Provisional text

JUDGMENT OF THE COURT (Grand Chamber)

20 November 2018 (*)

(Actions for annulment — Decision of the Permanent Representatives Committee (Coreper) — Decision approving the submission of a reflection paper to an international body — Admissibility — Challengeable act — Exclusive, shared or complementary competence of the European Union — Action of the European Union alone in an international body or participation of the Member States alongside it — Conservation of marine biological resources — Fisheries — Protection of the environment — Research — Marine protected areas (MPAs) — Antarctic Treaty — Convention on the Conservation of Antarctic Marine Living Resources — Weddell Sea and Ross Sea)

In Joined Cases C−626/15 and C−659/16,

ACTIONS for annulment under Article 263 TFEU, brought on 23 November 2015 (C−626/15) and 20 December 2016 (C−659/16), respectively,

European Commission, represented by A. Bouquet, E. Paasivirta and C. Hermes, acting as Agents, with an address for service in Luxembourg,

applicant,

v

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

defendant,

supported by:

Federal Republic of Germany, represented by T. Henze, J. Möller, K. Stranz and S. Eisenberg, acting as Agents,

Hellenic Republic, represented by G. Karipsiadis and K. Boskovits, acting as Agents,

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

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

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

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

Republic of Finland, represented by J. Heliskoski, acting as Agent,

Kingdom of Sweden, represented by A. Falk, C. Meyer-Seitz, U. Persson, N. Otte Widgren, L. Zettergren and L. Swedenborg, acting as Agents,

United Kingdom of Great Britain and Northern Ireland, represented by C. Brodie, acting as Agent, and J. Holmes QC,

interveners (C−626/15),

European Commission, represented by A. Bouquet, E. Paasivirta and C. Hermes, acting as Agents, with an address for service in Luxembourg,

applicant,

v

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

defendant,

supported by:

Kingdom of Belgium, represented by J. Van Holm, C. Pochet and L. Van den Broeck, acting as Agents,

Federal Republic of Germany, represented by T. Henze, J. Möller and S. Eisenberg, acting as Agents,

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

French Republic, represented by D. Colas and B. Fodda, acting as Agents,

Grand Duchy of Luxembourg, represented by D. Holderer, acting as Agent,

Kingdom of the Netherlands, represented by B. Koopman, M. Bulterman and M. Noort, acting as Agents,

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

Republic of Finland, represented by J. Heliskoski, acting as Agent,

Kingdom of Sweden, represented by A. Falk, C. Meyer-Seitz, H. Shev and L. Zettergren, acting as Agents,

United Kingdom of Great Britain and Northern Ireland, represented by C. Brodie and G. Brown, acting as Agents, J. Holmes QC and J. Gregory, Barrister,

interveners (C−659/16),

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, J.-C. Bonichot, A. Arabadjiev, M. Vilaras, T. von Danwitz, F. Biltgen and K. Jürimäe, Presidents of Chambers, E. Juhász, M. Ilešič, J. Malenovský (Rapporteur), E. Levits, L. Bay Larsen and S. Rodin, Judges,

Advocate General: J. Kokott,

Registrar: V. Giacobbo-Peyronnel, Administrator,

having regard to the written procedure and further to the hearing on 13 March 2018,

after hearing the Opinion of the Advocate General at the sitting on 31 May 2018,

gives the following

Judgment

1 By its applications, the European Commission asks the Court (i) to annul the decision of the Council of the European Union, as contained in the conclusion of the Chairman of the Permanent Representatives Committee of 11 September 2015 ('the 2015 decision'), in so far as the conclusion approves the submission, on behalf of the European Union and its Member States, to the Commission for the Conservation of Antarctic Marine Living Resources ('the CCAMLR') of a reflection paper relating to a future proposal to create a marine protected area in the Weddell Sea ('the reflection paper') (Case C−626/15) and (ii) to annul the Council decision of 10 October 2016 ('the 2016 decision') in so far as it approves the submission, on behalf of the European Union and its Member States, to the CCAMLR, at the 35th annual meeting of that body, of three proposals for the creation of marine protected areas and a proposal for the creation of special areas for scientific study of the marine area concerned, of climate change and of the retreat of ice shelves (Case C−659/16).

Legal context

Public international law

Antarctic Treaty

2 The Antarctic Treaty, signed in Washington on 1 December 1959, entered into force on 23 June 1961. Article VI of that treaty states:

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

3 Article IX of the treaty provides:

'1. Representatives of the Contracting Parties … shall meet at the City of Canberra [Australia] within two months after the date of entry into force of the Treaty, and thereafter 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.

2. Each Contracting Party which has become a party to the present Treaty by accession under Article XIII shall be entitled to appoint representatives to participate in the meetings referred to in paragraph 1 of the present Article, during such time as that Contracting Party demonstrates its interest in Antarctica by conducting substantial scientific research activity there, such as the establishment of a scientific station or the despatch of a scientific expedition.'

4 Currently, 20 Member States are Contracting Parties to the Antarctic Treaty. Three Member States were signatories to the treaty on 1 December 1959 and have, on that basis, the status of 'ratifying' consultative parties (the Kingdom of Belgium, the French Republic and the United Kingdom of Great Britain and Northern Ireland). Nine others acceded to the Antarctic Treaty subsequently and have the status of 'acceding' consultative parties (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). Finally, eight Member States have the status

of non-consultative parties (the Kingdom of Denmark, the Republic of Estonia, the Hellenic Republic, Hungary, the Republic of Austria, the Portuguese Republic, Romania and the Slovak Republic). Only the consultative parties may participate in the decision-making at the meetings of the Contracting Parties.

Convention on the Conservation of Antarctic Marine Living Resources

5 The Convention on the Conservation of Antarctic Marine Living Resources was signed in Canberra on 20 May 1980 and entered into force on 7 April 1982 ('the Canberra Convention'). The preamble to the Canberra Convention states that the Contracting Parties:

'[recognise] the importance of safeguarding the environment and protecting the integrity of the ecosystem of the seas surrounding Antarctica;

[note] 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;

[are] conscious of the urgency of ensuring the conservation of Antarctic marine living resources;

[consider] that it is essential to increase knowledge of the Antarctic marine ecosystem and its components so as to be able to base decisions on harvesting on sound scientific information;

[believe] that the conservation of Antarctic marine living resources calls for international co-operation … with the active involvement of all States engaged in research or harvesting activities in Antarctic waters;

[recognise] 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;

[recall] the action already taken by the Antarctic Treaty Consultative Parties including in particular the Agreed Measures for the Conservation of Antarctic Fauna and Flora, as well as the provisions of the Convention for the Conservation of Antarctic Seals;

[bear] in mind the concern regarding the conservation of Antarctic marine living resources expressed by the Consultative Parties at the Ninth Consultative Meeting of the Antarctic Treaty and the importance of the provisions of Recommendation IX-2 which led to the establishment of the present Convention;

...

[recognise], in the light of the foregoing, that it is desirable to establish suitable machinery for recommending, promoting, deciding upon and coordinating the measures and scientific studies needed to ensure the conservation of Antarctic marine living organisms'.

6 Article I(1) to (3) of the Canberra Convention provides:

'1. This Convention applies to the Antarctic marine living resources of the area south of 60º 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 Convergence.

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

7 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; and

(c) prevention of changes or minimisation of the risk of changes in the marine ecosystem which are not potentially reversible over two or three decades, taking into account the state of available knowledge of the direct and indirect impact of harvesting, the effect of the introduction of alien species, the effects of associated activities on the marine ecosystem and of the effects of environmental changes, with the aim of making possible the sustained conservation of Antarctic marine living resources.’

8 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.

3. For the purposes of this Convention, “Antarctic Treaty Consultative Parties” means the Contracting Parties to the Antarctic Treaty whose representatives participate in meetings under Article IX of the Antarctic Treaty.’

9 Article VII of the Canberra Convention states:

‘1. The Contracting Parties hereby establish and agree to maintain the [CCAMLR].

2. Membership in the [CCAMLR] shall be as follows:

...

(c) each regional economic integration organisation which has acceded to this Convention pursuant to Article XXIX shall be entitled to be a Member of the [CCAMLR] during such time as its States members are so entitled;

...’

10 Article IX(1) and (2) of the Canberra Convention is worded as follows:

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

(a) facilitate research into and comprehensive studies of Antarctic marine living resources and of the Antarctic marine ecosystem;

(b) compile data on the status of and changes in population of Antarctic marine living resources and on factors affecting the distribution, abundance and productivity of harvested species and dependent or related species or populations;

(c) ensure the acquisition of catch and effort statistics on harvested populations;

...

(f) formulate, adopt and revise conservation measures on the basis of the best scientific evidence available, subject to the provisions of paragraph 5 of this Article;

...

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

(a) the designation of the quantity of any species which may be harvested in the area to which this Convention applies;

...

(d) the designation of protected species;

(e) the designation of the size, age and, as appropriate, sex of species which may be harvested;

(f) the designation of open and closed seasons for harvesting;

(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;

(h) regulation of the effort employed and methods of harvesting, including fishing gear, with a view inter alia to avoiding undue concentration of harvesting in any region or sub-region;

(i) the taking of such other conservation measures as the [CCAMLR] considers necessary for the fulfilment of the objective of this Convention, including measures concerning the effects of harvesting and associated activities on components of the marine ecosystem other than the harvested populations.'

11 Article XXIX(2) of the Canberra Convention states:

'This Convention shall be open for accession by regional economic integration organisations constituted by sovereign States which include among their members one or more States Members of the [CCAMLR] and to which the States members of the organisation have transferred, in whole or in part, competences with regard to the matters covered by this Convention. The accession of such regional economic integration organisations shall be the subject of consultations among Members of the [CCAMLR].'

12 The European Union approved the Canberra Convention by Council Decision 81/691/EEC of 4 September 1981 (OJ 1981 L 252, p. 26) and it became a party thereto on 21 April 1982.

13 To date, twelve Member States have become parties to the Canberra Convention, six (the Kingdom of Belgium, the Republic of Bulgaria, the Federal Republic of Germany, the French Republic, the Republic of Poland and the United Kingdom) before the European Union acceded to the convention and six (the Kingdom of Spain, the Hellenic Republic, the Italian Republic, the Kingdom of the Netherlands, the Republic of Finland and the Kingdom of Sweden) after its accession.

General framework for the establishment of marine protected areas

14 At its session held from 24 October to 4 November 2011, the CCAMLR adopted the conservation measure entitled 'General framework for the establishment of CCAMLR Marine Protected Areas', recitals 1 and 6 of which state:

'The [CCAMLR],

Recalling its endorsement of the work program of the Scientific Committee to develop a representative system of Antarctic Marine Protected Areas (MPAs) with the aim of conserving marine biodiversity in the Convention Area, and in accordance with the decision at the World Summit on Sustainable Development (WSSD) in 2002 to achieve a representative network of MPAs by 2012,

...

Recognising that CCAMLR MPAs aim to contribute to sustaining ecosystem structure and function, including in areas outside the MPAs, maintain the ability to adapt in the face of climate change, and reduce the potential for invasion by alien species, as a result of human activity'.

15 Paragraph 2 of the General framework for the establishment of CCAMLR Marine Protected Areas provides:

'CCAMLR MPAs shall be established on the basis of the best available scientific evidence, and shall contribute, taking full consideration of Article II of the [Canberra Convention] where conservation includes rational use, to the achievement of the following objectives:

(i) the protection of representative examples of marine ecosystems, biodiversity and habitats at an appropriate scale to maintain their viability and integrity in the long term;

(ii) the protection of key ecosystem processes, habitats and species, including populations and life-history stages;

(iii) the establishment of scientific reference areas for monitoring natural variability and long-term change or for monitoring the effects of harvesting and other human activities on Antarctic marine living resources and on the ecosystems of which they form part;

(iv) the protection of areas vulnerable to impact by human activities, including unique, rare or highly biodiverse habitats and features;

(v) the protection of features critical to the function of local ecosystems;

(vi) the protection of areas to maintain resilience or the ability to adapt to the effects of climate change.'

EU law

The multiannual position

16 The Council adopted Decision 13908/1/09 REV 1 of 19 October 2009 on the position to be adopted, on behalf of the European Union in the CCAMLR for the period 2009-14. That decision was replaced, for the period 2014-19, by Decision 10840/14 of 11 June 2014 ('the multiannual position').

17 It is apparent from Article 1 of the multiannual position that the rules which it lays down apply 'when [the CCAMLR] is called upon to adopt decisions having legal effects in relation to matters pertaining to the Common Fisheries Policy'.

18 Article 2 of the multiannual position provides that the specification of the EU position to be taken in the annual meeting of the CCAMLR is to be conducted in accordance with Annex II thereto. That annex establishes a simplified procedure under which:

'... the European Commission shall transmit to the Council or to its preparatory bodies in sufficient time before each annual Meeting of the CCAMLR a written document setting out the particulars of the proposed specification of the Union position for discussion and endorsement of the details of the position to be expressed on the Union's behalf.

If, in the course of further meetings, including on the spot, it is impossible to reach an agreement in order for the Union position to take account of new elements, the matter shall be referred to the Council or its preparatory bodies.'

Regulations (EC) No 600/2004 and (EC) No 601/2004

19 Recitals 4 and 5 of 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) state:*

'(4) Some of the technical measures adopted by the CCAMLR have been transposed by Council Regulation (EEC) No 3943/90 of 19 December 1990 on the application of the system of observation and inspection established under Article XXIV of the [Canberra Convention (OJ 1990 L 379, p. 45)], and by Council Regulation (EC) No 66/98 of 18 December 1997 laying down certain conservation and control measures applicable to fishing activities in the Antarctic [(OJ 1998 L 6, p. 41)].

(5) The adoption by the CCAMLR of new conservation measures and the updating of those already in force since the above Regulations were adopted means that the latter should be amended later.'

20 Article 1(1) of Regulation No 600/2004 *provides:*

'This Regulation lays down technical measures concerning the activities of [EU] fishing vessels which take and keep on board marine organisms taken from marine living resources in the area covered by the [Canberra Convention].'

21 Recital 6 of 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) states:*

*'With a view to implementing the new conservation measures adopted by the CCAMLR, [*Regulation (EEC) No 3943/90, Regulation (EC) No 66/98 and Council Regulation (EC) No 1721/1999 of 29 July 1999 laying down certain control measures in respect of vessels flying the flag of non-Contracting Parties to the [Canberra Convention] (OJ 1999 L 203, p. 14)] *should be repealed and replaced by a single Regulation bringing together the special provisions for the control of fishing activities arising from the [European Union's] obligations as a Contracting Party to the Convention*.'

22 Article 1(1) of Regulation No 601/2004 *provides:*

'This Regulation lays down general rules and conditions for the application by the [European Union] of:

(a) control measures applicable to fishing vessels flying the flag of a Contracting Party to the [Canberra Convention] operating in the Convention area in waters located beyond the limits of national jurisdictions;

(b) a system to promote compliance by vessels flying the flag of a non-Contracting Party to the [Canberra] Convention with conservation measures laid down by the [CCAMLR].'

Regulation (EU) No 1380/2013

23 Recital 13 of 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), states:

‘An ecosystem-based approach to fisheries management needs to be implemented, environmental impacts of fishing activities should be limited and unwanted catches should be avoided and reduced as far as possible.’

24 Article 2(1) to (3) of Regulation No 1380/2013 provides:

‘1. The [common fisheries policy (CFP)] shall ensure that fishing and aquaculture activities are environmentally sustainable in the long-term and are managed in a way that is consistent with the objectives of achieving economic, social and employment benefits, and of contributing to the availability of food supplies.

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.’

25 Article 4(1) of Regulation No 1380/2013 states:

‘For the purpose of this Regulation the following definitions shall apply:

...

(9) “ecosystem-based approach to fisheries management” means an integrated approach to managing fisheries within ecologically meaningful boundaries which seeks to manage the use of natural resources, taking account of fishing and other human activities, while preserving both the biological wealth and the biological processes necessary to safeguard the composition, structure and functioning of the habitats of the ecosystem affected, by taking into account the knowledge and uncertainties regarding biotic, abiotic and human components of ecosystems’.

Background to the cases

26 The CCAMLR has set itself the objective of creating a network of MPAs in the Antarctic, an objective which is expressly supported by the European Union.

27 Against that background, in preparation for the European Union’s participation in future annual meetings of the CCAMLR, the Council established in 2014, on the basis of Article 218(9) TFEU, the multiannual position, which lays down, inter alia, a simplified procedure for Council decision-making regarding the position to be adopted by the European Union in the CCAMLR on matters pertaining to the CFP. Under that procedure, before each annual meeting of the CCAMLR the Commission submits the relevant documents to the preparatory bodies of the Council. In practice, the Commission sends those documents either to the Council Working Party on Fisheries or to the Permanent Representatives Committee (Coreper).

Case C-626/15

28 On 31 August 2015 the Commission, acting on the basis of the simplified procedure established by the Council, submitted to the Council Working Party on Fisheries an informal document ('non-paper') to which the draft of the reflection paper was annexed. On pages 4 and 5 of that reflection paper, reference is made, inter alia, to the need to protect the ecosystem in the Weddell Sea and, in particular, the animals which form part of it, such as marine mammals, penguins and seabirds.

29 The Commission proposed that the reflection paper be submitted to the Scientific Committee of the CCAMLR on behalf of the European Union alone as, in its view, that paper fell within the area of the CFP.

30 At its meeting of 3 September 2015, the Council Working Party approved the content of the reflection paper, but took the view that the paper fell within the area of environmental policy rather than that of the CFP and that it therefore had to be submitted on behalf of the European Union and its Member States. In the light of that difference of views, it was decided to refer the matter to Coreper.

31 Coreper examined the matter at its meeting of 11 September 2015. After an exchange of views, the Chairman of Coreper declared that Coreper had approved the submission of the reflection paper and had decided that it was to be submitted to the CCAMLR at its 34th annual meeting on behalf of the European Union and its Member States.

32 In a declaration entered in the minutes of the meeting of 11 September 2015, the Commission expressed its disagreement on this last point. It stated that it was willing to submit the reflection paper to the CCAMLR on behalf of the European Union and its Member States, as Coreper had decided, but that it reserved the right to bring legal proceedings.

33 By application of 23 November 2015, the Commission brought an action for annulment of the 2015 decision in so far as it approves the submission of the reflection paper to the CCAMLR on behalf of the European Union and its Member States.

Case C-659/16

34 On 30 August 2016, the Commission, again acting on the basis of the simplified procedure, submitted an informal document ('non-paper') to the Council Working Party on Fisheries. On 6 September 2016, that document was supplemented by three draft proposals concerning the creation or support for the creation of MPAs in the Antarctic, namely the MPA in the Weddell Sea, an MPA in the Ross Sea and an MPA in the East Antarctic, and by a proposal for the creation of a group of special areas for scientific study of the marine area concerned, of climate change and of the retreat of ice shelves ('the envisaged measures').

35 The Commission proposed that the envisaged measures be submitted to the CCAMLR on behalf of the European Union alone, as in its view they fell within the CFP. In order to comply with the deadline for the submission of proposals to the annual meeting of the CCAMLR, the Commission sent those measures at the same time to the CCAMLR Secretariat, on behalf of the European Union.

36 At its meetings on 15 September and 22 September 2016, the Council Working Party on Fisheries examined the content of the envisaged measures. It took the view that they fell within the area of environmental policy, and not that of the CFP, so that, first, they had to be submitted to the CCAMLR on behalf of the European Union and its Member States and, second, they could not be approved under the simplified procedure established by the Council as that procedure was limited solely to matters relating to the CFP. The matter was then referred to Coreper, and subsequently to the Council.

37 On 10 October 2016 in Luxembourg, at its 3487th meeting, the Council approved the submission of the envisaged measures to the CCAMLR on behalf of the European Union and its Member States. It also decided that those measures established the position to be adopted by the European Union at the 35th annual meeting of the CCAMLR.

38 In a declaration entered in the minutes of the meeting, the Commission insisted that the envisaged measures fell within the area, referred to in Article 3(1)(d) TFEU, of exclusive EU competence regarding the conservation of marine biological resources, and that there was therefore no justification for submitting them on behalf of the European Union and its Member States.

39 In 2016, at its 35th annual meeting, the CCAMLR decided to give effect to two of the measures submitted and supported by the European Union, namely the establishment of an MPA in the Ross Sea and the creation of a number of special areas for scientific study of the marine area concerned, of climate change and of the retreat of ice shelves. In addition, the CCAMLR decided to continue discussions on the European Union's other two proposals.

40 By application of 20 December 2016, the Commission brought an action for annulment of the 2016 decision in so far as it approves the submission of the envisaged measures to the CCAMLR, at the 35th annual meeting of that body, on behalf of the European Union and its Member States.

Procedure before the Court and forms of order sought

41 In Case C-626/15, the Commission claims that the Court should:

– annul the 2015 decision in so far as it approves the submission of the reflection paper to the CCAMLR on behalf of the European Union and its Member States;

– order the Council to pay the costs.

42 The Council contends that the Court should:

– dismiss the action as inadmissible and, in any event, as unfounded;

– order the Commission to pay the costs.

43 By decisions of 7 April, 14 April, 29 April, 2 May and 3 May 2016, the President of the Court respectively granted (i) the Federal Republic of Germany, (ii) the Kingdom of Spain and the Kingdom of the Netherlands, (iii) the French Republic and the Republic of Finland, (iv) the Portuguese Republic and (v) the Hellenic Republic, the Kingdom of Sweden and the United Kingdom leave to intervene in support of the Council in this case.

44 In its rejoinder, the Council requested, on the basis of Article 60(1) of the Rules of Procedure of the Court of Justice, that the case be decided by the Grand Chamber.

45 By decision of the President of the Court of 10 February 2017, proceedings in Case C-626/15 were stayed until the close of the written part of the procedure in Case C-659/16.

46 In Case C-659/16, the Commission claims that the Court should:

– annul the 2016 decision in so far as it approves the submission of the envisaged measures to the CCAMLR, at the 35th annual meeting of that body, on behalf of the European Union and its Member States;

– order the Council to pay the costs.

47 The Council contends that the Court should:

– dismiss the action as unfounded;

– order the Commission to pay the costs.

48 By decision of 25 April 2017, the President of the Court granted 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 leave to intervene in support of the Council in this case.

49 By decision of the President of the Court of 10 February 2017, Cases C−626/15 and C−659/16 were joined for the purposes of the oral procedure and of the judgment.

50 After the close of the written procedure on 16 September 2016, the Council requested permission on 16 November 2016, in reliance upon Article 128(2) of the Rules of Procedure, to produce three new items of evidence in Case C−626/15, namely a note regarding establishment of the position of the European Union for the 35th annual meeting of the CCAMLR so far as concerns the envisaged measures, the text of the position thus adopted and a declaration of the Commission relating thereto.

51 By decision of the President of the Court of 10 January 2017, after the Advocate General had been heard, the three new items of evidence produced after the close of the written part of the procedure were admitted in Case C−626/15.

The request that the oral procedure be reopened

52 By letter received at the Court Registry on 27 June 2018, the Council requested that the oral procedure be reopened. In support of its request, it submitted, in essence, that the argument set out by the Advocate General in her Opinion concerning the alleged full exercise of the environmental competence of the European Union when the 2015 and 2016 decisions were adopted had not been raised by the Commission in its pleadings or at the hearing and, moreover, had not been debated between the parties at the hearing.

53 In that regard, it should be noted that, under Article 83 of the Rules of Procedure, the Court may at any time, after hearing the Advocate General, order the reopening of the oral part of the procedure, inter alia where the case must be decided on the basis of an argument which has not been debated between the parties or the interested persons referred to in Article 23 of the Statute the Court of Justice of the European Union (see, to that effect, judgment of 26 September 2018, *Belastingdienst/Toeslagen (Suspensory effect of the appeal)*, C-175/17, EU:C:2018:776, paragraph 20).

54 In the present instance, the Court holds, after hearing the Advocate General, that there is no need to decide the case on the basis of an argument which has not been debated before the Court.

55 Consequently, the Council's request that the oral procedure be reopened must be rejected.

The actions

Admissibility of the action in Case C−626/15

Arguments of the parties

56 The Council, supported by 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, contests the admissibility of the action in Case C−626/15, on the ground that the 2015 decision is not a challengeable act.

57 It submits, first, that the 2015 decision was adopted not by an institution but by Coreper, which is not endowed with a decision-making power of its own. Second, that decision is not such as to 'produce legal effects', within the meaning of Article 263 TFEU, since it approves a mere reflection paper designed to

gather views on the establishment of an MPA in the Weddell Sea. The 2015 decision cannot be classified as approval of a position of the European Union, for the purposes of Article 218(9) TFEU, as such classification requires the international body at issue to be about to adopt an act producing legal effects. Here, however, the precise content of the proposal to establish an MPA in the Weddell Sea was not yet known when the 2015 decision was adopted and it was not certain that such a proposal would be formulated.

58 The Commission contends that the action brought in Case C−626/15 is admissible. The 2015 decision is attributable to the Council, which is an institution. Moreover, it is intended to produce legal effects since it obliges the Commission to lodge the reflection paper on behalf of the European Union and its Member States, and not on behalf of the European Union alone. Furthermore, it amounts to adoption of a position for the purposes of Article 218(9) TFEU.

Findings of the Court

59 In accordance with settled case-law, any decision adopted by an institution, office, body or agency of the European Union, irrespective of its nature or form, which is intended to have legal effects constitutes a challengeable act for the purposes of Article 263 TFEU (see, inter alia, judgment of 28 April 2015, *Commission* v *Council*, C−28/12, EU:C:2015:282, paragraph 14).

60 First of all, as set out in Article 240(1) TFEU, Coreper consists of the permanent representatives of the governments of the Member States of the European Union and is responsible for preparing the work of the Council and for carrying out the tasks assigned to it by the latter. Thus, the framers of the Treaties intended to make Coreper an auxiliary body of the Council, for which it carries out preparation and implementation work (see, to that effect, judgment of 19 March 1996, *Commission* v *Council*, C−25/94, EU:C:1996:114, paragraphs 25 and 26).

61 Whilst the function of preparing the work of the Council and of carrying out the tasks assigned by it does not give Coreper the power to take decisions, a power which belongs, under the Treaties, to the Council (see, to that effect, judgment of 19 March 1996, *Commission* v *Council*, C−25/94, EU:C:1996:114, paragraph 27), the fact remains that, as the European Union is a union based on the rule of law, a measure adopted by Coreper must be amenable to judicial review where it is intended, as such, to produce legal effects and therefore falls outside the framework of that preparation and implementation function.

62 Next, so far as concerns determination of the effects which the 2015 decision is intended to produce, in accordance with settled case-law it is necessary to look to its substance, which must be assessed on the basis of objective criteria such as the context in which that measure was adopted, its content and its author's intention, provided that the latter can be determined objectively (see, to that effect, judgment of 17 July 2008, *Athinaïki Techniki* v *Commission*, C−521/06 P, EU:C:2008:422, paragraph 42).

63 So far as concerns, first, the context of the 2015 decision, it was adopted with a view to persuading the CCAMLR to establish an MPA in the Weddell Sea.

64 Second, as to that decision's content, in deciding that the reflection paper was to be submitted on behalf of the European Union and its Member States, Coreper obliged the Commission not to depart from that position in the exercise of its power to represent the European Union externally when participating at the 34th annual meeting of the CCAMLR.

65 Third, as regards the intention of the measure's author, it is apparent from the minutes of the Coreper meeting of 11 September 2015, which constitute material enabling that intention to be determined objectively, that the 2015 decision had the objective of establishing definitively the Council's and, accordingly, the European Union's position so far as concerns submission of the reflection paper to the CCAMLR on behalf of the European Union and its Member States, and not on behalf of the European Union alone.

66 In the light of the foregoing, the 2015 decision was thus indeed intended to produce legal effects and is therefore a challengeable act.

67 Accordingly, the plea of inadmissibility raised by the Council in Case C-626/15 must be rejected.

Substance

68 The Commission puts forward the same two pleas in law in support of each of its actions. The first, and principal, plea is to the effect that the 2015 and 2016 decisions ('the contested decisions') were adopted in breach of the exclusive competence which Article 3(1)(d) TFEU confers upon the European Union in the area of the conservation of marine biological resources. The second plea, put forward in the alternative, is to the effect that those decisions were adopted in breach of the exclusive competence which the European Union has for that same purpose by virtue of Article 3(2) TFEU.

The first plea: breach of Article 3(1)(d) TFEU

– *Arguments of the parties*

69 The Commission contends that the reflection paper and the envisaged measures should have been submitted to the CCAMLR on behalf of the European Union alone, and not on behalf of the European Union and its Member States, because they fall entirely or, in any event, mainly within the exclusive competence which the European Union possesses, by virtue of Article 3(1)(d) TFEU, in the area of the conservation of marine biological resources.

70 In support of its plea, the Commission submits, first, that that competence concerns not only conservation measures adopted in order to safeguard fishing opportunities, but all measures to conserve marine biological resources. The reference to the CFP in Article 3(1)(d) TFEU must be understood as intended to make it clear that the conservation of marine biological resources constitutes a specific competence within the more general competence of the European Union regarding fisheries, and not as limiting the exclusive competence arising from that provision solely to measures for the conservation of marine biological resources that are adopted in the context of fisheries policy.

71 Second, although the creation of an MPA is in part a response to environmental concerns, that fact is not sufficient for the view to be taken that a measure of that kind falls within environmental policy. Since Article 11 TFEU provides that environmental protection requirements must be integrated into the definition and implementation of the European Union's policies and activities, the mere fact that a measure pursues an objective or includes a component connected with protection of the environment does not necessarily mean that that measure falls within the competence which the European Union and the Member States share in environmental matters. That measure's centre of gravity would also have to lie on the side of environmental policy. In the present instance, the centre of gravity of the reflection paper and of the envisaged measures, and, accordingly, that of the contested decisions, tilt towards the exclusive competence which the European Union possesses in respect of conservation of marine biological resources.

72 In any event, even if that exclusive competence is limited solely to protection measures falling within the CFP, that is to say, to measures intended to safeguard fishing opportunities, the reflection paper and the envisaged measures nevertheless fall within such a competence since, as Regulation No 1380/2013 states, the CFP is founded on an ecosystem-based approach.

73 The Council and all the intervening Member States contend that the first plea is unfounded. The words 'under the [CFP]', used in Article 3(1)(d) TFEU, are intended to limit the exclusive competence, possessed by the European Union in the context of the CFP, solely to conservation measures adopted in order to safeguard species concerned by fisheries. Whilst it is true that the reflection paper and the envisaged measures were concerned with the adoption of conservation measures, those measures fall, however, not

within the area of fisheries, but within that of protection of the environment, which, itself, falls within a competence that the European Union shares with the Member States.

74 In the alternative, some of the intervening Member States submit that the reflection paper and the envisaged measures fall within the competence which, in accordance with Article 4(3) TFEU, the European Union and the Member States may exercise in parallel in respect of research and that, on that basis, they had to be submitted to the CCAMLR on behalf of the European Union and its Member States.

– *Findings of the Court*

75 *First of all, althoughthe contested decisions merely state that the reflection paperandthe envisaged measuresmust be submitted tothe CCAMLRon behalf of the European Union and its Member States, the fact remains that, inasmuch as they approve the content of that paper and of those measures without amendment, the competence to adopt the contested decisions is determined by the nature and the content of the paper and measures and by their aim and context.*

76 *Indeed, it should be recalled that, according to settled case-law, in order to identify the competence to which decisions are to be linked, it is necessary to specify their appropriate legal basis by having regard to objective factors that include the context, content and aims pursued by the decisions at issue(*judgment of 18 December 2014, *United Kingdom* v *Council*, C−81/13, EU:C:2014:2449, paragraph 35).

77 In addition, according to settled case-law, if examination of an EU measure reveals that it pursues several purposes or that it comprises several components and if one of these is identifiable as the main or predominant purpose or component, whereas the others are merely incidental, the measure must then be founded on a single legal basis, namely that corresponding to the main purpose or component (*see, to that effect,* judgments of 24 June 2014, *Parliament* v *Council*, C−658/11, EU:C:2014:2025*,* paragraph *43and the case-law cited, and of* 4 September 2018, *Commission* v *Council (Agreement with Kazakhstan)*, C−244/17, EU:C:2018:662*,* paragraph *37and the case-law cited).*

78 It is only exceptionally that an EU measure must be founded simultaneously on several legal bases, that is to say, when it simultaneously pursues a number of objectives or has several components that are inseparably linked, without one being incidental to the other (see, to that effect, *judgment of* 11 September 2003, *Commission* v *Council*, C−211/01, EU:C:2003:452, paragraph *40).*

79 *In the present instance, all the parties agree that the reflection paperandthe envisaged measuresare capable of falling within a number of areas of EU competence. On the other hand, they disagree as to the legal basis upon which the contested decisionshad to adopted.* Consequently, the case-law recalled inparagraphs *76 to 78 of the present judgment must be applied to*the reflection paper and the envisaged measures.

80 In that regard, the Commission contends that the main purpose and component of the reflection paper and the envisaged measures fall within the exclusive competence which the European Union possesses in respect of conservation of marine biological resources under the CFP, in accordance with Article 3(1)(d) TFEU. In its submission, that provision applies to the adoption of any document or to any measure directed at conserving marine resources, whatever the objective pursued.

81 Accordingly, in order to determine whether the plea is well founded, it is necessary, first, to specify the scope of the exclusive competence of the European Union in respect of conservation of marine biological resources under Article 3(1)(d) TFEU and then, second, to determine whether, as the Commission contends, the exclusive or main purpose and component of the reflection paper and the envisaged measures fall within that area of competence.

82 So far as concerns, in the first place, the extent of the exclusive competence that the European Union possesses under Article 3(1)(d) TFEU, it should be noted that that provision states that the abovementioned competence relates to the conservation of marine biological resources ‘under the [CFP]’.

83 On the basis of the ordinary meaning of those words it must be held that only conservation of marine biological resources which is undertaken under the CFP, and which is therefore inseparable from the CFP, is referred to in Article 3(1)(d) TFEU.

84 It is therefore only in so far as the conservation of marine biological resources is pursued under the CFP that it falls within the exclusive competence of the European Union and is, consequently, as Article 4(2)(d) TFEU expressly states, excluded from the competence that the European Union and its Member States share in the area of agriculture and fisheries.

85 That conclusion is supported by the origins of Article 3(1)(d) TFEU.

86 Initially, the Treaties prescribed, among the competences of the European Union, the establishment of a common agricultural policy including fisheries, without separate mention of the conservation of marine resources. Under that competence, the European Union adopted, on 20 October 1970, Regulation (EEC) No 2141/70 of the Council laying down a common structural policy for the fishing industry (OJ, English Special Edition 1970 (III), p. 703), Article 5 of which specifically empowered the Council to adopt measures for the conservation of fishery resources. That power was then reproduced in the Act concerning the conditions of accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland (OJ, English Special Edition, 27 March 1972, p. 14), an act in respect of which the Court has held that, at the end of the transitional period laid down by it, the Member States cease to have competence in respect of that area (see, to that effect, judgments of 14 July 1976, *Kramer and Others*, 3/76, 4/76 and 6/76, EU:C:1976:114, paragraph 40, and of 5 May 1981, *Commission* v *United Kingdom*, 804/79, EU:C:1981:93, paragraphs 17 and 27).

87 As regards, in the second place, determination of the exclusive or main purpose or component of the reflection paper and the envisaged measures, *as has been recalled in paragraph 76of the present judgmentthey must be determined on the basis of objective factors amenable to judicial review, namely the context, content and aims pursued by the decisions at issue*.

88 So far as concerns, first, the context, given that the reflection paper and the envisaged measures were intended to be submitted to the CCAMLR, it is necessary to *examine the tasks assigned by the Canberra Convention to that international body and the rights andobligations of the States representedwithin it*.

89 *In that regard, it is, admittedly, apparent from Article IX ofthe Canberra Convention, read in conjunction with Article II thereof,that a certain number of tasks assigned to the CCAMLRrelate to the conservation of A*ntarctic marine living resources that are fished.

90 *However, first of all, the introductory paragraph of the preamble to the Canberra Convention explains that that convention was adopted in view of the importance of safeguarding the environment and protecting the integrity of the e*cosystem of the seas surrounding Antarctica.

91 *Next, the scope of the* Canberra Convention is not limited merely to fishery-related resources but extends, under Article I(1) and (2), to all species of living organisms that form part of the Antarctic marine ecosystem, including birds.

92 Furthermore, Article V(2) of the Canberra Convention states that the parties to that convention which are not parties to the Antarctic Treaty must undertake to observe the measures agreed under that treaty 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, which goes well beyond the obligations normally entered into in the context of a fisheries management agreement.

93 *Finally, the* General framework for the establishment of CCAMLR Marine Protected Areas*does not assignfishing activities or the conservation of fishery resources as the main purpose of those areas*. *On the other hand,* it is apparent from recitals 1 and 6 of that framework that the MPAs which the CCAMLR may

create have as objectives the maintenance of ‘marine biodiversity’, of ‘ecosystem structure and function’ and of the ecosystem’s ‘ability to adapt in the face of climate change’, and the reduction of ‘the potential for invasion by alien species, as a result of human activity’. Also, paragraph 2 of the framework, which is intended to define those objectives, states that MPAs must contribute to the achievement of ‘the protection of representative examples of marine ecosystems, biodiversity and habitats at an appropriate scale to maintain their viability and integrity in the long term’, to the ‘protection of key ecosystem processes, habitats and species’, to ‘the protection of areas vulnerable to impact by human activities’, and to ‘the protection of features critical to the function of local ecosystems’.

94 It follows that not only is the CCAMLR empowered to adopt various measures falling within environmental protection, but also that such protection constitutes the main purpose and the main component of those measures.

95 *So far as concerns, second, the contentofthe reflection paperandthe envisaged measures, it is true, as the Advocate General has observed in point 94of her Opinion, that particular attention is paid in them to regulation of the activity of fishing vessels. However, as is apparent from paragraphs 5.3and 5.4 of the proposal to create an MPA in the Weddell Sea,paragraphs 3and 7 of the proposal to create an MPA in the Ross Sea and the introductory paragraphand paragraph 10of the proposal for the* creation of special areas for scientific study of the marine area concerned, of climate change and of the retreat of ice shelves*, that regulation is intended to lay down a partial, but significant, prohibition on fishing, which wouldbe authorised only by way of exception, in order to preserve the ecosystems concerned or, in the case of that last measure, in order to enable study of the impact of climate change on the marine ecosystem that the measure covers.It follows that the very limited fishing opportunitiesprovided for by the aforesaid measures and reflection paper in the areas concerned are justified exclusively by environmental considerations*.

96 *Also, certain provisions of the reflection paperand the envisaged measures, such as paragraph 5.5 of the proposal to create an MPA in the Weddell Sea, paragraph 10 of the proposal to create an MPA in the Ross Sea and paragraph 14 of the proposal for the* creation of special areas for scientific study of the marine area concerned, of climate change and of the retreat of ice shelves, also prohibit the dumping or discharge of waste and therefore do not concern the regulation of the activities of fishing vessels as such.

97 *Consequently, whilst it is true thatthe reflection paperandthe envisaged measuresare concerned in part with regulation of the activities of fishing vesselsand therefore, in terms of content, go beyond environmental protection alone*, the latter nevertheless constitutes their main component.

98 *As regards, third, the objectives pursued bythe reflection paperand the envisaged measures, it is apparent both from their preambles and from their provisions that that paper and those measures are directed at*conserving, studying and protecting the ecosystems, biodiversity and habitats in the Antarctic, and at combating the harmful effects of climate change on that region, which is of the utmost importance for the world’s climate. Thus, the animal species which those measures are intended to protect are not limited to those that are fished commercially but include, inter alia, as mentioned on pages 4 and 5 of the reflection paper, in paragraph 3(1)(b) o*f the proposal to create an MPA in the Weddell Sea and inparagraph 3(i) of the proposal to create an MPA in the Ross Sea, certain birds and marine mammals*.

99 Therefore, the objectives pursued by *the reflection paper and the envisaged measures,* which *contribute to achievement of a number of the objectives, laid down in Article 191(1) TFEU, of EU environmental policy, bear out the conclusions drawn in paragraphs 94 and97 of the present judgment*.

100 It follows from the foregoing that, contrary to the Commission’s submissions, fisheries constitute only an incidental purpose of the reflection paper and the envisaged measures. As protection of the environment is the main purpose and component of that paper and those measures, it must be held that the contested decisions do not fall within the exclusive competence of the European Union laid down in Article 3(1)(d) TFEU, but within the competence under Article 4(2)(e) TFEU regarding protection of the environment that it shares, in principle, with the Member States.

101 That conclusion cannot be called into question by the fact that, under Article 11 TFEU, environmental protection requirements must be integrated into the definition and implementation of the European Union's policies and activities, including the CFP. Whilst the European Union must comply with that provision when it exercises one of its competences, the fact remains that environmental policy is expressly referred to in the Treaties as constituting an autonomous area of competence and that, consequently, when the main purpose and component of a measure relate to that area of competence, the measure must also be regarded as falling within that area of competence (see, to that effect, Opinion 2/00 (*Cartagena Protocol on Biosafety*) of 6 December 2001, EU:C:2001:664, paragraphs 34 and 42 to 44).

102 Likewise, whilst it is admittedly open to the European Union to integrate into the CFP matters designed to implement that policy within the framework of an ecosystem-based approach intended to minimise the negative impacts of fishing activities on the marine ecosystem and to avoid the degradation of the marine environment on account of those activities, as is illustrated by recital 13 of Regulation No 1380/2013 and Articles 2(3) and 4 of that regulation, such an approach pursues a much more limited objective than the objectives pursued by the reflection paper and the envisaged measures, set out in paragraph 98 of the present judgment, and cannot therefore justify those measures being integrated into the CFP.

103 In the light of the foregoing, the first plea must be dismissed in its entirety as unfounded.

The second plea, put forward in the alternative: breach of Article 3(2) TFEU

– *Arguments of the parties*

104 In the alternative, the Commission contends that, if submission of the reflection paper and the envisaged measures to the CCAMLR were not to fall within the competence of the European Union referred to in Article 3(1)(d) TFEU, the European Union should nevertheless have put forward that paper and those measures on its behalf alone, by virtue of Article 3(2) TFEU.

105 The Commission points out that, under Article 3(2) TFEU, the European Union has exclusive competence for the conclusion of an international agreement where that agreement may affect common rules or alter their scope. That competence concerns not only the conclusion of international agreements but also, as in the present instance, the adoption of implementing measures by the bodies established under such agreements. Accordingly, assuming that participation in the vote that is to lead to the adoption of the envisaged measures within the CCAMLR falls within a shared competence, that competence has become exclusive for two reasons. First, those measures conflict with the multiannual position, according to which positions within that international body must be adopted by the European Union acting alone. Second, establishment of the MPAs and special research areas proposed may affect a number of rules contained in Regulations No 600/2004 and No 601/2004.

106 Furthermore, the Commission submits that the Council has wrongly taken the view that shared competence necessarily results in external action of the European Union and its Member States being joint action. In actual fact, according to the Commission, the Council refuses to respect the fact that, in a supposed area of shared competence, the European Union may indeed act alone and may do so by applying the decision-making procedure laid down by the Treaties.

107 In its defence, the Council, supported by all the intervening Member States, submits, first, that the envisaged measures, if they were to be adopted, are not liable to affect the scope of the multiannual position, because, as is apparent from Article 1 thereof and point 2 of Annex I thereto, the sphere of application of the multiannual position was limited on purpose by the Council to matters pertaining to the CFP. The envisaged measures do not fall within that policy.

108 The Commission's argument concerning the two regulations referred to does not meet the evidential requirements resulting from the Court's case-law. As the Court held in the judgment of 4 September 2014, *Commission* v *Council* (C−114/12, EU:C:2014:2151, paragraph 75), it is for the party which pleads that the external competence of the European Union is exclusive to prove this. However, the Commission has not

put forward any evidence or arguments to establish that the external competence of the European Union invoked by it on the basis of Article 3(2) TFEU is exclusive. In any event, the envisaged measures do not contain any provision that may affect the application of Regulations No 600/2004 and 601/2004, because those regulations concern fishing activities and not, as in the present instance, activities for the conservation of biological resources.

109 Finally, as regards the argument that the Council has confused shared competence and the joint nature of the action, although this argument was set out by the Commission in its applications the Council chose not to respond to it.

– *Findings of the Court*

110 So far as concerns the argument relating to the application of Article 3(2) TFEU, it should be recalled, first of all, that under that provision the European Union has exclusive competence for the conclusion of an international agreement when its conclusion may affect common rules or alter their scope.

111 Thus, in reserving exclusive competence for the European Union to adopt an agreement in the circumstances specified in Article 3(2) TFEU, the EU legislature seeks by that provision to prevent the Member States from being able, unilaterally or collectively, to undertake obligations with third States which may affect common rules or alter their scope (see, to that effect, Opinion 2/15 (*EU-Singapore Free Trade Agreement*) of 16 May 2017, EU:C:2017:376, paragraph 170).

112 In the light of that objective, Article 3(2) TFEU must therefore be interpreted, in order to preserve its practical effect, as meaning that, although its wording refers solely to the conclusion of an international agreement, it also applies, at an earlier stage, when such an agreement is being negotiated and, at a later stage, when a body established by the agreement is called upon to adopt measures implementing it.

113 Next, it is apparent from settled case-law that there is a risk that common EU rules may be adversely affected by international commitments undertaken by the Member States, or that the scope of the rules may be altered, such as to justify an exclusive external competence of the European Union where those commitments fall within the scope of those rules. However, a finding that there is such a risk does not presuppose that the area covered by the international commitments and that covered by the EU rules coincide fully. In particular, the scope of EU rules may be affected or altered by international commitments where the latter fall within an area which is already covered to a large extent by such rules (Opinion 1/13 (*Accession of third States to the Hague Convention*) of 14 October 2014, EU:C:2014:2303, paragraphs 71 to 73).

114 Furthermore, such a risk of common EU rules being affected may be found to exist where the international commitments at issue, without necessarily conflicting with those rules, may have an effect on their meaning, scope and effectiveness (see, to that effect, judgment of 4 September 2014, *Commission* v *Council*, C−114/12, EU:C:2014:2151, paragraph 102, and Opinion 1/13 (*Accession of third States to the Hague Convention*) of 14 October 2014, EU:C:2014:2303, paragraph 85).

115 It is for the party concerned to put forward evidence or arguments to establish that the exclusive nature of the external competence of the European Union on which it seeks to rely has been disregarded (see, to that effect, judgment of 4 September 2014, *Commission* v *Council*, C−114/12, EU:C:2014:2151, paragraph 75).

116 In the present instance, the Commission has not put forward such evidence or arguments.

117 In the first place, in order to establish that the international commitments at issue fall within an area already covered by EU rules, the Commission merely refers to the content of the multiannual position and of Regulations No 600/2004 and No 601/2004, without analysing whether their sphere of application covers ‘to a large extent’ those of the international commitments.

118 In that regard, it follows from the analysis set out in paragraphs 89 to 92 of the present judgment that the Canberra Convention empowers the CCAMLR, to which the reflection paper and the envisaged measures were addressed, to adopt measures the main component and purpose and, therefore, the sphere of application of which is essentially the protection of the environment.

119 On the other hand, it is apparent that the area covered by the multiannual position and by Regulations No 600/2004 and No 601/2004 is, in essence, limited to fisheries. First, it is apparent from Article 1 of the multiannual position and point 2 of Annex I thereto that the multiannual position covers the positions to be taken on behalf of the European Union within the CCAMLR when that body is called upon to adopt decisions having legal effects in areas connected with the CFP. Second, it follows from recitals 4 and 5 of Regulation No 600/2004 and recital 6 of Regulation No 601/2004 and from the wording of Article 1 of each of those regulations that the latter are essentially intended to govern fishing activities in the area covered by the Canberra Convention.

120 Thus, the sphere of application of the international commitments concerned cannot be regarded, in any event, as falling 'to a large extent' within that already covered by the multiannual position or by Regulations No 600/2004 and No 601/2004.

121 In the second place, the Commission has not provided sufficient evidence or arguments relating to the nature of the alleged risk of an effect.

122 So far as concerns the multiannual position, the Commission merely states that it does not lay down an obligation that the European Union must act jointly with the Member States. In that regard, it need only be noted that Article 1 of the multiannual position specifies that the latter concerns solely establishment of the position of the European Union in the annual meeting of the CCAMLR when that body is called upon to adopt decisions having legal effects in relation to matters pertaining to the CFP. It follows that, in any event, the multiannual position did not predetermine in the slightest whether the contested decisions, whose main component and purpose fall within environmental policy, had to be adopted by the European Union alone or by the European Union acting with the participation of the Member States.

123 Likewise, so far as concerns Regulations No 600/2004 and No 601/2004, the Commission has admittedly set out a number of common rules which, in its submission, could be adversely affected by the envisaged measures if they were to be adopted and has thus put forward some evidence or arguments that might demonstrate that the envisaged measures fall, at any rate in part, within the sphere of application of Regulations No 600/2004 and No 601/2004. However, it has not identified, in order to demonstrate that the envisaged measures may affect the meaning, scope and effectiveness of those regulations, the provisions of those measures which are said to give rise to those adverse effects, or even specified in what the adverse effects consist.

124 Therefore, the Commission's argument that the contested decisions were adopted in breach of Article 3(2) TFEU must be rejected as unfounded.

125 As for the Commission's argument that the Council has confused the concepts of 'shared competence' and of 'joint nature of external action' and, consequently, has not accepted that, in an area of shared competence, the European Union may act alone, that argument cannot succeed.

126 It is true that the Court has had occasion to state that the mere fact that international action of the European Union falls within a competence shared between it and the Member States does not preclude the possibility of the required majority being obtained within the Council for the European Union to exercise that external competence alone (see, to that effect, judgment of 5 December 2017, *Germany* v *Council*, C−600/14, EU:C:2017:935, paragraph 68, citing paragraph 244 of Opinion 2/15 (*EU-Singapore Free Trade Agreement*) of 16 May 2017, EU:C:2017:376).

127 That said, in accordance with settled case-law, when the European Union decides to exercise its powers they must be exercised in observance of international law (see, to that effect, inter alia, judgment of

3 September 2008, *Kadi and Al Barakaat International Foundation* v *Council and Commission*, C−402/05 P and C−415/05 P, EU:C:2008:461, paragraph 291 and the case-law cited).

128 In the specific context of the system of Antarctic agreements, exercise by the European Union of the external competence at issue in the present cases that excludes the Member States would be incompatible with international law.

129 It is clear from reading Article VII(2)(c) of the Canberra Convention in conjunction with Article XXIX(2) thereof that a regional economic integration organisation, such as the European Union, can accede to that convention and become a member of the CCAMLR only if its Member States are members. On the other hand, no analogous condition is laid down tying the presence of those States within the CCAMLR to the fact that the regional organisation concerned is also a member of that commission.

130 Consequently, the Canberra Convention does not grant regional integration organisations, such as the European Union, a fully autonomous status within the CCAMLR.

131 That is all the more the case given that the set of treaties and international agreements applicable to the Antarctic forms an organised and coherent system, headed by the oldest and most general treaty among them, namely the Antarctic Treaty, a fact which is reflected by Article V of the Canberra Convention. It follows from Article V that even the parties to the Canberra Convention which are not parties to the Antarctic Treaty acknowledge the special obligations and responsibilities of the Antarctic Treaty consultative parties and, consequently, observe the various measures recommended by them. Therefore, the Antarctic Treaty consultative parties have primary responsibility for developing the aforesaid set of Antarctic agreements and for safeguarding its coherence.

132 The European Union is one of the Contracting Parties to the Canberra Convention to which the provisions of Article V(1) and (2) of that convention are addressed, since it is not a party to the Antarctic Treaty. It follows, in particular, that it is required to acknowledge the special obligations and responsibilities of the Antarctic Treaty consultative parties, including of those of its Member States which have that status, whether or not they are members of the CCAMLR.

133 In those circumstances, to permit the European Union to have recourse, within the CCAMLR, to the power which it has to act without the participation of its Member States in an area of shared competence, when, unlike it, some of them have the status of Antarctic Treaty consultative parties, might well, given the particular position held by the Canberra Convention within the system of Antarctic agreements, undermine the responsibilities and rights of those consultative parties — which could weaken the coherence of that system of agreements and, ultimately, run counter to Article V(1) and (2) of the Canberra Convention.

134 It follows that the second plea, put forward in the alternative, must be dismissed.

135 As neither of the two pleas has been upheld, the action must be dismissed in its entirety.

Costs

136 Article 138(1) of the Rules of Procedure provides that the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. In the present instance, since the Commission has been unsuccessful, it must, in accordance with the forms of order sought by the Council, be ordered to bear its own costs and to pay those incurred by the Council.

137 In addition, Article 140(1) of the Rules of Procedure provides that the Member States and institutions which have intervened in the proceedings are to bear their own costs. Consequently 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 are to bear their own costs.

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

1. **Dismisses the actions;**

2. **Orders the European Commission to bear its own costs and to pay those incurred by the Council of the European Union;**

3. **Orders 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 to bear their own costs.**

[Signatures]

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* Language of the case: French.