JUDGMENT OF THE COURT
13 October 1992 *

In Case C-71/90,

Kingdom of Spain, represented initially by Carlos Bastarreche Sagües and subsequently by Alberto José Navarro González, Director General for Community Legal and Institutional Coordination, and Rosario Silva de Lapuerta, Abogado del Estado, Head of the State Legal Department for Matters before the Court of Justice of the European Communities, acting as Agents, with an address for service in Luxembourg at the Spanish Embassy, 4-6 Boulevard Emmanuel Servais,

applicant,

v

Council of the European Communities, represented by Arthur Alan Dashwood, a Director in the Council's Legal Service, and John Carbery, Legal Adviser, assisted by Germán-Luis Ramos Ruano, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Xavier Herlin, Manager of the Legal Directorate of the European Investment Bank, 100 Boulevard Konrad Adenauer, Kirchberg,

defendant,

supported by

Commission of the European Communities, represented by Robert Caspar Fischer and Francisco José Santaolalla, Legal Advisers, acting as Agents, with an address for service in Luxembourg at the office of Roberto Hayder, a representative of its Legal Service, Wagner Centre, Kirchberg,

* Language of the case: Spanish.

Federal Republic of Germany, represented by Ernst Röder, Regierungsdirektor in the Federal Ministry of Economic Affairs, and Joachim Karl, Oberregierungsrat in the same Ministry, acting as Agents, with an address for service in Luxembourg at the German Embassy, 20-22 Avenue Emile Reuter,

and

United Kingdom of Great Britain and Northern Ireland, represented by J. E. Collins, of the Treasury Solicitor's Department, acting as Agent, assisted by Christopher Vajda, Barrister, with an address for service in Luxembourg at the United Kingdom Embassy, 14 Boulevard Roosevelt,

interveners,

APPLICATION for the annulment of Council Regulation (EEC) No 4049/89 of 19 December 1989 allocating, for 1990, certain catch quotas between the Member States for vessels fishing in the Norwegian exclusive economic zone and the fishing zone around Jan Mayen (OJ 1989 L 389, p. 44),

THE COURT,

composed of: O. Due, President, C. N. Kakouris and M. Zuleeg (Presidents of Chambers), G. F. Mancini, R. Joliet, J. C. Moitinho de Almeida and M. Diez de Velasco, Judges,

Advocate General: C. O. Lenz,
Registrar: D. Triantafyllou, Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 18 February 1992,

after hearing the Opinion of the Advocate General at the sitting on 6 May 1992,

gives the following

Judgment

1 By application lodged at the Court Registry on 20 March 1990, the Kingdom of Spain brought an action under the first paragraph of Article 173 of the EEC Treaty for the annulment of Council Regulation (EEC) No 4049/89 of 19 December 1989 allocating for 1990 certain catch quotas between the Member States for vessels fishing in the Norwegian exclusive economic zone and the fishing zone around Jan Mayen (OJ 1989 L 389, p. 44). That regulation followed the Agreement on fisheries signed on 15 March 1977 between the Community and the Kingdom of Norway (OJ 1980 L 226, p. 48), and the consultations between the contracting parties concerning the allocation of catch quotas for Community vessels in the fishing zone of Norway for 1990.

2 The Council adopted the contested regulation on the basis of Article 11 of 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 system provides, *inter alia*, for conservation measures which, under Article 2, may involve among other things the restriction of fishing effort, in particular by limits on catches.

3 According to Article 3 of Regulation No 170/83, where, in the case of one species or a group of related species, it becomes necessary to limit the catch, the total allowable catch ('TAC') for each stock or group of stocks, the shares available to the Community as well as, where applicable, the total catch allocated to third countries and the specific conditions for taking those catches, are to be fixed each year. The shares available to the Community are to be increased by the total of Community catches outside the waters under the jurisdiction or sovereignty of the Member States.

4 Article 4(1) of Regulation No 170/83 provides that 'the volume of catches available to the Community referred to in Article 3 shall 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'. Article 4(2) provides that the Council, acting in accordance with the procedure laid down in Article 43 of the Treaty and on the basis of a report to be submitted by the Commission before 31 December 1991 on the fisheries situation in the Community, the economic and social development of the coastal areas and the state of the stocks and their likely evolution, is to make such adjustments as may prove necessary to the distribution of resources among Member States.

5 Finally, Article 11 of Regulation No 170/83 provides that the choice of conservation measures, the determination of TACs and of the volume of the catches available to the Community and the distribution amongst Member States of that volume are to be decided by the Council acting by a qualified majority on a proposal from the Commission. The regulations determining the TACs for the species of fish which must be conserved and distributing the volume of catches available to the Community among the Member States have been adopted each year, on that basis, since 1983.

6 By Council Regulation (EEC) No 172/83 of 25 January 1983 fixing for certain fish stocks and groups of fish stocks occurring in the Community's fishing zone, total allowable catches for 1982, the share of these catches available to the Community, the allocation of that share between the Member States and the conditions under which the total allowable catches may be fished (OJ 1983 L 24, p. 30), the Council allocated the stocks available in Community waters in accordance with the three criteria indicated in the preamble to that regulation: traditional fishing activities, the specific needs of areas particularly dependent on fishing and its dependent industries and the loss of fishing potential in the waters of third countries.

7 The same criteria were used for the distribution of the resources available outside Community waters under agreements with non-member countries contained in

various Council regulations, such as Council Regulation (EEC) No 173/83 of 25 January 1983 amending Regulation (EEC) No 370/82 concerning the management and control of certain catch quotas for 1982 for vessels flying the flag of a Member State and fishing in the Regulatory Area defined in the NAFO Convention (OJ 1983 L 24, p. 68), No 174/83 of 25 January 1983 allocating among Member States catch quotas available in 1982 to the Community under the Agreement on fisheries between the Community and Canada (OJ 1983 L 24, p. 70), No 175/83 of 25 January 1983 allocating certain catch quotas between Member States for vessels fishing in the Norwegian Economic Zone and the fishery zone around Jan Mayen (OJ 1983 L 24, p. 72), and Nos 176/83 and 177/83 of 25 January 1983 allocating catch quotas between Member States for vessels fishing in Swedish waters (OJ 1983 L 24, p. 75) and in Faroese waters (OJ 1983 L 24, p. 77).

8 The percentage allocations, determined on the basis of fishing activity in the reference period from 1973 to 1978 and converted into quantitative allocations, have not changed since 1983 and have been used for all allocations since that time. The accession of the Portuguese Republic and the Kingdom of Spain to the Community on 1 January 1986 did not bring about any change in the distribution formula, the two new Member States being excluded from it.

9 Reference is made to the Report for the Hearing for a fuller account of the applicable Community legislation, the procedure and the pleas in law and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

10 In support of its application, the applicant puts forward two pleas in law alleging, respectively, breach of the principle of stability of fishing activities and breach of the principle of non-discrimination.

The plea alleging breach of the principle of stability of fishing activities

11 The applicant maintains that, by adopting the contested regulation, which excludes it from the distribution, the Council applied in an incorrect manner the principle of stability of fishing activities embodied in Article 4(1) of Regulation No 170/83, in that it took no account of the applicant's legitimate claims for access to the fishery resources available outside the Community, allocated to the Community as a whole.

12 In support of its contention, the applicant essentially puts forward two arguments.

13 In the first place, it claims that the review arrangements referred to in Article 4(2) of Regulation No 170/83 do not constitute the only way of adjusting the distribution formula, decided on in 1983, to reflect new circumstances. The Council itself recognized, in a statement recorded in the minutes when Regulation No 170/83 was adopted, that, even before formal review of the distribution system, it would be necessary, when assessing the relative stability of the quotas to be allocated to the Member States, to take account of the various circumstances which might significantly affect the general situation which gave rise to the initial allocation. The accession of new Member States constitutes a substantial change in that situation, as the initial pattern of distribution was designed for ten Member States and thus no longer reflects the present composition of the Community. Moreover, the lack of provisions on that subject in the Act of Accession means that the principle of relative stability of fishing activities must be applied having regard to the new composition of the Community.

14 Secondly, it submits that the fishing possibilities granted to the Community under the Agreement with Norway have been systematically under-exploited by the Member States to which they were allocated. Therefore, the principle of relative stability of fishing activities would not have been infringed if fishing possibilities had been granted to other Member States, since the Member States which had been the exclusive beneficiaries of that principle had never entirely exhausted their quotas.

15 Before the above arguments are considered, it should be borne in mind that, in its judgment in Case 46/86 *Romkes* v *Officier van Justitie* [1987] ECR 2681, the Court has already given its views on the compatibility with the requirement of relative stability of fishing activities laid down in Regulation No 170/83 of the quota distributions made after the initial distribution in 1983. In paragraph 17 of that judgment, the Court thus stated that the requirement of relative stability must be understood as meaning that in that distribution each Member State is to retain a fixed percentage. It made clear in that regard that, in specifying that provisions effecting the adjustments that it may prove necessary to make to the distribution of the resources among Member States are to be enacted by the Council in accordance with the procedure laid down in Article 43 of the Treaty, Article 4(2) of that regulation shows that the distribution formula originally laid down under Article 4(1), on the basis of Article 11, is to continue to apply until an amending regulation is adopted in accordance with the procedure followed for Regulation No 170/83.

16 As regards the argument concerning the accession of the Kingdom of Spain to the Community on 1 January 1986, it must be stated that the objective fact of accession cannot in itself produce legal effects, since the conditions of accession are set out in the Act of Accession.

17 In the present case, Article 2 of the relevant Act of Accession provides that, from the date of accession, the provisions of the original Treaties and the acts adopted by the institutions of the Communities before accession are to be binding on the new Member States and are to apply in those States under the conditions laid down in those Treaties and in the Act of Accession itself.

18 It is undisputed that, with respect to fisheries and, in particular, external resources, the Act of Accession (Article 167 in the case of Spain) provides for a system of integration whereby the Community merely takes over the management of fisheries agreements previously concluded with non-member countries by the new Member States, and provisionally maintains, in their case, the rights and obligations resulting therefrom, pending the adoption by the Council of appropriate decisions concerning the continuation of fishing activities under those agreements.

19 In those circumstances, pursuant to Article 2 of the Act of Accession, the existing Community rules must be applied, in particular the principle of relative stability as laid down by Regulation No 170/83, which moreover has not been amended in any way, with the exception of a technical adjustment to the number of votes in the decision-making procedure referred to in Article 14(2) (Annex I, point XV, of the Act of Accession), and as interpreted by the Court.

20 That argument must therefore be rejected.

21 It must be made clear, however, that whilst the Act of Accession did not affect, as it might have done, the existing situation regarding the distribution of external fishery resources, the fact nevertheless remains that, since accession, the Kingdom of Spain has been in the same position as those Member States that did not benefit from the initial allocation.

22 It follows that, on the one hand, that Member State is entitled to participate in the allocation of any new fishing possibilities that become available under agreements with non-member countries concluded after accession which have as their subject-matter fishery resources yet to be distributed, and, on the other hand, that if and when the system is reviewed, under Article 4(2) of Regulation No 170/83, it may put forward its claims on the same footing as all the other Member States.

23 As regards the Kingdom of Spain's argument concerning the under-exploitation of quotas, it should be noted that, in reality, as the Council has moreover pointed out, without being convincingly contradicted, the fishing possibilities attributed to the Community under an agreement with a non-member country are based on forecasts concerning the state and development of stocks, which may prove incor-

rect and may not reflect the quantities actually capable of being caught. In those circumstances, the mere fact that the quantities caught fall short of the quantities forecast cannot create an obligation to carry out a new distribution for the following year. Furthermore, the Kingdom of Spain has produced no evidence of intentional under-exploitation, by the Member States entitled to them, of the fishery quotas allocated to them under the contested regulation.

24 Since the second argument likewise cannot be upheld, the plea as to breach of the principle of relative stability of fishing activities must be rejected in its entirety.

The plea in law concerning breach of the principle of non-discrimination

25 The applicant maintains that, by adopting the contested regulation without including it in the distribution formula, the Council infringed the principle of non-discrimination embodied in Article 7 of the Treaty.

26 In support of its contention, the applicant claims, firstly, that, during the reference period, namely from 1973 to 1978, the Spanish fleet undertook extensive fishing activities in the waters of Norway. It would be in conformity with the judgment in *Romkes*, cited above, for those traditional activities to be taken into account in the distribution formula, since in it the Court held that the distribution method was not contrary to the principle of non-discrimination laid down in Article 7 of the Treaty since it requires the fishermen of each Member State to make an effort to restrict their catches to levels in proportion to the catches they were taking before the entry into force of the Community system for the conservation of fishery resources.

27 It claims, secondly, that discrimination also arises, on the one hand, from the fact that although the new Member States forfeited to the Community, following accession, the power to negotiate fisheries agreements with non-member countries,

they are still excluded from the fishing possibilities obtained by the Community through its own negotiation of such agreements with non-member countries; on the other hand, the other Member States benefited from fisheries agreements concluded by Spain with non-member countries before accession, whereas Spain is excluded from the quotas obtained by the Community under agreements which it had itself concluded during the same period.

28 It must be observed that the applicant's situation is not comparable with that of the other Member States included in the distribution, if account is taken of the provisions of the Act of Accession, as indicated above, regarding the integration of the new Member States in the common fisheries policy, and particularly regarding the external fishery resources already available and distributed at the time of accession.

29 In so far as the Act of Accession did not change the existing situation as regards the distribution of external resources, the existing Community rules continue to be applicable. Accordingly, the new Member States cannot rely on circumstances antedating accession, in particular their fishing activities during the reference period, in support of their contention that the provisions in question should not be applied. Since their accession, they have been in the same position as the Member States excluded from the distributions under the principle of relative stability of fishing activities, which was reflected, as far as the agreements concluded before accession are concerned, in the distribution effected in 1983. This conclusion cannot be undermined by the fact that, as a result of their accession, the new Member States no longer have the power to conclude independent agreements, which places them in a situation identical to that of all the other Member States, or by the fact that they did not receive anything in return for the external resources which they brought into the Community.

30 The plea as to breach of the principle of non-discrimination must therefore be rejected.

31 It is apparent from all the foregoing considerations that the application must be dismissed in its entirety.

Costs

32 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the Kingdom of Spain has been unsuccessful, it must be ordered to pay the costs. Pursuant to Article 69(4), the Commission and the intervening Member States must be ordered to bear their own costs.

On those grounds,

THE COURT

hereby:

1. Dismisses the application;

2. Orders the Kingdom of Spain to pay the costs, with the exception of those of the Commission, the Federal Republic of Germany and the United Kingdom, which are ordered to bear their own costs.

Due Kakouris Zuleeg

Mancini Joliet Moitinho de Almeida Diez de Velasco

Delivered in open court in Luxembourg on 13 October 1992.

J.-G. Giraud O. Due

Registrar President