OPINION OF ADVOCATE GENERAL DARMON
delivered on 27 October 1993 *

Mr President,
Members of the Court,

1. The case before the Court today has the particular feature, which has not occurred before to my knowledge, of concerning an action for annulment brought by a national of a non-member country against a letter of the Commission addressed to the Swedish ambassador to the European Communities. This feature is enough to explain the Commission's two objections of inadmissibility.

2. Before examining them, the factual and legal background to this action should be summarized, referring to the Report for the Hearing [1] for fuller details.

3. Under an agreement dated 21 March 1977 the European Economic Community and the Government of Sweden granted reciprocal rights for their respective vessels in their exclusive fishing areas (Article 1), limited however to catch quotas determined annually (Article 2) and subject, as appropriate, to the grant of fishing licences (Article 3).

4. Each party was to ensure compliance with the agreement by the vessels within its jurisdiction (Article 5(1)), and could take the necessary measures with respect to the vessels of the other party to ensure compliance with its provisions (Article 5(2)).

5. A procedure for consultation, and if necessary arbitration, was established to settle any dispute which might arise on the interpretation or application of the agreement (Article 7).

6. The agreement was approved by a Council Regulation of 27 June 1980, to which it was annexed. [2]

* Original language: French.

1 — I — Legal background.

2 — Council Regulation (EEC) No 2209/80 of 27 June 1980 on the conclusion of the Agreement on fisheries between the European Economic Community and the Government of Sweden (OJ 1980 L 226, p. 1).

7. In a regulation of 20 December 1990, [3] the Council laid down the conditions to be respected by Swedish vessels fishing within Community waters, the consequence of non-compliance being withdrawal of the fishing licence for a maximum of 12 months.

8. On 10 December 1991 the Swedish fishing vessel Lavön, owned by Fiskano AB, a company established under Swedish law, was the subject of a check by the Netherlands authorities (Algemene Inspectie Dienst), as a result of which it became apparent it was not on the list of vessels with fishing licences. Those authorities informed the Commission, which confirmed that this was the case.

9. The Commission therefore wrote to the Swedish ambassador to the European Communities on 19 February 1992 to inform him that the Lavön had been 'engaged in illegal fishing activity' and, in accordance with Article 3(7) and (8) of Regulation No 3929/90, would 'not be considered for a new fishing licence' [4] for a period of 12 months from 15 December 1991.

10. A copy of the letter was forwarded to Fiskano by the Swedish authorities. On 30 March 1990 Fiskano sent a complaint to the Commission, which was rejected in a letter of 5 May 1992.

11. The present application is directed against the letter of 19 February 1992.

12. As stated above, in my opinion the Commission is putting forward two pleas of inadmissibility, which it does not distinguish. The first relates to the nature of the challenged measure, the second to the requirement that there must be direct and individual concern to the applicant.

13. Before examining the first plea, it should be noted, as far as formal criteria are concerned, that in its decisions the Court has never accepted the way an act is described by the institution whose act it is, but has instead carried out its own examination in order to determine its real character.

14. Thus in the *Fédération Charbonnière de Belgique* v *High Authority* judgment, [5] the Court held that a letter had to be seen as a decision in view of the fact that

3 — Council Regulation (EEC) No 3929/90 of 20 December 1990 laying down for 1991 certain measures for the conservation and management of fishery resources applicable to vessels flying the flag of Sweden (OJ 1990 L 378, p. 48).

4 — Annex I to the application.

5 — Case 8/55 [1954 to 1956] ECR 245.

'The High Authority has thus unequivocally determined the attitude which it had decided to take henceforth should the circumstances mentioned under point 2(d) of the letter arise.' [6]

15. Let it also be noted, again as a preliminary point, that the fact that a letter derives from an international agreement does not mean that it is not subject to examination and review by the Court.

16. Thus the Court held in the *Haegeman* judgment [7] that an agreement concluded by the Council was

'an act of one of the institutions' [8]

with the effect that

'the provisions of the Agreement, from the coming into force thereof, form an integral part of Community law' [9]

and were accordingly within the Court's jurisdiction for interpretation.

17. The Court further held in Opinion 1/75 [10] that

'The question whether the conclusion of a given agreement is within the power of the Community and whether, in a given case, such power has been exercised in conformity with the provisions of the Treaty is, in principle, a question which may be submitted to the Court of Justice, either directly, under Article 169 or Article 173 of the Treaty, or in accordance with the preliminary procedure, and it must therefore be admitted that the matter may be referred to the Court in accordance with the preliminary procedure of Article 228.' [11]

18. It is in the light of those statements that the Commission's argument must be examined, namely that the letter in question cannot form the subject of an application by the applicant in that, being addressed to a non-member country, it belonged to the sphere of relations between sovereign powers and consequently could not be of direct and individual concern to the applicant. As an inter-State communication, it could not be classified as a 'decision', being merely a proposal for a penalty, originating from the Commission but whose disposal would be a matter for the Swedish authorities exclusively.

6 — P. 257.
7 — Case 181/73 [1974] ECR 449.
8 — Paragraph 4.
9 — Paragraph 5.
10 — [1975] ECR 1355.
11 — P. 1361.

19. That argument can be refuted by an interpretation of the relevant provisions of the agreement and the regulations in force at the time when the infringement was found to have taken place.

20. While the agreement provides in Article 5(1), as the Commission correctly states, that each party must ensure that its own vessels comply with its provisions and those of the other regulations, it nevertheless remains the case that neither the Community nor the Kingdom of Sweden intended to abandon its jurisdiction with respect to compliance with the relevant rules by the vessels of the other party.

21. Article 5(2) provides indeed that:

'Each Party may take within its area of fisheries jurisdiction such measures, in conformity with international law, as may be necessary to ensure compliance with the provisions of this Agreement by vessels of the other Party.'

22. If a vessel fails to comply with such obligations, either or both of the parties can impose a penalty on it without thereby encroaching upon the other party's sovereignty.

23. On the contrary, this is an instance of observance of the principle, well established in public international law, of territorial sovereignty, in this case in the form of an exclusive fishing zone, a concept acknowledged by the Permanent Court of International Justice in the well known *Lotus* judgment of 7 September 1927: [12]

'(...) the first and foremost restriction imposed by international law upon a State is that — failing the existence of a permissive rule to the contrary — it may not exercise its power in any form in the territory of another State'. [13]

24. Neither party intended to abandon its own jurisdiction within its territorial limits.

25. This is the very concept adopted in Regulation (EEC) No 3929/90, Article 3(8) of which authorizes the Commission on behalf of the Community to refuse to issue a licence to Swedish vessels which infringe the regulation, without prejudice to its entitlement under the second paragraph of Article 4 to

12 — Permanent Court of International Justice, Collection of Judgments, Series A No 10 (Judgment No 9).

13 — P. 18.

'submit, on behalf of the Community, to Sweden the names and characteristics of the Swedish vessels which will not be authorized to fish in the Community's fishing zone the next month(s) as a consequence of an infringement of Community rules'.

26. The regulation, in conformity with the agreement, thus authorizes the Commission either to withdraw or refuse a fishing licence to a vessel which has infringed one of its provisions, or merely to propose to Sweden that such a penalty be inflicted.

27. However, might it not be open to Sweden, within the framework of the agreement, to challenge that 'decision', given that a consultation and arbitration procedure is provided for 'in the event of a dispute concerning the interpretation or application of this Agreement'? [14]

28. The Commission considers that that provision is not intended to 'apply to the day-to-day management of the agreement'. [15]

29. I agree.

30. Reference should be made here to the Court's judgment in *Adams* v *Commission*, [16] a case in which the applicant, who had been convicted in Switzerland for disclosing to the Commission confidential information on anti-competitive practices by the Hoffmann-La Roche company, complained that the Commission had not referred the matter to the Joint Committee set up under the Free Trade Agreement between the Community and Switzerland.

31. The Court held that

'the decision whether or not to refer the matter to the Joint Committee may not be taken except for purposes which have to do *exclusively with general interests* of the Community, following an assessment which is essentially political and which cannot be challenged before the Court by an individual'. [17]

32. Similarly, the procedure referred to in Article 7 is not intended to be applied to the consequences of an individual decision, but solely to settle possible disputes which may arise directly between the parties, for example on the conservation of fishery resources (methods of fishing) or protected zones.

14 — Article 7(2).
15 — Paragraph 10 of the reply.
16 — Case 53/84 [1985] ECR 3595.
17 — Paragraph 15, my emphasis.

33. Since the Community was authorized to refuse to consider the Lavön for the grant of a licence, it must therefore be examined firstly whether the letter in this case was a decision within the meaning of the second paragraph of Article 173, and secondly whether it was of direct and individual concern to the applicant, despite being addressed to the Kingdom of Sweden.

34. The Commission argued in its written pleadings and at the hearing that the letter could not be interpreted as prohibiting the issue of a licence, but merely as proposing that a licence should be refused, so that it could not be regarded

'as a measure emanating from the competent authority, intended to produce legal effects and constituting the culmination of procedure within that authority, whereby the latter gives its final ruling in a form from which its nature can be identified'. [18]

35. It must be stated, however, that the actual wording of the letter does not allow the Swedish authorities any discretion, but simply informs them that issue of a licence to the Lavön has been suspended for 12 months. It is therefore, as indeed is shown by the express reference in the letter itself, a measure taken under paragraphs 7 and 8 of Article 3, not a proposal made under the second paragraph of Article 4.

36. Moreover, this is how the Swedish Government appears to have analysed the letter, simply passing a copy on to the applicant.

37. Given that it is a decision, can the applicant claim to be directly and individually concerned?

38. According to the Commission, even before the letter in question was sent, the Swedish authorities had already decided that the Lavön would not be issued a fishing licence for 1992, since it did not appear on the annual list, transmitted on 17 January 1992, of vessels flying the Swedish flag for which the authorities had requested licences for that year.

39. In the Commission's opinion, it was therefore the refusal of the Swedish authorities to include the vessel on the annual list which adversely affected the applicant and not the Commission's decision, so that the measure it seeks to have annulled was not of direct concern to it.

40. The Court's case-law in this respect states that such an application is admissible if

18 — Judgment in Case 54/65 *Compagnie des Forges de Châtillon v High Authority* [1966] ECR 185, at p. 195.

the applicant has an interest in obtaining the annulment of the contested measure. [19]

41. It is therefore for the Commission to show that the annual list is definitive and completely excludes the possibility that a vessel not originally included may subsequently be granted one or more monthly licences. The Commission's mere assertions on this point find no support in the agreement or the regulation.

42. Moreover, the agreed record of conclusions of consultations between the Community and Sweden, [20] on arrangements to be made for licences for 1991, states that 'requests for amendments to the basic lists may be made at any time and shall be processed expeditiously' (paragraph 2, second subparagraph, second sentence). I have likewise ascertained in this respect that the vessel GG 229 Bristol appears for the first time on the list for area IV for December 1991, but is not on the annual list for 1991. [21]

43. Finally, the very title of the base list does not permit the assertion that it is unalterable; it reads:

'The base lists of Swedish vessels *intending* to fish in Community waters in 1992', [22] whereas the monthly list contains a formal request for licences ('Swedish vessels *applying for permission* to fish'). [23]

44. It follows that the letter at issue could have adversely affected the applicant by depriving it at the very least of the chance of being included on the list.

45. Since the Swedish authorities had no discretion with respect to the Commission's decision, the applicant was directly concerned.

46. As to the concept of 'individual concern', the Court gave the following definition in the *Plaumann* judgment: [24]

'Persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from

19 — See the judgment in Case 77/77 *B. P.* v *Commission* [1978] ECR 1513, at paragraph 13.

20 — Annex to the rejoinder.

21 — Annexes 1 and 2 to the defence.

22 — Annex 6 to the defence, my emphasis.

23 — Annex 8 to the defence, my emphasis.

24 — Case 25/62 *Plaumann* v *Commission* [1963] ECR 95.

all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed.' [25]

47. It suffices to note that the decision concerns the Lavön to the exclusion of all other vessels.

48. Consequently, I propose that the Court dismiss the objection of inadmissibility.

49. At the reply stage the applicant raised a plea of illegality, arguing that the Council had not been competent to adopt Regulation (EEC) No 3929/90, in that it prescribed a penalty, and that it had violated the Treaty by delegating to the Commission the power to impose that penalty.

50. The Commission argues that the plea should be rejected under Article 42(2) of the Rules of Procedure, which states that no new pleas in law may be introduced in the course of the proceedings unless they are 'based on matters of law or fact which come to light in the course of the procedure'.

51. During the oral procedure the applicant argued that there had been a wrong reference in the letter at issue, which had prevented it from raising the plea at the outset, at the application stage.

52. This argument fails to convince.

53. To be sure, the refusal of a fishing licence is founded in the letter in question on Regulation (EEC) No 3939/90, not No 3929/90.

54. That wrong number cannot, however, be considered as having prevented the applicant from raising the plea of illegality at the outset, especially as the precise reference to the date and publication number of the *Official Journal of the European Communities* was sufficient to allow a reasonably diligent economic agent to ascertain the content of the regulation.

55. Moreover, the letter refers to the later Regulation No 3885/91 (OJ 1991 L 367, p. 48), which is virtually identical to the previous one, apart from the year of application and the quotas allotted. The possibility of a prohibition under Article 3(7) and (8) is repeated in identical terms. Furthermore, Fiskano refers to the later regulation in its

25 — P. 107.

application without raising any plea of illegality in this respect.

56. The plea of illegality must consequently be declared inadmissible.

57. I turn to the substance of the case.

58. The applicant alleges infringements by the Commission of the right to a fair hearing and the principle of proportionality, and the failure to state reasons for the contested decision.

59. But before examining those points it should be noted that under the agreement the parties each have distinct areas of competence. Sweden, exercising a discretionary power, draws up the list of vessels in respect of which it seeks licences to fish in Community waters, and the Commission then issues the licences, without having the right to inspect the vessels suggested, provided it has not barred them for breaching the agreement or the regulations.

60. As the Commission rightly states, it is not for the Commission to examine how Sweden distributes the licences, that being within Swedish sovereignty, with the result that it has no cause to know why that State has put forward one vessel rather than another for the grant of a monthly licence.

61. The case is different, however, with respect to decisions originating from the Commission itself.

62. According to the Court's case-law,

'... when any administrative body adopts a measure which is liable gravely to prejudice the interests of an individual it is bound to put him in a position to express his point of view' [26]

and

'observance of the right to be heard is, in all proceedings initiated against a person which are liable to culminate in a measure adversely affecting that person, a fundamental principle

26 — Judgment in Case 121/76 *Moli* v *Commission* [1977] ECR 1971, at paragraph 20.

of Community law which must be guaranteed even in the absence of specific rules'. [27]

63. So general a principle, whose existence was affirmed *inter alia* in the *Hoffman-La Roche* judgment, [28] cannot vary in scope according to the nature of the decision being examined by the Court, in that it represents a minimum standard which cannot therefore be subdivided according to the specific nature of the procedure being followed.

64. The Commission does not dispute that it did not give the applicant a hearing before adopting the contested decision; it justifies this 'omission' by the international character of the agreement between the Kingdom of Sweden and the Community.

65. A like argument has already been examined in connection with admissibility. I will therefore merely repeat that, this being a measure taken by a Community institution and intended to have legal consequences for the applicant, it was necessary to respect all guarantees, including procedural ones.

66. That was not so in the present case, since Fiskano was not in a position to make observations on the complaints before the decision at issue was adopted.

67. However, I do not suggest that the Court should annul the decision on those grounds, since

'For such an infringement of the right to be heard to result in an annulment it must, however, be established that, had it not been for that irregularity, the outcome of the procedure might have been different.' [29]

68. Without requiring Fiskano to prove that it held a licence when the infringement was found to have occurred, a certificate from the competent Swedish authorities on the grant of a licence for the month in question could have been taken into consideration.

69. Fiskano has not produced such a document, claiming merely that since it had been authorized to fish in Community waters at the beginning of 1990, the Commission was under 'a special duty of care to obtain the information'. [30]

27 — Judgment in Case C-142/87 *Belgium* v *Commission* [1990] ECR I-959, at paragraph 46.

28 — Judgment in Case 85/76 *Hoffman-La Roche* v *Commission* [1979] ECR 461, at paragraph 14.

29 — *Belgium* v *Commission*, cited above, at paragraph 48.

30 — Page 7 of the reply.

70. Such an argument is not sufficient, since the applicant does not state any factor which, if known, could have induced the Commission to take a different decision.

71. Consequently, I suggest that the Court reject this plea.

72. As to the principle of proportionality, the Court's case-law requires that the penalty for failing to comply with a Community obligation should not exceed

'what is appropriate and necessary to attain the objective sought'. [31]

73. It must therefore be determined whether the infringement could legitimately be penalized by a prohibition on receiving a fishing licence for one year.

74. Regulation (EEC) No 3929/90 imposes various obligations on Swedish vessels fishing in Community waters: they must keep a log book, [32] transmit certain information to the Commission, [33] ... and must hold a fishing licence. [34]

75. Failure to comply with any of these obligations means that the licence is withdrawn or that a licence cannot be issued 'for a period not exceeding 12 months'. [35]

76. Since the infringement committed was the most serious one under the provisions of the regulation, the Commission was able in the present case to refuse the applicant a licence for the period in question, without there being a breach of the principle of proportionality.

77. Finally, with reference to the reasons stated in the letter at issue, it suffices to note that by stating that

'the said vessel was not in possession of a licence to fish in EEC waters during the (...)

31 — Judgment in Case 122/78 *Buitoni* v *Forma* [1979] ECR 677, at paragraph 16.

32 — Article 2(2).
33 — Article 2(3).
34 — Article 3(1).
35 — Article 3(8).

period and consequently was engaged in illegal fishing activity',

the Commission gave a sufficient statement of reasons for its decision, consequently allowing 'the Court to review its legality and [providing] the undertaking concerned with the information necessary to enable it to ascertain whether or not the decision is well founded'. [36]

78. Since Fiskano has failed in this last plea, its application must be dismissed.

79. I therefore propose that the Court:

(1) declare admissible the application brought by Fiskano AB against the Commission's decision of 19 February 1992;

(2) declare inadmissible the plea of illegality brought at the reply stage against Council Regulation (EEC) No 3929/90 of 20 December 1990 laying down for 1991 certain measures for the conservation and management of fishery resources applicable to vessels flying the flag of Sweden;

(3) dismiss the application;

(4) order Fiskano to pay the costs.

36 — Judgment in Joined Cases 296 and 318/82 *Netherlands and Leeuwarder Papierwarenfabriek* v *Commission* [1985] ECR 809, at paragraph 19.