JUDGMENT OF THE COURT (Second Chamber)

17 March 2005 *

In Case C-91/03,

ACTION for annulment under Article 230 EC, brought on 28 February 2003,

Kingdom of Spain, represented by N. Díaz Abad, acting as Agent, with an address for service in Luxembourg,

applicant,

v

Council of the European Union, represented by J. Carbery, F. Florindo Gijón and M. Balta, acting as Agents,

defendant,

* Language of the case: Spanish.

supported by:

Commission of the European Communities, represented by T. van Rijn and S. Pardo Quintillàn, acting as Agents, with an address for service in Luxembourg,

French Republic, represented by G. de Bergues and A. Colomb, acting as Agents, with an address for service in Luxembourg,

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, C. Gulmann, R. Schintgen, P. Kūris (Rapporteur) and J. Klučka, Judges,

Advocate General: A. Tizzano,
Registrar: K. Sztranc, Administrator,

having regard to the written procedure and further to the hearing on 11 November 2004,

after hearing the Opinion of the Advocate General at the sitting on 13 January 2005,

gives the following

Judgment

1 By its application, the Kingdom of Spain seeks annulment of paragraph 6 of Annex I to Council Regulation (EC) No 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the common fisheries policy (OJ 2002 L 358, p. 59, 'the contested regulation').

The legal background and the origins of the dispute

2 Article 2 of Council Regulation (EEC) No 2141/70 of 20 October 1970 laying down a common structural policy for the fishing industry (OJ, English Special Edition 1970 (III), p. 703) established the principle of free access to waters under the jurisdiction or sovereignty of the Member States.

3 In derogation from that principle, Article 100(1) of the Act of Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland and the adjustments to the Treaties (OJ 1972 L 73, p. 14, 'the Act of Accession 1972') authorised the Member States until 31 December 1982 to restrict fishing in waters under their sovereignty or jurisdiction, situated within a limit of six nautical miles calculated from the base lines of the coastal Member State, to vessels which traditionally fished in those waters.

4 On 25 January 1983 the Council of the European Union adopted Regulation (EEC) No 170/83 establishing a Community system for the conservation and management of fishery resources (OJ 1983 L 24, p. 1). Under Article 6(1) of that regulation, the Member States were authorised to retain the arrangements defined in Article 100 of the Act of Accession 1972 and to generalise up to 12 nautical miles for all waters under their sovereignty or jurisdiction the limit of six miles laid down in that article.

5 According to Article 6(2) of that regulation, '[i]n addition to the activities pursued under existing neighbourhood relations between Member States, the fishing activities under the arrangements established in paragraph 1 of this Article shall be pursued in accordance with the arrangements contained in Annex I, fixing for each Member State the geographical zones within the coastal bands of other Member States where these activities are pursued and the species concerned.' That Annex was amended pursuant to Article 26 of the Act concerning the conditions of accession of the Kingdom of Spain and the Portuguese Republic and the adjustments to the Treaties (OJ 1985 L 302, p. 23, 'the Act of Accession 1985').

6 Article 160 of the Act of Accession 1985 provides, as a provisional measure, restrictions on fishing without distinguishing the fishing zones on either side of the 12-nautical-mile limit calculated from the base lines.

7 Article 166 of the Act of Accession provides:

'The regime defined in Articles 156 to 164, including the adjustments which the Council will be able to adopt pursuant to Article 162, shall remain in force until the date of expiry of the period laid down in Article 8(3) of Regulation (EEC) No 170/83.'

8 Under Article 8(3) of Regulation (EEC) No 170/83:

'The Commission shall submit to the Council, during the 10th year following 31 December 1992, a report on the economic and social situation of coastal regions, on the basis of which the Council, acting in accordance with the procedure laid down in Article 43 of the Treaty, shall decide on the provisions which, once the 10-year-period mentioned in this paragraph has expired, could follow the arrangements referred to in Articles 6 and 7.'

9 The time-limit laid down in Article 166 of the Act of Accession 1985 was therefore 31 December 2002, the date on which the arrangements provided for by Article 160 of that Act were also to expire.

10 Article 17 of the contested regulation provides:

'1. Community fishing vessels shall have equal access to waters and resources in all Community waters other than those referred to in paragraph 2, subject to the measures adopted under Chapter II.

2. In the waters up to 12 nautical miles from baselines under their sovereignty or jurisdiction, Member States shall be authorised from 1 January 2003 to 31 December 2012 to restrict fishing to fishing vessels that traditionally fish in those waters from ports on the adjacent coast, without prejudice to the arrangements for Community

fishing vessels flying the flag of other Member States under existing neighbourhood relations between Member States and the arrangements contained in Annex I, fixing for each Member State the geographical zones within the coastal bands of other Member States where fishing activities are pursued and the species concerned.

...'

11 Annex I to that regulation defines the conditions of access to coastal bands within the meaning of Article 17(2) of the regulation. Under Point 6 of that annex, in the zone stretching from the border between the Kingdom of Spain and the French Republic to 46°08' North, Spanish vessels may fish for anchovy only between 1 March and 30 June and for anchovy as live bait only between 1 July and 31 October; with regard to sardines, those vessels may fish for them only from 1 January to 28 February and from 1 July to 31 December. In addition, fishing activities relating to those various species of fishing must be carried out in accordance with and within the limits of activity carried on during the year 1984.

12 By laying down the rule of free access to waters more than 12 nautical miles from the coastal Member State's baselines ('the zone beyond the 12-mile limit'), Article 17 (1) of the contested regulation replaces, in relation to Spanish fishing vessels' access to French waters, the arrangements under the Act of Accession 1985, in particular, Article 160 thereof. That provision laid down limitations similar to those provided for in respect of the 6-to-12-mile zone by Annex I to the contested regulation.

13 During the negotiations preceding the adoption of the contested regulation, the Kingdom of Spain sought amendment of point 6 of the draft regulation, in order to do away with the restrictions provided for by the Act of Accession 1985, which applied to Spanish vessels in the 6-to-12-mile zone calculated from the baselines of the French Atlantic coast. Spain also requested that the conditions of access should be brought into line with those for French vessels in Spanish maritime waters.

14 The Council decided not to make amendments to point 6.

15 The Kingdom of Spain presented a declaration expressing its disagreement and 'reserving the right to bring the matter before the Court of Justice of the European Communities in order to have that part of the regulation amended'.

16 Those were the circumstances in which it decided to bring this action.

17 By orders of the President of the Court of 30 June and 8 September 2003, the Commission and the French Republic were granted leave to intervene in support of the forms of order sought by the Council.

Concerning the action

18 In its application the Kingdom of Spain has raised two pleas in law, which it is appropriate to examine in reverse order to that in which they are presented.

Concerning the plea alleging infringement of the Act of Accession 1985

Arguments of the parties

19 The Spanish Government maintains that Article 160 of the Act of Accession 1985, which restricted access by Spanish vessels to the zone within 12 nautical miles calculated from the baselines ('the 12-mile zone') of the French coast and to the zone beyond 12 miles, has not been applicable since 31 December 2002, by virtue of the provisions relating to the transitional period provided for by Article 166 of that Act of Accession. Consequently, the restrictions covering both the 12-mile zone and the zone beyond 12 miles ought to have been repealed. By continuing those restrictions, the contested regulation unjustifiably prolongs the transitional arrangements beyond the time-limit fixed by that Act.

20 Furthermore, the Spanish Government argues that there is no specific measure concerning access to pelagic species in the 12-mile zone that requires special management of that zone.

21 The Council contends that it is not the purpose of Article 166 of the Act of Accession 1985 to restrict the powers of the Community legislature after 31

December 2002. Provisions adopted on the basis of Article 37 EC are new measures the lawfulness of which may be evaluated only having regard to the provisions of the Treaty in force.

22 The Council states, moreover, that Annex I to Regulation No 170/83 was amended by Article 26 of the Act of Accession 1985 and by Chapter XV of Annex I to that Act. That article appears in Part Three of the Act of Accession, relating to adaptations to acts adopted by the institutions, and not in Part Four of that Act, relating to transitional measures. As a result, the Council considers that the adaptations to Regulation No 170/83 are unlimited in duration and cannot be regarded as temporary measures.

23 According to the Council, Articles 156 to 164 of the Act of Accession 1985 do not mention the arrangements for access to the coastal band of the French Republic. It is, in its view, unreasonable to interpret Article 166 of that Act of Accession as applying also to the expiry of a provision to which no reference is made, but which was to be found in a regulation amended pursuant to Article 26 of that Act and the content of which was reiterated in the regulation adopted on the basis of Article 37 EC. What is more, it maintains that Article 166 does not regulate the arrangements for access to the coastal band.

24 In addition, it argues that the Kingdom of Spain's request that the conditions for fishing in the coastal band should apply without limit in time is not supported by any legal basis.

25 The Commission, intervening in support of all the Council's arguments, considers in particular that the Spanish Government misinterprets the provisions of the Act of Accession 1985. In its opinion, Article 166 of that Act does not refer to the conditions of access of Spanish vessels to French Atlantic waters within the 12-mile zone. The Act of Accession does no more than adapt Annex I to Regulation No 170/83 by supplementing the table which sets out in detail the conditions for access to the Member States' coastal zones.

26 The French Government considers that the adaptations to Regulation No 170/83 were made pursuant to Article 26 of the Act of Accession 1985, which appears, not in Part Four of that act concerning transitional measures, but in Part Three, relating to adaptations to acts adopted by the institutions. It follows that measures taken pursuant to that article are permanent in nature. In consequence, point 6 of Annex I to the contested regulation cannot constitute an infringement of the transitional measures of the Act of Accession 1985.

Findings of the Court

27 As the Spanish Government and the Commission observed at the hearing, it must be held that Article 160 of the Act of Accession 1985 contains a rule analogous to that at issue in these proceedings and that it does not draw any distinction, so far as its ambit is concerned, between the waters comprised in the 12-mile zone and waters beyond that zone.

28 It must also be found that that provision, appearing in Part Four of the Act of Accession 1985 relating to transitional measures, has not been applicable since the date fixed by Article 166 of that Act, viz., 31 December 2002.

29 It does not, however, follow from those findings that the Community legislature could not adopt the contested rule under its competence conferred by Article 37 EC.

30 That Articles 160 and 166 of the Act of Accession 1985 want legal effect is due, in particular, to the circumstance that, with regard to the 12-mile zone, Annex I to Regulation No 170/83 has been added to by a rule analogous to that at issue in the present case by virtue of Article 26 of the Act of Accession 1985, with the result that that rule quite apparently falls within the competence of the Community legislature as defined in Article 37 EC.

31 It follows from all the foregoing that the plea alleging infringement of the act of Accession 1985 must be rejected.

Concerning the plea alleging breach of the principle of non-discrimination

Arguments of the parties

32 The Spanish Government claims that point 6 of Annex I to the contested regulation imposes restrictions which do not exist, either as regards French vessels' access to Spanish coastal bands or as regards other Member States' coastal bands. It states that the Kingdom of Spain is the only Member State the vessels of which have restricted access to the coastal bands of its neighbour State. It concludes therefrom that it is

afforded discriminatory treatment contrary to the principle of equality enshrined in Article 12 EC and Article 34(2) EC relating to the common agricultural policy and fisheries.

33 The Spanish Government states that the common policy rules may be differentiated according to zones or regions only on the basis of criteria that ensure a proportionate division of advantages and disadvantages between those concerned, without distinguishing between the territories of the Member States. In the instant case, there is, in its view, no objective reason for different treatment.

34 Furthermore, the Spanish Government claims that, on the one hand, the same restrictions of access as those imposed on vessels when the Kingdom of Spain acceded to the Community have been maintained, without account's being taken of the expiry of the transitional period and, on the other, the Agreement on fisheries concluded between the Community and the Government of Spain on 15 April 1980 and approved by Council Regulation (EEC) No 3062/80 of 25 November 1980 (OJ 1980 L 322, p. 3) concerns only the exclusive 200-mile economic zone.

35 The Council maintains that it is sufficient to examine Annex I to the contested regulation to find that the rules of access are not reciprocal. Access is often restricted by species and sometimes limited in time.

36 In its view, those limitations originate in the desire to comprehend traditional fishing activities in those zones in order to enable them to continue. The list of those limitations does not answer to any geographic criterion of neighbourhood or reciprocity.

37 The Council contends that in that way the Kingdom of Spain keeps for its vessels the same conditions of access as those they had before that State acceded to the Community and until the contested regulation was adopted. Furthermore, it states that before that accession the fishing agreement concluded on 15 April 1980 between the Community and the Kingdom of Spain granted no unlimited access for the latter's vessels to the French coastal band.

38 Consequently, the Council considers that the Kingdom of Spain has in no way been the victim of discrimination, but has rather been afforded treatment that is objective and comparable to that afforded the other Member States.

39 In addition, the Council argues that the applicant has furnished no explanation of how it considers that the institution, by adopting the contested regulation, acted in manifestly inappropriate fashion in the exercise of its powers. The Council observes that while, beyond the 12 nautical miles calculated from the baselines of the Member States, the principle is of free access to the waters for all Community vessels, within the 12-mile zone, on the other hand, the arrangements reserve access to the fishing vessels that traditionally operate there from ports on the adjacent coast. As a result, limited access to those waters for vessels that do not operate out of those ports is already a privileged legal situation. Spanish vessels alone have access to the French 12-mile zone.

40 The Commission maintains that the Kingdom of Spain's plea is founded on a misunderstanding of the whole legislative context. It stresses the difference in kind that exists between the arrangements applicable to waters and resources situated, on the one hand, within the 12-mile zone and, on the other, beyond that zone. That limitation of access is based on objective grounds of conservation of the most sensitive of Community waters, such as those situated near to coasts and on social and economic grounds intended to protect the activity of fishing with small-tonnage vessels. It considers that, contrary to the Spanish Government's submission, the

extension until 31 December 2012 of the arrangements for limited access to the waters under the sovereignty or jurisdiction of the other Member States is more than justified in the wording of the regulation, properly speaking, and in particular in the 14th recital in the preamble thereto. It is therefore of the opinion that there exists an objective reason for distinguishing the arrangements applicable to the 12-mile zone from those applicable to the zone beyond the 12 miles. It states that, in defining the conditions on which Spanish vessels have access to French coastal waters, the Council took into account the traditional conditions for access existing before the Kingdom of Spain acceded to the Community, linked to neighbourhood relations.

41 The French Government argues that the objective pursued by the contested regulation is the sustainable continuation of traditional fishing activity and that, as a result, it is inappropriate to use criteria based on reciprocity.

42 It emphasises, furthermore, on the one hand, that in the 6-to-12-mile zone calculated from the baselines of the Spanish coasts French vessels are authorised to fish only for pelagic species and, on the other, that the contested regulation offers the same opportunities for access as those that Spanish vessels have always enjoyed since their Member State acceded to the Community. It concludes that Spain has not been treated in a discriminatory manner.

Findings of the Court

43 It is settled case-law that the principle of non-discrimination requires that comparable situations must not be treated differently unless such treatment is objectively justified (Joined Cases 201/85 and 202/85 *Klensch and Others* [1986] ECR 3477, paragraph 9).

44 It is appropriate to observe that, with regard to the 12-mile zone, Article 17(2) of the contested regulation explicitly authorises the Member States to restrict fishing to vessels that traditionally operate within that zone from ports on the adjacent coast. However, that article provides for certain specific arrangements giving Community fishing vessels flying the flags of other Member States the right to fish in the 12-mile zones under pre-existing neighbourhood relations between Member States. Annex I to the contested regulation, referred to by Article 17(2), fixes for each of the Member States the geographical zones within the coastal bands of other Member States where those activities are pursued and the species concerned.

45 It is furthermore to be borne in mind that the 14th recital in the preamble to the contested regulation states that '[r]ules in place restricting access to resources within the 12 nautical mile zones of Member States have operated satisfactorily benefiting conservation by restricting fishing effort in the most sensitive part of Community waters and preserving traditional fishing activities on which the social and economic development of certain coastal communities is highly dependent' and that '[t]hey should therefore continue to apply until 31 December 2012'.

46 The Spanish Government has not challenged the fundamental principles underlying the arrangements applicable to the 12-mile zones and established by the contested regulation.

47 None the less, it considers that by adopting point 6 of Annex I to the contested regulation, the Council has caused the Kingdom of Spain to suffer discrimination

contrary to the principle of equality enshrined in Article 12 EC and Article 34(2) EC relating to the common agricultural policy and fisheries.

48 It maintains, in particular, that the common policy rules may be differentiated depending on zones or regions only on the basis of objective criteria that ensure a proportionate division of the advantages and disadvantages between those concerned, without distinguishing between the territories of the Member States. In the circumstances of the case, it believes that there is no objective reason justifying different treatment.

49 That plea in law is unfounded.

50 In this regard, the Council, the Commission and the French Government correctly point out that the purpose of the arrangements applicable to the 12-mile zones, provided for by Article 17(2) of the contested regulation, is to protect the most sensitive Community waters, while taking account of the need to preserve traditional fishing activities.

51 Such a purpose does not of itself entail the application of criteria of reciprocity.

52 In any case, the Spanish Government has not demonstrated that, by adopting point 6 of Annex I to the contested regulation, the Council has departed from the stated purpose.

53 It is apparent simply from reading Annex I to the contested regulation that access to the coastal bands of Member States other than the French Republic, when accorded to Community fishing vessels, is restricted in time and limited to certain species.

54 In addition, it is to be recalled that point 6 of Annex I to the contested regulation does no more than extend the arrangements that have been in force since the Kingdom of Spain acceded to the Community.

55 In those circumstances, the plea in law alleging breach of the principle of non-discrimination must be rejected.

56 From all the foregoing it follows that the Kingdom of Spain's action must be dismissed.

Costs

57 Under Article 69(2) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs if they have been applied for. Since the Council has applied for costs and the Kingdom of Spain has been unsuccessful, the latter must be ordered to bear its own costs and to pay those incurred by the Council. In accordance with Article 69(4) of those Rules, a Member State or institution intervening in the proceedings is to bear its own costs. The Commission and the French Republic, as interveners, are therefore to bear their own costs.

On those grounds, the Court (Second Chamber) hereby:

1. Dismisses the action;

2. Orders the Kingdom of Spain to bear its own costs and those incurred by the Council of the European Union;

3. Orders the French Republic and the Commission of the European Communities to bear their own costs.

[Signatures]