ORDER OF THE COURT OF FIRST INSTANCE (Fifth Chamber)
30 April 1999 *

In Case T-311/97,

Pescados Congelados Jogamar, SL, a company incorporated under Spanish law, established in Las Palmas, Spain, represented by Manuel de Cristóbal López, of the Madrid Bar, with an address for service in Luxembourg at the offices of Fiduciaire Beaumanoir, 48 Rue de Bragance,

applicant,

v

Commission of the European Communities, represented by Thomas van Rijn, Legal Adviser, and Juan Guerra Fernández, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

* Language of the case: Spanish.

APPLICATION for a declaration that, on the occasion of the boarding of the vessel *Albor Uno* by the Moroccan authorities, the Commission unlawfully failed to act in exercise of its authority in the fisheries sector and, in particular, of its powers under the Agreement on cooperation in the sea fisheries sector between the European Community and the Kingdom of Morocco,

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

composed of: J.D. Cooke, President, R. García-Valdecasas and P. Lindh, Judges,

Registrar: H. Jung,

makes the following

Order

Legal framework

1 Council Regulation (EC) No 150/97 of 12 December 1996 on the conclusion of an Agreement on cooperation in the sea fisheries sector between the European Community and the Kingdom of Morocco and laying down provisions for its implementation (OJ 1997 L 30, p. 1) approved the aforementioned agreement (hereinafter 'the Agreement'), the text of which is appended thereto.

2 The Agreement replaces the agreement approved by Council Regulation (EEC) No 3954/92 of 19 December 1992 on the conclusion of the Agreement on relations in the sea fisheries sector between the European Economic Community and the Kingdom of Morocco and laying down provisions for its implementation (OJ 1992 L 407, p. 1).

3 Articles 9 to 11 of the Agreement provide as follows:

'*Article 9*

Administrative cooperation

The Contracting Parties, desirous of ensuring the effectiveness of the measures for the development and conservation of fishery resources:

— shall develop administrative cooperation to ensure that their vessels respect the provisions of this Agreement and Morocco's regulations on sea fishing, each for its part,

— shall cooperate to prevent and combat illegal fishing, in particular through the exchange of information and close administrative cooperation.

The practical arrangements for the implementation of administrative cooperation are set out at Annex II.

The application of the practical arrangements for administrative cooperation shall be examined by both Parties within the Joint Committee provided for in Article 10 of this Agreement.

Article 10

Joint Committee

A Joint Committee shall be set up to ensure that this Agreement is applied correctly. The Joint Committee shall, *inter alia*:

— supervise the implementation, interpretation and proper working of the Agreement, and the settlement of disputes,

— constitute the necessary point of contact in matters of common interest regarding the fisheries sector,

— adopt the programmes and operations referred to in Article 3 of this Agreement,

— evaluate the results of the cooperation between the Contracting Parties with regard to supervision as set out in Annex II,

— examine the conduct of landings by Community vessels in Moroccan ports,

— examine the application of arrangements for cooperation to combat illegal fishing and for administrative cooperation to ensure respect for Moroccan regulations and the provisions of this Agreement.

The Committee shall meet once a year, alternately in Morocco and the Community, or in extraordinary session at the request of either of the Contracting Parties.

Article 11

Dispute settlement

The Contracting Parties shall consult each other on any dispute concerning the interpretation or application of this Agreement.'

4 Chapter VIII of Annex II to the Agreement, entitled 'Cooperation in the monitoring of fishing activities by Community vessels in Morocco's fishing zone', provides as follows:

'Chapter VIII

Procedure in the event of boarding

1. *Transmission of information*

The [Moroccan] Ministry [of Maritime Fisheries and the Mercantile Marine] shall inform the Delegation [of the Commission of the European Communities to Morocco] within 48 hours of any boarding of a Community fishing vessel operating in Morocco's fishing zone and shall provide a brief report of the circumstances and reasons for this boarding.

The Delegation shall also be kept informed of the progress of the procedures and any penalties imposed.

2. *Statement of boarding*

After the Moroccan authority responsible for fishery protection duties has drawn up a statement, the master of the vessel shall sign it.

This signature does not prejudice the rights of the master or any defence which he may make to the alleged infringement.

He shall take the vessel to the Moroccan port indicated by the Moroccan authority responsible for fishery protection duties.

3. *Settlement of boarding*

In accordance with the Dahir (Decree) of 23 November 1973 governing sea fishing, the infringement may be settled:

(a) by administrative settlement:

the amount of the fine shall be determined in accordance with Moroccan legislation laying down minimum and maximum figures;

(b) through legal proceedings:

if there is no administrative settlement and the matter is brought before a competent judicial body, a bank security shall be determined by the competent authorities as soon as possible in accordance with Article 110 of the Dahir (Decree) of 31 March 1919 and lodged by the shipowner with a bank designated by the Moroccan authorities.

The bank security shall be irrevocable until the legal proceedings have been concluded.

It shall be released, less any trial costs, by the competent authority once the legal proceedings have concluded without the master in question being found guilty.

Similarly, if he is found guilty and the fine imposed is less than the security lodged, the balance, less any trial costs, shall be released after the judgment.

The vessel shall be released and its crew authorised to leave the port:

— either as soon as the obligations imposed by the administrative settlement procedure have been completed on presentation of the receipt for the settlement, or

— when proof of lodging of a bank security pending completion of the legal proceedings is provided.'

Facts

5 The vessel *Albor Uno* is owned by Pescados Congelados Jogamar, SL, and operated by Mrs Galván Carratalá.

6 On 16 July 1997 the *Albor Uno* was intercepted by a Moroccan patrol boat, boarded and diverted to the port of El-Aaiun on the ground that on 15 July 1997 it had been fishing 4.5 nautical miles off the Moroccan coast, that is to say, inside the 12-mile limit.

7 The Moroccan authorities, acting in accordance with Chapter VIII (1) of Annex II to the Agreement, informed the Community authorities of this by letter of 17 July 1997.

8 On 18 July 1997 the Commission of the European Communities sent an expert, Mr Pagliarani, to El-Aaiun to examine the situation and draw up a report.

9 On the same day, Mr Pagliarani and Mrs Carratalá, together with Mr Fontán, Managing Director of the Asociación Nacional de Armadores de Cefalópodos (Anacef), Mr Miranda, Fisheries Adviser with the Spanish Embassy in Rabat, and Mr Fernández, Spanish Consul in Agadir, met with Mr Berrada Gouzi, a captain in the Moroccan Royal Navy, who informed them that the *Albor Uno* had been fined MAD 701 195.

10 On 21, 23 and 24 July 1997 respectively, the Commission delegation to Rabat (hereinafter 'the Delegation') sent a fax and two letters to the Moroccan Ministry of Maritime Fisheries and the Mercantile Marine (hereinafter 'the Moroccan Fisheries Ministry'), requesting all available information concerning the boarding of the *Albor Uno* and proposing that a tripartite committee be set up, composed of representatives of the Moroccan Fisheries Ministry, the Commission and the Moroccan Royal Navy, to examine the introduction of procedures designed to ensure greater transparency in the handling of cases involving the boarding of vessels.

11 On 28 July 1997 Mr Charles — the Delegation official responsible for fishery matters — had a meeting with Mr Laghrib — head of the department at the Moroccan Fisheries Ministry responsible for monitoring fishing — at which they discussed compliance with the Agreement and the reliability of the 'GPS' navigation and fishing pathfinder system and the 'Plotter' navigation receiver.

12 By letter of 29 July 1997, and at a meeting which took place on the same day between Mr Gallimore, *Chargé d'Affaires* at the Delegation, and Mr Rhanmi, Secretary-General with the Moroccan Fisheries Ministry, the Community authorities requested an extraordinary session of the Joint Committee set up under Article 10 of the Agreement. That request was repeated on several occasions, but consistently refused, since the Moroccan authorities took the view that the Agreement had not been infringed.

13 By fax of 11 August 1997 addressed to the Delegation and intended to intimate formal notice, the applicant requested the names, telephone and fax numbers of the various officials and official bodies handling the matter — as well as a copy of the report drawn up by the expert and the name and contact numbers of the official in whose keeping that document lay — so that it could contact them.

14 By fax of 13 August 1997, the Delegation replied that the Commission had made every effort to settle the affair concerning the boarding of the *Albor Uno*, whilst making sure that the provisions of the Agreement were respected. The Delegation concluded that Moroccan law applied and that Mrs Carratalà could therefore deal directly the Moroccan authorities.

15 By fax of 14 August 1997 addressed to the Delegation, the applicant referred to the fact that it had waited for one month, and demanded the information requested in its fax of 11 August 1997, together with all other details concerning the Commission's negotiations with the Moroccan authorities, so that it could take action itself.

16 By fax of 19 August 1997, the Commission forwarded Mr Pagliarani's report to the applicant. This stated that the 'Plotter' and 'GPS' navigation and fishing pathfinder systems with which the *Albor Uno* was equipped indicated that on 15 July 1997 the vessel had been fishing outside the 12-mile limit, and that there was no sign that the ship's log had been tampered with. Mr Pagliarani concluded that the positions adopted by the respective parties were wholly at odds and that the position could be clarified only if the Moroccan authorities provided further information concerning the radar detection of the *Albor Uno* and the related navigational data.

17 By fax of the same date, Mr Cavaco, Director-General of the Directorate-General for Fisheries (DG XIV) replied to the applicant's fax of 14 August 1997. He referred to the terms of the Agreement, under which it is for the ship-owner to choose the means by which a case of boarding is to be settled, that is to say, whether by administrative settlement or through legal proceedings. He also stated that the Commission had played no part in the negotiations with the Moroccan authorities.

18 The *Albor Uno* was released on 1 September 1997 by administrative settlement.

Procedure and forms of order sought

19 The applicant brought the present proceedings by application lodged on 10 December 1997.

20 By separate document, lodged at the Registry of the Court of First Instance on 20 February 1998, the Commission raised a preliminary plea of inadmissibility

on the basis of Article 114(1) of the Rules of Procedure. The applicant submitted its observations on that plea on 3 April 1998.

21 In its application the applicant claims that the Court should:

— declare that, contrary to the EC Treaty (Article 38 et seq.) and Regulation No 3954/92, the Commission failed to act by not intervening in connection with the boarding of the *Albor Uno*;

— declare that the Commission should not have delegated its powers in fishery matters to national authorities;

— order the Commission to pay the costs.

22 By its preliminary plea of inadmissibility, the Commission claims that the Court should:

— declare the application inadmissible;

— order the applicant to pay the costs.

23 In its observations on the preliminary plea of inadmissibility, the applicant claims that the Court should:

— dismiss the preliminary plea of inadmissibility;

— continue the procedure and examine the substance;

— order the Commission to pay the costs occasioned by this plea.

Admissibility

24 Under Article 114(3) of the Rules of Procedure, after a preliminary plea of inadmissibility has been raised, the remainder of the proceedings is oral unless the Court decides otherwise. In the present case, the Court (Fifth Chamber) takes the view that sufficient information is available in the case-file and that there is no need to open the oral procedure.

Arguments of the parties

25 The Commission contends that the application is manifestly inadmissible.

26 First, the Commission maintains that, contrary to the requirements of the second paragraph of Article 175 of the Treaty, it was not first called upon to act. The applicant's fax of 11 August 1997 does not satisfy the essential conditions which the Court of First Instance requires if it is to infer that the institution concerned has thereby been called upon to act. The document in question does not refer to either Article 175 of the Treaty or to the fact that it, the fax, constitutes the administrative stage of the procedure for a declaration of failure to act; nor does it mention the measures which the applicant considers necessary to remedy the Commission's alleged inaction or failure to act.

27 Secondly, the Commission submits that, contrary to the requirements established by the case-law of the Court of Justice, the application does not concern the same subject-matter as the invitation to act (Joined Cases 41/59 and 50/59 *Hamborner Bergbau and Thyssen Bergbau* v *High Authority* [1960] ECR 493, p. 505). In its fax of 11 August 1997, the applicant merely asked the Commission for the names, telephone and fax numbers of the officials and official bodies handling the matter — as well as a copy of the expert's report and contact numbers for the official in whose keeping the report lay — so that it could contact them. In its application, on the other hand, the applicant claimed that the Court should declare that, by not intervening in connection with the boarding of the *Albor Uno*, the Commission had failed to comply with the provisions of the Treaty and that it should direct the Commission to take action itself in fishery matters, rather than delegate power to national authorities.

28 Thirdly, the Commission maintains that its alleged inaction would not, under any circumstances, constitute a failure to act in respect of which proceedings may be brought under Article 175 of the Treaty, because the information requested by fax of 11 August 1997 — names, contact numbers and a report — cannot be equated with a legally binding decision.

29 Lastly, the Commission submits that the applicant lacks the necessary *locus standi* to bring proceedings because it would not have been directly and individually concerned by the measure which it alleges the Commission failed to take. The Commission's non-intervention on the occasion of the boarding of the *Albor Uno* was unavoidable in the absence of an amendment or waiver of the Agreement, which would have altered the legal position of third parties. Secondly, the non-delegation of the Commission's powers in fishery matters to national authorities would also have been of concern to all vessels fishing under licence in Moroccan

waters, as well as to the Spanish authorities. It cannot be sustained, therefore, that the Commission's non-intervention in these respects was of individual concern to the *Albor Uno*.

30 The applicant submits, first — as regards the Commission's contention that the applicant failed to satisfy an essential procedural requirement, namely, to call upon the Commission to act — that the principle of proportionality requires that Community measures placing a financial burden on the persons concerned must go no further than is strictly necessary for attaining the objective pursued and entail the minimum sacrifice possible on the part of the traders affected (Case 265/87 *Schräder* v *Hauptzollamt Gronau* [1989] ECR 2237). Excessive procedural requirements which would make access to legal remedies more difficult or impossible would run counter to the right to effective judicial protection. The applicant submits that even if, in practice, the institution must be formally called upon to act, the wording of Article 175 of the Treaty does not require that the action to be taken be specified or that it be confined to what is expressly requested. The purpose of calling upon the institution to act is to start time running for the purposes of Article 175 and to determine in substance the action requested. Those requirements were satisfied by the fax of 11 August 1997. The date on which time started to run is the date on which the vessel was boarded and the action requested was action to secure the vessel's release.

31 Secondly, as regards the contention that the application does not concern the same subject-matter as the invitation to act, the applicant argues that the action was brought, not because the Commission had failed to take specific action, but because it had remained inactive in failing to avail itself of the courses of action open to it. The applicant cannot be required to ask the Commission to adopt specific political measures, particularly in an international dispute. Indeed, such measures would not be of a legal nature.

32 Lastly, in order to counter the Commission's contention that its inaction does not constitute a failure to act in respect of which proceedings may be brought under Article 175 of the Treaty and that the applicant lacks *locus standi*, the applicant argues that the right of a natural or legal person to bring proceedings before the Court only if a Community institution has failed to address to that person any act other than a recommendation or an opinion merely means that proceedings cannot be brought in respect of failure to adopt a measure which would have had no legal effect.

33 Accordingly, the Court of Justice has given a broad interpretation to the concept of 'act' for the purposes of Article 175 of the Treaty, so as to ensure legal protection for persons to whom the measure in question, albeit not formally addressed to them, is nevertheless in practice of concern in the same way as to the persons addressed. It is sufficient that the contested measure be of direct and individual concern to the applicant, even if the latter is not the addressee (Case 247/87 *Star Fruit* v *Commission* [1989] ECR 291 and Case C-107/91 *ENU* v *Commission* [1993] ECR I-599).

Findings of the Court

34 It should be recalled that an action brought under Article 175 of the Treaty for failure to act is admissible only in so far as the applicant has duly followed the pre-litigation procedure, satisfying the essential procedural requirement of calling upon the institution concerned to act, within the meaning of the second paragraph of that provision (Case 17/57 *Gezamenlijke Steenkolenmijnen in Limburg* v *High Authority* [1959] ECR 1, p. 8, and Case T-64/96 *De Jorio* v *Council* [1997] ECR II-127, paragraph 39).

35 If such a request is to be capable of setting in motion the pre-litigation procedure for an action for failure to act, it must be expressed with sufficient clarity and precision for the institution to have a clear idea of the content of the decision sought and to realise that the purpose of the request is to compel the institution to state a position (Joined Cases 81/85 and 119/85 *Usinor* v *Commission* [1986] ECR 1777, paragraph 15).

36 In the present case, in its fax of 11 August 1997, the applicant merely asked the Commission for the names, telephone and fax numbers of the officials and official bodies handling the matter — as well as a copy of the expert's report and the name and contact numbers of the official in whose keeping the report lay — so that it could contact them.

37 It must be recalled that, although there is no need, at the pre-litigation stage of an action for failure to act, to satisfy excessively stringent conditions as regards evidence that essential procedural requirements have been observed, the fax of 11 August 1997 does not embody a call upon the Commission to act, but merely a request that the Commission provide certain information so that the applicant could take action itself. Moreover, that fax did not indicate that it constituted a preliminary to legal proceedings (Joined Cases 22/60 and 23/60 *Elz* v *High Authority* [1961] ECR 181, p. 188, and Case 25/85 *Nuovo Campsider* v *Commission* [1986] ECR 1531, paragraph 8).

38 It follows that, before lodging the present application, the applicant did not duly follow the pre-litigation procedure by calling upon the Commission to act, within the meaning of the second paragraph of Article 175 of the Treaty. It thus failed to fulfil an essential procedural requirement, which means that its application for a declaration of failure to act is inadmissible (*De Jorio* v *Council*, cited above, paragraph 39).

39 It follows that the action must be declared inadmissible in its entirety without there being any need to examine the remainder of the arguments put forward by the Commission.

Costs

40 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful, it must be ordered to pay the costs incurred by the Commission, in accordance with the form of order sought by that institution.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby orders:

1. The application is dismissed as inadmissible.

2. The applicant shall bear the costs.

Luxembourg, 30 April 1999.

H. Jung
Registrar

J.D. Cooke
President