OPINION OF ADVOCATE GENERAL FENNELLY

delivered on 17 October 1995 *

1. These proceedings under Article 169 of the Treaty arise out of inordinate fishing for anchovy by French registered fishing boats in 1991 and 1992 and the failure of the French authorities to pursue those responsible.

I — The relevant Community legislation

2. Council Regulation (EEC) No 170/83 ('the 1983 Regulation'), [1] establishing a Community system for the conservation and management of fishery resources, provides, at Article 1, that the aim of the system is to:

'... ensure the protection of fishing grounds, the conservation of biological resources of the sea and their balanced exploitation on a lasting basis and in appropriate economic and social conditions'.

3. Article 3(1) of the 1983 Regulation provides that:

'Where in the case of one species or group of related 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 as well as, where applicable, the total catch allocated to third countries, and the specific conditions for taking these catches, shall be fixed each year.'

Conservation measures, necessary to achieve these objectives and to be adopted by the Council on a proposal from the Commission, may include not only traditional means such as closed seasons and areas, gear regulations and minimum fish size, but also the fixing of total allowable catches ('TACs') for stocks or groups of stocks for which a limitation of fishing proves necessary.

* Original language: English.

1 — OJ 1983 L 24, p. 1.

Article 4(1) provides as follows:

'The volume of the 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.'

4. Pursuant to the 1983 Regulation, the Council adopted respectively Council Regulation (EEC) No 3926/90 of 20 December 1990 [2] (the '1990 Regulation') and Council Regulation (EEC) No 3882/91 [3] (the '1991 Regulation') fixing, for certain fish stocks and groups of fish stocks, the TACs for 1991 and 1992 and certain conditions under which they may be fished. These regulations fix, through their Article 3 and their Annex 2, the quotas attributed to the French Republic for the stock of anchovy in the ICES division VIII ('the zone'). [4] These quotas amounted to 3 000 tonnes for both the 1991 and 1992 fishing years. Furthermore, Article 5 of both regulations contained the following provision:

'1. It shall be prohibited to retain on board or to land catches from stocks for which TACs or quotas are fixed unless:

(i) the catches have been taken by vessels of a Member State having a quota and that quota is not exhausted ... .'

5. The operation of the TACs system is also regulated by Council Regulation (EEC) No 2241/87 [5] establishing certain control measures for fishing activities (the '1987 Regulation'). [6] Article 1 of the 1987 Regulation provides:

'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

2 — OJ 1990 L 378, p. 1.

3 — OJ 1991 L 367, p. 1.

4 — This sector comprises essentially the waters of the Gulf of Gascony.

5 — OJ 1987 L 207, p. 1.

6 — The 1987 Regulation was subsequently modified by Council Regulation (EEC) No 3483/88; OJ 1988 L 306, p. 2, and has now been replaced by Council Regulation (EEC) No 2847/93, establishing a control system applicable to the common fisheries policy; OJ 1993 L 261, p. 1.

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.'

6. Pursuant to Article 11(1) of the 1987 Regulation, fish caught by boats flying the flag of a Member State or registered in a Member State are attributed to the quota of that Member State. To this end each Member State is obliged, by Article 9(1) and (2), before the fifteenth day of each month, to register all fish landed by its boats and to notify the Commission of all fish subject to TACs or quotas landed at its ports during the preceding month.

7. Under Article 11(2) of the 1987 Regulation:

'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 for that stock or group of stocks by such vessels as well as the retention on board, the transhipment and landing of fish taken after that date and *shall* decide on a date up to which transhipment and landings or final notifications of catches are permitted. The Commission *shall forthwith* be notified of this measure and shall then inform the Member States' (emphasis added).

Upon notification of the provisional prohibition the Commission is obliged by Article 11(3), on the basis of the available information, to fix the date upon which the relevant Member State's quota is deemed to be exhausted and so inform that Member State. The Commission may also fix such a date on its own initiative. Under

Article 11(3), the significance of the fixing of this date is that:

'Fishing vessels flying the flag of, or registered in, a Member State shall cease fishing in respect of a stock or of a group of stocks subject to quota on the date on which the quota allocated for the stock or group of stocks in question to that Member State is deemed to be exhausted; such vessels shall equally cease retention on board, transhipment, landing or arranging, and landing in respect of such catches taken after that date.'

8. Under Article 11(b) of the 1987 Regulation, as amended, [7] if a Member State learns that one of its fishing boats is not complying with conservation or control measures, it may subject that boat to additional control measures. Such controls may involve inspecting the vessel and permitting it only to land the relevant fish if '... the vessel has on board a document certified by the Member State of registration and stating that the latter has inspected the vessel within the last two months'.

7 — Article 11(b) was added by Article 1(2) of Council Regulation (EEC) No 3483/88, loc. cit. ibid.

II — Factual circumstances and procedure

A. The Facts

(i) 1991

9. While the relevant French quota was 3 000 tonnes, according to figures available to the Commission and not disputed by the French Republic, catches by French boats of anchovy in the zone between 1 January 1991 and 28 February 1991 amounted to 3 397.2 tonnes. [8] None the less, the French Republic took no steps provisionally to prohibit such fishing. On becoming aware of the situation as a result of information belatedly made available by the French authorities, the Commission was forced to act on its own initiative. It adopted Commission Regulation (EEC) No 1326/91, concerning the prohibition of fishing for anchovy by vessels flying the flag of France (the '1991 Commission Regulation'), which entered into force on 24 May 1991. [9] Article 1 prohibited fishing, transhipment or landing of anchovy caught in the waters '... by vessels flying the flag of France or registered in France'.

8 — The Commission bases this figure on its end-of-year reading of the monthly landing figures made available to it by the French authorities (the first of which was not communicated until 5 May 1991).

9 — OJ 1991 L 127, p. 11.

10. According to information provided by the French authorities to the Commission, 6 020.6 tonnes of anchovy had already been landed in France by French boats by the end of May 1991. This represents more than double the relevant quota. However, catches of anchovy continued, though at a reduced rate, despite the prohibition imposed by the 1991 Commission Regulation, with the result that, by the end of the year, the total catch for the year had risen to 6 402 tonnes.

(ii) 1992

11. A similar but even more serious violation of the French quota occurred in the zone in 1992. Although the quota had been exceeded by the end of February (3 430.4 tonnes having been landed), the only action taken by the French authorities was to inform the Commission, by a communication of 2 April 1992, in response to a Commission demand for information of 17 March 1992, that the catches of anchovy by French boats in the zone amounted to 3 473 tonnes between 1 January and 29 March 1992. They again took no steps to fix the date of the likely exhaustion of the quota or, consequently, provisionally to prohibit fishing. Once again the Commission was forced to prohibit any further fishing. It adopted Commission Regulation (EEC) No 942/92, concerning the stopping of fishing for anchovy by vessels flying the flag of France (the '1992 Commission Regulation'), which entered into force on 16 April 1992. [10] None the less, the fishing continued and, by the end of July, 5 390 tonnes of anchovy had been landed. [11]

12. France was able subsequently (on 3 July 1992) to obtain from Spain a transfer of 6 000 tonnes of the Spanish quota for anchovy in the zone, thereby increasing its initial quota to 9 000 tonnes. This allowed the Commission to repeal, as of 5 August 1992, its earlier prohibition. [12] Consequent upon the formal legal 're-opening' of fishing, catches rose to 8 995.4 tonnes by the end of September. Again, no provisional prohibition of further fishing was adopted by the French authorities. Fishing continued unabated and the anchovy catch reached a total of 12 781 tonnes by the end of November and 14 013 tonnes by the end of the year.

10 — OJ 1992 L 101, p. 42.

11 — The figure of 5 390 tonnes is based on the monthly figures communicated to the Commission. The definitive figures subsequently available to the Commission show that by the end of July, some 5 559.4 tonnes had actually been landed.

12 — See Commission Regulation (EEC) No 2265/92 revoking Commission Regulation (EEC) No 942/92 concerning the stopping of fishing for anchovy by vessels flying the flag of France; OJ 1992 L 220, p. 5. The reality of the situation was, of course, that the fishing, though prohibited, had never actually been stopped.

B. Procedure

13. The Commission began the pre-contentious stage of the Article 169 infringement procedure on 6 June 1993 by way of a formal letter addressed to the French Government. The Commission argued that, by not taking the measures to ensure that its quota was respected during 1991 and 1992 for catches of anchovy in the zone, the French Republic had failed to comply with its obligations under the relevant regulations.

14. On 22 July 1993 the French Government, in reply to the formal letter, accepted that it had not 'rapidly' taken national measures to prohibit the relevant fishing even though the quota was, or was about to be, exhausted. It confined itself to two observations. Firstly, it referred to the fact that in 1992 it was negotiating — with some assurance of success — to obtain a quota transfer from Spain which would bring the total French quota to a level where it would cover the likely extent of the excess over the original quota, having regard to the excess which had occurred in 1991. Secondly, it questioned the efficacy of the quota system as a means of protecting anchovy. In its opinion a more effective system would be one involving the prohibition of fishing in certain areas and at certain times.

15. Considering this response an effective admission of liability in respect of the infringements alleged in the formal letter, the Commission sent a reasoned opinion to the French Republic on 2 May 1994, but received no reply. The present application to the Court was registered on 28 February 1995 and the orders which are sought are identical to those set out in the reasoned opinion.

16. In its application the Commission seeks a declaration that:

— by not prohibiting provisionally fishing by its boats of anchovy stock in the waters of the ICES division VIII in such a way as to ensure respect for the quotas which had been assigned to it for 1991 and 1992,

— by not pursuing those responsible for fishing and connected activities regarding the same stock carried out after the prohibition of fishing decreed by the Commission in 1991 and 1992,

the French Republic has failed to fulfil its obligations under Article 11(2) and Article 1 of the 1987 Regulation, read in conjunction with Article 3 and the annexes to the 1990 and 1991 Regulations, and that the French Republic be ordered to pay the costs.

17. The French Republic submitted a defence dated 28 April 1995. In the light of the nature of the defence, the Commission did not consider it necessary to submit a reply. In conformity with Article 44a of the Rules of Procedure, the Court decided to dispense with an oral hearing.

III — Observations of the parties

A. The Commission

(i) Failure to adopt provisional measures

18. The Commission submits that under Article 11(2) of the 1987 Regulation the Member States are obliged to prevent their quotas being exceeded by introducing, prior to the exhaustion of the quota, such provisional measures prohibiting fishing as are necessary to ensure that the quota is not subsequently exceeded. The reference to the date on which the quota '*shall be deemed to have been exhausted*' (Commission emphasis) indicates clearly that preventative action must be taken when the quota is approaching exhaustion. This obligation must be interpreted strictly because any other interpretation would jeopardize the attainment of the legislative objectives namely, the conservation of fishery resources. It cannot, thus, be regarded as compatible with this obligation for Member States to await the exhaustion of their quotas before adopting any measures. The Commission submits that this interpretation is perfectly in accordance with the relevant case-law of the Court and cites *Commission* v *France* [13] and *Commission* v *Netherlands*. [14]

19. In so far as 1991 is concerned, the Commission submits that the French Republic should have acted provisionally during the month of February, at the latest, to prohibit the relevant fishing. As no such steps were taken by the French authorities, the Commission was forced to introduce its own measures. Consequently, the Commission submits that the excessive catches of anchovy by French boats in 1991 can be attributed directly to the failure by the French Republic to adopt appropriate provisional measures.

13 — Case C-62/89 [1990] ECR I-925.
14 — Case C-52/91 [1993] ECR I-3069.

20. In relation to 1992, the Commission submits that the French Republic should also have adopted provisional measures before the end of February in order to ensure that its initial quota was not exceeded. Similarly, later in the same year, action should have been taken by the French Republic as soon as it became clear that the increased quota was likely to be exceeded. According to the Commission the possibility of obtaining a quota transfer from another Member State does not justify ignoring the basic obligation to ensure respect for the pre-existing quota.

(ii) Failure to take action against boats engaging in illegal fishing

21. The Commission submits that, in accordance with Articles 1 and 11(3) of the 1987 Regulation and Articles 5 of the 1990 and 1991 Regulations, the French Republic was obliged to bring criminal or administrative proceedings against those responsible for infringing the prohibition on fishing. The failure to take any such steps is likely to have confirmed, in the eyes of those who continued to fish, the mistaken belief or impression that the requirement not to fish once the quota has expired did not, in reality, apply to them. Furthermore, the Commission points out that the Court has already declared that a failure by a Member State to take measures against those engaged illegally in fishing, where such offences could have been established by its authorities, constitutes a failure to fulfil its obligations under Article 1 of the 1987 Regulation. [15]

B. France

22. In its memorandum in defence, the French Republic does not contest either the declarations sought by the Commission in its application or the legal arguments upon which they are based. The French Government confines itself to two observations.

23. First, while admitting that fishing was closed later than it should have been in 1991, the French Government attributes this to weaknesses in its statistical information gathering system as a result of which the breach of the quota failed to come to the attention of the French authorities prior to the beginning of May. Based on this knowledge, those authorities sent telex messages on 22 May 1991 to the various relevant maritime authorities and to the central committee on maritime fishing (*comité central des pêches maritimes*) informing them of impending action by the Commission to prohibit further anchovy fishing and asking them to circulate this information. [16]

15 — The Commission refers to Case C-64/88 *Commission* v *France* [1991] ECR I-2727, paragraph 24 of the judgment.

16 — In fact the Commission had already adopted (on 21 May) the 1991 Commission Regulation. However, pursuant to Article 2, this regulation did not enter into force until 24 May 1991.

24. In relation to the second declaration sought by the Commission, the French Government accepts that it did not take any measures to pursue those responsible for what it accepts amounted to illegal anchovy fishing, but argues that this was due to the grave socio-economic circumstances prevailing at the time in the anchovy fishing industry. [17] Those circumstances (fear of serious social disturbances, occupation of public buildings and blocking of ports) forced the French authorities to abstain from intervening. Furthermore, the French Government claims that this policy facilitated the subsequent restoration of a climate of mutual confidence and dialogue between it and the anchovy fishermen concerning the need properly to manage fish stocks.

IV — Legal analysis and conclusion

25. The French Republic does not dispute that it failed to adopt timely provisional measures to prohibit the relevant anchovy fishing during either 1991 or 1992 when the quota approached exhaustion. Article 11(2) imposes a clear and unambiguous obligation on Member States. The obligation is modelled upon the identical obligation contained in Article 10(2) of Council Regulation (EEC) No 2057/82, [18] establishing certain control measures for fishing activities by vessels of the Member States, which has already been interpreted by the Court in earlier infringement proceedings brought by the Commission against France. [19] In that case the Court ruled that, '... the Member States are required to adopt in good time all the measures necessary to prevent the quotas at issue being exceeded, so as to ensure compliance with the quotas allocated to the Member States for the purpose of conserving fishery resources'. [20] The consequence of this obligation was that the relevant Member State was required '... to adopt binding measures to prohibit all fishing activity provisionally *even before the quotas were exhausted*' [21] (emphasis added). The rationale underlying this interpretation was clearly articulated by Advocate General Jacobs in his Opinion when, having identified the crucial role played by provisional prohibitions in ensuring the respect of quotas, he stated that:

'An interpretation of Article 10(2) which would permit Member States to wait until after the quota was exhausted before taking action, or to adopt measures of a non-binding nature, would be inconsistent with the binding character of the quotas. It would also undermine the underlying objective of quotas, i. e. the conservation of scarce fishing resources.' [22]

17 — The French Government expressly restricts the temporal scope of this plea to the 1992 fishing year.

18 — OJ 1982 L 220, p. 1.

19 — Case C-62/89, loc. cit., note above.

20 — Ibid., paragraph 17 of the judgment.

21 — Loc. cit., paragraph 18 of the judgment.

22 — Loc. cit., paragraph 20 of the Opinion.

26. In so far as 1991 is concerned, the French Government attributes its failure to adopt appropriate provisional measures to inadequacies in its information gathering system. A similar plea, based on the practical difficulties of foreseeing the imminent exhaustion of quotas, was advanced in the previous case but was firmly rejected by the Court which held that it was settled case-law that a '... Member State cannot rely upon practical difficulties in order to justify its failure to adopt appropriate supervisory measures'. [23]

27. Furthermore, in this case the infringement was not addressed satisfactorily even when the knowledge of the breach of the quota became manifest. The only response of the French Government was to send a telex to its maritime authorities, who were thereby requested to publicize the measure which the Commission was about to take as a direct result of the French Republic's failure to ensure respect by its fishing boats of the quota assigned to France. Having regard both to the unequivocal nature and the importance of the conservation obligation imposed on Member States by Article 11(2) of the 1987 Regulation, such a response must be considered to be utterly inadequate.

28. In 1992, the attitude of the French authorities in relation to the exhaustion of the quota appears to have been to rely upon the prospective transfer of part of the Spanish quota. The Court has already held that the Member States cannot rely on the mere possibility of subsequent exchanges of quotas in order to free themselves from their obligations under Community fisheries legislation:

'Such negotiations, the result of which is uncertain, cannot justify the continuation of fishing after the exhaustion of the quota, since if the attempt to increase the quota by means of an exchange fails or the quantities obtained are insufficient to cover the catches made any delay in the provisional closure of fishing is likely to aggravate the extent to which the quota is exceeded. It follows that any agreement for the exchange of quotas concluded with another Member State for the purpose of increasing a quota must take place either before the exhaustion of the initial quota or after the provisional prohibition of fishing.' [24]

Neither of these conditions was satisfied in this case. Moreover, even after the quota transfer was obtained, the French authorities failed to prevent the extended quota being illegally exceeded by French fishing boats.

23 — Loc. cit., paragraph 23 of the judgment.

24 — Case C-62/89, loc. cit., note above, paragraph 20 of the judgment.

29. I believe that the Commission is, thus, entitled to the declaration sought in respect of the failure by the French Republic to take steps provisionally to prohibit the relevant anchovy fishing and thereby ensure that the quotas assigned to it in 1991 and 1992 were respected.

30. The Commission also seeks a declaration concerning the failure of the French authorities to pursue, by means of criminal or administrative proceedings, those of its fishing boats which were responsible for continuing to fish despite the exhaustion of the French Republic's quotas in 1991 and 1992 and those responsible for activities connected with such fishing. The Commission correctly points out that such a failure constitutes a clear infringement of Article 1 in conjunction with Article 11(3) of the 1987 Regulation and Articles 5 of the 1990 and 1991 Regulations. The 'connected activities' referred to by the Commission would include those other ancillary acts mentioned in Article 11(3). In my opinion, the Commission is also correct in submitting that the failure to take effective punitive measures against such violations jeopardized the operation of the quota system. In so far as 1991 is concerned, no reason has been advanced by the French Republic either to justify or excuse its failure. The Commission is thus clearly entitled to the declaration sought in respect of the failure of the French authorities to take action in that year.

31. In relation to 1992, the French Government refers (by way of newspaper cuttings annexed to its memorandum in defence) to tense socio-economic circumstances in the industry concerned and the likelihood that social disturbances and criminal activities would have ensued, had it sought to pursue the boats engaged in illegal fishing, as a reason for taking no steps whatsoever to comply with its obligations under the relevant Community legislation. I believe that such an approach to the enforcement of Community legislation by a Member State is manifestly unacceptable. Article 189(2) of the Treaty provides that regulations shall have general application and shall be binding in their entirety and directly applicable in all Member States. Article 5 of the Treaty imposes a strict duty of cooperation on Member States to adopt all measures necessary to attain the objectives of the Treaty.

32. It follows, in my opinion, that, where Member States are specifically charged with the enforcement of Community law they are obliged to utilize all their State apparatus including, if necessary, their police powers to ensure the fulfilment of their obligations. Article 1(2) of the 1987 Regulation leaves no room for doubt as to this obligation, while leaving to the Member State the choice between suitable and effective penal or administrative action. The scope of this obligation might be tempered in wholly exceptional circumstances where, by reason of a specific event amounting to *force majeure*, a Member State is unable to fulfil its

responsibilities. [25] In the circumstances of the present case I believe that, even if the French Government had sought formally to rely on the prevailing socio-economic climate as evidence of the type of 'insurmountable difficulties' which might be constitutive of *force majeure*, I would have had serious doubts not merely as to the probative value of newspaper cuttings in support of such a defence, but, more fundamentally, as to whether the socio-economic circumstances in question could ever justify a Member State in failing to take action against its own citizens' defiance of Community law. [26] However, no such defence has been raised in this case. I conclude therefore that, in the light of the undisputed failure of the French Republic to comply with its obligations under Community law in 1992, the Commission is also entitled to the declaration sought in that respect.

Conclusion

33. Accordingly I am of the opinion that the Court should:

(1) declare that

— by not adopting provisional prohibitions of fishing by its boats of anchovy stock in the waters of the ICES division VIII in such a way as to ensure respect for the quotas which had been assigned to it for 1991 and 1992,

— by failing in the years 1991 and 1992 to take effective penal or administrative action against those responsible for fishing and connected activities

25 — See, e. g., Case 101/84 *Commission* v *Italy* [1985] ECR 2629, where the Court accepted that a bomb attack on a data processing centre could have constituted *force majeure* (at least for a certain but not protracted period of time) in relation to Italy's failure to compile some statistical returns required by Community law.

26 — Case 101/84, loc. cit. ibid., paragraph 16 of the judgment.

regarding that stock after the prohibition of fishing imposed by the Commission in those years,

the French Republic has failed to fulfil its obligations under Articles 1 and 11 of Council Regulation (EEC) No 2241/87, read in conjunction with Article 3 and the annexes to Council Regulation (EEC) No 3926/90 and Council Regulation (EEC) No 3882/91;

(2) order the French Republic to bear the costs of these proceedings.