

- meet urgent needs of conservation of resources in fish, submitted to the Council proposals which, although they were not adopted by the Council, represent the point of departure for concerted Community action.
4. In pursuance of Article 7 of the EEC Treaty Community fishermen must have, subject to exceptions duly prescribed, equal access to the fish stocks coming within the jurisdiction of the Member States. The Council alone has the power to determine the detailed conditions of such access in accordance with the procedures laid down by the third subparagraph of Article 43 (2) of the Treaty and Article 102 of the Act of Accession. This legal situation cannot be modified by measures adopted unilaterally by the Member States.
  5. In a situation characterized by the inaction of the Council and by the maintenance, in principle, of the conservation measures in force at the expiration of the period laid down in Article 102 of the Act of Accession, the Council Decision of 25 June 1979 and the parallel decisions, as well as the requirements inherent in the safeguard by the Community of the common interest and the integrity of its own powers, impose upon Member States not only an obligation to undertake detailed consultations with the Commission and to seek its approval in good faith but also a duty not to lay down national conservation measures in spite of objections, reservations or conditions which might be formulated by the Commission.
  6. In order to meet the requirements of the decisions of the Council and of the procedure fixed by the Hague Resolution the consultation to be engaged in by the government of a Member State must, prior to the adoption of conservation measures, allow the Commission to weigh up all the implications of the provisions proposed and to exercise properly the duty of supervision devolving upon it in pursuance of Article 155 of the EEC Treaty.

In Case 804/79

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Advisers, Donald W. Allen and John Temple Lang, acting as Agents, with an address for service in Luxembourg at the office of its Legal Adviser, Mario Cervino, Jean Monnet Building, Kirchberg,

applicant,

supported by

FRENCH REPUBLIC, represented by Gilbert Guillaume, Director of Legal Affairs at the Ministry of Foreign Affairs, acting as Agent, and for the

purposes of the written procedure by Philippe Moreau-Defarges, Adviser at the Directorate for Legal Affairs at the Ministry for Foreign Affairs, acting as Joint Agent, with an address for service in Luxembourg at the Embassy of the French Republic,

and

IRELAND, represented by Louis J. Dockery, Chief State Solicitor, acting as Agent, assisted, for the purposes of the oral procedure, by James Lynch, Assistant Chief State Solicitor, and by Declan N. C. Budd, Barrister, with an address for service in Luxembourg at the Irish Embassy,

interveners,

v

UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND, represented by R. D. Munrow, Assistant Treasury Solicitor, acting as Agent, assisted by Lord Mackay of Clashfern, QC, and Peter G. Langdon-Davies, Barrister of the Inner Temple, with an address for service in Luxembourg at the Embassy of the United Kingdom,

defendant,

APPLICATION for a declaration that, by adopting and applying in 1979 certain national measures relating to sea fisheries, the United Kingdom has failed to fulfil its obligations under the EEC Treaty,

## THE COURT

composed of: J. Mertens de Wilmars, President, P. Pescatore, Lord Mackenzie Stuart and T. Koopmans (Presidents of Chambers), A. O'Keefe, G. Bosco, A. Touffait, O. Due and U. Everling, Judges,

Advocate General: G. Reischl  
Registrar: A. Van Houtte

gives the following

## JUDGMENT

## Facts and Procedure

The facts of the case, the course of the procedure and the submissions and arguments of the parties may be summarized as follows:

## I — Facts

On 20 October 1970 the Council of the European Communities adopted, pursuant in particular to Articles 42 and 43 of the EEC Treaty, Regulation (EEC) No 2141/70 laying down a common structural policy for the fishing industry (Official Journal, English Special Edition 1970 (III), p. 703) and Regulation (EEC) No 2142/70 on the common organization of the market in fishery products (Official Journal, English Special Edition 1970 (III), p. 707).

Articles 98 to 103 of the Act concerning the Conditions of Accession and the Adjustments to the Treaties, annexed to the Treaty of 22 January 1972, known as "the Accession Treaty", contain provisions relating to fisheries. In particular, Article 102 provides that the Council, acting on a proposal from the Commission, shall determine, from the sixth year after accession at the latest, conditions for fishing with a view to ensuring protection of the fishing grounds and conservation of the biological resources of the sea.

On 19 January 1976, the Council adopted Regulation (EEC) No 100/76 on the common organization of the market in fishery products (Official Journal L 20, p. 1) and Regulation (EEC) No 101/76 laying down a common structural policy for the fishing

industry (Official Journal L 20, p. 19). The first of those regulations repeals Regulation (EEC) No 2142/70 and the second regulation repeals Regulations (EEC) No 2141/70.

Article 1 of Regulation (EEC) No 101/76 provides as follows:

"Common rules shall be laid down for fishing in maritime waters and specific measures shall be adopted for appropriate action and the coordination of structural policies of Member States for the fishing industry to promote harmonious and balanced development of this industry within the general economy and to encourage rational use of the biological resources of the sea and of inland waters".

Under Article 2 (1):

"Rules applied by each Member State in respect of fishing in the maritime waters coming under its sovereignty or within its jurisdiction shall not lead to differences in treatment of other Member States.

Member States shall ensure in particular equal conditions of access to and use of the fishing grounds situated in the waters referred to in the preceding subparagraph for all fishing vessels flying the flag of a Member State and registered in Community territory".

Article 2 (2) of Regulation (EEC) No 101/76 provides that Member States must notify other Member States and the Commission of the existing laws and administrative rules and regulations in respect of fishing in their maritime waters and those rules arising out of the

duty to ensure equal conditions of access to and use of the fishing grounds; under Article 3, Member States must notify other Member States and the Commission of any alterations they intend to make to their fishery rules.

Article 4 of Regulation No 101/76 provides that:

“Where there is a risk of over-fishing of certain stocks in the maritime waters referred to in Article 2, of one or other Member State, the Council, acting in accordance with the procedure provided for in Article 43 (2) of the Treaty on a proposal from the Commission may adopt the necessary conservation measures.

In particular, these measures may include restrictions relating to the catching of certain species, to areas, to fishing seasons, to methods of fishing and to fishing gear”.

At its meeting on 30 October 1979 in The Hague the Council drew up and formally adopted on 3 November 1976 a resolution that the Member States would by concerted action extend as from 1 January 1977 their fisheries jurisdiction to 200 miles off their North Sea and North Atlantic coasts.

On the same occasion, the Council agreed (Annex VI to the Resolution) to a Commission declaration (hereinafter referred to as “the Hague Resolution”) worded as follows:

“Pending the implementation of the Community measures at present in preparation relating to the conservation of resources, the Member States will not take any unilateral measures in respect of the conservation of resources.

However, if no agreement is reached for 1977 within the international fisheries

commissions and if subsequently no autonomous Community measures could be adopted immediately, the Member States could then adopt, as an interim measure and in a form which avoids discrimination, appropriate measures to ensure the protection of resources situated in the fishing zones off their coasts.

Before adopting such measures, the Member State concerned will seek the approval of the Commission, which must be consulted at all stages of the procedures.

Any such measures shall not prejudice the guidelines to be adopted for the implementation of Community provisions on the conservation of resources.”

On 18 February 1977, the Council adopted Regulation (EEC) No 350/77 laying down certain interim measures for the conservation and management of fishery resources (Official Journal L 48, p. 28).

At its meeting on 30 and 31 January 1978, the Council reached agreement on the following declaration (Official Journal C 154, p. 5):

“The Council failed to reach agreement at this meeting on the definition of a new common fisheries policy but agreed to resume examination of these matters at a later date. Pending the introduction of a common system for the conservation and management of fishery resources, all the delegations undertook to apply national measures only where they were strictly necessary, to seek the approval of the Commission for them and to ensure that they were non-discriminatory and in conformity with the Treaty”.

On 19 December 1978, the Council adopted a decision “under the Treaties, concerning fishery activities in waters under the sovereignty or jurisdiction of Member States, taken on a temporary

basis pending the adoption of permanent Community measures”.

By that decision, the Council, pending the conclusion of an agreement on community measures for the conservation and management of fishery resources and related matters and in view both of Article 102 of the Act of Accession and of the need to protect the biological resources and to maintain suitable relations with third countries in fisheries matters, adopted interim measures applicable until a definitive agreement had been reached or until the end of March 1979 at the latest. Those interim measures were as follows: the Member States were to conduct their fisheries in such a way that the catches of their vessels during the interim period took into account total allowable catches (TACs) submitted by the Commission to the Council and the part of the TACs made available to third countries under agreements or arrangements made with them by the Community. The catches taken in the interim period were to be offset against the allocations eventually decided upon by the Council for 1979.

As regards technical measures for the conservation and surveillance of fishery resources, Member States were to apply the same measures as they applied on 3 November 1976, and other measures taken in accordance with the procedures and criteria of Annex VI of the Council Resolution of 3 November 1976 (the Hague Resolution).

Identical interim measures were once more adopted by the Council by Decision 79/383 of 9 April 1979 (Official Journal L 93, p. 40), then by Decision 79/590 of 25 June 1979 (Official Journal L 161, p. 46); the interim measures which form the subject-

matter of the latter decision were applicable until 31 October 1979 at the latest.

Before this, by a letter of 21 March 1979, the Government of the United Kingdom had informed the Commission that in the absence of Community agreement beforehand, the United Kingdom intended to adopt several national measures relating to sea fisheries with effect from 1 June, and sought approval of those measures under the Hague Resolution. Those measures concerned more particularly the increase in certain fishing areas of the mesh size for whitefish and nephrops fishing, the fixing of a minimum landing size for certain species of fish, including whiting, the laying down of a permitted percentage of by-catches in nephrops fishing and the fixing of a minimum landing size for nephrops.

After a voluminous exchange of correspondence and several consultations, the Commission received official notification from the Government of the United Kingdom on 19 June 1979 of five draft statutory instruments, and on 29 June 1979 of a sixth draft statutory instrument, replacing one of the first five, relating to the sea fisheries sector, which were to come into force on 1 July 1979, in spite of the Commission's objections. The Commission was also notified at the same time of certain problems raised by the application of the licensing system for herring fishing and the scheme for the management of herring resources in the waters of the Isle of Man and Northern Irish Sea.

The statutory instruments contested by the Commission, as regards both

national powers to adopt them and as regards several of their provisions and the detailed rules for their adoption were as follows: the Fishing Nets (North-East Atlantic) (Variation) Order 1979, Statutory Instrument No 744, the Immature Sea Fish Order 1979, Statutory Instrument No 741, the Immature Nephrops Order 1979, Statutory Instrument No 742, the Nephrops Tails (Restrictions on Landing) Order 1979, Statutory Instrument No 743, the Sea Fish (Minimum Size) Order (Northern Ireland) 1979, replaced, on 29 June 1979, by the Sea Fish (Minimum Size) (Amendment) Order (Northern Ireland) 1979, Statutory Rules of Northern Ireland No 235.

(a) The Fishing Nets (North-East Atlantic) (Variation) Order 1979 imposes, as regards fishing for protected species of whitefish in Region 2 of the North-East Atlantic Fisheries Commission, except the Irish Sea, a minimum mesh size of 75 mm for trawl nets made of single twine and 80 mm for such nets made of double twine, whilst the existing North-East Atlantic Fisheries Commission regulations provide for a mesh size of 70 and 75 mm respectively.

The same order increases the minimum mesh size for nephrops fishing from 55/60 mm to 75 mm for trawl nets made of double twine and 70 mm for trawl nets made of single twine in the whole of the North-East Atlantic Fisheries Commission Region 2. It fixes the maximum by-catch of protected whitefish species at 50% and also contains certain technical measures relating to the structure of the nets.

(b) The Immature Sea Fish Order 1979 fixes a minimum landing size for various species of fish. The provisions of that order are applicable to all fishing boats

operating within United Kingdom fishery limits; an exemption is provided for as regards by-catches in industrial fishery.

(c) The Immature Nephrops Order 1979 fixes a minimum landing size of 25 mm, measured by the length of the carapace, which corresponds to a total length of 86 mm, for nephrops landed in the United Kingdom, and lays down detailed rules for that measurement; it prohibits foreign fishing boats from carrying on board in United Kingdom waters nephrops of less than the size laid down in that order.

(d) The Nephrops Tails (Restrictions on Landing) Order 1979 prohibits the landing of nephrops tails except where the quantity consists of not more than 290 tails per kilogram of the landed weight.

(e) The Sea Fish (Minimum Size) (Amendment) Order (Northern Ireland) 1979 fixes, in Irish waters, the minimum landing size for whiting at 27 cm and for nephrops at 25 mm carapace length.

The agreements envisaged in 1979 between the Governments of the United Kingdom and of the Isle of Man concerning the conditions for herring fishing in the Northern Irish Sea within the context of the Herring (Irish Sea) Licensing Order 1977, Statutory Instrument No 1388, and the Herring (Isle of Man) Licensing Order 1977, Statutory Instrument No 1389, discriminated, according to the Commission's information, against Irish fishermen, in particular in the licensing system authorizing fishing within the 12-mile zone around the Isle of Man and the landing of fish on that island, and contained quantitative restrictions in the form of quotas per fisherman and per fishing day.

After a further exchange of correspondence and further consultations, the Commission, by a letter of 6 July 1979, initiated against the United Kingdom the procedure laid down in Article 169 of the EEC Treaty. In that letter it complained that the United Kingdom had failed to fulfil its obligations under Community law by adopting the contested national fisheries measures; consequently, the Government of the United Kingdom was requested to submit its observations before 20 July 1979.

By a letter of 31 July 1979, the Government of the United Kingdom submitted its observations on its alleged failure to fulfil its obligations under the Treaty.

Since these observations did not satisfy the Commission, it issued on 3 August 1979 the reasoned opinion provided for in Article 169 of the EEC Treaty. In that opinion it requested the Government of the United Kingdom to take, within 45 days, the necessary steps to bring to an end the infringements of Community law consisting, in its view, in the application of the statutory instruments relating to sea fisheries brought into force on 1 July 1979; the Commission reserved to itself the right to take a final position shortly on the arrangements for herring fishing in the waters of the Isle of Man and Northern Irish Sea.

After further consultations, the Commission issued on 2 October 1979 a second reasoned opinion in which the Government of the United Kingdom was requested to bring to an end the infringements of Community law consisting in the application of certain measures affecting herring fishing in the waters of the Isle of Man and Northern Irish Sea.

## II — Written procedure

By application lodged on 13 November 1979, the Commission, pursuant to the second paragraph of Article 169 of the EEC Treaty, brought before the Court of Justice the alleged failure of the United Kingdom to fulfil its obligations in the sea fisheries sector.

By orders of 12 December 1979 and 26 March 1980, the Court permitted the French Republic and Ireland to intervene in support of the Commission's submissions.

The written procedure followed the normal course.

The Court, after hearing the report of the Judge-Rapporteur and the views of the Advocate General, decided to open the oral procedure without any preparatory inquiry. However, it requested the Commission on 10 July 1980 to specify with regard to each of the measures forming the subject-matter of its application the submissions on which it requires the Court to rule and, on 7 October 1980, requested the Commission and the Government of the United Kingdom to reply in writing to several questions. Those requests were complied with within the prescribed periods.

## III — Conclusions of the parties

The *Commission*, in the last part of its conclusions, which were made specific at the request of the Court, concludes that the Court should:

- Declare that the United Kingdom has failed to fulfil its obligations under the EEC Treaty and the Hague Resolution by adopting and applying, in 1979, the Fishing Nets (North-East Atlantic) (Variation) Order, the Immature Sea Fish Order, the Immature Nephrops Order, the Nephrops Tails (Restrictions on

Landing) Order, the Sea Fish (Minimum Size) (Amendment) Order (Northern Ireland) and a licensing system or management scheme for herring fishing in the waters of the Isle of Man and the Irish Sea;

- Order the United Kingdom to pay the costs.

The *Government of the French Republic*, intervener, claims that the Court should rule that the United Kingdom, by unilaterally enacting the fishery measures of 1 July 1979, has failed to fulfil its obligations under Community law.

The *Government of Ireland*, intervener, claims that the Court should rule that, in introducing and applying the measures for 1979 which are the subject-matter of the Commission's application, the United Kingdom has failed to fulfil its obligations under the Treaty.

The *Government of the United Kingdom* contends that the Court should rule that it has not failed to fulfil its obligations under the EEC Treaty in the matters which form the subject-matter of the Commission's application.

#### IV — Submissions and arguments of the parties in the course of the written procedure

The *Commission* puts forward objections to the measures in question from two points of view: on the one hand, generally, as regards the competence of Member States to adopt after 31 December 1978 autonomous measures in

the fisheries sector, and on the other, as regards the various measures specifically, in relation to the procedure and to several of the substantive provisions of those measures.

The *Government of the French Republic* contests the United Kingdom's power to take the unilateral measures complained of and considers that the decision relating to the mesh size of the nets for nephrops fishing is premature, unnecessary, excessive and discriminatory.

The *Government of Ireland* considers that the United Kingdom has not, in respect of any of the measures in question, complied with its obligations under the Hague Resolution and that the measures applied to fishing in the waters of the Isle of Man and the Northern Irish Sea are discriminatory.

The *Government of the United Kingdom*, for its part, is of the opinion that the Member States have retained the power to adopt in 1979 national measures in the sea fisheries sector, that those measures were not subject to the authorization of the Commission, that the measures in question were adopted according to the applicable procedural rules and that they are not contrary to substantive Community law.

#### A — *The problem of competence*

The *Commission* maintains that since the expiry of the transitional period referred to in Article 102 of the Act of Accession, the Member States no longer have power to take conservation measures in the fisheries sector and that such measures may only validly be adopted by the Member States if they have previously been authorized by the Community.



(a) The Community has, under the EEC Treaty itself, competence in fisheries matters; its powers in that sector do not derive from Article 102, which has some other purpose. Since Article 102 cannot be without legal effect, its effect must be to bring to an end the powers of Member States to adopt measures "with a view to ensuring protection of the fishing grounds and conservation of the biological resources of the sea", in so far as those powers had not ended at an earlier date as a result of the adoption of Community fishery measures.

(b) This opinion is based on the case-law of the Court of Justice, in particular the judgments of 14 July 1976 (Joined Cases 3, 4 and 6/76, *Kramer and Others* [1976] ECR 1279), 16 February 1978 (Case 61/77, *Commission v Ireland* [1978] ECR 417) and 3 July 1979 (Joined Cases 185 to 204/78, *Van Dam and Others* [1979] ECR 2345). It follows in particular from those judgments that the competence of the Member States in relation to conservation measures is only of a transitional nature and that they were only permitted to take such measures at national level as long as the transitional period laid down by Article 102 of the Act of Accession continued to run and as long as the Community had not yet fully exercised its powers in the matter. The words used by the Court show clearly that it paid particular attention to the date marking the end of the competence of the Member States. The rule about the temporary competence of Member States is additional to and separate from the rule that national measures enacted under Member States' powers have to comply with Community law; it is also separate from the normal rule that when the

Community has legislated comprehensively on a particular topic, Member States no longer have power to legislate on the same topic.

(c) The statement of the Court that Member States have, at the latest within the period laid down by Article 102 of the Act of Accession, a duty to use all political and legal means to ensure the participation of the Community in the international fisheries conventions implies that after that date Member States no longer have the necessary power to participate themselves.

(d) The fact that the Hague Resolution of 1976 prohibits, for a short period, Member States from adopting unilateral measures for the conservation of resources, which is at first sight surprising, seems natural when Article 102 is interpreted as depriving Member States of their entire legislative powers in fisheries matters from a date only just over two years later. Apart from the question of the date on which the period laid down in Article 102 expires, which has in the meantime been decided by the Court, the wording of that provision is unambiguous: after the date laid down therein, the Council, and only the Council, has power to lay down the conditions for fishing, for protection of the fishing grounds and conservation of the biological resources of the sea.

(e) The substantial arguments for treating the fisheries sector in this way

are to be found in the real nature of this activity: in the sector of the conservation of the biological resources of the sea, worthwhile results can only be attained thanks to the cooperation of all the Member States and through a system of rules binding on all the States concerned, including non-member countries.

The links between the internal and external powers of the Community are particularly close in the fisheries sector. The great proportion of Community fishery resources has come within Community jurisdiction because of the Community decision to extend fishing limits to 200 miles. In no other area of law is the jurisdiction of Member States based so completely on a Community measure; in no other area have measures adopted by the Community such an immediate and direct impact on the rights of citizens of non-member countries and on the relations of the Community with those countries.

(f) The Court has ruled that the Council's power to adopt conservation measures derives from the EEC Treaty, in particular from Article 43. Article 102 of the Act of Accession was not intended to be the basis of the Council's power in this sector; it was intended to be an invitation to the Council to adopt a common fisheries policy within a certain period. Since such a provision cannot have no legal effects, it means that the action for which it makes provision may

only be taken by the Council and not by Member States.

Since the Member States no longer have competence to adopt national fisheries measures they may adopt them only if they are authorized by the Community to do so. The Council, unable to agree on a Community measure, might be able to agree to authorize national measures; if a particular measure has not been so authorized, the Commission must necessarily have the power under Article 155 in these exceptional circumstances to authorize a Member State to adopt national conservation measures. The Commission's power thus to authorize certain national conservation measures has been recognized by the Decisions of the Council of 19 December 1978, 9 April and 25 June 1979.

(g) As regards the criteria and other procedures applicable, the Commission agrees with the United Kingdom that the Hague Resolution applies and is legally binding. The Commission must be consulted by the Member States concerned at all stages of the procedures; as to the criteria applicable, it follows from the Hague Resolution that the Member States may adopt "as an interim measure and in a form which avoids discrimination, appropriate measures to ensure the protection of resources ..." and from the Council declaration of 31 January 1978 that national measures may only be taken in as far as they are strictly necessary for the conservation and management of fishery resources, are non-discriminatory and in conformity with the Treaty and if the approval of the Commission has been sought beforehand.

The Hague Resolution remains applicable but in a situation substantially changed by the expiration of the period contemplated by Article 102. The legal regime applicable since 1 January 1979 is based on Article 102 and not on a new strict interpretation of the Hague Resolution. In these circumstances, neither the Hague Resolution nor Regulation No 101/76 could have given back to Member States the competence which Article 102 brought to an end.

(h) In the alternative, it is necessary to state that if Member States still have powers in fisheries matters after the date by which the Council should have acted, they have a strict duty to cooperate and they may exercise those powers only with the approval of either the Council or the Commission. This view is based on Article 5 of the EEC Treaty but does not depend on the interpretation of Article 102 which the United Kingdom is unwilling to accept.

Article 102 shows that Member States unanimously agreed that the Council should adopt comprehensive fisheries measures by the end of the period referred to in that article. Since the Council has failed to adopt Community measures, Member States have a duty to cooperate so as to remedy as far as possible the failure of the Council. They have two duties: a duty to take measures on the problems with which the Council should have dealt, in particular urgent conservation problems, and a duty to do

so only with the consent of a Community institution.

If the Council had acted in accordance with Article 102, Member States would incontestably already have lost their powers in fisheries matters; if they now have such powers, they have them only because of the default of the Council, and any national measures are merely a substitute for those measures which should by now have been adopted by the Council. Those national powers cannot be greater than those which the Council would now have; the Member States may therefore in any case only adopt measures proposed or approved by the Commission, just as the Council can adopt only such measures (subject to an exception). If the Member States still have powers in fisheries matters, they may exercise them, because of Article 102, only with the consent of the Commission.

It would be incompatible with Article 5 of the EEC Treaty for Member States to take advantage of the default of the Council to adopt national measures which they would not be able to adopt if the Council had acted in accordance with Article 102 and which *ex hypothesi* are not measures which the Council had agreed to adopt. This reasoning assimilates the need for Commission approval in fisheries matters to the need for Commission approval, by way of a Commission proposal, for most decisions of the Council. In the sector of protection of fishery resources, the measures which the Commission *ex hypothesi* must approve are measures of the same kind which the Commission is and should be proposing to the Council and which the Council should seek to adopt.

(i) Member States have certain possibilities *de jure* and *de facto* to prevent the adoption of Community measures. It would be wrong if a Member State which had unjustifiably obstructed the adoption of Community measures were free, without the consent of the Community institutions, to use powers which, if the Council had acted, it would clearly no longer be able to exercise.

(j) The Council Decision of 25 June 1979 which was in force on the date on which the national measures in question came into operation refers explicitly to Article 102 and supports the Commission's interpretation of that article. Its wording indicates that the Hague Resolution is no longer in force in so far as it recognizes the power of Member States to adopt national conservation measures; that Resolution is in force only in so far as it relates to procedures and criteria. The reference by the Decision of 25 June 1979 only to the procedures and criteria of the Hague Resolution does not make sense except on the Commission's interpretation of Article 102, since it would have been absurd to give Member States greater freedom to adopt national measures than they had previously had under that Resolution as a whole.

The *Government of the French Republic* recalls that the fisheries sector, and more precisely that of the conservation of marine species, indisputably falls within the powers expressly devolved to the Community by the Treaties.

(a) As regards the circumstances in which the Council was obliged to exercise and has exercised Community powers in regard to the conservation of the resources of the sea, a fundamental

distinction must be drawn between the transitional period laid down in Article 102 of the Act of Accession and the following period.

(b) As far as the first period is concerned, it follows clearly from the case-law of the Court that where the Council has refrained from acting, the Member States could until 31 December 1978 take certain national measures for the conservation of species, but that on any view that power came to an end on 1 January 1979. This principle was moreover recognized by the Council itself in the Hague Resolution.

(c) As far as the second period is concerned, the case-law of the Court has established that all national powers in this field came to an end on 31 December 1978. Thereafter the Council alone has power to take measures for the conservation of marine products; moreover, the Council could not restore to the Member States powers which the latter permanently lost at the expiry of the transitional period without infringing the provisions of Article 102.

The Hague Resolution was itself adopted from the same perspective. That Resolution was drawn up "pending the implementation of the Community measures at present in preparation relating to the conservation of resources" and it was never envisaged that its application would be prolonged beyond 31 December 1978, the end of the transitional period.

All national powers in the field of the protection of the fishing grounds and the conservation of the biological resources

of the sea therefore came to an end totally and irreversibly on 31 December 1978.

(d) The interim measures adopted by the Council on 19 December 1978, 9 April, 25 June (and 29 October) 1979 cannot, since all national powers came to an end on 31 December 1978 pursuant to Article 102 and since the Hague Resolution ceased to apply at that date, be interpreted as having the aim not of authorizing Member States to take measures after 31 December 1978 but of crystallizing the measures previously taken by the States; the Member States are obliged to apply after 1 January only those measures in force on 3 November 1976, the date of the adoption of the Hague Resolution, and those duly taken in accordance with that Resolution between 3 November 1976 and 31 December 1978, the date upon which all national powers came to an end. This is the only interpretation compatible with Article 102 as construed by the Court. The interim decisions taken by the Council must, in accordance with the texts of the Treaties, the case-law of the Court and their actual wording, be interpreted as crystallizing decisions and not as decisions delegating or transferring power.

(e) No new technical protective measures may now be taken by the Member States. By adopting the disputed measures the United Kingdom has therefore failed to fulfil its obligations.

The *Government of Ireland*, as regards the competence of a Member State to

take conservation measures in 1979, considers that the position is governed by the Council Decisions of 19 December 1978, 9 April, 25 June (and 29 October) 1979. The interpretation of the powers of the Council in the sphere of fisheries conservation placed upon Article 102 of the Act of Accession by the French Republic is too restrictive and cannot be accepted. Certain circumstances may make it necessary for the Council, even after 31 December 1978, to lay down rules, procedures and criteria for action by individual Member States instead of action by the Council itself. There is no reason why the Council should not authorize Member States, if and in so far as the authorization of the Council to this end may be necessary, to introduce measures of fisheries conservation if the Council considers such a course to be in the best interests of the Community.

In this case, the Court is required to decide whether the United Kingdom's measures for 1979 complied with the interim decisions taken by the Council in 1978 and 1979, including the Hague Resolution, which has not been altered, and other relevant rules of Community law, in particular Article 7 of the EEC Treaty, Article 2 of Regulation No 101/76 and Article 4 of Protocol No 3 to the Act of Accession concerning the Channel Islands and the Isle of Man, Article 3 of Regulation No 101/76 and the provisions of the London Convention of 1964 on the rights of Ireland and Irish fishermen.

The *Government of the United Kingdom* is of the opinion that the Member States have an inherent power and right to take conservation measures, except in so far

as they have limited that right by treaty. These limitations are that the measures must comply with the positive requirements of Community law, notably Regulation No 101/76 and the Hague Resolution, and must not conflict with Community measures taken in that field. Member States are under an obligation to seek the approval of such measures from the Commission, not to obtain the Commission's authorization.

(a) The passing on 31 December 1978 of the date by which, at the latest, the Council is required by Article 102 of the Act of Accession to take Community conservation measures did not of itself affect the power of Member States to take such measures. The power of Member States is only limited to the extent that the Council actually takes such measures.

The matter was in any case at all material times regulated by the express terms of the successive Council Decisions of 19 December 1978, 9 April and 25 June 1979, which expressly authorize such measures.

(b) Article 102 cannot be construed as conferring an exclusive power or competence on the Council to enact conservation measures. It quite clearly requires the Council to exercise its powers by a certain date. Since the Council can only proceed by agreement there is no way of compelling it to comply; Article 102 cannot intend that in default of punctual performance of this obligation by the Council the fish stocks should remain indefinitely without protection.

(c) The Council has not however been completely inactive; without having adopted comprehensive Community conservation measures in accordance with its obligation under Article 102, it has however made a series of decisions declaring its intention of reaching an agreement as early as possible on Community measures for the conservation and management of fishery resources and related matters and meanwhile providing for interim measures until a definitive agreement has been reached.

(d) The legality of the measures taken by the United Kingdom during the validity of the interim measure taken by the Council on 25 June 1979 must be judged by the requirements of that decision, which has exactly the same status and binding force as the Hague Resolution itself; the question therefore is whether the United Kingdom measures were taken "in accordance with the procedures and criteria" of that Hague Resolution.

(e) The Council in no way intended to grant the Commission a power of veto over national conservation measures; it chose to rely on the requirement of the Hague Resolution that Member States must "seek the approval" of the Commission.

(f) The Commission's argument that Article 102 has the effect of bringing to an end the powers of Member States in so far as they had not ended at an earlier date is unsupported. It is not supported by the case-law of the Court of Justice; the Court has not hitherto had to decide what would be the position if the time-

limit set by Article 102 should pass without the Council having complied fully with its duty to take conservation measures.

(g) To state that only the Council has competence does not enable it to be argued that national measures may nevertheless be authorized by the Commission.

In this respect it is necessary first of all to state that in fact the Council has authorized national measures by its decision of 25 June 1979; moreover, Article 155 of the EEC Treaty cannot be interpreted as empowering the Commission to authorize a Member State to take a measure which *ex hypothesi* it had no power to take. In fact the Commission claims a power not to authorize a measure which is not authorized by the Council but to veto a measure which is authorized by the Council.

(h) The reference in the "interim" Decisions of 19 December 1978, 9 April and 25 June 1979 to the procedures and criteria of the Hague Resolution must not be understood as requiring Member States to obtain the authorization rather than to seek the approval of the Commission.

(i) The argument of the French Government that all national powers came to an end on 31 December 1978 is not supported either by the case-law of the Court or by Article 102 of the Act of Accession; it is refuted by the wording of the "interim" decisions and by practice: during 1979, the Member States made at least 25 applications to the Commission for approval of national conservation

measures including one such application by the French Government itself.

(j) The Commission's alternative argument is as fallacious as its original argument: the powers of the Member States have so far been limited only by the terms of the Hague Resolution which only requires them to "seek the approval" of the Commission, not to obtain its consent. The Commission has in no way acquired a power of veto over national conservation measures.

(k) It is quite wrong to request the Court to express an opinion on the conduct of Member States in the performance of their legislative functions; in any case such an examination cannot constitute a ground for conferring a power of veto on the Commission.

#### *B — Procedural rules*

The *Commission* complains, only in the alternative, that the measures in question were adopted in breach of several procedural rules.

(a) Although the Commission asked in April 1979, it did not receive the texts of the five statutory instruments adopted by the United Kingdom until 19 June, three months after first notification and after the date on which they had originally been intended to come into force. A further measure, which was due to come into force and in fact came into force on 1 July 1979, was only notified to the Commission on 29 June 1979. The Government of the United Kingdom did not give any explanation or justification

for this; it therefore clearly failed to fulfil its obligations under the Hague Resolution, according to which it must consult the Commission "at all stages of the procedures".

The complaint that the Commission itself was responsible for the lack of discussion is refuted by the facts.

There is no justification for attempting to make a distinction between "changes in fishing rules" within the meaning of Regulation No 101/76 which must merely be notified and the measures to which the Hague Resolution applies. Although the wording of the Resolution and Article 3 of Regulation No 101/76 is not the same, they do not apply to different categories of measure. The Hague Resolution, according to the case-law of the Court, must be interpreted as referring to all conservation measures.

In any case, less than 48 hours' notice of a change which the United Kingdom intended to make to existing rules is not sufficient to comply with Article 3 of Regulation No 101/76.

(b) The statutory instruments submitted to the Commission in June 1979 contained provisions which were different from those of which it was notified on 21 March.

(c) The Government of the United Kingdom objected at the Council meeting on 25 June 1979 to Community measures *qua* Community measures although it had no objection to a series of national measures having identical

effects. The fact that it refused to adopt as Community measures certain measures to which it agreed fully as a matter of substance is incompatible with the obligations of a Member State under the Treaty, in particular Article 5 thereof.

(d) With one exception, the Government of the United Kingdom refused to modify the measures in question in the light of the Commission's objections. This refusal cannot in this case be objectively justified by the alleged lateness of the request.

(e) The United Kingdom was in breach of its obligations under the Hague Resolution by adopting the measures which it notified in accordance with Article 3 of Regulation No 101/76 but for which it did not seek the Commission's approval.

(f) As a whole, the Government of the United Kingdom failed properly to inform and consult the Commission and to give it adequate time to reach a decision, contrary to Article 5 of the Treaty and the Hague Resolution.

The *Government of the French Republic* claims that the United Kingdom has failed in this case to fulfil its obligations under Article 5 of the Treaty and the Council decisions. On the same assumption, it has also infringed Articles 2 and 3 of Regulation No 101/76 by not notifying the proposed measures to the other Member States in due time.

The *Government of Ireland* also complains that the United Kingdom was in breach in particular of the Hague



Resolution by failing to give information and to cooperate.

adoption of new legislation or of new statutory instruments to control fishing in the sea area in question would have been.

(a) The Government of the United Kingdom initially supplied the Commission only with incomplete information, particularly in the case of the Isle of Man measures; reasonable requests by the Commission for further information were only answered after long delays, in some instances even after the measures in question had been implemented. The general tendency of the United Kingdom's conduct was to regard the procedural obligations imposed by the Council decisions of 1979 and by the more general rules of the Treaty as a series of mere formalities rather than as substantive obligations to cooperate by giving adequate notice and adequate information concerning measures proposed, and by making a genuine effort to reach agreement in advance on such measures which seriously affected the interests of fishermen of other Member States.

(c) In any case, Ireland was not notified in advance by the United Kingdom or Isle of Man authorities of the measures proposed by those authorities for fishing by Irish boats in the "low season" in the water within 12 miles of the Isle of Man coast, either pursuant to Article 3 of Regulation No 101/76 or otherwise.

The *Government of the United Kingdom* contests the procedural infringements complained of.

(b) The argument that some of these measures were merely "changes in fishing rules" rather than measures of fisheries conservation and were not therefore subject to the requirements of the Council decisions and the Hague Resolution cannot be accepted. The measures in question were all taken in connexion with the objective of conservation of fish stocks; the fact that no new legislation or statutory instrument may have been adopted in 1979 for the Isle of Man fishery is irrelevant. The administrative measures taken in 1979 by the United Kingdom and Isle of Man authorities under pre-existing statutory powers were as much subject to the procedures of the Hague Resolution and Article 3 of Regulation No 101/76 as the

(a) The lack of consultation is attributable to the Commission which, instead of accepting the invitation to discuss the proposed measures, asked to see the draft statutory instruments, thus postponing discussion of the proposals until their final form had been decided upon.

In any case, the Commission has no right to see the draft instruments as such; it is entitled to know in sufficient time and in sufficient detail what is proposed and to be consulted at all stages of the procedures. The United Kingdom has fulfilled this requirement fully.

The Commission is setting up two standards: several measures adopted by the other Member States were not notified to the Commission until some

time after they came into force. Moreover, no minimum period of notice has been laid down by Community law.

The Hague Resolution refers to unilateral measures in respect of the conservation of resources.

(b) The differences between the statutory instruments notified to the Commission on 21 March 1979 and those notified in June were very minor.

(c) The reasons why a Member State takes action within the Council, the legislative organ of the Community, do not come within the jurisdiction of the Court.

(d) To air a political grievance before the Court amounts to inviting the Court to interfere with the internal functioning of another Community institution in defiance of the requirements of Article 4 (1) of the EEC Treaty.

In fact, the request to modify its proposals was not made to the Government of the United Kingdom until 27 June 1979, three days before they came into force; that request was belated.

(e) Since the measures in question were changes in fishing rules, not conservation measures, the question of seeking the Commission's approval under the Hague Resolution did not arise.

*C — Certain substantive provisions of the measures in question*

The Commission considers that the United Kingdom measures involve certain substantive infringements of Community law.

(a) The early introduction of an increased minimum mesh size for trawl nets and of a minimum landing size for nephrops was unnecessary and unfair to fishermen. The measures in themselves are not contested; the complaint relates to their premature introduction.

The United Kingdom should have provided for a period of grace of several weeks, giving fishermen a reasonable time to write off and replace nets previously used; the fishermen had legitimate expectations that the existing rules would be maintained. Protection of that legitimate expectation required the grant of a period of grace. By refusing this, the United Kingdom failed in its duty only to take conservation measures which are strictly necessary and to avoid, as it is obliged to do under Article 5 of the EEC Treaty, causing unnecessary and unreasonable inconvenience and loss to fishermen of other Member States, or at least to minimize such inconvenience or loss.

The measures in question gave rise to various incidents: the boarding of several French fishing boats and the institution of criminal proceedings against and conviction of their skippers.

(b) The agreements reached between the Governments of the United Kingdom and of the Isle of Man with regard to the conditions laid down for herring fishing in the Northern Irish Sea made it necessary for fishermen to possess a licence in order to be able to fish within

the 12-mile zone around the Isle of Man; they involved quantitative restrictions in the form of quotas per fisherman and per fishing day; it was possible to limit the number of licences and the landing of fish was reserved to fishermen holding a landing licence which was issued only to holders of a fishing licence.

Irish fishermen were subject to many forms of discrimination compared with United Kingdom and Isle of Man fishermen: they were not informed in good time of the duty to hold a licence; they were not enabled to satisfy that requirement by normal and reasonable means; criteria of "historic interests" were applied to them, obliging them to acknowledge that they had fished without licences in 1977 and 1978 or to reduce their individual claims to an "historic interest" in the fisheries concerned. As a whole, they were victims of very subtle administrative obstructionism.

Even if the Community fishery rules did not apply to the Isle of Man, Article 4 of Protocol No 3 to the Treaty of Accession unequivocally prohibits all discrimination.

The *Government of the French Republic* considers that the measure increasing the minimum mesh size for nephrops fishing nets is incompatible with Community law.

(a) The unilateral introduction by the United Kingdom on 1 July 1979 of a 70 mm mesh size is premature having regard to the conservation needs of the species.

The initial proposals of the Commission envisaged the implementation of such a measure on 1 September 1979; the adoption of the date of 1 July 1979 runs counter to the Council declaration at its meeting on 4 April 1979, is not based on any scientific justification and is in breach of an agreement reached in the Council.

(b) The measures in question create unjustified discrimination between the Member States and between types of fishing.

The abrupt change to a mesh size of 70 mm is such as to accelerate the movement towards progressive substitution of British nephrops fishermen for French fishermen. Since the stock of nephrops is not threatened, the only possible reason for a change to a mesh size of 70 mm is the desire to reduce the by-catches of bottom species; such a reason may be criticized at a scientific level, at a political level and at a legal level.

(c) The unilateral British decision on the mesh size for nephrops fishing is of such a nature as adversely to affect and to jeopardize the formulation of a common fisheries policy.

(d) The measure in question causes serious financial loss to French fishermen, the magnitude of which is such as to encourage fishermen no longer to visit the waters in which they have traditionally carried on their activities in accordance with their historic rights and with Community law. This loss consists of the boarding of boats, the fining of their skippers, the confiscation of gear and the deterrent

effect, the consequences of which are far heavier, on French fishermen who traditionally fish those waters.

The *Government of Ireland*, complains that the measures concerning herring fishing in the waters of the Isle of Man and Northern Irish Sea are discriminatory to Irish fishermen.

The Community rules, including the prohibition on discrimination, apply to the waters within the 12-mile zone of the Isle of Man, if not outside three miles then at least outside six miles from that coast. Moreover, the traditional rights of Ireland and her fishermen under the London Convention of 1964 to fish within a defined area between six and 12 miles off the west side of the Isle of Man have the force of law under the Community Treaties, in particular Article 100 (2) of the Act of Accession. The exercise of the special fishing rights of Ireland is also covered by the "equal treatment" rule in Article 4 of Protocol No 3 to the Act of Accession concerning the Channel Islands and the Isle of Man.

Irish fishermen or their representatives received application forms for fishing in the Isle of Man and Northern Irish Sea fishery, including the zone between six and 12 miles of the Isle of Man coast, only very belatedly, as regards both the low and the high seasons; they were moreover placed in an unfavourable position to establish their "historical interest".

The whole of the licensing system for fishing within the waters adjacent to the Isle of Man in 1979, including the "historic interest" criterion, as that

system was operated by the Isle of Man and United Kingdom authorities, was discriminatory against Irish fishermen.

The *Government of the United Kingdom* considers the substantive infringements complained of to be unfounded.

(a) The increase in the mesh size of the nets for nephrops fishing, of the minimum landing size of nephrops and of the mesh size for fishing for whitefish were justified for good scientific reasons, in particular the recommendations of the International Council for the Exploration of the Sea; the United Kingdom's refusal to agree to the proposed Community regulation which would have delayed the introduction of those measures was amply justified.

Conservation measures decided upon with the aim of increasing yields of fish to all concerned in the long term may in the short term involve temporary losses for fishermen.

To delay the introduction of the measures beyond 1 July 1979 would have caused damage to the stocks and hence to the livelihoods of fishermen; the measures in question were therefore both appropriate and necessary.

The introduction of an interim measure relating to nephrops fishing was not contrary to the Council declaration of 4 April 1979.

The criticisms of the French Government are based on social and economic grounds, whereas the measures in question are based in essence on the scientific recommendations of the International Council for the Exploration of the Sea.

(b) The complaints concerning the issue of licences to Irish boats for herring fishing can only relate to the waters situated between six and 12 miles off the base-lines of the Isle of Man during the 1979 season; the rules of Community law governing fish conservation measures do not apply to those waters, pursuant in particular to the new Article 227 (5) (c) of the EEC Treaty and to Protocol No 3 to the Act of Accession.

No discrimination against Irish fishermen has been shown in this case. The small number of licences granted to Irish fishermen is due to the fact that a small proportion was permissible in accordance with historical criteria.

## V — Oral procedure

The Commission, represented by its Agents, Donald W. Allen and John Temple Lang, the French Republic, represented by its Agent, Gilbert Guillaume, Ireland, represented by Declan N. C. Budd, BL, and the United Kingdom, represented by the Lord Advocate, Lord Mackay of Clashfern, QC, assisted by Peter G. Langdon-Davies and by Mr Cushing as an expert witness, presented oral argument and answered questions put by the Court at the sitting on 9 December 1980.

The Advocate General delivered his opinion at the sitting on 12 February 1981.

## Decision

- 1 By application lodged at the Court Registry on 13 November 1979 the Commission of the European Communities brought an action under Article 169 of the EEC Treaty for a declaration that, by applying in the matter of sea fisheries unilateral measures comprising on the one hand five statutory instruments relating to the mesh of nets and the minimum landing size for certain species and on the other hand a licensing system for fishing in the Irish Sea and the waters round the Isle of Man, the United Kingdom has failed to fulfil its obligations under the Treaty.
- 2 The measures belonging to the first group comprise the following statutory instruments, which were brought into force on 1 July 1979:
  - The Fishing Nets (North-East Atlantic) (Variation) Order 1979, SI No 744;
  - The Immature Sea Fish Order 1979, SI No 741;

- The Immature Nephrops Order 1979, SI No 742;
  - The Nephrops Tails (Restrictions on Landing) Order 1979, SI No 743;
  - The Sea Fish (Minimum Size) (Amendment) Order (Northern Ireland) 1979, SI No 235.
- 3 The provisions applied in the Irish Sea and the waters round the Isle of Man are based on two orders:
- The Herring (Irish Sea) Licensing Order 1977, SI No 1388; and
  - The Herring (Isle of Man) Licensing Order 1977, SI No 1389.

It should be noted that these are the same measures as have already been the subject of the Court judgment of 10 July 1980 (Case 32/79 *Commission v United Kingdom*).

#### History of the dispute

- 4 It is common ground that at the beginning of 1979 the Council, to which the Commission, in pursuance of Article 102 of the Act of Accession, had proposed the adoption of a series of measures for the conservation of fishery resources in the waters under the jurisdiction of the Member States, failed to adopt the necessary provisions. In the circumstances the Council adopted interim measures which, applied for limited periods, were extended from time to time. These Decisions, the wording of which is similar, are dated 19 December 1978 (not published), 9 April 1979, (79/383 (Official Journal L 93, p. 40)) and 25 June 1979, (79/590 (Official Journal L 161, p. 46)). The latter decision, which was applicable at the time of the bringing into force of the five statutory instruments of the first group, is worded as follows:

#### “Council Decision of 25 June 1979

under the Treaties, concerning fishery activities in waters under the sovereignty or jurisdiction of Member States, taken on a temporary basis pending the adoption of permanent Community measures.

The Council intends to reach an agreement as early as possible in 1979 on Community measures for the conservation and management of fishery resources and related matters. Pending its decision in the matter and in view

both of Article 102 of the Act of Accession and of the need to protect the biological resources and to maintain suitable relations with third countries in fisheries matters, the Council, on 19 December 1978 and 9 April 1979, adopted interim measures which were in force from 1 January to 31 March 1979 and from 1 April to 30 June 1979 respectively. Following on from these measures, the Council has decided on the following interim measures which will apply from 1 July 1979 until the Council has reached a definitive agreement or until 31 October 1979, whichever is the earlier.

1. Member States shall conduct their fishery in such a way that the catches of their vessels during the interim period shall take into account TACs submitted by the Commission to the Council in their communications of 23 November 1978 and 16 February 1979 and the part of the TACs made available to third countries under agreements or arrangements made with them by the Community. The catches taken in the interim period will be offset against the allocations eventually decided upon by the Council for 1979.
  
2. As regards technical measures for the conservation and surveillance of fishery resources, Member States shall apply the same measures as they applied on 3 November 1976, and other measures taken in accordance with the procedures and criteria of Annex VI to the Council resolution of 3 November 1976.”
  
5. By a letter of 21 March 1979 the Government of the United Kingdom informed the Commission of its intention to bring into force on 1 June 1979 a series of measures for the conservation of fishery resources concerning the mesh of nets, minimum landing sizes and by-catches and sought the approval of the Commission in this matter in accordance with Annex VI to the Hague Resolution (the text of which, hereinafter referred to as “the Hague Resolution”, which was not published in the Official Journal, was quoted in the Court’s judgment of 16 February 1978 (Case 61/77 *Commission v Ireland* [1978] ECR 417, at paragraph 37). Subsequently the Government informed the Commission that the proposed measures would not come into force until 1 July.
  
6. The Commission reserved its position until it had obtained the complete text of the proposed measures and the Government of the United Kingdom sent

to it on 19 June 1979 five draft statutory instruments and on 29 June 1979 a sixth replacing one of the first five. In the correspondence exchanged on this subject with the Government of the United Kingdom the Commission repeatedly stressed that the proposed measures could not come into force without having received its approval in view of the fact that the subject-matter was within the powers of the Community.

- 7 The measures in question were brought into force on 1 July 1979.
- 8 On 6 July 1979 the Commission sent to the Government of the United Kingdom a letter notifying it that it was taking action under Article 169 of the Treaty. The Commission received the Government's observations by a letter dated 31 July 1979 and delivered its reasoned opinion on the above-mentioned statutory instruments on 3 August 1979 and on the dispute concerning fishing in the Irish Sea and the waters round the Isle of Man on 2 October 1979.
- 9 The parties do not dispute the fact that the statutory instruments brought into force on 1 July 1979 by the United Kingdom are genuine conservation measures and that they correspond, at least in principle, to the measures proposed at the same time by the Commission to the Council as regards the whole of the sea areas in question. The criticisms made by the Commission are based on the consideration that measures of this type cannot be effectively adopted except for the whole of the Community, that the Council would have been in a position to adopt them in the form intended by the Treaty if the United Kingdom had not itself blocked the decision-making process in the Council and that by unilaterally adopting the measures in question the United Kingdom has encroached upon the powers which belong in their entirety, as from 1 January 1979, to the Community. According to the Commission, in the circumstances the disputed measures could therefore be adopted only with its authorization.
- 10 It is only in the alternative that the Commission has considered the substance of the various measures adopted in order to show that, even though they are genuine measures of conservation, their adoption has breached the principle



of the equality of treatment of all Community fishermen, either as regards the time at which they came into force or as regards the detailed methods of their application.

- 11 The Government of the French Republic and the Government of Ireland have expressed their support for the Commission's case.
- 12 The French Government recalls that fisheries and more precisely the conservation of marine species are covered by the powers expressly transferred to the Community and stresses that on 31 December 1978 all national powers in the matter of conservation measures disappeared totally and irreversibly. A fundamental distinction must therefore be made, in accordance with the existing case-law of the Court, between the period which expired on 31 December 1978 and the ensuing period. Henceforth the power to adopt measures for the protection of the biological resources of the sea comes within the competence of the Community alone and more precisely of the Council. The Council cannot, without disregarding the provisions of Article 102, restore to the Member States a power which they have definitively lost. Having regard to these legal facts, the decisions adopted by the Council must be understood as decisions "crystallizing" and fixing the conservation measures as they existed at the expiration of the transitional period and not as decisions delegating or transferring power.
- 13 The Government of Ireland, whilst supporting the Commission's action, does not however accept the French Government's position with regard to the question of powers. It takes the view that the situation is governed by the successive decisions of the Council, as referred to above, but it would not wish to exclude the possibility that the Council might, even after the expiration of the period laid down in Article 102 of the Act of Accession, adopt rules, procedures and criteria for action by individual Member States instead of action by the Council itself if circumstances make urgent conservation measures necessary.
- 14 The Government of the United Kingdom claims that as long as the Council has not exercised the powers conferred upon it by Article 102 of the Act of Accession, even after the expiration of the period laid down in that article,

the Member States retain residual powers and duties until the Community has fully exercised its powers. It does not dispute that the measures adopted in these circumstances by the Member States must be compatible with all relevant provisions of Community law; in this case the real question therefore is whether the measures are in conflict with the Community legislation in force and whether, in adopting them, the United Kingdom has disregarded any one of its obligations in pursuance of Community law.

- 15 The Government of the United Kingdom takes the view that at the time when it introduced the five statutory instruments at issue there was no Community legislation in force on the same matter just as there was no Community legislation affecting herring fishing in the Irish Sea and the waters round the Isle of Man. The Government feels that it has satisfied the obligations resulting from the Council's decisions and the Hague Resolution in view of the fact that it consulted the Commission at all stages of the preparation of the disputed measures and sought its approval. On the other hand it does not agree that that Resolution and the decisions extending its application may be interpreted as requiring the prior authorization of the Commission for any action by the Member States.
- 16 Having regard to the uncertainties characterizing the legal situation in the field in question it is appropriate in the first place to establish what the state of Community law was as regards conservation measures at the relevant period. Once the bases of the legal situation have been established it will then be necessary to consider separately on the one hand the question of the compatibility with Community law of the adoption of the five statutory instruments disputed by the Commission and on the other the fisheries situation in the Irish Sea and the waters round the Isle of Man, which raises special legal problems.

#### The state of the law at the time in question

- 17 The Court has had occasion to recall in former judgments and most recently in its judgment of 10 July 1980, to which reference has already been made, the elements of Community law which are applicable in this matter. The situation described in those judgments has in the meantime undergone a

substantial change by reason of the fact that since the expiration on 1 January 1979 of the transitional period laid down by Article 102 of the Act of Accession, power to adopt, as part of the common fisheries policy, measures relating to the conservation of the resources of the sea has belonged fully and definitively to the Community.

- 18 Member States are therefore no longer entitled to exercise any power of their own in the matter of conservation measures in the waters under their jurisdiction. The adoption of such measures, with the restrictions which they imply as regards fishing activities, is a matter, as from that date, of Community law. As the Commission has rightly pointed out, the resources to which the fishermen of the Member States have an equal right of access must henceforth be subject to the rules of Community law.
- 19 It is in the light of this position of principle that the legal situation must be assessed. It is characterized by the fact that, in a matter in which the powers are in the hands of the Community, the Council has not adopted, within the required periods, the conservation measures referred to by Article 102 of the Act of Accession.
- 20 On this subject it is appropriate to stress, first of all, that the transfer to the Community of powers in this matter being total and definitive, such a failure to act could not in any case restore to the Member States the power and freedom to act unilaterally in this field.
- 21 It follows, as has been stated by the French Government, that in the absence of provisions adopted by the Council in accordance with the forms and procedures prescribed by the Treaty, the conservation measures as they existed at the end of the period referred to in Article 102 of the Act of Accession are maintained in the state in which they were at the time of the expiration of the transitional period laid down by that provision.
- 22 However, it is not possible to extend that idea to the point of making it entirely impossible for the Member States to amend the existing conservation measures in case of need owing to the development of the relevant biological and technological facts in this sphere. Such amendments would be of a

limited scope only and could not involve a new conservation policy on the part of a Member State, since the power to lay down such a policy belongs henceforth to the Community institutions.

- 23 Having regard to the situation created by the inaction of the Council, the conditions in which such measures may be adopted must be defined by means of all the available elements of law, even though fragmentary, and by having regard, for the remainder, to the structural principles on which the Community is founded. These principles require the Community to retain in all circumstances its capacity to comply with its responsibilities, subject to the observance of the essential balances intended by the Treaty.
- 24 In this respect it should be recorded first of all that at the time of the events giving rise to the dispute, the Commission had presented the proposals required by Article 102 of the Act of Accession so that the Council had before it a draft relating to the whole of the conservation measures to be adopted. Although it is true that the Council did not follow those proposals, it did at least lay down certain guide-lines, expressed in the decisions referred to above and, in particular, in that of 25 June 1979, which was applicable at the time of the events in question.
- 25 These decisions, which were essentially of an interim nature, adopt the Commission's proposals as regards total allowable catches (TACs) as a limit to the aggregate of fishing activities during the period in question. They moreover consolidate the technical measures for conservation and control of fishery resources in force at the relevant time. They thus reflect, on the one hand, the Council's intention to reinforce the authority of the Commission's proposals and, on the other hand, its intention to prevent the conservation measures in force from being amended by the Member States without any acknowledged need.
- 26 As regards any amendments which may be necessary to the existing conservation measures, the decisions which have been mentioned refer to the "procedures and criteria" of the Hague Resolution. It may be recalled that that Resolution excludes in principle unilateral measures by the Member States and that in the absence of Community measures it admits only of

measures adopted to ensure the protection of resources and in a form which avoids discrimination. Furthermore it emphasizes that such measures shall not prejudice the guide-lines to be adopted for Community policy on the conservation of resources.

- 27 Before adopting such measures the Member State concerned is required to seek the approval of the Commission, which must be consulted at all stages of the procedure. It should be noted that these requirements, which were originally defined during the transitional period laid down by Article 102 of the Act of Accession, must be considered henceforth in a new setting, characterized by the exclusive powers of the Community on this subject and by the full effect of the relevant rules of Community law, without prejudice to the transitional provisions of Articles 100, 101 and 103 of the Act of Accession, the application of which is however not at issue in this case.
- 28 According to Article 5 of the Treaty Member States are required to take all appropriate measures to facilitate the achievement of the Community's task and to abstain from any measure which might jeopardize the attainment of the objectives of the Treaty. This provision imposes on Member States special duties of action and abstention in a situation in which the Commission, in order to meet urgent needs of conservation, has submitted to the Council proposals which, although they have not been adopted by the Council, represent the point of departure for concerted Community action.
- 29 Furthermore it should be remembered that in pursuance of Article 7 of the Treaty, Community fishermen must have, subject to the exceptions mentioned above, equal access to the fish stocks coming within the jurisdiction of the Member States. The Council alone has the power to determine the detailed conditions of such access in accordance with the procedures laid down by the third subparagraph of Article 43 (2) of the Treaty and Article 102 of the Act of Accession. This legal situation cannot be modified by measures adopted unilaterally by the Member States.
- 30 As this is a field reserved to the powers of the Community, within which Member States may henceforth act only as trustees of the common interest, a

Member State cannot therefore, in the absence of appropriate action on the part of the Council, bring into force any interim conservation measures which may be required by the situation except as part of a process of collaboration with the Commission and with due regard to the general task of supervision which Article 155, in conjunction, in this case, with the Decision of 25 June 1979 and the parallel decisions, gives to the Commission.

31 Thus, in a situation characterized by the inaction of the Council and by the maintenance, in principle, of the conservation measures in force at the expiration of the period laid down in Article 102 of the Act of Accession, the Decision of 25 June 1979 and the parallel decisions, as well as the requirements inherent in the safeguard by the Community of the common interest and the integrity of its own powers, imposed upon Member States not only an obligation to undertake detailed consultations with the Commission and to seek its approval in good faith, but also a duty not to lay down national conservation measures in spite of objections, reservations or conditions which might be formulated by the Commission.

32 It may be noted that this process of cooperation between Member States and the Commission has been confirmed by a practice which has been widely followed inasmuch as the Commission has given its views on a large number of national conservation measures notified to it by the various Member States concerned and has put forward, where appropriate, reservations or conditions (cf. for the period in question, the Communications published in Official Journals C 154 of 1978, p. 5, C 119 of 1979, p. 5, C 133 and C 237 of 1980, p. 2 in each case).

33 It is in the light of the state of law as thus defined that the two groups of measures which are the subject of the dispute must be considered.

#### The statutory instruments contested by the Commission

34 The Government of the United Kingdom claims that the five statutory instruments contested by the Commission were the subject of prior consultation on

its part in accordance with the decisions of the Council and the procedure laid down by the Hague Resolution. There can be no question of its having brought them into force before obtaining the Commission's view, the more so as it may be seen from the information supplied by the Commission itself that the majority of the measures adopted by the Member States at the time in question had been notified only after they entered into force and that the cases of prior approval were exceptional.

- 35 In this respect it must be stated that the consultation carried out by the Government of the United Kingdom was unsatisfactory and cannot be considered as being in accordance with the requirements of the Council decisions. Although it is true that the Commission was informed on 21 March 1979 of the Government's intentions it was only on 19 June that it was able to acquaint itself with the text of the proposed measures. Having regard to the technical complexity of the matter it is clear that this way of handling the matter did not allow the Commission to weigh up all the implications of the provisions proposed and to exercise properly the duty of supervision devolving upon it in pursuance of Article 155 of the Treaty.
- 36 It may be noted that the Commission put forward its reservations at the very beginning of the consultation procedure and that it renewed them expressly on 22 and 27 June after taking note of the wording of the measures and making known its intention not to approve them until a more thorough examination had made it possible to find an area of agreement. The Government of the United Kingdom did not take any action in consequence of those observations and the measures were brought into force on 1 July 1979 with the result that the Commission immediately initiated the procedure under Article 169 of the Treaty by a letter of 6 July 1979.
- 37 The United Kingdom Government's argument to the effect that in other cases the Commission gave retroactive approval to measures already brought into force by the Member States cannot affect this view of the position. In fact it is established that in all the cases referred to the measures in question were in the end approved, where necessary after acceptance by the State concerned of the conditions laid down by the Commission. Although the

procedure adopted in this matter by certain Member States may appear unsatisfactory from the point of view of the duty to cooperate laid down in Article 5 of the Treaty, the cases referred to are not comparable with the disputed measures of the United Kingdom, in respect of which the Commission made known its reservations from the beginning of the consultation procedure and against which it formally maintained its objections.

- 38 It therefore appears that the United Kingdom has failed to fulfil its obligations under the Treaty both by having prevented the Commission, by the consultation procedure adopted, from giving adequate consideration to the proposed measures and by having brought them into force in spite of the Commission's objections.

The measures applicable to the Irish Sea and the waters round the Isle of Man

- 39 The Government of Ireland, which attaches special importance to this aspect of the dispute, has asked the Court to clarify the legal situation as regards the application of the relevant rules of Community law in the territorial waters around the Isle of Man.

- 40 As the Court has already declared in its judgment of 10 July 1980, it is not necessary in this connexion to consider the constitutional position of the Isle of Man or the relationship of that territory to the Community as it is clear from the very wording of the order in question, namely the Herring (Isle of Man) Licensing Order, SI No 1389, that that measure was adopted under the legislation of the United Kingdom by the British Government so that the United Kingdom must take full responsibility for that measure *vis-à-vis* the Community.

- 41 It is sufficient to state that the legal bases of the fishery regime disputed by the Commission remained in 1979 the same as those which the Court had to consider in its judgment of 10 July 1980 for the years 1977 and 1978. Even though it appears from the file that the regime seems to have been slightly liberalized in favour of Irish fishermen, the Court can only maintain the



assessment which it made in the judgment referred to, to the effect that the system of fishing licences applied in the Irish Sea and the waters round the Isle of Man did not form the subject-matter of any consultation or consequently of any authorization on the part of the Commission, that the detailed rules for its implementation were reserved wholly to the discretion of the United Kingdom authorities without its being possible for the Community authorities, the other Member States and those concerned to be legally certain how the system would actually be applied.

- 42 This system, as such, has infringed one of the fundamental rules in this matter, referred to above, in the sense that it has prevented the fishermen of other Member States and particularly those of Ireland from having access to fishery zones which ought to be open to them on an equal footing with the fishermen of the United Kingdom.
- 43 It is therefore necessary to repeat for the year 1979 the finding already laid down by the judgment of 10 July 1980 of a failure by the United Kingdom to fulfil its obligations. Moreover the fact must be recorded that the system applied in the maritime zone referred to calls in question one of the essential principles in this matter.

#### Costs

- 44 Under Article 69 (2) of the Rules of Procedure the unsuccessful party must be ordered to pay the costs. As the defendant has failed in its submissions it must be ordered to pay the costs, including those of the interveners.

On those grounds,

#### THE COURT

hereby:

1. Declares that the United Kingdom has failed to fulfil its obligations under the EEC Treaty:
  - (a) by having brought into force on 1 July 1979 without appropriate prior consultation and in spite of the Commission's objections, the following statutory instruments:

- The Fishing Nets (North-East Atlantic) (Variation) Order 1979, SI No 744;
- The Immature Sea Fish Order 1979, SI No 741;
- The Immature Nephrops Order 1979, SI No 742;
- The Nephrops Tails (Restrictions on Landing) Order 1979, SI No 743;
- The Sea Fish (Minimum Size) (Amendment) Order (Northern Ireland) 1979, SI No 235;

(b) by having maintained in force in the Irish Sea and the waters round the Isle of Man in pursuance of the Herring (Irish Sea) Licensing Order 1977, SI No 1388, and the Herring (Isle of Man) Licensing Order 1977, SI No 1389, a system of fishing licences which had not been the subject of appropriate consultation with or an authorization from the Commission, the detailed rules for the implementation of which were reserved wholly to the discretion of the United Kingdom authorities, without its being possible for the Community authorities, the other Member States and those concerned to be legally certain how the system would actually be applied and which, as a result, had the effect of preventing fishermen from other Member States from having access to fishery zones which ought to be open to them on an equal footing with the fishermen of the United Kingdom;

2. Orders the United Kingdom to pay the costs including those of the interveners.

Mertens de Wilmars    Pescatore    Mackenzie Stuart    Koopmans    O'Keefe  
Bosco                      Touffait                      Due                      Everling

Delivered in open court in Luxembourg on 5 May 1981.

A. Van Houtte  
Registrar

J. Mertens de Wilmars  
President