On those grounds,

THE COURT (First chamber),

in answer to the question submitted to it by the Tribunal de Grande Instance, Bayonne, by judgments of 23 April 1981, hereby rules:

Consideration of the question raised has disclosed no factor of such a kind as to affect the validity of Council Regulations No 1719/80 of 30 June 1980 (Official Journal L 168, p. 27), No 2527/80 of 30 September 1980 (Official Journal L 258, p. 1) No 3305/80 of 17 December 1980 (Official Journal L 344, p. 33), No 272/81 of 27 January 1981 (Official Journal L 27, p. 72) and No 554/81 of 27 February 1981 (Official Journal L 57, p. 1). The provisions of those regulations are enforceable against Spanish nationals.

O'Keeffe Bosco Koopmans

Delivered in open court in Luxembourg on 28 October 1982.

For the Registrar

H. A. Rühl

Principal Administrator

A. O'Keeffe

President of the First Chamber

OPINION OF MR ADVOCATE GENERAL CAPOTORTI DELIVERED ON 27 MAY 1982 [1]

Mr President,
Members of the Court,

1. The Tribunal de Grande Instance [Regional Court], Bayonne, by judgments of 23 April and of 21 May 1981 has referred to the Court of Justice four requests for preliminary rulings which are almost literally identical to those to which the Court has already replied in its judgments of 8 December 1981, the first of which was delivered in Joined Cases 180 and 266/80 *(Crujeiras*

1 — Translated from the Italian.

Tome and Yurrita) and the second in Case 181/80 *(Arbelaiz-Emazabel).*

The facts considered by the court in the main proceedings also resemble the facts in the cases which I have just cited: Spanish fishing vessels were discovered fishing without a Community licence in the maritime zone situated within 200 miles from the French Atlantic Coast and the persons responsible were accordingly charged with a breach of the French provisions on fishery protection which also ensure that the Community regulations are upheld. Thereafter the Bayonne court again raised the issue of the validity, having regard to prior international obligations, of the body of Council regulations laying down certain measures for the conservation and management of fishery resources applicable to vessels flying the flag of Spain and, should those regulations be valid, their applicability to Spanish nationals.

The Court is aware that these regulations not only specify certain conditions for fishing by Spanish vessels within the exclusive economic zone of the Community in the Atlantic Ocean and in the North Sea beyond the zone of the territorial waters but at the same time lay down new detailed rules for fishing by those vessels in French territorial waters and in particular within the reserved fishing area of 6 to 12 miles. It is now clear that Cases 137 and 140/81 *(Campandeguy Sagarzazu and Echevarria Sagasti)* are parallel to the *Crujeiras Tomé and Yurrita* cases inasmuch as the contested Community rules fall to be considered in so far as they apply to fishing carried on between the 12 and 200-mile zone whilst Cases 138 and 139/81 *(Marticorena-Otazo and Prego Parada)* correspond exactly to the *Arbelaiz-Emazabel* case which arose from prohibited fishing within French territorial waters.

In the two judgments of 8 December 1981 the Court considered the problems of the effect on the validity of the Community regulations in question of the "prior international obligations" arising principally from the London Fisheries Convention of 9 March 1964 and of the Geneva Convention of 29 April 1958 on Fishing and the Conservation of the Living Resources of the High Seas (relied upon in the *Crujeiras Tomé and Yurrita* cases) and of the General Agreement on Fishing concluded by France and Spain on 20 March 1967 (taken into consideration in the judgment in *Arbelaiz-Emazabel* case). When it concluded its wide-ranging and scrupulous examination the Court declared that consideration of the question raised had disclosed no factor of such a kind as to affect the validity of Council Regulations No 2160 of 30 September 1977 *(Arbelaiz-Emazabel* case) and No 1744 of 24 July 1978 *(Crujeiras Tomé and Yurrita);* the regulations had therefore to be regarded as enforceable against Spanish nationals.

In my opinion that finding of the Court holds good for all the interim rules adopted by the Council with regard to fishing by vessels flying the flag of Spain, beginning with Council Regulation No 373 of 24 February 1977 up to the date of the entry into force of the Agreement on Fisheries between the European Economic Community and Spain, signed

on 15 April 1980, (that is up to 22 May 1981, on which date Regulation No 554 of 27 February 1981 was in force). The principal reasons on which the two judgments of 8 December 1981 are based relate to *the entire provisional arrangements concerning fisheries* introduced by the Community with regard to Spanish vessels from 1977 onwards: I refer to the matter of the continuous cooperation of the Spanish authorities in the application of these arrangements (paragraphs 14 to 16 of the decision in the judgment in the *Crujeiras Tome* and *Yurrita* cases; paragraphs 27 to 28 of the decision in the judgment in the *Arbelaiz-Emazabel* case) and to the decisive statement that the "interim régime established by the Community under its own rules falls within the framework of the relations established between the Community and Spain in order to resolve the problems inherent in conservation measures and the extension of fishery limits and in order to ensure reciprocal access by fishermen to the waters subject to such measures. Those relations were substituted for the régime which previously applied in those zones in order to take account of the general development of international law in relation to fishing on the high seas and the increasingly urgent need to conserve the living resources of the sea". (Paragraph 18 of the decision in the first judgment: paragraphs 29 to 30 of the decision in the second).

Accordingly it does not appear to me necessary to repeat the arguments which I presented to the Court in my Opinion of 15 September 1981 in Cases 180, 181 and 266/80 or to summarize the entire contents of the two judgments of 8 December 1981. The circumstances of fact and the references for preliminary rulings in the cases cited above and in the present cases coincide, as I have stated, almost entirely. The judgment given five months ago by the Court appears to me well-founded. No new matters have been put forward by the court making the references. There is accordingly no reason for the content of the new decision to be different.

2. It should be pointed out that in the criminal proceedings which gave rise to Cases 138 and 139/81 Mr Marticorena-Otazo and Mr Prego Parada were also charged with the offence of using nets with a mesh-size which was not in conformity with the regulations. This led the Tribunal to mention, amongst the applicable provisions, those of Community Regulations No 2527 of 30 September 1982, No 3458 of 17 December 1980 and No 272 of 27 January 1981 but did not bring about any change in the content of the preliminary questions which make a general reference to the "regulations ... laying down certain temporary measures for the conservation and management of fishing resources applicable to vessels flying the flag of Spain ...", like the questions submitted in Cases 137 and 140/81. The court in the main proceedings thus properly held that the said three regulations were to be classified as measures for the conservation and management of fishing resources. Indeed, it is right that since the provisions in question have the same objective of protecting the environment for fishing as that pursued by the provisions regarding fishing licences (as is also shown by the title of the regulations in question: "technical measures for the conservation of fishery

resources"), there are no grounds for holding that comparison with the international agreements which I have mentioned earlier could produce different results from those obtained with regard to the regulations on fisheries. The difference which has been indicated between the facts in Cases 138 and 139/81 and those in Cases 137 and 140/81 accordingly does not appear to me to justify any departure from the approach taken in the judgments of 8 December of last year.

3. There remains one problem on which the attention of the parties was concentrated (above all in the course of the oral procedure) and which made available to the defence in the main proceedings the only ground of any relevance for suggesting that the outcome of three of those cases should be different from that of the well-known earlier cases. That ground is as follows: the fishing without a licence, which constitutes the factual basis in all of these cases, was carried out on 2 February 1981 by Mr Campandeguy Sagarzazu and Mr Marticorena-Otazo (Cases 137 and 138), on 9 February 1981 by Mr Prego Parada (Case 139) and finally on 10 March 1981 by Mr Echevarria Sagasti (Case 140/81). On the last-mentioned date Regulation No 554/81 of 27 February 1981 which authorized vessels flying the flag of Spain and having a Community licence to make catches of fish up to 31 May was in force: accordingly Case 140/81 is identical to the *Crujeiras Tome* and *Yurrita* cases also from the point of view of the specific legal context in question (the act of fishing, in other words, had to be appraised in the light of one of the regulations laying down temporary measures for the conservation and management of fishery resources). However the dates of 2 and 9 February 1981 fall within a period in which no regulation of that nature was in force. Regulation No 3305/80 of 17 December 1980 had extended from 31 December 1980 until 31 January 1981 the validity of the licences for fishing for Spanish vessels already granted under Regulation No 1719/80 of 30 June 1980 and it was only the subsequent Regulation No 554/81 of 27 February 1981, cited above, which reintroduced the system of licences with effect from 4 March (that is, from the date of its publication). Accordingly, from 1 February to 3 March 1981, there were no measures authorizing fishing by Spanish vessels in the fishing zones of the Member States covered by the Community rules.

The advocates defending the fishermen concerned in Cases 137, 138 and 139/81 have argued, on the basis of that circumstance, that the Spanish fishermen must be considered as free to fish in the fishing zones in question during the said period of interruption in the Community system of licences. That is said to be confirmed by a certain interpretation of the Agreement on Fisheries concluded by the European Economic Community and Spain on 15 April 1980, provisionally applicable from the date of signature. For its part the French Government made the observation that throughout the entire period during which the Community system of licences was interrupted, the existing national provisions had to be applied.

I have to observe in the first place that it is impossible to disregard or ignore the content of the preliminary questions formulated by the Tribunal de Grande Instance, Bayonne: it is on the basis of those questions that the Court of Justice is called upon to "declare the law". The problem submitted is restricted to the validity and enforceability against Spanish nationals of the Community provisions on the conservation and management of fishery resources which, as the Court is aware, were adopted between 1977 and 1981. The absence of provisions of this kind, or, rather, of specific provisions governing fishing licences between 1 February and 3 March 1981, is a matter for appraisal by the court in the main proceedings: that court has not asked the Court of Justice in this case how the Community legal system must be interpreted in relation to fishing by Spanish vessels during that particular period. The present cases, like those which preceded them, must be considered in the correct context. They of course raise many problems and display various aspects, but not all of these aspects and problems need to be considered by this Court. It is not for the Court in this instance to correct a request for a preliminary ruling which has been imperfectly drafted, or, rather, to come to a conclusion as to the specific intent underlying. It would, on the contrary, be placing itself in the position of the national court if it were to deal with a question involving a search for applicable provisions where that court has requested a review of the validity of particular regulations. In my view this enlargement of the scope of preliminary questions is a manoeuvre on the part of the parties concerned to which the Court should not lend its support.

4. Nevertheless I feel it necessary to express my point of view regarding the alleged freedom to fish during the period when the issue of licences was impossible because there were no Community regulations in force. The advocates defending the fishermen charged before the court in the main proceedings properly recalled that in the same period the Agreement on Fisheries between the European Economic Community and Spain of 15 April 1980 was already provisionally applicable and that Article 4 of the Agreement provides that: "each party may require that in the fishing zone falling under its jurisdiction fishing by vessels of the other party shall be subject to licence". The fact that, in this way, the introduction of the system of licences is thus at the option of each party shows, according to the defence, that in the absence of rules providing for the grant of licences Spanish fishermen were free to fish in Community waters.

That argument will not withstand critical examination. First, it is clear that every clause in an agreement must be placed within the context of that agreement. In particular, Article 4, cited above, must be read in the light of the articles which immediately precede it. Article 2 provides that access to the fishing zone falling under the jurisdiction of each party is to be *granted* to the fishing vessels of the other party "under the conditions laid down by the following articles". Article 3 (1) provides that each party is to determine each year, for the fishing zone falling under its jurisdiction, (a) "the total allowable catch for individual stocks or complexes of stocks ...."; (b) "after appropriate reciprocal consultations, the catch allotted to the fishing

vessels of the other party and the zones in which these catches may be made". It is accordingly clear that there is no freedom of access for the fishing vessels of each party to the fishing zone of the other; such access is made available through a "concession" which, even before it is expressed by the issue of the licence, presupposes that the catches which the fishing vessels of the other party may make have been determined. The optional nature of the system of licences is thus explained: the essential point is that the limit of the catches allotted to the fishing vessels of the other party should be fixed and there is nothing to prevent the use of methods involving the fixing of quotas or different forms of control of licences. However, the fishermen of each party are in any event obliged to postpone their fishing until the other party has completed the annual determination of limits provided for in Article 3 (1) and until there is a positive outcome of the "appropriate reciprocal consultations" referred to in subparagraph (b) of that article.

It is furthermore sufficient to read the preamble to Regulation No 554/81 of 27 February 1981 to realize that it was precisely the delay in these negotiations which was the cause of the interruption of the fishing by Spanish nationals in Community waters from 1 February 1981. The third recital in the preamble to the regulation in fact states that "the Community and Spain held consultations, in accordance with the procedure provided for in the Agreement, concerning the conditions of fishing by vessels of either party in the fishing zone of the other party during the year 1981" and that "these consultations were not concluded until 17 February 1981". Further on it is stated that "at the conclusion of these consultations, the Community delegation undertook to recommend to its authorities that certain measures should be adopted, for the said period, authorizing fishing by Spanish vessels in the fishing zones of Member States which are subject to Community fisheries regulations". The final measures for 1981 were introduced later by the Regulation No 1569/81 of 1 June 1981 which accordingly determined all catches by Spanish vessels authorized in the course of the year, excluding only the period of interruption, from 1 February to 3 March (Article 10 (3)). Regulation No 554/81, for its part, was adopted as an interim measure, as its title indicates, within the scheme of the conjunctural policy mentioned in Article 103 of the EEC Treaty in order to avoid prolonging the interruption beyond 3 March (cf. the sixth recital in the preamble); the same had been done in the case of Regulation No 3305/81, by extending the validity of the licences from 31 December 1980 to 30 January 1981.

The situation which I have described — delay in the consultations and thus in fixing the final system for the licences, the late adoption of an interim measure and subsequent regularization through another regulation — has been repeated this year. On 15 February 1982, since the Council found that the consultations between the Community and Spain had not been concluded until 26 January, it adopted Regulation No 379/82 "in order to permit an early resumption of fishing by Spanish vessels" (third recital in the preamble) and authorized catches by Spanish vessels in the Community fisheries zone from 15 February until

30 April 1982, which meant that from 1 January to 15 February 1982 the activities of those fishing vessels in the waters of the Community had remained paralysed. Then, on 29 April, the Council fulfilled, by Regulation No 1041/82, the undertakings which it had given in the course of the consultations with Spain by authorizing fishing by Spanish vessels (but still subject to the system of licences) for the year 1982. However, the year was reduced by the first forty-five days since the authorization for catches refers to the period from 5 February to 31 December 1982 (Article 1). Furthermore, regard is had to the fact that the vessels concerned "will only be engaged in fishing during part of 1982" (third recital in the preamble) and accordingly the number of licences remained proportionate to an entire solar year. These recent rules thus confirm that in the period during which Community provisions on the conservation and management of fishery resources were not in force Spanish vessels were not authorized to fish in the waters of the EEC.

5. In addition to the considerations derived from the context of the Agreement on Fisheries between the Community and Spain and from the way in which it is applied there are arguments based on general international law. As the Court is aware the Agreement was concluded after the extension to 200 nautical miles of the fishery zone of the Member States in the waters of the Atlantic and in the North Sea (on 1 January 1977) and the similar extension of the Spanish economic zone (with effect from 15 March 1978). The Court is further aware that the Community and Spanish decisions were in accordance with the general trend in the new law of the sea which developed in the 1970s and became clearly apparent when the Third United Nations Conference on the Law of the Sea was held during which recognition of the economic zone of 200 miles was one of the points on which the States taking part agreed. The preamble to the Agreement between the European Economic Community and Spain states that it took into account the work of the conference and affirms that the extension by coastal States of the areas of biological resources falling within their jurisdiction should "be conducted pursuant to and in accordance with the principles of international law". The individual clauses of the Agreement must accordingly be interpreted within the framework of those principles.

There is no doubt that the fact that the belt of sea between 12 and 200 miles from the coast falls under the "jurisdiction" of the coastal State with regard to the exploitation of economic resources, in particular fishing, means that that State is entitled to exclude the fishermen of other countries and this is incompatible with the alleged right of the latter to obtain access to that belt of sea in the absence of an international agreement authorizing them to do so or of specific permission from the authorities of the coastal State. In substance the rules which have always been applied in the territorial waters of the States today also cover the economic zone (which is properly described as "exclusive") although solely with regard to the exploitation of the resources of such waters. The Agreement between the

Community and Spain accordingly establishes the rules governing fishing in the "fishing zones falling under the jurisdiction of each party" without drawing a distinction between the territorial waters and the economic zone; and the preamble refers to the exercise of "sovereign rights for the purpose of exploring, exploiting, conserving and managing" the resources falling within the area 200 miles from the coast and at no point distinguishes between the two belts of sea into which these 200 miles are legally divided.

It is true that the Draft Convention on the Law of the Sea, which resulted from the Third United Nations Conference, which has recently been concluded, does provide that each coastal State must give other States access to the catch exceeding its own harvesting capacity within the limits necessary for the conservation of fishing resources (Article 62 (2)). The same provision however shows that the determination of the total allowable catch and of the harvesting capacity of the coastal State is a matter for that State itself (in this case for the Community) and that in any event access for the fishermen of non-member countries requires an agreement. Furthermore, in the part concerning the procedure for resolving disputes concerning the interpretation and application of the Convention the draft emphasizes (in Article 297 (3)) the sovereign nature of the rights to the living resources of the economic zone and the consequent discretionary powers of the coastal State for determining the volume of catches, its own harvesting capacity and the allocation of surpluses amongst other States; and in the protection of that discretion the Draft goes so far as to provide that, with regard to disputes concerning such sovereign rights, the States are not obliged to comply with the requirements as to the judicial procedures laid down in Section 2 (Article 286 et seq.).

6. The state of general international law ultimately leads to the same conclusion as that which resulted from my analysis of the Agreement on Fisheries between the European Economic Community and Spain: in the absence of arrangements for authorizations by the Community foreign fishermen are prohibited from entering the zone which extends 200 miles from the Atlantic coast of the Member States. That is the reason why, during the periods in which the consultations between the Community and Spain on the fishing arrangements in that zone extended beyond the time when the previous arrangements expired, the Community endeavoured to restrict the adverse effects for Spanish vessels by enacting interim measures like Regulations Nos 3305/80, 554/81 and 379/82. It furthermore provides justification for the conclusion that Article 10 (3) of Regulation No 1569/81, according to which "no licence shall be valid for the period 1 February to 3 March 1981. All fishing by vessels flying the flag of Spain in the area referred to in Article (1) shall be prohibited during that period", is of a *declaratory* nature. In other words, that provision — contrary to the submission made on behalf of the defendants — did not introduce a retroactive prohibition but confirmed what constituted the legal consequence necessarily flowing from the existence of the exclusive fishing zone subject to the Community rules and of the absence of arrangements for authorizations for the period stated above.

It is also in the light of general international law and of the Agreement on Fisheries between the Community and Spain that it is necessary to reject the idea of the continued existence of "historical rights" of Spanish fishermen or of their revival during the periods when there were no Community rules. Under the present system of the law of the sea there does not seem to be any possibility of according a special status to persons habitually frequenting certain fishing zones. It has been recalled that Article 3 of the Agreement between the European Economic Community and Spain requires the parties, in determining the possibilities of each party for fishing in the waters controlled by the other, to take into account "the advantage of preserving the traditional characteristics of fishery activities in the frontier coastal areas". It is certainly not possible, however, to deduce from this passage that a particular Contracting State is entitled to consider itself as having a guaranteed right to fish in these areas on the basis of tradition. The paragraph in question of Article 3 merely sets out the factors which Spain and the Community will have to take into consideration when they exercise, each year, their respective powers of determining the volume of catches allotted to the fishing vessels of the other party. In short, it remains certain that the periodic determination of that volume is the prerogative of each State (in the present cases, of the Community in the place of its members) as regards its own fishing zone, either by virtue of the Draft Convention on the Law of the Sea proposed by the United Nations or by virtue of the Agreement between the Community and Spain; the result is that the safeguarding of traditional fishing activities has been reduced to constituting one of the considerations of appropriateness to be borne in mind for purposes of the decision (and probably also in the course of the prior bilateral consultation provided for in the said Agreement on Fisheries).

It must finally be stated that it might perhaps be possible to consider that there had been a revival of the "historical rights" of the Spanish fishermen on the basis of the Agreement on Fisheries between France and Spain of 1967 if it were supposed that, in a period when there are no Community rules on licences for fishing, the rules applied in France before January 1977 once more became applicable. However, that argument does not hold good. It is clear that, from the time when the Agreement between the Community and Spain became provisionally applicable, that is from the date of signature, it has taken precedence in the Member States over any prior incompatible agreements regardless of whether Community regulations on licences for fishing are in force. More generally I consider that after the Community began in 1977 to exercise its power in fishery matters, also in relation to the rules governing catches in the 200 mile zone in the Atlantic, that power is not "restored" to the Member States merely because of a failure to exercise continuity in the system of licences. In fact the failure to define for a certain time the volume of the catches allotted to Spain, with the consequent interruption in the system of licences, itself constitutes a choice of Community policy inasmuch as it excludes Spanish vessels from the fishing zone of the European Economic Community; this is something which is bound to occur, in

view of the exclusive nature of the abovementioned fishing zone, whenever authorizations are not granted in good time. Furthermore this already existed in embryo in The Hague Resolution of 1976 on the extension to 200 miles of the waters under the jurisdiction of the Community. In that resolution the European Council had established that the exploitation of fishing resources in these waters by non-member countries would take place under Community agreements with such countries and thus, naturally, within the limits fixed by the agreements and contained in the detailed rules for their application.

7. For the reasons which I have set out above I conclude by proposing that the Court, in reply to the preliminary questions submitted to it by the Tribunal de Grande Instance, Bayonne, by judgments of 23 April and of 24 May 1981 in Cases 137, 138, 139 and 140/81, should give the following ruling:

(a) Consideration of the regulations of the Council laying down certain interim measures for the conservation and management of fishery resources applicable to vessels flying the flag of Spain has disclosed no factor of such a nature as to affect their validity.

(b) The said regulations were accordingly enforceable against Spanish nationals.

Should the Court consider that it must give a ruling on the matter of the interruption of the arrangements concerning licences for fishing from 1 February to 3 March 1981, I propose that it should give the following ruling on that point:

In the period during which the arrangements for granting licences to Spanish fishermen were interrupted, namely from 1 February to 3 March 1981, such fishermen were prohibited from engaging in all fishing activity in the territorial waters of the Member States and in the respective exclusive economic zones subject to the Community measures on the conservation and management of fishery resources.