

OPINION OF ADVOCATE GENERAL
TIZZANO

delivered on 13 January 2005¹

I — Introduction

1. In the present case the Kingdom of Spain (hereinafter also referred to as 'Spain' or the 'applicant') applies to the Court under Article 230 EC for annulment of point 6 of Annex I of Council Regulation (EC) No 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy (hereinafter 'Regulation No 2371/2002' or the 'contested regulation').²

2. That government contends, for the reasons that I shall describe below, that the provision in question infringes the principle of non-discrimination and the Act of Accession of the Kingdom of Spain and the Portuguese Republic to the European Communities of 1985 (hereinafter the 'Act of Accession of Spain' or simply the 'Act of Accession').³

II — Legal background

3. In order to protect the Community fisheries resources from over-exploitation, the Community adopted a number of measures to regulate the access of fishing vessels to Community waters.

4. To clarify the context in which the contested regulation in the present case was adopted, it is necessary first and foremost to refer to Council Regulation (EEC) No 2141/70 of 20 October 1970 laying down a common structural policy for the fishing industry,⁴ which established the principle of free access to the waters under the jurisdiction or sovereignty of the Member States (Article 2).

5. It must then be recalled that, in derogation from that principle, Article 100(1) of the Act of Accession of the Kingdom of Denmark, Ireland and the United Kingdom to the European Communities of 1972 (herein-

1 — Original language: Italian.

2 — OJ 2002 L 358, p. 59.

3 — OJ 1985 L 302, p. 69.

4 — OJ, English Special Edition 1970 (III), p. 703.

after the '1972 Act of Accession')⁵ authorised the Member States, until 31 December 1982, to restrict fishing in waters under their sovereignty or jurisdiction, situated within a limit of six nautical miles from the coast, to vessels which fish traditionally in those waters. Under Article 103 of that Act, it was for the Council to adopt any necessary measures to prolong the application of the said derogation beyond the abovementioned date.

6. In fact, the Council adopted Regulation (EEC) No 170/83 of 25 January 1983 establishing a Community system for the conservation and management of fishery resources (hereinafter 'Regulation No 170/83'),⁶ Article 6(1) of which prolonged the abovementioned restrictions on access to the coastal waters of the Member States until 31 December 1992 and extended them to 12 nautical miles from the coast.

7. The second paragraph of the same article provided that 'the fishing activities under the arrangements established in [paragraph 1] shall be pursued in accordance with the arrangements contained in Annex I, fixing for each Member State the geographical zones within the coastal bands of other Member States where these activities are pursued and the species concerned'.

8. That annex was amended by Article 26 of the Act of Accession of Spain in order to establish, in so far as is relevant here, the arrangements for the access of Spanish vessels to the French coastal band and of French vessels to the Spanish coastal band, which had previously been governed by the Agreement on fisheries between the European Economic Community and the Government of Spain of 1980 (hereinafter the 'EEC-Spanish fisheries agreement of 1980').⁷

9. In particular, the amendments to the annex in question consisted in adding a new table for the 'Coastal waters of Spain' and updating that for the 'Coastal waters of France and the Overseas Departments'.

10. According to those tables, access by Spanish vessels to the waters between 6 and 12 nautical miles from the French Atlantic coast stretching from the Franco-Spanish border up to 46°08' North is permitted only in certain periods of the year and only for the catching of sardines and anchovies.

5 — OJ 1972 L 73, p. 14.

6 — OJ 1983 L 24, p. 1.

7 — That agreement was approved on behalf of the Community by means of Council Regulation (EEC) No 3062/80 of 25 November 1980 on the conclusion of the Agreement on fisheries between the European Economic Community and the Government of Spain (OJ 1980 L 322, p. 3).

11. French vessels, by contrast, may catch all pelagic species in the waters between 6 and 12 nautical miles from the Spanish Atlantic coast stretching from the Franco-Spanish border round to the Cap Mayor lighthouse (3°47' West).

12. Those arrangements were confirmed by the adoption of Council Regulation (EEC) No 3760/92 of 20 December 1992 establishing a Community system for fisheries and aquaculture (hereinafter 'Regulation No 3760/92'),⁸ Annex I of which reproduces the tables of Annex I of Regulation No 170/83 as amended by the Act of Accession of Spain.

13. Regulation No 3760/92 was repealed by Regulation No 2371/2002, which is the subject of these proceedings.

14. The objective of the latter regulation is to 'ensure exploitation of living aquatic resources that provides sustainable economic, environmental and social conditions' (Article 2).

15. The 14th recital of the regulation states that:

'Rules in place restricting access to resources within the 12 nautical mile zones of Member States have operated satisfactorily benefiting conservation by restricting fishing effort in the most sensitive part of Community waters and preserving traditional fishing activities on which the social and economic development of certain coastal communities is highly dependent. They should therefore continue to apply until 31 December 2012'.

16. To that end, Article 17 of the regulation confirms, in the first paragraph, the general rule of equal access of Community fishing vessels to Community waters and resources and provides, in the second paragraph, that:

'In the waters up to 12 nautical miles from baselines under their sovereignty or jurisdiction, Member States shall be authorised from 1 January 2003 to 31 December 2012 to restrict fishing to fishing vessels that traditionally fish in those waters from ports on the adjacent coast, without prejudice to the arrangements ... contained in Annex I, fixing for each Member State the geographical zones within the coastal bands of other Member States where fishing activities are pursued and the species concerned'.

17. Points 6 and 7 of that annex reproduce respectively the tables 'Coastal waters of France and the Overseas Departments' and

⁸ — OJ 1992 L 389, p. 1.

'Coastal waters of Spain' contained in Annex I of Regulation No 170/83 amended by the Act of Accession of Spain, described above (see paragraph 9 et seq.).

18. That having been said, I would point out that, by laying down the rule of equal access to all Community waters beyond the 12-mile limit, Article 17(1) of Regulation No 2371/2002 replaces, as far as the access of Spanish fishing vessels to French waters is concerned, the rules established in the Act of Accession, and in particular in Article 160 thereof. That provision imposed similar restrictions to those laid down for the zone between 6 and 12 nautical miles in Annex I of Regulation No 2371/2002 (and its predecessors).

19. Lastly, it must be noted that the arrangement provided for in Article 160 was due to lapse on 31 December 2002 at the latest, which under Article 166 of the Act of Accession was the expiry date of the arrangements defined in Articles 156 to 164 of that Act.⁹

9 — Article 166 states that 'The regime defined in Articles 156 to 164, including the adjustments which the Council will be able to adopt pursuant to Article 162, shall remain in force until the date of expiry of the period laid down in Article 8(3) of Regulation (EEC) No 170/83'. The latter provision lays down that 'The Commission shall submit to the Council, during the 10th year following 31 December 1992, a report on the economic and social situation of coastal regions, on the basis of which the Council, acting in accordance with the procedure laid down in Article 43 of the Treaty, shall decide on the provisions which, once the 10-year period mentioned in this paragraph has expired, could follow the arrangements referred to in Articles 6 and 7'. It follows, as indicated in the text, that the expiry date mentioned in Article 166 of the Act of Accession was 31 December 2002.

III — Facts and procedure

20. During the negotiation of Regulation No 2371/2002 Spain had requested the removal of the restrictions which the Community legislation then in force imposed on the activities of its fishing vessels in the zone situated between 6 and 12 nautical miles from the coast in French Atlantic waters in order to bring the conditions for access to that zone into line with those for French vessels in Spanish waters.

21. However, the Council decided to leave the access arrangements for Spanish fishing vessels unchanged, reproducing in points 6 and 7 of Annex I of the contested regulation the same tables contained in Annex I of Regulation No 170/83 (amended by the Act of Accession of Spain) and of Regulation No 3760/92.

22. As a result of that refusal, by act lodged on 28 February 2003 Spain asked the Court to annul point 6 of Annex I of Regulation No 2371/2002 and to order the Council to pay the costs.

23. The Council opposed that application, asking the Court to dismiss the action and to order the applicant to pay the costs.

24. By orders of the President of 30 June and 8 September 2003 respectively, the Court granted the Commission and the French Republic (hereinafter 'France') leave to intervene in the present case in support of the form of order sought by the Council, pursuant to Article 93(1) of the Rules of Procedure.

25. In the proceedings thus instituted, written observations were presented by the applicant, the Council, the Commission and France.

26. The applicant, the Council and the Commission participated in the hearing on 11 November 2004.

IV — Analysis

A — The plea as to infringement of the principle of non-discrimination

27. In its first plea Spain complains that the contested regulation gives rise to an infringement to its detriment of the principle of non-discrimination, laid down in general terms in Article 12 EC and specifically with regard to the common agricultural policy in Article 34(2) EC.

28. In particular, Spain maintains that fishing by French vessels in Spanish waters within 12 nautical miles of the coast is not subject to the same restrictions as those laid down for Spanish vessels in the corresponding French waters. Furthermore, it claims that restrictions such as those applying to Spanish fishing vessels are not to be found in any arrangements for access by the fishing vessels of a Member State to the fisheries resources in the waters within the 12-mile band of another Member State. Spain therefore considers that it is the only Member State whose vessels have restricted access to those resources of the neighbouring Member State.

29. The applicant adds that no objective justification can be adduced for maintaining such discriminatory treatment, because following the expiry of the transitional period (set on the basis of Article 166 of the Act of Accession at 31 December 2002 at the latest) it is in the same position as the other Member States. It therefore asserts that its vessels should benefit from unrestricted access to French waters within or beyond 12 nautical miles from the coast.

30. This is contested by the Council — supported by France and the Commission — according to which the allegation of an infringement of the principle of non-discrimination is based on two wrong premisses. In its opinion, it is not true that only the

access of Spanish vessels is restricted in terms of the permitted species and period of the year, just as it is not true that there is no objective justification for such treatment.

33. Having ascertained that the Spanish case is not an isolated instance, it remains to be seen whether the situation described nevertheless constitutes an infringement of the principle of non-discrimination.

31. In now assessing the two positions in contention, I first observe, in agreement with the Council, that from an examination of Annex I of Regulation No 2371/2002 it is easy to ascertain that the rules for exploiting the waters within the 12-mile limit are not based on the principle of reciprocity. For example, French vessels have access to fisheries resources within the 12-mile limit in Irish waters even though Irish vessels do not enjoy the same privilege in French waters; similarly, Belgian vessels may exploit the coastal waters of the United Kingdom, Ireland and Denmark, whereas the vessels of those States may not do the same in Belgian waters.

34. To that end, it should be considered first that the purpose of the regulation that is the subject of the present dispute is, as indicated above, to ensure 'exploitation of living aquatic resources that provides sustainable economic, environmental and social conditions' (Article 2).

35. In order to achieve that objective, as the Council and the Commission point out, the contested regulation makes a distinction — which the applicant appears to have overlooked — between the arrangements applicable up to 12 nautical miles from the coast and those applicable beyond that limit.

32. Moreover, on the basis of the said annex, fishing by other Member States as well as Spain is also restricted according to species (this applies to the vessels of France, Ireland, Germany, the Netherlands and Belgium in the 12-mile zone of the United Kingdom and to the vessels of Germany, the Netherlands and Belgium in Denmark's 12-mile zone) and according to the time of year (this applies to Belgian vessels in Denmark's 12-mile zone and to German vessels in the French 12-mile zone).

36. Whereas in the latter case Article 17(1) of the regulation requires the general application of the principle of free access to fisheries resources, for the 12-mile zone the second paragraph of that article extends the validity of the arrangements for restricted access contained in the earlier regulations on

this subject.¹⁰ It follows that access continues to be permitted only for vessels that have traditionally operated in the zones in question, in accordance with the usual conditions laid down in that regard.

equally important need to protect fishermen who have traditionally operated in such waters no role has been granted to considerations based on reciprocity or on the contiguity of Member States.

37. As can be seen from the 14th recital of the regulation, the purpose of such restrictions is to protect 'the most sensitive part of Community waters' while at the same time taking account of the need to '[preserve] traditional fishing activities on which the social and economic development of certain coastal communities is highly dependent'.

40. Hence, given that the logic of the access arrangements established by the contested regulation depends on whether the activity of the fishing vessels of other Member States in the 12-mile zone of a Member State is 'traditional' or not, it is now a question of determining whether, in that context, there is discrimination against Spanish fishing vessels.

38. Hence, on the one hand a rule has been imposed that preserves the fisheries resources of that zone by restricting exploitation as much as possible. On the other, an attempt has been made to reconcile that objective with protection of the fishermen who have traditionally operated in the waters in question and who would be denied the activity from which they earn their livelihood if they became subject to restrictions that had not applied in the past.

41. In this regard, it is hardly necessary to recall that, according to the settled case-law of the Court,¹¹ the principle of non-discrimination requires that comparable situations not be treated differently and that different situations not be treated in the same way, except where objectively necessary.

39. It is important to note, however, that in seeking to strike this balance between the need to protect the fisheries resources in the particularly sensitive 12-mile zone and the

42. On that premiss, it seems to me first of all that Spain's argument that, as its vessels

¹⁰ — As described in detail in the section on the legal background, the regulations in question are Regulation No 70/83 (as amended by the Act of Accession of Spain) and Regulation No 3760/92.

¹¹ — See, in particular, the judgments in Cases 8/82 *Wagner v Bundesanstalt für landwirtschaftliche Marktordnung* [1983] ECR 371, paragraph 18, 283/83 *Racke v Hauptzollamt Mainz* [1984] ECR 3791, paragraph 7, C-311/97 *Royal Bank of Scotland v Greece* [1999] ECR I-2651, paragraph 26, and C-120/99 *Italy v Council* [2001] ECR I-7997, paragraph 80.

have free access to the resources of the zone beyond the 12 nautical mile limit, it is discriminatory to impose restrictions on them within the inshore zone overlooks the fact that the two zones are subject to different rules, so that the very basis for applying the principle of non-discrimination is absent.

43. Moreover, nor in my view is there discrimination in the fact that the contested regulation subjects the exploitation of the French waters within the 12-mile limit by Spanish fishing vessels to less favourable conditions than those laid down for the exploitation of the corresponding Spanish zone by French fishing vessels.

44. In fact, the exploitation of French waters within the 12-mile limit is denied to the fishing vessels of all the Member States, with the exception of those (including Spanish fishing vessels) that have traditionally operated there, which continue to have access to the resources of that zone subject to the conditions traditionally laid down. The same applies to the exploitation of Spanish waters within the 12-mile limit, which is denied to the fishing vessels of all the Member States, again with the exception of those that continue to enjoy the conditions traditionally laid down (and which, moreover, in this case are only French vessels).

45. In both cases, the general rule is therefore to protect the fisheries resources of the particularly sensitive waters within the 12-mile limit, denying access to the fishing vessels of other Member States as a matter of principle. That rule is subject to exceptions stemming from the objective need not to deprive the fishermen of other Member States of the opportunity to carry on the activities from which they have traditionally derived their livelihood.

46. Hence, since the exploitation arrangements laid down in Regulation No 2371/2002 take the form of a general non-discriminatory rule with objectively justified exceptions, it appears to me to be unscathed by the objections raised by the applicant.

47. Nor can it be objected that, by merely taking a snapshot of the situation existing at the time of Spain's accession to the Community, Regulation No 2371/2002 failed to take account of the need to preserve the situations acquired by Spanish fishermen prior to accession.

48. Above all, given the many years that have elapsed since Spain's entry to the Community, to my mind it would seem difficult to maintain that Spanish fisherman can still lay claim to situations acquired before accession (and, as we have seen, not

confirmed at that time) that are deserving of protection and thus liable to entail sacrificing the protection of the fisheries resources of French waters within the 12-mile limit.

London Convention and the Franco-Spanish agreement mentioned above.

49. But leaving that aside, I must point out that, contrary to Spain's assertions, the arrangements in force before accession did not in fact grant Spanish fishing vessels free access to that zone.

51. The foregoing leads me to conclude that Regulation No 2371/2002, and in particular point 6 of Annex I, does not infringe the principle of non-discrimination. I therefore propose that the Court dismiss the first plea of the application.

50. As stated in the *Arbelaiz-Emazabel* judgment,¹² it is true that during the negotiations that led to the conclusion of the fisheries agreement of 1980 between the EEC and Spain the Spanish Government had initially requested that the rights which its fishing vessels enjoyed in the 6 to 12-mile zone of French Atlantic waters under earlier international agreements, in particular the London Convention of 1964¹³ and the Franco-Spanish fishing agreement of 1967,¹⁴ be maintained. However, it is also true that that government then abandoned its claims in the course of the negotiations, declaring that 'the provisions of the [1980] agreement are to be substituted for the provisions of the agreements concerning relations in respect of fisheries to which the Member States of the EEC and Spain are parties',¹⁵ which undoubtedly included the

B — *The alleged infringement of the Act of Accession of Spain to the European Communities*

52. In its second plea, Spain maintains that point 6 of Annex I of Regulation No 2371/2002 constitutes an infringement of the Act of Accession.

53. It maintains that Article 160 of the Act imposes restrictions on the access of Spanish fishing vessels to the fisheries resources of French Atlantic waters both in the zone within 12 nautical miles from the coast and in the zone beyond that limit. It asserts that, since under Article 166 of the Act the provisions of Articles 156 to 164 of the Act are applicable exclusively for a transitional period due to expire on 31 December 2002 (see paragraph 19 above), after that date the

12 — Judgment in Case 181/80 *Arbelaiz-Emazabel* [1981] ECR 2961.

13 — London Fisheries Convention of 9 March 1964 (United Nations Treaty Series, Vol. 581, No 8432), which was ratified by France and Spain in 1965.

14 — General agreement on fishing concluded between France and Spain by an exchange of notes on 20 March 1967 (*Journal Officiel de la République Française* of 4 August 1967, p. 7807).

15 — Paragraph 18.

Community legislator could no longer legitimately maintain in force restrictions on the activities of Spanish fishing vessels in French Atlantic waters, even within the 12-mile zone.

54. According to the applicant government, by continuing to subject Spanish vessels to the same conditions for access to the above-mentioned zone provided for in the regulations that preceded it¹⁶ and had been adopted while Article 160 of the Act of Accession was valid, the contested regulation constitutes an undue extension of the transitional arrangements beyond the period laid down in the Act.

55. The Council, supported by France and the Commission, replies to these objections with arguments that I feel bound to share.

56. First of all, it appears to me that the contested regulation cannot infringe Article 166 of the Act of Accession, because that provision is not, in fact, intended to restrict the work of the Community legislator after the expiry of the transitional period but merely stipulates that certain provisions of the Act of Accession, including Article 160, lose their validity after that date.

57. But apart from that, I think it is important to state that, contrary to the assertions of the applicant government, the rules to which Community law subjects access to French Atlantic waters within the 12-mile limit — currently by means of the contested regulation and previously by means of its predecessors¹⁷ — do not in fact fall within the scope of Articles 156 to 164 of the Act of Accession, so that whether the latter remain in force or not has no bearing on them.

58. As rightly stated at the hearing by the Council and especially by the Commission, it is true that Article 160 of the Act of Accession does not expressly exclude French Atlantic waters within the 12-mile limit from its scope, but the fact is that it is not relevant in the present case because access to those waters is in reality subject to special rules introduced by means of the amendments to Regulation No 170/83 contained in the Act of Accession itself. In particular, as described above (see paragraph 8 et seq.), Article 26 of the Act of Accession inserted into Annex I of that regulation a new table for the 'Coastal waters of Spain' and updated that for the 'Coastal waters of France and the Overseas Departments'. Those tables were last reproduced in Annex I of the contested regulation.

16 — As described in the section on the legal background, I am referring to Regulation No 170/83 (as amended by the Act of Accession of Spain), and Regulation No 3760/92.

17 — See footnote 16.

59. Since Article 26 comes in Part Three of the Act of Accession dealing with 'Adaptations to acts adopted by the institutions' and not in Part Four dealing with 'Transitional measures', it has no link with the transitional period under Article 166 of the Act. Furthermore, the fact that only the restrictions on access to waters outside the 12-mile limit are transitional — and not also those for inshore waters — is the logical consequence of the fact that, as we saw when examining the first plea, the principle of free access for all Community vessels applies in general only to the former. It is therefore logical that arrangements derogating from that principle could be imposed on Spanish fishing vessels only for the transitional period associated with accession to the Community.

60. As the same principle does not apply to the zone within the 12-mile limit, however, I see no merit in the applicant government's assertion that the expiry of the transitional period automatically also entails the expiry of the restrictions on the access of Spanish vessels to French Atlantic waters within that limit.

61. Those restrictions were inserted into Regulation No 170/83 by the Act of Accession (and subsequently confirmed in the regulations that replaced it) in order to subject access by Spanish vessels to French waters within the 12-mile limit to regulations consistent with the generally applicable rule on access to the coastal waters of a Member State by the fishing vessels of other Member States. As I have indicated several times

above, that rule consists in a prohibition from exploiting the fisheries resources of that zone except for the stated exceptions for those States whose fishing vessels have traditionally operated in the coastal waters of the other States.

62. As the introduction and maintenance of the restrictions on the activities of its fishing vessels in French waters within the 12-mile limit meant that Spain was subject to the same rules that continue to apply among the other Member States, there is no reason to consider that the expiry of the transitional period associated with accession implies that such restrictions are automatically unlawful.

63. That the arguments of the applicant government are unfounded is also confirmed by the fact that although the rules on the exploitation of French waters within the 12-mile limit were inserted into Regulation No 170/83 by means of the Act of Accession they became part of that regulation in every respect and must therefore have the same scope as the other rules that had been contained in the regulation from the outset. As the regulation also provided for restrictions in relations between founding countries (as is the case, for example, of German fishing vessels in French waters), it is obvious to me that the measures contained in Regulation No 170/83 are unaffected by the expiry of transitional periods associated with accession.

64. The same conclusion must apply *a fortiori* to Regulation No 2371/2002, which has nothing to do with the Act of Accession of Spain and which was adopted solely pursuant to Article 37 EC.

65. On the basis of the foregoing, I therefore propose that the Court also dismiss the second plea, and hence the entire application.

V — Costs

66. In the light of Article 69(2) of the Rules of Procedure and the conclusion I have reached regarding dismissal of the application, I consider that the applicant must be ordered to pay the Council's costs. The French Republic and the Commission, on the other hand, must bear their own costs in accordance with Article 69(4) of the Rules of Procedure.

VI — Conclusion

67. On the basis of the foregoing considerations, I propose that the Court declare that:

- (1) the application is dismissed;
- (2) the Kingdom of Spain is ordered to pay the costs;
- (3) the French Republic and the Commission shall bear their own costs.