JUDGMENT OF THE COURT OF FIRST INSTANCE (First Chamber)
6 July 1995 *

In Case T-572/93,

Odigitria AAE, a company incorporated under Greek law, having its registered office in Athens, represented by Epameinondas Marias, Gergios K. Stefanakis and Anastassia Chatzitzani, of the Athens Bar, with an address for service in Luxembourg at the Chambers of Ekaterini Thill-Kamitaki, 17 Boulevard Royal,

applicant,

v

Council of the European Union, represented by John Carbery, Legal Adviser, and Sophia Kyriakopoulou, of its Legal Service, both acting as Agents, with an address for service in Luxembourg at the office of Bruno Eynard, Director of the Legal Affairs Directorate of the European Investment Bank, 100 Boulevard Konrad Adenauer,

and

* Language of the case: Greek.

Commission of the European Communities, represented by Xénophon A. Yataganas, Legal Adviser, acting as Agent, with an address for service in Luxembourg at the office of Georgios Kremlis, of its Legal Service, Wagner Centre, Kirchberg,

defendants,

APPLICATION for an award of damages pursuant to Article 178 and the second paragraph of Article 215 of the EC Treaty,

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (First Chamber),

composed of: J. L. Cruz Vilaça, President, H. Kirschner and A. Kalogeropoulos, Judges,

Registrar: J. Palacio González, Administrator,

having regard to the written procedure and further to the hearing on 21 February 1995

gives the following

Judgment

Facts

1 These proceedings arise from a dispute between the Republic of Senegal (hereafter 'Senegal') and the Republic of Guinea-Bissau (hereafter 'Guinea-Bissau') concerning the exact demarcation of their marine areas. The dispute arises from differing interpretations of a border agreement concluded between the French Republic and the Portuguese Republic in 1960 before those States obtained their independence.

2 In order to resolve the dispute, the two parties agreed in 1985 to submit it to arbitration. An arbitration award was made on 31 July 1989.

3 On 2 August 1989 Guinea-Bissau challenged by written notification the arbitration award and expressed its intention to bring legal proceedings. The Government of Guinea-Bissau also made the following statement: '... Guinea-Bissau, anxious to assert the rights of its people, would for its part establish a strong presence in the region in order to exploit its biological resources without allowing any activity to be an obstacle to such exploitation and its monitoring by the competent authorities'. On 14 August 1989 that statement and the notification of 2 August 1989 were communicated to the Ministries of Foreign Affairs of the Member States, to the Council and to the Commission.

4 Guinea-Bissau then brought the dispute before the International Court of Justice in the Hague (hereafter 'ICJ') seeking the adoption of protective measures. The application was dismissed by order of the ICJ of 2 March 1990. By judgment of

12 November 1991 the ICJ upheld the arbitration award. The authorities of Guinea-Bissau then decided to lodge an application on the merits before the ICJ. To the Commission's knowledge, those proceedings have not yet come to an end.

5 In the meantime, the European Economic Community (hereafter 'the EEC') had concluded, on 15 June 1979 an agreement with the Senegalese Government on fishing off the coast of Senegal. That agreement was approved on behalf of the EEC by Council Regulation (EEC) No 2212/80 of 27 June 1980 on the conclusion of the Agreement between the Government of the Republic of Senegal and the European Economic Community on fishing off the coast of Senegal, of the Protocol, and of the exchanges of letters referring thereto (OJ 1980 L 226, p. 16).

6 The purpose of that agreement is defined in Article 1 thereof: to establish the principles and rules which will govern in future, in all respects, the fishing activities of vessels flying the flags of Member States of the Community in the waters over which Senegal has jurisdiction in respect of fisheries. Article 4 of the agreement stipulates that fishing activities by Community vessels in Senegal's fishing zone are to be subject to the possession of a licence issued at the Community's request by the authorities of Senegal. Point E of Annex I to the agreement specifies the zones in which licences are to be valid, according to the type of fishing and the type of vessel in question.

7 On 27 February 1980 the EEC also approved a fishing agreement with Guinea-Bissau which was approved by Council Regulation (EEC) No 2213/80 of 27 June 1980 on the conclusion of the Agreement between the Government of the Republic of Guinea-Bissau and the European Economic Community on fishing off the coast of Guinea-Bissau, and of the two exchanges of letters referring thereto (OJ 1980 L 226, p. 33).

8 The agreement with Senegal was amended several times by agreement between the parties. On 4 February 1991 the EEC concluded and the Council approved, by Regulation (EEC) No 420/91 on the conclusion of the Protocol defining, for the period 1 May 1990 to 30 April 1992, the fishing rights and financial compensation provided for in the Agreement between the European Economic Community and the Government of Senegal on fishing off the coast of Senegal (OJ 1991 L 53, p. 1), a Protocol to the agreement with Senegal defining the fishing rights and financial compensation (hereafter 'the Protocol of 4 February 1991'). The Protocol was applied provisionally following an exchange of letters between the parties.

9 Similarly, on 25 April 1990, the EEC concluded and the Council approved, by Regulation (EEC) No 1236/90 on the conclusion of the Protocol establishing for the period 16 June 1989 to 15 June 1991 the fishing rights and financial compensation provided for in the Agreement between the European Economic Community and the Republic of Guinea-Bissau on fishing off the coast of Guinea-Bissau (OJ 1991 L 125, p. 1), a Protocol to the agreement with Guinea-Bissau defining the fishing rights and financial compensation (hereafter 'the Protocol of 25 April 1990').

10 Article 7 of the Protocol of 25 April 1990 repealed the Annex to the agreement concluded with Guinea-Bissau and replaced it with a new annex which, in point K, defines the procedure in case of boarding as follows:

'The authorities of the Commission of the European Communities in Guinea-Bissau shall be notified within 48 hours of any boarding within the Guinea-Bissau fishing zone of a fishing vessel flying the flag of a Member State of the Community and shall at the same time receive a brief report of the circumstances and reasons leading to the boarding.

Should the case be brought before a competent judicial body, the Guinea-Bissau authorities may fix a bank security at the request of the Community or the ship owner.

In that case, the Guinea-Bissau authorities shall undertake to release the vessel within 24 hours following the lodging of the bank security.

The bank security shall be released by the competent authority once the master of the vessel concerned has been acquitted by the judicial decision.

Should one of the parties consider it necessary, it may request urgent consultations under Article 10 of the Agreement.'

11 Against that background, the Guinea-Bissau Embassy in Brussels sent to the Commission, on 11 May 1990 a Note Verbale, No 447/CIJ/90, in order to 'inform it of developments in the maritime region off the coasts of Guinea-Bissau and Senegal'. A fresh incident was reported concerning the boarding by the Senegalese navy, on 11 April, of a Soviet fishing vessel possessing a Guinea-Bissau fishing licence which, according to the embassy, was in waters unarguably under Guinea-Bissau jurisdiction. The note ended with a request that 'the report, which is extremely serious, be brought to the attention of all parties which you consider should be informed ...'. The note was registered at the Commission on 28 May 1990.

12 On 14 May 1990, the fishing vessel 'Theodoros M', flying the Greek flag and belonging to the applicant, which had left the port of Dakar on 10 May and held a fishing licence granted by the Senegalese authorities, was boarded by a Guinea-Bissau coast-guard vessel in the disputed waters. Having boarded the vessel, the Guinea-Bissau authorities seized and confiscated its cargo, consisting of approximately six tonnes of fish, and its documents. The 'Theodoros M' had obtained the

fishing licence from the Senegalese ministry responsible for sea fisheries, in accordance with the provisions in force between Senegal and the Community. The application for a licence had been submitted to the Senegalese authorities through the Commission and the licence had been issued in respect of the applicant's vessel through the Commission's delegation at Dakar.

13 The master of the 'Theodoros M' was charged before the People's Court of Bissau for having fished in waters under Guinea-Bissau sovereignty without holding the necessary licence. By judgment of 28 May 1990 the People's Court of Bissau upheld that charge and ordered the master to pay a fine of 213 519 000 Guinean pesos. The court found that the master was aware of the existence of a dispute between the two republics concerning the zone in which the vessel was boarded. The vessel was released on 25 July 1990.

14 By telex message of 21 June 1990 the Maritime Fisheries Directorate of the Greek Ministry of Agriculture recommended to the National Cooperative of Deep Sea Fishermen and the Union of Deep Sea Shrimp Fishermen to ask their members 'not to fish in that zone, to which the two countries lay claim, without having first obtained a fishing licence for both the territorial waters of Guinea-Bissau and those of Senegal'.

Course of the procedure

15 Those are the circumstances in which, by application lodged at the Registry of this Court on 6 December 1993, the applicant brought an action against (1) the European Community, represented in law by its competent institutions, (2) the Council of the European Union and (3) the Commission of the European Communities in

order to obtain compensation, pursuant to the second paragraph of Article 215 of the Treaty, for damage suffered owing to acts and omissions of the defendant parties.

16 The written procedure followed the normal course. The Court heard argument from the parties following reference of the case to a chamber composed of three judges. Without objection from the parties the Court decided to refer the case to the chamber in accordance with Articles 12, 14 and 51 of its Rules of Procedure as in force at that time.

17 Upon hearing the report of the Judge-Rapporteur, the Court (First Chamber) decided to open the oral procedure without any preliminary inquiries. However, the Court requested the applicant to reply in writing before the hearing to a series of questions. The Commission was requested to make a document available to the Court.

18 At the hearing on 21 February 1995 the Court heard oral argument from the parties and their answers to the questions which it had asked.

Forms of order sought by the parties

19 The applicant claims that the Court should:

— declare the action admissible;

— declare, pursuant to the second paragraph of Article 215 of the Treaty, that the European Community is liable for the damage caused to it and order the European Community to pay damages of DR 102 446 183 with interest calculated at 24% a year from the time of lodgment of the application;

— order the defendant to pay the costs.

20 The Council contends that the Court should:

— dismiss the action brought by the applicant on the ground that in concluding the Protocol of 4 February 1991 with Senegal it did not commit any wrongful act which could be regarded as infringing a higher-ranking rule of law for the protection of individuals;

— in the improbable event that the Court should find that such an infringement occurred, declare that it is not a sufficiently clear infringement and, in any event, that the applicant failed to take all the necessary precautions in not showing care and not ascertaining all the conditions in which its vessels would operate;

— order the applicant to pay the costs.

21 The Commission contends that the Court should:

— dismiss the application as unfounded;

— order the applicant to pay the costs.

Admissibility

22 On its own initiative the Court has corrected the names of the parties to the proceedings since, by virtue of Article 17 of the Statute (EC) of the Court, only the institutions of the Community, which must be distinguished from the Community as such, may be defendants to a direct action.

Substance

23 In support of its action the applicant puts forward four pleas, of which only the first is directed against both the Council and the Commission. The first plea is that the negotiation by the Commission and the conclusion by the Council, on the Commission's proposal, of the Agreement Protocols of 25 April 1990 and 4 February 1991, concluded respectively with Guinea-Bissau and Senegal, were wrongful. The second plea is that the Commission was wrong to fail to inform the applicant of the dispute between Guinea-Bissau and Senegal. The third plea is that the Commission was wrong in failing, following the boarding of the applicant's vessel, to consult the Guinea-Bissau authorities pursuant to point K of the Annex to the Protocol of 25 April 1990. The final plea is that the Commission was wrong in failing to request the fixing of a bank security pursuant to that same provision.

24 It asks the Court to declare that the European Community is liable, under the second paragraph of Article 215 of the EC Treaty, to make good all the damage which it has suffered. It assesses the amount of the damage at DR 102 446 183, consisting

of its operating costs during the two and a half months in which the vessel was immobilized, the losses which it has suffered and the non-material damage caused to it. As regards the level of interest rates on the Greek market, an interest rate of 24% a year is necessary, according to the applicant.

The first plea: liability arising from a legislative act negotiated by the Commission and adopted by the Council on the Commission's proposal

Arguments of the parties

25 The applicant claims that, in concluding the Protocol of 25 April 1990 with Guinea-Bissau and the Protocol of 4 February 1991 with Senegal, without taking account of the legal proceedings pending before those States before the ICJ concerning the demarcation of their maritime zones, the Council and the Commission committed a fault of such a nature as to incur the Community's liability. According to the applicant, the Council and the Commission were at least bound to exclude from the fishing agreements in question the area in dispute until the ICJ gave final judgment. In this regard, they rely on the fact that the Republic of Finland and the Republic of Estonia have excluded a fishing zone to which both those republics lay claim from a fishing agreement which was concluded recently.

26 It states that the Council and the Commission committed a serious and sufficiently clear breach of higher-ranking rules of law for the protection of individuals by acting in clear, grave breach of the limits of their discretion. They had not fulfilled their obligation under general principles of Community law to guarantee freedom of fishing in the waters of non-member countries by protecting in particular legal certainty and the legitimate expectations of traders. At the hearing, the applicant

submitted that three principles had been breached, namely the principle to show due care and ensure good administration in the conclusion of an international agreement, the principle of legal certainty and the principle of legitimate expectations of traders who were entitled to pursue their fishing activities after having obtained the necessary fishing licences.

27 The Council submits that, in adopting Regulation No 420/91 of 4 February 1991, it did not infringe any higher-ranking rule of law for the protection of individuals. The Community may not, when concluding a fishing agreement with a non-member State, judge the limits of their jurisdiction over maritime waters, especially where a dispute exists in this regard between the contracting State and other States when the States involved are States with which the Community has also concluded fishing agreements.

28 The Council therefore submits that it exercised its discretion in a manner which did not in any way disregard the limits on the exercise of its powers. If it had insisted on the contested maritime zones being excluded, the negotiations would have broken down because its attitude would have been interpreted as the taking of a position on a matter which was pending before the ICJ. Any attitude other than that of a neutral attitude with regard to sovereignty disputes between non-member States would probably have caused non-member countries to refuse to conclude such agreements with the Community. The fact that such disputes are the subject of arbitration or court proceedings does not change that situation.

29 Consequently, the Council considers that it did not infringe any higher-ranking rule of law for the protection of individuals in concluding the Protocol of 4 February 1991 with Senegal.

30 The Council also disputes that there was a direct causal link between its role of legislature and the damage which the applicant claims to have suffered. In any event, according to the Council, the alleged causal link was broken by the conduct of the applicant itself which showed a lack of care in not enquiring before leaving the port of Dakar about the conditions in which it would have to work, as any prudent shipowner would have done.

31 Moreover, the Council doubts whether it is possible for a vessel which had been fishing in Senegalese waters for at least nine months at the time when it was boarded could have been unaware of the existence of a dispute between Senegal and neighbouring Guinea-Bissau over the demarcation of those waters. The existence of that dispute was public knowledge owing to the publicity surrounding the numerous boardings of fishing vessels in the waters in question; when the applicant's vessel was boarded, no less than 14 seaman and a Senegalese observer were on board the 'Theodoros M'; finally, it is very plain from the judgment of the People's Court of Bissau of 28 May 1990 that the master of the vessel was aware of the dispute.

32 The Commission explained that the demarcation of the Senegalese fishing zone is determined by Article 1 of the Agreement between the Community and Senegal and that this is in accordance with the 1982 United Nations Convention on the Law of the Sea. According to the Commission, the way in which that agreement is framed corresponds to the way in which all fishing agreements concluded by the Community are framed and does not interfere in the dispute relating to the demarcation of the marine areas of the States in question. Any other way of framing the agreement would necessarily have addressed the question of the demarcation of the marine areas of the States in question and would therefore have gone outside the sphere of the Community's competence and would rightly have been interpreted by the States concerned as interference in their internal affairs.

33 The Commission also submits that the dispute between Senegal and Guinea-Bissau, which goes back to 1960 and had been the subject of arbitration and court judgments, was known to all those concerned. Its existence could not therefore have

been unknown to prudent traders who had been pursuing their fishing activities in those waters practically without interruption since 1981.

Findings of the Court

34 The second paragraph of Article 215 of the Treaty provides that in the case of non-contractual liability the Community, in accordance with the general principles common to the laws of the Member States, is to make good any damage caused by its institutions in the performance of their duties. In the case of legislative measures involving choices of economic policy, it is clear from the settled case-law of the Court that the Community can incur liability only as a result of a sufficiently serious breach of a superior rule of law for the protection of individuals (see, in particular, the judgments in Joined Cases 83/76 and 94/76, 4/77, 15/77 and 40/77 *Bayerische HNL and Others* v *Council and Commission* [1978] ECR 1209, paragraphs 4, 5 and 6, and Joined Cases C-104/89 and C-37/90 *Mulder and Others* v *Council and Commission* [1992] ECR I-3061, paragraph 12). More specifically, in the context of a legislative measure such as the one in the present case, characterized by the exercise of a wide discretion essential for the implementation of the common agricultural policy, the Community does not incur liability unless the institution concerned has manifestly and gravely disregarded the limits on the exercise of its powers (see the judgment in the *Bayerische HNL* case, cited above, paragraph 6).

35 It is also clear from the case-law that omissions by the Community institutions may give rise to liability only in so far as the institutions have infringed a legal obligation to act under a provision of Community law (see, for example, the judgment in Case C-146/91 *KYDEP* v *Council and Commission* [1994] ECR I-4199, paragraph 58). Consequently, in the present case it is necessary to examine whether the defendant institutions infringed an obligation to insert in the agreements in question a clause relating to the fishing zone in dispute between the two republics concerned.

6 In this regard, it must be recalled that, having regard to the discretionary power conferred on the Council in the implementation of the common agricultural policy, review by the Community Court must be limited to examining whether the measure in question is vitiated by a manifest error or misuse of powers, or whether the authority in question has manifestly exceeded the limits of its discretion (see, for example, the judgment of the Court of Justice in Case C-331/88 *Fedesa and Others* [1990] ECR I-4023, paragraph 8, and in Case C-280/93 *Germany* v *Council* [1994] ECR I-4973, paragraph 90). It must also be stated that the legality of such a measure adopted in the field in question can be affected only if the measure is manifestly inappropriate in relation to the objective which the competent institution intends to pursue (see the judgment of the Court of Justice in Case 265/87 *Schräder* v *Hauptzollamt Gronau* [1989] ECR 2237, paragraphs 21 and 22).

37 In the present case, in the exercise of the powers conferred upon it by Articles 43 and 228 of the Treaty, the Community legislature took the view that it was in the interests of the Community to negotiate and approve the fishing agreement concluded between the Community and Senegal.

38 As regards the content of that agreement, it must be observed that the Community institutions enjoy a wide discretion in the field of the Community's external economic relations, as in the corresponding internal field of the common agricultural policy. In concluding the agreements and protocols with the two States in question, the Council and the Commission did not go beyond the limits of the discretion which they have in this matter and did not in any case adopt a measure manifestly inappropriate in relation to the objective which they were pursuing. The Council and the Commission could not have asked for the zone in dispute to be excluded from those agreements without taking a position on matters forming part of the internal affairs of non-member States. If the Community opposed the claims of the States concerning the zones over which they claim to have jurisdiction or opposed the exercise of that jurisdiction when a dispute exists, those non-member countries would very probably refuse to conclude such agreements with the Community. Moreover, if the Community asked for zones to which other States lay claim to be excluded, that move would certainly be interpreted as interference by the Commu-

nity in those disputes. The exclusion of such zones at the Community's request would also have the effect of weakening the claim of the non-member State in question to have the right to exercise such jurisdiction. The fact that such disputes are submitted to arbitration or are the subject of legal proceedings strengthens that argument, since, where proceedings are pending before the ICJ, it is not appropriate for the Community to take a position on disputes between non-member States.

39 Nor may the applicant rely, as it did at the hearing, on the fact that the Community agreed to exclude from the fishing agreement between the Republic of Finland and the Republic of Estonia a fishing zone which was in dispute between the Republic of Estonia and the Republic of Latvia in support of its claim that the principle to take care obliged the Community to exclude the zone in question from the agreement concluded with Senegal. That was an agreement concluded at that time by two non-member States which were not subject to observance of Community law. Nor can the applicant draw argument from Article 234 of the EC Treaty since that provision imposes no obligation on the Community but only on the Member States and cannot therefore refer to Community negotiations with non-member States.

40 It follows from the foregoing that the principle of exercising care and ensuring good administration was not infringed by the Community institutions.

41 As regards the alleged breach of the principle of protection of legitimate expectations, it is settled law that the right to claim protection of legitimate expectations extends to any individual who is in a situation from which it is clear that, in giving him specific assurances, the Community administration caused him to entertain justified hopes (see, in particular, the judgment of the Court of First Instance in Case T-534/93 *Grynberg and Hall* v *Commission* [1994] ECR-SC II-595, paragraph 51, and in Case T-465/93 *Consorzio Gruppo di Azione Locale Murgia Messapica* v

Commission [1994] ECR II-361, paragraph 67). In the present case, however, the applicant has not shown or does not claim that the Council and the Commission had given it precise assurances as regards the content of the fishing agreement concluded between the Community and Senegal and its protocols. Consequently, the Council and the Commission cannot be accused of having acted in disregard of the applicant's legitimate expectations in concluding that fishing agreement and its protocols.

42 Moreover, on the assumption that the applicant's argument seeks to demonstrate that, in concluding the fishing agreement in question and its protocols, the Council and the Commission acted in disregard of its legitimate expectation that that agreement and its protocols would be in conformity with the principles of good administration and the exercise of care, that argument is indissociable from the applicant's arguments relating to breach of those principles.

43 In so far as the applicant's argument refers to the fishing licence issued to it, the Court finds that this argument is indissociable from the second plea.

44 As regards the principle of legal certainty, it must be observed that the dispute between Guinea-Bissau and Senegal did create some uncertainty for operators fishing in the disputed waters. However, that uncertainty was not attributable to the agreements and protocols which the Community concluded but to a dispute for which the Community is not responsible (see paragraphs 1 to 4 and 37 and 38 of this judgment). In such circumstances, no fault can be found with the Council and the Commission for not having given up the benefits which conclusion of the fishing agreements in question could bring to the Community, especially since Community fishermen were in a position to avoid the damaging consequences of the situation of uncertainty thus created. It was for the master of the vessel to determine precisely his position at sea. If his intention was to fish in the disputed waters,

the master had the possibility of applying in advance for a licence from each of the States concerned so as to avoid reprisals by one of them, provided that compliance was shown, if appropriate, for the provisions laid down by the Protocols concluded by the Community on the employment of nationals of the two States in question on his vessel, which, incidentally, played no material part in this case.

45 It must be concluded that, in taking into consideration the advantages of concluding the agreements in question and the possibilities for traders to avoid any drawbacks, the Community did not infringe the principle of legal certainty.

46 It follows from the foregoing that in negotiating, proposing and adopting Regulations Nos 2212/80 and 420/91, neither the Council nor the Commission infringed higher-ranking rules of law protecting the applicant and that the first plea cannot therefore be upheld.

47 It follows that the application must be dismissed in so far as it is directed against the Council.

The second plea: liability of the Commission arising from the omission to inform the applicant about the dispute

Arguments of the parties

48 The applicant maintains that the Commission had the duty to inform it of the existence of a dispute between Guinea-Bissau and Senegal, of the written communi-

cation of 2 August 1989 and the Note Verbale of 11 May 1990 in which Guinea-Bissau had, in the applicant's view, threatened to seize any vessel fishing in the contested waters without a Guinea-Bissau licence, and, finally, of the boarding of three Soviet fishing vessels by Senegal. Consequently, it considers that the defendant manifestly and seriously disregarded the limits of its discretion and thus committed a sufficiently clear infringement of a superior rule of law protecting individuals, namely general principles of international law, and more particularly the principle of exercising care when concluding international agreements.

49 The applicant states that the damage which it has thus suffered goes beyond the bounds of the economic risks inherent in activities in the fisheries sector and refers *inter alia* to the judgment in the case of *Mulder and Others* v *Council and Commission*, cited above, paragraph 13.

50 In its reply, the applicant repeats that no one drew its attention to the risks which it was running in fishing in the zone in question. It rejects the possibility of any joint liability, pointing out that the judgment of the Bissau People's Court makes no mention of an admission by the master and that the assessment of his culpability is irrelevant in this case. The judgment given against the master is one of expediency, serving to reinforce the claims of Guinea-Bissau. That is why the applicant did not lodge an appeal against it. Such an appeal would have prolonged the vessel's arrest without the master having the slightest chance of being acquitted, since his acquittal would have called in question the merits of Guinea-Bissau's border claims.

51 The applicant maintains that if it had known of the dispute between Senegal and Guinea-Bissau its vessel would not have entered the disputed waters and it would have attempted to obtain a fishing licence pursuant to the agreement concluded

between the Community and Guinea-Bissau. It points out that this step was recommended by the competent Greek authorities after the seizure of its vessel.

52 The applicant also states that, as from 11 May 1990 — the date on which the Embassy of Guinea-Bissau sent Note Verbale No 447/CIJ/90 — the Commission ought to have immediately taken all possible measures to inform all Community vessels to which it had issued fishing licences, in accordance with the EEC-Senegal agreement, so as to enable them to take themselves the steps which were needed.

53 The applicant states that it is clear from a telegram of 13 June 1990 from the Commission's Director General for Fisheries that the Commission was aware of the Note Verbale of 11 May 1990. In its view, it is also clear from a telex from the Greek Ministry of 21 June 1990 that the Commission was aware of it even before 14 May 1990.

54 The applicant concludes that, in omitting to inform it, the Commission showed complete indifference, lack of care and negligence. If the Commission — acting in accordance with the principle of good administration — had immediately informed its vessel, which had only left port the previous day, it would not have fished in the waters in dispute and its vessel would not have been boarded.

55 The Commission repeats its argument that the existence of the dispute between Senegal and Guinea-Bissau, which dates back to 1960 and has been the subject of arbitration awards and judgments, could not have been unknown to careful operators who have being carrying on their fishing activities in those waters practically without interruption since 1981. At the hearing the Commission added that the fact that no Community vessel, except for the applicant's, has been boarded since such agreements came into being constitutes irrefutable proof that the dispute was a matter of common knowledge.

56 The Commission points out that Guinea-Bissau's written communication of 2 August 1989 was couched in general terms and did not at that time contain any threat of the possible adoption of unilateral measures. The communication was sent to all the diplomatic delegations of the Member States, which means that those concerned were also informed by their national administrations.

57 It states that it received Note Verbale No 447/CIJ/90 of 11 May 1990 on 28 May 1990, fourteen days after the 'Theodoros M' was boarded.

58 The Commission points out that it had neither the means nor the duty to inform each shipowner individually of the risk which it was running: it was for national administrations to inform their nationals about it.

59 The Commission also states that other shipowners took the care of obtaining fishing licences from the two countries concerned and that those which preferred to fish in Senegal systematically avoided the disputed zone.

60 The Commission considers that it is impossible for the applicant to have missed the report that four vessels belonging to the Senegalese group 'Adrien', with 76 member of crew on board, were boarded for the same reasons by the Guinea-Bissau authorities on 1 January 1990.

61 Finally, at the hearing the Commission advanced a new factual argument concerning the precise point in the disputed zone at which the vessel was boarded. According to the Commission, that point was only 1.5 or 2 miles from the limits of the disputed zone, which is very close to the undisputed Senegalese maritime zones. It considers that it follows that, by his statements, the master admitted that he entered the disputed zone in error. He therefore committed an error of navigation.

Findings of the Court

62 First, in negotiating the agreement and the related protocol and in not excluding the disputed waters from the agreement and the protocol, the Commission did not infringe a higher-ranking rule of law for the protection of individuals.

63 However, the question to be examined is whether, from the administrative point of view, the Commission committed a fault of such a nature for the Community to incur liability by not protecting Community vessels fishing in the disputed zone on the basis of licences issued through the Commission pursuant to agreements concluded by the Community. Fishing licences are in fact applied for on behalf of the shipowner and issued on behalf of Senegal through the intermediary of the Commission (see the Annex to the Protocol of 4 February 1991 concerning the conditions governing fishing activities in Senegal's fishing zone by vessels flying the flag of a Member State of the Community, point A). The applicant's licence was therefore issued to it through the intermediary of the Commission Delegation in Senegal. Consequently, contrary to what the Commission contends, its delegation was in a position to attach to each licence which it sent out a note warning the licence holder of the risks of fishing in the disputed zone. In this regard, it cannot object that such a warning could not have been framed without offending the sensitivity of the two States in question. The Commission, as an institution, was in a position to word such a warning in sufficiently neutral and diplomatic terms in order to avoid taking a position in the dispute between those States.

64 Furthermore, if the Commission had considered it inappropriate to attach such notes to licences, it could have asked the Member States themselves to inform the persons concerned of the risks of fishing in the waters in dispute between the two States in question, as in fact was done by the Greek Government after the applicant's vessel was boarded (see paragraph 14 above).

65 On the assumption that the Commission did in fact infringe a duty to provide information, the question to be examined is whether such an infringement caused damage. If the master of the vessel had known about the dispute at the time when his vessel was boarded, the fact that the Commission had not informed him of the dispute could not have contributed in any way to the causing of the alleged damage.

66 With regard to that question, the Council and the Commission contend that it was clear in particular from the judgment of the People's Court of Bissau that the master knew about the dispute between Guinea-Bissau and Senegal at the time when his vessel was boarded. In its reply, the applicant disputed that contention but without specifically explaining what the master did in fact know. It was for that reason that the Court asked the applicant, by a measure of organization of procedure, to adopt a precise position on the factual findings made by the People's Court of Bissau relating to what the master knew. The applicant's reply was again ambiguous and that ambiguity was not dispelled during the oral procedure. Finally, the applicant did not call the master as a witness in order to establish that, at the time of the material events, he had no knowledge of the dispute between Guinea-Bissau and Senegal.

67 It must be added that, in response to a question from the Court asking it from which time the master had been fishing in Senegalese waters, the applicant replied that this question was not decisive since the master should have been able to rely on the responsible Community departments. Whatever the extent of his knowledge, he could not call in question the validity of 'the Community authorization' on the basis of which he acted. The Court finds that this reply is once again characterized by the same ambiguity as that found in the previous paragraph.

68 Although the findings made by the People's Court of Bissau may be explained, as the applicant states, by the latter's tactic of not allowing the proceedings before that

court to drag on, account must also be taken of the fact that before the incident in question the Senegalese authorities had boarded a number of vessels. Given the Commission's assertions that this event and the dispute between the two republics were known about in the circles concerned, the applicant has not, in spite of a measure of organization of procedure, explained what its master specifically knew, nor has it called witnesses, such as the master, to controvert the Commission's assertions even though they related to the applicant's own case.

69 In view of those circumstances, the master of the applicant's vessel must be considered to have known about the dispute between Guinea-Bissau and Senegal over the zone in question and about the risks which he ran of being boarded there by one of the two republics, without its being necessary for the Court of its own motion to call the master as a witness.

70 The Court considers that, although the master of the vessel was in fact aware that the zone in question was disputed by the two republics, the boarding of his vessel can be explained only by his deliberate decision to fish there at his own risk or by a navigational error which caused him to fish there without his realizing it.

71 In either case, the Commission's failure to inform the applicant of the dispute between the two States in question did not cause the alleged damage.

72 It follows that the alleged damage was not caused by the Commission's conduct (see, for example, the judgments of the Court of Justice in Case 169/73 *Compagnie Continental France* v *Council* [1975] ECR 117, paragraphs 22 and 23, 28 and 32 and in Case 26/81 *Oleifici Mediterranei* v *EEC* [1982] ECR 3057, paragraphs 23 and 24).

73 Consequently, the second plea is unfounded.

The third plea: liability of the Commission arising from failure to request urgent consultations with the Guinea-Bissau authorities

Arguments of the parties

74 The applicant maintains that, pursuant to point K of the Annex to the Protocol of 25 April 1990, the Commission ought to have sought urgent consultations with the Guinea-Bissau authorities in order to request the immediate lifting of the unlawful arrest of its vessel and its immediate release, which it could have easily secured. Instead of doing that, it remained passive, indifferent, negligent and inactive, which had the effect of prolonging the vessel's arrest for two and a half months. In so acting, the Commission infringed the Protocol of 25 April 1990 and acted in breach of its duty to exercise care, thus incurring liability towards the applicant.

75 In the reply, the applicant adds that, although it secured its vessel's release, it was after having paid the amount necessary for that purpose, without any intervention by the Commission.

76 The Commission replies that its delegation in Bissau had intensive consultations in order to facilitate the vessel's release and that it thus more than satisfied its obligations under the agreements in force. One of its representatives was present at the trial and after 15 May 1990 made several approaches to the Government and President of the Republic of Bissau. The Commission therefore considers that it fulfilled its obligations to seek urgent consultations.

Findings of the Court

77 The Court finds that at no stage in the proceedings has the applicant specifically challenged the Commission's assertions relating to the various steps which it took in support of the applicant's interests (see pages 8 and 9 of the defence) and that there is no reason to doubt that the Commission Delegation in Guinea-Bissau fulfilled its obligations under point K of the annex and its duty to provide diplomatic protection to the master and the applicant.

78 Consequently, the third plea cannot be accepted.

The fourth plea: liability of the Commission arising from an omission to request the fixing of a bank security

Arguments of the parties

79 The applicant maintains that the Commission was bound, under point K of the Annex to the Protocol of 25 April 1990, to request provision of a bank security in order to obtain the release of its vessel. In not acting in accordance with its obligations the Commission committed a fault giving rise to the damage suffered by the applicant. It explains that it does not criticize the Commission for not having itself provided such a security but only for not having requested the fixing of such security pursuant to the Protocol of 25 April 1990.

80 The Commission states that it does not take the step of providing a bank security unless this is absolutely impossible for the person concerned, for example, if there

is no representation in the country in question. In the present case, a representative of the company 'Somecom' acting for the applicant was present in Bissau after 17 May 1990. The following day, the master stated that he had no need of a lawyer since he was represented in Guinea-Bissau by the company Semapesca. It adds that it does not have financial means to provide bank securities in favour of private undertakings and that it has no authority to approach banks in order for them to act as sureties.

81 In its reply, the applicant adds that the company Sorecom had power only to deal with financial matters, to the exclusion of any other acts of representation.

Findings of the Court

82 It must be stated that provision of a bank security, provided for by point K of the Annex to the Protocol of 25 April 1990, is a discretionary matter for the Guinea-Bissau court seized of the case. It may be requested either by the owner of the vessel or by the Community.

83 The Commission was therefore right in contending that it was obliged to lodge a request for the fixing of a bank security only if the company subject to the constraint measure is not capable of doing this itself.

84 The applicant was represented on the spot by a company ('Somecom' or 'Sorecom') and although the lodging of a request for the fixing of a bank security exceeded that company's authority, the applicant could have given it the necessary powers to lodge such a request. Consequently, the Commission Delegation was not obliged to lodge such a request.

85 It follows that the Commission did not act in breach of its duty to provide diplomatic protection.

86 It follows from the foregoing that the four pleas directed against the Commission are unfounded.

87 Consequently, the action must also be dismissed in so far as it is directed against the Commission.

Costs

88 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for. Since the applicant has been unsuccessful, the Council's and Commissions's claims must be upheld and the applicant ordered to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber)

hereby:

1. Dismisses the application;

2. Orders the applicant to pay the costs.

Cruz Vilaça Kirschner Kalogeropoulos

Delivered in open court in Luxembourg on 6 July 1995.

H. Jung J. L. Cruz Vilaça

Registrar President