OPINION OF ADVOCATE GENERAL STIX-HACKL

delivered on 5 March 2002 [1]

I — Introduction

1. This action for failure to fulfil Treaty obligations concerns the conduct of the United Kingdom authorities in connection with the management of fishing quotas for 1985 to 1988 and 1990. In parallel proceedings in Case C-140/00 the Commission is raising analogous complaints in regard to 1991 to 1996.

2. In its defence the United Kingdom Government is essentially contending that the Commission has failed to discharge its duty to adduce evidence of the Treaty infringements which it alleges, but does not contest as a whole the cases of overfishing raised by the Commission in the relevant management years. The present case therefore chiefly concerns the question of the allocation of the burden of proof.

3. The Court has already pronounced on that question in its judgment of 1 February 2001 in Case C-333/99. [2] It falls to be examined therefore whether fresh considerations arising in particular from the arguments of the United Kingdom Government militate against application here of the considerations underlying the judgment in that case. Should that prove not to be the case it will be a matter of determining whether the Commission's submissions warrant the declarations sought by it or not.

II — Legislation

4. Article 1 of Regulation (EEC) No 170/83 [3] states that the purpose of that regulation is to ensure the protection of fishing grounds, the conservation of the biological resources of the sea and their balanced exploitation on a lasting basis and under appropriate economic and social conditions.

1 — Original language: German.

2 — Case C-333/99 *Commission* v *France* [2001] ECR I-1025. See also my Opinion in Joined Cases C-418/00 and C-419/00 *Commission* v *France*, ECR I-3969, I-3972.

3 — Council Regulation (EEC) No 170/83 of 25 January 1983 establishing a Community system for the conservation and management of fishery resources (OJ 1983 L 24, p. 1). That regulation was repealed and replaced by Council Regulation (EEC) No 3760/92 of 20 December 1992 establishing a Community system for fisheries and aquaculture (OJ 1992 L 389, p. 1).

5. Article 2(1) of Regulation No 170/83 provides for the formulation of the conservation measures necessary to achieve the above aims. Under Article 2(2) thereof the measures mentioned in Article 2(1) may include, *inter alia*, the restriction of fishing effort, in particular by the imposition of limits on catches.

6. Article 3 of Regulation No 170/83 provides that where, in the case of a species, it becomes necessary to limit the catch the total allowable catch for each stock or group of stocks, the shares available to the Community and, where applicable, the total catch allocated to third countries, as well as the specific conditions for taking these catches, are to be fixed each year. Under Article 4 of that regulation the volume of the catches available to the Community is to be distributed between the Member States in a manner which assures each Member State relative stability of fishing activities for each of the stocks considered.

7. Pursuant to that provision, the United Kingdom was allocated fishing quotas for 1985 to 1988 and for 1990 under Council Regulation (EEC) No 1/85,[4] Council Regulation (EEC) No 3721/85,[5] Council Regulation (EEC) No 4034/86,[6] Council Regulation (EEC) No 3977/87[7] and Council Regulation (EEC) No 4047/89[8] respectively.

8. As regards the management of quotas, Article 5(2) of Regulation No 170/83 pro-

4 — Council Regulation (EEC) No 1/85 of 19 December 1984 fixing, for certain fish stocks and groups of fish stocks, provisional total allowable catches for 1985 and certain conditions under which they may be fished (OJ 1985 L 1, p. 1). That regulation was amended by Council Regulation (EEC) No 800/85 of 26 March 1985 amending for the second time Regulation (EEC) No 1/85 (OJ 1985 L 89, p. 4), Council Regulation (EEC) No 2756/85 of 27 September 1985 amending for the third time Regulation (EEC) No 1/85 (OJ 1985 L 259, p. 68) and Council Regulation (EEC) No 3720/85 of 20 December 1985 amending for the fourth time Regulation (EEC) No 1/85 (OJ 1985 L 361, p. 1).

5 — Council Regulation (EEC) No 3721/85 of 20 December 1985 fixing, for certain fish stocks and groups of fish stocks, total allowable catches for 1986 and certain conditions under which they may be fished (OJ 1985 L 361, p. 5). That regulation was amended by Council Regulation (EEC) No 3777/85 of 31 December 1985 amending Regulation (EEC) No 3721/85 (OJ 1985 L 363, p. 1), Council Regulation (EEC) No 114/86 of 20 January 1986 extending until 31 December 1986 the validity of Regulations (EEC) No 3721/85, No 3730/85, No 3734/85 and No 3777/85 concerning fisheries (OJ 1986 L 17, p. 4), Council Regulation (EEC) No 2057/86 of 25 June 1986 amending for the third time Regulation (EEC) No 3721/85 (OJ 1986 L 176, p. 3), Council Regulation (EEC) No 2374/86 of 24 July 1986 amending for the fourth time Regulation (EEC) No 3721/85 (OJ 1986 L 206, p. 4), and Council Regulation (EEC) No 3221/86 of 21 October 1986 amending for the fifth time Regulation (EEC) No 3721/85 (OJ 1986 L 300, p. 2).

6 — Council Regulation (EEC) No 4034/86 of 22 December 1986 fixing, for certain fish stocks and groups of fish stocks, the total allowable catches for 1987 and certain conditions under which they may be fished (OJ 1987 L 376, p. 39). That regulation was amended by Council Regulation (EEC) No 1365/87 of 18 May 1987 amending Regulation (EEC) No 4034/86 (OJ 1987 L 129, p. 15), Council Regulation (EEC) No 1880/87 of 30 June 1987 amending Regulation (EEC) No 4034/86 (OJ 1987 L 179, p. 4), Council Regulation (EEC) No 2999/87 of 5 October 1987 amending Regulation (EEC) No 4034/86 (OJ 1987 L 285, p. 2) and Council Regulation (EEC) No 3545/87 of 23 November 1987 amending for the fourth time Regulation (EEC) No 4034/86 (OJ 1987 L 337, p. 7).

7 — Council Regulation (EEC) No 3977/87 of 21 December 1987 fixing, for certain fish stocks and groups of fish stocks, the total allowable catches for 1988 and certain conditions under which they may be fished (OJ 1987 L 375, p. 1). That regulation was amended by Council Regulation (EEC) No 3173/88 of 14 October 1988 amending Regulation (EEC) No 3977/87 (OJ 1988 L 282, p. 30), Council Regulation (EEC) No 3286/88 of 20 October 1988 amending Regulation (EEC) No 3977/87 (OJ 1988 L 292, p. 3) and by Council Regulation (EEC) No 3472/88 of 7 November 1988 amending Regulation (EEC) No 3977/87 (OJ 1988 L 305, p. 12).

8 — Council Regulation (EEC) No 4047/89 of 19 December 1989 fixing, for certain fish stocks and groups of fish stocks, the total allowable catches for 1990 and certain conditions under which they may be fished (OJ 1989 L 389, p. 1). That regulation was amended by Council Regulation (EEC) No 738/90 of 22 March 1990 amending Regulation (EEC) No 4047/89 (OJ 1990 L 82, p. 7), Council Regulation (EEC) No 1874/90 of 27 June 1990 amending for the second time Regulation (EEC) No 4047/89 (OJ 1990 L 171, p. 1) and by Council Regulation (EEC) No 1887/90 of 29 June 1990 amending for the third time Regulation (EEC) No 4047/89 (OJ 1990 L 172, p. 1).

vides that the 'Member States shall determine, in accordance with the applicable Community provisions, the detailed rules for the utilisation of the quotas allocated to them.'

9. The requirements for fulfilling this obligation were initially laid down in Council Regulation (EEC) No 2057/82.[9] That regulation laid down rules for the control of catches by fishing vessels flying the flag of, or registered in, a Member State in order to ensure observance of the limits fixed for permissible levels of fishing. Those rules included measures concerning the inspection by Member States' authorities of fishing vessels and their activities at sea and in port. Furthermore, Member States had periodically to report to the Commission on their inspection activities and on the action taken with regard to any violations of the common fisheries rules.

10. As originally drawn, Article 1 of Regulation No 2057/82 provided, *inter alia*, as follows:

'1. Each Member State shall, within ports situated in its territory and within maritime waters subject to its sovereignty or jurisdiction, inspect fishing vessels flying the flag of, or registered in, a Member State in order to ensure compliance with all the regulations in force concerning conservation and control measures.

2. If the competent authorities of a Member State observe, as a result of an inspection carried out by them under paragraph 1, that a fishing vessel flying the flag of, or registered in, a Member State does not comply with the relevant regulations concerning conservation and control measures, they shall take penal or administrative action against the skipper of such a vessel.'

11. Regulation No 2057/82 was amended by Council Regulation (EEC) No 3723/85[10] with effect from 1 January 1986. The obligation on Member States to take penal or administrative action where the rules concerning conservation and control measures were not being complied with was extended in such a way that such action was to be taken not only against the skipper of the vessel but also against any other person responsible.

12. With effect from 1 January 1987 Article 1 of Regulation No 2057/82 was

9 — Council Regulation (EEC) No 2057/82 of 29 June 1982 establishing certain control measures for fishing activities by vessels of the Member States (OJ 1982 L 220, p. 1).

10 — Council Regulation (EEC) No 3723/85 of 20 December 1985 amending Regulation (EEC) No 2057/82 establishing certain control measures for fishing activities by vessels of the Member States (OJ 1985 L 361, p. 42).

again amended,[11] this time to read *inter alia* as follows:

'1. In order to ensure compliance with all the regulations in force concerning conservation and control measures, each Member State shall, within its territory and within maritime waters subject to its sovereignty or jurisdiction, monitor fishing activity and related activities. It shall inspect fishing vessels and all activities whose inspection would enable verification of the implementation of this regulation, including the activities of landing, selling and storing fish and recording landings and sales.

2. If the competent authorities of a Member State observe, as a result of monitoring or inspection carried out by them under paragraph 1, that the relevant rules concerning conservation and control measures are not being complied with, they shall take penal or administrative action against the master of such a vessel or any other person responsible.'

13. Under Article 6(1) of Regulation No 2057/82, as amended by Regulation No 3723/85, after each voyage, the skipper or his agent must submit to the authorities of the Member State whose landing places he uses a declaration concerning the quantities landed and the location of catches. Under Article 6(2) Member States have the task of verifying the accuracy of those declarations.

14. Article 7(1) of Regulation No 2057/82, as amended by Regulation No 4027/86, provides that if a master has transhipped catches to another vessel or has landed them outside the Community, he must inform the Member State whose flag his vessel is flying or in which his vessel is registered *inter alia* of the quantities involved and of the location of the catches in so far as they relate to stocks subject to the quota rules.

15. Article 10 of Regulation No 2057/82, as amended by Regulation No 4027/86, provides:

'1. All catches of a stock or group of stocks subject to quota made by fishing vessels flying the flag of a Member State or registered in a Member State shall be charged against the quota applicable to that State for the stock or group of stocks in question, irrespective of the place of landing.

11 — Council Regulation (EEC) No 4027/86 of 18 December 1986 amending Regulation (EEC) No 2057/82 establishing certain control measures for fishing activities by vessels of the Member States (OJ 1986 L 376, p. 4).

2. Each Member State shall determine the date from which the catches of a stock or group of stocks subject to quota made by the fishing vessels flying its flag or registered in that Member State shall be deemed to have exhausted the quota applicable to it for that stock or group of stocks. As from that date, it shall provisionally prohibit fishing for that stock or group of stocks by such vessels as well as the retention on board, the transhipment and the landing of fish taken after that date and shall decide on a date up to which transhipments and landings or final notifications of catches are permitted. The Commission shall forthwith be notified of this measure and shall then inform the other Member States.

3. Following notification under paragraph 2 or on its own initiative, the Commission shall fix, on the basis of the information available, the date on which, for a stock or group of stocks, the catches subject to TAC, quota or other quantitative limitation made by fishing vessels flying the flag of, or registered in, any Member State are deemed to have exhausted the quota, allocation or share available to that Member State or, as the case may be, to the Community.

When an assessment of the situation referred to in the preceding subparagraph is made, the Commission shall advise the Member States concerned of the prospect of fishing being halted as a result of a TAC's being exhausted.

...'

16. Regulation No 2057/82 was replaced by Council Regulation (EEC) No 2241/87 [12] with effect from 1 August 1987. That regulation, which in its turn was repealed with effect from 1 January 1994, consolidated the amended versions of Regulation No 2057/82. Articles 1 and 11 of Regulation No 2241/87 thus corresponded to Articles 1 and 10 of Regulation No 2057/82, as amended by Regulation No 4027/86.

17. Article 9 of Regulation No 2241/87 provided, *inter alia*, as follows:

'1. Member States shall ensure that all landings by fishing vessels flying the flag of, or registered in, a Member State of stocks or groups of stocks subject to TACs or quotas are recorded....

2. Before the 15th of each month, each Member State shall notify the Commission

12 — Council Regulation (EEC) No 2241/87 of 23 July 1987 establishing certain control measures for fishing activities (OJ 1987 L 207, p. 1).

of the quantities of each stock or group of stocks subject to TACs or quotas landed during the preceding month and shall provide it with any information received under Articles 7 and 8.

Notifications to the Commission shall indicate the location of the catches as laid down in Articles 5 and 6 and the nationality of the fishing vessels concerned.

Without prejudice to the other provisions of this paragraph Member States shall, at the request of the Commission where catches of stocks or groups of stocks subject to TACs or quotas may reach TAC or quota levels, provide more detailed or more frequent information than this paragraph requires.

3. The Commission shall inform Member States of the notifications received pursuant to this article within 10 days of the date on which it received them.

4. Each Member State shall keep, or cause to be kept, records submitted to its competent authorities in accordance with Articles 5 and 6 and the particular detailed rules for the application of those articles, in such a way as to be able to trace back such documents, which form the basis of the notification to the Commission referred to in paragraph 2, over a period of three years from the beginning of the year following the year in which the related landings were made.'

III — Facts, procedure and forms of order sought

A — *Facts and procedure*

18. Essentially the Commission is alleging that the United Kingdom exceeded the catch quotas allocated to that Member State for various fish stocks in the years 1985 to 1988 and 1990.

19. By letters dated 2 October 1986, 13 May 1987 and 26 March 1991 the Commission drew the United Kingdom Government's attention to the fact that in the case of various fish stocks catch quotas had been exceeded in 1985.

20. In those letters it specifically alleged that the United Kingdom authorities had,

contrary to the relevant provisions of Community law, taken no steps to prevent quotas from being exceeded.

21. The United Kingdom replied on 9 December 1986, 11 June 1987 and 16 May 1991 to the relevant letters of formal notice concerning overfishing in 1985, on 10 November 1987 and 16 May 1991 concerning overfishing in 1986, on 28 June 1989 and 16 May 1991 concerning overfishing in 1987, on 22 July 1991 concerning overfishing in 1988 and on 19 April 1993 concerning overfishing in 1990.

22. In its letters of reply the United Kingdom Government provided detailed explanations concerning the cases of overfishing at issue and pointed in particular to unpredictable and unexpected landings of stocks, bad weather conditions and late reporting of landings in Spain by fishing vessels flying the United Kingdom flag or registered in the United Kingdom but operating out of Spanish ports (which I shall refer to as 'anglo-Spanish vessels').

23. The Commission took the view that those letters did not allay suspicions of a Treaty infringement. On 21 November 1988, therefore, it addressed to the United Kingdom a reasoned opinion concerning 1985. A reasoned opinion concerning 1986 was addressed to the United Kingdom on 9 February 1989. The reasoned opinion of 1 October 1992 concerns 1985, 1986 and 1987. Finally, the reasoned opinion of 17 April 1996 concerns 1988 and 1990.

24. The United Kingdom replied to the reasoned opinions in respect of the years 1985 to 1987 in letters dated 8 February 1989, 17 April 1989 and 5 February 1993 and, in respect of the years 1988 and 1990, in a letter dated 13 July 1996. The United Kingdom Government drew particular attention therein to measures for improved monitoring of anglo-Spanish vessels which in its view had prevented subsequent overfishing.

Fishing management year 1985

25. In respect of 1985 the Commission founds its action on nine cases of overfishing or of fishing in zones in which the United Kingdom had no quota. [13] In their letter of reply dated 11 June 1987 to the Commission's letter of formal notice of 2 October 1986 the United Kingdom authorities claimed that six of those cases were at least partly attributable to anglo-Spanish vessels.

13 — Hereinafter 'fishing in unauthorised zones'.

Fishing management year 1986

26. In respect of 1986 the Commission founds its action on four cases of overfishing and one case of fishing in unauthorised zones.

27. With respect to sole fishing in zones V b (EC zone), VI, XII and XIV, according to the Commission, the United Kingdom authorities stated that by mid-November the level of catches had already reached 14 tonnes — out of the permitted quantity of 15 — so they decided to prohibit further fishing on 29 November 1986. However, according to the Commission's figures the quota of 15 tonnes had been reached in October, with the result that the fishery should already have been closed at that time. Moreover, three more tonnes were landed between the ban being imposed and the end of the year.

28. With respect to sole fishing in zone VII a, according to the Commission, the United Kingdom authorities explained that part of the overfishing was attributable to anglo-Spanish vessels. They also explained that on 13 October they imposed a 10% catch restriction, but after an unexpected increase in catches that restriction proved to be inadequate, so that fishing was prohibited with effect from 15 November. The Commission counters that explanation by stating that the restriction was applied only at a time when 707 tonnes out of an annual quota of 720 tonnes had been landed. In addition, the landings had continued to rise after closure with some five tonnes being caught thereafter.

29. As regards overfishing of hake and cod, according to the Commission, the United Kingdom authorities explained that once more overfishing was partly attributable to anglo-Spanish vessels. For cod they also referred to difficulties caused by the large number of landings by small vessels which do not have to comply with the log-book rules.

30. In addition, the Commission states that the United Kingdom authorities conceded in their letter of 17 April 1989 that, with respect to blue ling and ling, catches had continued after the Commission ordered closure of the fishery on 15 October.

Fishing management year 1987

31. In respect of 1987 the Commission founds its action on two cases of overfishing and six cases of fishing in unauthorised zones.

Fishing management year 1988

32. In respect of 1988 the Commission founds its action on one case of overfishing of mackerel.

33. The Commission points out that, following the adoption of Commission Regulation (EEC) No 3165/88 [14] of 14 October 1988, the United Kingdom authorities, at the request of the Commission and with its assistance, launched an inquiry into the reporting of mackerel catches by United Kingdom vessels.

34. On the basis of the results of that investigation, the Commission estimated that 50 245.9 tonnes of the quantities stated in the log-books as having been made in zone VI had actually been caught in zone IV. The Commission therefore decided, on the basis of a cautious estimate, to re-attribute 25 000 tonnes to that zone. At the same time it expressly stated that it was proceeding on the assumption that, if a large number of landing declarations concerning a total of 32 000 tonnes had not been lost, it might have become clear that some of that amount had come from other zones.

14 — Commission Regulation (EEC) No 3165/88 concerning the stopping of fishing for mackerel by vessels flying the flag of the United Kingdom (OJ 1988 L 282, p. 18).

35. In the Commission's view, even though the United Kingdom does not agree with it as to the precise extent of overfishing of mackerel, the United Kingdom has not disputed that overfishing of mackerel did occur or that some of it could be attributed to illegal fishing in zone IV. The United Kingdom authorities recognised that a comparison of the information held by the Commission with the entries appearing in log-books revealed some uncertainty, but asserted in their letters of 22 July 1991 and 13 July 1996 that the uncertainty was the result of circumstances such as bad weather.

Fishing management year 1990

36. In respect of 1990 the Commission founds its action on four cases of overfishing.

37. In respect of plaice and sole the Commission claims that, in the absence of prompt control measures, it was foreseeable that the annual catch would exceed the quota by late October. However, no measures to prevent that outcome were adopted. According to the United Kingdom authorities, the overfishing in question was due to computer problems and to a substantial and unpredictable increase of landings in the Netherlands.

38. As regards cod catches in north Norway waters, the Commission maintains that the United Kingdom's cumulative catch reached 2 571 tonnes by the end of May and by December had increased by a further 2 tonnes, although the United Kingdom authorities had banned fishing on 27 April.

B — *Forms of order sought*

39. On the basis of the replies by the United Kingdom authorities to its reasoned opinions, the Commission considers that, during the five years in question, the United Kingdom failed to observe the Community rules on conservation and management of fishery resources; it therefore decided to bring the present action. In its application, which was lodged at the Court Registry on 30 November 1999, the Commission claims that the Court should:

1. declare that in respect of each of the years 1985 to 1988 and 1990, by failing

   (i) to put in place appropriate detailed rules for the utilisation of the quota allocated to it and to carry out inspections and other controls as required by the relevant Community regulations,

   (ii) to close provisionally the fisheries for certain stocks when the relevant quota was exhausted,

   (iii) (in 1988 only) to take sufficient measures to prevent the misreporting of landings of mackerel and

   (iv) to take administrative or penal action against the masters of ships infringing the regulations, or against such other person as was responsible for such infringement,

   the United Kingdom has failed to comply with its obligations under: (a) Article 5(2) of Regulation (EEC) No 170/83 [15] and Article 1(1) of Regulation (EEC) No 2057/82 [16] (with respect to the period to 1 August 1987) and Article 1(1) of Regulation (EEC) No 2241/87 [17] (in respect of the period thereafter); (b) Article 10(2) of Regu-

15 — Cited in footnote 3.
16 — Cited in footnote 9.
17 — Cited in footnote 12.

lation (EEC) No 2057/82 and Article 11(2) of Regulation (EEC) No 2241/87; (c) Article 9 of Regulation (EEC) No 2241/87; and (d) Article 1(2) of Regulation (EEC) No 2057/82 or Article 1(2) of Regulation (EEC) No 2241/87 in conjunction with Article 5(2) of Regulation (EEC) No 170/83;

2. order the United Kingdom to pay the costs.

40. The United Kingdom contends that the Court should dismiss the application as unfounded and order the Commission to pay the costs.

IV — Legal assessment

41. In the case of all the heads of claim the parties are divided as to whether the Commission has adduced adequate proof of the infringements of obligations alleged by it. Accordingly, prior to examining the individual heads of claim, it is appropriate to go into the question of the allocation of the burden of proof in Treaty infringement proceedings concerning compliance with Community rules on the conservation and management of fishery resources.

A — *General: allocation of burden of proof*

42. The United Kingdom Government does not deny that considerable overfishing took place in the years 1985 to 1988 and 1990 (hereinafter 'the relevant period'). Nor — with two exceptions — are the figures on which the Commission's action is based contested. Conversely, the United Kingdom Government challenges the Commission's submissions to the effect that the competent national authorities had not ensured compliance with the relevant provisions and the non-observance of the fishing quotas at issue was attributable thereto.

43. Essentially the United Kingdom Government's defence is based on the argument that, although the Commission has proven specific cases of overfishing, it has not discharged its burden of proof in regard to the general declarations sought by it. In particular, the Commission has not demonstrated that certain steps had not been taken. It has merely inferred this from individual cases of overfishing, which does not meet the requirements of the burden of proof.

44. The United Kingdom is correctly basing its argument on the principle that in Treaty infringement proceedings the Commission

cannot rely on a mere presumption but must adduce precise and specific facts. [18]

45. However, in the application of that principle to proceedings concerning compliance with Community rules on the conservation and management of fishery resources reference must be also made to the judgment of 1 February 2001 in Case C-333/99. [19] There the Court found that 'the scale of those figures and the repetition of the situation which they describe' showed 'that the instances of overfishing could not but have been the consequence of a failure by the French authorities to comply with their monitoring obligations. The French Government's argument that the Commission is basing itself on no more than a presumption is for that reason unjustified.' [20]

46. It is thus established that the Commission's action in proceedings concerning compliance with Community rules on the conservation and management of fishery resources cannot be dismissed as unfounded simply because it is merely based on specific cases of overfishing. Even a few cases of overfishing in the individual Member States may, owing to their possible cumulative effect, seriously jeopardise attainment of the objectives of the Community rules. It is therefore only logical that, in accordance with the judgment in Case C-333/99, whether there is held to be an infringement of the obligations provided for in the relevant regulations is determined not by the number of stocks affected by overfishing but by the relative scale and repetition of overfishing.

47. The Commission is also right to point out that the Community rules do not prescribe the measures necessary in order to ensure compliance with the quotas. Rather it is a matter for the Member State to select the measures which will be most effective under local conditions. Accordingly, the Commission cannot be required to prove which measure(s) ought to have been taken in order to prevent overfishing.

48. The approach adopted by the Court in Case C-333/99 appears in more than one respect to be apposite.

18 — Case 290/87 *Commission* v *Netherlands* [1989] ECR 3083, paragraph 17, Case C-62/89 *Commission* v *France* [1990] ECR I-925, paragraph 37, and Case C-244/89 *Commission* v *France* [1991] ECR I-163, paragraph 35.

19 — Cited in footnote 2.

20 — Judgment cited in footnote 2, at paragraph 35. See also my Opinion of 11 October 2001 in pending Cases C-418/00 and C-419/00 *Commission* v *France*, cited in footnote 2.

49. It should first be observed that the burden of proof is allocated in such a way that no party is required to adduce negative proof, which is extremely difficult. Nor, therefore, does the Commission have to prove the failure to adopt appropriate measures. That is in line with the Court's case-law on proof of infringements of provisions of the law governing market organisations in connection with the clearance of EAGGF accounts under which a comparable allocation of the burden of proof is justified, *inter alia*, on the ground that the Member State is in a better position to adduce positive proof. [21]

50. Thus, in regard to Community policy on fisheries, account is taken of its objectives by virtue of the obligation on the Member States as a matter of principle to achieve a result, that is to say to observe the fishing quotas allocated to them, which in its turn represents the indefeasible condition for attainment of the objectives under Article 1 of Regulation No 170/83. That consideration will therefore inform the assessment of the pleas and submissions.

21 — Reference need only be made to the judgment in Case C-374/99 *Spain* v *Commission* [2001] ECR I-5943, paragraph 15: 'Although it is for the Commission to prove an infringement of the rules of the common organisation of agricultural markets, it is not obliged to demonstrate exhaustively the insufficiency of the checks carried out by national administrations or the irregularity of the figures transmitted by them...' and the Opinion of Advocate General Geelhoed in that case (point 44): 'It is thus for the Member State — on the basis of information available to it and not to the Commission — to prove that the Commission did not correctly establish the facts or, in a given case, classified them incorrectly.'

B — *Failure to put in place appropriate detailed rules for the utilisation of fishing quotas*

1. Parties' submissions

51. In the Commission's view, it flows from the Member States' obligation under Article 5(2) of Regulation No 170/83 to determine, in accordance with the applicable provisions of Community law, detailed rules for utilisation of quotas allocated to them, that they have also to ensure compliance with the measures adopted, which in its turn requires appropriate penalties to be laid down. Although the problem of the landing of fish outside the United Kingdom was known for a long time, cases of overfishing continued throughout the whole of the relevant period; that permits the inference that the United Kingdom did not put in place appropriate detailed rules for utilisation of the fishing quotas, or that the competent national authorities did not adequately monitor compliance with such rules.

52. The Commission further claims that the United Kingdom authorities did not ensure that all catches were in fact reported. Likewise no system was put in place for analysing all data in order to enable fishing activity to be banned at the

correct time. Nor was compliance with such bans secured. Finally, the United Kingdom authorities did not seek to subject anglo-Spanish vessels to regular controls in the United Kingdom. All those matters resulted, according to the Commission, in an infringement of the obligations under Article 1(1) of Regulation No 2057/82 (in respect of the period until 1 August 1987) or under Article 1(1) of Regulation No 2241/87 (in respect of the subsequent period).

53. In line with the general argument put in its defence, [22] the United Kingdom Government contends that it is not possible for defects in the system of controls in the relevant period to be inferred from specific cases of overfishing since to do so would amount to an unlawful presumption. [23]

54. The United Kingdom Government also points to the human and material resources made available by it.

55. To the extent to which the Commission alleges failure to adopt specific measures, the United Kingdom Government refers to the judgment in Case C-328/96, [24] according to which the Commission has specifically to indicate to the Member State concerned that the latter must adopt a particular measure where the Commission seeks to make failure to adopt such a measure the subject-matter of its Treaty infringement proceedings.

2. Appraisal

56. First, it must be stated that the Commission has provided proof of a considerable number of cases of overfishing in the relevant period. In that connection it must be stressed that the Commission's figures have essentially not been contested.

57. In light of the judgment in Case C-333/99 [25] the United Kingdom Government's arguments on allocation of the burden of proof cannot be upheld. It may indeed be inferred from the scale of quantities in excess of quota and the repetition of cases of overfishing that the cases of overfishing complained of were only possible because the competent authorities did not comply with their obligations to carry out controls or did not do so adequately. [26] The United Kingdom Government's argument that the Commission relied on a mere presumption is therefore unsubstantiated.

22 — See above, point 43 et seq.

23 — See case-law cited in footnote 18.

24 — *Commission* v *Austria* [1999] ECR I-7479, paragraph 39.

25 — Cited in footnote 2.

26 — Also see above, point 43 et seq.

58. Nor is the reference to the number of quotas adhered to of any avail. In light of the aim of conservation of individual stocks compliance with Community rules on the conservation and management of fishery resources cannot turn on whether a majority of the quotas allocated to the Member State concerned have been adhered to. The decisive factor is rather the extent to which the Member State has adhered to each individual quota allocated to it.

59. That view of the matter is not altered by the judgment in Case C-328/96 cited above. In that case the Commission inferred from the failure to adopt a measure that there had been an infringement of the Treaty. However, the present case does not concern the adoption of or the failure to adopt a specific measure, but the failure to achieve a specific result. As regards determination of the detailed rules for utilisation of fishing quotas Community law does not prescribe the adoption of specific measures but merely the adoption of measures which secure adherence to the quotas allocated to the Member State concerned. As a matter of principle the choice of measures to be adopted remains a matter for the Member States. In light of the cases of overfishing established by the Commission the outcome of the action in that respect does not depend on whether no measures at all or only inadequate measures were adopted.

60. It should also be noted that the United Kingdom Government has itself argued that a considerable number of the cases of overfishing is attributable to anglo-Spanish vessels. That bears out the Commission's allegation that the United Kingdom authorities had not managed to have such vessels subjected to regular checks in the United Kingdom.

61. It follows from all the foregoing that the United Kingdom has failed to fulfil its obligations under Article 5(2) of Regulation No 170/83 in conjunction with Article 1(1) of Regulation No 2057/82 and Article 1(1) of Regulation No 2241/87 respectively by not putting in place the requisite detailed rules for the utilisation of the quotas allocated to it in respect of the fishing management years 1985 to 1988 and 1990 and by not ensuring in those years compliance with Community rules on the conservation of fish species by means of adequate supervision of fishing activities and appropriate controls of the fishing fleet, and of the landing and recording of catches.

C — *Defective recording of landings of certain mackerel catches in 1988*

1. Parties' submissions

62. The Commission submits that Article 9 of Regulation No 2241/87 imposes the

duty on each Member State not only to ensure that landings by fishing vessels flying the flag of the Member State concerned or registered in that Member State are recorded, and to forward the relevant information to the Commission within a specified period, but also to ensure that the information recorded and notified is accurate. However, the United Kingdom authorities took no steps to ensure in 1988 that the zones in which mackerel were caught were correctly recorded or subsequently corrected.

63. For its part the United Kingdom Government argues that the Commission has not produced proof of misreporting. Moreover, the Commission relied on an estimation in assessing the scale of excess quantities. Irrespective of that matter, it contends that Article 9(2) of Regulation No 2241/87 merely entails an obligation to forward to the Commission within the period specified such information as is contained in the log-books. The United Kingdom complied with that requirement.

64. On this point as well the United Kingdom Government considers the Commission's submissions to be insufficient because the Commission did not mention the measures which in its view it was necessary to adopt. The investigations conducted by the national authorities in conjunction with the Commission did not yield new information concerning the actual locations of catches. It was therefore impossible either to correct the information already supplied or to institute penal or administrative proceedings against those responsible.

65. In its reply the Commission stresses that the system of recording catches was an essential precondition for the adoption of measures to prevent quotas from being exceeded, so that the accuracy of reports was of decisive importance. The United Kingdom also disregards the fact that all Member States have a duty under Article 9(1) of Regulation No 2241/87 to ensure that all landings of stocks or groups of stocks subject to TACs or quotas are recorded. The Commission also claims that Article 9(4) of Regulation No 2241/87 was infringed because the records concerning the quantity at issue were not kept in accordance with requirements.

66. According to the United Kingdom Government the Commission is relying in this connection on a letter not appended to the application. In light of Article 42(2) of the Rules of Procedure the allegations of

infringement of Article 9(1) and (4) of Regulation No 2241/87 are out of time.

2. Appraisal

67. The second head of claim is the only one which relates to a specific instance. None the less, it ought to be capable of being dealt with on the basis of the principles already discussed. [27]

68. It should be observed that the United Kingdom acknowledges in principle the problems associated with the uncertainties as to the locations in which the mackerel quantity at issue was caught and on which the Commission based its view. The investigations conducted in this regard by the United Kingdom authorities showed however that the data recorded concerning catch areas were partly incorrect, though it was not possible with any certainty to attribute the quantities concerned to the correct zone.

69. It can therefore be regarded as established that part of the information concerning mackerel catches in 1988 has been proven to be incorrect.

70. The Commission is also right to point out that the duty of Member States under Article 9(2) of Regulation No 2241/87 is not limited to forwarding to the Commission within the period specified information provided to the authorities. The efficacy of the Community rules depends essentially on the reliability of the data collected by the Member States. On the one hand they enable the Member States themselves to adopt at the right time the measures necessary in a specific case in order to prevent quotas from being exceeded. On the other hand, however, they constitute the essential precondition for supervision by the Commission in this area. In this connection it is appropriate also to mention Article 10 EC, which requires the Member States to facilitate the fulfilment by the Community institutions of their tasks.

71. Accordingly, the Member States' obligation under Article 9(1) and (2) of Regulation No 2241/87 cannot merely be to forward data collected by them to the Commission within the period specified. On the contrary, they must at the same time ensure at least to a reasonable extent that information provided is not incorrect or, where there is doubt as to the accuracy of information, they must use their best endeavours to cooperate in order swiftly to clarify the matter. It should also be noted that under Article 9(2) the Member States are specifically obliged to include in their notifications to the Commission information concerning the location of catches.

27 — See above, point 43 et seq.

If the accuracy of such information were not important, that obligation would become meaningless. [28]

72. The fact that the United Kingdom authorities did not adequately ensure that in 1988 a considerable quantity of mackerel was correctly recorded by the competent national authorities is sufficient to show that Article 9(1) of Regulation No 2241/87 has been infringed.

73. The transmission of unreliable data and the lack of endeavour subsequently to correct the information forwarded constitutes in its turn an infringement of Article 9(2) of Regulation No 2241/87. The fact that evidence was not sufficient for instituting penal or administrative proceedings is not sufficient to justify that infringement.

74. In accordance with the principles governing allocation of the burden of proof discussed at the outset [29] the Commission has in my view adduced sufficient proof of an infringement of Article 9(1) and (2) of Regulation No 2241/87: it has shown that the information forwarded by the United Kingdom was plainly to a large extent unreliable. Yet in 1988 the United Kingdom authorities neither ensured that the information reported to them was correct nor that the information forwarded by them to the Commission was sufficiently reliable.

75. In connection with the obligation to keep the records which form the basis of the notifications to the Commission by the relevant Member State, the Commission has not stated to what extent the United Kingdom failed to comply with the duty incumbent on it. Infringement of Article 9(4) of Regulation No 2241/87 cannot therefore be established.

76. Accordingly, it must be concluded that in 1988 the United Kingdom failed to fulfil its obligations under Article 9(1) and (2) of Regulation No 2241/87 by not adopting adequate measures to ensure correct reporting of mackerel landings.

28 — See also Article 6(2) of Regulation No 2241/87: 'The Member States shall take the necessary measures to verify the accuracy of the declarations made...'.

29 — See above, point 43 et seq.

D — *Delayed banning of fishing*

1. Parties' submissions

77. Relying on case-law,[30] the Commission submits that it follows from Article 10 of Regulation No 2057/82 and Article 11 of Regulation No 2241/87 that the Member States are bound to take all appropriate steps in due time in order to prevent quotas allocated to the Member States for the purpose of conserving fishery resources from being exceeded. The requirement of timely action entails the obligation to adopt mandatory measures even before exhaustion of the quotas in order to ban any relevant fishing activity until further notice. It is alleged that the United Kingdom authorities in all cases either took no action or did so belatedly.

78. For its part the United Kingdom Government argues that the obligation to close the fishery provisionally applies only where exhaustion of the quotas is actually foreseeable. The Commission has not demonstrated in the individual cases that in spite of foreseeable exhaustion of quotas, no closure order was made. Only in five cases[31] did the Commission mention actual figures without, however, taking into account certain explanations.[32]

79. In its reply the Commission deliberately disregards cases of fishing in unauthorised zones in order to deal with the specific cases of overfishing. In that connection it asserts that the United Kingdom Government does not deny that the quotas at issue were already exhausted by the time the orders prohibiting further fishing took effect. Furthermore, the Commission demonstrated on the basis of figures that at the time the orders took effect the quotas had already been exhausted. It may be inferred from the judgment in Case 290/87 *Commission* v *Netherlands*[33] that the Commission has already discharged its duty to adduce evidence if it indicates the level of catches at the time when the prohibition orders were imposed. In the present case as well that date is the only relevant one.

2. Appraisal

80. In accordance with the Court's settled case-law[34] the Member States are obliged

30 — Judgments in Case C-62/89 (cited in footnote 18), paragraph 20, Case C-244/89 (cited in footnote 18), paragraph 20, and Case C-52/95 *Commission* v *France* [1995] ECR I-4443, paragraph 29.

31 — Sole fishery in zones V b, VI, XII and XIV in 1986; sole fishery in zone VII a in 1986; plaice fishery in zone VII f and g, in 1990; sole fishery in zones II and IV in 1990, and sole fishery in zone VII e in 1990.

32 — See above, points 27 et seq. and 37 et seq.

33 — Cited in footnote 18, paragraph 13.

34 — It is sufficient to refer to Case C-333/99 (cited in footnote 2) with the references it contains.

under Article 10 of Regulation No 2057/82 or Article 11 of Regulation No 2241/87, [35] even before exhaustion of the quotas, to take binding measures to prohibit fishing activity until further notice.

81. It should be stated right away that a finding that the provisions cited have been infringed cannot be made to depend on proof by the Commission of specific catch levels where the Member State itself concedes that, in spite of the fact that quotas were exceeded, no measure at all was adopted. That the Commission provided figures in five cases only [36] may be accounted for by the fact that in the other cases no steps at all were taken temporarily to prohibit fishing.

82. The deficiencies in the measures adopted in connection with the cases of overfishing in the years 1985 to 1987 were accounted for on the part of the United Kingdom principally by the fact that those cases of overfishing were attributable to anglo-Spanish vessels. It was thus difficult to obtain catch levels in due time, which in turn explains the time when the measures at issue were adopted.

83. The Court has consistently held that a Member State cannot rely on practical difficulties in order to justify its failure to adopt appropriate supervisory measures. On the contrary, it is for the Member States responsible for implementing Community regulations in the fisheries sector to overcome those difficulties by adopting appropriate measures. [37]

84. For that reason practical difficulties, such as the landings of catches in Spain mentioned by the United Kingdom Government, as well as the fluctuations in levels of catches in other Member States or non-Member States, cannot be relied on, particularly since those difficulties were by no means insurmountable and Community rules did not leave unregulated the question of the transmission of information between the Member States and between Member States and non-Member States. [38]

85. Finally, the Commission's argument that the suspension in 1990 of the fishing licences of vessels over 10 m in length is not equivalent to a temporary prohibition of fishing since not all vessels are affected by it must be upheld.

35 — According to the judgment in Case C-52/95 (cited in footnote 30) Article 11(2) of Regulation No 2241/87 founds the same obligation on the part of the Member States as Article 10(2) of Regulation No 2057/82.

36 — See footnote 34.

37 — Case C-333/99 (cited in footnote 2), paragraph 44, Case C-52/95 (cited in footnote 30) and Case C-62/89 (cited in footnote 18).

38 — See e.g. Articles 6 and 7 of Regulation No 2057/82.

86. Thus, in those cases in which a measure was adopted the Commission has adduced adequate proof, on the basis of the quantities which had been caught at the time when the prohibition orders took effect, of the fact that the United Kingdom was not successful in achieving a temporary closure of fishing before exhaustion of the quotas allocated to it which are at issue.

87. In light of all the foregoing the United Kingdom has infringed its obligations under Article 10(2) of Regulation (EEC) No 2057/82 and Article 11(2) of Regulation (EEC) No 2241/87 by not temporarily prohibiting fishing of certain stocks, or not doing so in due time, when catches could be deemed to have exhausted the corresponding quotas.

E — *Absence of penal or administrative sanctions*

1. Parties' submissions

88. The Commission is of the view that the Member States were required by Article 1(2) of Regulation No 2057/82, in the version applicable at the relevant times, or under Article 1 of Regulation No 2241/87, to take penal or administrative action against any persons responsible for a breach of the Community rules with regard to control and conservation measures. [39] Moreover, practical difficulties, such as the lack of adequate evidence alleged by the United Kingdom authorities, cannot justify the failure to institute such proceedings. Similarly, the fact that the vessels 'responsible' for the overfishing operated outside territorial waters is also no justification.

89. For its part the United Kingdom Government asserts that under the Court's case-law [40] the Commission must point to 'precise and specific' facts from which the inference to be drawn is that the competent authorities of a Member State were systematically refraining from taking action against persons responsible for such infringements. However, the Commission has not adduced such proof; it has been unable to identify a single case in which the United Kingdom authorities failed to take action where there was clear and sufficient evidence.

90. In regard to anglo-Spanish vessels the United Kingdom Government further submits that the United Kingdom authorities

39 — Article 1 of Regulation No 2057/82 originally made provision for that only in regard to skippers; the wider obligation under the wording of the later versions was already implied by the terms of Article 10 EC, however.

40 — Case 290/87 (cited in footnote 18), paragraphs 18 to 20, and Case C-52/95 (cited in footnote 30), paragraphs 33 to 36.

did not receive from the Spanish authorities adequate information concerning infringements by vessels registered in the United Kingdom. Not until the adoption of Council Regulation (EEC) No 3483/88 [41] was a basis created for improved cooperation between the Member States.

91. Finally, in its rejoinder the United Kingdom Government cites proceedings taken against persons responsible for certain infringements in the relevant period.

2. Appraisal

92. First of all, it should be stated that the obligation to institute penal or administrative proceedings in cases of non-compliance with the provisions concerning conservation and control measures existed as a matter of principle both under Article 1(2) of Regulation No 2057/82, whether in the original version or as amended by Regulations Nos 3723/85 and 4027/86, and under Article 1(2) of Regulation No 2241/87. The question is whether the Commission has adduced proof of an infringement by the United Kingdom of this obligation in the relevant period.

93. Since in the present case the infringement of that obligation is contested it would likewise appear necessary to discuss the question of the allocation of the burden of proof.

94. It is true that, under the Court's case-law, the Commission must adduce 'precise and specific facts' in relation to the alleged breach of duty. [42] However, neither the case-law nor practical considerations support the inference that the Commission is under a duty to prove systematic failure to proceed to apply sanctions.

95. In its judgment in Case C-52/95 [43] the Court addressed the significance of the obligation in question in light of the objectives pursued by the Community rules. [44] Since, however, in that case the breach of duty was uncontested, [45] the Court did not at that time need to go into the question of the burden of proof.

96. If the Commission had to prove systematic failure to act on the part of the

41 — Council Regulation (EEC) No 3483/88 of 7 November 1988 amending Regulation (EEC) No 2241/87 establishing certain control measures for fishing activities (OJ 1988 L 306, p. 2).

42 — Judgment in Case 290/87 (cited in footnote 18), paragraph 20.

43 — Cited in footnote 30.

44 — See paragraph 35 of the judgment cited: 'If the competent authorities of a Member State were systematically to refrain from taking action against the persons responsible for such infringements, both the conservation and management of fishery resources and the uniform application of the common fisheries policy would be jeopardised.'

45 — Cf. para. 33 of the judgment cited.

Member State, it would have to prove a negative. In light of the abovementioned considerations of principle [46] it seems appropriate not to require the Commission to adduce such proof.

97. In the present case the Commission stated in any event that during the whole of the pre-litigation phase the United Kingdom failed, in breach of its obligations under Article 5 of Regulation No 2057/82 and Article 4 of Regulation No 2241/87, to communicate to it information concerning any such proceedings. The United Kingdom merely pointed to the difficulties arising from the fact that most of the vessels flying the United Kingdom flag responsible for cases of overfishing were not operating in territorial waters. In that connection the United Kingdom is invoking a practical difficulty which, however, under the Court's consistent case-law, is not sufficient to justify failure to fulfil an obligation. [47]

98. Nor is it possible to accept the United Kingdom Government's argument that there was no obligation to institute penal or administrative proceedings because the evidence was inadequate under national law, since the inadequacy is attributable to the fact that, in breach of obligations under Community law, the national authorities did not adequately supervise catches of fish and associated activities. In the final analysis that argument amounts to an attempt to seek to use an original infringement of Community law to justify a subsequent one.

99. Finally, it must be determined to what extent the evidence adduced by the United Kingdom Government in the annex to the rejoinder can be considered. It may be precluded by the second sentence of Article 42(1) of the Rules of Procedure, under which the reasons for the delay in offering evidence must be stated. The reason given by the United Kingdom Government was that the delay in bringing proceedings was so long that it was difficult to assemble the information. Even though the facts did in some cases occur a considerable time ago, this cannot explain why the United Kingdom did not deal with the matter already during the pre-litigation phase. The reasons given appear therefore to be insufficient. [48]

100. It follows from the abovementioned considerations that the United Kingdom

46 — See above, point 49 et seq.

47 — Reference need only be made to Case C-62/89 (cited in footnote 18), paragraph 23.

48 — Reference should also be made in this connection to Article 10 EC. On the content of the information produced suffice it to state that it does not show whether proceedings were instituted in a significant number of cases.

has infringed Article 1(2) of Regulation (EEC) No 2057/82 and Article 1(2) of Regulation (EEC) No 2241/87, in conjunction with Article 5(2) of Regulation (EEC) No 170/83, by not instituting administrative or penal proceedings against the masters of vessels who contravened those provisions or against other persons who were responsible for such infringements.

V — Costs

101. Under Article 69(2) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs. Since the United Kingdom has been unsuccessful and the Commission has applied for an order in that connection, the United Kingdom must be ordered to pay the costs.

VI — Conclusion

102. On the grounds set out above I therefore propose that the Court:

(1) Declare that, in respect of the years 1985 to 1988 and 1990, the United Kingdom of Great Britain and Northern Ireland has failed to comply with its obligations under (a) Article 5(2) of Regulation (EEC) No 170/83 and Article 1(1) of Regulation (EEC) No 2057/82 (in respect of the period up to 1 August 1987) and Article 1(1) of Regulation (EEC) No 2241/87 (in respect of the subsequent period), (b) Article 10(2) of Regulation (EEC) No 2057/82 and Article 11(2) of Regulation (EEC) No 2241/87, (c) Article 9(1) and (2) of Regulation (EEC) No 2241/87 and (d) Article 1(2) of Regulation (EEC)

No 2057/82 or Article 1(2) of Regulation (EEC) No 2241/87 in conjunction with Article 5(2) of Regulation (EEC) No 170/83 by

— failing to put in place appropriate detailed rules for the utilisation of the quotas allocated to it and to carry out inspections and other controls as required by the relevant Community regulations,

— failing provisionally to close, or to close in due time, fisheries in respect of certain stocks, when catches were deemed to have exhausted the relevant quotas,

— failing in 1988 to take sufficient measures to prevent the misreporting of landings of mackerel, and

— failing to take administrative or penal action against the masters of ships infringing the regulations, or against such other persons as were responsible for such infringements.

(2) Order the United Kingdom of Great Britain and Northern Ireland to pay the costs.