JUDGMENT OF THE COURT

29 June 1999 *

In Case C-206/97,

Kingdom of Sweden, represented by Lotty Nordling, Rättschef in the Legal Secretariat (EU) of the Ministry of Foreign Affairs, acting as Agent, with an address for service in Luxembourg at the Swedish Embassy, 2 rue Heinrich Heine,

applicant,

v

Council of the European Union, represented by Rüdiger Bandilla, Director of the Legal Service, Eva Karlsson and Lauri Railas, Legal Advisers, acting as Agents, with an address for service in Luxembourg at the office of Alessandro Morbilli, Manager of the Legal Affairs Directorate, European Investment Bank, 100, Boulevard Konrad Adenauer

defendant,

supported by

Commission of the European Communities, represented by Christina Tufvesson and Thomas van Rijn, Legal Advisers, acting as Agents, with an address for

* Language of the case: Swedish

service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

intervener,

APPLICATION for the annulment of Council Regulation (EC) No 390/97 of 20 December 1996 fixing, for certain fish stocks and groups of fish stocks, the total allowable catches for 1997 and certain conditions under which they may be fished (OJ 1997 L 66, p. 1) as regards the allocation of cod in Zone III b, c and d,

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, P.J.G. Kapteyn (Rapporteur), J.-P. Puissochet, G. Hirsch and P. Jann (Presidents of Chambers), J.C. Moitinho de Almeida, C. Gulmann, J.L. Murray, D.A.O. Edward, H. Ragnemalm and L. Sevón, Judges,

Advocate General: P. Léger,

Registrar: H. von Holstein, Deputy Registrar,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 1 December 1998,

after hearing the Opinion of the Advocate General at the sitting on 9 February 1999,

gives the following

Judgment

1 By application lodged at the Court Registry on 30 May 1997, the Kingdom of Sweden brought an action under Article 173 of the EC Treaty (now, after amendment, Article 230 EC) for the annulment of Council Regulation (EC) No 390/97 of 20 December 1996 fixing, for certain fish stocks and groups of fish stocks, the total allowable catches for 1997 and certain conditions under which they may be fished (OJ 1997 L 66, p. 1) as regards the allocation of cod in Zone III b, c and d.

The Community legislation

Fishing in the Baltic Sea

2 Under Article V of the Convention on fishing and conservation of the living resources in the Baltic Sea and the Belts to which the Community acceded by virtue of Council Decision 83/414/EEC of 25 July 1983 (OJ 1983 L 237, p. 4, hereinafter 'the Convention'), amended by the Protocol to the Conference of the representatives of the States Parties to the Convention, signed in Warsaw on 11 November 1982, fishing in the Baltic Sea is regulated by the International Baltic Sea Fishery Commission (hereinafter 'the IBSFC'). Under Articles IX to XI of the Convention, the IBSFC is to fix annually for each Contracting Party the

total allowable catch (hereinafter 'TAC') for each stock of fish and for each zone; to that end it draws up recommendations which become binding on the Contracting States if no objection is made by them within a specified period.

3 For 1997 the TAC for cod in the European Community fishing zones was fixed at 109 600 tonnes by the 22nd session of the IBSFC, held in Warsaw from 16 to 20 September 1996.

Regulation (EEC) No 3760/92

4 Article 8(4)(i) of Council Regulation (EEC) No 3760/92 of 20 December 1992 establishing a Community system for fisheries and aquaculture (OJ 1992 L 389, p. 1) provides that the Council, acting by qualified majority on a proposal from the Commission, is to determine for each fishery or group of fisheries, on a case-by-case basis, the total allowable catch and/or total allowable fishing effort. Under Article 8(4)(ii), the Council is to distribute the fishing opportunities between Member States in such a way as to assure each Member State stability of fishing activities for each of the stocks concerned.

5 Pursuant to Article 3(g), 'Community fishing opportunity' means 'the fishing opportunity available for the Community in Community fishing waters, plus the total of the Community fishing opportunities outside the Community fishing waters, less the total of the fishing availabilities allocated to third countries'.

6 Article 3(a) of the same regulation provides that 'Community fishing waters' means 'the waters under the sovereignty or jurisdiction of the Member States'.

Article 121 of the Act of Accession

7 The share of the Community fishing opportunities for stocks which are regulated by a catch limit to be allocated to the Kingdom of Sweden is determined by Article 121(1) of the Act concerning the conditions of accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded (OJ 1994 C 241, p. 21, and OJ 1995 L 1, p. 1, hereinafter 'the Act of Accession').

8 As regards the allocation of cod in Zone III b, c and d, the Kingdom of Sweden's share is fixed as 35.037% by the table in Article 121(1) of the Act of Accession. Note 7 to that table states that that percentage is to apply to the first 50 000 tonnes of Community fishing opportunities. For fishing opportunities in excess of 50 000 tonnes, the share for the Kingdom of Sweden is fixed at 40.000%. According to the same note, 'these allocations do not take account of the continued transfers of quotas from Sweden to the present Member States of the Union, resulting from the 1992 EEA arrangements'. Finally, note 2 to the table indicates that the reference to Zone III b, c and d relates only to 'Community waters'.

9 According to Article 121(2) of the Act of Accession, the shares allocated to the Kingdom of Sweden are to be set in accordance with Article 8(4) of Regulation No 3670/92. On the basis of that article, the allocation of shares was effected for 1995 and 1996 respectively by Council Regulations (EC) Nos 3362/94 of 20 December 1994 and 3074/95 of 22 December 1995 fixing, for certain fish stocks and groups of fish stocks, the total allowable catches... and certain conditions under which they may be fished (OJ 1994 L 363, p. 1, and OJ 1995 L 330, p. 1).

Regulation No 390/97

10 The Community catch for 1997 was allocated among the Member States by Regulation No 390/97, which the Kingdom of Sweden seeks to have annulled in part.

11 Article 2 of that regulation provides that the TACs are fixed for 1997 as set out in Annex I. According to that annex, the TACs for cod (*Gadus Morhua*) in zone III b, c and d are fixed as 112 452 tonnes (109 600 tonnes under the TACs fixed by the IBSFC and 2 852 tonnes representing the 'compensation cod' (see paragraph 12 of this judgment)). The quantity allocated to the Kingdom of Sweden is, according to the same annex, 38 860 tonnes (35.037% of 50 000 tonnes + 40.000% of 59 600 tonnes = 41 360 tonnes, of which 2 500 tonnes have to be transferred to the other Member States under the agreement concluded in the form of an exchange of letters between the Community and the Kingdom of Sweden upon signature of the Treaty on the European Economic Area).

The 'compensation cod'

12 It is clear from the case-file that in the negotiations leading to the accession of the Kingdom of Sweden to the European Union, final agreement on the method of allocating Baltic Sea cod was the subject of difficult negotiations. Certain Member States considered that the Kingdom of Sweden's share did not properly reflect the historical patterns of fishing and therefore undermined their own fishing interests in the Baltic Sea.

13 At the 1733rd Council meeting, held in Brussels from 25 February to 1 March 1994, the Council agreed to include the following declaration in its minutes (doc. 5057/94 ADD 1 PV/CONS 5, p. 7, hereinafter 'the 1994 declaration'):

'Baltic cod

The Council and the Commission will acquire additional fishing rights of cod amounting to any allocation to Sweden beyond 35.037%. The additional quotas will be allocated between Germany and Denmark.'

14 In accordance with that declaration, for 1995, 1996 and 1997 the Community purchased 'compensation cod' from the three Baltic States.

15 For 1997, the Community obtained 2 852 tonnes of 'compensation cod', comprising 900 tonnes from Estonia, 127 tonnes from Latvia and 1 825 tonnes from Lithuania. That quantity was shared between the Kingdom of Denmark (69% = 1 968 tonnes) and the Federal Republic of Germany (31% = 884 tonnes). Thereafter, those quantities were added to the shares of the TAC available to the Community, allocated in accordance with the internal method of allocation to Denmark (43.36% of 109 600 tonnes = 47 526 tonnes + 1 968 tonnes = 49 494 tonnes) and the Federal Republic of Germany (18.94% of 109 600 tonnes = 20 756 tonnes + 884 tonnes = 21 638 tonnes).

16 By order of the President of the Court of 24 October 1997, the Commission was granted leave to intervene in support of the Council.

Application of the method of allocation provided for in Article 121(1) of the Act of Accession

17 In support of its application, the Kingdom of Sweden claims that, in adopting Regulation No 390/97, the Council failed to apply Article 121 of the Act of Accession as regards the allocation of cod in Zone III b, c and d. According to the Swedish Government, nowhere is it stated that Articles 116 to 122 of the Act of Accession are concerned, as the Council contends, only with 'internal resources'. The term 'External resources', being the title under which appear Articles 124 and 125 of the Act of Accession, is not used to designate generally the fishing opportunities resulting from international agreements with third countries. In its view the Council should, in Sweden's case, have shared out the TACs of 112 452 tonnes of cod in accordance with the criteria laid down in Article 121(1) of the Act of Accession, which would have given a quantity of 39 999 tonnes (0.35037 × 50 000 tonnes and 0.4000 × 62 452 tonnes = 2 500 tonnes).

18 The Swedish Government adds that Note 2 to the table in Article 121(1) of the Act of Accession implies that the fishing opportunities outside Community waters were excluded when the share of the cod catches to be allocated to the Kingdom of Sweden was determined. In contrast, the fishing opportunities that were transferred to the Community to be exploited in Community waters were not excluded. According to the Swedish Government, it follows that the term 'Community fishing opportunities' used in Article 121(1) of the Act of Accession must be interpreted in the same way as that appearing in Article 3(g) of Regulation No 3760/92.

19 As regards the 1994 declaration, the Swedish Government claims that it does not provide sufficient justification for disregarding the Act of Accession: a declaration of that kind cannot override that act. If the declaration does not conform to the Act of Accession, the only conclusion to be drawn is that any allocation based on it must be excluded.

20 The Council contends, on the other hand, that no provision of the Act of Accession allows the inference that the aim of Articles 116 to 122 thereof is to regulate fishing in waters other than those belonging to the Community following Sweden's accession. It adds that the presentation and wording of the table in Article 121(1) of the Act of Accession make it quite clear that that provision relates only to the share allocated to the Kingdom of Sweden in the 'Reference zones for fixing the TACs' concerned.

21 According to the Council, that reference is important because, for the allocation of resources, the term 'TAC' is in general used only for the allocation of internal resources. The inclusion for a year in the regulation relating to the TACs of 'compensation cod', which constitutes a special case, in no way changes that situation. Where the zones mentioned in that table are not, as such, zones in which the resources available to the Community are 'Community TAC resources', it is made clear that the method of allocation applies only to 'Community waters'.

22 The Council also mentions the reference to 'Community waters' in Note 2 to the table in Article 121(1) of the Act of Accession, which indicates that the method of allocation fixed for Baltic Sea cod applies only to internal Community resources, that is to say the fishing opportunities available to the Community by virtue of its own fishing rights in waters under the sovereignty or jurisdiction of the Member States.

23 After outlining the historical background to Article 121(1) of the Act of Accession, the Commission states that the present action raises the fundamental question whether the term 'Community fishing opportunity' defined in Article 3(g) of Regulation No 3760/92 includes the 'compensation cod' obtained by the Community from the Baltic States.

24 The Commission considers that the term 'Community fishing opportunity' also includes fishing opportunities in the waters of third countries and in international waters. Such a definition cannot be applied to Article 121(1) of the Act of Accession since that provision does not cover the fishing possibilities resulting from agreements concluded with third countries. In that regard, the Commission refers to the structure and content of Chapter 3 of Title V of Part Four of the Act of Accession.

25 It is clear from the foregoing that the legality of Regulation No 390/97 depends on whether or not the method of allocation of cod fishing opportunities for Sweden provided for in Article 121(1) of the Act of Accession is to be applied to the 'compensation cod' acquired by the Community from third States.

26 It is therefore necessary to establish, for cod, what the 'Community fishing opportunities' are to which Article 121(1) of the Act of Accession refers when, applying the method of allocation, it awards a share to the Kingdom of Sweden.

27 According to Article 3(g) of Regulation No 3760/92, 'Community fishing opportunity' is the fishing opportunity available for the Community in Community fishing waters, plus the total of the Community fishing opportunities outside the Community fishing waters, less the total of the fishing availabilities allocated to third countries.

28 It follows that Article 121(1) of the Act of Accession does not exclude application of the method of allocation to fishing carried out under agreements concluded between the Community and third countries, whether such fishing takes place inside or outside Community fishing waters.

29 However, it is common ground that the 'compensation cod' at issue in this case is that fished in Zone III b, c, and d. According to Note 2 to the table in Article 121(1) of the Act of Accession, that zone is limited to 'Community waters'.

30 It follows that, as regards cod fishing, the method of allocation determining the share of catches allocated to the Kingdom of Sweden under Article 121(1) of the Act of Accession applies only to fishing opportunities in the Community fishing waters.

31 The allocation of the share accruing to the Kingdom of Sweden from a transfer of resources obtained by the Community from a third State cannot depend upon the catches being located in Community waters. Therefore the reference to 'Community waters' must be interpreted as being intended to ensure that the reference zone indicated in the Act of Accession corresponds to that of the IBSFC recommendations so that the method of allocation determining the share of catches allocated to the Kingdom of Sweden is applied to the TAC fixed by those recommendations.

32 That interpretation is corroborated by the heading of the second column of the table in Article 121(1) of the Act of Accession, according to which the zones listed there correspond to the 'ICES [International Council for Exploration of the Sea] or IBSCF Division Reference zones for fixing the TACs'.

33 It is common ground that, according to IBSFC Recommendation No 4, the TAC for cod in the Community fishing waters was fixed at 109 600 tonnes.

34 It follows that the method of allocation determining the share of catches allocated to the Kingdom of Sweden with regard to cod stocks in Zone III b, c and d,

mentioned in the table in Article 121(1) of the Act of Accession, applies only to the TAC of 109 600 tonnes mentioned in the IBSFC recommendation.

35 That method of allocation does not therefore apply to the 'compensation cod' which the Community obtained from third States, even though, in some cases, it may be caught in Community fishing zones.

36 The Council was therefore right to base its calculation, in Annex I to Regulation No 390/97, of cod catches allocated to the Kingdom of Sweden in Zone III b, c and d only on the TAC allocated by the IBSFC and to exclude the transfers of resources represented by the 'compensation cod'.

37 It follows that the action must be dismissed.

Costs

38 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 in the successful party's pleadings. Since the Council has asked for costs and the Kingdom of Sweden has been unsuccessful, it must be ordered to pay the costs. In accordance with the first subparagraph of Article 69(4), the Commission must be ordered to bear its own costs.

On those grounds,

THE COURT

hereby:

1. **Dismisses the application;**

2. **Orders the Kingdom of Sweden to pay the costs;**

3. **Orders the Commission of the European Communities to bear its own costs.**

Rodríguez Iglesias Kapteyn Puissochet Hirsch

Jann Moitinho de Almeida Gulmann

Murray Edward Ragnemalm Sevón

Delivered in open court in Luxembourg on 29 June 1999.

R. Grass G.C. Rodríguez Iglesias

Registrar President