OPINION OF MR ADVOCATE GENERAL MANCINI
delivered on 7 February 1985 *

Mr President,
Members of the Court,

1. The Court is called upon to give judgment in proceedings brought against the United Kingdom by the Commission of the European Communities under Article 169 of the EEC Treaty. The complaint made against the United Kingdom is that it failed to levy the customs duties payable on fish caught as a result of a joint Polish and British fishing operation, thereby infringing Article 4 (2) (f) of Regulation (EEC) No 802/68 of the Council of 27 June 1968 on the common definition of the concept of the origin of goods (Official Journal, English Special Edition 1968 (I), p. 165) and the rules governing the Common Customs Tariff in force at the material time (Council Regulation (EEC) No 3000/79 of 20 December 1979, Official Journal 1979, L 342, p. 1).

2. In the late 1970s fish prices underwent a marked downturn as a result of increased catches made in the North Atlantic and in the seas of the southern hemisphere coming on to the market in the Community. This came as a hard blow to the Community fishing industry, which had already been damaged by reduced if not total loss of access to Norwegian and Icelandic waters. Hence the various attempts that were made to alleviate the situation, including the events which are the subject of these proceedings. Fearful of the effects which an idle fishing fleet would have on fishermen's employment and, at the same time, anxious to continue to supply fish products to the processing industry, a number of British operators approached the Polish authorities with the proposal that joint cod-fishing operations be undertaken in the Baltic Sea.

Agreement was reached, and so it was that in April 1980 five or six deep-sea trawlers set out from the north-east of England to cast their nets into the sea 40 to 80 miles off the Polish coast, hence in international waters (for which, however, Poland apparently claims exclusive fishing rights). The lines attached to the nets were taken over by Polish fishing vessels and the nets trawled. After some time the British trawlers drew alongside the Polish vessels and took the lines on board. The nets were hoisted on deck and the catch, consisting of 2 500 tonnes of cod, was discharged into the trawlers' refrigerated holds. On completion of those operations the British trawlermen recompensed their Polish partners (apparently with a load of fish, such as mackerel and herring, not found in those waters) before turning for home.

On the basis of the statements made by the masters of the trawlers, the customs authorities at the port of disembarcation considered the cod to have originated in a non-member country and ordered that security of UKL 141 000 be furnished against any duty that might be payable. The owners of the trawlers appealed against that measure to Her Majesty's Customs and Excise. That authority allowed the appeal

* Translated from the Italian.

and ordered the security to be repaid. The reason which it gave for its decision was that, for the purposes of Article 4 (2) (f) of Regulation No 802/68, the product of the joint fishing operation must be regarded as being of United Kingdom origin and hence exempt from customs duties.

At this point, alerted by a written question from three Members of the European Parliament, the Commission made inquiries of the United Kingdom Government. The reply came in a note dated 6 January 1982 in which it was stated that the United Kingdom customs authority considered the fish to be of Community origin since vessels registered in the United Kingdom and flying the British flag had taken it from the sea. But that did not convince the Commission, which took the view that the words 'taken from the sea' ('extraits de la mer') denoted rather the catching of fish. In its contention fish could not be of Community origin if the nets were trawled by vessels from non-member countries. In addition, it maintained, since there were no agreements between Poland and the Community governing fishing in the Baltic, citizens of Member States of the Community were not entitled to fish in the area in which the cod was 'taken from the sea': consequently, in order to enter into possession of the fish the British trawlermen must have purchased it.

Being therefore convinced that the fish in question was of Polish origin the Commission, by letter of 13 August 1982, initiated the procedure laid down in Article 169 of the EEC Treaty. In reply, however, the United Kingdom Government merely enlarged on the line indicated by it a few months earlier; it stated that according to Regulation No 802/68 fish had the origin of the country whose vessel 'takes them from the sea' and that it was only when the net was brought aboard the vessel that the fish inside the net were 'taken from the sea'. That was the point that mattered and arguments such as the absence of agreements between the Community and Poland had no bearing on it. Nevertheless, the United Kingdom was prepared to accept amendments to the legislation governing the origin of goods provided that they were not retroactive.

The Commission, however, maintained its position and proceeded to deliver a reasoned opinion on 10 October 1983 in which it argued as follows: (a) 'extraire' signifies, *inter alia*, the act of separating a substance from the whole of which it is a part and 'extraits de la mer' signifies the act of catching fish in the net and so separating them from the element in which they lived before being caught; (b) the absence of agreements between the Community and Poland and the latter's claim to exclusive fishing rights in the waters in which the fishing took place are not matters of no import: on the contrary, they imply that the British fishermen were only acting as transporters of Polish fish; (c) there is no need for the legislative amendment to which the United Kingdom refers, since Regulation (EEC) No 802/68 already covers joint fishing operations. Consequently, the United Kingdom Government was requested to take, within one month from the date of service of the opinion, the measures necessary to comply with it, including in particular the recovery of the import duties payable.

On 15 November 1983, the United Kingdom requested an extension of one month in order that full consideration might be given to the matter. But once it had been established that the United Kingdom did not intend to comply with the opinion, the

Commission brought an action before the Court by an application dated 5 April 1984.

3. As we know, the concept of the origin of goods is important in the Community context for the application of a number of provisions relating to trade, in particular various Common Customs Tariff rules, and for the purposes of the issue of certificates of origin for products exported to non-member countries. At one time there was no international definition of the concept and the difficulties ensuing from this (one need only mention the divergencies, which were sometimes very considerable, as between the relevant national rules) prompted the Council to adopt Regulation No 802/68. It is worth emphasizing that the definition incorporated in that regulation served as a model for the draftsmen of the International Convention on the Simplification and Harmonization of Customs Procedures (Kyoto, 18 May 1973).

The regulation employs two criteria for the purpose of determining the origin of goods: goods may originate in the country in which they were 'wholly obtained or produced' or, if two or more countries were concerned in their production, in 'the country in which the last substantial process or operation that was economically justified' was performed. Article 4 (2) (f) of the regulation has recourse to the first criterion inasmuch as it considers as 'goods wholly obtained or produced in one country' 'products of sea-fishing and other products taken from the sea by vessels registered or recorded in that country and flying its flag'. This dispute centres precisely on the term 'extraits de la mer' and the corresponding terms used in the other language versions of the provision: 'taken from the sea', 'estratti dal mare', 'gefangen', 'uit de zee gewonnen', 'optages fra havet', «εξαγόμενα εκ της θαλάσσης».

We have already seen, in the summary of the procedure prior to the application to the Court, what meanings are attributed to those words by the applicant and the defendant. Nevertheless, it is worth returning to that subject in order to give an account of the embellishments made by the parties to their respective arguments in their pleadings and during the oral proceedings.

Let us commence with the Commission (which, by the way, eventually abandoned the argument based on the non-existence of fishing agreements between the EEC and Poland). What the Commission contributed by way of new material in its application and oral submissions was a rigorous examination of its point of view in the light of the various versions which I have just cited. The upshot of that exercise is, in the Commission's view, that to construe 'extraire' as signifying the act of separating a substance from the whole of which it is a part is largely justified by the French, Italian, Greek, Danish and Dutch texts. Whereas the English version is less amenable to this interpretation, the German is very amenable if not conclusive: the German term 'gefangenes Erzeugnis' actually means 'product which is caught' and hence, as far as trawl fishing is concerned, that the fish are taken in the net (and as a result separated from the free space in which they previously moved) which is towed behind the vessel.

The philological research carried out by the United Kingdom Government goes no less deep (perhaps deeper). In its contention, it is necessary to look at the etymology of the words used in the French and Italian texts. 'Extrait' and 'estratto' are derived from the Latin 'extrahere', meaning 'to draw out' and the fish are only 'drawn out' when the nets containing them are raised out of the water

and emptied on the deck. Moreover, it argues, the legislature's choice of words was guided by specific legal and economic reasons. The word 'product' indicates goods reduced to human possession or ownership. On this view it is impossible to describe fish which are still in the water — albeit trapped in a net — as a product: apart from any other consideration the net may break in the sea or on being raised with the consequent loss of all or some of the catch.

But that is not all. Numerous Community instruments (the Agreements between the EEC and the Portuguese Republic, Israel and Egypt, the Lomé Convention, and so on) the French and German versions of which speak — perhaps not by chance — of products 'tirés de la mer' and 'gewonnen' respectively are claimed to support the United Kingdom argument. Hence, according to the United Kingdom, it is not permissible to give the term 'gefangen' the weight attributed to it by the Commission. Admittedly it signifies 'caught' but for that very reason it is inapplicable to a whole series of products taken from the sea (crustaceans, molluscs, seaweed, sponges, corals) which can only be taken and which are described in fact as 'gewonnen' in Article 4 (2) (d) and (h).

The United Kingdom finds further confirmation of the soundness of its argument in the seventh recital in the preamble to Regulation No 802/68 and also in Article 5 of that regulation which sets out the second of the two criteria mentioned above and emphasizes the economic justification of the last process or operation carried out on the product. The United Kingdom maintains that keeping nets full of fish in the sea is completely unjustified in economic terms. From the economic point of view the decisive point in the process of fishing is that at which the nets are raised from the water and landed on deck. It is at that moment that it is determined whether the fish are or are not of Community origin.

4. What can one add at this point? Perhaps the Court will allow me to make a modest literary reference: I doubt whether Marguerite Yourcenar or Graham Greene would be prepared to read each morning a piece or two of Community legislation 'pour prendre le ton', as Stendhal used to read articles of the Code Civil. In other words, I admire the wisdom of the Community legislature but not its careless and too often imprecise language. For instance, in the past I have had to interpret a regulation in which the chemical transformation of white or raw sugar into substances other than sugar is termed purely and simply 'disposal'. I am sure that each one of you can recount similar experiences.

In those circumstances mobilizing all the resources of Romance and Teutonic philology in order to read one meaning or another into the participle 'extrait' seems to me a slightly absurd exercise: all the more so since, in my view, each of the meanings contended for by the parties ('drawn out' and 'separated from their environment') is legitimate and the secondary arguments — 'gefangen' in Article 4 (2) (f) as against 'gewonnen' in Article 4 (2) (h) — are equivalent and cancel each other out like the elements of certain zero-sum operations. I would add that, in Italy at least, the origins of the term 'estrazione' in the context of this case certainly do not show the linguistic duel between the Commission and the United Kingdom in a serious light.

Its use goes back to the late nineteenth century and stems from a dispute between various departments of State as to which of them should be responsible for fisheries. In the end, fishing was determined to be an industry, but, believe it or not, the winning argument was based on a resemblance which someone perceived between fishing and mining (the latter activity being, of course, described in bureaucratic jargon as 'estrattiva').

5. Having said that I would observe that the duel somehow has something false about it. The reference made by the United Kingdom to the consequences of a possible break in the nets (the fish would be lost, *ergo* they can only be said to be caught when the nets have been hoisted on board without mishap) shows, in my view, that the parties' dispute about the meaning of 'extraits' is a superficial one only. In substance the situation is different. The applicant and the defendant alike identify 'taking from' with 'catching'; what they disagree upon is the moment at which that operation takes place, the one considering that it is when the fish enter the net, the other when the net is lifted on board. However if that really is the situation, then the applicant is in the right. Although lacking in appropriate technical and legal substantiation the position adopted by the applicant does accord with common sense which dictates that catching and netting amount to the same thing, irrespective of the risk that the net will tear.

Let us then endeavour to reconcile common sense and the law. To begin with, the Commission's view is lent a certain colouring of truth by the views expressed by writers on the civil law in all the Member States, according to whom, as is well known, fish are considered to be caught and hence the property of the fisherman when, by entering the net, they lose their natural liberty. The same approach is taken, moreover, in the very few decided cases on the point, in particular in an old but significant English judgment according to which there is not sufficient property in fish *nearly* enclosed in a net to maintain an action of trespass against a person who prevents their capture although some other action might lie (*Young* v *Hichens,* 1843, 6 QB 606). Can it be inferred from that that had the fish been *fully* enclosed — as was certainly the situation in the present case — the English court would have conferred greater protection on the party in possession? On a strictly logical basis the answer would be in the affirmative.

In my view, however, the decisive argument is a different one. If the rule defining the origin of the fish is carefully examined it will be seen that its essential feature, the factor on which origin is made to depend, is the nationality of the vessel doing the fishing. There can be no doubting the importance which the legislation attaches to such matters as where the vessel is registered and which flag it is flying. But — and this is the point — what is to be understood by 'vessel'? Maritime law is very clear in that regard. 'Vessel' does not signify merely the hull but the hull with all its accessories and appurtenances, that is to say, in the case of a fishing vessel, engine, masts, sails, ropes and fishing gear, including the nets.

So a vessel is to be viewed as *res composita* (single composite thing), and, of course, a vessel on the high seas is to be viewed (in accordance with a universally recognized rule of international law) as *territoire flottant* of the State to which it belongs. Let us combine those two concepts and apply them to the problem in this case. The outcome is obvious: the fish which are netted come, by virtue of that very fact, within the customs sphere of the State whose flag is being flown by the fishing boat using the net. Nor can it be objected that the nets in this case were of British ownership. Indeed they were; but it is also true that when the nets were being trawled the Poles were in lawful possession of them pursuant to a contract which they had concluded with the owners of the fishing boats. In any event I do not believe that the rule whereby the origin of the fish is determined by the nationality of the vessel can be interpreted so as to attach importance to the ownership of the nets. If that were possible it would be simplicity itself to work out schemes for the division of labour capable of influencing the origin of the fish, thus enabling import duties to be 'dodged' and making a mockery of the funtion of the Common Customs Tariff.

Moreover, it seems to me that this — that is to say prevention of customs fraud and avoidance of the resultant impact on the Community's own resources — is the real aim of the provision. The connection which it establishes between the origin of the product and the nationality of the vessel has a sense in so far as fishing *directly performed* by undertakings from Member States enjoys the exemption from duties. In short, the exemption was provided for the protection of those undertakings; hence it is plain that that purpose is not fulfilled when undertakings from non-member countries are associated in the fishing (*a fortiori* in the peculiar circumstances of the present case).

What I am proposing to the Court, therefore, is not only inherently correct, it also accords best with the teleological interpretation which must be given to Regulation No 802/68 and, in particular, to Article 4 thereof.

6. I will add a few words in conclusion on the argument that the United Kingdom derives from the second of the two criteria on the basis of which Regulation No 802/68 determines the origin of products. It will be recalled (a) that Article 5 emphasizes the economic importance of the last process or operation undergone by the goods where two or more countries were concerned in their production and (b) that, according to the United Kingdom, the sole operation of economic importance in a fishing operation of the type in question in this case is the raising of the nets and the discharge of their contents on deck.

In my view the premise of that argument is defective in so far as it assumes that the origin of the fish can also be determined by using the criterion contained in Article 5. On the contrary, we know that the relevant rules are already contained in their entirety in Article 4, and the United Kingdom Government knows it too, for it has taken a microscope to every word of that provision. I shall add that in my opinion, which is based on the case-law of the Court (see, most recently, the judgment of 23 February 1984 in Case 93/83 *Zentralgenossenschaft des Fleischergewerbes eG* v *Hauptzollamt Bochum* [1984] ECR 1095), Article 5 only covers manufactured products; it is plain that there can be no question of assimilating fishing as such to a 'manufacture' of fish.

7. For all the above reasons I consider that the fish caught as a result of the joint fishing operation, referred to under 2 above, were of Polish origin. Hence, by failing to levy the import duties thereon, the United Kingdom infringed Article 4 (2) (f) of Regulation (EEC) No 802/68 of the Council of 27 June 1968 on the common definition of the concept of the origin of goods, and the rules governing the Common Customs Tariff.

I therefore propose that the Court declare that the United Kingdom failed to fulfil its obligations under the above-mentioned provisions. The United Kingdom, as the unsuccessful party, should be ordered to bear the costs.