REPORT FOR THE HEARING
delivered in Case 207/86 *

I — Facts

A — *The rules contained in the Act of Accession concerning access by Spanish vessels to the waters of the former Community of Ten*

The rules concerning access by Spanish vessels to the waters of the former Community of Ten are contained in Articles 156 to 166 (Chapter 4, Section II) of the Act of Accession of Spain and Portugal to the European Economic Community of 12 June 1985 (Official Journal 1985, L 302, p. 9) (hereinafter referred to as the 'Act of Accession'). Articles 156 and 157 state in that regard that access by those vessels is subject to the system laid down in that section of the Act of Accession and that only 'those vessels referred to in Articles 158, 159 and 160 may engage in fishing activities and may do so solely in the zones and under the conditions that are specified in those Articles'.

Article 158 of the Act of Accession provides, in respect of non-specialized fishing, that 300 Spanish vessels specified in the list — known as the 'basic list' — in Annex IX to the Act of Accession are to be authorized to fish in the waters of the former Community of Ten. However, under the second paragraph of Article 158 only 150 vessels that appear on the periodical lists adopted by the Commission may exercise their entitlement to fish at the same time.

The procedure for drawing up those periodical lists is set out in Article 163 (1) of the Act of Accession. The Spanish authorities are to submit draft lists to the Commission. Article 163 (2) adds that those lists are to cover a period of at least one month and that 'after having been checked, these lists shall be approved by the Commission which shall forward them to the Spanish authorities and to the supervisory authorities of the other Member States concerned'.

Article 163 was implemented by Commission Regulation (EEC) No 3531/85 of 12 December 1985 (Official Journal 1985, L 336, p. 20) laying down certain technical and control measures relating to the fishing activities of vessels flying the flag of Spain in the waters of the other Member States, except Portugal. That regulation provides that the draft lists prepared by the Spanish authorities should indicate the names and registration numbers of the vessels, the names of the owners, and the intended methods and areas of fishing. Article 3 (5) also provides that the Commission is to examine the proposed periodical lists and draw up the definitive lists.

In order to ensure compliance with those provisions of the Act of Accession, on 31 December 1985 the Council adopted Regulation (EEC) No 3781/85 laying down the measures to be taken in respect of operators who do not comply with certain provisions relating to fishing contained in the Act of Accession (Official Journal 1985, L 363, p. 26). That regulation established a penalty system consisting of the non-entry of the vessel on the periodical lists.

* Language of the Case: Spanish.

B — *The Spanish rules*

On 12 June 1981, before Spain's accession to the Communities, the Spanish authorities adopted a ministerial order 'regulating the fishing activities of high-sea and deep-sea fleets operating within the geographical limits of the North-East Atlantic Fisheries Commission' (NEAFC) (Official Journal of the Spanish State No 157 of 2 July 1981). Under that order, all vessels appearing on a list of vessels which, on 23 April 1980, had a right of access to the waters of the former Community of Ten acquire a right of access to Community fisheries to the extent of available quotas. That order provides for the possibility that a single vessel may cumulate the rights of access of several vessels belonging to the same shipowner. Furthermore, if a vessel is sold, broken up or exported by its owner under the conditions set out in the order, that vessel's right of access may also be transferred to another vessel belonging to the same owner.

The purpose of that order is to encourage shipowners to reduce the number of vessels used for fishing in the waters of the former Community of Ten and to increase the profitability of the vessels concerned which, as a result of cumulated rights of access, can fish more often.

C — *The origins of the dispute*

The members of the applicant association, Apesco, are a number of Spanish shipowners whose vessels appear on the list of 300 vessels in Annex IX to the Act of Accession. The vessels of those undertakings do not, however, enjoy fishing rights that have been cumulated on the basis of the Spanish ministerial order of 1981. Indeed, the association was formed in order to have the system established by that ministerial order changed.

Another association, Ceepesca, is made up of shipowners whose vessels do enjoy cumulated fishing rights.

The vessels belonging to the members of Apesco appear much less frequently on the periodical lists drawn up by the Spanish authorities and approved by the Commission than those belonging to the members of Ceepesco. In fact, whereas Apesco vessels number 142 of the 300 vessels on the basic list, between January and July 1985 its vessels were permitted to fish in the waters of the former Community of Ten for only half the number of days allocated to the other 158 vessels.

D — *The course of the procedure before the Court*

By orders of 3 December 1986 and 28 January 1987 the Court granted leave to intervene in support of the Commission first of all to Internacional Pesquera Coruñesa SA (Interpesco SA), Miya SA, Lagunak SL and the Asociacíon de Armadores de Buques de Pesca con Derechos de Accesso a las Pesquerias de la CEE (hereinafter referred to as 'Ceepesca') and then to the Kingdom of Spain.

By an order of 30 September 1987, the Court, upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, decided to assign the case to the Fifth Chamber and to open the oral procedure without any preparatory inquiry.

II — Conclusions of the parties

The *applicant* claims that the Court should:

1. Declare void the approval of the periodical list for the month of July of Spanish fishermen authorized to fish in Community waters;

2. Declare that the vessels grouped under Apesco are henceforth entitled not to be the subject of discrimination;

3. Order the Commission to restore the legal situation of those vessels by compensating, in future periodical lists, the fishermen at present discriminated against for the lost days' fishing.

The *Commission* contends that the Court should:

1. Dismiss the application by Apesco;

2. Order Apesco to pay the costs.

The *Kingdom of Spain*, intervener, contends that the Court should:

1. Dismiss the application by Apesco;

2. Order Apesco to pay the costs.

Internacional Pesquera Courñesa SA (Interpesco SA), Miya SA, Lagunak SL and *Ceepesca*, interveners, contend that the Court should:

1. Dismiss the application by Apesco;

2. Order Apesco to pay the costs.

III — Submissions and arguments of the parties

A — *Admissibility*

The Commission considers that only the operators of vessels appearing on the contested periodical list have the capacity to bring an action for annulment against the act approving that list. Hence, with regard to Apesco, the Commission believes that the action is admissible only in so far as it is brought in the name of those operators.

Moreover, the Commission emphasizes that under Article 173 of the Treaty the Court has no jurisdiction to order the Commission to remedy the discrimination which the operators of the vessels grouped under Apesco allege they have suffered by granting compensation to those vessels.

Finally, even if the Commission were to accept that Apesco was entitled to challenge the act approving the list for the month of July 1986, it considers that Apesco is not entitled in these proceedings to raise the issue of whether the national provisions are in conformity with Community law.

Ceepesca, intervening in support of the Commission, emphasizes that the action was brought in August 1986, when the list for the month of July 1986 was no longer applicable. Ceepesca therefore believes that the action is out of time.

Furthermore, it considers that Apesco is in reality challenging provisions of internal Spanish law and that it is for the Spanish courts to decide that question. Thus the Court has no jurisdiction to adjudicate on the present action.

Apesco, for its part, lays emphasis on the fact that its action is directed against an act of the Commission, namely the act approving the periodical list for the month of July 1986, and that that act may be challenged on the basis of Article 173 of the EEC Treaty. Apesco believes too that, as an association to which Spanish vessels that have been discriminated against belong, it has a clear interest in bringing proceedings.

B — *Substance*

In the first place Apesco states that it follows from Articles 156 and 157 of the Act of Accession that the rules instituted as regards conditions of access by Spanish fishermen to the waters of the former Community of Ten are exhaustive, except for two special cases in respect of which Regulations No 3531/85 and No 3781/85 were adopted. There is no provision in the Act of Accession or those regulations conferring on the Spanish authorities the task of adopting rules giving details of or elaborating the system of access by Spanish vessels. Moreover, there is no rule providing for delegation of powers to the Spanish authorities. In those circumstances approval of the periodical lists remains exclusively within the competence of the Commission which, for those purposes, may take into account Community law only. A reading of Articles 158 and 163 of the Act of Accession and of the abovementioned Regulation No 3531/85 shows clearly that it is for the Commission to establish and approve the periodical lists.

In the second place, in Apesco's view, the competence of the Commission goes beyond merely formal checking of the lists, as follows from the use of the word 'adopts' in Article 158 (2) and the words 'draws up' in Article 3 (5) of Regulation No 3531/85 and the verbs 'check' and 'approve' in Article 163. Hence Apesco believes that the Commission must check whether the list submitted to it has been drawn up in accordance with the applicable Community rules and that it should refuse to approve the list if Community law is thereby infringed. The Commission does, therefore, have the power to check whether certain vessels have been unlawfully excluded from the periodical lists. Moreover, the Commission has power to exclude a vessel that has incurred a penalty by not entering it on the lists as provided for by Regulation No 3781/85 if the penalty has not been taken into account in the proposed lists submitted for its approval.

Thirdly, in Apesco's opinion, the Commission has infringed Community law by approving proposed lists that include certain vessels more often than others. In effect, in so doing the Commission is using the criteria employed by the Spanish authorities when establishing the proposed lists. Those criteria are contrary to Community law, because neither in Community law, nor in the Act of Accession or implementing regulations, is any rule to be found to justify the proposition that certain Spanish vessels that appear on the list of 300 have any greater entitlement than others included therein to access to the waters of the former Community of Ten. Apesco emphasizes that the Act of Accession confers equal rights on the 300 Spanish vessels authorized to fish in Community waters.

The periodical lists as approved by the Commission include 'phantom' vessels, that is to say vessels which are no longer operational but which thereby obtain rights of access, whereas vessels appearing on the list of 300 that do not have cumulated rights of access are penalized although the penalties laid down by Community law itself have not been incurred. It must therefore be concluded that such a situation is prohibited by Community law because it conflicts with

the principles of equal treatment and proportionality recognized by Community law.

Fourthly, the applicant points out that Article 2 of Council Regulation No 101/76 of 19 January 1976 laying down a common structural policy for the fishing industry (Official Journal 1976, L 20, p. 19) provides that the Member States 'shall ensure in particular equal conditions of access to and use of the fishing grounds situated in the waters referred to in the preceding subparagraph for all fishing vessels flying the flag of a Member State and registered in Community territory.' Thus, by granting fishing rights more frequently to some vessels than to others the Commission acted in breach of the prohibition of discrimination contained in Community law.

The Commission fully shares the view of Apesco that the rules on access to Community waters are contained in the Act of Accession and fall within the exclusive jurisdiction of the Community. However, it considers that in exercising that exclusive jurisdiction the Community may entrust certain tasks to and confer certain powers on the Member States, allowing them a greater or lesser margin of discretion. Such delegation of powers is perfectly permissible and frequently used. Thus, on fishing matters, Article 5 (2) of Council Regulation No 170/83 of 25 January 1983 (Official Journal L 24, p. 1) provides that each Member State is to manage the fishing quota allocated to it.

In this case the Commission considers that the Act of Accession itself left it to the national authorities to select the vessels authorized to fish periodically in Community waters and simply gave the Commission the task of checking and formally adopting the list.

In that regard the Commission relies mainly on the text of Article 163 (2), which specifies that the Commission is to check the lists submitted by the Spanish authorities. In the Commission's view, the word 'check' shows that its role is limited to examining whether in the case in point the vessels entered on the list of 150 vessels are actually included on the basic list and, further, to satisfying itself that the number of vessels proposed does not exceed the limits set out in the Act or that the vessels have not incurred the penalties laid down in Regulation No 3781/85. The Act of Accession therefore institutes a clear distribution of tasks between the Commission and the Spanish authorities.

The Commission maintains that that analysis is supported by the measures adopted by the Council and the Commission for the implementation of the Act of Accession. Indeed, those different regulations do not allow for the amendment of the draft lists in any way. For the Commission to have been in a position to select the vessels entered on the periodical lists, a system would have had to be laid down enabling fishermen to make themselves known directly and in detail to the Commission's departments, which was not the case.

It is thus for the national authorities to choose the vessels on the basic list and to enter them on the draft periodical lists submitted for the approval of the Commission. The Commission therefore considers that any litigation concerning the contents of those lists should be heard before Spanish courts.

The Commission then examines the argument founded on the concept of equal conditions of access which appears in

Council Regulation No 101/76. It considers that argument to be subsidiary since it does not relate to the content of the draft lists, such content being the exclusive responsibility of the Spanish authorities. That said, the Commission lays particular emphasis on the fact that the first subparagraph of Article 2 (1) of Regulation No 101/76 provides that 'Rules applied by each Member State in respect of fishing in the maritime waters coming under its sovereignty or within its jurisdiction shall not lead to differences in treatment of other Member States.' In the Commission's view, Article 2 thereby obliges each Member State to treat fishermen from other Member States as being on an equal footing with its own nationals, not to ensure equal treatment between its nationals.

The Kingdom of Spain, intervening in support of the Commission, first of all examines the different provisions of the Act of Accession and concludes that none has been infringed in the case in point. Not one of those provisions imposes an obligation or condition of equality or establishes any criterion for the selection of the vessels. That situation is due to the fact that at the time of the Accession negotiations the Kingdom of Spain, which supported the maintenance of a system of cumulating rights, caused it to be stated in the Act of Accession that access to fishing zones was to be obtained for each vessel on the basis of cumulated rights. That system of access, which is perfectly fair and equitable, is the one in force in Spanish law and consequently is respected in the Act of Accession.

Further, the Kingdom of Spain considers that Article 2 of Regulation No 101/76 is quite clear. That provision establishes equal conditions of access to and use of the fishing grounds for the fishing vessels of a Member State in relation to those of other Member States, but such a principle may not be relied on with regard to what the Kingdom of Spain calls internal equality, that is to say between the vessels of the same Member State.

Similarly, there is no infringement of Article 7 of the Treaty, because approval of the periodical list for the month of July does not create any discrimination on grounds of nationality.

Finally, the Kingdom of Spain considers that an action under Article 173 of the Treaty is not the appropriate procedure for examining whether an internal rule of Spanish law is lawful and whether it complies with Community law.

In any event, it considers that the ministerial order of 12 June 1981 does not infringe any rule of Community law. In the first place, Community law has not been substituted for the ministerial order of 12 June 1981 which has thus remained fully in force. In the second place, the ministerial order does not contain any provision that is contrary to the Act of Accession. In the third place, that order does not infringe the principle of equality which is not laid down in any concrete provision contained therein. In the fourth place, the order instituted a series of economic and fiscal advantages in favour of addressees satisfying the conditions contained in the rules. As far as vessels that do not satisfy those conditions are concerned, which is the case of vessels belonging to members of Apesco, it was clear that they would not obtain those advantages. That alleged discrimination does not, however, result from the rule but from non-compliance with the rule. It is the persons concerned who are themselves creating discrimination by not complying with the rule.

In conclusion, the Kingdom of Spain considers that the ministerial order has achieved its purposes since the number of fishing boats has been reduced from 460 in 1981 to 300 in 1986.

Internacional Pesquera Coruñesa SA (Interpesco SA), Miya SA, Lagunak SL and Ceepesca, also intervening in support of the Commission, state first of all that the Act of Accession provides expressly in Article 163 that the drawing up of the periodical lists is in law the task of the Spanish authorities.

Since neither the Act of Accession nor implementing Regulation No 3531/85 lay down criteria for drawing up those lists, the Spanish authorities must comply with the Spanish rules in force, that is to say the ministerial order of 12 June 1981.

In addition, the abovementioned interveners state that the Commission's sole task is to check the contents of the lists submitted by the Spanish administration. In a specific case, that checking would consist of verifying whether the vessels entered on the draft lists appear in Annex IX to the Act of Accession, whether or not they have incurred a penalty and whether the technical details correspond to those included in the Annex. It is therefore definitely not the task of the Commission to examine, reject or confirm the internal criteria employed by the Spanish authorities when drawing up the draft periodical lists. Consequently, the fact of approving a draft produced in accordance with the order of 12 June 1981 does not mean that the Commission is thereby applying an internal rule of the Spanish legal order.

Finally, with regard to the alleged breach of the principle of equality of conditions of access, the abovementioned interveners emphasize first of all that, on the internal level, there has been no breach of the principle of equal treatment, since the order of 12 June 1981 is a general text of which the fishing undertakings which appear in the annex to the order may yet avail themselves. Then, at Community level, the difference from the point of view of cumulated rights does not necessarily imply unequal treatment of the two categories of vessels. The entry into force of the Act of Accession did not adversely affect the situation of vessels that did not have cumulated rights because the Act of Accession raised the number of vessels authorized to fish simultaneously in the waters of the EEC to 150, whereas the number of such vessels was previously much lower.

Finally, Article 2 (1) of Regulation No 101/76 does not apply to the case referred to by Apesco on the grounds that, on the one hand, the system laid down by the Act of Accession is a provisional system which derogates from the general Community system for conserving and managing fishing resources and, on the other hand, the fishing activities referred to in the Act of Accession are carried out in waters that are not under the sovereignty or within the jurisdiction of Spain.

R. Joliet
Judge-Rapporteur