



Reports of Cases

JUDGMENT OF THE COURT (Grand Chamber)

6 October 2015*

(Action for annulment — United Nations Convention on the Law of the Sea — International Tribunal for the Law of the Sea — Illegal, unreported and unregulated fishing — Advisory opinion proceedings — Submission by the European Commission of a written statement on behalf of the European Union — No prior approval of the content of that statement by the Council of the European Union — Article 13(2) TEU, Article 16 TEU and Article 17(1) TEU — Article 218(9) TFEU and Article 335 TFEU — Representation of the European Union — Principles of conferral of powers and institutional balance — Principle of sincere cooperation)

In Case C-73/14,

ACTION for annulment under Article 263 TFEU, brought on 10 February 2014,

Council of the European Union, represented by A. Westerhof Löfflerová, E. Finnegan and R. Liudvinaviciute-Cordeiro, acting as Agents,

applicant,

supported by:

Czech Republic, represented by M. Smolek, E. Ruffer, J. Vlácil and M. Hedvábná, acting as Agents,

Hellenic Republic, represented by G. Karipsiadis and K. Boskovits, acting as Agents, with an address for service in Luxembourg,

Kingdom of Spain, represented by M. Sampol Pucurull, acting as Agent,

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

Republic of Lithuania, represented by D. Kriauciūnas and G. Taluntytė, acting as Agents,

Kingdom of the Netherlands, represented by M. Bulterman, M. Gijzen and M. de Ree, acting as Agents,

Republic of Austria, represented by C. Pesendorfer and G. Eberhard, acting as Agents,

Portuguese Republic, represented by L. Inez Fernandes and M.L. Duarte, acting as Agents,

Republic of Finland, represented by J. Heliskoski and H. Leppo, acting as Agents,

* Language of the case: English.

United Kingdom of Great Britain and Northern Ireland, represented by E. Jenkinson and M. Holt, acting as Agents, and by J. Holmes, Barrister,

interveners,

v

European Commission, represented by K. Banks, A. Bouquet, E. Paasivirta and P. Van Nuffel, acting as Agents, with an address for service in Luxembourg,

defendant,

THE COURT (Grand Chamber),

composed of V. Skouris, President, K. Lenaerts (Rapporteur), Vice-President, R. Silva de Lapuerta, M. Ilešič, L. Bay Larsen, A. Ó Caoimh, J.-C. Bonichot, C. Vajda, S. Rodin and K. Jürimäe, Presidents of Chambers, J. Malenovský, J.L. da Cruz Vilaça and F. Biltgen, Judges,

Advocate General: E. Sharpston,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 14 April 2015,

after hearing the Opinion of the Advocate General at the sitting on 16 July 2015,

gives the following

Judgment

- 1 By its application, the Council of the European Union seeks the annulment of the decision of the European Commission of 29 November 2013 to submit the ‘Written statement by the European Commission on behalf of the European Union’ (‘the contested decision’) to the International Tribunal for the Law of the Sea (‘ITLOS’) in Case No 21.

Legal context

Provisions relating to ITLOS

- 2 The United Nations Convention on the Law of the Sea, signed in Montego Bay on 10 December 1982, and which entered into force on 16 November 1994 (‘UNCLOS’), was approved on behalf of the European Community by Council Decision 98/392/EC of 23 March 1998 concerning the conclusion by the European Community of the United Nations Convention of 10 December 1982 on the Law of the Sea and the Agreement of 28 July 1994 relating to the implementation of Part XI thereof (OJ 1998 L 179, p. 1).
- 3 Article 191 of UNCLOS provides:

‘The Seabed Disputes Chamber shall give advisory opinions at the request of the Assembly or the Council on legal questions arising within the scope of their activities. Such opinions shall be given as a matter of urgency.’

4 Article 287(1) of UNCLOS states:

‘When signing, ratifying or acceding to [UNCLOS] or at any time thereafter, a State shall be free to choose, by means of a written declaration, one or more of the following means for the settlement of disputes concerning the interpretation or application of [UNCLOS]:

(a) [ITLOS] established in accordance with Annex VI;

...’

5 Annex VI of UNCLOS contains the Statute of ITLOS.

6 Article 16 of that statute, entitled ‘Rules of [ITLOS]’, provides:

‘[ITLOS] shall frame rules for carrying out its functions. In particular it shall lay down rules of procedure.’

7 According to Article 21 of that statute, entitled ‘Jurisdiction’:

‘The jurisdiction of [ITLOS] comprises all disputes and all applications submitted to it in accordance with [UNCLOS] and all matters specifically provided for in any other agreement which confers jurisdiction on [ITLOS].’

8 The rules of procedure of ITLOS, in the version amended on 17 March 2009, govern, in Articles 130 to 137 thereof, the ‘[a]dvisory proceedings’ before the Seabed Disputes Chamber. Under Article 133 of those rules, the States party to UNCLOS and the intergovernmental organisations which are likely to be able to furnish information on the question to which the request for an advisory opinion relates are to be invited to present written statements on that question and, in the event that oral proceedings are held, to make oral statements at those proceedings.

9 Article 138 of those rules provides:

‘1. [ITLOS] may give an advisory opinion on a legal question if an international agreement related to the purposes of [UNCLOS] specifically provides for the submission to [ITLOS] of a request for such an opinion.

2. A request for an advisory opinion shall be transmitted to [ITLOS] by whatever body is authorized by or in accordance with the agreement to make the request to [ITLOS].

3. [ITLOS] shall apply mutatis mutandis articles 130 to 137.’

International agreements on illegal, unreported and unregulated fishing

10 Several provisions of international agreements to which the European Union is party concern the respective obligations and responsibilities of the flag State and the coastal States in relation to fishing on the high seas or within an exclusive economic zone, and are therefore relevant to the fight against illegal, unreported and unregulated fishing (‘IUU fishing’), which jeopardises the conservation and management of fish stocks.

11 That is the case, inter alia, as regards Articles 56, 61 to 68, 73, 91, 94 and 116 to 120 of UNCLOS, Articles III, V, VI and VIII of the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, approved on 24 November 1993 by Resolution 15/93 of the Twenty-Seventh Session of the Conference of the United Nations Food and

Agriculture Organisation ('the FAO Compliance Agreement'), to which the Community acceded under Council Decision 96/428/EC of 25 June 1996 (OJ 1996 L 177, p. 24), and Articles 5 to 14 and 17 to 21 of the Agreement adopted on 4 August 1995 in New York (United States) for the implementing of the provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the conservation and management of straddling stocks and highly migratory fish stocks ('the United Nations Fish Stocks Agreement'), which was ratified, on behalf of the Community, by Council Decision 98/414/EC of 8 June 1998 (OJ 1998 L 189, p. 14).

Partnership agreements between the European Union and coastal States in relation to fishing

- 12 The Sub-Regional Fisheries Commission ('the SRFC') is an intergovernmental organisation for fisheries cooperation established by a convention of 29 March 1985 and consists of the Republic of Cape Verde, the Republic of Gambia, the Republic of Guinea, the Republic of Guinea-Bissau, the Islamic Republic of Mauritania, the Republic of Senegal and the Republic of Sierra Leone.
- 13 The European Union has concluded partnership agreements with various member States of the SRFC. Most of those agreements contain a provision similar to Article 5(4) of the Fisheries Partnership Agreement between the European Union and the Republic of Cape Verde (OJ 2006 L 414, p. 3), according to which '[t]he Community undertakes to take all the appropriate steps required to ensure that its vessels comply with this Agreement and the legislation governing fisheries in the waters over which Cape Verde has jurisdiction'.

European Union measures in relation to IUU fishing

- 14 Council Regulation (EC) No 1005/2008 of 29 September 2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing, amending Regulations (EEC) No 2847/93, (EC) No 1936/2001 and (EC) No 601/2004 and repealing Regulations (EC) No 1093/94 and (EC) No 1447/1999 (OJ 2008 L 286, p. 1; 'the IUU Regulation'), lays down a detailed framework for measures to combat IUU fishing.
- 15 As can be seen from recital 5 in the preamble thereto, the purpose of that regulation is to enhance the European Union's action against IUU fishing, '[i]n line with its international commitments' recalled in recital 1 in the preamble to that regulation, namely those arising from UNCLOS, from the FAO Compliance Agreement and from the United Nations Fish Stocks Agreement.
- 16 Council Regulation (EC) No 1006/2008 of 29 September 2008 concerning authorisations for fishing activities of Community fishing vessels outside Community waters and the access of third country vessels to Community waters, amending Regulations (EEC) No 2847/93 and (EC) No 1627/94 and repealing Regulation (EC) No 3317/94 (OJ 2008 L 286, p. 33), governs the access of third country vessels to European Union waters and the access of European Union vessels to third country waters.
- 17 The enforcement of and monitoring of compliance with the IUU Regulation are ensured by Council Regulation (EC) No 1224/2009 of 20 November 2009 establishing a Community control system for ensuring compliance with the rules of the common fisheries policy, amending Regulations (EC) No 847/96, (EC) No 2371/2002, (EC) No 811/2004, (EC) No 768/2005, (EC) No 2115/2005, (EC) No 2166/2005, (EC) No 388/2006, (EC) No 509/2007, (EC) No 676/2007, (EC) No 1098/2007, (EC) No 1300/2008, (EC) No 1342/2008 and repealing Regulations (EEC) No 2847/93, (EC) No 1627/94 and (EC) No 1966/2006 (OJ 2009 L 343, p. 1).

- 18 Pursuant to the IUU Regulation, the Commission, by Regulation (EU) No 468/2010 of 28 May 2010 establishing the EU list of vessels engaged in illegal, unreported and unregulated fishing (OJ 2010 L 131, p. 22), which has been amended several times, established a European Union list of vessels engaged in IUU fishing, on the basis of lists adopted by regional fisheries management organisations ('RFMOs'). The European Union is a member of most of those RFMOs.
- 19 The European Union also adopted various regulations implementing measures taken by the RFMOs as regards certain third countries. That is the case, for example, as regards Council Regulation (EC) No 826/2004 of 26 April 2004 prohibiting imports of Atlantic blue-fin tuna (*Thunnus thynnus*) originating in Equatorial Guinea and Sierra Leone and repealing Regulation (EC) No 2092/2000 (OJ 2004 L 127, p. 19) and Council Regulation (EC) No 827/2004 of 26 April 2004 prohibiting imports of Atlantic bigeye tuna (*Thunnus obesus*) originating in Bolivia, Cambodia, Equatorial Guinea, Georgia and Sierra Leone and repealing Regulation (EC) No 1036/2001 (OJ 2004 L 127, p. 21).

Background to the dispute

- 20 On 28 March 2013, ITLOS received a request for an advisory opinion from the SRFC ('the request for an advisory opinion').
- 21 That request, registered as Case No 21, concerns the following questions:
- (1) What are the obligations of the flag State in cases where [IUU] fishing activities are conducted within the Exclusive Economic Zone of third party States?
 - (2) To what extent shall the flag State be held liable for IUU fishing activities conducted by vessels sailing under its flag?
 - (3) Where a fishing license is issued to a vessel within the framework of an international agreement with the flag State or with an international agency, shall the State or international agency be held liable for the violation of the fisheries legislation of the coastal State by the vessel in question?
 - (4) What are the rights and obligations of the coastal State in ensuring the sustainable management of shared stocks and stocks of common interest, especially the small pelagic species and tuna?
- 22 By order of 24 May 2013, ITLOS invited the parties to UNCLOS, the SRFC and other intergovernmental organisations to submit, by 29 November 2013 at the latest, their written statements in Case No 21. It also decided to hold oral proceedings in that case.
- 23 On 5 August 2013, the Commission adopted the decision 'concerning the submission of statements on behalf of the Union on the request for an advisory opinion submitted by the Sub-Regional Fisheries Commission to the International Tribunal for the Law of the Sea in Case Number 21' (C(2013) 4989 final, 'the decision of 5 August 2013').
- 24 Recitals 9 and 10 in the preamble to that decision state that, '[b]y virtue of Article 335 TFEU, the Union is to be represented in legal proceedings by the Commission' and that '[i]t is ... appropriate that the Commission submits written observations for the Union on the questions submitted to ITLOS, and participates in the oral proceedings'. Recital 11 in the preamble to that decision adds that 'under the principle of loyal cooperation, the Commission should inform the Council via its competent working group.'

- 25 Article 1 of the decision of 5 August 2013 provides that '[t]he Commission shall submit written statements on behalf of the European Union on the questions submitted on 27 March 2013 by the [SRFC] to [ITLOS] for an advisory opinion in case number 21 [and] ... shall participate [in] the oral proceedings in case number 21'. According to Article 2 of that decision, '[t]he Legal Service of the Commission is instructed to give effect to the present Decision'.
- 26 Within the Council, the request for an advisory opinion was examined by the Law of the Sea Working Party ('the COMAR group'), as regards ITLOS's jurisdiction to deliver an advisory opinion and the admissibility of the questions submitted, and by the Working Party on Internal and External Fisheries Policy ('the FISH group'), as regards the substance of the questions.
- 27 During the meetings of the FISH group on 12 September 2013 and of the COMAR group on 17 September 2013, the Commission reaffirmed its intention to submit written observations on behalf of the European Union and argued that no prior approval by the Council was needed for it to do so. At the meeting of the FISH group, the Council Presidency stated that it was necessary for the Council to approve the content of those written observations and asked the Commission to send a draft written statement to the Council by the end of October 2013 at the latest.
- 28 On 22 October 2013, the Commission sent the Council a '[w]orking document outlining the main lines of the Union submission in case ITLOS 21' ('the working document of 22 October 2013'). In that document, the Commission, referring to its decision of 5 August 2013, reiterated that 'under the principle of loyal cooperation', the Council was 'to be informed'. It emphasised that it 'look[ed] forward to taking in the utmost account any suggestions and advice from Member States to make the Union's case more solid'.
- 29 At the meetings of the FISH group on 24 October 2013 and of the COMAR group on 30 October 2013, in the course of which the working document of 22 October 2013 was examined, the Commission repeated that it would not submit any draft statement to the Council for prior approval.
- 30 The working document of 22 October 2013 was revised several times, on 15, 18 and 26 November 2013. The successive versions were discussed at the meetings of the FISH group on 15 and 22 November 2013. In the introductory part of the revised version of that document dated 15 November 2013, the Commission again emphasised that, under Article 335 TFEU, it was entitled to represent the European Union in legal proceedings and that such representation did not require the Council's prior approval of the written observations submitted on behalf of the European Union.
- 31 On 27 November 2013, the issue of the possible submission of written observations to ITLOS on behalf of the European Union was examined by the Committee of Permanent Representatives (Coreper) of the Member States on the basis of a report prepared by the FISH group. The Member States' delegations and the Presidency of Coreper insisted that it was for the Council, in accordance with Article 16 TEU, to decide whether the European Union should submit written observations and, if so, to endorse or modify the content of those observations. Coreper considered that, if the Council could not endorse any position regarding the potential submission of such observations, there was no position in that respect and that, accordingly, no written submission on the request for an advisory opinion could be made to ITLOS on behalf of the European Union. The Commission, on the other hand, maintained its view that formal approval by the Council was not necessary in this case, and indicated that it would submit a written statement to ITLOS on behalf of the European Union.
- 32 On 29 November 2013, having taken account of comments received from a number of Member States' delegations, the Commission sent ITLOS the '[w]ritten statement by the European Commission on behalf of the European Union' in Case No 21. The Council was notified of this by e-mail on the same day.

33 Seven Member States, as parties to UNCLOS, also submitted a written statement to ITLOS in Case No 21.

Forms of order sought by the parties and the procedure before the Court

34 The Council claims that the Court should annul the contested decision and order the Commission to pay the costs.

35 The Commission claims that the Court should dismiss the action and, in the alternative, maintain the effects of the contested decision until a new decision has been taken within a reasonable time, and order the Council to pay the costs.

36 The Czech Republic, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Republic of Lithuania, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Finland and the United Kingdom of Great Britain and Northern Ireland were granted leave to intervene in support of the form of order sought by the Council. The Portuguese Republic did not, however, participate in any stage of the present proceedings.

Preliminary considerations

37 It is common ground between the parties that, by the contested decision, the Commission, following the exchange of views with the Council, carried out the intentions it expressed on 5 August 2013 by presenting to ITLOS in Case No 21, on behalf of the European Union, a written statement the content of which had not been submitted to the Council for approval, despite the latter's request.

38 In those circumstances, the present action must be construed as complaining that the Commission disregarded the Council's prerogatives by failing to submit the content of the written statement presented on behalf of the European Union in Case No 21 to the Council for prior approval.

Substance

39 The Council raises two pleas in law in support of its action. The first plea alleges infringement of the principle of conferral of powers laid down in Article 13(2) TEU and of the principle of institutional balance. The second plea alleges infringement of the principle of sincere cooperation laid down in that provision.

The first plea in law

40 The first plea in law is composed of two parts. By the first part, the Council alleges breach of Article 218(9) TFEU. By the second part, it alleges breach of Article 16(1) TEU. It is appropriate to examine these two parts together.

Arguments of the parties

41 The Council, supported by all of the intervening Member States, with the exception of the Republic of Austria, maintains, in the context of the first part of the first plea in law, that its prerogatives under Article 218(9) TFEU were infringed by the Commission in the present case.

- 42 According to those parties, Article 218(9) TFEU covers any situation in which a body, of any kind, set up by an international agreement applies that agreement by an act having legal effects, whether binding or non-binding, in the European Union. That, they submit, is the case here. ITLOS was set up by an international agreement, namely UNCLOS, and the advisory opinion at issue in the present case is liable to have significant effects on the application of UNCLOS and other international agreements to which the European Union is party and, accordingly, on the European Union's legal order. Since the request for an advisory opinion concerns an area which is governed, to a large extent, by EU law, that opinion is liable to have an impact on the exercise of the European Union's competence and on its *acquis* in that area. It might also necessitate amendment of the EU legislation in relation to IUU fishing.
- 43 In the context of the second part of the first plea in law, the Council, supported by all of the intervening Member States, claims that the Commission has, in any event, infringed Article 16(1) TEU in the present case, by assuming powers vested exclusively in the Council.
- 44 In that respect, those parties submit, in the first place, that Article 17(1) TEU does not authorise the Commission to ensure the external representation of the European Union autonomously, disregarding the Council's policy-making role under the second sentence of Article 16(1) TEU.
- 45 In this case, given the significant consequences that the content of the written statement submitted to ITLOS on behalf of the European Union could have at the international level, particularly as regards the relations between the European Union and the member States of the SRFC, it was for the Council, in accordance with Article 16(1) TEU, to determine the content of that statement. The Commission's role, on the other hand, consisted in executing the policy defined by the Council and ensuring the European Union's external representation on the basis of that policy.
- 46 In the second place, the Council and all of the intervening Member States submit that Article 335 TFEU does not undermine the foregoing line of argument.
- 47 In that respect, the Kingdom of Spain, the French Republic, the Kingdom of the Netherlands, the Republic of Austria and the Republic of Finland submit that Article 335 TFEU exclusively concerns the representation of the European Union in national legal proceedings, and not the submission of observations on behalf of the European Union, as part of the European Union's external action, before a court set up by an international agreement.
- 48 The Council and all of the intervening Member States submit that, in any event, Article 335 TFEU cannot, in view of the ordinary meaning of the concept of 'representation' and the principle of conferral of powers laid down in Article 13(2) TEU, be understood as authorising the Commission, outside of matters relating to its own operation, to act autonomously in legal proceedings, without respecting the Council's power to determine the content of the European Union's position on the questions at issue. The external representation of the European Union by the Commission, whether political or legal, falls within the scope of the sixth sentence of Article 17(1) TEU, which means that the Council's policy-making role under the second sentence of Article 16(1) TEU must be taken into account.
- 49 In the third place, the Council and the intervening Member States submit that the representation of the European Union by the Commission before ITLOS does not concern the application of the Treaties, within the meaning of the second sentence of Article 17(1) TEU. Accordingly, the Commission cannot rely on its role as guardian of the Treaties in order to develop autonomously its own interpretation of the international rules in question. Moreover, the submission of observations on behalf of the European Union in Case No 21 did not amount to a technical description of the European Union *acquis* in the relevant area. It also involved political and strategic choices concerning a number of issues raised by that case, such as ITLOS's jurisdiction to give the advisory opinion requested in that case and the admissibility of the questions submitted.

- 50 In the fourth place, the Council, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Republic of Lithuania and the Republic of Finland submit that there is no established European Union policy in relation to the fight against IUU fishing that could have justified the Commission's failure to obtain prior authorisation from the Council in this case. Nor is there an established European Union policy on the novel question of the general jurisdiction of ITLOS to give advisory opinions or on the issues concerning the respective responsibilities of the flag State, the coastal State and international organisations in relation to IUU fishing.
- 51 In response to the first part of the first plea in law, the Commission contends that Article 218(9) TFEU is applicable only where a body set up by an international agreement has, as an executive body, the power to establish rules or adopt decisions in the context of that agreement. That provision therefore does not concern the positions to be expressed on behalf of the European Union before an international court.
- 52 In response to the second part of the first plea in law, the Commission submits, primarily, that Article 335 TFEU reflects the general principle that the Commission represents the European Union in all judicial proceedings, whether national or international. That provision does not require the Commission to obtain the authorisation of another EU institution in order to act on behalf of the European Union before a court. In the system established by the Treaties, the representation of the European Union before an international court is a role of a constitutional nature conferred on the Commission by Article 13(2) TEU, the first and second sentences of Article 17(1) TEU and Article 335 TFEU.
- 53 According to the Commission, a distinction must be made between two situations. The first situation relates to the external representation of the European Union for political or diplomatic purposes such as the negotiation of international agreements, which is governed by the sixth sentence of Article 17(1) TEU and may fall within the scope of Article 16(1) TEU where no European Union policy exists. The second situation, to which present case corresponds, concerns the representation of the European Union before an international court, in the context of which the Commission is required to ensure, in the general interest of the European Union pursuant to the first sentence of Article 17(1) TEU, the application of EU law, for the purpose of that provision, including international agreements to which the European Union is party.
- 54 In the alternative, the Commission submits that, even if the Court were to consider that the sixth sentence of Article 17(1) TEU was applicable in the present case, the Commission is entitled to represent the European Union where a European Union policy has already been established by the Council. In this case, there was a complete legal and policy framework, at the EU level, allowing the Commission to carry out its task of external representation of the European Union without the need for further guidance from the Council.

Findings of the Court

- 55 It is common ground between the parties that the questions raised by the request for an advisory opinion concern, at least in part, the area of the conservation of marine biological resources under the common fisheries policy, which constitutes, pursuant to Article 3(1)(d) TFEU, an area of exclusive EU competence, and that the European Union, as a contracting party to UNCLOS, on the basis of which ITLOS was set up, was competent to take part in the advisory opinion proceedings before that court in Case No 21, in accordance with Article 133 of the rules of procedure of ITLOS.
- 56 In support of its decision to represent the European Union in the context of its participation in those proceedings and to present, in that connection, a written statement on behalf of the European Union, the Commission relied on Article 335 TFEU, as can be seen from the documents in the file and as it confirmed both in its written pleadings and at the hearing.

- 57 A number of the intervening Member States submit, however, that Article 335 TFEU is not applicable to the representation of the European Union before an international court such as ITLOS. In their view, that article concerns only proceedings before national courts.
- 58 However, it is clear from the case law of the Court that Article 335 TFEU, although restricted to Member States on its wording, is the expression of a general principle that the European Union has legal capacity and is to be represented, to that end, by the Commission (see, to that effect, judgment in *Reynolds Tobacco and Others v Commission*, C-131/03 P, EU:C:2006:541, paragraph 94).
- 59 It follows that Article 335 TFEU provided a basis for the Commission to represent the European Union before ITLOS in Case No 21.
- 60 Nevertheless, as the Council has emphasised, supported by the intervening Member States, the applicability of Article 335 TFEU in the present case does not exhaustively resolve the issue, raised by the first plea in law, of whether the principle of conferral of powers laid down in Article 13(2) TEU required that the content of the written statement presented to ITLOS in Case No 21 by the Commission, on behalf of the European Union, receive the prior approval of the Council.
- 61 In that respect, it must be recalled that, under Article 13(2) TEU, each institution is to act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them. That provision reflects the principle of institutional balance, characteristic of the institutional structure of the European Union, a principle which requires that each of the institutions must exercise its powers with due regard for the powers of the other institutions (see judgment in *Council v Commission*, C-409/13, EU:C:2015:217, paragraph 64 and the case-law cited).
- 62 In the present case, the line of argument put forward by the Council and the intervening Member States consists in alleging that, by submitting to ITLOS in Case No 21, on behalf of the European Union, a written statement the content of which had not been approved by the Council, the Commission disregarded the Council's powers under Article 218(9) TFEU and, in any event, the second sentence of Article 16(1) TEU.
- 63 In the first place, the reference in Article 218(9) TFEU to the positions to be adopted on the European Union's behalf 'in' a body set up by an international agreement and called upon to adopt acts having legal effects means that the application of that provision concerns the positions to be adopted on behalf of the European Union in the context of its participation, through its institutions or, as the case may be, through its Member States acting jointly in its interests, in the adoption of such acts within the international body concerned. The European Union was invited to express, as a party, a position 'before' an international court, and not 'in' it.
- 64 That interpretation is supported by the context and purpose of Article 218(9) TFEU.
- 65 As the Advocate General observed in points 70 to 74 of her opinion, that provision provides, by way of derogation from the ordinary procedure set out in Article 218(1) to (8) TFEU for the negotiation and conclusion of international agreements by the European Union, a simplified procedure for deciding on the positions to be adopted on behalf of the European Union in the context of its participation in the adoption, within a decision-making body set up by the international agreement concerned, of acts applying or implementing that agreement.
- 66 Unlike the case that gave rise to the judgment in *Germany v Council* (C-399/12, EU:C:2014:2258), which concerned the position to be adopted on behalf of the European Union in the context of its participation, through Member States, in the adoption of recommendations within the body set up by the international agreement in question, the present case concerns the determination of a position to

be expressed on behalf of the European Union before an international judicial body requested to give an advisory opinion, the adoption of which falls solely within the remit and responsibility of the members of that body, acting, to that end, wholly independently of the parties.

- 67 It follows that Article 218(9) TFEU is not applicable in the present case, and it is not necessary to examine whether the advisory opinion of ITLOS sought in Case No 21 is an ‘act having legal effects’, within the meaning of that provision.
- 68 In the second place, it must be examined whether it follows from the second sentence of Article 16(1) TEU that the Council should have approved the content of the written statement submitted to ITLOS on behalf of the European Union in Case No 21 before that statement was sent to ITLOS.
- 69 In that respect, it must be observed that the request for an advisory opinion concerned the respective obligations and responsibilities of the flag State and the coastal State in relation to IUU fishing, which undermines the conservation and management of fish stocks. As noted in paragraphs 10 and 11 of the present judgment, IUU fishing falls within the scope of a range of provisions of UNCLOS, to which the European Union is a contracting party, of the FAO Compliance Agreement, to which the Community acceded by Decision 96/428, of the United Nations Fish Stocks Agreement, which the Community ratified by Decision 98/414, and of partnership agreements between the European Union and member States of the SRFC, which form an integral part of the legal order of the European Union pursuant to Article 216(2) TFEU (see, to that effect, judgment in *Air Transport Association of America and Others*, C-366/10, EU:C:2011:864, paragraph 73 and the case-law cited). It is also the subject of detailed regulation in EU law, which, moreover, was reinforced in 2008 in order to take into account the European Union’s international commitments, as noted in paragraphs 14 to 19 of the present judgment.
- 70 In that context, it can be seen from the written statement submitted on behalf of the European Union to ITLOS in Case No 21 that that statement consisted in suggesting answers to the questions raised in that case, by setting out the manner in which the European Union envisaged the interpretation and application of the relevant provisions of UNCLOS, of the FAO Compliance Agreement, and of the United Nations Fish Stocks Agreements in relation to IUU fishing, and by describing the measures contained, in that connection, in the partnership agreements and the EU legislation referred to in the previous paragraph.
- 71 The purpose of that statement was therefore not to formulate a policy in relation to IUU fishing, for the purpose of the second sentence of Article 16(1) TEU, but to present to ITLOS, on the basis of an analysis of the provisions of international and EU law relevant to that subject, a set of legal observations aimed at enabling that court to give, if appropriate, an informed advisory opinion on the questions put to it.
- 72 The Council and some intervening Member States contend that the written statement submitted to ITLOS on behalf of the European Union in Case No 21 also contained considerations relating to that court’s jurisdiction to give the requested advisory opinion and the admissibility of the questions put to it, which constitute strategic or political choices that it was for the Council to make.
- 73 However, those considerations are, like the observations submitted on the substance of the case in question, characteristic of participation in proceedings before a court. They cannot, in those circumstances, be regarded as policy making, within the meaning of Article 16(1) TEU.
- 74 The Council and some Member States further emphasise the significant political consequences liable to arise, particularly as regards the relations between the European Union and the member States of the SRFC, from the content of the written statement submitted, on behalf of the European Union, to ITLOS in Case No 21.

- 75 However, even if that were correct, it would in any event not suffice — in the light of the findings in paragraphs 69 to 71 of the present judgment — to support the view that determining the content of that written statement constituted the exercise of a policy-making function, within the meaning of the second sentence of Article 16(1) TEU.
- 76 It follows from the foregoing that, by sending the written statement, on behalf of the European Union, to ITLOS in Case No 21 without having submitted its contents to the Council for approval, the Commission did not infringe that provision.
- 77 In the light of all the above, the first plea in law must be rejected.

The second plea in law

Arguments of the parties

- 78 In the context of the second plea in law, the Council, supported by the Czech Republic, the Kingdom of Spain, the French Republic, the Republic of Lithuania and the Republic of Austria claim that the Commission, in the present case, infringed the principle of sincere cooperation laid down in Article 13(2) TEU.
- 79 In that respect, those parties submit, in the first place, that, contrary to the requirement set out in Article 218(9) TFEU, the Commission did not submit to the Council a proposal for a decision establishing the position to be expressed on behalf of the European Union before ITLOS, which made it impossible for the Council to adopt such a decision. By not submitting a proposal, the Commission also failed to fulfil its obligation, under Article 17(1) TEU, to take appropriate initiatives to promote the general interest of the European Union, a failure which made it impossible for the Council to carry out the functions conferred on it by Article 16(1) TEU.
- 80 In the second place, they submit that the Commission failed to cooperate sincerely with the Council in the preparation of the content of the written statement to be presented before ITLOS. The Commission merely sent the Council, for information only, successive documents which were much less detailed than the final written statement sent to ITLOS, even though the Member States' delegations to the Council wished to have access to a draft of the full text, which would, inter alia, have allowed them to prepare their own submissions in full knowledge of the European Union position envisaged in this case.
- 81 The Commission contends that it in no way infringed the principle of sincere cooperation.
- 82 It submits, in the first place, that, since it was not necessary to adopt a decision pursuant to Article 218(9) TFEU, no proposal for such a decision was required.
- 83 In the second place, it submits that it fully cooperated with the Council in this case and that it took into account the divergent views expressed within the Council on certain issues raised by the request for an advisory opinion as well as the suggestions made by the Member States.

Findings of the Court

- 84 Under Article 13(2) TEU, the European Union's institutions are to practise mutual sincere cooperation. That sincere cooperation, however, is exercised within the limits of the powers conferred by the Treaties on each institution. The obligation resulting from Article 13(2) TEU is therefore not such as to change those powers (judgment in *Parliament v Council*, C-48/14, EU:C:2015:91, paragraphs 57 and 58).

- 85 In the present case, the main argument put forward by the Council and some of the intervening Member States in the context of the second plea in law is based on the premiss that the determination of the content of the written statement submitted on behalf of the European Union to ITLOS in Case No 21 fell within the competence of the Council pursuant to Article 218(9) TFEU or the second sentence of Article 16(1) TEU. That was not the case, however, as can be seen from the examination of the first plea in law. Accordingly, it cannot be claimed that the Commission failed to fulfil its obligation of sincere cooperation by not taking the initiatives entailed in the application of those two provisions.
- 86 That being said, the principle of sincere cooperation requires the Commission to consult the Council beforehand if it intends to express positions on behalf of the European Union before an international court.
- 87 In the present case, the Commission complied with that obligation. As can be seen from paragraphs 28 to 32 of the present judgment, prior to submitting the written statement on behalf of the European Union to ITLOS in Case No 21, the Commission sent the Council the working document of 22 October 2013, which was revised several times up until 26 November 2013 in order to take account of the views expressed within the FISH and COMAR groups. The Council's claim that the Commission did not sincerely cooperate in the preparation of the content of that written statement is therefore incorrect.
- 88 Lastly, it should be noted that the Commission has indicated — without being contradicted by the Council or by the intervening Member States — that the neutral position expressed in that written statement concerning the issue of ITLOS's jurisdiction to give the advisory opinion sought in Case No 21 was dictated by its concern to take into account, in the spirit of sincere cooperation, the divergent views on that issue expressed by the Member States within the Council.
- 89 It follows that the second plea in law must be rejected.
- 90 In the light of all of the foregoing considerations, the action must be dismissed in its entirety.

Costs

- 91 Under Article 138(1) of the Rules of Procedure of the Court of Justice, the unsuccessful party must be ordered to pay the costs if they have been applied for in the other party's pleadings. Since the Commission has applied for the Council to be ordered to pay the costs and the Council has been unsuccessful, the Council must be ordered to pay the costs. In accordance with Article 140(1) of the Rules of Procedure, under which the Member States which have intervened in the proceedings are to bear their own costs, the Czech Republic, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Republic of Lithuania, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Finland and the United Kingdom must be ordered to bear their own costs.

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

- 1. Dismisses the action;**
- 2. Orders the Council of the European Union to pay the costs;**
- 3. Orders the Czech Republic, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Republic of Lithuania, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Finland and the United Kingdom of Great Britain and Northern Ireland to bear their own costs.**

[Signatures]