



Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 31 May 2018¹

Joined Cases C-626/15 and C-659/16

European Commission

v

Council of the European Union

(Action for annulment — Choice of correct legal basis — Exclusive competence, shared competence or supplementary competence of the European Union — The Union acting alone in an international body or Member States participating alongside the Union — Conservation of marine biological resources — Fisheries — Protection of the environment — Research — Marine protected area (MPA) — Antarctic — Weddell Sea and Ross Sea — Decision of the Permanent Representatives Committee (Coreper) — Challengeable act)

I. Introduction

1. Disputes arise with great regularity at EU level over whether the European Union is permitted to act alone in international bodies in order to participate in their debates and decisions or only together with its Member States. The disagreement is always over the legal basis for the Union's external action under its founding Treaties.
2. Such questions of competence are questions of power that have been fiercely debated in legal proceedings for decades. The points at issue are, first, how complicated the internal decision-making process must be on the European side and, second, who is permitted to take a seat at the international negotiating table on the European side. Since the entry into force of the Treaty of Lisbon, the positions in this regard appear to have become much more entrenched.
3. The present case concerns measures to protect the seas in the Antarctic, in particular the creation of various marine protected areas (MPA), which have been discussed for a number of years at the annual meetings of the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR).
4. The European Commission, the Council of the European Union and the Member States agree in substance on making an active contribution to the protection of the seas in the Antarctic. From a procedural point of view, however, the Council and the Member States insist that marine protection measures are to be classified under environmental policy and thus under the area of shared competences (Article 4(2)(e) TFEU) and, in their view, it is therefore necessary for the Union and the Member States to act together on the international stage. The Commission, on the other hand, takes the position that they are measures for the conservation of marine biological resources under the common fisheries policy (Article 3(1)(d) TFEU) which come under the Union's exclusive competences

¹ Original language: German.

and do not therefore permit any external action by the Member States alongside the institutions of the Union. It is also under discussion whether the Union has an implicit exclusive external competence in this area in accordance with the ERTA principle² (Article 3(2) TFEU) and to what extent research policy, which is among the supplementary competences of the Union (Article 4(3) TFEU), is relevant in the present case.

5. Specifically, in this case the Commission is challenging two decisions taken within the Council on action by the Union at the CCAMLR's 34th and 35th annual meetings in 2015 and 2016 ('the contested decisions'):

- In Case C-626/15 the Commission is contesting a decision of 11 September 2015, as documented in the conclusions of the Chair of the Permanent Representatives Committee (Coreper), by which Coreper approved that a reflection paper on the establishment of a marine protected area in the Weddell Sea be submitted to the CCAMLR on behalf of the Union and its Member States at its 34th annual meeting in 2015 ('the 2015 decision').³
- In Case C-659/16 the Commission is challenging the decision of the Council of 10 October 2016 concerning the establishment of the Union's position for the 35th annual meeting of the CCAMLR in 2016 ('the 2016 decision').⁴ That decision also concerned the creation of a total of four marine protected areas and special areas for scientific study in the Antarctic seas, including the marine protected area in the Weddell Sea already discussed the previous year and a marine protected area in the Ross Sea.

6. The Court's judgment in these two cases will form a further piece in the complex mosaic of the external competences of the Union and its Member States produced by the Treaty of Lisbon. In particular, the present case offers an opportunity to clarify whether the existence of a competence shared between the Union and its Member States necessarily requires joint ('mixed') action by the Union and its Member States in international bodies or whether the Union is also permitted, or even obliged, to take external action alone. In addition, in Case C-626/16 it must first be discussed under what circumstances Coreper decisions constitute challengeable acts for the purposes of Article 263 TFEU. The proceedings relating to the Partnership Agreement with Kazakhstan (Case C-244/17), in which I am also delivering an Opinion today, concern entirely different questions in connection with the requirements for a majority with regard to Council decisions which display certain links to the common foreign and security policy.

II. Legal framework

A. EU law

7. The framework for this case in EU law is defined primarily by Articles 2, 3 and 4 TFEU and by Articles 4(1) and 5(2) TEU. In addition, Articles 191 and 192 TFEU are relevant. Reference should also be made to the fundamental rules governing the common fisheries policy contained in Regulation (EU) No 1380/2013.⁵

² The ERTA principle goes back to the judgment in *Commission v Council* ('ERTA', 22/70, EU:C:1971:32, paragraphs 15 to 19); a more recent summary can be found, for example, in Opinion 1/03 of 7 February 2006 (New Lugano Convention, EU:C:2006:81, paragraphs 114 to 133).

³ The content of this decision is reproduced in the summary record of the 2554th meeting of the Permanent Representatives Committee of 23 September 2015 (Council document 11837/15, paragraph 65, p. 19 and 20, and Council document 11644/1/15/REV).

⁴ That decision was taken on the basis of an 'I/A Item Note' (Council document 12523/16). The actual content of the position to be adopted by the Union is apparent from Council document 12445/16.

⁵ Regulation (EU) No 1380/2013 of the European Parliament and of the Council of 11 December 2013 on the Common Fisheries Policy, amending Council Regulations (EC) No 1954/2003 and (EC) No 1224/2009 and repealing Council Regulations (EC) No 2371/2002 and (EC) No 639/2004 and Council Decision 2004/585/EC (OJ 2013 L 354, p. 22).

8. Article 1 of Regulation No 1380/2013 defines the scope of the common fisheries policy:

‘1. The Common Fisheries Policy (CFP) shall cover:

(a) the conservation of marine biological resources and the management of fisheries and fleets exploiting such resources;

...

2. The CFP shall cover the activities referred to in paragraph 1 where they are carried out:

...

(c) by Union fishing vessels outside Union waters; or

(d) by nationals of Member States, without prejudice to the primary responsibility of the flag State.’

9. The objectives of the common fisheries policy are described in Article 2 of Regulation No 1380/2013 as follows:

‘1. The CFP shall ensure that fishing and aquaculture activities are environmentally sustainable in the long-term ...

2. The CFP shall apply the precautionary approach to fisheries management, and shall aim to ensure that exploitation of living marine biological resources restores and maintains populations of harvested species above levels which can produce the maximum sustainable yield.

...

3. The CFP shall implement the ecosystem-based approach to fisheries management so as to ensure that negative impacts of fishing activities on the marine ecosystem are minimised, and shall endeavour to ensure that aquaculture and fisheries activities avoid the degradation of the marine environment.

...

5. The CFP shall, in particular:

...

(j) be coherent with the Union environmental legislation ...’

10. With regard the objectives of the Union’s external fisheries policy, Article 28(1) of Regulation No 1380/2013 states:

‘In order to ensure sustainable exploitation, management and conservation of marine biological resources and the marine environment, the Union shall conduct its external fisheries relations in accordance with its international obligations and policy objectives, as well as the objectives and principles set out in Articles 2 and 3.’

B. International law

11. In international law, the provisions of the Canberra Convention are relevant. Reference should also be made to the Antarctic Treaty.

1. The Canberra Convention

12. The Convention on the Conservation of Antarctic Marine Living Resources⁶ (Canberra Convention) was signed on 20 May 1980 in Canberra (Australia) and entered into force on 7 April 1982. In addition to the European Union, 12 of its Member States are parties,⁷ together with 23 non-member countries.

13. Article I of the Canberra Convention provides:

‘1. This Convention applies to the Antarctic marine living resources of the area south of 60° South latitude and to the Antarctic marine living resources of the area between that latitude and the Antarctic Convergence which form part of the Antarctic marine ecosystem.

2. Antarctic marine living resources means the populations of fin fish, molluscs, crustaceans and all other species of living organisms, including birds, found south of the Antarctic.

3. The Antarctic marine ecosystem means the complex of relationships of Antarctic marine living resources with each other and with their physical environment.

...’

14. Article II of the Canberra Convention states:

‘1. The objective of this Convention is the conservation of Antarctic marine living resources.

2. For the purposes of this Convention, the term “conservation” includes rational use.

3. Any harvesting and associated activities in the area to which this Convention applies shall be conducted in accordance with the provisions of this Convention and with the following principles of conservation:

- (a) prevention of decrease in the size of any harvested population to levels below those which ensure its stable recruitment. For this purpose its size should not be allowed to fall below a level close to that which ensures the greatest net annual increment;
- (b) maintenance of the ecological relationships between harvested, dependent and related populations of Antarctic marine living resources and the restoration of depleted populations to the levels defined in subparagraph (a) above;

...’

15. In Article III the Canberra Convention lays down rules governing its relationship with the Antarctic Treaty:

‘The Contracting Parties, whether or not they are Parties to the Antarctic Treaty, agree that they will not engage in any activities in the Antarctic Treaty area contrary to the principles and purposes of that Treaty ...’

⁶ Approved on behalf of the European Economic Community by Council Decision 81/691/EEC of 4 September 1981 on the conclusion of the Convention on the conservation of Antarctic marine living resources (OJ 1981 L 252, p. 26).

⁷ These are the Kingdom of Belgium, the Republic of Bulgaria, the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, the Kingdom of the Netherlands, the Republic of Poland, the Republic of Finland, the Kingdom of Sweden and the United Kingdom of Great Britain and Northern Ireland.

16. In addition, Article V of the Canberra Convention provides:

‘1. The Contracting Parties which are not Parties to the Antarctic Treaty acknowledge the special obligations and responsibilities of the Antarctic Treaty Consultative Parties for the protection and preservation of the environment of the Antarctic Treaty area.

2. The Contracting Parties which are not Parties to the Antarctic Treaty agree that, in their activities in the Antarctic Treaty area, they will observe as and when appropriate the agreed measures for the conservation of Antarctic fauna and flora and such other measures as have been recommended by the Antarctic Treaty Consultative Parties in fulfilment of their responsibility for the protection of the Antarctic environment from all forms of harmful human interference.

...’

17. Article VII of the Canberra Convention establishes the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR), which is inter alia assigned the following function in Article IX of the Convention:

‘1. The function of the Commission shall be to give effect to the objective and principles set out in Article II of this Convention. To this end, it shall:

...

(f) formulate ... conservation measures ...

...

2. The conservation measures referred to in paragraph 1(f) above include the following:

...

(g) the designation of the opening and closing of areas, regions or sub-regions for purposes of scientific study or conservation, including special areas for protection and scientific study;

...’

18. In addition to the European Union, eight of its Member States are currently members of the CCAMLR.⁸

2. *The Antarctic Treaty*

19. The Antarctic Treaty was signed in Washington, DC (United States of America) on 1 December 1959. Three European Union Member States, as Signatories of the Antarctic Treaty, have the status of Contracting Parties.⁹ Nine other EU Member States have the status of Consultative Parties¹⁰ and eight have the status of Non-Consultative Parties.¹¹

⁸ They are the Kingdom of Belgium, the Federal Republic of Germany, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic of Poland, the Kingdom of Sweden and the United Kingdom of Great Britain and Northern Ireland.

⁹ They are the Kingdom of Belgium, the French Republic and the United Kingdom of Great Britain and Northern Ireland.

¹⁰ These are the Republic of Bulgaria, the Czech Republic, the Federal Republic of Germany, the Kingdom of Spain, the Italian Republic, the Kingdom of the Netherlands, the Republic of Poland, the Republic of Finland and the Kingdom of Sweden.

¹¹ These are the Kingdom of Denmark, the Republic of Estonia, the Hellenic Republic, Hungary, the Republic of Austria, the Portuguese Republic, Romania and the Slovak Republic.

20. Under Article IX(1) of the Antarctic Treaty:

‘Representatives of the Contracting Parties ... shall meet ... at suitable intervals and places, for the purpose of exchanging information, consulting together on matters of common interest pertaining to Antarctica, and formulating and considering, and recommending to their Governments, measures in furtherance of the principles and objectives of the Treaty, including measures regarding:

...

(f) preservation and conservation of living resources in Antarctica.’

21. In Article VI of the Antarctic Treaty, the territorial scope of the treaty is defined as follows:

‘The provisions of the present Treaty shall apply to the area south of 60° South Latitude, including all ice shelves ...’

III. Background to the dispute

22. The CCAMLR has set itself the aim of creating a network of marine protected areas in the Antarctic region. That aim is expressly supported by the European Union.

23. Against this background, in 2014, in preparation for the Union’s participation in future annual meetings of the CCAMLR, the Council established a ‘pluriannual position’ based on Article 218(9) TFEU, which, among other things, introduced a ‘simplified procedure’ for Council decision-making on the position to be adopted by the Union in the CCAMLR in relation to matters pertaining to the common fisheries policy.¹² According to that position, before each annual meeting of the CCAMLR the Commission services submit the relevant documents to the preparatory bodies of the Council. In practice the Commission services transmit those documents either to the Council Working Party on Fisheries or to Coreper.

A. Case C-626/15

24. On 31 August 2015, the Commission services submitted to the Council Working Party on Fisheries, under the simplified procedure, an informal document (‘non-paper’) to which was annexed a draft ‘reflection paper on a future proposal for the establishment of a marine protected area in the Weddell Sea’.¹³

25. The Commission services proposed that the reflection paper be submitted to the CCAMLR (to be precise the CCAMLR Scientific Committee¹⁴) on behalf of the Union alone because, in their view, it came under the common fisheries policy.

26. At its meeting on 5 September 2015, the Council Working Party approved the content of the reflection paper, but classified it under environmental policy and therefore considered it necessary for the paper to be submitted to the CCAMLR Scientific Committee on behalf of the Union *and* its Member States. The matter was referred to Coreper.

¹² Council Decision of 11 June 2014 on the position to be adopted, on behalf of the European Union, in the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR) (Council document 10840/14). The ‘simplified procedure’ is set out in Annex II to that decision.

¹³ The Weddell Sea was named after the British explorer James Weddell and at a depth of up to 5 000 m covers an area of more than 2.5 million km².

¹⁴ The Scientific Committee is an advisory body to the CCAMLR under Article XIV of the Canberra Convention.

27. Coreper dealt with the matter at its meeting on 11 September 2015. After an exchange of views, the Chair of Coreper stated that there was a consensus regarding the content of the reflection paper and that the paper was to be submitted to the CCAMLR at its 34th annual meeting in 2015. He also stated that it had been decided to submit the reflection paper to the CCAMLR on behalf of the Union *and* its Member States.

28. The Commission protested against this latter point in a declaration which it placed on record. It declared that it was willing to submit the reflection paper, as decided by Coreper, to the CCAMLR on behalf of the Union and its Member States, but expressly reserved the possibility of legal remedies.

B. Case C-659/16

29. On 30 August 2016, the Commission services submitted an informal document ('non-paper') to the Council Working Party on Fisheries, again under the simplified procedure. The document was supplemented on 6 September 2016 by four draft proposals on the creation or support for the creation of marine protected areas in the Antarctic, in particular the MPA for the Weddell Sea already discussed in 2015,¹⁵ an MPA for the Ross Sea,¹⁶ an MPA for the East Antarctic and a group of special areas for scientific study in ice shelf retreat.¹⁷

30. The Commission services proposed that those documents be submitted to the CCAMLR on behalf of the Union alone because, in their view, they came under the common fisheries policy. In order to respect the time limits applicable to the submission of proposals to the CCAMLR's annual meetings, the Commission lodged those documents with the CCAMLR Secretariat immediately on behalf of the Union alone.

31. At its meetings on 15 and 22 September 2016, the Council Working Party discussed the content of the reflection paper and of the four proposals and approved them substantively on 22 September 2016, but classified them under environmental policy and therefore considered it necessary for them to be submitted to the CCAMLR on behalf of the Union *and* its Member States. The Working Party also took the view that the simplified procedure was not applicable under the circumstances because, according to its object, the procedure is limited to matters pertaining to the common fisheries policy. The matter was then referred first to Coreper and then to the Council.

32. On 10 October 2016, at its 3487th meeting in Luxembourg, the Council approved the Commission's intention to submit the reflection paper and the four proposals to the CCAMLR on behalf of the Union. It also noted that those documents showed the position to be adopted by the Union at the 35th annual meeting of the CCAMLR.

33. In a declaration which it placed on record, the Commission insisted that the abovementioned documents related to the area of exclusive competences of the Union for the conservation of marine biological resources. It expressed its willingness to make clear to the CCAMLR Secretariat that the documents were to be construed as having been submitted on behalf of the Union and its Member States,¹⁸ but expressly reserved the possibility of legal remedies.

34. At its 35th annual meeting in 2016, the CCAMLR then decided to adopt two of the proposals submitted or supported by the Union, namely to establish a marine protected area in the Ross Sea and several special areas for scientific study. It also decided to discuss further the two remaining proposals from the Union, including the possible establishment of an MPA in the Weddell Sea.

¹⁵ See above, point 24 of this Opinion.

¹⁶ The Ross Sea was named after the British explorer James Clark Ross and at a depth of up to 1 200 m covers an area of around 1.55 million km².

¹⁷ For simplicity I will refer to all these areas hereinafter as marine protected areas.

¹⁸ The Commission amended the documents submitted to the CCAMLR Secretariat to that effect on 12 October 2016.

IV. Procedure before the Court and forms of order sought

35. The Court is now hearing two actions for annulment under Article 263(2) TFEU in proceedings between the Commission and the Council in Cases C-626/15 and C-659/16. The Council is supported by a number of Member States.

A. Case C-626/15

36. In Case C-626/15, by written pleading of 23 November 2015, the Commission brought an action for annulment against the 2015 decision.

37. Pursuant to Article 131(2) of the Rules of Procedure, the President of the Court of Justice granted the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Kingdom of the Netherlands, the Portuguese Republic, the Republic of Finland, the Kingdom of Sweden and the United Kingdom of Great Britain and Northern Ireland leave to intervene in support of the form of order sought by the Council in that case.

38. The Commission claims in Case C-626/15 that the Court should:

- partially annul the 2015 decision in so far as in that decision the Council specified that the reflection paper is to be submitted on behalf of the Union and its Member States, rather than on behalf of the Union alone, and
- order the Council to pay the costs.

39. The Council, supported by its nine interveners, contends that the Court should:

- dismiss the action for partial annulment of the reflection paper as inadmissible, but in any case as unfounded,¹⁹ and
- order the Commission to pay the costs.²⁰

B. Case C-659/16

40. In Case C-659/16, by written pleading of 20 December 2016, the Commission brought an action for annulment against the 2016 decision.

41. Pursuant to Article 131(2) of the Rules of Procedure, the President of the Court of Justice granted the Kingdom of Belgium, the Federal Republic of Germany, the Kingdom of Spain, the French Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Portuguese Republic, the Republic of Finland, the Kingdom of Sweden and the United Kingdom of Great Britain and Northern Ireland leave to intervene in support of the form of order sought by the Council in that case.

¹⁹ The Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Republic of Finland, the Kingdom of Sweden and the United Kingdom of Great Britain and Northern Ireland claim that the Court should dismiss the Commission's action as inadmissible and in the alternative as unfounded. The Kingdom of the Netherlands and the Portuguese Republic claim that the Court should dismiss the Commission's action as unfounded.

²⁰ The Hellenic Republic, the Republic of Finland, the Portuguese Republic, the Kingdom of Sweden and the United Kingdom of Great Britain and Northern Ireland do not make any submissions as to costs.

42. The Commission claims in Case C-659/16 that the Court should:

- partially annul the 2016 decision in so far as it establishes a position to be adopted by the Union and its Member States rather than by the Union alone, and
- order the Council to pay the costs.

43. The Council, supported by its 10 interveners, contends that the Court should:

- dismiss the action for partial annulment of the contested decision as unfounded and
- order the Commission to pay the costs.²¹

C. Further procedure before the Court

44. Both actions brought by the Commission were examined before the Court on the basis of the written documents. On 10 January 2017, the President of the Court of Justice authorised the Council to produce new evidence in Case C-626/15. By order of 10 February 2017, the President also stayed the proceedings in Case C-626/15 pending the closure of the written procedure in Case C-659/16. Furthermore, by decision of the same date, the President joined the two Cases C-626/15 and C-659/16 for the purposes of the oral procedure and judgment.

45. The joint hearing, at which the Commission, the Council and its interveners except for the Kingdom of Belgium, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands and the Republic of Finland participated, took place on 13 March 2018.

46. At the request of the Council in Case C-626/15, the Court is sitting in a Grand Chamber in these proceedings pursuant to the third paragraph of Article 16 of its Statute. Pursuant to Article 29(1) of the Rules of Procedure, the Court decided to assign Joined Cases C-626/15 and C-659/16 to the same formation of the Court.

V. Admissibility of the action in Case C-626/15

47. In Case C-626/15 considerable discussion is dedicated to the question of the admissibility of the Commission's action. Unlike in Case C-659/16, the Council and many of its interveners fiercely deny that the 2015 decision contested by the Commission in Case C-626/15 can be the subject of an action for annulment in accordance with Article 263 TFEU. In essence, they rely on two arguments: first, it is merely a decision of Coreper, not a decision of the Council and, second, that decision does not entail any binding legal effects.

A. Attribution of the contested decision to the Council

48. There is no doubt that Coreper is not as such a Union institution upon which the Treaties confer powers, but an auxiliary body of the Council, for which it carries out preparation and implementation work²² (first sentence of Article 240(1) TFEU).

²¹ The Republic of Finland, the Portuguese Republic, the Kingdom of Sweden and the United Kingdom of Great Britain and Northern Ireland do not make any submissions as to costs.

²² Judgment of 19 March 1996, *Commission v Council* (FAO, C-25/94, EU:C:1996:114, paragraph 26).

49. However, the fact that Coreper may only adopt certain procedural decisions (second sentence of Article 240(1) TFEU and Article 19(7) of the Council's Rules of Procedure) and does not otherwise have the power to take decisions, which belongs, under the Treaties, to the Council,²³ certainly does not exclude its acts from review by the EU judiciary. Rather, the acts of Coreper are attributable to the Council. If Coreper acts unlawfully, the Council must answer for this before the EU Courts. This point of view is supported by the idea of comprehensive legal protection and comprehensive judicial review in respect of all acts of bodies, offices or agencies of the Union on which Article 263 TFEU is based.

50. It is true that in many cases there is a separate Council measure which has merely been prepared by Coreper. In that case the judicial review relates to that Council measure and the preparatory acts of Coreper cannot be challenged separately before the Courts.

51. It is a different situation, however, where exceptionally only Coreper takes action, while the Council does not act at all at ministerial level. In that case, the act of Coreper is the conclusion of the procedure in question²⁴ and the position of the Council as a Union institution is definitively laid down by that act of Coreper.²⁵ That was true of the events of 2015 to which Case C-626/15 relates. Consequently, as an act attributable to the Council, the 2015 decision must be amenable to judicial review by the EU Courts.

B. Legal effects of the 2015 decision

52. According to consistent case-law, any provisions adopted by the institutions of the European Union, whatever their form, which are intended to have binding legal effects, are regarded as 'actionable measures' within the meaning of Article 263 TFEU.²⁶

53. To ascertain whether or not a contested measure produces (or is intended to produce) such effects, it is necessary to look to its substance,²⁷ which must be assessed in accordance with objective criteria. This includes first and foremost the contents of that measure, but consideration must also be given to the context in which it was adopted and the powers of the institution which adopted the measure.²⁸ The intention of those who drafted the measure is also relevant,²⁹ provided that it can be determined objectively.

54. Contrary to the view apparently taken by the Council, the relevant question is not whether the reflection paper submitted to the CCAMLR is challengeable *as such*. Rather, it must be examined whether the decision taken by Coreper in 2015 for that reflection paper to be submitted to the CCAMLR on behalf of the Union and its Member States produces binding legal effects and can thus be classified as an actionable measure within the meaning of Article 263 TFEU.

²³ Judgment of 19 March 1996, *Commission v Council* (FAO, C-25/94, EU:C:1996:114, paragraph 27).

²⁴ See, to that effect, judgment of 11 November 1981, *IBM v Commission* (60/81, EU:C:1981:264, paragraph 11), with regard to the Commission's administrative procedure.

²⁵ See, to that effect, judgments of 11 November 1981, *IBM v Commission* (60/81, EU:C:1981:264, paragraph 10), and of 17 July 2008, *Athinaiki Techniki v Commission* (C-521/06 P, EU:C:2008:422, paragraph 42), each with regard to the Commission's administrative procedure.

²⁶ Judgments of 31 March 1971, *Commission v Council* (AETR, 22/70, EU:C:1971:32, paragraph 42); of 2 March 1994, *Parliament v Council* (ACP Financial Regulation, C-316/91, EU:C:1994:76, paragraph 8); of 19 March 1996, *Commission v Council* (FAO, C-25/94, EU:C:1996:114, paragraph 29); of 13 October 2011, *Deutsche Post and Germany v Commission* (C-463/10 P and C-475/10 P, EU:C:2011:656, paragraph 36); and of 25 October 2017, *Slovakia v Commission* (Own resources, C-593/15 P and C-594/15 P, EU:C:2017:800, paragraph 46).

²⁷ Judgments of 17 July 2008, *Athinaiki Techniki v Commission* (C-521/06 P, EU:C:2008:422, paragraph 42), and of 25 October 2017, *Slovakia v Commission* (Own resources, C-593/15 P and C-594/15 P, EU:C:2017:800, paragraph 47).

²⁸ Judgment of 25 October 2017, *Slovakia v Commission* (Own resources, C-593/15 P and C-594/15 P, EU:C:2017:800, paragraph 47).

²⁹ Judgment of 17 July 2008, *Athinaiki Techniki v Commission* (C-521/06 P, EU:C:2008:422, paragraph 42).

55. As regards, first, the *contents* of the 2015 decision, it stipulates that the reflection paper on the establishment of a marine protected area in the Weddell Sea is to be submitted to the CCAMLR jointly on behalf of the Union and its Member States and not on behalf of the Union alone. This is a strong indication that the 2015 decision produced legal effects as it restricted the Commission's options in respect of the way it acted at the CCAMLR's 34th annual meeting in 2015. In particular, the decision prevented the Commission from exercising its power to ensure the Union's external representation (sixth sentence of Article 17(1) TEU) other than by joint international action with the representatives of the Member States.

56. With respect to the *context* of the 2015 decision, second, reference should be made to the pluriannual position adopted by the Council in 2014.³⁰ In that position a power of examination and decision-making is expressly conferred on the 'preparatory bodies' of the Council with a view to establishing, in a 'simplified procedure', the Union's position on certain subjects to be discussed at the CCAMLR's annual meetings. The reflection paper at issue in Case C-626/15 was referred to Coreper specifically under that simplified procedure. This fact also suggests that the 2015 decision produced binding legal effects.

57. The same holds, lastly, for the *intention of those who drafted the measure*. It is common ground between the parties that by its 2015 decision Coreper wished to define how specifically the Union's representatives had to act in connection with the 34th annual meeting of the CCAMLR.

58. Against this background, it must be considered that the 2015 decision was intended to produce binding legal effects and did produce such effects.

C. The counterarguments of the Council and some of its interveners

59. The Council and some of its interveners attempt to refute the existence of a challengeable act in Case C-626/15 in essence with two counterarguments.

1. The powers of the Commission and the Council under Articles 16 and 17 TEU

60. First of all, those parties to the proceedings assert that under the second sentence of Article 16(1) TEU the Council is responsible for carrying out policy-making for the Union, including in respect of its external action and the Union's external representation to be carried out by the Commission under the sixth sentence of Article 17(1) TEU.³¹

61. This objection is ineffective, however, as the — completely undisputed — existence of the Council's power under the second sentence of Article 16(1) TEU does not exclude the possibility that the specifications regarding the external action of the Union which the Council makes on that basis produce legal effects and can be challenged before the EU Courts. On the contrary, it would appear that such specifications confer legal effects on the decision in question and make it a challengeable act for the purposes of Article 263 TFEU.

³⁰ See above, point 23 of this Opinion.

³¹ With regard to the distinction between those two powers of the Council and the Commission, see judgment of 28 July 2016, *Council v Commission* (Switzerland's financial contribution, C-660/13, EU:C:2016:616).

2. *The establishment of positions of the Union under Article 218(9) TFEU*

62. Second, the Council and some Member States object that the 2015 decision has no legal effects because that decision did not establish a position of the Union within the meaning of Article 218(9) TFEU. They base their view on the fact that at the 34th annual meeting of the CCAMLR no formal decision was due to be taken on a marine protected area in the Weddell Sea, but the reflection paper at issue was merely to be submitted to the CCAMLR in preparation for any future decision.

63. This objection is also not convincing for two reasons.

64. In the first place, Article 218(9) TFEU is to be given a broad interpretation.³² A position of the Union for the purposes of that provision is certainly not to be established only where a specific decision on an act having legal effects is imminent in an international body, but also where the Union wishes to stimulate a debate or to participate in such a debate within that international body which could possibly lead to the adoption of an act having legal effects,³³ as the aim of Article 218(9) TFEU is to ensure that the Union speaks with a single voice throughout the decision-making process of the international body concerned and that its contributions in that process are authorised by its competent bodies.

65. In the second place, the Council may also consider it desirable to establish a common position of the Union for acting in an international body in areas not governed by Article 218(9) TFEU, on a voluntary basis as it were. If it does so, that position is binding and requires sincere cooperation from the other Union institutions (second sentence of Article 13(2) TEU) and the Member States (Article 4(3) TEU and first sentence of Article 191(4) TFEU).

66. Even if the 2015 decision were not therefore considered to constitute the binding establishment of a position of the Union pursuant to Article 218(9) TFEU, but only the voluntary establishment of a common position outside the scope of Article 218(9) TFEU with a view to a debate beginning in an international body, that decision cannot be denied its legally relevant effects, especially since the joint submission of the reflection paper by the Union and its Member States gave the CCAMLR and the other Contracting States of the Canberra Convention the impression that the possible establishment of a marine protected area for the Weddell Sea did not fall within the exclusive competence of the Union or at least that the Union could not speak alone on this subject. This provides sufficient grounds to consider legal effects to exist within the meaning of Article 263 TFEU.³⁴

D. Interim conclusion

67. All in all, the 2015 decision is therefore a challengeable act for the purpose of Article 263 TFEU. Consequently, the Commission's action in Case C-626/15 is admissible.

³² See, to that effect, judgment of 7 October 2014, *Germany v Council* (Vine and Wine, C-399/12, EU:C:2014:2258, paragraph 63), according to which recommendations of an international body also fall within the scope of the Article 218(9) TFEU if they are capable of influencing the content of the legislation to be adopted by the EU legislature.

³³ See, to that effect, judgment of 7 October 2014, *Germany v Council* (Vine and Wine, C-399/12, EU:C:2014:2258, paragraph 65), according to which Article 218(9) TFEU is applicable 'regardless of whether the acts ... will, in fact, actually be voted on by the competent body'.

³⁴ See, to that effect, judgment of 19 March 1996, *Commission v Council* (FAO, C-25/94, EU:C:1996:114, paragraphs 35 and 37).

VI. Substance of the actions in Cases C-626/15 and C-659/16

68. The two actions in Cases C-626/15 and C-659/16 are well founded in so far as it turns out that in the contested 2015 and 2016 decisions the Council wrongly enjoined the Commission to submit the documents and positions in question regarding envisaged marine protected areas to the CCAMLR on behalf of the Union *and* its Member States. It must therefore be clarified, in other words, whether the Union was permitted to take part in the CCAMLR's discussions and decisions alone on its own behalf — without the participation of its Member States — as the Commission had proposed.

69. The Commission alleges that the Council infringed the Union's power to act alone on the international stage by insisting on joint action by the Union and its Member States. In this regard it raises two pleas in law both in Case C-626/15 and in Case C-659/16. In the first place, the Council infringed the exclusive Union competence for the conservation of marine biological resources under the common fisheries policy laid down in Article 3(1)(d) TFEU (first plea in law) and, in the second place, it failed to recognise the existence of an exclusive Union competence under the third variant of Article 3(2) TFEU on account of the risk of affecting common rules or altering their scope (ERTA principle, second plea in law).

70. The outcome of both pleas in law ultimately hinges on which substantive legal basis was relevant for the 2015 and 2016 decisions and whether that legal basis permitted or even required the Union to act alone in the CCAMLR. Under the principle of conferral (first sentence of Article 5(1) and Article 5(2) TEU in conjunction with Article 4(1) TEU), such a legal basis is required not only for the internal action of the Union, but also for its external action.³⁵ The choice of the correct legal basis has constitutional significance.³⁶

A. *First plea in law: Article 3(1)(d) TFEU*

71. By its first plea in law, the Commission asserts in essence that the Union alone was competent for the documents to be submitted to the CCAMLR and for the matters concerning the envisaged marine protected areas to be discussed at that body's annual meetings in 2015 and 2016 because they all concerned the conservation of marine biological resources under the common fisheries policy and thus fell within the scope of an exclusive Union competence under Article 3(1)(d) TFEU.

72. There is indeed provision under the common fisheries policy for measures for the conservation of marine biological resources (Article 1(1)(a) of Regulation No 1380/2013). Such conservation measures do not necessarily have to be restricted to Union waters, but can also be applied as part of the external fisheries policy outside Union waters, provided they relate to activities by Union fishing vessels or by nationals of Member States (Article 1(2)(c) and (d) and Article 28 of Regulation No 1380/2013).³⁷

³⁵ Opinion 2/94 of 28 March 1996 (Accession by the Community to the ECHR, EU:C:1996:140, paragraph 24), and judgment of 5 December 2017, *Germany v Council* (COTIF, C-600/14, EU:C:2017:935, end of paragraph 44).

³⁶ Opinion 2/00 of 6 December 2001 (Cartagena Protocol on Biosafety, EU:C:2001:664, paragraph 5); and judgments of 14 June 2016, *Parliament v Council* (Tanzania, C-263/14, EU:C:2016:435, paragraph 42); and of 5 December 2017, *Germany v Council* (COTIF, C-600/14, EU:C:2017:935, paragraph 80).

³⁷ See also judgments of 14 July 1976, *Kramer and Others* (3/76, 4/76 and 6/76, EU:C:1976:114, paragraph 31), and of 24 November 1993, *Mondiet* (C-405/92, EU:C:1993:906, paragraph 12).

73. However, the common fisheries policy is certainly not the only conceivable point of reference for EU measures for the conservation of marine biological resources. Historically, the common fisheries policy was often the *sedes materiae* for conservation measures to be taken at European level.³⁸ Nevertheless, it is apparent from Article 3(1)(d) TFEU³⁹ that the Treaties now expressly distinguish between measures for the conservation of marine biological resources taken under the common fisheries policy and measures for the conservation of marine biological resources taken under other Union policies.

74. Unsurprisingly, against this background, the Council and its interveners take the view that the marine protected areas envisaged within the framework of the CCAMLR do not relate to the common fisheries policy, but rather environmental policy and possibly research, areas in which competences are shared between the Union and the Member States (Article 4(1) in conjunction with 4(2)(e) and 4(3) TFEU).

75. Both sides put forward their respective arguments with astonishing passion. The Council and some of its interveners make the underlying allegation that the Commission wished to do everything possible to prevent international action by the Member States, while the Commission alleges that the Council is compulsively looking for legal bases that always permit participation by the Member States alongside the Union.

76. I would like to point out in this regard that the choice of the legal basis must have regard not only to objective factors amenable to judicial review, which include in particular the aim and content of the contested decision,⁴⁰ but also to the context of that decision.⁴¹

77. On the other hand, the subjective assessment and the general political intentions of those who drafted the measure have no significance for the choice of legal basis.⁴² If, in determining the legal basis for an EU act in the area of external action, the Council were to seek to prevent the Union from acting alone and to enable the Member States to participate alongside the Union, this could even constitute a misuse of powers within the meaning of Article 263(2) TFEU.

78. The legal basis which has been used for the adoption of other European Union measures which might, in certain cases, display similar characteristics is equally irrelevant⁴³ (for example the approval of the Canberra Convention on behalf of the European Economic Community and the participation of the Community or the Union in previous CCAMLR decisions). In accordance with settled case-law, a mere practice on the part of the Council cannot derogate from the rules of the Treaties and cannot therefore create a precedent that is binding on the EU institutions.⁴⁴

³⁸ See the case-law just cited in footnote 37 and the judgment of 5 May 1981, *Commission v United Kingdom* (Conservation measures in matters of sea fisheries, 804/79, EU:C:1981:93).

³⁹ According to the wording of Article 3(1)(d) TFEU, the exclusive Union competence for the conservation of marine biological resources applies only 'under the common fisheries policy'. Conversely, Article 4(1) in conjunction with Article 4(2)(d) TFEU makes clear that a competence shared between the Union and the Member States exists for agriculture and fisheries 'excluding the conservation of marine biological resources'.

⁴⁰ Judgments of 11 June 1991, *Commission v Council* (Titanium dioxide, C-300/89, EU:C:1991:244, paragraph 10), and of 14 June 2016, *Parliament v Council* (Tanzania, C-263/14, EU:C:2016:435, paragraph 43); and Opinion 1/15 of 26 July 2017 (Envisaged agreement with Canada concerning passenger data, EU:C:2017:592, paragraph 76).

⁴¹ Judgments of 26 September 2013, *United Kingdom v Council* (Extension of social security rules to the EEA, C-431/11, EU:C:2013:589, paragraph 48); of 27 February 2014, *United Kingdom v Council* (Extension of social security rules to Switzerland, C-656/11, EU:C:2014:97, paragraph 50); and of 18 December 2014, *United Kingdom v Council* (Extension of social security rules to Turkey, C-81/13, EU:C:2014:2449, paragraph 38).

⁴² See to that effect, for example, Opinion 2/00 of 6 December 2001 (Cartagena Protocol on Biosafety, EU:C:2001:664, paragraph 22).

⁴³ Judgments of 10 January 2006, *Commission v Council* (Rotterdam Convention, C-94/03, EU:C:2006:2, paragraph 50); of 24 June 2014, *Parliament v Council* (Mauritius, C-658/11, EU:C:2014:2025, paragraph 48); and of 18 December 2014, *United Kingdom v Council* (Extension of social security rules to Turkey, C-81/13, EU:C:2014:2449, paragraph 36).

⁴⁴ Judgment of 23 February 1988, *United Kingdom v Council* (Substances having a hormonal action, 68/86, EU:C:1988:85, paragraph 24); Opinion 1/94 (WTO Agreement, EU:C:1994:384, paragraph 52); and judgment of 25 October 2017, *Commission v Council* (World Radiocommunication Conference 2015, C-687/15, EU:C:2017:803, paragraph 42).

1. Need for a centre of gravity approach

79. The present case illustrates particularly clearly that the planned establishment of marine protected areas in the Antarctic has links both to the conservation of marine biological resources under the common fisheries policy and to the fields of the environment and research regulated in the TFEU. On the one hand, the marine protected areas envisaged within the framework of the CCAMLR are intended for the conservation and study of Antarctic marine living resources (Article II(1) of the Canberra Convention), that is to say, an objective of environmental policy and possibly of research policy, while, on the other, they are intended to permit a rational use of those resources (Article II(2) of the Canberra Convention), that is to say, sustainable fishing in particular.

80. Theoretically, the Union would thus have available for its participation in the establishment of the envisaged marine protected areas both its competences in environmental policy (Title XX of the FEU Treaty⁴⁵) and possibly in research policy (Title XIX of the FEU Treaty) and its competences for the conservation of marine biological resources under the common fisheries policy (Title III of the FEU Treaty); the latter competence must in turn, under the horizontal clause in Article 11 TFEU, be exercised with due consideration of environmental protection requirements and pursue an ecosystem-based approach (Article 2(3) of Regulation No 1380/2013).

81. In such a situation where there is more than one conceivable legal basis, it is necessary, according to settled case-law, both on the internal and the external action of the Union, to adopt a centre of gravity approach. If, as in this case, an act pursues a twofold purpose or it comprises two components, and if one of these is identifiable as the main or predominant purpose or component, whereas the other is merely incidental, the act must be based on a single legal basis, namely that required by the main or predominant purpose or component. Only very exceptionally is a measure to be founded on more than one legal basis simultaneously, namely if it simultaneously pursues a number of objectives, or has several components, which are inextricably linked without one being incidental to the other.⁴⁶

82. As I have already stated elsewhere,⁴⁷ that centre of gravity approach may not result *vertically* in an extension of the Union's competences compared with the Member States; otherwise the principle of conferral would be undermined (Article 5(1), first sentence, and (2) TEU, in conjunction with Article 4(1) TEU). However, that centre of gravity approach is readily applicable *horizontally*, that is to say, where it is clear that the Union has competences for all the components of its envisaged act and it is merely necessary to make the correct choice between those powers.

83. That is the case here. It is common ground that the Union has competences in the area of the environment, research and the conservation of marine biological resources under the common fisheries policy which, taken together, are undoubtedly sufficient to participate in all the measures within the framework of the CCAMLR to which the contested 2015 and 2016 decisions related,

⁴⁵ The case-law on the precise basis for the external competence of the Union in the field of environmental policy is not entirely consistent. In Opinion 2/00 of 6 December 2001 (Cartagena Protocol on Biosafety, EU:C:2001:664, paragraph 44) the Court invoked Article 175 EC, the present Article 192 TFEU. On the other hand, in the recent judgment of 5 December 2017, *Germany v Council* (COTIF, C-600/14, EU:C:2017:935, paragraph 65), it stated that in the area of the environment the European Union 'has an explicit external competence, under the fourth indent of Article 191(1) TFEU'. In the judgment of 30 May 2006, *Commission v Ireland* (MOX plant located at Sellafield, C-459/03, EU:C:2006:345, paragraphs 90 to 92), the Union's external competence in regard to protection of the marine environment is expressly recognised on the basis of a reading of Article 175 EC in conjunction with the fourth indent in Article 174(1) EC, the present Article 192 TFEU and the fourth indent in Article 191(1) TFEU. It is ultimately unnecessary in the present case to determine whether Article 191 TFEU or Article 192 TFEU or a combination of the two provisions is relevant, as in each scenario the competence is shared between the Union and its Member States under Article 4(1) in conjunction with Article 4(2)(e) TFEU.

⁴⁶ Opinion 2/00 of 6 December 2001 (Cartagena Protocol on Biosafety, EU:C:2001:664, paragraph 23); and judgments of 11 June 2014, *Commission v Council* (Framework Agreement with the Philippines, C-377/12, EU:C:2014:1903, paragraph 34); and of 14 June 2016, *Parliament v Council* (Tanzania, C-263/14, EU:C:2016:435, paragraph 44).

⁴⁷ See my Opinion in *Commission v Council* (Vietnam, C-13/07, EU:C:2009:190, point 113).

namely in discussions and decisions regarding the establishment of various marine protected areas in the Antarctic. The parties are in dispute only as to which of those Union competences was to be relied on as the centre of gravity, with all the consequences which this could have for the Member States acting autonomously on the international stage alongside the Union.

2. Subordinate role of research in connection with marine protected areas

84. With regard, first, to the research aspect, I consider that this aspect plays only a subordinate role in all the envisaged CCAMLR measures to which the contested 2015 and 2016 decisions related.

85. It is true that the planned marine protected areas in the Antarctic are also intended to improve the study of marine ecosystems there. Accordingly, research is repeatedly mentioned in the documents at issue.⁴⁸ However, the proposed research activities are not an end in themselves, but serve the overarching objective of the conservation of Antarctic marine living resources, to which the CCAMLR is committed in accordance with the Canberra Convention and the Antarctic Treaty. Research in the planned marine protected areas therefore has a genuine environmental policy focus and is ultimately to be regarded only as an ancillary measure for the purposes of environmental protection.

86. The situation is the same in connection with the contested 2016 decision for the envisaged special areas for scientific study in ice shelf retreat. Admittedly, at first sight the express designation of those areas as ‘study areas’ might suggest that the research element might be preponderant there at least. On closer inspection, however, ecosystems and the forces of nature are to be studied in those special areas with a view to better climate protection and improved protection of flora and fauna in the Antarctic. The centre of gravity here is thus likewise on environmental protection and not on research as such.

87. In summary, the research components of the contested 2015 and 2016 decisions are therefore to be regarded as incidental, with the result that no research policy legal basis could be relied on in the adoption of those decisions, even in combination with other legal bases.

3. Preponderance of the environmental link over the fisheries aspect

88. The centre of interest in the present case is the delineation between environmental policy and fisheries policy. This aspect, which is rightly the main focus of the parties to the proceedings in Cases C-626/15 and C-659/16, has been addressed only peripherally in case-law previously,⁴⁹ with the result that it has not really been possible to develop clear, practicable criteria. The Court has simply found that a measure cannot be regarded as part of action on environmental matters merely because it takes account of environmental protection requirements, as consideration must be given to those requirements in all policy areas under the horizontal clause in the present Article 11 TFEU.⁵⁰ In addition, the Court recalled that the rules of the Treaties on environmental policy leave intact the powers held by the Union under other provisions of the Treaties.⁵¹

⁴⁸ See, for example, the 14th recital in the preamble to the Proposal on a conservation measure establishing the Weddell Sea Marine Protected Area (WSMPA), submitted as Annex A.2-B to the application in Case C-659/16: ‘research and monitoring related to the objectives of the WSMPA form an integral part of the management of the WSMPA’. In addition, specific research objectives are set out in section 3 of that Proposal, in provisions S 11 and S 12, and the provisions of section 7 describe in more detail how the research activities are to be authorised and carried out.

⁴⁹ See in particular judgment of 24 November 1993, *Mondiet* (C-405/92, EU:C:1993:906), and Opinion of Advocate General Wahl in the pending case *Deutscher Naturschutzring, Dachverband der deutschen Natur- und Umweltschutzverbände e.V.* (C-683/16, EU:C:2018:38).

⁵⁰ Judgments of 29 March 1990, *Greece v Council* (Chernobyl, C-62/88, EU:C:1990:153, paragraph 20), and of 24 November 1993, *Mondiet* (C-405/92, EU:C:1993:906, paragraph 27).

⁵¹ Judgments of 29 March 1990, *Greece v Council* (Chernobyl, C-62/88, EU:C:1990:153, paragraph 19), and of 24 November 1993, *Mondiet* (C-405/92, EU:C:1993:906, paragraph 26).

89. The Court has dealt much more frequently with the question of how the powers of the Union institutions in the field of the common commercial policy (Article 207(1) TFEU) are to be delineated from those in other policy areas, not least environmental policy (Article 192 TFEU).⁵² It is settled case-law that the mere fact that an EU act is liable to have implications for trade with one or more third States is not enough for it to fall within the common commercial policy; on the other hand, such an act concerns commercial policy if it relates specifically to such trade in that it is essentially intended to promote, facilitate or govern such trade and has direct and immediate effects on it.⁵³

90. These criteria can also be applied *mutatis mutandis* as a guide for the delineation between fisheries policy and environmental policy to be made in this case. If they are employed, the mere fact that an EU act has certain implications for fisheries is not enough for it to fall within the common fisheries policy. Such an act can be regarded as a genuine fisheries policy measure only if it

- relates specifically to fisheries activity in that it is essentially intended to promote, facilitate or govern such activity, *and*
- has direct and immediate effects on fisheries activity.

91. Conversely, an EU act cannot be regarded as part of environmental policy solely because it takes account of environmental protection requirements, as should always be the case under Article 11 TFEU, but only where environmental protection is the focus.

92. If regard is had to the aims, content and context⁵⁴ of the contested 2015 and 2016 decisions in the light of these criteria, it cannot be denied that, with their prohibitions and restrictions on fishing, the envisaged marine protected areas in the Antarctic have direct and immediate effects on fisheries activity. However, the emphasis is not on promoting, facilitating or even merely governing fishing in any of those marine protected areas; rather, following a whole series of environmental policy measures in certain sub-regions, fishing is completely prohibited there for several decades and is at most tolerated within certain limits in other sub-regions.

93. The main *aim* of the envisaged marine protected areas is to conserve, study and protect ecosystems, biodiversity and habitats in the Antarctic and to tackle the harmful effects of climate change in that region which is extremely important to the world's climate.⁵⁵ The species to be protected are certainly not just those which are fished commercially, but also, for example, birds (including penguins) and sea mammals (such as seals and whales).

⁵² With specific regard to the delineation between the common commercial policy and environmental policy see, for example, judgment of 29 March 1990, *Greece v Council* (Chernobyl, C-62/88, EU:C:1990:153); Opinion 2/00 of 6 December 2001 (Cartagena Protocol on Biosafety, EU:C:2001:664); and judgments of 12 December 2002, *Commission v Council* (Energy Star, C-281/01, EU:C:2002:761); and of 10 January 2006, *Commission v Council* (Rotterdam Convention, C-94/03, EU:C:2006:2).

⁵³ Judgments of 18 July 2013, *Daiichi Sankyo and Sanofi-Aventis Deutschland* (C-414/11, EU:C:2013:520, paragraph 51); and of 22 October 2013, *Commission v Council* (Conditional access services, C-137/12, EU:C:2013:675, paragraph 57); Opinion 2/15 of 16 May 2017 (Free Trade Agreement with Singapore, EU:C:2017:376, paragraph 36); and judgment of 25 October 2017, *Commission v Council* (Revised Lisbon Agreement, C-389/15, EU:C:2017:798, paragraph 49).

⁵⁴ With regard to the relevance of the aim, content and context of the act in question, see again above, point 76 of this Opinion.

⁵⁵ See, for example, the eighth recital in the preamble to the Proposal on a CCAMLR conservation measure establishing the Weddell Sea Marine Protected Area (cited in footnote 48), in which the desire is expressed 'to ensure that areas vulnerable to the effects of climate change and impacts by human activities are protected in recognition of their global and regional environmental and scientific importance'. In the ninth recital of that Proposal it is further noted 'that the Weddell Sea has largely pristine ecosystems and diverse marine living resources and that it is crucial for global ocean circulation and the world's climate, and is also an ideal area for studying ecosystem effects, resilience and adaptive capacity to climate change and ocean acidification separate from the impacts of human activities, such as fishing'. Provisions G 1 to G 6 regarding the general objectives of the marine protected area in section 3 of that proposal again refer mainly to protection of ecosystems, biodiversity, habitats and the effects of climate change.

94. As far as *content* is concerned, the planned CCAMLR rules on the establishment of various marine protected areas admittedly pay particular attention to regulating the activity of fishing vessels, but such that fishing there is largely prohibited and is permitted only exceptionally, in some smaller sub-regions and subject to strict conditions.⁵⁶ It should also be stated that those rules are by no means restricted to fisheries activities but also, for example, prohibit the discharging or dumping of waste.⁵⁷ In addition, it is proposed to study how ecosystems develop in sub-regions of marine protected areas with fishing activities and in sub-regions without fishing activities,⁵⁸ which does not constitute a genuine fisheries policy measure.

95. The *context* of the envisaged marine protected areas is likewise not characterised solely by fisheries policy, but encompasses general environmental protection considerations. It is true that fishing plays a much more prominent role in the Canberra Convention than in other international agreements connected with the Antarctic Treaty, such as the Madrid Protocol.⁵⁹ As the Commission rightly states, the importance of fishing regulation with a view to a rational use of Antarctic marine living resources — including as a source of protein — under the Canberra Convention should not be underestimated (see Article II(2) and (3) of that Convention⁶⁰). Nevertheless, under the Canberra Convention too, the Contracting Parties — that is to say, the members of the CCAMLR that decide on the establishment of marine protected areas in the Antarctic — have a responsibility for the protection of the Antarctic environment from all forms of harmful human interference which goes beyond the purely economic dimension (see Article V(2) of the Canberra Convention in conjunction with Article IX(1)(f) of the Antarctic Treaty⁶¹). Such interference of human origin can undoubtedly occur in areas other than fishing. The Council very rightly points to possible drilling operations to extract mineral resources. Furthermore, I think it conceivable that sooner or later the construction of wind farms could be discussed.

96. Against this background, the envisaged marine protected areas in the Antarctic to which the contested 2015 and 2016 decisions related are genuine environmental policy projects and not conservation measures under the common fisheries policy.

97. It may be that the environmental protection requirements, as noted by the Commission, also play an important role under the common fisheries policy and have produced a sustainable, ecosystem-based approach there (Article 2 of Regulation No 1380/2013), as required by the horizontal clause in Article 11 TFEU. Nevertheless, the Antarctic marine protected areas to which the contested 2015 and 2016 decisions were dedicated did not, according to their centre of gravity, constitute fisheries policy measures with an environmental conscience, but environmental protection measures with — very serious — implications for fishing.

98. The Council was therefore right not to base the contested 2015 and 2016 decisions on the Union's powers for the conservation of marine biological resources under the common fisheries policy, but solely on environmental policy.

⁵⁶ See, for example, section 5 of the Proposal on a CCAMLR conservation measure establishing the Weddell Sea Marine Protected Area (cited in footnote 48), in which 'Restricted, prohibited and managed activities' are listed and provision 4 establishes the general rule that 'fishing activities are prohibited'.

⁵⁷ See, for example, provision 5 in section 5 of the Proposal on a CCAMLR conservation measure establishing the Weddell Sea Marine Protected Area (cited in footnote 48): 'Dumping or discharging of any waste or other matter and the introduction of any sewage ... is prohibited'.

⁵⁸ See, for example, section 2.3 of the Proposal for a Weddell Sea Marine Protected Area Management Plan, which is annexed to the Proposal on a CCAMLR conservation measure establishing the Weddell Sea Marine Protected Area (cited in footnote 48): 'The Fisheries Research Zone includes both fished areas and unfished reference areas to advance our understanding about the ecosystem effects of longline fishing ...'.

⁵⁹ Protocol on Environmental Protection to the Antarctic Treaty, signed in Madrid on 4 October 1991.

⁶⁰ See also the second recital of the Canberra Convention, which notes the concentration of marine living resources found in Antarctic waters and the increased interest in the possibilities offered by the utilisation of these resources as a source of protein.

⁶¹ See again the Preamble to the Canberra Convention, where, first, 'the importance of safeguarding the environment and protecting the integrity of the ecosystem of the seas surrounding Antarctica' is emphasised in a prominent position (first recital) and, second, 'the prime responsibilities of the Antarctic Treaty Consultative Parties for the protection and preservation of the Antarctic environment and, in particular, their responsibilities under Article IX, paragraph 1(f) of the Antarctic Treaty in respect of the preservation and conservation of living resources in Antarctica' are stressed (sixth recital).

99. The situation here is therefore quite different from that in the pending case *Deutscher Naturschutzring*,⁶² in which the *establishment* of a marine protected area in its *entirety* is not in dispute, but only *specific measures* to *implement* the requirements for that protected area in the field of fisheries. It makes sense to found specific implementing measures of this kind on the legal bases in the area of fisheries policy and other implementing measures with a more pronounced environmental character on environmental policy.

4. Outcome of the Commission's first plea in law concerning the identification of a legal basis other than that favoured by the Commission

100. On the basis of my above statements, the Commission is not therefore successful in its claims that the substantive legal basis for the contested 2015 and 2016 decisions rests in the Union's power for the conservation of marine biological resources under the common fisheries policy; rather the view taken by the Council and its interveners that the Union's environmental policy powers were to be exercised is confirmed.

101. Nevertheless, it would be premature to reject the first plea in law in Cases C-626/15 and C-659/16 solely because in it the Commission erroneously relies on the exclusive Union competence for the conservation of marine biological resources under the common fisheries policy (Article 3(1)(d) TFEU), as the real, much more fundamental contention raised by the Commission in its first plea in law is different. As is evident from both its written and its oral submissions to the Court, the Commission alleges that in the contested 2015 and 2016 decisions the Council forced it to submit the documents at issue to the CCAMLR jointly on behalf of the Union and its Member States, although it would have been possible and sufficient to act on behalf of the Union alone.

102. As I will explain below, this central contention raised by the Commission can still hold even if, in accordance with the legal opinion of the Council and its interveners, the contested 2015 and 2016 decisions come under environmental policy and not the common fisheries policy favoured by the Commission. There is neither the legal necessity in environmental policy for the Member States to participate alongside the Union by way of mixed action in the bodies of the CCAMLR (see immediately below, section a) nor is there scope for voluntary participation by the Member States (see further below, section b).

103. The principle of '*ne ultra petita*' does not prevent the Court from upholding the first plea in law in Cases C-626/15 and C-659/16 on a different ground from that mentioned by the Commission itself. The Court is not the 'mouthpiece of the parties'.⁶³ Accordingly, it cannot be obliged to confine itself to the arguments put forward by the parties in support of their claims, or else it might be forced, in some circumstances, to base its decision on erroneous legal considerations.⁶⁴

(a) No legal necessity for the Member States to participate

104. It is true that under Article 4(1) in conjunction with Article 4(2)(e) TFEU environmental policy is among the shared competences which are conferred on neither the Union nor the Member States for exclusive use. Nevertheless, the existence of a *shared* competence does not necessarily mean that there would always have to be *mixed* action by the Union and its Member States in an external area, with the Union being absolutely reliant for its external action on participation by the Member States alongside it.

⁶² See Opinion of Advocate General Wahl in the pending case *Deutscher Naturschutzring, Dachverband der deutschen Natur- und Umweltschutzverbände* (C-683/16, EU:C:2018:38).

⁶³ In the words of Advocate General Léger in his Opinion in *Parliament v Gutiérrez de Quijano y Lloréns* (C-252/96 P, EU:C:1998:157, point 36).

⁶⁴ See, to that effect, order of 27 September 2004, *UER v M6 and Others* (C-470/02 P, EU:C:2004:565, paragraph 69), and judgment of 21 September 2010, *Sweden and Others v API and Commission* (C-514/07 P, C-528/07 P and C-532/07 P, EU:C:2010:541, paragraph 65).

105. Advocate General Szpunar put it perfectly:⁶⁵ ‘shared competences’ and ‘mixed agreements’ (or, applied to the present case, ‘mixed external action’) are two separate issues.⁶⁶

106. It may be that in the majority of cases where it acts alone on the international stage, the Union has an exclusive external competence under Article 3(1) or (2) TFEU. However, the existence of such an exclusive competence is not an absolute precondition for the Union to be able to enter into international agreements with third countries or to act in international bodies alone, that is, without the Member States alongside it.

107. Along these same lines, only recently in its judgment on International Carriage by Rail (the ‘COTIF judgment’), the Court expressly rejected the idea that in areas where the European Union and its Member States have shared competences, external Union competence cannot exist unless those shared competences have become exclusive competences under the mechanism of the Article 3(2) TFEU (in essence under the ERTA principle).⁶⁷ It is also clear from that judgment that international agreements can be approved by the Union alone even if they fall within an area of shared competence, provided the required majority can be mobilised for such action in the Council.⁶⁸

108. There is a need for mixed action by the Union and its Member States on the international stage only where the Union itself does not have sufficient exclusive or shared competences to act alone in relation to third countries or in international bodies. Only if the Union does not have powers of its own is it absolutely necessary for the Member States to participate alongside the Union in international matters.⁶⁹

109. There was no such need here, however. There is absolutely no dispute that in the present case, based on its powers in environmental policy, the Union had sufficient competences of its own to participate alone in the discussions and decisions in the CCAMLR on the establishment of marine protected areas in the Antarctic. When asked, the Council and its interveners were also unable to identify a single measure in connection with the marine protected areas in question for which the Union might lack the necessary competence in this case.

110. The Commission is therefore correct when it argues that, even if the contested 2015 and 2016 decisions come under the shared competences in environmental policy, there was no legal necessity for the documents at issue to be submitted to the CCAMLR and for the positions in question to be delivered in the CCAMLR jointly on behalf of the Union and its Member States.

⁶⁵ Opinion of Advocate General Szpunar in *Germany v Council* (COTIF, C-600/14, EU:C:2017:296, point 83 and preceding heading).

⁶⁶ See, in the same vein, judgment of 30 May 2006, *Commission v Ireland* (MOX plant located at Sellafield, C-459/03, EU:C:2006:345, paragraph 93).

⁶⁷ Judgment of 5 December 2017, *Germany v Council* (COTIF, C-600/14, EU:C:2017:935, paragraph 61).

⁶⁸ See judgment of 5 December 2017, *Germany v Council* (COTIF, C-600/14, EU:C:2017:935, paragraph 68). In that judgment the Court qualifies its recent statement in Opinion 2/15 of 16 May 2017 (Free Trade Agreement with Singapore, EU:C:2017:376, paragraph 244 in conjunction with paragraph 243), in which it held that commitments contained in an international agreement which fall within a competence shared between the European Union and the Member States ‘cannot be approved by the European Union alone’.

⁶⁹ That was the situation, for example, with the conclusion of individual areas of regulation in the Agreement annexed to the WTO Agreement, for which the common commercial policy did not provide an adequate legal basis at that time (see Opinion 1/94 of 15 November 1994, WTO Agreement, EU:C:1994:384). The same holds at present for the envisaged Free Trade Agreement with Singapore (see Opinion 2/15 of 16 May 2017, Free Trade Agreement with Singapore, EU:C:2017:376).

(b) No scope for voluntary participation by individual Member States

111. It remains to be considered whether, in view of the recourse to the Union's powers in environmental policy there is still scope for the Member States to act *voluntarily* alongside the Union in the CCAMLR. This cannot meaningfully apply to all the Member States, however, but only those which are themselves actually members of the CCAMLR,⁷⁰ as only they may participate in the discussions and decisions of the CCAMLR.

112. The starting point for the considerations in this regard should be Article 2(2) TFEU, which describes the operation of the competences shared between the Union and its Member States. According to its wording, that provision applies not only to legislative activity, but generally to the adoption of legally binding acts, and can therefore also be effective in respect of decisions like the contested decisions in the field of the external action of the Union.

113. Under Article 2(2) TFEU, a characteristic of shared competences is that the Member States may exercise their competence to the extent that the Union has not exercised its competence (second sentence of Article 2(2) TFEU); the Member States may again exercise their competence to the extent that the Union has decided to cease exercising its competence (third sentence of Article 2(2) TFEU).

114. In the present case — despite the protestations to the contrary made by some parties to the proceedings at the hearing before the Court — there is no objective evidence amenable to review that the Council did not wish to exercise the Union's existing environmental competences.⁷¹ On the contrary, the contested 2015 decision authorises the Commission, with express recourse to environmental policy, to submit a reflection paper to the CCAMLR at its 34th annual meeting in 2015 (also) on behalf of the Union. Likewise having recourse to environmental policy, the contested 2016 decision formally established a position which was to be taken by the Union at the CCAMLR's 35th annual meeting in 2016. It therefore simply cannot be argued that in the two contested decisions the Council did not exercise the Union's environmental competence.

115. Nor is there any objective evidence amenable to review in this case that the Council exercised the Union's environmental competences in the contested 2015 and 2016 decisions only partially for political reasons. It is true that in the absence of a legal obligation to take action the Council could certainly have determined in the present case that the Union would not make full use of its powers in environmental matters. However, it clearly did not take that path. Rather, the two contested decisions each related to the entirety of the measures to be discussed or decided at the CCAMLR's annual meetings in 2015 and 2016 with a view to the establishment of the marine protected areas in question. It is not apparent anywhere in the contested decisions that the Union refrained from exercising its powers in environmental policy in respect of a specific element of the measures envisaged within the framework of the CCAMLR⁷² or wished to leave those measures in the responsibility of the Member States.

⁷⁰ See above for details, point 18 of this Opinion.

⁷¹ It can be inferred from the judgments of 30 May 2006, *Commission v Ireland* (MOX plant located at Sellafield, C-459/03, EU:C:2006:345, in particular paragraph 96), and of 5 December 2017, *Germany v Council* (COTIF, C-600/14, EU:C:2017:935, paragraph 68, second sentence) that the Union can decide in each individual case not to exercise its inherent powers in an area of shared competences fully, but only partially, thereby allowing scope for autonomous action by the Member States.

⁷² Examples might include the protection of individual, specifically designated species or the implementation of individual measures to study the problem of ice shelf retreat.

116. It seems to me that the only reason why the Council ultimately advocated joint action in the CCAMLR on behalf of the Union *and* its Member States in the contested 2015 and 2016 decisions is that the Council erroneously⁷³ summarily equated shared competences and mixed action, but not that the Union had insufficient powers for specific elements of the measures to be discussed or decided in the CCAMLR or that the Union purposefully wished to refrain from exercising individual aspects of its powers.

117. Against this background, the Union must be considered not only to have had a competence in the field of environmental policy for all the measures to be discussed or decided in the CCAMLR, but also to have exercised that competence fully. The Member States were therefore prevented, pursuant to the second sentence of Article 2(2) TFEU, from exercising their own competences in respect of the same subjects, even only by acting alongside the Union in the CCAMLR.

118. The same conclusion must also be drawn from Article 191(4) TFEU.

119. The second subparagraph of Article 191(4) TFEU makes clear that Member States' competence to negotiate in international bodies and to conclude international agreements is not prejudiced. However, as the wording of that clause makes clear (*'the previous subparagraph shall be without prejudice to Member States' competence ...'*⁷⁴), the Member States are guaranteed a residual environmental external competence only in relation to the subjects regulated in the first subparagraph of Article 191(4) TFEU, that is to say, in relation to the 'arrangements for cooperation' with the competent international organisations and third countries. That is not the situation in the present case, however, as the subject of the contested 2015 and 2016 decisions is not the 'arrangements for cooperation' between the Union and the CCAMLR, but specific substantive measures for the establishment of marine protected areas in the Antarctic.

120. A more extensive general reservation of competence to the Member States in environmental matters cannot be inferred from the second subparagraph of Article 191(4) TFEU. Otherwise the environmental competences would lose their character as competences shared between the Union and the Member States within the meaning of Article 2(2) TFEU and Article 4(1) in conjunction with Article 4(2)(e) TFEU and simply be turned into parallel competences which could be exercised at any time both by the Union and by the Member States, and possibly by both side by side. However, this is not compatible with the fact that, according to the will of the authors of the Treaties, the second subparagraph of Article 191(4) TFEU (formerly the second subparagraph of Article 130r(4) EC) is expressly without prejudice to the principles of the ERTA case-law,⁷⁵ which would be impossible in the case of parallel competences.

121. It would be conceivable at most for individual Member States to pursue the intention, on the basis of Article 193 TFEU, of committing to more stringent environmental standards than the Union at international level and, with that objective in view, to wish to contribute to discussions and decisions in international bodies on their own behalf.⁷⁶ However, there is also no objective evidence amenable to review in this regard in the present case. Rather, there was a consensus between the Union institutions and the Member States regarding the content of the measures envisaged within the framework of the CCAMLR for the establishment of marine protected areas.

⁷³ See above, points 104 to 110 of this Opinion.

⁷⁴ Emphasis added.

⁷⁵ See Declaration No 10 annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Maastricht signed on 7 February 1992 (Treaty on European Union — Declaration on Articles 109, 130r and 130y of the Treaty establishing the European Community, OJ 1992 C 191, p. 100): 'The Conference considers that the provisions of Article 109(5), Article 130r(4), second subparagraph, and Article 130y do not affect the principles resulting from the judgment handed down by the Court of Justice in the AETR case.'

⁷⁶ With regard to marine protected areas like those at issue in this case, it would be conceivable, for example, that individual Member States wish to undertake in international law to refrain entirely from any human activity in Antarctic waters, rather than merely being subject to the restrictions proposed by the Union.

122. Nor is voluntary participation by individual Member States alongside the Union on the basis of Article 4(3) TFEU permitted in this case. That provision does make clear that in areas including research the Member States are not prevented from exercising their competence even where the Union carries out activities of its own. However, as has already been explained above,⁷⁷ the discussions and measures at issue for the establishment of marine protected areas within the framework of the CCAMLR do not come under the area of research. Of course, this does not prevent Member States from participating, alone or alongside the Union, in other measures to be discussed or decided in the CCAMLR whose centre of gravity lies in the area of research.

123. Lastly, it should be pointed out that individual Member States have territorial interests in the Antarctic outside the scope of the European Union's founding Treaties and Union policies.⁷⁸ It cannot be ruled out that the Member States concerned will participate on their own behalf alongside the Union in discussions and decisions in the CCAMLR in order to safeguard such interests, provided the interests in question are specified. In the present case, however, there is no objective evidence amenable to review in this regard. In addition, the contested 2015 and 2016 decisions, which offered *all* Member States and not just *individual* Member States the possibility of participating in the CCAMLR alongside the Union, quite clearly go beyond what would be necessary to safeguard those territorial interests.

5. *Interim conclusion*

124. All in all, in response to the Commission's first plea in law in Cases C-626/15 and C-659/16, the contested 2015 and 2016 decisions should be annulled in so far as in those decisions it is specified that the Union is not to submit the reflection papers and positions at issue within the framework of the CCAMLR alone, but only jointly on behalf of the Union and its Member States.

B. *Second plea in law: Article 3(2) TFEU*

125. By its second plea in law, the Commission alleges that the Council failed to recognise the Union's exclusive external competence laid down in Article 3(2) TFEU. It asserts that the contested 2015 and 2016 decisions resulted in common rules being affected and their scope being altered within the meaning of the last clause of Article 3(2) TFEU, by which the ERTA principle was codified.⁷⁹

126. This second plea in law is raised only in the alternative. Because, in accordance with my above statements, the Commission's first plea in law results in the annulment of the contested 2015 and 2016 decisions, I will address the second plea in law only for the sake of completeness.

127. First, the Commission asserts that the measures envisaged within the framework of the CCAMLR for the establishment of marine protected areas could affect the Council's 2014 pluriannual position on the Union's action in the CCAMLR.⁸⁰

128. In this regard it is sufficient to note that, according to its wording, the pluriannual position applies only to matters pertaining to the common fisheries policy. Since the contested 2015 and 2016 decisions, as has been stated above,⁸¹ do not come under the common fisheries policy, but environmental policy, it can be ruled out a priori that the pluriannual position of 2014 is affected.

⁷⁷ See above, points 84 to 87 of this Opinion.

⁷⁸ This applies in particular to the French Republic and the United Kingdom of Great Britain and Northern Ireland.

⁷⁹ Judgments of 4 September 2014, *Commission v Council* (Protection of the rights of broadcasting organisations, C-114/12, EU:C:2014:2151, paragraphs 64 to 67), and of 26 November 2014, *Green Network* (C-66/13, EU:C:2014:2399, paragraphs 27 and 28).

⁸⁰ See above, point 23 of this Opinion.

⁸¹ See above, in particular points 88 to 98 of this Opinion.

129. Second, the Commission asserts that the measures envisaged within the framework of the CCAMLR for the establishment of marine protected areas could affect Regulations (EC) No 600/2004⁸² and No 601/2004.⁸³

130. In fact, the first of those two regulations governs technical measures and the second control measures applicable to fishing activities in the area covered by the Convention on the Conservation of Antarctic Marine Living Resources (Canberra Convention). It is thus clear that the possible prohibitions and restrictions on fishing which, as part of the envisaged marine protected areas in the Antarctic, were the subject of the contested 2015 and 2016 decisions could result in those regulations being affected or their scope being altered. As we know, according to the relevant case-law, it is sufficient for the risk of rules being affected or their scope being altered that the measures to be discussed and decided at international level fall within the scope of the common rules applicable at EU level,⁸⁴ without there necessarily having to be a substantive contradiction between them.⁸⁵

131. It should be noted, however, that fishing regulation is only of subordinate importance in the contested 2015 and 2016 decisions and merely forms one element of the envisaged CCAMLR measures for the establishment of marine protected areas in the Antarctic.

132. Consequently, even if the Union did have an exclusive external competence in respect of the measures regulated in Regulations No 600/2004 and No 601/2004 pursuant to the last clause of Article 3(2) TFEU, that exclusive competence could serve as a legal basis only for specific, individual elements of the contested 2015 and 2016 decisions and could not support all the measures provided for in those decisions.

133. If the second plea in law in Cases C-626/15 and C-659/16 were relevant, it would therefore have to be rejected as unfounded.

C. Maintenance of the effects of the contested decisions

134. If the Court partially annuls the contested 2015 and 2016 decisions, as I propose in the context of the first plea in law, the question arises whether the effects of the annulled parts of those decisions are to be maintained pursuant to the second paragraph of Article 264 TFEU.

135. The Commission rightly points out that such partial annulment affects the contested decisions only in so far as those decisions prescribe mixed action by the Union and its Member States in the CCAMLR. Neither is the legal basis for the Union's action at the CCAMLR's 34th and 35th annual meetings removed, nor is the substance of the reflection papers submitted by the Union in that body and of the positions adopted by it affected.

⁸² Council Regulation (EC) No 600/2004 of 22 March 2004 laying down certain technical measures applicable to fishing activities in the area covered by the Convention on the conservation of Antarctic marine living resources (OJ 2004 L 97, p. 1).

⁸³ Council Regulation (EC) No 601/2004 of 22 March 2004 laying down certain control measures applicable to fishing activities in the area covered by the Convention on the conservation of Antarctic marine living resources and repealing Regulations (EEC) No 3943/90, (EC) No 66/98 and (EC) No 1721/1999 (OJ 2004 L 97, p. 16).

⁸⁴ See Opinion 1/13 of 14 October 2014 (Accession of third States to the Hague Convention, EU:C:2014:2303, paragraph 71); judgment of 26 November 2014, *Green Network* (C-66/13, EU:C:2014:2399, paragraph 29); and Opinions 3/15 of 14 February 2017 (Marrakesh Treaty to Facilitate Access to Published Works, EU:C:2017:114, paragraph 105); and 2/15 of 16 May 2017 (Free Trade Agreement with Singapore, EU:C:2017:376, paragraph 181).

⁸⁵ See Opinions 2/91 of 19 March 1993 (ILO Convention No 170, EU:C:1993:106, paragraphs 25 and 26); 1/13 of 14 October 2014 (Accession of third States to the Hague Convention, EU:C:2014:2303, paragraph 86); 3/15 of 14 February 2017 (Marrakesh Treaty to Facilitate Access to Published Works, EU:C:2017:114, paragraph 113); and 2/15 of 16 May 2017 (Free Trade Agreement with Singapore, EU:C:2017:376, paragraph 201).

136. However, the partial annulment of the contested decisions takes away the legitimacy, from the perspective of EU law, for the Member States acting alongside the Union at the 34th and 35th annual meetings of the CCAMLR. Because some EU Member States actually contributed to the CCAMLR's decisions at those annual meetings, not least in the decision on the establishment of a marine protected area for the Ross Sea, doubts could arise at international level as to the scope of the respective international commitments entered into by the Union and by its Member States.

137. Accordingly, I recommend that, in order to avoid any legal uncertainty, the Court maintain the effects of the annulled parts of the contested decisions pursuant to the second paragraph of Article 264 TFEU.

D. Costs

138. 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, according to my proposed solution, the Council has ultimately been unsuccessful in both cases and the Commission has applied for costs in each case, the Council must be ordered to pay the costs in both cases. On the other hand, the Member States granted leave to intervene in support of the Council must each bear their own costs in accordance with Article 140(1) of the Rules of Procedure in each of the two cases in which they participated.

VII. Conclusion

139. In light of the foregoing, I propose that the Court should:

- (1) in Case C-626/15, annul the decision of the Permanent Representatives Committee of 11 September 2015 on the submission of a reflection paper on the establishment of a marine protected area in the Weddell Sea for the 34th annual meeting of the Commission for the Conservation of Antarctic Marine Living Resources in so far as in that decision it is specified that the reflection paper is to be submitted on behalf of the Union and its Member States, rather than on behalf of the Union alone;
- (2) in Case C-659/16, annul the decision of the Council of the European Union of 10 October 2016 concerning the establishment of the position to be adopted at the 35th annual meeting of the Commission for the Conservation of Antarctic Marine Living Resources in so far as in that decision it is specified that the position is to be adopted on behalf of the Union and its Member States, rather than on behalf of the Union alone;
- (3) order that the effects of the annulled parts of the contested decisions be maintained;
- (4) order the Council of the European Union to bear its own costs and to pay the costs incurred by the European Commission in both cases;
- (5) order the Kingdom of Belgium, the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Portuguese Republic, the Republic of Finland, the Kingdom of Sweden and the United Kingdom of Great Britain and Northern Ireland each to bear their own costs in each of the two cases in which they participated.