OPINION OF ADVOCATE GENERAL ALBER

delivered on 21 September 2000 [1]

I — Introduction

1. This action for failure to fulfil Treaty obligations concerns the conduct of the French authorities in connection with the management of fishing quotas for 1988 and 1990. The Commission complains that the French authorities did not promptly and effectively prohibit fishing as soon as quotas were exhausted, with the result that during those years the fishing quotas were exceeded.

II — Legal context

2. Article 5(2) of Council Regulation (EEC) No 170/83 of 25 January 1983 establishing a Community system for the conservation and management of fishery resources [2] states:

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

3. That obligation is more closely defined in Article 1 of Council Regulation (EEC) No 2241/87 of 23 July 1987 establishing certain control measures for fishing activities: [3]

'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.

1 — Original language: German.

2 — OJ 1983 L 24, p. 1.

3 — OJ 1987 L 207, p. 1.

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.

3. ...'

4. Article 11 of Regulation No 2241/87 deals with the management of fishing quotas by Member States:

'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.

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. ...'

III — The facts, the procedure and the claims of the parties

A — The year 1988

5. By letter of 1 August 1989 the Commission requested the French Government to reply to various complaints concerning the management of fishing quotas in 1988. These concerned:

— the exceeding of the quotas for 17 fish stocks,

— failure to notify the monthly catch data,

— failure to impose a temporary ban on fishing when quotas were deemed to have been exhausted, and

— failure to monitor fishing of these stocks during the last months of the year.

6. By letter of 23 October 1989 the French authorities drew attention to the difficulties with which they were faced, described the efforts they had made up to that point and announced other measures for the future.

7. On 1 October 1990, by formal notice, the Commission initiated an infringement procedure against France for exceeding the fishing quotas for 14 fish stocks. It asserted:

— failure to impose a temporary ban on fishing when quotas were deemed to have been exhausted and

— failure to monitor fishing (Article 5(2) of Regulation No 170/83).

8. By letter of 27 November 1990 the French authorities admitted overfishing due to the belated prohibition of fishing and explained that this was the result of shortcomings in the statistical monitoring system. Since 1988, it had been doing everything it could to eradicate those shortcomings. However, the French authorities denied that they had failed to exercise sufficient control over fishing activity. The Commission had simply assumed that a belated halt to fishing meant insufficient control. Yet, according to the case-law,[4] it could not base an action for failure to comply with Treaty obligations on a presumption.

9. On 29 September 1992, under Article 169 of the EC Treaty (now Article 226 EC), the Commission sent the French Government a reasoned opinion in which it reiterated its two complaints and gave the French Government two months to reply.

10. In their reply of 3 December 1992 the French authorities pointed out that, at any

4 — In their reply to the reasoned opinion, the French authorities referred to the judgments in Cases 290/87 *Commission* v *Netherlands* [1989] ECR 3083, paragraph 17, C-62/89 *Commission* v *France* [1990] ECR I-925, paragraph 37, and C-244/89 *Commission* v *France* [1991] ECR I-163, point 35.

rate in 1991 and ever since, their measures had complied with the requirements of Community law, as the Commission itself had acknowledged. As far as the infringement of Article 5(2) of Regulation No 170/83 was concerned, they considered that the Commission had not established any breach of that rule and that, moreover, according to case-law, in this respect Article 11 of Regulation No 2241/87 [5] was a *lex specialis*.

12. On 22 January 1992 the French authorities replied that the quotas had been exceeded because of the shortcomings of the statistical monitoring system. The anchovy catches recorded up to the month of July had given no indication that the fishing quota would be exhausted by August. The French authorities had become aware of the exhaustion of the quota only on 5 November and had prohibited further anchovy fishing on 17 November. The same applied to whiting, mackerel and common sole. Since 1 April 1991, a new data-gathering system had been in place and would enable the requirements of the Community regulations to be met. With regard to catches made after the date on which further fishing was prohibited, they only amounted to ten tonnes or so.

B — The year 1990

11. By letter of 15 November 1991 the Commission noted that the French fishing quotas for 1990 had been exceeded for some stocks because the French authorities had failed to impose a temporary ban on fishing in good time. In the case of anchovies, the Commission requested the authorities to provide the data on catches and landings on which they had based their decision to halt fishing, including their estimates for imminent but not yet recorded and known landings and the probable future trend in catches, together with the date on which, in the estimation of the French authorities, the quota would be exhausted. The Commission also asked to be informed of all the measures that would be taken against those responsible in the event of fishing quotas being exceeded.

13. On 25 January 1993 the Commission initiated the infringement procedure by sending the French authorities a formal notice in which it indicated that the explanations provided by the French authorities in the course of the abovementioned exchange of letters were not such as to justify the French authorities' behaviour, which was inconsistent with Community law.

14. In their reply of 17 March 1993 the French authorities again pointed out that, after a few teething problems, the new statistical monitoring system was giving satisfactory results, as the Commission had

5 — See point 4 above.

confirmed in its report of 6 March 1992 on the monitoring of implementation of the common fisheries policy (p. 62).

15. On 4 June 1997 the Commission issued a reasoned opinion reiterating the two complaints and giving the French Government two months in which to reply. The French Government replied by letter of 22 August 1997. It referred to an order of the competent minister of 24 August 1990 redistributing France's fishing quotas.

C — Claims of the parties

16. On 9 September 1999 the Commission brought the present action.

17. The Commission of the European Communities claims that the Court should:

(1) declare that

— by failing to determine the appropriate detailed rules for the utilisation of the quotas allocated to it for the 1988 and 1990 fishing years,

— by failing to ensure compliance with the Community rules on the conservation of species through adequate monitoring of fishing activities and through appropriate inspection of the fishing fleet, actual landings and catch records for both the 1988 and 1990 fishing years,

— by not temporarily prohibiting, in both the 1988 and 1990 fishing years, fishing by vessels flying the French flag or registered in French territory at times when the catches made were deemed to have exhausted the corresponding quota, and by finally prohibiting fishing at a time when the quota had been largely exceeded,

— by failing, for the 1988 and 1990 fishing years, to take penal or administrative action against any master or other person responsible for fishing after a prohibition had been imposed,

the French Republic has failed to fulfil its obligations under (i) Article 5(2) of Regulation (EEC) No 170/83 of 25 January 1983 in conjunction with Article 1(1) of Regulation (EEC) No 2241/87 of 23 July 1987, (ii) Article 11(2) of Regulation (EEC) No 2241/87 and (iii) Article 5(2) of Regulation (EEC) No 170/83 in conjunction with Article 1(2) of Regulation (EEC) No 2241/87;

(2) order the French Republic to pay the costs.

18. The French Republic requests the Court to examine the subject-matter and the merits of the case.

IV — Legal analysis

A — Arguments of the Commission

(1) Lack of control measures

19. In the opinion of the Commission, the French Republic infringed the provisions of Article 5(2) of Regulation No 170/83 in conjunction with those of Article 1(1) of Regulation No 2241/87,[6] inasmuch as the French authorities did not adequately control fishing. Those provisions presuppose control measures that are diversified enough to take into account the specific characteristics of the various fisheries and effective enough to prevent quotas from being exceeded.

20. During the years 1988 and 1990, the French Republic failed to impose adequate controls. If it had done so, quotas would have been respected and the French authorities would have prohibited in good time the fishing of species whose quotas were exceeded in those fishing years. The order of 24 August 1990 could not be regarded as an adequate measure either.

(2) Belated prohibition of fishing

21. The Commission also claims that the French Republic infringed Article 11(2) of Regulation No 2241/87.[7] By virtue of that provision, every Member State must, on the basis of the information available as to catches taken, determine the expected date of exhaustion of the quota and adopt, in good time, the appropriate measures to enable fishing to be prohibited as from that date. However, during the 1988 fishing year, in every case fishing was prohibited

6 — For the text of these provisions see points 2 and 3 above.

7 — See point 4 above.

only after the quota had been exhausted. During the 1990 fishing year, in none of the six cases of overfishing established was any national measure taken to stop fishing.

(3) Lack of criminal or administrative penalties

22. Finally, in the opinion of the Commission, the French Republic also infringed Article 1(2) of Regulation No 2241/87. [8] According to the case-law of the Court, the penalties for infringement of the fishing quota system for which that article provides are essential to the application of the common fisheries policy. [9]

B — Arguments of the French Republic

23. The French Republic does not deny that it faced problems during the periods in question. With regard to criminal or administrative penalties, it refers to the measures adopted in 1997 which, it claims, met the Commission's requirements.

24. The French Government points out, though only in its rejoinder, that even if the exceeding of quotas by France were assumed to have had an adverse effect on fishery resources, it could not have endangered them, given the French share of the overall Community catch and the natural evolution of stocks. Nor did the overfishing lead, through the application of Community law, to a reduction in the fishing quotas for the fleets of other Member States or to a change in the formula for the distribution of resources among Member States. Accordingly, it did not disturb the balance between the various fleets.

25. Finally, the French Republic asks why the Commission should have brought an action for failure to fulfil Treaty obligations based on facts now more than ten years old, when it acknowledges that France improved its performance in subsequent fishing years. The French Government accordingly invites the Court to examine the cause, the reality and the extent of the alleged infringements in the light of the objectives of the common fisheries policy.

8 — See point 3 above.

9 — Judgment in Case C-52/95 *Commission* v *France* [1995] ECR I-4443, paragraph 34 et seq.

C — Opinion

(1) Interpretation of the claims of the French Republic

26. As worded, the French Republic's defence fails to meet the requirements of Article 40(1)(c) of the Rules of Procedure, inasmuch as it does not seek a sufficiently precise form of order. The outcome sought by the French Republic is not apparent from its request that the Court of Justice should examine the subject-matter and the merits of the case. Nevertheless, since the French Republic is defending itself at all, it must be concluded that its aim is to have the action dismissed.

(2) The admissibility of the action

27. The French Government's contentions, considered together with its references to the passage of time and the acknowledgement of improvements in the French measures taken to control fishing activities, imply that the French Government is questioning the Commission's legal interest in bringing proceedings.

28. In certain special cases, having regard to the rights of the defence, an extremely protracted infringement procedure may preclude the bringing of the corresponding action. [10] However, the French Government has not adduced any circumstances that might justify such a conclusion. Moreover, it is for the Commission to judge, in pursuing an infringement procedure, precisely when an action should be brought. [11] In this instance, it will be noted, in particular, that the dispute in question concerns parallel complaints relating to two different years and, moreover, that in the meantime the Commission has brought another infringement action against the French Republic on similar grounds. [12] Thus, since 1989, the Commission has been constantly at odds with the French Republic over the French measures to implement the common fisheries policy. The action is therefore admissible.

(3) The merits of the case

29. Both parties are agreed that, as described by the Commission, the French Republic failed to fulfil the requirements of

10 — Judgment in Case C-96/89 *Commission* v *Netherlands* [1991] ECR I-2461, paragraphs 15 and 16.

11 — See my Opinion delivered on 27 January 2000 in Case C-359/97 *Commission* v *United Kingdom* [2000] ECR I-6355, paragraph 96, with additional references.

12 — Judgment in Case C-52/95 (cited in footnote 9 above).

Community law in the context of the common fisheries policy and that therefore, in the years 1988 and 1990, the French fishing fleet exceeded the fishing quotas allocated to it.

30. The French Republic refers to the shortcomings of its statistical monitoring system during the years in question. In fact, as regards the operation of this system *as long ago as 1991*, in case C-52/95 *Commission* v *France*, the Court of Justice found that:

'First, as regards the statistical system in operation in 1991, it has consistently been held [...] that a Member State cannot rely on practical difficulties in order to justify its failure to adopt appropriate control measures. On the contrary, it is for the Member States responsible for implementing Community regulations in the fishery products sector to overcome those difficulties by adopting appropriate measures.' [13]

13 — Judgment cited in footnote 9 above, paragraph 28.

31. Of course, the same applies to the years 1988 and 1990.

32. With regard to the French Government's observation that, in principle, the infringements have had no injurious effect, there is no need to consider its validity. First, under Article 42(2) of the Rules of Procedure, the argument is belated since it was advanced for the first time in the rejoinder. Second, the regulations which the French Republic has infringed create, for Member States, an obligation to act whether or not there may be any damage. Only by applying them in this way is it possible to prevent threats to the conservation of fish stocks.

V — Costs

33. Under Article 69(2) of the Rules of Procedure, the unsuccessful party is required to pay the costs. The French Republic having failed in its pleas and the Commission having applied for the costs to be paid by the French Republic, the latter should be ordered to pay the costs.

VI — Conclusion

34. In the light of the above, I therefore propose that the Court should:

(1) declare that:

— by failing to determine the appropriate detailed rules for the utilisation of the quotas allocated to it for the 1988 and 1990 fishing years,

— by failing to ensure compliance with the Community rules on the conservation of species through adequate monitoring of fishing activities and through appropriate inspection of the fishing fleet, actual landings and catch records for both the 1988 and 1990 fishing years,

— by not temporarily prohibiting in both the 1988 and 1990 fishing years, fishing by vessels flying the French flag or registered in French territory at times when the catches made were deemed to have exhausted the corresponding quota, and by finally prohibiting fishing at a time when the quota had been largely exceeded by far,

— by failing, for the 1988 and 1990 fishing years, to take penal or administrative action against any master or other person responsible for fishing after a prohibition had been imposed,

the French Republic has failed to fulfil its obligations under (i) Article 5(2) of Council Regulation (EEC) No 170/83 of 25 January 1983 establishing a Community system for the conservation and management of fishery resources in conjunction with Article 1(1) of Council Regulation (EEC) No 2241/87 of 23 July 1987 establishing certain control measures for fishing activities, (ii) Article 11(2) of Regulation (EEC) No 2241/87 and (iii) Article 5(2) of Regulation (EEC) No 170/83 in conjunction with Article 1(2) of Regulation (EEC) No 2241/87;

(2) order the French Republic to pay the costs.