	Pescatore	Mackenzie Stuart
O'Keeffe	Koopmans	Everling	Chloros	

Delivered in open court in Luxembourg on 23 March 1982.

P. Heim
Registrar

G. Bosco
President of the First Chamber
Acting as President

OPINION OF MR ADVOCATE GENERAL REISCHL
DELIVERED ON 2 FEBRUARY 1982 ¹

*Mr President,
Members of the Court,*

A number of German undertakings engaged in deep-sea fishing, namely

Nordsee Deutsche Hochseefischerei GmbH, Reederei Mond Hochseefischerei Nordstern AG & Co. KG and Friedrich Busse Hochseefischerei Nordstern AG & Co. KG (both of the

¹ — Translated from the German.

Nordstern Group), and Reederei Söhle, placed orders prior to 31 December 1970 for the construction of thirteen factory-ships for fishing of the same type as part of a joint project. The orders were completed and the ships put into service during the period between September 1972 and October 1973.

When the undertakings which had ordered the ships learned in the spring of 1973 that it was possible to obtain aid from the European Agricultural Guidance and Guarantee Fund [hereinafter referred to as "the Fund"] under the provisions of Regulation No 17/64/EEC of the Council of 5 February 1964 (Official Journal, English Special Edition 1963-1964, p. 103) they submitted applications for such assistance in respect of four ships, that is to say, two for Nordsee, and one each for Reederei Söhle and the Nordstern Group. It became known early in 1973 that measures to encourage conversion projects in the salt cod-fishing industry were to be taken pursuant to Regulation (EEC) No 2722/72 of the Council of 19 December 1972 (Official Journal, English Special Edition (28-30 December, p. 31) and the same undertakings then submitted additional applications under that programme in the spring of 1973 in respect of five other ships — Nordsee for two ships, Reederei Söhle also for two ships, and the Nordstern Group for one ship. In the case of the last four ships which I said were to be constructed — two ships for Nordsee and one ship each for Reederei Söhle and the Nordstern Group — the undertakings decided not to request aid from Community funds.

The applications which they submitted were, in part, successful. Certain funds

were granted by the Commission and paid to Nordsee, Reederei Söhle and the Nordstern Group in July and August 1974, for one ship in each case under the provisions of Regulation No 17/64. In addition, certain sums were granted in June 1974 and paid in 1975 by the Commission under the special programme for the cod-fishing sector in respect of three ships, one each for Nordsee, Reederei Söhle and the Nordstern Group. An application for aid in respect of one ship in the case of Nordsee was withdrawn; two applications in respect of a ship each for Nordsee and Reederei Söhle were rejected.

After all applications had been submitted it became known — by a letter of 10 May 1973 from an official in the German Federal Ministry of Food, Agriculture and Forestry to the Verband der Deutschen Hochseefischereien [German Deep-sea Fishing Association], if I am not mistaken, a copy of which was received by Nordsee — that there were insufficient Community funds available to satisfy all the applications which had been made. As a result an agreement was made on 27 June 1973 between Nordsee, Reederei Söhle and three of the shipping undertakings in the Nordstern Group whereby the aid from EEC funds was to be so pooled between the contracting parties that one-thirteenth of the total aid would be allotted to each of the thirteen factory ships in question. The agreement also provided that all questions arising out of the agreement were to be settled by mutual agreement between the parties, and that in the absence of agreement the issue was to be finally settled, without recourse to courts of law, by an arbitrator who, if the parties were unable to agree on one, was to be appointed by the Industrie- und Handelskammer [Chamber of Industry and Commerce] Bremen. The undertakings also made a supplementary

agreement, likewise of 27 June 1973, to the effect that if one or more of the parties was compelled, owing to the existence and implementation of the first agreement, to pay back all or part of the aid, the aid not to be repaid was to be re-apportioned in accordance with the terms of the first agreement.

In 1976 doubts arose as to whether the aforementioned redistribution might not entail the risk of having to repay aid to the Commission, and the Nordstern Group therefore insisted on clarification. Nordsee approached officers of the Commission on the matter in the latter half of 1976. Its representatives then learned that the Commission considered that pooling of aid was not permissible and would attempt to obtain repayment of aid disposed of in such a manner.

Following that an official of the Federal Ministry of Food, Agriculture and Forestry informed Reederei Söhle that the Commission was anxious to obtain a declaration that no pooling of aid had occurred, or would occur. In a telex message sent by Reederei Söhle, on behalf of itself and Nordsee, to the Ministry on 25 November 1976 an assurance was given that no pooling of aid from EEC funds had taken place, no such obligation existed and there was no intention to effect such pooling. That information was passed to the officers of the Commission. A similar declaration was also made by a representative of the Nordstern Group to an official of the Federal Ministry of Food, Agriculture and Forestry.

Nevertheless, Nordsee insisted that the parties abide by the agreement of 27 June 1973 and claimed from Mond and Friedrich Busse of the Nordstern Group

a compensatory payment, the amount of which is not in dispute, together with payment of interest from 1 September 1975. That was refused, first on the ground that because the pooling agreement infringed Community law on aid, which stipulates that aid is linked to a given project, it was void under Article 134 of the German Bürgerliches Gesetzbuch [Civil Code], and secondly because the claim was precluded by Article 242 of the Bürgerliches Gesetzbuch as Nordsee would be obliged to return such re-adjustment payments to the Commission.

In those circumstances recourse was had to the arbitrator provided for in the agreement, who in the absence of agreement between the parties was appointed by the Industrie- und Handelskammer [Chamber of Industry and Commerce] Bremen.

In examining the case the arbitrator came to the conclusion that the claim depended on the answer to the question whether the pooling arrangement was reconcilable with the provisions of Community law on aid set out in the two regulations already referred to, Regulations No 17/64 and No 2722/72, together with Regulation (EEC) No 729/70 of the Council of 21 April 1970 (Official Journal, English Special Edition 1970 (I), p. 218). If, despite the fact that the principal aim of the aid — the carrying out of the projects as planned — had been achieved, the agreement amounted to an "irregularity" in particular within the meaning of Article 8 of Regulation No 729/70 because Community aid must not be passed on to other parties but was linked to a given project inasmuch as it was intended to benefit only projects selected for special promotion, then the claimant in the arbitration proceedings, Nordsee, had in fact

no entitlement. On the contrary, in such circumstances Member States would have to take steps to recover the aid; immediate withdrawal of the aid might also be expected from the Commission. Moreover, the declarations made to the Commission by the undertakings participating in the pooling agreement (to which I referred earlier) must be taken as an indication that they had withdrawn from the pooling agreement. Furthermore, if it was to be accepted that there was an irregularity there could be no claim under the supplementary agreement of 27 June 1973 either, for if the pooling itself amounted to an irregularity the agreement re-adjusting the pooling must also be regarded as an infringement of Community law on aid and thus void under Article 134 of the Bürgerliches Gesetzbuch. However, because the arbitrator was uncertain as to the interpretation of the law on aid and as to what precisely was to be understood by the term "irregularity", he considered that a preliminary ruling on the point from the Court of Justice was required.

Another problem which he encountered, of course, was whether a court of arbitration is entitled at all to make a reference under Article 177. He considers that there are grounds for allowing that it is, although in the case-law to date only judicial organs of the State, forming part of the national organization of the administration of justice, have been recognized as having the right to submit a reference for a preliminary ruling. He relies on the fact that as arbitrator his duty is to apply substantive law and Community law with the same precision as the ordinary courts, that he is bound to ensure that the procedure adopted is compatible with the requirements of the due administration of justice, and that his findings are reached independently, the fact that he is appointed by the Industrie- und Handelskammer being significant in this respect; he also observes that his decision is final since

recourse to the courts was excluded, that pursuant to Article 1040 of the German Zivilprozeßordnung [rules of civil procedure] it has the same effects as a definitive judgment, and that in proceedings for leave to issue execution or have the award set aside under Articles 1041 and 1042 of the Zivilprozeßordnung such awards are subject to only limited review and not to a review of their application of the law such as that which is exercisable by a final court of appeal. The arbitrator also refers to the purpose of the procedure for obtaining a preliminary ruling which is to guarantee uniformity in applying the law, a purpose which would not be so well served were references for preliminary rulings to be allowed solely in proceedings either for leave to issue execution or to have the award set aside, owing to the limited scope for review which they afford in the case of arbitration awards.

By an order of 22 April 1981, therefore, he suspended the proceedings before him and referred the following questions to this Court for a preliminary ruling:

- "1. Is a German arbitration court, which must decide not according to equity but according to law, and whose decision has the same effects as regards the parties as a definitive judgment of a court of law (Article 1040 of the Zivilprozeßordnung [rules of civil procedure]) authorized to make a reference to the Court of Justice of the European Communities for a preliminary ruling pursuant to the second paragraph of Article 177 of the EEC Treaty?
2. Where persons in receipt of aid from the Guidance Section of the European Agricultural Guidance and Guarantee Fund for projects of the same kind (construction of factory-ships) agree after applying for but before being granted Community aid that the aid granted after the ships have been put into service and paid for is to be divided (pooled) between

them in proportion to the number of all objects of the same kind built and put into use by them, that is to say including objects which are of the same kind but not the subject of a grant, and subsequently divide the aid in accordance with that agreement, does that amount to an irregularity leading to a total or partial recovery within the meaning of Community law, in particular Regulation No 17/64/EEC of the Council of 5 February 1964, Regulation (EEC) No 729/70 of the Council of 21 April 1970 and Regulation (EEC) No 2722/72 of the Council of 19 December 1972?"

My views on this case are as follows.

I — The first point to be considered is the *admissibility of the reference*, that is to say, of a request for a preliminary ruling to the Court of Justice by an arbitrator called upon to decide a dispute under the terms of a private agreement.

Consideration of that point must be automatic and quite independent of the fact that the first question referred to this Court by the arbitrator concerns just one point. Moreover, the question at issue — all that is required for the purposes of the main proceedings — is solely that of determining the authority of the person *who has actually referred the matter to this Court*; it is *not* therefore simply to make a *general interpretation* of Article 177 in relation to arbitration which, as has been made clear by the views expressed in the present proceedings, takes many forms.

1. In this context it is important to note that the decisions of the arbitrator who has made the reference are based not on equity but on law, including statute law, and that such proceedings are regulated in certain respects by the German

Zivilprozeßordnung (Article 1025 et seq.). Thus Article 1034, for instance, contains a few basic rules of procedure guaranteeing respect for the rule of law. By virtue of them the arbitrator is required to hear the parties and establish the facts giving rise to the dispute before making his award; in addition, legal representation by lawyers may not be refused. Article 1039 provides that the arbitrator's award must be deposited at the registry of the competent court; Article 1040 provides that an arbitration award has the same effects as between the parties as a definitive judgment of the courts. It should be noted, however, that its effects may not take precedence over the effects of a judgment emanating from a court or tribunal of the State because they are enforceable not automatically but only on application by one of the parties (see the judgment of the Bundesgerichtshof [Federal Court of Justice] of 11 April 1958, reported in *Neue Juristische Wochenschrift*, 1958, p. 950) and because the parties may, by agreement between them, refuse to be bound by an arbitration award (see the judgment of the Oberlandesgericht [Higher Regional Court] Bremen of 14 December 1956, reported in *Neue Juristische Wochenschrift* 1957, p. 1035). Further to that, Article 1041 defines the grounds on which an arbitration award may be set aside, and it is especially noteworthy that for that purpose no comprehensive review to ensure correct application of the law is undertaken, the only test — as far as the content of the award is concerned — being whether it offends against public morality or public policy. Finally, Article 1042 provides that execution is based upon the arbitrator's award once it has been declared enforceable. The requisite declaration in that respect is made by an ordinary court of law whose jurisdiction is governed by Articles 1045 and 1046 of the Zivilprozeßordnung, and it may be refused if one of the grounds of nullity listed in Article 1041 is present.

2. Whether a reference arising from arbitration proceedings of this kind is admissible or not cannot be deduced from *the previous decisions of this Court*, which has already more than once had to consider questions raised by bodies which are not courts or tribunals of the State. Clearly, in the present instance not all the criteria are present which were considered to be important in the two cases which are relevant on the issue, Case 61/65¹ and Case 246/80².

(a) As far as the judgment in Case 61/65 is concerned it must be conceded that a number of the factors which were held in that case to be indicative of the status of a court or tribunal and of the capacity to make a reference are also present in this case. As in that case, the body making the reference has to take its decision according to the principles of law, and procedure is governed by provisions which are similar to those which apply in the ordinary courts; the body deciding the issue is also duly constituted in accordance with national law, as arbitration courts must be, because they figure in German procedural law as tribunals competent to decide contentious matters.

In the same judgment, however, importance was also attached to the fact that the body in question was a *permanent* one, and that it enjoyed compulsory jurisdiction conferred upon it by the State to settle disputes defined in general terms. As we know, the Commission takes the view that arbitration tribunals of the kind here in question correspond to that description, with the sole proviso that it is not the individual arbitration tribunal which must be considered, but the fact that

arbitration *as such* is a permanent judicial institution in the legal system; in other words, that the legal system reserves to arbitration a general sphere of jurisdiction, without which private arbitration agreements would be ineffective.

However, not only is there room for doubt as to whether such a view is actually justified here, but it is in any case quite certain that in the present case elements are absent which in Case 61/65 were considered to be important as well, namely the involvement of the State, through a minister, in the composition of the arbitration tribunal and the exercise of a similar influence in the drafting of the rules of procedure.

(b) The position is similar with regard to the recent judgment delivered in Case 246/80, which concerned a reference to the Court of Justice for a preliminary ruling by a body — known as the Appeals Committee — set up by an association of doctors in the Netherlands constituted under private law. The fact that the committee was appointed for five-year terms, so that it was not a body convened to settle a dispute *ad hoc*, was not the only factor decisive for the admissibility of the reference. Importance was clearly also attached to the fact that the influence of public authority was clearly discernible, first because the internal rules of the association might be amended only in consultation with the minister responsible, and secondly because appointments to the Appeals Committee were made jointly by representatives of the medical profession and the minister responsible.

3. The crucial question is therefore whether one may go considerably further than the cases just described in applying Article 177 and regard in addition arbitration courts constituted under private law of the kind described at the beginning of this opinion as courts or

1 — Judgment of 30 June 1966 in Case 61/65 *G. Vaassen (nee Goubels) v Management of the Beambtenfonds voor het Mijnbedrijf* [1966] ECR 261.

2 — Judgment of 6 October 1981 in Case 246/80 *Broekmeulen v Huisarts Registratie Commissie* [1981] ECR 2311.

tribunals within the meaning of that provision.

The point was debated thoroughly from all aspects in the course of the proceedings and is also the subject of much controversy among writers: the defendants in the main proceedings and the Commission favoured an affirmative answer whilst the governments of the United Kingdom, the Italian Republic and the Kingdom of Denmark expressed their doubts, not all with the same degree of intensity. It is clear from the debate that it is by no means easy to resolve the issue and that it has far-reaching significance for the development of Community law, the work of the Court of Justice and arbitration under private law.

(a) Clearly, the *wording* of Article 177 of the EEC Treaty must be taken as the starting point of an examination of the problem.

The government of the United Kingdom relies upon that in its views. It is of the opinion that the phrase "court or tribunal of a Member State" and the corresponding expressions in the other language versions as well as the use of the concept of "judgment" and the corresponding terms in the other language versions support the view that the provision covers only official organs of the States, which have been endowed with a jurisdiction of their own emanating from the State but not arbitration tribunals which deliver not judgments but arbitration awards, whose authority derives from agreement between the parties and whose decisions acquire the stamp of public authority only through the intervention of national courts.

It cannot be denied that that argument, especially the reference to the concept of

"judgment", carries a certain conviction and is not wholly without justification. However, as the Commission's representative pointed out it must not be overlooked that the question of arbitration was probably not considered when the Treaty was drafted and therefore it cannot be simply assumed that the terms used were chosen with the specific intention of excluding arbitration courts as such from the scope of Article 177. I should also remind the Court that, as I pointed out in my opinion in C-246/80, a perfectly plausible view is that the authors of the Treaty intended the formulae used principally to preclude applications to the Court of Justice from, on the one hand, courts of non-member countries or international courts and, on the other hand, the *parties* to the dispute, as well as from the Member States and *non-judicial authorities* within them.

I am therefore inclined to take the view that reliance on the wording of Article 177 alone does not provide adequate support for the solution of the problem before us which was proposed by the United Kingdom Government.

(b) The next question is, what effect on the issue has the *purpose of Article 177* considered in the light of Article 164 of the EEC Treaty, according to which one of the essential tasks of the Court of Justice is to ensure the correct and uniform application of Community law as far as it is relevant in national proceedings.

For that reason, it has been submitted, the emphasis in interpreting Article 177 should be placed not so much on the *status* of the adjudicatory body as on its *functions*. However, that would seem to imply that even private arbitration bodies should be brought within the scope of Article 177 at least in so far as they

observe rules of procedure similar to those of national courts and base their decisions, not on equity, but on law, including statute law, and in so far as those decisions have the same effects as the independent decision of a court of law, that is to say, they are legally binding and enforceable, and in so far as the State courts have only very limited supplementary tests to apply. It must even be regarded as unacceptable, it is claimed, for such a vital field of dispensation of justice, which is substituted for that of the national courts and in which Community law has a not insignificant part to play, to fall outside the operation of Article 177 and that it should be accepted that a considerable area of the law in practice might develop, in certain circumstances in divergence from Community law.

(aa) No one can deny that that provides a powerful initial argument in favour of answering the question in the affirmative. A number of objections thereto, moreover, may be relatively easily disposed of.

(i) That applies to the British Government's view that Article 177 is intended to ensure that the *aims of the Treaty* will not be overlooked in national legal proceedings. Yet, it argues, it would seem highly unlikely that questions concerning vital aims of the Treaty should arise in private arbitrations; on the contrary, it is safe to assume that in such proceedings the provisions relating to import restrictions, aids, freedom of movement, freedom of establishment and freedom to provide services will be relevant only in exceptional circumstances.

That argument overlooks the fact that Article 177 concerns not only the vital

aims of the Treaty, but Community law itself. At least some areas of Community law — questions relating to Article 30 and Article 85 perhaps, as the defendant pointed out — may well be of significance in arbitration proceedings. It is also difficult to maintain that such instances are really isolated individual cases which may easily be ignored, assuming that kind of quantitative approach, which may well be modified in the light of future developments, to be acceptable in any case in interpreting the provisions of the Treaty.

(ii) The same applies to the fear which was expressed that clarifications of Community law supplied at the request of private arbitration tribunals might prove worthless because they would not be heeded, and to remark that preliminary rulings serve a purpose only in the case of ordinary courts of law whose judgments are published and therefore influence the development of law, which may not be said of private arbitration tribunals, especially if there are not permanent institutions.

The only arbitration tribunal we are concerned with here is one whose awards are based on law, including statute law; it must also, therefore, have regard to Community law, which must be considered as part of public law and which has binding effects, so that there can be no doubt that a preliminary ruling on a point of Community law is binding upon it. Although against that it must be conceded that an arbitration tribunal set up for a single case merely makes an award which becomes known solely to the parties, in principle, and probably has no influence on the development of the law, one must not overlook the fact that the same may be said of many judgments of national courts of law. Moreover, it was rightly pointed out that once the Court of Justice becomes involved the essential effect as far as Community law

is concerned derives from the preliminary ruling and that is, of course, always published.

(iii) Furthermore, it is not correct to argue that there is no need to allow arbitration tribunals to have a right of reference to the Court of Justice because steps to obtain clarification of points of Community law which may arise in such cases may always be taken by the ordinary courts of law which are called upon to apply certain tests in connection with the proceedings for leave to issue execution, or to which application may be made in appropriate circumstances to have the arbitration award set aside.

As to that, it may rightly be observed that not only has the principle of the efficient use of legal procedure led to the grant of a right of reference even to the lower courts in national judicial systems, but it is significant that (as was convincingly demonstrated) arbitration awards are widely recognized and complied with so that the ordinary courts are not called upon to intervene at all. Moreover, it must be borne in mind that the content of arbitration awards under German law — and apparently under many other legal systems — is subject to review only if it appears to be contrary to public morality or public policy. Arbitration awards are not subject to further review — for instance, to ensure that they comply with the normal mandatory principles of the relevant law, and it may therefore be assumed that only a part, perhaps relatively small, of the Community law relevant to a particular arbitration may be subject to discussion even in related court proceedings.

(iv) Similarly, I am not convinced by the reference made by the British

Government's representative to the fact that all Member States are bound by the Protocol on arbitration clauses of 29 September 1923 or the Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards which oblige them to recognize agreements containing arbitration clauses and which precludes other courts from exercising jurisdiction in such cases.

It must be borne in mind, of course — particularly in the light of the preliminary rulings delivered by this Court — that recognizing the existence of a right to make a reference does not mean a transposition of jurisdiction to decide the legal dispute in question, jurisdiction which is retained in every case by the court hearing the main action. That explains, too, why the aforementioned provisions do not appear to have occasioned any difficulties even in regard to the British legal practice whereby up to 1979 the ordinary law courts had wide powers to intervene, at the request of the parties, in arbitration proceedings in order to clarify specific preliminary issues, a practice which, despite restrictive legislation dating from 1979, is still permitted to some extent nowadays.

(v) Finally, I am likewise unimpressed by the argument also put forward by the British Government that the application of Article 177 to arbitration proceedings would have adverse effects on the arbitration tribunals which exist in some large cities in the Communities. The British Government argued that since many parties to arbitration proceedings do not agree to a reference to the European Court of Justice such an extension might drive arbitration tribunals away from the Community, thus occasioning a loss in invisible exports

and a diminution of the influence of the laws of the Member States which are frequently adopted as the *lex fori* and a corresponding increase in the influence of extra-Community legal systems.

I feel that that is surely an over-estimation of a risk which may or may not exist (in any case, the Second International Arbitration Congress in Rotterdam in 1966 supported the right of reference), and like the majority of the participants in that Congress I am loath to ascribe any decisive influence to considerations of that nature.

(bb) Apart from that there are, however, *doubts of much greater weight* which give cause for hesitation in extending to private arbitration tribunals the right to make references to the Court of Justice under Article 177.

(i) Since the wording is not wholly unambiguous the question to be faced is whether it is really correct to infer an assumption on the part of the authors of the Treaty that arbitration tribunals must be included in the scope of Article 177, and an intention to ensure the uniform and correct application of Community law in the sphere of arbitration, too.

That such was the case may be doubted, not merely in view of those legal systems which fully exclude any review of arbitration awards, but also from the point of view of those, such as German law, which permit review of arbitration awards only in the form of an examination restricted to the aspects of *ordre public* and to preclude any offence against public morality. If a failure to apply substantive national law is thus tolerated in arbitration awards — in other words, if the absence of

precautions to ensure the uniform correct application of the law was not considered to jeopardize the proper evolution of the law, then in my view there is scarcely any justification for considering that more stringent requirements were necessary with regard to Community law. In any case, it was possible to derive comfort from the thought that, in so far as arbitration awards may be reviewed from the two aspects referred to above, essential principles of Community law, too, may be recognized in this way and clarification of them may be obtained by means of references for a preliminary ruling from the ordinary courts of law in the course of proceedings for leave to issue execution or to have an award set aside.

Doubts arise, however, in the case of legal systems under which arbitration awards are subject to full review by the ordinary courts, for when access to the courts is organized in this way it may well appear simply that there is no compelling need for a right of reference in arbitration proceedings because the aim of such a reference may just as well be attained in proceedings before the ordinary courts, to which any party will readily turn who feels himself to have been prejudiced as a result of an incorrect application of Community law.

Such considerations are, I am sure, undeniably sufficient to rebut any line of argument which seeks to rely on the meaning and purpose of Article 177 rather than its wording.

(ii) The view — also to be found occasionally in legal writings — that extending the scope of Article 177 to include arbitration bodies whose awards are based on law, including statute law, must in many cases lead to recognition

of a *duty* on the part of such tribunals to make references has similar consequences. That is certainly the case when review of arbitration awards by ordinary courts of law is wholly excluded; but it ought also to be recognized in cases where review is so restricted that a tiny part, at most, of Community law — that embraced in the concept of *ordre public* — may be taken into account in the court proceedings. I might add that I do not see how that result may be avoided by relying on the argument that the whole structure of Article 177 is designed for national courts of law so that the duty of reference could only apply to them, or with the argument that even legal remedies available within the ordinary judicial system are, as often as not, subject to limited review, and do not immediately give rise to a duty of reference. The fact is that if Article 177 is to apply to arbitration tribunals at all, then it must apply in full; in other words, as far as the *duty* of reference is concerned, the meaning and purpose of the provision as defined elsewhere, namely to ensure the uniform and correct application of the law, must not be overlooked. As far as the judicial remedies available within the ordinary jurisdiction of the courts are concerned, however, my interpretation is not that they usually involve only a limited review of points of law; where that is the case, however, I think that the question whether the third paragraph of Article 177 applies is one which cannot be avoided.

If that view is taken, it must surely be regarded as quite impossible that that result (that arbitration courts or tribunals may, and *must*, make references for preliminary rulings) was really intended. In this connection one must reflect the risk that the Court of Justice would be burdened with a work-load the extent of which would be difficult to estimate if it were to be thus diverted from its own work to deal with private disputes, often

of very minor significance, involving some aspects of Community law. It must also be admitted, moreover, that the result would be a scarcely tolerable intrusion into the field of arbitration. The essence of arbitration is precisely to enable the parties to a dispute to obtain, without having recourse to the courts, a speedy decision on the dispute in a manner designed to avoid publicity and keep costs relatively low. Those advantages would certainly be largely destroyed by a compulsory reference for a preliminary ruling even though, admittedly, the brevity of proceedings for obtaining a preliminary ruling and the preferential treatment they enjoy mean that only negligible delay would be involved.

(iii) The theory that in interpreting Article 177 the emphasis should be placed not so much on whether the decisions are recognized by the State and delivered in proceedings governed by the rule of law — a description which may in fact apply equally, as the representative of the Italian Government pointed out, to many purely *administrative* decisions —, but rather on whether the institution which is given the right of reference is equipped with the authority of the State, which means that only national courts, or at least tribunals in which the influence of public authority is strongly in evidence, are to be regarded as within the purview of Article 177, may also be justified on the ground that that interpretation provides the best guarantee that the questions which are referred to the Court for a preliminary ruling will be useful and necessary. In fact, if Article 177 is to serve its true purpose such a safeguard, as it were the interposition of an effective filter, is indispensable.

That is a point which must give rise to considerable doubt in the case of many *ad hoc* arbitration tribunals, although for

permanent arbitration tribunals it may well be less true. Since in many cases arbitration tribunals are not composed of lawyers and the parties frequently have no legally trained representative it cannot altogether be expected that they will produce well-defined questions of Community law which are relevant to the issue. There is also the risk of an abuse of the procedure for obtaining a preliminary ruling: disputes might be fabricated in order to obtain preliminary rulings of purely academic interest, and that cannot effectively be prevented by establishing strict requirements to the effect that the decision making the reference must include convincing evidence that the questions submitted for a preliminary ruling are relevant to a decision in the dispute.

(iv) Finally, the representative of the United Kingdom Government also observed that the choice of wording in Article 177 — “court or tribunal of a Member State” — requires that the tribunal in question be “of” a Member State, but that that might give rise to considerable problems in the case of an arbitration tribunal established for an individual case, with international connections. In that case the place where it holds its sittings may be taken into account, which need not, of course — if it is free to choose — always be in the same place; the relevant locality might be established on the basis of the applicable procedural law (chosen by the parties) or the substantive law applicable to the contested agreement and may even be made to depend, apart from the nationality of the parties, on the place where the award is made or on the court which has jurisdiction in the action for leave to issue execution.

It is possible that the problems I have outlined may simply be dismissed as trifling on the assumption that such “grey areas” will be clarified in the course of time, which was the view expressed by the Commission’s rep-

resentative during the oral procedure. I myself am inclined to the view that there is a sound basis for arguing that in view of difficulties of that nature it should be assumed that the authors of the Treaty did not intend to include arbitration tribunals when they settled the wording of Article 177.

(c) In the light of all those considerations I think one cannot escape the conclusion that ultimately the weight of argument is rather *against*, than in favour of, the view that the actual reference before us must be considered to be admissible. Naturally, however, and especially as the point at issue is, and may no doubt continue to be, the subject of much controversy, I shall not end my opinion with that conclusion but go on to give, in the alternative, my views as to the *substantive issues raised in the reference*.

II — The substance of the arbitrator’s enquiry is whether agreements such as those to be assessed in the original proceedings, and implementation of them, constitute “irregularities” within the meaning of Regulations Nos 17/64, 729/70 and 2722/72 rendering aid granted by the Guidance Section of the European Guidance and Guarantee Fund liable to recovery in whole or in part.

The German deep-sea fishing undertakings named at the beginning of this opinion had agreed after applying for, but before being granted, EEC aid that the aid granted after the ships had been put into service and paid for would be shared among them on the basis of the number of all factory-ships of the same kind which had been constructed and put into service by them; in other words, the agreement was to include projects which had not been assisted, for which applications for aid had not been submitted or had been withdrawn or assistance for which had been expressly refused. As stated in the order making

the reference, in all except three cases the ships in question had not yet been put into service when the applications for aid were submitted.

1. Before examining the question I shall briefly review the content of the relevant Community regulations.

(a) Article 13 of *Regulation No 17/64* provides as to the conditions for the grant of aid from the European Agricultural Guidance and Guarantee Fund that aid is to be granted from the Fund for projects relating to the improvement of the agricultural structure in respect of which *applications* have been submitted to the Commission. The information to be given in the applications is set out in the Annex to Regulation No 45/64/EEC (Official Journal, English Special Edition 1963-1964, p. 135). It must include a detailed description of the applicant and the beneficiary, including a description of their main activities and economic position; in addition, the project — with a general estimate of the total cost, a programme for completion of the work and the expected results — is to be described, and details of the proposed method of financing the project are to be given.

In Article 14 of Regulation No 17/64 the general criteria which must be met by projects in order to be eligible for aid are set out. The article indicates, *inter alia*, that projects must “offer an adequate guarantee in respect of the lasting economic effect of the improvement made in the structure of agriculture”; in addition, such projects must be aimed “at making or keeping farms economically viable and at increasing their competitiveness”.

Article 17 of the regulation provides that aid from the Fund consisting of capital subsidies must not alter the conditions of competition in such a way as to be incompatible with the principles contained in the relevant provisions of the Treaty.

Article 18 stipulates that for a given project the subsidies must not amount in relation to the investment made, to more than 25%, that the financial contribution of the party benefiting from the improvement must not be less than 30%, and that the Member State on whose territory the project is to be carried out must contribute to the financing thereof.

Article 21 provides that the *Commission* shall *decide* upon the aid to be granted after consulting the Fund Committee on the financial aspects and in particular on the finances available; the decision “shall be communicated to the Member State concerned and to the beneficiaries”.

Finally, Article 22 states that the aid shall be granted to the persons who are ultimately responsible, wholly or partially, for the cost of carrying out the project. It provides, further, that the authorities appointed by the Member States are to transmit to the Commission all supporting documents or any documents which give adequate proof that the financial or other conditions laid down for each project have been fulfilled, and that the Commission may, if necessary, verify this by inspection on the spot. It also contains the provision that if the conditions are not fulfilled, aid from the Fund may be suspended, reduced or discontinued, and that the Commission is to make a decision on the financial aspects.

(b) The next provision which was mentioned, *Regulation No 729/70* on the financing of the common agricultural policy (Official Journal, English Special Edition 1970 (I), p. 218) provides, in Article 8, that the Member States are to take the measures necessary to satisfy themselves that transactions financed by the Fund are actually carried out and are executed correctly, to prevent and deal with irregularities, and to recover sums lost as a result of irregularities or negligence. Article 9 (1) provides that the Member States are to take all suitable measures to facilitate the supervision which the Commission may consider it necessary to undertake within the framework of the management of Community financing, including inspections on the spot.

(c) Article 2 of the other regulation which is pertinent, *Regulation No 2722/72* on the financing by the European Agricultural Guidance and Guarantee Fund, Guidance Section, of conversion projects in the salt cod-fishing industry stipulates, *inter alia*, that for projects to be eligible for aid there must be adequate guarantees of the lasting economic effects of the structural improvement which is planned.

Article 5 states the technical requirements which must be satisfied by certain vessels listed in Article 1 (3) (a).

Article 4 provides that each application — which must, moreover, by virtue of Annex I to Regulation No 1462/73 (Official Journal L 145 of 2. 6. 1973, p. 11) contain certain information, including proof of the profitability of the project — must be accompanied by an economic analysis of the project; Article 6 provides that in support of each request for aid the Member State concerned is to submit to the Commission an economic analysis demonstrating that for the project planned the

amount of fishery produce envisaged is reasonable in the context of marketing possibilities.

The provisions in Article 11 correspond to those of Articles 17 and 18 of Regulation No 17/64, and those of Article 13 correspond to Article 22 of that regulation.

According to Article 14, the Commission is to decide on the applications submitted; pursuant to Article 15, such decisions will be communicated to the Member State concerned and to the recipients of the aid.

Article 18 provides that throughout the period for which aid is granted by the Fund the authorities designated for the purpose by the Member States are to submit to the Commission, at the latter's request, all supporting documents or any other documents showing that the financial or other conditions imposed in the case of each project are being fulfilled.

Finally, Article 19 provides that where a project for which aid has been granted is not carried out as planned or where certain conditions are not met, aid from the Fund may be suspended, reduced or cancelled; the Commission is to make a decision thereon after consulting the Fund Committee on the financial aspects. There is also provision here for the Commission to recover unwarranted payments.

2. From those provisions the following principles may be extracted:

Subsidies of the kind in question are granted only *on application*, in other words they are — as stated in the proceedings — subject to the terms of the application.

They are not intended for whole sectors or regions, but only for precisely defined projects conducted by specific undertakings: they may thus be described as “linked to a given project”.

The Commission decides in what direction Community funds are to be channelled, and therefore one may speak of the Commission's *exclusive power of decision*.

That alone compels the conclusion that where an agreement is made by applicants for aid *before* the Commission has given its decisions on the aid, whereby Community funds are to be applied, not in accordance with the Commission's criteria but — because projects are to be included in respect of which no application for aid was made — on the basis of criteria determined by the undertakings party to the agreement, that agreement is *incompatible* with the principles I have just described. Such an agreement amounts to nothing short of an anticipatory revision of the Commission's decision and therefore an encroachment upon that institution's exclusive power of decision. Indeed, it must not be forgotten that the basis for the Commission's decisions is defined in the applications which were submitted for aid. In those applications the applicant is identified and precise details of the actual projects are given. That basis, which extends to cover the full amount of the subsidy, is quite clearly altered by agreements of the kind in question here, and in such cases if — as in the present case — the appropriate information is not supplied, the Commission's decision is made on false premises.

3. In the light of those fundamental facts, the claimant's attempts in the oral procedure to defend the agreements cannot suffice to alter that conclusion.

The claimant pointed out that the purpose of a subsidy is to provide an *inducement* to follow a particular course of action, but that such a purpose clearly ceases to be relevant, when — as in the present case — aid is granted long after the ships benefiting therefrom have been put into operation and paid for. In such circumstances, since the money — as the Commission must have been aware — could no longer have been put towards the *construction* of the ships, what was in question was in reality aid without the function of a subsidy, and therefore it was no longer accurate to speak of its being “linked to the project”; similarly the freedom of the recipients to dispose of the aid could not be called in question. The claimant is of the opinion that in the present case it would also be inaccurate to speak of an encroachment upon the Commission's exclusive power of decision. That was terminated on payment of the aid and completion of the project — in other words, when the aim of the subsidy had been achieved. There could not therefore reasonably be any exclusive power of decision as far as disposal of the monies paid out was concerned, or any constraint in that respect, since once the project had been completed and paid for the Community aid which had been granted could not be disposed of otherwise than in the context of private law. Lastly, the claimant considers not only that there is absolutely no room for doubt that an agreement between recipients of aid is possible *after payment* of the aid, just as is the disposal of the ships in respect of which aid was granted together with a transfer of the subsidies; it also believes that the agreement may be defended by referring to the aim to be achieved — the prevention of distortions of competition — also mentioned in Article 11 of Regulation No 2722/72, and on the ground that the result was in conformity with the intentions of the German authorities, which had given equal subsidies for all ships.

Against that, it was rightly emphasized that one point which ought not to be overlooked is that arrangements made by the recipients of the aid are to be found in the *agreement* of 27 June 1973, and that at that time by no means all the projects had already been completed.

Moreover, under the Community rules — and this is even more important — it is by no means true to say that it is immaterial how the funds are applied after they have been paid out provided only that the relevant projects are in fact completed. We have seen that a decision on aid also concerns the *future* development of a project, which must — and in that context the way in which it is financed is certainly not irrelevant — provide a guarantee that the project is of *lasting* economic benefit. Provision has also been made for checking that projects are properly carried out and ensuring that the conditions are observed. To that end Article 19 of Regulation No 2722/72 provides expressly that aid may be suspended, reduced or cancelled depending on whether a project is carried out “as planned”, which obviously includes keeping within the financing plan.

For that reason the conclusion is not affected by the claimant's contention that it is possible to conclude an agreement such as that at issue *after* the aid has been granted, quite apart from the fact that at that time such an agreement — an agreement which was designed to cover a risk — would cease to have any purpose. Furthermore, I doubt whether it would really be possible to effect an immediate sale of a ship for which aid had been granted and to transfer that aid at the same time, or to withdraw the ship at short notice from circulation, without thereby frustrating the purpose of the subsidy.

As to the claim that the purpose of the agreement was to prevent *distortions of competition* and thereby achieve an approach similar to that adopted for German subsidies, the point that *German* aid in such matters is apparently distributed subject to different considerations is not the only important one. The crux of the matter is that it is the Commission's duty in making decisions as to aid to ensure that conditions of competition are not altered in any way which is incompatible with the relevant principles contained in the Treaty (Article 17 of Regulation No 17/64 and Article 11 of Regulation No 2722/72). In so doing it must consider conditions of competition in the *Community*, a test which — because decisions have to be taken on projects in other Member States, too — naturally entails application of a standard other than that of national competition law. If in that context it comes to the conclusion that the grant of aid to certain undertakings appears compatible with Community law, the implication must be that there is no distortion of competition, and there can therefore be no question of resorting to private agreement in order to rectify the situation.

4. If the pooling contract under examination by the arbitrator constitutes an “irregularity” within the meaning of Community law, therefore, that being obviously something which does not require the presence of elements constitutive of a criminal offence, and the original attitude of the German authorities — who when passing on the applications for aid did not mention the existence of the agreement which was known to them and made no attempt to have the applications altered — being irrelevant, then that part of the arbitrator's second question which refers to the *recovery of aid* requires the following brief comments.

The relevant provisions are Article 22 of Regulations No 17/64 and Article 19 of Regulation No 2722/72, to which I have already referred. According to those provisions aid may be suspended, refused or discontinued if projects are not carried out as planned or if certain conditions are not met. The Commission is then to make a decision on the financial aspects and is to recover unwarranted payments.

The Commission interprets that, correctly in my view, to mean that it has a discretion in the matter. It may therefore distinguish between different types of infringement — technical or fraudulent — and take into consideration the manner in which the projects in question have been completed. Indeed,

the Commission has expressly declared the compensatory payments under a pooling contract would always constitute grounds for initiating proceedings for recovery of the aid, but is unable to indicate what the extent of any such recovery would be.

I am not entirely sure that that is sufficient to enable the arbitrator in this reference to make a decision in the case before him, for taking the reference as a whole it is not quite clear whether he considers the important point to be that recovery is a necessary consequence of an irregularity, or whether it is sufficient that it may be such a consequence. However, as far as the Court is concerned it should not be necessary to say more on that aspect of the case.

III — To sum up, my conclusion is as follows:

I consider that there are good reasons for *regarding as inadmissible* the reference for a preliminary ruling which has been submitted to this Court the President of the Hanseatisches Oberlandesgericht in his capacity as arbitrator.

If the Court does not endorse that view, the question which was submitted should be answered as follows:

Where the recipients of aid from the Guidance Section of the European Agricultural Guidance and Guarantee Fund for similar projects agree, after applying for EEC aid but before it has been granted to them, that after the ships have put into operation and paid for the aid which has been granted shall be shared among them on the basis of the number of all objects *of the same kind* constructed and put into operation by them, that is, so as to include objects for which no aid was granted, and to share the aid in accordance with that agreement, that amounts to an irregularity within the meaning of Regulation No 17/64 and Regulation No 2722/72. Such an irregularity may lead to the recovery of the aid which was granted.