OPINION OF ADVOCATE GENERAL LÉGER

delivered on 9 February 1999 *

1. This action for annulment was brought by the Kingdom of Sweden against 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. [1]

2. The Kingdom of Sweden disputes the share of cod catches it was allocated under the contested regulation for 1997.

I — The Community legislation

The Convention on fisheries and the conservation of fishery resources in the waters of the Baltic and the Belts [2]

3. Fishing in the waters of the Baltic Sea is governed by the International Baltic Sea Fishery Commission (the IBSFC) set up under Article V of the Convention.

4. Every year, on the basis of scientific data, the IBSFC fixes a total allowable catch (TAC) for each fish stock and each zone. For this purpose it prepares recommendations, which become binding on the Contracting Parties unless they raise objections within a certain period. [3]

5. The TACs for cod during 1997 were fixed at the 22nd session of the IBSFC held in Warsaw from 16 to 20 September 1996. Recommendation No 4 [4] adopted at that session states that the TAC for cod in the Community fishing zones must not exceed 109 600 tonnes.

* Original language: French.

1 — OJ 1997 L 66, p. 1, 'the contested regulation'.

2 — The convention known as 'the Gdansk Convention' (hereinafter 'the Convention'), to which the Community acceded under Council Decision 83/414/EEC of 25 July 1983 on the accession of the Community to the Convention on fishing and the conservation of the living resources in the Baltic Sea and the Belts, as amended by the Protocol to the Conference of the Representatives of the States Parties to the Convention signed in Warsaw on 11 November 1982 (OJ 1982 L 237, p. 4). The Convention entered into force with respect to the European Econo.

3 — Articles IX to XI of the Convention.

4 — Annex 3 to the application.

Regulation (EEC) No 3760/92

6. This Council regulation establishes a Community system for fisheries and aquaculture. [5]

7. Article 8(4) of the basic regulations provides:

'The Council, acting by a qualified majority on a proposal from the Commission:

(i) shall determine for each fishery or group of fisheries, on a case-by-case basis, the total allowable catch and/or total allowable fishing effort, where appropriate on a multiannual basis...'

8. According to Article 8(4)(ii), the Council, under the same procedure, 'shall distribute the fishing opportunities between Member States in such a way as to assure each Member State relative stability of fishing activities for each of the stocks concerned...'.

9. In Article 3(g) of the basic regulation 'Community fishing opportunity' is defined as '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'.

Article 121(1) of the Act of Accession of the Kingdom of Sweden [6]

10. Article 121(1) fixes by species and by zone the share of Community fishing opportunities for stocks which are regulated by a catch limit to be allocated to Sweden.

11. The share of the cod stock allocated to Sweden in Zone III b, c, d was fixed at 35.037%, [7] as shown in the table in Article 121(1). Note 7 to that table reads: 'This percentage shall be applicable to the first 50 000 tonnes of Community fishing opportunities' and 'For Community fishing

5 — Regulation of 20 December 1992 (OJ 1992 L 389, p. 1, 'the basic regulation').

6 — 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), as amended by Decision 95/1/EC, Euratom, ECSC of the Council of the European Union of 1 January 1995 adjusting the instruments concerning the accession of new Member States to the European Union (OJ 1995 L 1 p. 1, 'the Act of Accession').

7 — Hereinafter 'the allocation formula'.

opportunities in excess of 50 000 tonnes, the Swedish share shall be 40.000%'. The note also states: 'These allocations do not take account of the continued transfer of quotas from Sweden to the present Member States of the present Union, resulting from the 1992 EEA arrangements'.

12. Article 121(2) provides: 'The shares allocated to Sweden shall be set in accordance with Article 9(4) of Regulation (EEC) No 3760/92...'.

13. Under that provision, shares were allocated in respect of 1995 and 1996 by Regulations (EC) No 3362/94 [8] and No 3074/95 [9] respectively.

14. The contested regulation determined the allocation for 1997.

Regulation No 390/97

15. Article 2 of the contested regulation provides that TACs 'for stocks or groups of stocks to which Community rules apply and the share of these catches available to the Community are hereby fixed for 1997 as set out in Annex I'.

16. In Annex I the TAC for cod in Zone III b, c, d is 112 452 tonnes. The quantity allocated to the Kingdom of Sweden is given in that Annex as 38 860 tonnes. [10]

'Compensation cod'

17. During the accession negotiations, conflicting interests became apparent regarding the fixing of Sweden's share of Community fishing opportunities for cod.

18. Some Member States considered that that share did not reflect traditional fishing arrangements and thus prejudiced their

8 — Council Regulation of 20 December 1994 fixing, for certain fish stocks and groups of fish stocks, the total allowable catches for 1995 and certain conditions under which they may be fished (OJ 1994 L 363, p. 1).

9 — Council Regulation of 22 December 1995 fixing, for certain fish stocks and groups of fish stocks, the total allowable catches for 1996 and certain conditions under which they may be fished (OJ 1994 L 330, p. 1).

10 — The share allocated to the Kingdom of Sweden is calculated as follows: 35.037% of 50 000 tonnes + 40% of 59 600 tonnes = 41 360 tonnes, from which must be deducted 2 500 tonnes in order to meet obligations entered into under the EEA arrangements, namely 38 860 tonnes. The share of the Kingdom of Sweden was thus calculated on the basis of a total of 109 600 tonnes, the difference of 2 852 tonnes between that quantity and the 112 452 tonnes constituting the 'compensation cod'.

interests as regards fishing in the Baltic Sea.

19. At the session of the Council held between 25 February and 1 March 1994, the Council decided to record the following declaration in its minutes: [11]

'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'. [12]

20. Pursuant to that declaration, the Community bought 'compensation cod' from the three Baltic States in respect of 1995, 1996 and 1997.

21. In 1995 the cod which could be fished in the waters of the Baltic States was shared between the Kingdom of Denmark and the Federal Republic of Germany. In 1996 the additional quantity acquired by the Community could be fished in Community waters. It was also shared between those two Member States.

22. In 1997 the Community obtained 2 852 tonnes of 'compensation cod', 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). Each share was then added to the TACs available to the Community which had been allocated, in accordance with their respective formulas, to the Kingdom of Denmark (a total of 49 494 tonnes) and the Federal Republic of Germany (a total of 21 638 tonnes).

23. The total amount of the TACs which, according to Annex I to Regulation No 390/97, is 112 452 tonnes, is therefore made up of the 109 600 tonnes decided by the IBSFC and the 2 852 tonnes of 'compensation cod'.

II — The action for annulment

24. In support of its action, the Kingdom of Sweden claims that the allocation for 1997 of cod in Zone III b, c, d, as indicated in the contested regulation, is not in accordance with Article 121(1) of the Act of Accession,

11 — Hereinafter referred to as 'the 1994 declaration'.

12 — Declaration recorded in the minutes of the 1733rd session of the Council held in Brussels.

in that Sweden was not allocated any share of the 'compensation cod'.

25. The applicant contends that 'compensation cod' does not constitute an external resource within the meaning of the Act of Accession, but a Community fishing opportunity covered by Article 121(1), a share of which, assessed according to the formula laid down in that act, should therefore be accorded to it.

26. The Council and the Commission both submit that the action should be dismissed on the ground that 'compensation cod' is an external resource so far as the Community is concerned, and therefore the formula contained in Article 121(1) of the Act of Accession does not apply to it. They contend that 'compensation cod' owes its existence to the need to allocate to the Kingdom of Denmark and the Federal Republic of Germany additional quotas intended to offset the prejudice which those States contend their interests sustained as a result of the share allocated to the Kingdom of Sweden by application of that formula. [13]

27. The legality of the contested regulation therefore depends on whether or not the formula contained in Article 121(1) of the Act of Accession should be applied to 'compensation cod'.

28. In order to answer that question it is necessary for that provision — from which Regulation No 390/97 must not derogate — to be interpreted. Certain considerations relied on by the Council or the Commission in order to justify the contested regulation, although in some cases helping to clarify the meaning of Article 121(1), cannot replace such an interpretation as a basis for dismissing the action brought by the Swedish Government.

29. Thus, the reference to the traditional fishing arrangements in the Baltic Sea, in support of the view that the quantities allocated by the Act of Accession should be adjusted on the ground that the formula laid down in respect of the Kingdom of Sweden goes further than is appropriate, having regard to customary fishing practice in that sector, is not sufficient, even if it is assumed that the details of those arrangements are undisputed, to establish the legality of the contested regulation.

30. Likewise, the 1994 declaration, although expressly approved by the Kingdom of Sweden, cannot derogate from Article 121(1) of the Act of Accession if it is established that the formula allocated to Sweden is applicable without distinction to any quantity of cod acquired by the Community in the relevant zone.

13 — According to the Council, the Kingdom of Denmark and the Federal Republic of Germany consider that the share which was finally allocated to the Kingdom of Sweden did not accurately reflect the traditional fishing arrangements in the Baltic Sea.

31. Not only does such a declaration constitute, in the view of the Council itself, [14] a political commitment, which is not sufficient for it to have the legal effects attaching to binding Community measures adopted in accordance with the rules of the EC Treaty, but also, even if any interpretative value were to be accorded to that declaration — and the Court does sometimes accord such value to declarations of that kind — it could not be relied on to resolve the dispute in this particular case. [15]

32. Indeed, the 1994 declaration, which establishes the principle of acquiring additional fishing rights in respect of cod in order to allocate them to the Kingdom of Denmark and the Federal Republic of Germany, ended with the adoption of the contested provisions of Regulation No 390/97. Its content is therefore of greater relevance to the interpretation of that regulation than to the assessment of whether it is in conformity with the Act of Accession.

33. The meaning of the relevant provisions of the contested regulation is not in doubt since, in Annex I to the regulation, the TAC for European Community cod in Zone III b, c, d includes 'compensation cod' whereas the Kingdom of Sweden's TAC for cod is established solely on the basis of the TAC allocated by the IBSFC.

34. The Council explains that the share claimed by the Kingdom of Sweden relates to fishing rights obtained by the European Community with the precise aim of offsetting the reduction in the share of the TACs of the Kingdom of Denmark and the Federal Republic of Germany following the Act of Accession.

35. However, it should be pointed out that, in the same way that the 1994 declaration cannot lay down any exception to the principle set out in Article 121(1) of the Act of Accession, the reasons for its adoption are not conducive to a definitive interpretation of that provision.

36. The need to provide compensation, which lay behind the decision to acquire additional fishing rights, might also arise if Article 121(1) laid down a formula applicable to all Community fishing opportunities. In that case, fishing rights acquired under the 1994 declaration would constitute compensation in absolute terms and not a readjustment of the relative shares of each Member State.

14 — Page 1 of the Council's answers to the questions put to it by the Court.

15 — The Court has consistently held that '... declarations recorded in minutes are of limited value, since they cannot be used for the purpose of interpreting a provision of Community law where no reference is made to the content of the declaration in the wording of the provision in question and the declaration therefore has no legal significance' (Case-329/95 *VAG Sverge* [1997] ECR I-2675, paragraph 23). However, it slightly altered this position of principle when it held that 'inasmuch as it serves to clarify a general concept... a declaration of that kind [contained in a directive] may be taken into consideration when interpreting that provision' (Case C-368/96 [1998] ECR I-7967, paragraph 27).

37. The intent to ensure compensation does not therefore provide irrefutable proof that the Act of Accession should be read in the way the Council and the Commission suggest.

38. Assessment of the validity of the contested regulation thus also calls for an analysis of Article 121(1) of the Act of Accession itself.

39. The Swedish Government claims that the term 'Community fishing opportunity' used in Article 121(1) is defined in Article 3(g) of the basic regulation as '... 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'. This, it is alleged, means that Sweden's share of cod should have been calculated by applying the formula also to 'compensation cod', since the term 'Community fishing opportunity' also includes fishing rights acquired by the Community. [16]

40. The applicant adds that there is no indication that Articles 116 to 122 of the Act of Accession, which are in Section II entitled 'Access to waters and resources', apply only to internal resources.

41. The Council replies that there is no reason to conclude that the purpose of Section II is to regulate fishing in waters other than those belonging to the Community. It adds that the presentation and wording of the table contained in Article 121(1) clearly show that that provision relates only to the share allocated to the Kingdom of Sweden in the 'reference zones for fixing the TACs concerned'. It explains that the initials 'TAC' are normally only used for allocating internal resources.

42. The Council also states that the reference to 'Community waters' in Note 2 to the table indicates that the formula applies only to the Community's internal resources, in other words the fishing opportunities available to the Community by virtue of its own fishing rights in waters which are under the sovereignty or jurisdiction of the Member States.

43. The Commission for its part submits that the term 'Community fishing opportunities', which includes fishing opportunities in the waters of a third country and in international waters, cannot be applied to Article 121(1) since that provision does not cover fishing opportunities resulting from

16 — According to that method of calculation, the Kingdom of Sweden, which voted against the contested regulation, estimates that its share should have been 39 999 tonnes (0.35037 × 50 000 tonnes and 0.4 × 62 452 tonnes — 2 500 tonnes) (page 6 of the application).

agreements concluded with third countries. In that connection, the Commission refers to the structure and content of Title V, Chapter 3, of the Act of Accession.

44. Although not free of ambiguity, as the submissions made by the various parties show, the wording of Article 121(1) and the position which it occupies within the Act of Accession do provide us with some useful guidance for interpretation.

45. First of all, it is necessary to specify the precise consequences which may be inferred from the position of Article 121 within Chapter 3, entitled 'Fisheries', of Title V on 'Transitional Measures concerning Sweden'. [17]

46. I agree with the Kingdom of Sweden that one cannot conclude from the fact that Article 121 comes within Section II, entitled 'Access to waters and resources', in other words not in Section III, the title of which is 'External resources', that the formula only applies to the European Community's internal resources and does not cover fishing opportunities resulting from agreements which the Community has entered into with third countries, as the Council and the Commission claim.

47. Section III, 'External resources', comprises two provisions, Articles 124 and 125, the objective of which is limited, in the case of Article 124, to the legal arrangements applying upon accession to the fishing agreements concluded by the Kingdom of Sweden with third countries and, in the case of Article 125, to the rules concerning the granting by the European Union of a financial contribution to the 'release of smolt carried out by the competent Swedish authorities'.

48. It cannot therefore be considered that the scope of Section III extends to agreements which the Community has concluded with third countries, which means that at this stage of our analysis the hypothesis that Section II applies to that category of agreements stands.

49. Likewise, the Commission's submission that Section II applies only to waters coming under the sovereignty or jurisdiction of the European Union, since, by virtue of Articles 117 and 118, that Section covers access by Swedish vessels solely to those waters, does not appear by itself to be decisive.

50. The reference made in those articles to 'waters under the sovereignty or jurisdiction of the Member States of the Union as at present constituted' is insufficient to exclude from the scope of Article 121

17 — The V is in Part 4 of the Act of Accession, entitled 'Transitional measures'.

catches made under agreements concluded by the Community with third countries.

51. In fact, not only is that class of agreement not governed by Section III, but there is nothing in the terms of Articles 117 and 118 which would preclude application of Article 121 to catches made by Swedish vessels in Community waters in accordance with agreements which authorise transfers of catch quotas by third countries for the benefit of the Community.

52. That interpretation is even supported by the argument that the definition given in Regulation No 3760/92 of the term 'Community fishing opportunity' includes fishing opportunities outside the Community fishing zone in addition to those available for the Community within the Community fishing zone.

53. Although Article 3 of Regulation No 3760/92 states that the definition it provides is 'For the purposes of this Regulation...', which appears to exclude its being used to interpret the Act of Accession, such a restriction seems excessive since numerous articles in Section II refer to the basic regulation and to the system introduced under it.

54. Moreover, the conditions relating to a specific sector of the accession of a new Member State have a natural tendency to combine with the existing law in that sector, which is structured, in the case of agriculture and fisheries, around the basic regulations introducing each Community policy.

55. It should also be noted that Article 121(2) of the Act of Accession refers expressly to Article 8(4) of the basic regulation to determine the procedure for setting the shares allocated to the Kingdom of Sweden. According to subparagraph (ii) of Article 8(4), the Council is empowered, in particular, to 'distribute *the fishing opportunities* between Member States in such a way as to assure each Member State relative stability of fishing activities for each of the stocks concerned,' [18] which necessarily includes, according to the definition contained in Article 3(g), Community fishing opportunities outside the Community fishing zone.

56. However, the foregoing considerations relate to the general legal arrangements introduced under Article 121(1) of the Act of Accession and not to its application to the particular case which is the subject of the present action, as a close reading of the table contained in that provision shows.

57. The cod with which the Kingdom of Sweden associates 'compensation cod' is that fished in Zone III b, c, d. The table in Article 121 states that that zone is limited

18 — Emphasis added.

to 'Community waters.' [19] It follows that the formula allocated to the Kingdom of Sweden can only apply to Community fishing opportunities within the Community fishing zone, [20] and excludes Community fishing opportunities outside that zone.

58. Article 121(1) of the Act of Accession thus does not exclude *a priori* application of the formulas for which it provides to fishing zones situated outside Community waters unless some contrary indication restricts its scope, as it does in the present case since a territorial limit is set on the initial zone which provides the basis for calculating catches.

59. Having established that the formula only applies to cod fished in the waters of that zone belonging to the Community, it remains to be ascertained whether the Council observed the terms of Article 121 of the Act of Accession in excluding the Kingdom of Sweden from the allocation of 'compensation cod' in the contested regulation.

60. In other words, is it sufficient for the Kingdom of Sweden to show that some or all of the 'compensation cod' comes from Community waters in order for those fishing rights to be accorded it in the proportion determined by the formula?

61. It is apparent from the minutes recording the conclusions of the fishing talks between the three Baltic States and the European Community, which were held in 1996, [21] that the 2 852 tonnes of 'compensation cod' for 1997 result from a transfer: that of the right of the Member States to fish for cod in Community waters.

62. Application of the formula contained in 121(1) of the Act of Accession may prove to be inappropriate, however, if it is merely an option, so that fishing may just as well take place in the waters of the Baltic States as in Community waters, depending on what Member States decide.

63. I am therefore prompted to conclude that the share of cod in zone III b, c, d allocated to the Kingdom of Sweden was not fixed in order to apply to catch quotas acquired from third countries by the Community, regardless of the allocations of TACs made by the IBSFC.

19 — Annex 1 to the Council's defence shows that this zone is one of the ICES fishing zones. These initials, which stand for 'International Council for the Exploration of the Sea', refer to an international scientific and technical body which carries out assessments relating to fish species, groups of species and fisheries. It issues opinions based mainly on biological criteria, and makes recommendations concerning levels of catches or attendant technical measures.

20 — This is defined in Article 3(1) of the basic regulation as referring to 'the waters under the sovereignty or jurisdiction of the Member States'.

21 — Annexes 4, 5 and 6 to the application.

64. The intention of the States signatories to the Act of Accession is confirmed by the lack of justification for drawing a distinction between catches made in Community waters and those made outside those waters in order to restrict application of the formula contained in Article 121(1) to catches in Community waters.

65. There is no apparent reason why, in the case of a transfer of resources secured by the Community, allocation of the share due to the Kingdom of Sweden should depend on the catches being made in Community waters — quite apart from the fact that it would be difficult to check where catches were made in order to apply a differentiated system.

66. The purpose of using the term 'Community waters' could only have been to make the reference zone indicated in the Act of Accession the same as that mentioned in the IBSFC recommendations, [22] which are intended to have legal effects within the Community, in order to apply to the TAC fixed by those provisions the formula allocated to the Kingdom of Sweden.

67. This approach is confirmed by the title of the second column of the table in Article 121: 'ICES or IBSFC Division Reference zones for fixing the TACs'. [23] The second column determines the reference zones used for the purpose of fixing, for each species, the share of catches allocated to the Kingdom of Sweden.

68. The fact that the Council, in Annex I to the contested regulation, included 'compensation cod' in the TAC of the European Community when in the same Annex the share of the Kingdom of Sweden was calculated on the basis of a TAC which did not include that resource is not capable of altering the meaning of the Act of Accession, which forms part of Community primary legislation.

69. It therefore appears that the view which must prevail is that put forward by the Council and the Commission, namely that the formula contained in Article 121(1) applies only to TACs directly fixed by the IBSFC for the European Community in respect of Community waters, by a recommendation which has become binding.

70. The criterion by which the scope of Article 121(1) of the Act of Accession may be defined is thus not so much the geogra-

22 — See point 5 of this Opinion.

23 — Footnote not relevant to the English version.

phical origin of catches as the origin of the catch quotas.

71. In those circumstances, the calculation of the share allocated to the Kingdom of Sweden by the Council in Annex I to the contested regulation, which is based solely on the TAC allocated by the IBSFC and excludes the transfers of resources represented by 'compensation cod', does not appear to infringe Article 121(1) of the Act of Accession.

Conclusion

72. In the light of the foregoing I propose that the Court should:

— dismiss the appeal;

— order the Kingdom of Sweden to pay the costs.