JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber)
6 December 2001 *

In Case T-196/99,

Area Cova, SA, established in Vigo (Spain),

Armadora José Pereira, SA, established in Vigo,

Armadores Pesqueros de Aldán, SA, established in Vigo,

Centropesca, SA, established in Vigo,

Chymar, SA, established in Vigo,

Eloymar, SA, established in Estribela (Spain),

Exfaumar, SA, established in Bueu (Spain),

Farpespan, SL, established in Moaña (Spain),

Freiremar, SA, established in Vigo,

Hermanos Gandón, SA, established in Cangas (Spain),

Heroya, SA, established in Vigo,

Hiopesca, SA, established in Vigo,

José Pereira e Hijos, SA, established in Vigo,

Juana Oya Pérez, residing in Vigo,

Manuel Nores González, residing in Marín (Spain),

Moradiña, SA, established in Cangas,

* Language of the case: Spanish.

Navales Cerdeiras, SL, established in Camariñas (Spain),

Nugago Pesca, SA, established in Bueu,

Pesquera Austral, SA, established in Vigo,

Pescaberbés, SA, established in Vigo,

Pesquerías Bígaro Narval, SA, established in Vigo,

Pesquera Cíes, SA, established in Vigo,

Pesca Herculina, SA, established in Vigo,

Pesquera Inter, SA, established in Cangas,

Pesquerías Marinenses, SA, established in Marín,

Pesquerías Tara, SA, established in Cangas,

Pesquera Vaqueiro, SA, established in Vigo,

Sotelo Dios, SA, established in Vigo,

represented by A. Creus Carreras and A. Agustinoy Guilayn, lawyers,

applicants,

v

Council of the European Union, represented by R. Gosalbo Bono, J. Carbery and M. Sims, acting as Agents,

and

Commission of the European Communities, represented by T. Van Rijn and J. Guerra Fernandez, acting as Agents, with an address for service in Luxembourg,

defendants,

APPLICATION for compensation pursuant to Article 235 EC and the second paragraph of Article 288 EC in respect of loss suffered by the applicants as a result of (1) the acceptance by the Commission and the Council of a total allowable catch for 1995 of 27 000 tonnes of Greenland halibut in the Regulatory Area defined in the Convention on Future Multilateral Cooperation in the North West Atlantic Fisheries and (2) the conclusion of a bilateral agreement between the Community and Canada and the adoption of Council Regulation (EC) No 1761/95 of 29 June 1995 amending, for the second time, Regulation (EC) No 3366/94 laying down for 1995 certain conservation and management measures for fishery resources in the Regulatory Area as defined in the Convention on Future Multilateral Cooperation in the North-west Atlantic Fisheries (OJ 1995 L 171, p. 1) establishing, with effect from 16 April 1995, a quota of 5 013 tonnes of Greenland halibut for Community vessels,

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Third Chamber),

composed of: J. Azizi, President, K. Lenaerts and M. Jaeger, Judges,

Registrar: J. Palacio González, Administrator,

having regard to the written procedure and further to the hearing on 20 March 2001,

gives the following

Judgment

Legislative background

1 The Convention on Future Multilateral Cooperation in the North-West Atlantic Fisheries ('the NAFO Convention'), approved by Council Regulation (EEC) No 3179/78 of 28 December 1978 concerning the conclusion by the European Economic Community of the Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries (OJ 1978 L 378, p. 1), is designed in particular to promote the conservation, optimum utilisation and rational management of the fishery resources of the North-West Atlantic area as defined in Article 1.1 of the Convention (the 'Regulatory Area').

2 The parties to the NAFO Convention, which include the Community, may, in particular, limit catches of certain species in certain parts of the Regulatory Area. For that purpose, the parties set a total allowable catch ('TAC') and then determine the share of the catch available to each of them, including the Community. Finally, the Council allocates the share available to the Community — the Community quota — among the Member States in accordance with Article 8(4) of Council Regulation (EEC) No 3760/92 of 20 December 1992 establishing a Community system for fisheries and aquaculture (OJ 1992 L 389, p. 1).

Factual background

3 In September 1994 the Fisheries Commission of the North-West Atlantic Fisheries Organisation ('the NAFO') set a TAC for Greenland halibut for the first time. It amounted to 27 000 tonnes and applied in 1995 in NAFO sub-areas 2 and 3.

4 Council Regulation (EC) No 3366/94 of 20 December 1994 laying down for 1995 certain conservation and management measures for fishery resources in the Regulatory Area (OJ 1994 L 363, p. 60) recorded, in the seventh recital in its preamble, that the maximum catch level for Greenland halibut in NAFO sub-areas 2 and 3 in 1995 was as yet unallocated among NAFO Contracting Parties, that the NAFO Fisheries Commission was to convene a meeting to decide the allocation and that catches of Greenland halibut would be authorised in 1995 and counted against the quotas decided for Member States.

5 At a special meeting held from 30 January to 1 February 1995, the NAFO Fisheries Commission decided to make available to the Community a share of the TAC for Greenland halibut amounting to 3 400 tonnes.

6 The Community considered that allocation to be insufficient and, through the Council, raised an objection on 3 March 1995 pursuant to Article XII.1 of the NAFO Convention.

7 On the same day, apparently in reaction to the submission of that objection by the Council, Canada amended its legislation in order to be able to inspect vessels beyond its exclusive economic zone. The possibility of having recourse to that type of inspection had been provided for by a statute for the protection of coastal

fisheries, approved by the Canadian Parliament on 12 May 1994. Those legislative amendments took place in the context of the growing irritation expressed by the Canadian Government since the beginning of 1994 in respect of the Spanish fleet fishing for Greenland halibut in the Regulatory Area, and which manifested itself in particular by an increased presence of Canadian patrol vessels in that area. In the same spirit, the Canadian Government had formulated a reservation on 10 May 1994 as to the jurisdiction of the International Court of Justice in The Hague in relation to the resolution of international fisheries disputes affecting Canada. On 9 March 1995, on the basis of that freshly amended legislation, the Canadian authorities boarded the vessel *Estai* belonging to the applicant José Pereira e Hijos SA, which was fishing in the Regulatory Area. Amongst other incidents, it should be mentioned in particular that, on 26 March 1995, a Canadian patrol vessel cut the fishing tackle of the vessel *Pescamauro Uno*, and that, on 5 April 1995, the vessel *José Antonio Nores* was harassed and damaged by Canadian patrol vessels.

8 By Regulation (EC) No 850/95 of 6 April 1995 amending Regulation No 3366/94 (OJ 1995 L 86, p. 1), the Council established an autonomous Community quota limiting Community catches of Greenland halibut in NAFO sub-areas 2 and 3 for 1995 to 18 630 tonnes. The regulation made it clear that '... this autonomous quota should respect the conservation measure established for this resource, namely, the TAC of 27 000 tonnes... [and that] it [was] necessary to provide for the possibility of stopping the fishery once the TAC [had] been reached, even before the autonomous quota [was] exhausted'.

9 In order to end the diplomatic dispute between the Community and the Canadian Government arising from the matters described in paragraphs 6 and 7 above, on 20 April 1995 those parties signed an agreement, constituted in the form of an agreed minute, an exchange of letters, an exchange of notes and the annexes thereto, on fisheries in the context of the NAFO Convention, approved by Council Decision 95/586/EC of 22 December 1995 (OJ 1995 L 327, p. 35; 'the bilateral fisheries agreement'). By Council Decision 95/546/EC of 17 April 1995 on the signature and provisional application of the Agreement between the European Community and Canada on fisheries in the context of the NAFO Convention (OJ 1995 L 308, p. 79), the Council had authorised the Commission to sign that agreement and stated that the latter was to be applied provisionally upon its signature.

10 In accordance with that bilateral fisheries agreement, the Council adopted Regulation (EC) No 1761/95 of 29 June 1995 amending, for the second time, Regulation No 3366/94 (OJ 1995 L 171, p. 1), which established for 1995, with effect from 16 April 1995, a Community quota of 5 013 tonnes for catches of Greenland halibut in NAFO sub-areas 2 and 3.

11 By Regulation (EC) No 2565/95 of 30 October 1995 concerning the stopping of fishing for Greenland halibut by vessels flying the flag of a Member State (OJ 1995 L 262, p. 27), the Commission recorded that the Community quota for 1995 established by Regulation No 1761/95 was exhausted and therefore, in accordance with Article 21(3) of Council Regulation (EEC) No 2847/93 of 12 October 1993 establishing a control system applicable to the common fisheries policy (OJ 1993 L 261, p. 1), declared a halt to fishing for Greenland halibut in NAFO sub-areas 2 and 3.

12 At the time of the facts, the applicants, who operated refrigeration vessels, were fishing, or wished to fish, for Greenland halibut in the Regulatory Area.

Procedure and forms of order sought

13 On 16 October 1995, the applicants and three associations of vessel owners brought an action before the Court of First Instance for the annulment of Regulation No 1761/95, in which they pleaded that the bilateral fisheries agreement was unlawful. On 25 January 1996, they brought an action for the annulment of Regulation No 2565/95. Those actions were dismissed as inadmissible by the Court of First Instance (Orders of the Court of First Instance of 8 July 1999 in Case T-194/95 *Area Cova and Others* v *Council* [1999] ECR II-2271 and Case T-12/96 *Area Cova and Others* v *Council and Commission* [1999] ECR II-2301). The appeals against those orders were dismissed by the

Court of Justice (Orders of the Court of Justice of 1 February 2001 in Joined Cases C-300/99 P and C-388/99 P *Area Cova and Others* v *Council* [2001] ECR I-983 and Case C-301/99 P *Area Cova and Others* v *Council and Commission* [2001] ECR I-1005).

14 It was in those circumstances that, by an application lodged at the Registry of the Court of First Instance on 2 September 1999, the applicants brought the present action for compensation.

15 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Third Chamber) decided to open the oral procedure.

16 By letter lodged at the Registry on 12 January 2001, the applicants requested as an inquiry measure the calling of certain witnesses who attended the meeting of the NAFO Fisheries Commission of September 1994.

17 The parties presented oral argument and replied to the oral questions of the Court of First Instance, particularly concerning the relevance of the inquiry measure sought, at the hearing on 20 March 2001.

18 The applicants claim that the Court should:

— declare the defendants liable under Article 288 EC for the loss suffered by them on account of the Commission's attitude during the negotiations held under the NAFO Convention with a view to establishing a TAC for Greenland halibut for 1995, on account of the Council's failure to challenge

the TAC which was established, and on account of the negotiation and approval of the bilateral fisheries agreement and the adoption of Regulation No 1761/95;

— order the defendants to pay by way of damages, in respect of material damage, an amount to be agreed between the parties but between EUR 23 836 750 and EUR 50 393 979, and, in respect of non-material damage, EUR 25 000 per vessel concerned;

— order the hearing of four witnesses who attended the NAFO Fisheries Commission meeting of September 1994 and the production of the defendants' internal documents concerning the preparation of that meeting and the meeting from January to February 1995, and concerning the negotiations with Canada;

— order the defendants to pay the costs.

19 The Council and the Commission contend that the Court should:

— dismiss the action as unfounded;

— order the applicants to pay the costs.

Law

20 The applicants base their action primarily upon the Community's liability for fault and, in the alternative, on its no-fault liability.

I — *Liability for fault*

21 The applicants rely on three factors, namely, first, the illegality of the Commission's conduct during the negotiations under the NAFO Convention in September 1994 for establishing a TAC for Greenland halibut for 1995, second, the illegality of the Council's action in adopting Regulation No 3366/94 in December 1994, and, third, the illegality of the action of the Council and the Commission in concluding and approving the bilateral fisheries agreement and adopting Regulation No 1761/95.

A — *The illegality of the Commission's conduct during the negotiations under the NAFO Convention for establishing a TAC for Greenland halibut for 1995*

Arguments of the parties

22 The applicants argue that, although the Community institutions have a certain discretion, that power is not unlimited. In their submission, when they exercise their powers, the institutions must act diligently, adopting their decisions in

compliance with the principles of sound administration, requiring an exhaustive examination of the circumstances and the consequences of their action.

23 They reject the Commission's argument that the latter's conduct during the negotiations in the NAFO was to be assessed under the liability criteria applying to legislative measures. The Commission's conduct could not in any way be regarded as a legislative measure that had to be complied with.

24 They argue that the Commission is the only institution with the power to defend the interests of Community vessel owners in the context of the NAFO.

25 In that respect, they accuse it of failing, first, to demonstrate its disagreement with the establishment by the NAFO Fisheries Commission, at its meeting in September 1994, of a TAC for Greenland halibut of 27 000 tonnes for 1995, and, second, to recommend to the Council that it should lodge an objection to that TAC, in accordance with Article XII of the NAFO Convention, that being the only legal instrument capable of preventing that TAC from becoming enforceable against the Community.

26 They maintain that those omissions are unlawful.

27 In the first place, the approved TAC of 27 000 tonnes was devoid of scientific foundation, the scientific advisory board of the NAFO (the 'scientific advisory board') having recommended a much larger TAC of 40 000 tonnes following its

meeting from 8 to 22 June 1994. The applicants note that, on the basis of that recommendation, the Community delegation had proposed a TAC of 40 000 tonnes to the NAFO Fisheries Commission at its meeting in September 1994, and that it had stated grounds for that proposal as being based on the best scientific information available. Moreover, the approved TAC of 27 000 tonnes caused very serious damage to the fishing industry of Member States which had fleets in the Regulatory Area, in that that quantity constituted a reduction of more than 50% from the previous level of catches in that area, which had been 62 000 tonnes.

28 Second, the omissions complained of arose from a clear breach by the Commission of the principles of sound administration.

29 The applicants claim that the Commission mishandled Community representation in the NAFO. First, during the six years preceding the conflict, six different heads were appointed in succession to lead the Community delegation. Continuity of the Community's action was therefore not assured. Second, coordination within the Community delegation had been insufficient, its members, who were always very numerous, having been largely unable for reasons of internal politics to agree on a common position. Third, the Community delegation did not negotiate sufficiently to obtain the support of other countries. Since the Community had only one vote, its position was easily nullified by Canada, which was always very active in negotiations with other NAFO members. Thus, during the meeting of the NAFO Fisheries Commission in September 1994, the Community had not been in a position to receive support for its proposal of a TAC of 40 000 tonnes.

30 That mismanagement of Community representation had a decisive influence on the attitude of the Community delegation before and during the meeting of the NAFO Fisheries Commission from 19 to 23 September 1994, and particularly during the last meeting of 23 September 1994, at which a 1995 TAC for Greenland halibut of 27 000 tonnes was adopted.

31 First, in the light of the conclusions of the meeting of the scientific advisory board from 8 to 22 June 1994, recommending a total catch of Greenland halibut not exceeding 40 000 tonnes for 1995, the Commission did not adopt its position until a few days before the meeting of the NAFO Fisheries Commission from 19 to 23 September 1994. That position, namely to agree to a TAC but, in the interests of Community fishermen, to fix its amount as high as possible, namely at 40 000 tonnes, was not given concrete expression in a negotiating strategy. Neither before that meeting from 19 to 23 September 1994 nor during the early days of the meeting, on which that point had not yet been officially discussed by the NAFO Fisheries Commission, did the Community delegation informally request the necessary support from other delegations. Nor did it defend a clear position during the coordination meetings with the delegations of the Member States of the Community, so that the latter did not know the position which it intended to adopt.

32 Moreover, during that meeting from 19 to 23 September 1994, the Commission delegation had been chaired by a newly-assigned official who was attending a NAFO meeting for the first time and was therefore not aware of the problems raised by the NAFO or the dynamics of meetings of that type.

33 As a result of the combination of those factors, the decisive meeting of the NAFO Fisheries Commission, specifically dealing with the question of establishing a TAC for Greenland halibut, took a turn that was harmful to the applicants.

34 The question at issue was dealt with in less than 10 minutes. Canada proposed a TAC of 15 000 tonnes, without any scientific argument. The Community delegation proposed a TAC of 40 000 tonnes. No delegation supported the Community's proposal. Norway then declared itself willing to accept the Canadian position, if it were increased to 27 000 tonnes. Russia immediately declared its support for the Norwegian proposal. Canada stated that it could

accept the proposed change. According to the applicants, the chairman of the NAFO Fisheries Commission then announced that a position receiving the support of major countries seemed to have to be accepted and asked whether anyone was opposed. At that point, the members of the Community delegation discussed among themselves and did not speak, so that the proposal for a TAC of 27 000 tonnes was accepted by general consensus, and thus without opposition from the Community delegation. The Spanish and Portuguese delegations, conscious of the fact that, if the matter of Greenland halibut rested there, it would no longer be possible to raise an objection to the agreement under Article XII of the NAFO Convention, informed the head of the Community delegation that he had to clarify his position on the initial vote. It was only later that the head of delegation asked the chairman of the NAFO Fisheries Commission to have a mention made in the minutes of the meeting that the Community had abstained on that question.

35 The applicants query why the Community delegation, even though, despite its passivity, it had thereby just saved at the last minute its right to raise an objection to the TAC of 27 000 tonnes under Article XII of the NAFO Convention, subsequently failed to recommend to the Council that that procedure should be initiated.

36 The Council has not submitted any arguments relating specifically to that alleged illegality.

37 The Commission argues, as to the legal principles to be applied in this case, that the relevant principles are those concerning the liability of the Community for legislative measures. As for the question whether the claim is well founded, it argues that the applicants have failed to indicate what higher rule of law protecting individuals has been infringed, or to demonstrate that any infringements of such a rule which may have taken place have been serious and obvious.

Findings of the Court

38 The applicants are accusing the Commission of irregular conduct, namely of participating in multilateral negotiations within the NAFO Fisheries Commission in September 1994 in a manner contrary to the principle of sound administration.

39 However, that conduct can have caused the loss alleged only to the extent that it had a decisive influence on the result of the negotiations, that is to say the decision of the NAFO Fisheries Commission to establish a 1995 TAC for Greenland halibut of 27 000 tonnes. In turn, that measure by an international organisation became binding on the Community, thus affecting the applicants and being capable of causing the loss claimed by them, only because it was confirmed by the Council in Regulation No 3366/94.

40 The loss claimed therefore originates not in the negotiations themselves and the role which the Commission may have played therein, and thus in a line of conduct claimed to be irregular, but in measures of a general nature of which the negotiations in question constituted a necessary and decisive preparatory phase, namely the decision of the NAFO Fisheries Commission to establish a TAC for Greenland halibut of 27 000 tonnes and Regulation No 3366/94 ratifying that decision in Community law.

41 The principles of liability applicable in this case are therefore those relating to the Community's liability for damage caused by legislative measures.

42 In such circumstances, Community law confers a right to reparation under the second subparagraph of Article 288 EC where three conditions are met, namely that the rule of law infringed is intended to confer rights on individuals, that the breach is sufficiently serious, and, finally, that there is a direct causal link between the breach of the obligation resting on the Community and the damage sustained by the injured parties (Case C-352/98 P *Bergaderm and Goupil* v *Commission* [2000] ECR I-5291, paragraph 42).

43 Concerning the first condition, it must be held that the applicants have not pleaded the infringement of a rule of law intended to confer rights upon individuals. The illegality they complain of, supposing it to be established, consists only in the infringement of the principle of sound administration.

44 The first condition for the Community's non-contractual liability coming into operation has therefore not been established.

45 As to the second condition, namely that there be a sufficiently serious breach of the rule of law in question, involving a serious and obvious disregard by a Community institution of the limits on its discretion (*Bergaderm and Goupil*, paragraph 43), it should be noted that the applicants are essentially arguing that the result of the negotiations, which they consider harmful, is contrary to the scientific data.

46 In that respect, it should first be pointed out that the adoption of measures for conserving marine resources forms an integral part of the common agricultural policy, whose objectives under Article 33 EC include ensuring the rational

development of production and assuring the availability of supplies (Case C-405/92 *Mondiet* v *Armement Islais* [1993] ECR I-6133, paragraph 24). When, in implementing that policy, Community institutions are called upon to evaluate a complex economic situation, they have a discretion which is not limited solely to the nature and scope of the measures to be taken but also, to some extent, to the finding of basic facts (Case C-179/95 *Spain* v *Council* [1999] ECR I-6475, paragraph 29).

47 It is settled case-law that that is so where, pursuant to Article 8(4) of Regulation No 3760/92, the Council fixes TACs and distributes fishing opportunities among Member States (Case C-4/96 *NIFPO and Northern Ireland Fishermen's Federation* v *Department of Agriculture for Northern Ireland* [1998] ECR I-681, paragraphs 41 and 42; *Spain* v *Council*, paragraph 29). It is *a fortiori* so where, as in this case, the conservation measure has been decided upon not by the Community alone but by an international organisation, in this case the NAFO, in which the Community participates in the same way as all the other contracting parties.

48 Concerning the conformity of the result of the negotiations with the scientific data, it should be noted that, in its meeting from 8 to 22 June 1994, the scientific advisory board found, on the subject of fishing for Greenland halibut in the Regulatory Area, that 'the impact of current fishing on stock gives cause for concern'. On the subject of sub-areas 2 and 3 of the Regulatory Area, it made the following finding:

'All the indicators of available stock seem to indicate a significant decline.... The scientific advisory board considers that any catch level over 40 000 tonnes for 1995 (current forecast including catches by non-contracting parties) will not be sufficient to limit fishing. Some have argued, on the basis of certain indicators of available stock, that catches for 1995 should be reduced substantially more in order to halt the tendency of the biomass to diminish'.

49 The scientific advisory board therefore found that the stock of Greenland halibut had considerably diminished, that a catch quota exceeding 40 000 tonnes would not be adequate to restrain fishing and that the latter, in 1995, had to be substantially reduced in order to halt the tendency of the biomass to diminish.

50 A TAC of 40 000 tonnes did not therefore constitute the optimum proposed solution but, at the most, the smallest reduction tolerable, namely the threshold from which fishing had started to be reduced. In the logic of the opinion, in order to halt the tendency of the biomass to diminish, the catch should even have been lower than that threshold.

51 The fixing of a TAC of 27 000 tonnes was therefore not in clear contradiction with the opinion of the scientific advisory board. Even supposing that the fixing of that figure was imputable to the Commission, the latter did not therefore obviously and seriously disregard the limits on its wide discretion.

52 The second condition for the Commission's non-contractual liability to come into operation has therefore not been established.

53 Concerning the third condition, regarding the existence of a direct causal link between the infringement imputable to the institution and the damage claimed, it should be noted that, even if the result of the negotiations were imputable to the Commission, it became binding upon the applicants only from the time of, and on account of, its ratification by the adoption of Regulation No 3366/94, and because, on that occasion, the Council implicitly decided not to raise an objection under Article XII of the NAFO Convention. If the Council had raised such an objection, the result of the negotiations would not have bound the Community and the damage which the applicants claim resulted would not have arisen.

54 The applicants argue that the result of the negotiations is nevertheless imputable to the Commission because the latter did not participate more skilfully in those negotiations in such a way as to avoid it, because it failed formally to demonstrate its disagreement, and because it did not recommend to the Council that it should lodge an objection in accordance with Article XII of the NAFO Convention.

55 First, concerning the skill with which the Commission participated in the negotiations, it should be noted that the disputed decision of the NAFO Fisheries Commission is the result of multilateral negotiations in which the Community had only one vote and in which it was confronted by the determination of the Canadian Government which made a priority of restricting fishing for Greenland halibut in the Regulatory Area.

56 It is undisputed that the result of the negotiations, namely a TAC of 27 000 tonnes, has been the result of a compromise between the Community proposal of a TAC of 40 000 tonnes and the Canadian proposal of a TAC of 15 000 tonnes. It was thus almost exactly midway between those two proposals.

57 Taking those factors into account, the result of the negotiations in question cannot be regarded as a reverse for the Community, still less a reverse which was the consequence of negligence imputable to it.

58 Second, concerning the argument that the Commission should have formally demonstrated its disagreement with the decision taken by the NAFO Fisheries Commission rather than abstaining, it is undisputed that the Community's proposal for a TAC of 40 000 tonnes found no support amongst the other members of that Commission, save for Japan, the proposal having been regarded as insufficiently restrictive.

59 It follows that a negative vote by the Commission would not, in any event, have prevented the adoption of the disputed decision.

60 Third, concerning the argument that the result of the negotiations is imputable to the Commission because the latter failed to recommend to the Council that it raise an objection to their result, it should be noted that, in the context of the procedure for adopting Regulation No 3366/94, the Council was in any event dealing with the question whether that result should be ratified. Moreover, it was aware of the specific question of fishing for Greenland halibut, since one of its members, the Kingdom of Spain, had been a member of the Community delegation present at the meeting of the NAFO Fisheries Commission and had taken great interest in that question.

61 The omission complained of is therefore not capable of exercising a decisive influence on the decision of the Council to ratify the result of the contested negotiations in Regulation No 3366/94.

62 The third condition for the Community's non-contractual liability to apply has therefore not been established either.

63 The claim for compensation must therefore be dismissed in so far as it alleges that the Commission acted unlawfully in the negotiations under the NAFO Convention for fixing a TAC for Greenland halibut for 1995.

B — *The alleged illegality of the Council's action in adopting Regulation No 3366/94*

Arguments of the parties

64 The applicants complain that the Council ratified the decision of the NAFO Fisheries Commission to fix a TAC for Greenland halibut of 27 000 tonnes in Regulation No 3366/94, and did not avail itself of the opportunity reserved by Article XII of the NAFO Convention to lodge an objection against that decision in order to prevent it from becoming binding on the Community. First, by not lodging an objection, the Council neglected the interests of the Community set out in Article 33 EC. It misused its discretion by not basing its decision to refrain from making an objection on any of the objectives set out in that article. Failure to oppose the TAC did not contribute to achieving those objectives, particularly the objectives of ensuring rational development of agricultural production and a fair standard of living for the agricultural community, stabilising markets and assuring the availability of supplies. The decision in question was, on the contrary, based on different criteria from those of Article 33 EC.

65 They concede that, in this case, the Council had in mind the need to ensure the rational development of resources and availability of supplies. However, that aim also had to be implemented in harmony with the other objectives referred to in Article 33(1) EC, mentioned above, and in particular with the need to effect appropriate adjustments by degrees. They consider that, taking into account all those objectives and the TAC proposed by the scientific advisory board, it would have been more than reasonable for the Council to lodge an objection to a TAC of 27 000 tonnes, which involved an obvious disproportion between the ensuring of the conservation of those resources and the damage caused to the Community vessel owners affected.

66 Second, the applicants argue that, where an institution adopts a measure restricting the fair standard of living of the community concerned, the maintenance of which is one of the aims of the common agricultural policy, it must accompany that measure with measures compensating for the damage caused, in order to reduce the impact of the restrictions introduced.

67 Those compensatory measures were not introduced even though they were necessary, in particular for the applicants. That omission was all the more blameworthy because aid had been granted in similar situations. By way of example, the applicants refer to Council Regulation (EC) No 2330/98 of 22 October 1998 providing for an offer of compensation to certain producers of milk and milk products temporarily restricted in carrying out their trade (OJ 1998 L 291, p. 4).

68 The applicants consider that Article 5 EC requires the community institutions to protect the interests set out in Article 33 EC, so that the Council should have acted on the basis of that provision in order to protect the interests of the Community fleet within the NAFO.

69 The Council and the Commission deny the existence of the alleged illegality.

Findings of the Court

70 The applicants complain that the Council did not use the facility provided by Article XII of the NAFO Convention, which allows a member of the NAFO Fisheries Commission, including the Community, to lodge an objection to a proposal with the Executive Secretary of that organisation, preventing that

proposal from becoming binding on that member, and they complain of the fact that, in its Regulation No 3366/94, it ratified the result of the negotiations, thereby accepting the establishment of a TAC for Greenland halibut of 27 000 tonnes.

71 In support of that complaint, they argue that that failure to raise an objection was unlawful because it could not be based on the objectives of the common agricultural policy, that it was disproportionate, and that it should have been accompanied by compensatory measures in favour of Community fishermen.

72 Since the alleged illegalities took place through the adoption of Regulation No 3366/94, which was a legislative measure, the applicants must establish, in accordance with the principles set out by the Court of Justice in *Bergaderm and Goupil*, that a rule of law intended to confer rights on individuals has been infringed, that the breach is sufficiently serious, and that there is a direct causal link between the infringement and the damage.

73 As for the first condition, the Court finds that the applicants have not argued the infringement of a rule of law intended to confer rights upon individuals.

74 The first condition for bringing the Community's non-contractual liability into operation has therefore not been established.

75 In addition, as regards the second condition, that there be a sufficiently serious breach of the rule of law in question, since the Council was called upon in this case, in accordance with the principles referred to in paragraphs 46 and 47 above,

to assess a complex economic situation, it enjoyed a discretion on the question whether it was appropriate to raise an objection. It should therefore be examined whether the Council obviously and seriously exceeded the limits of that wide discretion.

76 Concerning the first argument, that the Council's decision is not based on any of the objectives of Article 33 EC, it should be noted that the Council's decision to adopt Regulation No 3366/94, accepting the TAC decided upon by the NAFO Fisheries Commission, and, by implication, deciding not to submit any objection, concerns a measure for conserving marine resources. It is settled case-law that it follows from the very duties and powers which Community law has established and assigned to the institutions of the Community on the internal level that the Community has authority to enter into international commitments for the conservation of marine resources (Joined Cases 3/76, 4/76 and 6/76 *Kramer and Others* [1976] ECR 1279, paragraph 33; Case C-25/94 *Commission* v *Council* [1996] ECR I-1469, paragraph 42). Such a measure forms an integral part of the common agricultural policy and is intended in particular to implement the objectives under Article 33(1)(a) and (d) EC, namely to ensure the rational development of resources and the availability of supplies. It has, moreover, been held above that that measure was reconcilable with the opinion of the scientific advisory board, which found a decline of stock of Greenland halibut in the Regulatory Area and recommended a reduction in fishing efforts.

77 The first argument is therefore unfounded.

78 Concerning the second argument, to the effect that the conservation measure is disproportionate here having regard to the damage caused to Community vessel owners, it should be noted that in order to establish whether a provision of Community law is in conformity with the principle of proportionality it is necessary to ascertain whether the means which it employs are appropriate and necessary to attain the objective sought (see, for example, Case C-161/96

Südzucker Mannheim v *Hauptzollamt Mannheim* [1998] ECR I-281, paragraph 31). However, in an area in which, as here, the Community institutions have a broad discretion, the lawfulness of a measure can be affected only if the measure is manifestly inappropriate having regard to the objective pursued. The Court's review must be limited in particular if the Council has to reconcile divergent interests and thus select options within the context of the policy choices which are its own responsibility (Case C-44/94 *Fishermen's Organisations and Others* [1995] ECR I-3115, paragraph 37; Case C-150/94 *United Kingdom* v *Council* [1998] ECR I-7235, paragraph 87; Case C-17/98 *Emesa Sugar* v *Aruba* [2000] ECR I-675, paragraph 53).

79 In this case, the fixing of the TAC in question, which was ratified by Regulation No 3366/94, was a measure intended to conserve and manage fishing resources, in this case the stock of Greenland halibut in the Regulatory Area. It should be noted, first, that the need for that measure arose from the opinion of the scientific advisory board, which found that there was a significant decline in the stock of Greenland halibut and therefore recommended that a TAC be established for that species, stating that that TAC must not in any case exceed 40 000 tonnes and that a substantially lower quantity might be necessary in order to halt the diminution of the biomass. The fixing of a TAC of 27 000 tonnes was therefore not in itself contrary to the available scientific data. Second, the TAC's level of 27 000 tonnes was the result of multilateral negotiation between the contracting parties of the NAFO. It represented a compromise half-way between the opposing positions of the Community and Canada, which had advocated a TAC of 40 000 and 15 000 tonnes respectively.

80 Third, in pursuing the objectives of the common agricultural policy, the Community institutions must secure the permanent harmonisation made necessary by any conflicts between those objectives taken individually and, where necessary, give any one of them temporary priority in order to satisfy the demands of the economic factors or conditions in view of which their decisions are made (see, for example, Joined Cases T-466/93, T-469/93, T-473/93, T-474/93 and T-477/93 *O'Dwyer and Others* v *Council* [1995] ECR II-2071, paragraph 80; *Spain* v *Council*, cited above, paragraph 28), on condition,

however, that such harmonisation does not have the effect of rendering impossible the realisation of the other objectives (Case C-324/96 *Petridi* v *Simou and Others* [1998] ECR I-1333, paragraph 30).

81 In this case, as the Council rightly points out, the fixing of a TAC at a level avoiding the worsening of the diminution of the stock of fish concerned also served the interests of Community fishermen, because it has allowed the safeguarding of resources in the long term and therefore the continuation of fishing for Greenland halibut in the Regulatory Area. The file shows that although the TAC in question, which was 27 000 tonnes in 1995, was reduced once again to 20 000 tonnes from 1996 to 1998, it was possible to raise it in 1999 to 24 000 tonnes. According to the information obtained at the hearing, it has been possible to increase the quantity caught since then. Thus, the other objectives of the common agricultural policy have not been obviously sacrificed. On the contrary, an approach by the Council taking into account only the objective of ensuring a higher standard of living for certain fishermen in the short term would have involved a serious risk of making the objectives laid down in Article 33(1)(a) and (d) EC, namely ensuring the rational development of resources and availability of supplies, impossible to achieve (to that effect, see *Petridi*, paragraph 31).

82 Bearing those factors in mind, the Council's decision to ratify the result of the disputed negotiations in Regulation No 3366/94 and the implied decision not to raise an objection against that result was not clearly disproportionate.

83 The argument is therefore unfounded.

84 Concerning the applicants' third argument, that when ratifying the result of the negotiations of the NAFO Fisheries Commission the Council should have adopted compensatory measures, it should be remembered that omissions by the

Community institutions give rise to liability on the part of the Community only where the institutions have infringed a legal obligation to act under a provision of Community law (Case C-146/91 *KYDEP* v *Council and Commission* [1994] ECR I-4199, paragraph 58; Case T-113/96 *Dubois et Fils* v *Council and Commission* [1998] ECR II-125, paragraph 56).

85 The applicants fail to state, however, by virtue of which provision of Community law the Council was supposedly obliged to accompany the adoption of Regulation No 3366/94 with compensatory measures. They merely argue that Article 5 EC lays an obligation on the institutions to protect the Community interests set out in Article 33 EC and infer therefrom that the Council should have acted on the basis of that provision to protect the interests of the Community fleet from decisions causing loss adopted within the NAFO.

86 Those articles, which set out the objectives of the common agricultural policy and confer upon the Community the necessary powers to achieve them, are not intended to define a statutory obligation to pay compensation incumbent upon the Community. Moreover, as has been seen in paragraphs 76, 80 and 81 above, Regulation No 3366/94 was adopted in compliance with the objectives set out in Article 33 EC.

87 The third argument must also be rejected.

88 The application for compensation must therefore be dismissed in so far as it argues that the Council acted unlawfully in adopting Regulation No 3366/94.

C — *The alleged illegality of the Council's and the Commission's action in concluding and approving the bilateral fisheries agreement and adopting Regulation No 1761/95*

89 The applicants argue that the bilateral fisheries agreement and Regulation No 1761/95 are tainted with serious defects which make them unlawful, in that, first, they constitute a sufficient violation of higher rules of law protecting individuals, namely the principles of legal certainty, the protection of legitimate expectations, proportionality, relative stability and respect for traditional fishing rights, and, secondly, they derive from a misuse of powers.

Infringement of the principle of legal certainty

— Arguments of the parties

90 The applicants argue that the principle of legal certainty has been infringed in this case in two ways.

91 First, they argue, that principle precludes the starting-point for the temporal scope of a Community measure being fixed at a date prior to its publication. They note that retrospective application is possible only by way of exception. That may only happen, they argue, where it is for an appropriate purpose, it respects the

legitimate expectations of the persons concerned and those persons know with certainty the scope of the new obligations imposed upon them.

92 In this case, Regulation No 1761/95, adopted on 29 June 1995 and published on 21 July 1995, was applied retrospectively, since it fixed the catch limit for Greenland halibut by the Community fleet at 5 013 tonnes as from 16 April 1995.

93 That retrospective application was unlawful, since the three conditions for authorising it, on an exceptional basis, were not met in this case. First, the purpose of Regulation No 1761/95 corresponded not to the requirements of the common fisheries policy but to the desire to normalise commercial relations with Canada, and was not therefore an appropriate purpose. In addition, the legitimate expectations which the various Community measures aroused on the part of the applicants, who organised their activities on the basis of the forecasts deriving from those measures, were not complied with. Finally, the vessel owners were not able to know exactly the new conditions in which they could carry on their activities.

94 Secondly, the principle of legal certainty also implied a requirement of foreseeability and trustworthiness in the Community legislation, based on the need to protect the addressees of that legislation against unforeseeable amendments thereto.

95 From that point of view, the applicants complain of the fact that both the bilateral fisheries agreement and Regulation No 1761/95, although constituting a radical change in the legislation, were applicable during the year of their adoption.

96 They emphasise in that respect, first, the inadequacy of the explanations concerning the bilateral fisheries agreement, which, having been concluded and provisionally applied in April 1995, was not published until December 1995, and, second, the uncertainty of the period of application of Regulation No 1761/95.

97 They note that, according to Community case-law, the principle of legal certainty must be observed all the more strictly in the case of a measure liable to have financial consequences, in which case Community legislation must be certain and its application foreseeable by individuals, so that those concerned may know precisely the extent of the obligations which it imposes on them.

98 In this case, the bilateral fisheries agreement and Regulation No 1761/95 involved economic or financial consequences of vital importance for the applicants, who had given undertakings in the context of their commercial activity and found themselves unable to fulfil them on account of the radical change in Community legislation resulting from those two measures.

99 The applicants observe that, after the bilateral fisheries agreement, concluded on 20 April 1995 and published in December 1995, came the publication, on 21 April 1995, of Regulation No 850/95, which fixed an autonomous Community quota of 18 630 tonnes and which, having regard to its form and its method of publication, was a legal measure which should legally apply in all respects. They add that Regulation No 1761/95, by reason of its retrospective application, and Regulation No 850/95 were superimposed in their application. They raise the question of what would have happened if, on the basis of Regulation No 850/95, the vessel owners had fished quantities exceeding the quota fixed by Regulation No 1761/95. They therefore claim that there has been a fresh infringement of the principle of legal certainty.

100 The Council and the Commission consider that there has been no infringement of the principle of legal certainty in this case.

— Findings of the Court

101 The applicants argue, first, that Regulation No 1761/95, adopted on 29 June 1995 and published on 21 July 1995, involved retrospective effect by providing that the Community Greenland halibut quota of 5 013 tonnes applied from 16 April 1995 and that catches made after 15 April 1995 but before its adoption were to count against that quota. They argue that that retrospective effect was unlawful because it did not have an appropriate purpose, because it did not respect the legitimate expectations of the persons concerned, and because the latter did not know with certainty the scope of the new obligations imposed upon them.

102 In that respect, whilst it is true that Regulation No 1761/95 provides that catches already made on 16 April 1995 were to be counted against the quota which it establishes, it does not, in reality, affect fishing operations carried out between 16 April 1995 and the date of its entry into force, because, at that date, that quota had not yet been exhausted, the halt in fishing having been declared, as Regulation No 2565/95 shows, only with effect from 2 November 1995. Its only consequence, therefore, was to limit future fishing operations. It therefore did not have the effect of preventing fishing operations or making them retrospectively unlawful, but only the effect of applying new rules to the future effects of situations which arose under the earlier rules, which constitutes a current and legitimate practice in the area of the common agricultural policy (see, to that effect, Case 203/86 *Spain* v *Council* [1988] ECR 4563, paragraph 19).

103 The argument is therefore unfounded.

104 Second, the applicants complain of the unforeseeability of the applicable legislation, which they maintain constitutes an infringement of the principle of legal certainty. First, both the bilateral fisheries agreement and Regulation No 1761/95 constituted a radical change in the legislation. They should not

therefore have applied during the year of their adoption. Second, the implementation of those measures was marked by uncertainties and ambiguities. The applicants argue, in that respect, the inadequacy of the grounds for provisionally applying the bilateral fisheries agreement, the uncertainty as to the period of application of Regulation 1761/95, and the difficulty in reconciling those two measures with Regulation No 850/95, published on 21 April 1995, after the conclusion of the abovementioned agreement, which had fixed an autonomous Community quota of 18 630 tonnes, thus greatly exceeding the Community quota arising from that agreement and Regulation No 1761/95.

105 Concerning, first, the argument that legislation involving radical change was applied too suddenly, it must be held that that change was not unforeseeable for a prudent and well-informed economic operator. Whilst the applicants could fish for Greenland halibut in the Regulatory Area without any restriction until 1994, the NAFO Fisheries Commission's fixing of a TAC for that species for the first time in September 1994, brought to the applicants' knowledge by 31 December 1994 at the latest (see paragraph 4 above), necessarily warned them of the fact that such fishing would henceforth be subject to restrictions. Since that TAC was fixed at a level of 27 000 tonnes, it was certain that the Community quota would be less than that quantity, even if the exact level of that quota was still uncertain at that time. The fixing of the Community quota at 3 400 tonnes, by the NAFO Fisheries Commission at the beginning of February 1995, warned them that they could not be certain of enjoying a larger quota, or at the very least that the fixing of a larger quota was uncertain.

106 The change in question was all the more foreseeable in that the Canadian Government's wish to see fishing for Greenland halibut in the Regulatory Area made subject to major restrictions was well known from the beginning of 1994 onwards. In that respect, the applicants have noted that, from that time onwards, the Canadian Government displayed growing irritation with the Spanish fishing fleet operating in the Regulatory Area, which manifested itself in particular by an increased presence of Canadian patrol vessels in that area, by the formulation, on 10 May 1994, of a reservation to the jurisdiction of the International Court of

Justice in The Hague concerning the settlement of international fishing disputes affecting Canada, and by the adoption, on 12 May 1994, of a law enabling Canada to inspect vessels beyond its exclusive economic zone. The actions taken by Canada in response to the formulation of the objection of 3 March 1995 by the Community unequivocally show the determination of that country not to tolerate any non-compliance by the latter with the quota of 3 400 tonnes allocated by the NAFO Fisheries Commission.

107 In those circumstances, the bilateral fisheries agreement and Regulation No 1761/95, the purpose of which was to fix the Community quota at 10 542 tonnes, taking account of catches made by Community fishermen between 1 January 1995 and 16 April 1995, were not in themselves a sudden change but the culmination of a process which began with the fixing of the TAC of 27 000 tonnes in September 1994.

108 Moreover, as the Commission has rightly argued, since the waters of the Regulatory Area are not under Community jurisdiction, any decision on catches must be adopted by the Community in agreement with the other contracting parties of the NAFO. Furthermore, it is not possible to predict at which moment one or more of those countries will increase the pressure for a reduction of catches. Where that happens, the Commission can only negotiate, seeking to obtain the best results for the market and for Community fishermen. In the present case, it negotiated and obtained what must reasonably be regarded as the largest volume catch possible in the circumstances. It was, if not obvious, at least reasonably foreseeable that the final solution would be between the quota allocated to the Community by the NAFO Fisheries Commission, namely 3 400 tonnes, and that of 18 630 tonnes fixed by the Community in reaction to that allocation. The compromise finally reached by the Commission allowed Community fishermen to catch 10 542 tonnes of Greenland halibut, a quantity half-way between the two positions. The context, moreover, was a situation of conflict, which constituted a risk of damage for Community fishermen which the Community institutions had to avert. In those circumstances, the result of the negotiations cannot have surprised the applicants.

109 Concerning, secondly, the argument that the implementation of the bilateral fisheries agreement and Regulation No 1761/95 was marked by uncertainties and ambiguities, the applicants argue first that the reasons stated for the provisional application of that agreement were insufficient. That argument is irrelevant, however, given that the applicants have not stated how such a procedural defect has affected their legal certainty. Moreover, the applicants were not at any time directly confronted by the bilateral fisheries agreement, and thus, *a fortiori*, its provisional application, that agreement and its immediate application having been brought into operation in relation to Community economic operators only by Regulation No 1761/95.

110 The applicants then argue that the period of application of Regulation No 1761/95 was uncertain. They fail, however, to state the nature of that uncertainty. In that respect, Regulation No 1761/95 shows that the Community quota in question was 5 013 tonnes and that it applied from 16 April 1995. The grounds for that regulation show that that quota and that date are the result of bilateral negotiations between the Community and Canada. The very title of that regulation indicates that the measures laid down therein apply 'for 1995'. Moreover, it is in the very nature of a quota that its duration expires when it is exhausted, the date of occurrence of which is uncertain by nature. The authority which established the quota cannot therefore be blamed for not fixing that date.

111 Finally the applicants argue that the bilateral fisheries agreement and Regulation No 1761/95 are hard to reconcile with Regulation No 850/95 of 6 April 1995, published on 21 April 1995, and thus after the conclusion of that agreement. Regulation No 850/95 had fixed an autonomous Community quota of 18 630 tonnes, thus exceeding the Community quota resulting from those measures.

112 In that respect, it should be noted that Regulation No 850/95 constituted the follow-up to the Council's decision to raise an objection against the Community quota of 3 400 tonnes fixed by the NAFO Fisheries Commission. Since, in accordance with Article XII(1) of the NAFO Convention, the effect of submitting

the objection had been that the decision fixing that quota did not become binding for the Community, a legal void existed. By adopting Regulation No 850/95, the Council intended to fill that void by fixing an autonomous Community quota.

113 The fact that Regulation No 850/95 was published after the adoption of the bilateral fisheries agreement was not capable of affecting the legal certainty of the vessel owners, since that agreement was not intended to produce direct effects in relation to economic operators. The provisions of that agreement were implemented, and therefore made enforceable against the latter, only by Regulation No 1761/95, adopted on 29 June 1995. The grounds for that regulation clearly show that its aim was to apply the bilateral fisheries agreement, and therefore repeal Regulation No 850/95.

114 Moreover, the applicants themselves stated in their application (point 106) on the subject of Regulation No 850/95:

'The Presidency and the Commission explained that this was a protective measure, in anticipation of the overall agreement, and that it was necessary in order to enable the fishermen to continue their activities, a legal void thus being avoided.'

115 That shows that they did not therefore regard that regulation as a definitive resolution of the conflict, on which they relied.

116 It follows that the principle of legal certainty has not been infringed.

Infringement of the principle of the protection of legitimate expectations

— Arguments of the parties

117 The applicants maintain that the Community authorities allowed them to have well-founded hopes of a positive resolution, from their point of view, of the conflict underlying this action, namely in the prospect that existing circumstances would be maintained, or at least that the reduction in fishing opportunities would not be significant. In that regard, they refer, first, to the Community objection to the allocation of the TAC; second, to Regulation No 850/95; third, to the statements of Community representatives who had expressed their determination in favour of maintaining fishing rights, especially to the intervention of the fisheries Commissioner before the Parliament on 15 March 1995 and a declaration of the Commission distributed on the same day to the vessel owners concerned, reaffirming their legitimate right to fish in the Regulatory Area, whatever the position of Canada might be; and, fourth, to the fact that the Commission itself encouraged several vessel owners, including the applicants, to devote their main activity to the fishing in question, by granting aid for experimental fishing projects. By the same token, the applicants point out that one of the conditions for granting that aid, in accordance with Article 14(2)(c) of Council Regulation (EEC) No 4028/86 of 18 December 1986 on Community measures to improve and adapt structures in the fisheries and aquaculture sector (OJ 1986 L 376, p. 7), was that the project had to relate to fishing zones whose estimated potential suggested stable and profitable exploitation in the long term.

118 They argue that this legitimate expectation was seriously thwarted by the conclusion of the bilateral fisheries agreement and the adoption of Regulation No 1761/95. They denounce the fact that the Community authorities further failed to examine the need to take transitional measures in order to mitigate the harmful consequences which their decisions would have upon them. The adoption of the bilateral fisheries agreement, incorporated into Regulation

No 1761/95, involved the immediate cessation of fishing activity by some of the applicants' vessels and caused significant changes in fishing yields. Under the principle of the protection of legitimate expectations, the Community authorities ought, first, not to have given immediate effect to Regulation No 1761/95 so as to give economic operators sufficient time to adjust their conduct to the new situation and, second, to have adopted appropriate transitional measures so as to allow passage from the previous situation to the amended situation.

119 The applicants note that neither the Council nor the Commission have proved the existence of justification for their action.

120 The Council and the Commission consider that the principle of the protection of legitimate expectations has not been infringed in this case.

— Findings of the Court

121 The applicants claim to have had a legitimate expectation of a favourable outcome of the dispute and, in particular, in the maintenance of the fishing opportunities which they had enjoyed before the dispute. In that respect, it should be noted, first, as the Commission rightly maintains, that the allocation of quotas cannot in principle create a situation of legitimate expectation for economic operators.

122 Whilst the protection of legitimate expectations is one of the fundamental principles of the Community, economic operators cannot have a legitimate expectation that an existing situation which is capable of being altered by the

Community institutions in the exercise of their discretion will be maintained, especially in an area such as the common agricultural policy, in which the institutions have a wide discretion. It follows that economic operators cannot claim a vested right to the maintenance of an advantage arising from Community legislation and which they enjoyed at a given time (see, for example, Case C-402/98 *ATB and Others* v *Ministero per le Politiche Agricole* [2000] ECR I-5501, paragraph 37).

123 As the Council points out, that applies even more strongly in the context of international negotiations which, by their very nature, imply concessions on either side and the negotiation of a compromise accepted by all the contracting parties.

124 An applicant cannot therefore claim to have a legitimate expectation in the maintenance of a TAC or a quota where fishing takes place in the waters of non-member countries or under the authority of an international organisation and the volume of catches must necessarily be negotiated with non-member countries whose wishes do not necessarily coincide with those of the Community.

125 Second, as has been seen in paragraphs 105 and 106 above, a limitation on opportunities for fishing Greenland halibut in the Regulatory Area was foreseeable as from autumn 1994 or, at the latest, from 31 December 1994, the publication date of Regulation No 3366/94, so that, in any event, since before the beginning of 1995 maintenance of the status quo could not constitute a legitimate expectation.

126 Third, the evidence which the applicants refer to in support of their argument is not capable of grounding legitimate expectations.

127 In the first place, concerning the objection by the Council on 3 March 1995 to the allocation of the TAC which gave only 3 400 tonnes to the Community, suffice it to say that that action demonstrates only the latter's refusal to accept that amount, and does not in any way prejudge the level of Community quota that would finally be applicable. That conclusion is all the more inescapable in this case, since, as the Commission rightly points out, the very lively reaction of Canada to that objection made it clear that the lodging of the objection would not resolve the question.

128 Second, concerning Regulation No 850/95, it should be noted that, as the applicants themselves acknowledged in their application (point 106), this was protective in nature, the aim of the measure being to fill the legal void caused by the objection referred to above. That objection provoked very lively reactions on the part of Canada, notably the seizure of the vessel *Estai*, which showed that that country was clearly not disposed to accept the Community quota exceeding the 3 400 tonnes allocated by the NAFO Fisheries Commission. In those well-known circumstances, Regulation No 850/95, the grounds for which clearly state that it was adopted as the result of the objection referred to above, was clearly not capable of founding a legitimate expectation that the Community would be allocated a quota of 18 630 tonnes. In that regard, as the Commission has rightly emphasised, the only Community quota which all the parties to the conflict accepted before the conclusion of the bilateral agreement, implemented by Regulation No 1761/95, and on which a legitimate expectation might be based, was that of 3 400 tonnes allocated by the NAFO Fisheries Commission. Moreover, it was only Regulation No 1761/95 which finally fixed the Community quota of Greenland halibut for 1995.

129 Third, concerning the statements by Community representatives, it should be noted that these merely reflect the concern of the Community institutions to defend Community interests in the negotiations which took place at the time. Given the unforeseeable nature of any international negotiation, those statements cannot give rise to legitimate expectations as to the result of those negotiations. Concerning the Commission's adoption of a position on 15 March 1995, this merely indicated that the seizure of the vessel *Estai* did not comply with international law and that Community vessels were authorised to fish in the

Regulatory Area, provided they complied with the measures for conserving resources taken by the NAFO itself and by the Community. However, it did not contain any precise figure as to the volume of catches authorised.

130 Fourth, the granting to certain applicants of Community aid for experimental fishing in relation to exploitation of the stock of Greenland halibut in the Regulatory Area is not capable of giving rise to a legitimate expectation that the Community quota fixed in the bilateral fisheries agreement and in Regulation No 1761/95 would not be imposed. In the first place, as the Commission rightly argues, the discovery and exploitation of a fishing resource is not in itself incompatible with conservation measures, which are entirely usual. Secondly, the granting of aid by the Community cannot give rise to a legitimate expectation that the exploitation of the fishing resource in question will last indefinitely. That is particularly so where, as in this case, that resource is not subject to exclusive management by the Community but to multilateral management, in the context of which the Community therefore has no assurance that it will always be able to make its point of view prevail. In this case, moreover, exploitation of the resource in question was not prevented, but merely made subject to quotas.

131 It follows that there has not been any infringement of the principle of the protection of legitimate expectations, let alone an obvious and serious infringement.

Infringement of the principle of proportionality

— Arguments of the parties

132 The applicants acknowledge that conservation of the biological resources of the high seas constitutes one of the most fundamental principles of international and

Community regulation of fishing activities, but they consider that, in this case, that objective was implemented disproportionately in relation to the legitimate interests of Community fishermen.

133 They consider that the Community institutions should have fought, first, for the fixing of a TAC of 40 000 tonnes, recommended by the scientific advisory board, which already involved a reduction for Community vessel owners in relation to the catches for 1994, and, second, concerning the allocation of that TAC amongst NAFO members, for a Community quota of 75.8%, representing the percentage of the Community fleet's catches during the most recent reference period.

134 The principle of proportionality would, however, have been complied with if, in connection with the allocation of the TAC of 27 000 tonnes amongst the NAFO contracting parties, the Community had defended the autonomous quota of 18 630 tonnes which it had adopted, even thought that represented only 69% of that TAC.

135 By contrast, the fixing of a Community quota of 5 013 tonnes from 16 April 1995, representing a total of 10 542 tonnes for the whole of 1995, was contrary to the principle of proportionality.

136 That sacrifice imposed on the Community fleet was all the more disproportionate for not being progressive in character and not being accompanied by any measure tempering its negative consequences for economic operators.

137 The Council and the Commission consider that the principle of proportionality has not been infringed in this case.

— Findings of the Court

138 The factors which constitute the principle of proportionality have been set out in paragraph 78 above.

139 In this case, it should be noted, first, that the bilateral fisheries agreement was intended not only to ensure the conservation of fish resources but also to put an end to the conflict between Canada and the Community, thereby ensuring, in the interest of the whole of the Community fishing industry, that all Community vessel owners carrying on their activity in the Regulatory Area, whatever the species being fished for, might resume that activity in safety without risking being prevented by the Canadian authorities.

140 Second, the Community quota was the result of a series of negotiations which, having regard to the circumstances, was certainly difficult. As in any negotiations, but particularly in the context of a series of international negotiations undertaken in such circumstances, the Community could not be certain of getting its point of view to prevail in its entirety, but was necessarily obliged to make concessions. The Commission rightly points out that, if it had demanded a larger quota, such a demand could have provoked a serious international crisis, harming all possibility of fishing in the Regulatory Area by the whole of the Community vessel owners wishing to fish there.

141 Since the principle of proportionality is to be assessed on the basis of whether the means are appropriate to the objective of the rule under consideration, this Court finds that, having regard to the dual objective of the agreement, including in particular the imperative and urgent aim of ending a conflict that was likely to affect the whole Community fishing industry, and having regard also to the fact that the measure in question arose from a difficult series of international

negotiations, that principle has not been obviously and seriously infringed. A Community quota corresponding in fact to 10 542 tonnes constituted an acceptable mean between the position of the Community, which fixed an autonomous quota of 18 630 tonnes for 1995 in Regulation No 850/95, and the quota allocated by the NAFO Fisheries Commission, which was only 3 400 tonnes.

142 Reference should also be made to paragraphs 105 and 106 above, in which it has been stated that the reduction of opportunities of fishing for Greenland halibut in the Regulatory Area and the fixing of the Community quota at a low level were foreseeable since the autumn of 1994, thus before the beginning of the 1995 fishing season.

143 It follows that the principle of proportionality has not been obviously and seriously infringed in this case.

Infringement of the principles of relative stability and respect for traditional fishing rights

— Arguments of the parties

144 The applicants consider that the Community institutions failed to take into account the principles of relative stability and respect for traditional fishing rights.

145 Concerning infringement of the principle of relative stability, which is recognised by Regulation No 3760/92, they argue that that principle is aimed at ensuring, in

connection with the fixing or allocation of catch quotas for species at risk of overexploitation, the relative stability of fishing activities by taking into account three criteria, namely traditional fishing activities, the particular needs of regions especially dependent on fishing, and the loss of catches in the waters of non-member countries.

146 They argue that account should have been taken of that principle in the context of the negotiations which led to the conclusion of the bilateral fisheries agreement, which was however not the case. None of the three criteria characterising that principle were complied with in this case. First, account was not taken of the fact that Community vessel owners had been the first to discover and develop deep water fishing specifically for Greenland halibut in the Regulatory Area. Next, the measures complained of were shown to be very damaging for Galicia, one of the regions of Europe with a strong fishing tradition and great dependence on that activity, and which moreover had one of the highest unemployment rates in the Community. Finally, the vessel owners concerned had recently suffered loss of catches in the waters of non-member countries, namely the progressive loss of traditional fishing areas during the 1980s, especially in the waters of the United States, Greenland, Norway, South Africa, Canada and Namibia. Those losses had been partly compensated for by exploiting the Regulatory Area.

147 Concerning the infringement of traditional fishing rights, the applicants argue that Spanish vessel owners discovered the possibility of fishing for Greenland halibut in the deep water (between 800 and 1 500 metres) of the Regulatory Area, that they were the first to carry out systematic fishing there exclusively for that species, and that they have done so for several years. Spanish vessel owners were granted Community aid in favour of experimental fishing, such aid having enabled that fishery to be discovered.

148 The Council and the Commission consider that the arguments in support of this head of complaint are totally devoid of foundation.

— Findings of the Court

149 The applicants claim that there has been infringement of the principle of relative stability and traditional fishing rights.

150 Concerning the principle of relative stability, it should be noted that this principle, laid down in Article 8(4) of Regulation No 3760/92, is intended to ensure for each Member State a share of the Community's TACs, determined essentially on the basis of the catches from which traditional fishing activities, the local populations dependent on fisheries and related industries of that Member State benefited before the quota system was established (Case C-4/96 *NIFPO and Northern Ireland Fishermen's Federation* v *Department of Agriculture for Northern Ireland* [1998] ECR I-681, paragraph 47).

151 That principle, which is peculiar to Community law, relates only to the allocation among the various Member States of the volume of catches available to the Community (Case C-405/92 *Mondiet* v *Armements Islais* [1993] ECR I-6133, paragraph 50). However, the bilateral fisheries agreement and Regulation No 1761/95 do not allocate the volume of catches available to the Community among the Member States but determine that volume, and are thus at a different stage from that to which that principle applies. Moreover, that determination took place in the context of international negotiations subject only to rules of international law, to which the principle in question in unknown.

152 Finally, since that principle concerns only relations between Member States, it cannot confer individual rights upon private parties, the infringement of which would give rise to a right to compensation in accordance with the second paragraph of Article 288 EC.

153 As for the traditional fishing rights allegedly arising from the development by Spanish vessel owners of fishing for Greenland halibut in the Regulatory Area from the beginning of the 1990s, it is sufficient to note that, regardless of whether, first, a consistent practice over only a few years can give rise to traditional fishing rights, second, those rights can specifically cover the catch of a given species, and third, the practice giving rise to those customary rights has been engaged in by each of the applicants considered separately, those rights could in any case enure only to the benefit of States, to the exclusion of individual vessel owners. The latter cannot therefore rely on an individual right the infringement of which entitles them to compensation under the second paragraph of Article 288 EC.

154 The principles of relative stability and respect for traditional fishing rights have therefore not been infringed.

Misuse of powers

— Arguments of the parties

155 The applicants consider that the defendants have misused their powers by adopting the bilateral fisheries agreement and Regulation No 1761/95. Those measures were taken on the basis of Community powers in the area of the common fisheries policy in order to achieve completely different objectives, particularly that of normalising commercial relations between Canada and the Community.

156 The Council and the Commission consider that there has been no misuse of powers in this case.

— Findings of the Court

157 The measures in question, as to their form, subject-matter and reasoning, fall within the context of the common fisheries policy. It is true that they were also designed to put an end to the fishing conflict between Canada and the Community and thus re-establish peace in the Regulatory Area. However, as the Commission has rightly pointed out, that aim fits perfectly within the context of the common fisheries policy. First, it was in the interest of Community fishermen, particularly the applicants, to ensure the safety of their fishing operations in the Regulatory Area. Second, since Canada is represented in several international fishing organisations and assumes a significant role there, the safeguarding of good relations with that country was important in the interests of managing fishing resources at world level. The Community institutions were required in this case not only to take account of the short-term interests of the applicants but also to weigh up the interests of all Community fishermen.

158 Moreover, as the Commission has rightly added, even if in this case it did pursue in an incidental and ancillary manner aims that did not fall directly and exclusively within the common fisheries policy, such as the normalisation of political or commercial relations with Canada, that fact does not constitute a misuse of powers. The maintaining of good international relations is legitimate in the context of all Community policies, since the various Community policies do not in any event constitute watertight compartments and the institutions must always take account, when legislating in the context of a specific policy, of the effects which are produced on the other activities of the Union and particularly on the public interest.

159 It has not therefore been established that there has been a misuse of powers in this case.

160 The claim for compensation must therefore also be dismissed in so far as it alleges that the Council and the Commission acted unlawfully in connection with the conclusion and approval of the bilateral fisheries agreement and the adoption of Regulation No 1761/95.

161 The claim for compensation, in so far is it is based on fault liability of the Community, must therefore be dismissed in its entirety, without it being necessary to carry out the measures of enquiry proposed by the applicants, which, in the light of the above assessments, are not relevant.

II — *No-fault liability*

A — *Arguments of the parties*

162 The applicants point out that the case-law has recognised strict liability of the Community where an individual has to bear, in the public interest, a financial burden which would not normally fall upon him (Joined Cases 9/71 and 11/71 *Compagnie d'Approvisionnement et Grands Moulins de Paris* v *Commission* [1972] ECR 391; Case 59/83 *Biovilac* v *EEC* [1984] ECR 4057; Case 267/82 *Développement and Clemessy* v *Commission* [1986] ECR 1907; Case 81/86 *De Boer Buizen* v *Council and Commission* [1987] ECR 3677; Case T-184/95 *Dorsch Consult* v *Council and Commission* [1998] ECR II-667).

163 They maintain, first, that they had to suffer unusual damage, or damage going beyond the limits of the economic risks inherent in the activities of the industry concerned (*Biovilac*, paragraph 27). That damage resulted from the establishment of the Greenland halibut quota for 1995. It was foreign to the risks inherent

in the fishing industry. The applicants argue in that respect that fishing is an economic activity in which the planning element is essential. The vessel owners have to plan and allocate voyages, take on the necessary crew, buy appropriate material and adapt the vessels to the particular character of each voyage, as well as obtaining the necessary fishing permits. Such preparations necessarily implied a high level of investment. In the circumstances of the present case, however, it was impossible for a diligent vessel owner to carry out his planning in a rational way, given the absence of the stability necessary for his business.

164 They explain that, initially, they could plan only on the basis of the TAC of 27 000 tonnes fixed by Regulation No 3366/94, which had yet to be allocated. They planned their business on that basis for 1995, taking account of the absence of definitive allocation. Surprisingly, the Community was awarded only 3 400 tonnes of that TAC, representing a reduction for the Community of 92% in relation to catches the previous year. The applicants argue that, although both the Council and the Commission announced an objection to that award, Canadian threats, that country's amendment of its legislation on 3 March 1995, the seizure of the vessel *Estai*, the harassment of vessels and the beginning of bilateral, not multilateral, negotiations, created a situation of insecurity and a feeling of anxiety for the vessel owners present in the fishery in question. That feeling was, however, balanced by confidence they had in the Community institutions assuring them that they would defend their rights in relation to Canada. They recall that, shortly afterwards, and while the negotiations were in progress, the Council allocated to them by Regulation No 850/95 a quota of 18 630 tonnes, which already implied a reduction of 58% in relation to catches the previous year. In spite of difficulties, they sought to adapt to that new environment. They were also confident in the fact that the Community institutions would maintain a firm attitude in the face of the illegality committed by Canada and the blackmail exercised by that State. However, because of the bilateral fisheries agreement, the applicants were deprived of all possibility of carrying on their activities in the normal way.

165 They argue that they did everything in their power to adapt to the changing circumstances and thus to mitigate their damage.

166 They consider that, even if the conflict between the Community and Canada was unavoidable, the damage could have been avoided if the Community, true to its action in comparable cases, had compensated the vessel owners affected. They refer, for example, to Council Decision 95/451/EC of 26 October 1995 on a specific measure for the grant of an indemnity to fishermen from certain Member States of the Community who have had to suspend their fishing activities in waters under the sovereignty or jurisdiction of Morocco (OJ 1995 L 264, p. 28) and Commission Decision 87/419/EEC of 11 February 1987 on a Regional Law providing for special measures for sea fishing in Sicily introduced by the Italian Government (OJ 1987 L 227, p. 50).

167 Secondly, the applicants argue that they have had to bear special damage, that is to say damage affecting a category of economic operators whose property interests are affected in a manner which sets them apart from all other economic operators (*Dorsch Consult*, paragraph 82). In this case, the vessel owners concerned constituted a perfectly defined and identified group, distinct from any other operator in the fishing industry. In the Regulatory Area, they carried out a traditional activity in fishing for Greenland halibut, which constituted the main source of activity for the fleet of refrigerated trawlers in which they had concentrated their investment.

168 The unusual and special damage in question was that described above in the part concerning liability for fault.

169 It was caused by the Community. The attitude and the actions of the defendants led to restrictions and to an instability which were reflected in disproportionate losses, foreign to normal fishing activity. The variations in the quota attributed to the Community fleet, which were directly linked to the attitude and actions of the defendants, prevented all reasonable planning and caused damage which, in normal circumstances, would not have been caused.

170 The Council and the Commission deny that the conditions for no-fault liability on the part of the Community have been met in this case.

B — *Findings of the Court*

171 It should be recalled that, in the event of the principle of such liability being recognised in Community law, a precondition for such liability would in any event be the cumulative satisfaction of three conditions, namely the reality of the damage allegedly suffered, the causal link between it and the act on the part of the Community institutions, and the unusual and special nature of that damage (Case C-237/98 P *Dorsch Consult* v *Council and Commission* [2000] ECR I-4549, paragraphs 17 to 19).

172 In order to assess whether the damage in question is unusual in character, it needs to be assessed whether it exceeds the limits of the economic risks inherent in the activities of the fishing industry (*Biovilac*, paragraph 27; Case T-184/95 *Dorsch Consult* v *Council and Commission*, paragraph 80).

173 In this case, the applicants have been affected by a reduction in their fishing opportunities following the fixing of a TAC and thus in a Community quota, the level of which was lower than they had forecast.

174 In that respect, Annex XIII to the application, which lists the quotas fixed in the Regulatory Area between 1995 and 1999, shows that variations, and even significant variations such as a reduction by half or a withdrawal of the TAC, are not unusual in that area. For example, the TAC for the species 'Squid (Ilex)' in

NAFO sub-areas 2 and 3, which was 150 000 tonnes from 1995 to 1998, was halved in 1999, and the TAC for the species 'Redfish' in area 3LN, which was 14 000 tonnes in 1995 and reduced to 11 000 tonnes in 1996 and 1997, was reduced to zero in 1998 and 1999.

175 Second, as has been seen in paragraphs 105 and 106 above, the reduction in the Community fleet's opportunities to fish for Greenland halibut in the Regulatory Area did not constitute an unforeseeable change, either in principle or even in extent, having regard to the circumstances and in particular to the extreme determination of the Canadian Government, which was well known from the beginning of 1994.

176 Third, even if the measures in question had the effect of limiting the possibilities of fishing for Greenland halibut in the Regulatory Area, they did not totally prevent the pursuit of such fishing, or prevent Community vessel owners from transferring their activity to the fishing of other fish in that area, or of the same or other species in other areas.

177 Fourth, the damage alleged by the applicants essentially consists of a loss of earnings, which itself rests on the premiss that they enjoyed a right to exploit the shoal of Greenland halibut in question. As has been seen above, however, the applicants cannot claim such a right, whether it is alleged as a traditional fishing right, as a right deriving from the principle of relative stability, or as an acquired right. It should be noted in that respect that economic operators cannot rely on an acquired right to the maintenance of an advantage arising from Community legislation, especially legislation worked out in the context of an international organisation in which the Community participates.

178 It follows that the damage claimed by the applicants did not exceed the limits of the economic risks inherent in the activities of the industry concerned. It was

therefore not 'unusual' in relation to the conditions under which the Community might be made non-contractually liable for a lawful act.

179 The cumulative nature of those conditions means that if one of them is not satisfied, the Community cannot incur non-contractual liability in respect of a lawful act of its institutions (Case C-237/98 P *Dorsch Consult* v *Council and Commission*, paragraph 54).

180 It follows that the action must also be dismissed in so far as it is based, in the alternative, on the no-fault liability of the Community.

181 The action must therefore be dismissed in its entirety.

Costs

182 In accordance with the first subparagraph of Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicants have been unsuccessful, they must be ordered to pay the costs, as applied for by the Council and the Commission.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber)

hereby:

1. **Dismisses the action;**

2. **Orders the applicants to pay the costs.**

Azizi Lenaerts Jaeger

Delivered in open court in Luxembourg on 6 December 2001.

H. Jung M. Jaeger

Registrar President

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