

questions of Community law are raised which the ordinary courts may be called upon to examine either in the context of their collaboration with arbitration tribunals or in the course of a review of an arbitration award, it is for those courts to ascertain whether it is necessary

for them to make a reference to the Court of Justice under Article 177 of the Treaty in order to obtain the interpretation or assessment of the validity of provisions of Community law which they may need to apply in exercising such functions.

In Case 102/81

REFERENCE to the Court under Article 177 of the EEC Treaty by Walther Richter, President of the Hanseatischen Oberlandesgericht [Hanseatic Higher Regional Court] Bremen, acting as arbitrator, for a preliminary ruling in the arbitration before him between

NORDSEE DEUTSCHE HOCHSEEFISCHEREI GMBH, Bremerhaven, Federal Republic of Germany,

and

1. REEDEREI MOND HOCHSEEFISCHEREI NORDSTERN AG & Co. KG, Bremerhaven,
2. REEDEREI FRIEDRICH BUSSE HOCHSEEFISCHEREI NORDSTERN AG & Co. KG, Bremerhaven,

on the interpretation of Regulation No 17/64/EEC of the Council of 5 February 1964 (Official Journal, English Special Edition 1963-1964, p. 103), Regulation (EEC) No 729/70 of the Council of 21 April 1970 (Official Journal, English Special Edition 1970 (I), p. 218) and Regulation (EEC) No 2722/72 of the Council of 19 December 1972 (Official Journal, English Special Edition 1972 (28-30 December), p. 31) all concerning aid from the Guidance Section of the European Agricultural Guidance and Guarantee Fund,

THE COURT

composed of: G. Bosco, President of the First Chamber, acting as President, A. Touffait and O. Due (Presidents of Chambers), P. Pescatore, Lord Mackenzie Stuart, A. O'Keeffe, T. Koopmans, U. Everling and A. Chloros, Judges,

Advocate General: G. Reischl
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and Issues

The order making the reference, the course of the procedure and the observations submitted under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and written procedure

1. Three German shipping groups, Nordsee Deutsche Hochseefischerei GmbH [hereinafter referred to as "Nordsee"], the claimant in the arbitration; Hochseefischerei Nordstern AG, to which the respondents belong; and Hanseatische Hochseefischerei (Reederei Söhle), undertook, together a joint project for the building of factory-ships for fishing (freezer ships). Thirteen ships were built under the project, which was begun in 1970; they were put into operation between September 1972 and April 1973. Federal loans were obtained for the construction of all the ships, the same amount being allotted for each ship

together with a 3 % reduction in the interest rate on the bank loans.

In 1972 the shipping companies applied for financial aid under Regulation No 17/64 of the Council of 5 February 1964 on the conditions for granting aid from the European Agricultural Guidance and Guarantee Fund (hereinafter referred to as "the Fund") (Official Journal 1963-1964, p. 103) in respect of four ships. Early in 1973 they became aware of Regulation (EEC) No 2722/72 of the Council of 19 December 1972 on the financing by the Fund's Guidance Section of conversion projects in the salt cod-fishing industry (Official Journal, English Special Edition 1972 (28-30 December), p. 31). Under that regulation they applied for aid in respect of a further five ships, within the special programme.

The Commission finally granted six of the nine applications, one based on Regulation No 17/64 and one based on

Regulation No 2722/72 for each of the three shipping groups. The other applications for aid were either withdrawn or rejected, although all thirteen ships were of the same kind and were ordered, built and put into operation at the same time.

2. After they had submitted their applications in the spring of 1973, but before the first decision of the Commission in October 1973, the shipping companies learned that Community funds would probably be insufficient to satisfy all the applications. In addition, they did not know on what criteria aid would be granted by the Fund. In the light of those circumstances, and under pressure from the Office of Economic Affairs and Foreign Trade of the Senate of the *Land* Bremen, Nordsee, the Söhle group and the Nordstern group made an agreement on 27 June 1973 whereby the parties to the agreement would share among themselves all aid from Community funds so that one-thirteenth of the total aid granted would be allotted to each freezer ship (a so-called "pooling" contract). On the same day they made a "supplementary agreement" whereby in the event of total or partial repayment of the aid "as a result of the existence and the performance of the aforementioned agreement" a re-distribution was to be made "on the basis of the aid not to be repaid, in the manner provided for in the aforementioned agreement".

3. Towards the end of 1975 the authorities in Bremen, and the federal authorities who were aware that the agreements had been made, began to have doubts as to whether such pooling was legal. Shortly afterwards Hochseefischerei Nordstern AG informed Nordsee by letter of 5 July 1976 that the pooling contract was of doubtful

validity in the light of recent developments in the law.

At a meeting in Brussels with officers of the Commission in the latter half of 1976 two members of Nordsee's management raised the question whether the pooling of aid was permissible. The officers of the Commission replied that a pooling of aid could not be endorsed and that if pooling took place the Commission would attempt to obtain repayment of aid not used for the purpose for which it was granted.

Through a German official of the Federal Ministry of Food, Agriculture and Forestry the Commission stated that it wished for a declaration that no pooling had been arranged. The following declaration was sent to the Commission in a telex message of 25 November 1976 by that official, who stated that he was acting on behalf of the Hanseatische Hochseefischerei (Reederei Söhle) and Nordsee:

"No pooling of EAGGF aid between our shipping companies has taken place, and no such obligation exists. Furthermore, there is no intention to carry out such a pooling in the future, either for aid already received or for future aid."

When an official of the management of the Nordstern group referred in the presence of the official of the Federal Ministry of Food, Agriculture and Forestry to the existence of a pool within the Nordstern group his attention was drawn to the abovementioned declaration and he was requested to make a declaration to the same effect, which he did orally.

4. The claimant in the arbitration, Nordsee, is now seeking payment under

the pooling contract of DM 2 162 894, the amount of which is not in dispute, together with interest at 9.5 % from 1 September 1975, from two of the shipping companies belonging to the Nordstern group. Six ships were built for Nordsee, but only three for the Nordstern group. Nordsee considers that the pooling contract, which contravenes neither German nor Community law, is valid and that the declarations made by the parties as to the absence of any pooling agreement are irrelevant since they were made only in response to doubts raised by the authorities regarding its legality which were, however, unfounded.

The respondents contend that the claim should be rejected. They take the view that the pooling agreement is void under German law inasmuch as it infringes Community law on aid because the aid is linked to a specific project and is not transferable.

5. Since the agreement of 27 June 1973 included an arbitration clause excluding recourse to the ordinary courts the claim was referred to Dr Walther Richter, President of the Hanseatisches Oberlandesgericht Bremen, acting as arbitrator. The parties were unable to agree on an arbitrator, and he was therefore appointed by the Chamber of Commerce of Bremen in accordance with the terms of the agreement.

The arbitrator found that the pooling agreement was not void under German law but that the respondent companies' obligation to compensate Nordsee depended under German law wholly on whether the pooling of aid from the Fund amounted to an "irregularity" within the meaning of Community law on aid (Article 22 (2) of Regulation No 17/64; Article 19 (1) of Regulation No

2722/72; Article 8 of Regulation No 729/70 of the Council of 21 April 1970 on the financing of the common agricultural policy (Official Journal, English Special Edition 1970 (I), p. 218), and therefore decided to defer a decision and refer the following questions to the Court for preliminary ruling:

1. Is a German arbitration court, which must decide not according to equity but according to law, and whose decision has the same effects as regards the parties as a definitive judgment of a court of law (Article 1040 of the Zivilprozeßordnung [rules of civil procedure]) authorized to make a reference to the Court of Justice of the European Communities for a preliminary ruling pursuant to the second paragraph of Article 177 of the EEC Treaty?
2. Where persons in receipt of aid from the Guidance Section of the European Agricultural Guidance and Guarantee Fund for projects of the same kind (construction of factory-ships) agree after applying for but before being granted Community aid that the aid granted after the ships have been put into service and paid for is to be divided (pooled) between them in proportion to the number of all objects of the same kind built and put into use by them, that is to say including objects which are of the same kind but not the subject of a grant, and subsequently divide the aid in accordance with that agreement, does that amount to an irregularity leading to a total or partial recovery within the meaning of Community law, in particular Regulation No 17/64/EEC of the Council of 5 February 1964, Regulation (EEC) No 729/70 of the Council of 21 April 1970 and Regulation (EEC) No 2722/72 of the Council of 19 December 1972?

The order making the reference, dated 22 April 1981, was lodged at the Court Registry on 27 April 1981.

6. As to the first question, the arbitrator took the view that the Court had not yet decided the question. It would appear from the judgment of 30 June 1966 in *G. Vaassen (née Göbbels) v Beambtenfonds voor het Mijnbedrijf* (Case 61/65 [1966] ECR 261) that it is not only the State courts forming part of the various national judicial systems which are to be regarded as courts or tribunals within the meaning of the second paragraph of Article 177 of the EEC Treaty but also bodies which have the characteristics of a court or tribunal. Endorsing the views expressed by Mr Advocate General Gand (in his opinion in Case 61/65, referred to above), the arbitrator considered that the issue depended on whether the arbitration tribunal, "having regard to the general principles applicable in the different Member States concerning the organization of the administration of justice, ... possesses the fundamental characteristics of a body required to settle disputes".

In the case of the arbitration tribunal making the reference those requirements are met:

- (a) The arbitration tribunal is bound to decide not on the basis of equity but according to law including statute law and hence is bound on the basis of the national legal order also to have regard under statute to the primary and secondary law of the European Communities.
- (b) It is true that the arbitrator is appointed by the parties, but on account of the absence of agreement between the parties he was appointed by the Bremen Chamber of Commerce, which is independent of the parties.
- (c) The form of procedure is the same as that before a court of law.
- (d) An arbitration award has, pursuant to Article 1040 of the Zivilprozess-

ordnung, the same effect as regards the parties as a definitive judgment. The arbitration agreement of 27 June 1973 provides, moreover, (last paragraph) that the decision of the arbitrator is to be final, any recourse to courts of law being excluded.

In contrast to a definitive judgment of a German national court, for the enforcement of an arbitration award leave to issue execution must admittedly be obtained from a national court (Article 1042 of the Zivilprozessordnung) and the award may be set aside by the national court (Article 1041 of the Zivilprozessordnung), but leave to issue execution may only be refused and the award may only be set aside on one of the six grounds listed in that article. Those differences do not, however, justify a denial of the arbitration tribunal's status as a judicial body, as the grounds for setting aside its award are patterned on the requirements for the re-opening of proceedings which have been settled before a national court by a definitive judgment (Articles 579, 580 of the Zivilprozessordnung), applications for leave to issue execution or for the setting aside of the award do not imply rights of appeal and above all do not make possible a review of the correct application of the law as by a court of appeal dealing with points of law, save in the exceptional case where the incorrect application of the law is so serious that the recognition of the arbitration award would offend against public morality or public policy (Article 1041 (1) (2) of the Zivilprozessordnung).

It would also be in keeping with the meaning and purpose of Article 177 of the EEC Treaty to allow such arbitration tribunals to refer questions to the Court for a preliminary ruling.

The purpose of the procedure for preliminary rulings is to guarantee the uniformity of Community law and it ensures that that law is applied in the same manner throughout the Member States.

While certain courts and tribunals are required to refer questions to the Court of Justice for a preliminary ruling under the third paragraph of Article 177 of the EEC Treaty, the *discretionary* power to make references to the Court for a preliminary ruling under the second paragraph of Article 177 ensures that Community law will be applied uniformly at an earlier stage in the judicial process. For that reason it should be recognized that an arbitration tribunal arriving at its decision according to law, including statute law, has jurisdiction to make a reference to the Court for a preliminary ruling in order to ensure the uniform application of Community law at that stage in those proceedings and not merely in proceedings brought for enforcement or to have the award set aside, especially as if an objection based on the existence of an arbitration clause is raised before a court of ordinary law and if such a clause exists the court will dismiss the application (Paragraph 1027a of the Zivilprozeßordnung).

Furthermore, a mistaken application of the law, in so far as it does not involve an offence against public morality or public policy (Paragraph 1041 (1) (2) of the Zivilprozeßordnung), cannot be rectified in proceedings for enforcement or to have the award set aside. Consequently, if arbitration tribunals are denied jurisdiction to refer matters to the Court of Justice for a preliminary ruling the uniform application of Community law will be jeopardized in a field of vital importance for the European Communities, namely commercial law, not to mention the fact that it is for the national courts to decide whether an infringement of Community law is so serious that public morality or public policy is affected and that it would not be easy for them to rectify a mistaken application of Community law on those exceptional grounds.

7. Pursuant to Article 20 of the Protocol on the Statute of the Court of

Justice of the EEC written observations were submitted by Messrs Deringer, Tessin, Herrmann and Sedemund, Rechtsanwälte of Cologne, on behalf of Reederei Mond Hochseefischerei Nordstern AG & Co. KG and Reederei Friedrich Busse Hochseefischerei Nordstern AG & Co. KG, the respondents in the arbitration; by the Government of the Italian Republic; by the United Kingdom; by the Government of the Kingdom of Denmark; and by the Commission of the European Communities, represented by Gianluigi Campogrande, a member of its Legal Department, acting as Agent, assisted by Jürgen Grunwald, a member of its Legal Department.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court decided to open the oral procedure without any preparatory inquiry.

II — Summary of the written observations submitted to the Court

1. *The first question*

In the opinion of the *respondents in the arbitration* the answer to the first question should be in the affirmative, for the reasons given by the arbitrator. They add that it would be incompatible with the principle of the efficient use of legal procedure to allow references to be made exclusively in the context of proceedings for recognition of an arbitration award. The second paragraph of Article 177 of the EEC Treaty expresses the same principle since it permits courts or tribunals other than those of last instance to make references to the Court of Justice. That principle militates in favour of allowing arbitration tribunals such as those described in the order for reference to refer questions to the Court for a preliminary ruling.

The respondents suggest that the Court reply to the first question as follows:

"An arbitration tribunal which is called upon to decide an issue in place of national courts of law and whose awards have, under the national judicial system, the same force of *res judicata* as the judicial decisions of State courts and tribunals, is empowered to refer questions to the Court of Justice of the European Communities for a preliminary ruling under the second paragraph of Article 177 of the EEC Treaty, provided that it may not decide issues on grounds of equity but is bound to apply all the relevant rules of law, including those of Community law."

The observations submitted by the *United Kingdom* are based on the assumption that the "arbitration court" mentioned in the reference has the status and exercises the functions of a *private* arbitrator, that is to say, it is composed of individuals appointed by agreement between the parties. That being so, the arbitrator does not exercise his functions or his jurisdiction on behalf of the State, and is therefore not an organ of the State. Arbitration of that kind, moreover, may deal only with issues which the parties would be free to settle between themselves were they able to agree.

The *United Kingdom* is of the opinion that the language of Article 177 supports the view that private arbitrators do not have the right of reference to the Court of Justice. The phrase "court or tribunal of a Member State" implies the existence of a close link between the adjudicatory body in question and the system of legal remedies in the Member State concerned. The reference must therefore be to an official organ of the Member State and not to a tribunal of a private nature which is free to conduct its proceedings in the territory of a Member State. Moreover, if private arbitrators

were allowed to refer questions to the Court under Article 177 the objectives which the parties seek to achieve in submitting their dispute to arbitration — speed, finality, and privacy — would be frustrated.

The *United Kingdom* emphasizes that arbitrators are subject to the *ordre publique* of the legal systems within which they operate. To that end, their awards are subject to judicial control and in that context any questions of Community law which may arise may be raised before the national courts or tribunals and, ultimately, before the Court of Justice pursuant to Article 177.

Were Article 177 to apply to arbitration tribunals considerable practical difficulties would arise, and there would be harmful consequences for the Community. A high proportion of arbitration conducted in the Member States concerns disputes where one of the parties, or even both of them, are not nationals of a Member State. In addition, most arbitrators are not lawyers but people with experience in the subject-matter of the dispute, or professional arbitrators. They would have great difficulty in identifying points of Community law.

Another practical difficulty concerns the geographical character of arbitrations. In international cases it would be necessary to decide whether the arbitration body was "of" one State or another, particularly if the arbitration agreement allowed the tribunal to select the place of its seat or when the tribunal has held sittings in a number of countries, which may include non-member countries.

In addition, a large amount of international commercial or maritime arbitration is conducted at the choice of the parties in certain important centres such as London, Paris, Frankfurt and Amsterdam, or even Geneva, Zürich or New York. According to the United Kingdom Government the possibility that arbitration proceedings in one of the Member States of the Community might be the subject of a reference to the Court of Justice for a preliminary ruling might affect the choice of the place of arbitration by private parties who might move it outside the Community. Such a development would jeopardize the contribution which the legal systems of the Community are able to make at present to the regulation of international trade.

For all those reasons the United Kingdom Government submits that the first question should be answered to the effect that an arbitrator determining an arbitration to which the parties have submitted of their own free will is not authorized to make a reference to the Court under the second paragraph of Article 177 of the EEC Treaty.

The *Italian Government* refers to the judgment of 30 June 1966 in *G. Vaassen (née Göbbels) v Beambtenfonds voor het Mijnbedrijf*, Case 61/65 (cited above). The arbitration tribunal in this instance is in a different position because its functions are not of a permanent nature and are based on the authority of a private agreement.

The Italian Government emphasizes that Article 177 restricted the power to make a reference to the Court to bodies which have the character of a "court or tribunal" and which settle disputes by means of a decision in the nature of a judgment. An arbitrator's award cannot be described as an act of public authority

so long as that character has not been attributed to it by the subsequent intervention of a judge invested with judicial powers.

The *Danish Government* distinguishes between permanent courts of arbitration created by law, with jurisdictional and procedural rules linking them to the normal judicial system on the one hand and other arbitration tribunals whose only legal basis lies in the agreement made between the parties on the other hand.

Only the first category of arbitral bodies has jurisdiction to refer questions to the Court of Justice for a preliminary ruling. The Danish Government is of the opinion that an arbitration tribunal is not to be considered as a court or tribunal within the meaning of Article 177 unless it is of a permanent nature and as such has power to decide an unlimited number of disputes between parties who have not themselves created the tribunal.

The Danish Government alternatively states that it is necessary to ensure that arbitration tribunals do not become a means of obtaining from the Court rulings devoid of any useful purpose, for the purpose of the resolution of an actual dispute.

The Danish Government concludes that in this case the answer to the first question should be in the negative because the tribunal in question is not a permanent body. Alternatively, the Danish Government takes the view that consideration of the substance of the case is possible only if the Court finds that the arbitration tribunal offers the requisite guarantees of legal certainty and if it considers, too, that the arbitration tribunal has the same duty as ordinary courts of law to decide of its

own motion whether a reference for a preliminary ruling appears necessary in order to resolve an actual case before it.

The *Commission* reviews the arguments of academic authorities on whether an arbitration tribunal has jurisdiction to make a reference to the Court of Justice under Article 177 of the Treaty. Writers who deny it such jurisdiction rely on the following arguments:

An arbitration tribunal cannot be considered a "court or tribunal of a Member State" within the meaning of the second paragraph of Article 177 of the EEC Treaty.

Arbitration tribunals generally decide on grounds of equity and are bound neither by statute nor by legal rules.

Arbitration tribunals are not bound by rulings delivered by the Court of Justice under the second paragraph of Article 177 of the EEC Treaty: thus the effect of such rulings would be that of mere legal opinions.

A right to make a reference for a preliminary ruling would be supererogatory because the Court of Justice may still be requested to give a ruling by the ordinary court of law during the proceedings for enforcement of the arbitrator's award.

The application of Community law in arbitration proceedings would be of a "private" nature and would have no significance for the general development of Community law.

Since arbitration awards are not subject to appeal, recognition of the right to make references for a preliminary ruling would automatically create an obligation to make them.

Those who favour a right of reference by arbitration tribunals on the other hand rely on the following arguments:

A recognition that there is jurisdiction to make references for a preliminary ruling

would encourage the uniform interpretation and application of Community law in an important sector of the administration of justice.

Exclusion of the right of reference would create the risk that arbitration tribunals might seek to evade or ignore provisions of Community law.

There are no objective grounds for denying arbitrators the right of reference when the arbitrators are bound to apply statute and other legal rules.

In international law the Member States which countenance arbitration awards which run counter to Community law would be held liable for such contraventions.

In the light of those arguments the *Commission* takes the view that it is difficult to give a categorical answer to the question because the concept of an arbitration tribunal is imprecise, particularly in view of the differences in practice and legislation between Member States. The question is rather under what conditions a body deciding a dispute may be considered to be a court or tribunal within the meaning of Article 177.

Adopting that approach, the *Commission* proceeds to examine the status of arbitration bodies under German law (Articles 1025 to 1048 of the *Zivilprozeßordnung*). A comparison of the nature of the powers of an arbitrator under German law with the criteria laid down by the Court in Case 61/65 leads to the conclusion that there is agreement on the most essential aspects.

The arbitration tribunal in question here:

Was properly constituted under national law;

Is considered under national law as a body charged with the settlement of disputes;

Is bound by national rules of legal procedure;

And is bound to apply rules of law.

It does not, however, satisfy the requirement that the jurisdiction to decide a given case must have been conferred directly by a national provision, or the requirement relating to the permanency of the body.

Nevertheless, the Commission stresses that the judicial powers of the arbitration tribunal, as an organ entrusted with the administration of justice, are rooted in the judicial system itself, which recognizes it and authorizes it to give legally binding decisions in disputes (Article 1040 of the Zivilprozeßordnung). The parties do not create the possibility of arbitration, they make use of it.

The fact that the existence of a particular arbitration tribunal is of limited duration is of no importance. It is essential, however, that the power of arbitration as such is a permanent feature of the judicial system.

The Commission considers, therefore, that Article 177 should be interpreted to include as a court or tribunal all national bodies which give judgment. The German arbitration tribunal does so and, what is more, is bound to apply Community law.

In conclusion the Commission suggests the following reply to the first question:

"A German arbitration tribunal which decides not on grounds of equity but on grounds of law and whose award has the same effects as regards the parties as a judicial decision with the force of *res judicata* (Article 1040 of the Zivilprozeßordnung) has jurisdiction to refer questions to the Court of Justice of the

European Communities for a preliminary ruling under the second paragraph of Article 177 of the EEC Treaty."

2. Second question

The respondents in the arbitration submit that the wording and context of Regulations Nos 17/64 and 2722/72 indicate that the aid provided for in the Guidance Section is not aid for a general sector, granted without distinction to all the undertakings in a particular branch of economic activity. On the contrary, the aid is granted only on a selective basis, with reference to specific individual investment projects which must satisfy precise conditions laid down in advance, both of substance and of form, and also of a technical nature. The aid is thus linked to a given project.

Thus, both regulations provide expressly that aid is granted for a "given project" (cf. Articles 13, 14 and 18 of Regulation No 17/64 and Articles 12 and 13 of Regulation No 2722/72). Moreover, aid from the Fund is granted only on application (Article 20 of Regulation No 17/64; Article 14 of Regulation No 2722/72), more particularly to the beneficiaries who are responsible for the cost "of the project" (Article 22 (1) of Regulation No 17/64; Article 13 of Regulation No 2722/72).

The specificity of the aid which is given is even more apparent in the decisions made by the Commission in the field: those decisions bear as their heading the name of the fishing vessel for which the aid is destined.

The respondents maintain that aid has been deflected from its rightful purpose if even before it has been granted by the Commission the person who is to receive the aid undertakes to pass it on to other undertakings in respect of which the Commission has decided specifically not to give aid. Such action deprives selective aid of its inherent purpose. Moreover, it

clearly alters the financial conditions on which the Commission bases its decision whether to grant aid, thus frustrating one of the essential criteria for the decision.

The result is that under such conditions the project for which aid has been granted is not carried out as intended, and that amounts to an irregularity within the meaning of Regulation No 729/70.

The concept of irregularity does not imply the existence of fraudulent intent. On the contrary, any infringement of Community law whatsoever amounts to an irregularity which precludes financing from Community funds (judgments of 7 February 1979: in Case 11/79, *Netherlands v Commission*, [1979] ECR 245; Joined Cases 15 and 16/76, *France v Commission*, [1979] ECR 321; and Case 18/76, *Federal Republic of Germany v Commission*, [1979] ECR 343).

The respondents conclude their submissions by suggesting that the reply to the second question should be as follows:

"Where the recipients of aid from the Guidance Section of the European Agricultural Guidance and Guarantee Fund agree, after applying for but before the grant of Community aid, that such aid will be shared among them on the basis of the total number of vessels of the same type, when no aid has been requested for some of them or such aid has been refused by the Commission, that amounts to an "irregularity" within

the meaning of Regulations of the Council Nos 17/64, 729/70 and 2722/72. Where the Commission ascertains the existence of such irregularities it is entitled to take action to recover the whole or part of the sums granted."

The *Italian Government* submits that a pooling agreement might result in Community aid's going to undertakings which do not satisfy the conditions laid down by the Community regulations. As a result the system of distributing aid within the Community might be undermined by such undertakings. The system was based on the idea that aid of that nature is granted in order to achieve certain specific ends at Community level; it is precisely for that reason that the Community provisions make the grant of such aid subject to appropriate conditions and requirements.

The *Commission* points out that the parties' declared aim was to adjust, as between themselves, the effects of the various decisions granting aid and to use that aid not in accordance with the Commission's criteria but in terms of considerations peculiar to the parties.

Such a practice conflicts with the Commission's exclusive power of decision and with the principle that aid is linked to the applications submitted. The terms of the applications require the aid to be used in each case wholly for the financing of the relevant project. The pooling contract, however, provided for the transfer to third parties of a portion, as yet undetermined, of the aid in order to assist projects *not included* in the application. The applications for aid were not amended, and the Commission

adopted its decisions to grant aid in each case on that basis.

The companies ought to have sought to achieve their aim of spreading available aid over a wider number of projects by means of a request to that effect to the Commission.

Under Article 22 (2) of Regulation No 17/64 and Article 19 (1) of Regulation No 2722/72 the Commission is empowered to take steps to recover the amounts transferred by way of adjustment between the parties.

In conclusion the Commission suggests that the reply to the second question should be as follows:

"It is incompatible with Community law on aid and, in particular, with Regulations Nos 17/64 and 2722/72 for recipients of aid from the Guidance Section of the European Agricultural Guidance and Guarantee Fund for projects of a similar nature (the construction of factory-ships for fishing) to agree after applying for Community aid but before such aid is granted that aid granted after the ships have been put into service and paid for will be shared (pooled) between them according to the total number of ships of the same type which they have had built and put into service, that is to say, including ships in respect of which no aid was granted but which are of a similar type. The Commission is entitled to take steps to recover payments made by way of adjustment under such an agreement."

III — Oral procedure

At the sitting of 1 December 1981 oral argument was presented by "Nordsee"

Deutsche Hochseefischerei GmbH, the claimant in the arbitration, represented by Prof. K. Redeker; by Mond Hochseefischerei Nordstern AG & Co. KG and Busse Hochseefischerei Nordstern AG & Co. KG, the respondents in the arbitration, represented by J. Sedemund; by the Government of the Italian Republic, represented by Pier Giorgio Ferri, acting as Agent; by the United Kingdom, represented by Stewart Boyd QC, acting as Agent; and by the Commission of the European Communities, represented by Jürgen Grunwald, a member of the Commission's Legal Department, acting as Agent.

In the course of the sitting *Nordsee* submitted observations on the *second question*.

It emphasized that all the vessels in question were put into service in October 1973 and paid for at that time. The agreement in question was entered into on 27 June 1973, on which date ten vessels were already in service and three others were in the course of completion. Consequently at that time it was already known that aid would be given only at a time when all the vessels were already built, in service and paid for.

There can therefore be no question in the circumstances of the aid's being intended to encourage the recipient to do something in the common interest; the aid was a pecuniary supplement which went to the undertaking and which did not fulfil the same purposes as a subsidy. The payments made by the Commission to the undertakings amounted therefore to a financial benefit which could no longer be linked to a project since it did not really form part of the financing of the individual project, which had already been completed. That eventually is, moreover, expressly provided for in Article 21 of Regulation

No 2722/72, in conjunction with project, when the object of the aid has already been achieved.
Article 1 (3) (b).

Nordsee submits that the Commission's exclusive power of decision ceases on payment and on completion of the The Advocate General delivered his opinion at the sitting on 2 February 1982.

Decision

- 1 By a decision of 22 April 1981 which was received by the Court on 27 April, the arbitrator in a dispute between three undertakings, all incorporated under German law and established in Bremerhaven, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty two questions concerning the interpretation of Article 177 of the Treaty and the interpretation of Regulation No 17/64 of the Council of 5 February 1964 (Official Journal, English Special Edition 1963-1964, p. 103), Regulation (EEC) No 729/70 of the Council of 21 April 1970 (Official Journal, English Special Edition 1970 (I), p. 218) and Regulation (EEC) No 2722/72 of the Council of 19 December 1972 (Official Journal, English Special Edition 1972 (28 to 30 December) p. 31), all concerning aid from the Guidance Section of the European Agricultural Guidance and Guarantee Fund (hereinafter referred to as "the Fund").
- 2 The original dispute related to performance of a contract entered into on 27 June 1973 by a number of German shipbuilders. The contract concerned a joint project for building thirteen factory-ships for fishing and its purpose was to apportion equally among the contracting parties all financial aid received by them from the Fund, so that one-thirteenth of the total amount of aid granted would be allotted for each ship to be built. By mutual agreement the parties to the contract had previously submitted applications to the Fund for aid for the construction of nine ships.
- 3 Of those nine applications the Commission finally accepted only six, the others being either withdrawn or rejected. One of the undertakings participating in the building programme sought payment from two of the other undertakings of the amounts to which it was entitled under the contract of 27 June 1973.

- 4 A dispute arose on the subject and was submitted for arbitration, as the contract of 1973 contained a clause stating that in the event of disagreement between the parties on any question arising from the contract a final decision was to be given by an arbitrator, all recourse to the ordinary courts being excluded. In accordance with that clause the arbitrator was appointed by the Chamber of Commerce of Bremen after it had become apparent that the parties to the dispute could not agree on the appointment of an arbitrator.
- 5 During the arbitration hearing the respondents claimed that the 1973 contract was void in so far as it arranged for aid from the Fund to go to the building of ships in respect of which the Commission had not granted such aid. They took the view that aid from the Fund was linked to completion of a specific project and could not therefore validly be transferred by the recipient to a different project.
- 6 The arbitrator was of the opinion that under German law the validity of a contract to share aid from the Fund depended on whether such sharing amounted to an irregularity under the relevant Community regulations. Considering that a decision on the point was necessary in order to allow him to make his award he referred the matter to the Court for a preliminary ruling.

Applicability of Article 177

- 7 Since the arbitration tribunal which referred the matter to the Court for a preliminary ruling was established pursuant to a contract between private individuals the question arises whether it may be considered as a court or tribunal of one of the Member States within the meaning of Article 177 of the Treaty.
- 8 The first question put by the arbitrator concerns that problem. It is worded as follows:

“Is a German arbitration court, which must decide not according to equity but according to law, and whose decision has the same effects as regards the parties as a definitive judgment of a court of law (Article 1040 of the Zivilprozeßordnung [rules of civil procedure]) authorized to make a reference to the Court of Justice of the European Communities for a preliminary ruling pursuant to the second paragraph of Article 177 of the EEC Treaty?”

- 9 It must be noted that, as the question indicates, the jurisdiction of the Court to rule on questions referred to it depends on the nature of the arbitration in question.
- 10 It is true, as the arbitrator noted in his question, that there are certain similarities between the activities of the arbitration tribunal in question and those of an ordinary court or tribunal inasmuch as the arbitration is provided for within the framework of the law, the arbitrator must decide according to law and his award has, as between the parties, the force of *res judicata*, and may be enforceable if leave to issue execution is obtained. However, those characteristics are not sufficient to give the arbitrator the status of a "court or tribunal of a Member State" within the meaning of Article 177 of the Treaty.
- 11 The first important point to note is that when the contract was entered into in 1973 the parties were free to leave their disputes to be resolved by the ordinary courts or to opt for arbitration by inserting a clause to that effect in the contract. From the facts of the case it appears that the parties were under no obligation, whether in law or in fact, to refer their disputes to arbitration.
- 12 The second point to be noted is that the German public authorities are not involved in the decision to opt for arbitration nor are they called upon to intervene automatically in the proceedings before the arbitrator. The Federal Republic of Germany, as a Member State of the Community responsible for the performance of obligations arising from Community law within its territory pursuant to Article 5 and Articles 169 to 171 of the Treaty, has not entrusted or left to private individuals the duty of ensuring that such obligations are complied with in the sphere in question in this case.
- 13 It follows from these considerations that the link between the arbitration procedure in this instance and the organization of legal remedies through the courts in the Member State in question is not sufficiently close for the arbi-

trator to be considered as a "court or tribunal of a Member State" within the meaning of Article 177.

- 14 As the Court has confirmed in its judgment of 6 October 1981 *Broekmeulen*, Case 246/80 [1981] ECR 2311), Community law must be observed in its entirety throughout the territory of all the Member States; parties to a contract are not, therefore, free to create exceptions to it. In that context attention must be drawn to the fact that if questions of Community law are raised in an arbitration resorted to by agreement the ordinary courts may be called upon to examine them either in the context of their collaboration with arbitration tribunals, in particular in order to assist them in certain procedural matters or to interpret the law applicable, or in the course of a review of an arbitration award — which may be more or less extensive depending on the circumstances — and which they may be required to effect in case of an appeal or objection, in proceedings for leave to issue execution or by any other method of recourse available under the relevant national legislation.
- 15 It is for those national courts and tribunals to ascertain whether it is necessary for them to make a reference to the Court under Article 177 of the Treaty in order to obtain the interpretation or assessment of the validity of provisions of Community law which they may need to apply when exercising such auxiliary or supervisory functions.
- 16 It follows that in this instance the Court has no jurisdiction to give a ruling.

Costs

- 17 The costs incurred by the Kingdom of Denmark, the Italian Republic, the United Kingdom and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main dispute are concerned, in the nature of a step in the arbitration proceedings, the decision as to costs is a matter for the arbitrator.

On those grounds,

THE COURT,

in answer to the questions referred to it by the arbitrator in the dispute between Nordsee Deutsche Hochseefischerei GmbH, on the one hand, and Reederei Mond Hochseefischerei Nordstern AG & Co. KG and Reederei Friedrich Busse Hochseefischerei Nordstern AG & Co. KG, on the other hand, by a decision of 22 April 1981, hereby rules:

The Court has no jurisdiction to give a ruling on the questions referred to it by the arbitrator.

Bosco	Touffait	Due	Pescatore	Mackenzie Stuart
O'Keeffe	Koopmans	Everling	Chloros	

Delivered in open court in Luxembourg on 23 March 1982.

P. Heim
Registrar

G. Bosco
President of the First Chamber
Acting as President

OPINION OF MR ADVOCATE GENERAL REISCHL
DELIVERED ON 2 FEBRUARY 1982 ¹

*Mr President,
Members of the Court,*

A number of German undertakings engaged in deep-sea fishing, namely

Nordsee Deutsche Hochseefischerei GmbH, Reederei Mond Hochseefischerei Nordstern AG & Co. KG and Friedrich Busse Hochseefischerei Nordstern AG & Co. KG (both of the

¹ — Translated from the German.