

OPINION OF ADVOCATE GENERAL
ALBER

delivered on 17 September 1998 *

A — Introduction

1. By the present action, Spain contests two Council regulations under which Portugal and France were authorised to carry out an exchange of fishing opportunities for anchovies. The distinguishing feature of that exchange was that part of the catch quota for ICES Zones IX and X, CECAF 34.1.1 (west and south-west of the Iberian Peninsula), initially allocated to Portugal, was transferred to France for fishing in ICES Zone VIII (Bay of Biscay).

2. Spain, which holds catch quotas for both the abovementioned fishing zones, claims that there has been a failure to observe the objectives of the common fisheries policy (optimum utilisation of the factors of production and stability of the market), set out in Article 39 of the EC Treaty, and a breach of the principles (rational and responsible exploitation of resources and relative stability) referred to in Regulation (EEC) No 3760/92¹ since the exchange involved different stocks in non-adjacent zones. Such an exchange, it claims, is

therefore not possible and was adopted only by circumventing the provisions governing the fixing of quotas (to the detriment of Spain).

3. The Council and the Commission, which has intervened in the proceedings on the side of the Council, rely essentially on the broad discretion which the Council has under the common fisheries policy and refer to the complex problems involved in integrating Spain and Portugal into the Community, which, they argue, justify the adoption of the contested regulations.

B — Facts and relevant legislation

4. There are two different stocks of anchovy in Community waters, for which total allowable catches (hereinafter: TACs²) and catch quotas are fixed. Those stocks

* Original language: German.

1 — Council Regulation (EEC) No 3760/92 of 20 December 1992 establishing a Community system for fisheries and aquaculture (OJ 1992 L 389, p. 1).

2 — Footnote redundant in the English version.

are situated in ICES Zone VIII and Zones IX and X, CECAF 34.1.1.

of fishing activities for each of the stocks concerned'

5. Under Article 161 of the Act concerning the conditions of accession of the Kingdom of Spain and the Portuguese Republic and the adjustments to the Treaties³ (hereinafter: Act of Accession), Spain was allocated a share of 90% for ICES Zone VIII, the remaining 10% being allocated to France. In accordance with the principle of relative stability between Spain and Portugal, the quota for the other stock was fixed at 48% for Spain and 52% for Portugal.

7. In order to clarify that point, the 11th to 14th recitals in the preamble to the regulation state as follows:

'Whereas, for the types of resources for which exploitation rates are to be limited, Community fishing opportunities should be established in the form of fishing availabilities for Member States allocated in quotas and, where necessary, in terms of fishing effort;

6. The system of distributing fishing opportunities between Member States is based on Regulation No 3760/92. The main objective of that regulation is to establish a framework for the conservation and protection of resources. In order to ensure the rational and responsible exploitation of resources on a sustainable basis, the Council may regulate the exploitation rate by restricting, for the period concerned, the volume of catches authorised and, if necessary, the fishing effort. In accordance with Article 8(4)(ii), where it proves necessary to restrict the exploitation rate in a fishery,⁴ the Council, acting by qualified majority on a proposal from the Commission:

Whereas conservation and management of resources must contribute to a greater stability of fishing activities and must be appraised on the basis of a reference allocation reflecting the orientations given by the Council;

'shall distribute the fishing opportunities between Member States in such a way as to assure each Member State relative stability

Whereas, in other respects, that stability, given the temporary biological situation of stocks, must safeguard the particular needs of regions where local populations are especially dependent on fisheries and related activities ...;

Whereas, therefore, it is in this sense that the notion of relative stability aimed at must be understood'

3 — OJ 1985 L 302, p. 1.

4 — See Article 8(2) of Regulation No 3760/92.

8. With regard to the possible exchange of fishing availabilities once the fishing opportunities have been established, Article 9 provides that 'Member States may, after notifying the Commission, exchange all or part of the fishing availabilities allocated to them'.

possibilities allocated to them under the conditions referred to in Annex IV point 1.

Point 1.1 of Annex IV states as follows:

9. Regulation (EEC) No 3362/94⁵ fixed, in Annex I, the TACs for 1995 by stock or group of stocks. It thus laid down, for Zone VIII, a precautionary TAC of 33 000 tonnes, of which 29 700 tonnes were allocated to Spain and 3 300 tonnes to France. For Zones IX and X, CEEFAC 34.1.1, it fixed a precautionary TAC of 12 000 tonnes, of which 5 740 tonnes were allocated to Spain and 6 260 tonnes to Portugal. These last-mentioned quotas were to be fished only in the waters under the sovereignty or within the jurisdiction of the Member State concerned or in international waters of the zone concerned.

'Exchanges between France and Portugal will be tacitly renewable for the period 1995 to 2002, subject to the possibility of annual amendment of the conditions thereof by each Member State at the time of the annual fixing of TACs and quotas.

Exchanges concern the following TACs:

10. On 27 March 1995, in order to ensure the 'management of the fishing effort relating to certain Community fishing areas and resources', the Council adopted Regulation (EC) No 685/95.⁶ Article 11(1) provides that, in accordance with Article 9 of Regulation No 3760/92, the Member States concerned may exchange fishing

- (i) a common TAC for anchovy being fixed for ICES areas VIII and IX, 80% of Portugal's fishing possibilities will be transferred every year to France. Quantities must be fished exclusively in waters under the sovereignty or jurisdiction of France;

⁵ — Council Regulation (EC) No 3362/94 of 20 December 1994 fixing, for certain fish stocks and groups of fish stocks, the total allowable catches for 1995 and certain conditions under which they may be fished (OJ 1994 L 363, p. 1).

⁶ — OJ 1995 L 71, p. 5.

...

11. By Regulation (EC) No 746/95,⁷ the Council again fixed a precautionary TAC for Zones IX and X, CECAF 34.1.1. Initially, therefore, the TAC of 12 000 tonnes remains applicable, with 5 740 tonnes continuing to be allocated to Spain. However, of the 6 260 tonnes allocated to Portugal, up to 5 008 tonnes may be fished in waters of ICES Zone VIII under the sovereignty or within the jurisdiction of France.

12. It can thus be stated in summary that, for both zones, different TACs and quotas had been fixed initially, these being shared between Spain and France in Zone VIII and between Spain and Portugal in the other zone. The last-mentioned regulation now allowed Portugal to fish part of its TAC from Zones IX and X, CECAF 34.1.1 in French waters of ICES Zone VIII. However, Portugal transferred that quota to France.

13. Spain's present action is directed against those lines of conduct.

14. The Spanish Government complains, first, that, by allowing part of the quota of anchovy which had been allocated to Portugal in Zone IX to be fished not in that zone but in Zone VIII, the TAC fixed for Zone VIII is being increased from 33 000 tonnes to 38 008 tonnes, without there being any new scientific data to justify it. Neither the optimum utilisation

of the factors of production nor the stability of the market is being pursued by means of the contested provisions. There is thus a failure to observe the objectives of the common fisheries policy set out in Article 39 of the EC Treaty.

15. In addition, it argues that, since there exist two independent stocks of anchovy, the TAC fixed for 1995 in Zone VIII is being increased, without any scientific basis whatsoever, by means of the contested provisions. That is in breach of the objective of Regulation No 3760/92, which lies in a rational and responsible exploitation of resources. A species of anchovy is even being overexploited by means of the contested provisions.

16. It further argues that, in so far as the amount by which the quota of anchovy in Zone VIII has been amended, that is, 5 008 tonnes, is awarded entirely to Portugal, the principle of relative stability is being infringed. Portugal has never had a quota in that zone, with the result that the award of a quota is in breach of the requirement to maintain the fixed percentage for each of the Member States which share the allocation of that stock.

17. The Spanish Government claims that the Court should:

⁷ — Council Regulation (EC) No 746/95 of 31 March 1995 amending Regulation (EC) No 3362/94 fixing, for certain fish stocks and groups of fish stocks, the total allowable catches for 1995 and certain conditions under which they may be fished (OJ 1995 L 74, p. 1).

— annul the final sentence in point 1.1.(i) of Annex IV to Council Regulation

(EC) No 685/95 of 27 March 1995 on the management of the fishing effort relating to certain Community fishing areas and resources;

C — Opinion

- annul the fifth heading, on anchovies, in Annex I to Council Regulation (EC) No 746/95 of 31 March 1995 amending Regulation (EC) No 3362/94 fixing, for certain fish stocks and groups of fish stocks, the total allowable catches for 1995 and certain conditions under which they may be fished;

18. Since the Spanish Government pleads, essentially, infringement of Article 39 of the EC Treaty on the one hand, and an infringement of Regulation No 3760/92 on the other, those two points must be examined separately below.

Infringement of Article 39 of the EC Treaty

- order the defendant institution to pay the costs.

The Council contends that the Court should:

- dismiss the action,

and

- order the applicant to pay the costs.

19. The Spanish Government claims, first, that the TAC of 33 000 tonnes originally fixed for Zone VIII was adopted on the basis of scientific data and was regarded by the Council as the appropriate TAC to ensure a rational and responsible exploitation of resources. Moreover, that TAC has undergone only insignificant fluctuations since Spain's accession and corresponds to an average of the catches made in the 1970s. Previous trends were thus taken into account and a sustainable exploitation ensured. If the Council now amends that TAC *de facto* from 33 000 tonnes to 38 008 tonnes, it will be breaking the continuity of the previous arrangements without having been persuaded of the need to do so by new scientific data. The Council's existing discretion when adopting provisions under the common fisheries policy must also keep within the limits set by the Treaty. However, if (as in this case) an exchange of quotas for different species in different fishing zones is now allowed, that is in breach of the objectives set out in

Article 39(a) and (c) of the EC Treaty, namely the optimum utilisation of the factors of production and the stability of the market.

20. The Council and the Commission rely essentially on the broad discretion which they have when adopting the contested measures. On the one hand, neither of the abovementioned stocks of anchovy were jeopardised. Moreover, the TACs fixed for those stocks were only precautionary. It is true that they had binding effect, but, since they were not adopted in the light of established scientific data, they can certainly be amended. Furthermore, there is nothing unusual about exchanges between different zones and between different species and they have often been carried out in the past.

21. Even if scientific advice on the individual stocks had been available, the Council would not have been obliged to follow it blindly when adopting the contested provisions. In this case, acting within the scope of its discretion, the Council weighed the interests of the common fisheries policy against the interests of the Community in further integrating Spain and Portugal into the Community. The outcome of that process is reflected in the contested regulations.

22. It should first be pointed out that the Court has consistently held that in pursuing the objectives of the common fisheries and agricultural policy the Community institutions must secure the permanent harmoni-

sation made necessary by any conflicts between those objectives taken individually and, where necessary, give any one of them temporary priority in order to satisfy the demands of the economic factors or conditions in view of which their decisions are made.⁸ The Court has also held that, in matters concerning the common agricultural policy, the Community legislature has a broad discretion which corresponds to the political responsibilities imposed upon it by Articles 40 and 43 of the Treaty.⁹

23. Judicial review of measures adopted by the Council must, having regard to the discretion conferred on the Council in the implementation of the common agricultural policy, be limited to examining whether the measure in question is vitiated by a manifest error or misuse of powers, or whether the Council has manifestly exceeded the limits of its discretion.¹⁰

24. In the Spanish Government's submission, there is an infringement of Article 39 in the mere fact that the TAC for Zone VIII was substantially amended without this having been necessary in the light of scientific findings.

8 — Judgments in Case C-280/93 *Germany v Council* [1994] ECR I-4973, 5057, at paragraph 47, Case C-311/90 *Hierl* [1992] ECR I-2061, at paragraph 13, and Case C-405/92 *Mondiet* [1993] ECR I-6133, at paragraph 51.

9 — Judgment in the *Germany v Council* case (cited in footnote 8) at paragraph 47; judgment in the *Hierl* case (cited in footnote 8) at paragraph 13; and judgment in Joined Cases C-267/88 to C-285/88 *Wuidart and Others* [1990] ECR I-435, at paragraph 14.

10 — Judgment in Case C-331/88 *Fedesa and Others* [1990] ECR I-4023, at paragraph 8.

25. It should be observed in that regard that the absence of such advice cannot prevent the Council from adopting such measures as it deems necessary for achieving the objectives of the common fisheries policy.¹¹ In connection with the taking into account of scientific data by the Council, the Court has held that judicial review must, having regard to the discretion conferred on the Council in the implementation of the common agricultural policy, be limited to examining whether the measure in question is vitiated by a manifest error or misuse of powers, or whether the authority in question has manifestly exceeded the limits of its discretion.

26. In the present case, the Council initially fixed a precautionary TAC of 33 000 tonnes for Zone VIII. That TAC was not adopted in the light of conclusive scientific findings but, rather, in the light of the previous trends of catch quotas in the zones concerned.

27. However, it does not follow from Spain's mere assertion that the Council may not amend the TAC in the absence of established scientific findings, that the Council manifestly misused its powers when it adopted the measures in question. Moreover, it is beyond dispute that the stock in Zone VIII is not jeopardised by the exchange of catch quotas between Portugal and France.

28. There is therefore no obvious basis for suggesting that the slight increase in catch quotas, which in the final analysis was connected with the determination of the possibilities of exchange between Portugal and France, was adopted in breach of Article 39(a) and (c) of the EC Treaty.

Infringement of Regulation No 3760/92

(a) Infringement of the requirement to ensure the rational and responsible exploitation of resources

29. In the Spanish Government's submission, the contested provisions are in breach of the objective contained in Regulation No 3760/92 of a rational and responsible exploitation of resources. According to the Spanish Government, that arises essentially from the fact that the ultimate effect was that a single TAC was fixed for two different and completely independent stocks of anchovy situated in different zones, namely Zone VIII and Zones IX and X, CECAF 34.1.1. On the one hand, the TAC in force for Zone VIII is substantially amended without this being necessary on the basis of new scientific findings. On the other hand, Regulation No 3760/92 contains procedural rules for the amendment of a TAC. Those rules are circumvented by the Council's conduct of allowing

¹¹ — Judgment in the *Mondiet* case (cited in footnote 8) at paragraph 31.

the exchange of fishing opportunities between Portugal and France.

taking into account the biological constraints with due respect for the marine eco-system⁷.

30. The Council and the Commission again rely in this respect on the broad discretion which they have in the adoption of provisions under the common fisheries policy. They further argue that their chosen line of conduct did not entail the risk of overfishing in Zone VIII. That risk would have arisen only if a new overall TAC had been fixed for that zone, which, under the distribution formula laid down in the Act of Accession, that is, 90% for Spain and 10% for France, would have had to be approximately 50 000 tonnes. In order to counter such a risk of overfishing, the transfer of fishing opportunities (of 5 008 tonnes) between Portugal and France eventually took place under Article 9 of Regulation No 3760/92. In the end, the Council merely adopted what had been negotiated between the Member States concerned within the limits of the possibilities allocated to them, but without jeopardising the stock of anchovy. The defendants also refer to the fact that fixing a TAC is not the only way to conserve stocks and that in this case it was done only on a precautionary basis since at the material time there were no established scientific findings relating to the stocks.

31. As is apparent from the second recital in the preamble to Regulation No 3760/92, the objective of that regulation is 'to provide for rational and responsible exploitation of living aquatic resources and of aquaculture, while recognising the interest of the fisheries sector in its long-term development and its economic and social conditions and the interest of consumers

32. Moreover, as stated in Article 2(2), the purpose of that regulation is to establish a framework for the conservation and protection of resources. The Council is therefore authorised to fix the respective TACs and to allocate the fishing opportunities between Member States. However, in that respect also, the Court has consistently held that in the implementation of the common agricultural policy the Council has a broad discretion, with the result that judicial review must be limited to examining whether the exercise of that discretion is vitiated by a manifest error or misuse of powers, or whether the authority in question did not clearly exceed the bounds of its discretion.¹²

33. It should also be pointed out that the Council is required to evaluate a complex economic situation when, acting on the basis of Article 8(4) of Regulation No 3760/92, it determines the TACs and distributes the fishing opportunities between Member States.

34. The discretion which the Council has in the implementation of the Community's

12 — Judgments in Case C-4/96 *NIFPO and Northern Ireland Fishermen's Federation* [1998] ECR I-681, at paragraph 42, and Case C-122/94 *Commission v Council* [1996] ECR I-881, at paragraph 18.

agricultural policy in connection with the evaluation of a complex economic situation is not limited solely to the nature and scope of the measures to be taken but also, to some extent, to the finding of basic facts inasmuch as, in particular, it is open to the Council to rely if necessary on general findings.¹³ Since, in claiming that Regulation No 3760/92 has been infringed, the Spanish Government again relies essentially on the absence of scientific advice and, moreover, merely complains that different stocks from different fishing zones may not be made subject to a common TAC, it has failed to show that the Council manifestly misused its powers.

of fishing possibilities between Portugal and France. Even though this involved different stocks from different zones, it may nevertheless be assumed that, overall, the stocks are not jeopardised.

36. That means, however, that the objective of rational and responsible exploitation of resources, which Regulation No 3760/92 was adopted to achieve, has not been infringed.

37. In that respect, the Kingdom of Spain's action is unfounded.

35. On the contrary, the Spanish Government concurs with the argument put forward by the Council and the Commission that the transfer of the Portuguese quota to France does not directly jeopardise the stock in Zone VIII, but that an overall increase in the TAC for Zone VIII would have jeopardised that stock. Since, under Article 4(2)(b) and (c), the Council is entitled to limit exploitation rates and to set quantitative limits on catches, the Spanish Government's submissions in the present case are not sufficient to establish a manifest misuse of powers on the part of the Council. After weighing the various interests of the fishing nations concerned, the Council eventually concluded that, even in the absence of established scientific findings, it could authorise the exchange

(b) Infringement of the principle of relative stability

38. In this connection, the Spanish Government claims that the contested regulations fail to observe the principle of relative stability. It is apparent from Regulation No 3760/92 that the Council is obliged to observe that principle when distributing the TACs between fishing nations. With regard to the zone in question, Zone VIII, the Act of Accession fixed a distribution of 90% for Spain and 10% for France. By authorising the exchange between Portugal and France, the Council awarded Portugal a quota for the first time in a zone in which it had never had a quota. As a result of the exchange, the TAC was increased *de facto* and as a result there was also a deviation from the distribution formula originally

¹³ — Judgment in the *NIFPO* case (cited in footnote 12) at paragraph 42.

adopted. It is true that Article 9 of Regulation No 3760/92 provides for the possibility of exchange, but that is merely intended to facilitate the distribution of the respective TACs as national quotas. However, once a TAC has been fixed, it is specifically not permitted to amend it for different zones by circumventing the provisions in force and to effect a redistribution. In particular, in this context, account must also be taken of the long period of seven years in total, which results in a fundamental redistribution of the quotas. It follows from the spirit and purpose of the possibility of exchange provided for in Article 9 that, while particular quotas in specific zones may certainly be transferred to other fishing nations, relative stability nevertheless continues to apply to each individual zone and stock. That principle therefore concerns a particular species of fish in a particular fishing zone.

39. The Council and the Commission counter that line of argument by referring again to their broad discretion when adopting legislation in the sphere of the common fisheries and agricultural policy. They contend moreover that the contested measures were necessary in order to ensure further integration of Spain and Portugal into the Community. In view of the prolonged and difficult accession negotiations with both of those countries, certain compromises were reached at that time, which regulated the fisheries policy to an extent acceptable to all the parties concerned. However, in order to take account of subsequent developments, the Council is entitled, within the scope of the discretion which it has, to derogate from the arrangements made at that time. The possibilities of exchange authorised between Portugal and France

constituted such a derogation and the adjustment of a compromise. However, since conflicts of interest are always liable to occur in connection with fisheries policy, the Council must have the freedom to give preference to certain interests over others when it adopts particular measures.

40. Furthermore, the TAC originally fixed for Zone VIII has manifestly not been amended, since the quota promised to France must still be attributed to Zones IX and X, CEECF 34.1.1. That may not be absolutely in accordance with a strict interpretation of the concept of relative stability, but a broad view is called for in this context. Such an approach is plainly necessary in the light of the aforementioned problems of integrating Spain and Portugal, as major fishing nations, into the common agricultural market.

41. It should first be pointed out that under Article 8(4) of Regulation No 3760/92 the Council is required to distribute the fishing opportunities between Member States in such a way as to assure each Member State relative stability of fishing activities for each of the stocks concerned. That stability must safeguard the particular needs of regions where local populations are especially dependent on fisheries and related activities.

42. The Court has held that it follows '... that the aim of the quotas is to ensure for each Member State a share of the Commu-

nity's TACs, determined essentially on the basis of the catches from which traditional fishing activities, the local populations dependent on fisheries and related industries of that Member State benefited before the quota system was established'.¹⁴

43. Likewise, in its judgment in the *Romkes* case,¹⁵ the Court held that the requirement of relative stability must be understood as meaning that in a distribution of quotas each Member State is to retain a fixed percentage.

44. Article 8(4)(ii) thus also lays down that the distribution of the fishing opportunities between Member States is to be done in such a way as to assure each Member State relative stability of fishing activities for each of the stocks concerned.

45. In general, it is for the Council, when allocating fishing opportunities among the Member States, to reconcile, for each of the stocks concerned, the interests represented by each Member State with particular regard to its traditional fishing activities and, where relevant, its local populations and industries dependent on fishing.¹⁶

46. In the present case, it should be noted that the Council authorised Portugal to fish part of its quota from Zones IX and X, CEECAF 34.1.1 in Zone VIII. However, that quota is transferred in its entirety to France. It is clear from the submissions of the parties that Portugal has traditionally never fished in Zone VIII. It should also be noted that the Council chose that course of action, that is, the exchange of fishing opportunities, in order to avoid having to make an overall increase in the TAC for Zone VIII.

47. However, since, as is apparent from the foregoing, the Council is required to weigh the interests of the parties concerned in the light of the principle of relative stability when it distributes the fishing opportunities, it should first be pointed out that Portugal originally had no interest whatsoever in Zone VIII. Moreover, since the exchange of fishing opportunities between two non-adjacent fishing zones resulted *de facto* in an increase in the TACs and in a redistribution of the catch quotas fixed in percentage terms, thereby circumventing the relevant provisions (retention of the 90:10 quota ratio), it must be held that the contested regulations infringe the principle of relative stability.

48. The line of argument put forward by the Council and the Commission concerning the difficulties of integrating Spain and Portugal into the Community cannot be upheld in the present case. With regard to those problems, a jointly-agreed political

14 — Judgment in the *NIFPO* case (cited in footnote 12) at paragraph 47, with further references.

15 — Case 46/86 *Romkes* [1987] ECR 2671, at paragraph 17.

16 — Judgment in the *NIFPO* case (cited in footnote 12) at paragraph 48.

solution should be sought instead of resorting to the indirect means of a quota exchange in order to avoid an overall increase in the catch quotas.¹⁷

49. Although it cannot be denied that the accession of those two countries to the Community involved difficulties, that cannot justify the Council's conduct. The Council manifestly increased the TAC and redistributed it by allowing for a quota allocated to Portugal for the first time in a zone in which Portugal had no fishing interests, without observing the principle of relative stability laid down in the Act of Accession.

50. The reference by the Council and the Commission to Spain's having already participated in such exchange possibilities itself cannot alter that conclusion in any way. In particular, it was not possible to show that Spain exchanged fishing opportunities with another country to its own advantage in similar circumstances. Although the examples cited certainly concerned different stocks and different fishing zones, they did not involve three countries, which is the distinctive feature of this case. Previous exchanges were characterised either by the fact that one Member State carried out an exchange between two quotas to which it was itself entitled or by the fact that two Member States exchanged their quotas in their traditional fishing

grounds without harming any third party. In the present case, however, the exchange was carried out only because an increase in the catch quotas overall would otherwise have been necessary, which would probably have led to the stock being jeopardised and would therefore not have been possible. The accusation that Spain's action is inconsistent with its previous actions (*venire contra factum proprium*) is therefore not founded.

51. It follows from all the foregoing that the Council regulations contested by Spain were adopted in breach of the principle of relative stability laid down in Regulation No 3760/92. The Kingdom of Spain's action is therefore well founded.

D — Costs

52. In accordance with Article 69(2) of the Rules of Procedure, the Council as the unsuccessful party must be ordered to pay the costs if they have been applied for in the successful party's pleadings. Pursuant to Article 69(4) the Commission must bear its own costs.

¹⁷ — Spain firmly expressed its concerns at the time of the adoption of the provisions at issue.

E — Conclusion

53. I therefore propose that the Court:

- (1) annul the final sentence of point 1.1(i) of Annex IV to Council Regulation (EC) No 685/95 of 27 March 1995 on the management of the fishing effort relating to certain Community fishing areas and resources;
- (2) annul the fifth heading, on anchovies, in Annex I to Council Regulation (EC) No 746/95 of 31 March 1995 amending Regulation (EC) No 3362/94 fixing, for certain fish stocks and groups of fish stocks, the total allowable catches for 1995 and certain conditions under which they may be fished;
- (3) order the Council to pay the costs and the Commission to bear its own costs.