OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER

delivered on 14 June 2001 [1]

I — Introduction

1. Under Article 173 of the EC Treaty (now, after amendment, Article 234 EC), the Italian Republic asks the Court of Justice to annul Article 2 and the table relating to bluefin tuna in Council Regulation (EC) No 49/1999 of 18 December 1998 fixing, for certain stocks of highly migratory fish, the total allowable catches for 1999, their distribution in quotas to Member States and certain conditions under which they may be fished [2] (hereinafter 'the Regulation' or 'Regulation No 49/1999').

2. The Italian Republic takes the view, for reasons which I shall set out in due course, that the percentages shown in Article 2(1) and the quotas established in Article 2(2), in conjunction with the Annex, are unlawful and cause it serious harm.

1 — Original language: Spanish.

2 — OJ 1999 L 13, p. 54.

II — International protection of tuna

3. The International Convention for the Conservation of Atlantic Tunas (hereinafter 'the Convention') was signed in Rio de Janeiro on 14 May 1966 and came into force on 21 March 1969. [3] Its objective is the conservation and management of Atlantic tuna, [4] through the cooperation of the signatories in maintaining the populations of those fish at levels which will permit the maximum sustainable catch. [5]

4. In order to achieve the proposed objectives, the Convention established the International Commission for the Conservation of Atlantic Tunas (hereinafter 'ICCAT'), which it authorised to make recommendations that become binding on the parties six months after the date of their notification

3 — The English version of the Convention is on the Internet, at http://www.iccat.es/.

4 — Article 1 defines its scope, which extends to the Atlantic Ocean and the adjacent seas.

5 — See the preamble to the Convention.

unless an objection is presented within that period. [6] The signatory States agreed to adopt all the measures necessary to ensure implementation of the Convention. [7]

5. At its ninth special meeting, which was held in Madrid during November and December 1994, ICCAT fixed, for the first time, owing to overfishing, a total allowable catch of bluefin tuna for 1995, restricting it to the level of catch in 1993 or 1994, whichever was higher. Starting in 1996, measures had to be taken as necessary to reduce catches progressively to 75% of the 1995 quantities, such objective to be achieved before the end of 1998. The States which, like the Italian Republic, were not yet party to the Convention, and the General Fisheries Council for the Mediterranean, [8] were informed of the recommendation and requested to give their cooperation. It was provided that the recommendation would come into effect on 2 October 1995. [9]

6. At its 14th regular meeting, held in Madrid in November 1995, ICCAT made a recommendation which, in the light of the large French catches of bluefin tuna landed during 1994, imposed specific limits for France during the three-year period 1996 to 1998 in the Mediterranean Sea and the Eastern Atlantic Ocean. [10] That recommendation, which came into force on 22 June 1996, was repealed by Recommendation 98-5, adopted in Santiago de Compostela in November 1998. [11]

7. At the 10th special meeting, held in San Sebastián in November 1996, ICCAT approved a new recommendation, which was officially notified on 3 February 1997 and entered into force on 4 August 1997, under which the catch limit of any Contracting Party which exceeded its quota would, in the subsequent management period, be reduced by 100% of the amount in excess; that figure could be as high as 125% [12] if the catch limit was exceeded in two consecutive management periods. [13] Application of the reduction would be deferred to a management period after the one immediately following the period in which the limit had been exceeded if, at the time the limits were fixed, not all the data relating to the catches for that period were

6 — See Articles IV and VIII.

7 — See Article IX(1).

8 — The Fisheries Council adopted ICCAT's recommendation in its Resolution 95/1 (see the document submitted by the Council as Annex III to its defence).

9 — ICCAT Recommendation 94-11 for the Management of Bluefin Tuna Fishing in the Eastern Atlantic Ocean and Mediterranean Sea ('Compendium of the Management Recommendations and Resolutions adopted by ICCAT for the Conservation of Atlantic Tunas and Tuna-like Species' — http://www.iccat.es/ — (hereinafter the 'Compendium'), p. 49).

10 — Recommendation for supplementary measures in the Eastern Atlantic Ocean and Mediterranean Sea (see Annex II submitted by the Council with the defence).

11 — The repeal is contained in Point 5 of the recommendation. See point 11 of this Opinion.

12 — Other appropriate action could also be taken, such as trade restrictive measures.

13 — Recommendation 96-14 regarding compliance in the Bluefin Tuna and North Atlantic Swordfish Fisheries (see Annex V to the defence and the Compendium, p. 88).

available. Thus, reductions in respect of over-fishing in 1997 would be applied to the 1999 quotas, not the 1998 quotas. This was decided in a supplementary recommendation adopted at the 11th special meeting, held in Santiago de Compostela between 16 and 23 November 1998, which was communicated to the parties on 22 December 1998 and came into force on 21 June the following year. [14]

III — Accession of the Community to ICCAT and its repercussions on Community law

8. By Decision of 9 June 1986, [15] the Council approved the accession of the Community to ICCAT, which took place on 14 November 1997. [16]

9. By Council Regulation (EC) No 65/98 of 19 December 1997, [17] and with the aim of implementing ICCAT's recommendations, [18] the quota of bluefin tuna allocated to the Community for the year 1998 was distributed between the Member States. [19]

10. In the third paragraph of Article 1 of the Regulation it was provided that the Commission would negotiate with ICCAT the revision of catch figures for Member States 'in order to allow for the later adjustment of such Member States' quotas of bluefin tuna'. Once the figures had been agreed, the Commission would promptly adjust the quotas of the various Member States.

11. In fulfilment of the abovementioned mandate, negotiations were opened with ICCAT. The result was the recommenda-

14 — This is Recommendation 98-13. See Annex VI to the defence, page 97 of the Compendium, and the Council's answer to the second of the questions put to it by the Court.

15 — Council Decision 86/238/EEC on the accession of the Community to the International Convention for the Conservation of Atlantic Tunas, as amended by the Protocol annexed to the Final Act of the Conference of Plenipotentiaries of the States Parties to the Convention signed in Paris on 10 July 1984 (OJ 1986 L 162, p. 33).

16 — Some Member States were party to the Convention before that date: Spain and France, since 21 March 1969; Portugal, since 3 September 1969; the United Kingdom (for Bermuda), since 10 November 1995; and Italy, since 6 August 1997 (see footnote 4 of the defence and the document which, as Annex I, the Republic of Italy enclosed with its application).

17 — The Regulation fixing, for certain stocks of highly migratory fish, the total allowable catches for 1998, their distribution in quotas to Member States and certain conditions under which they may be fished (OJ 1998 L 12, p. 145).

18 — See its third recital.

19 — Of the 4 452 tonnes allocated in the Atlantic Ocean, 3 went to Greece, 3 809 to Spain, 400 to France, 180 to Portugal and 60 to the rest of the Member States. In the Mediterranean Sea, the Community had 11 621 tonnes: 272 for Greece, 2 033 for Spain, 4 850 for France, 4 145 for Italy and 321 for Portugal. In both sectors France was allocated the maximum envisaged in the recommendation adopted by ICCAT at its 14th regular meeting (see point 6 of this Opinion).

tion adopted at the 11th special meeting. [20] In the new recommendation, which entered into force on 20 August 1999, [21] a total allowable catch of 32 000 tonnes was established for 1999 and of 29 500 tonnes for 2000, of which the Community was allocated 20 165 tonnes and 18 590 tonnes respectively. [22] The allocation of fishing possibilities between the contracting parties was calculated by using as a reference the unrevised figures for the catches of years 1993 and 1994, and the relevant reductions for exceeding the catch quota during 1997, as provided in the San Sebastián recommendation of November 1996 and in the supplementary recommendation adopted in Santiago de Compostela two years later. [23]

12. In order to implement the above recommendation, the Council approved Regulation No 49/1999 — the subject-matter of these proceedings — by which it divided the share available to the Community between the Member States, setting the percentage shares [24] in Article 2(1), which provided:

'The percentages allocated to Member States from the share available to the Community of bluefin tuna stocks in the Eastern Atlantic and the Mediterranean shall be as follows:

— France: 33.89%,

— Greece: 1.77%,

— Italy: 26.75%,

— Portugal: 3.23%,

— Spain: 34.35%.'

13. However, *ad hoc* parameters were set for 1999, in view of the special circumstances due to the Community's accession

20 — Recommendation 98-5 on the Limitation of Catches of Bluefin tuna in the Eastern Atlantic and Mediterranean (Compendium, p. 58).

21 — Except for Morocco and Libya. In its answer to the questions put to it by the Court of Justice, the Council states that the recommendation entered into force on 21 June 1999, but this statement contradicts the date which appears on Page 58 of the Compendium, which is 20 August of that year. In my view, the Council has made a mistake and indicated as the date of entry into force of this recommendation the date of entry into force of the supplementary recommendation mentioned in point 7 of this Opinion, which was adopted at the same special meeting.

22 — This allocation was calculated by adding the relative shares of each Member State (footnote ** to Recommendation 98-5).

23 — See paragraphs 2 and 4 of Recommendation 98-5.

24 — See the second, third and fourth recitals and Article 1 of the Regulation.

to ICCAT.[25] For that purpose, Article 2(2) refers to the Annex, which contains the following figures, expressed in tonnes, relating to bluefin tuna in the Eastern Atlantic Ocean and the Mediterranean Sea:

— Total allowable catches: 32 000

— EC: 16 136[26]

— France: 6 413

— Greece: 126

— Italy: 3 463

— Portugal: 519

— Spain: 5 555

— Others (by-catch): 60.

14. The above distribution was made as follows:[27] the 60 tonnes set aside, as by-catch, for Member States other than the five that received specific quotas, was deducted from the total available to the Community (20 165 tonnes). The remainder (20 105 tonnes) was divided between those five Member States, in accordance with the percentages stated in Article 2(1) of the Regulation.[28] From the quota thus allocated to each was subtracted any amount by which it exceeded its quota during 1997. As Greece and Italy would have had a very small share[29] after that reduction was made, the Council took away 850 tonnes from the other three States[30] and divided it between the two of them.[31]

15. The powers exercised by the Council in Regulations Nos 49/1999 and 65/98 have as their basis Council Regulation (EEC) No 3760/92 of 20 December 1992 establishing a Community system for fisheries

25 — See the fifth recital in the preamble to the Regulation.

26 — This figure is the result of subtracting from the 20 165 tonnes allocated to the Community in Recommendation 98-5 the 4 029 tonnes by which the Member States exceeded their quota during 1997 (France: 0 tonnes; Greece: 331 tonnes; Italy: 2 666 tonnes; Portugal: 81 tonnes and Spain: 951 tonnes).

27 — See the report of the Committee of Permanent Representatives, which the applicant enclosed with its application as Annex 4, and Paragraph 12 of the defence.

28 — France: 6 813 tonnes; Greece: 357 tonnes; Italy: 5 379 tonnes; Portugal: 650 tonnes; and Spain: 6 906 tonnes.

29 — 6 tonnes and 2 713 tonnes respectively.

30 — 400 tonnes from Spain and France, and 50 tonnes from Portugal.

31 — 750 tonnes for Italy and 100 tonnes for Greece.

and aquaculture,[32] Article 8(4) of which provides:

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

...

(ii) shall distribute the fishing opportunities between Member States in such a way as to assure each Member State relative stability of fishing activities for each of the stocks concerned; ...;

...'.

IV — The proceedings before the Court of Justice

16. A part has been played in these proceedings — as well as by the Italian Republic and the Council — by the Commission, the Kingdom of Spain and the French Republic, which have submitted written observations

At the hearing on 10 May 2001, oral argument was presented by the representatives of the applicant and the defendant and the Agents of the Commission and the Kingdom of Spain.

V — Analysis of the pleas supporting the claim for annulment

17. The Italian Republic puts forward two claims for annulment of Regulation No 49/1999: one in respect of Article 2(1), and the other in respect of Article 2(2) in conjunction with the Annex (the table relating to bluefin tuna), against which it makes a number of charges, some of which overlap. The other parties intervening in the proceedings have objected to both claims. I shall now analyse the two claims, following the arguments put forward to support them by the Italian Republic and referring, if necessary, to those adduced in response by the other parties.

1. *Article 2(1) of Regulation No 49/1999*

A — Inadequate statement of reasons

18. The Italian Republic states in its application that the only statement of the

32 — OJ 1992 L 389, p. 1.

reasons on which Article 2(1) is based is found in the fourth recital in the preamble to the Regulation, according to which 'the percentage shares of the Member States in catches from the Eastern Atlantic and Mediterranean stocks for bluefin tuna should be set.' The applicant considers that this is merely ostensible reasoning which does not fulfil the requirements laid down in the case-law of the Court of Justice, since it does not explain the allocation of quotas made in the contested provision.

19. The statement of reasons is not just a courtesy, nor is it a routine formality. It is a rationalising factor in the exercise of power, facilitating review thereof. It operates both to prevent arbitrariness and to provide protection. That is how it is seen by the Court of Justice which has, on numerous occasions, pointed out that the objective of the statement of reasons required by Article 190 of the EC Treaty (now Article 253 EC) is to enable the persons concerned to ascertain the reasons for the measure and to enable the competent court to exercise its power of review. [33]

20. I consider that, as far as Article 2(1) of the Regulation is concerned, the requirements laid down by Article 190 of the Treaty for statements of reasons have been satisfied. In order to account for the introduction of the provision and, therefore, of the percentages it allocates to the Member States listed in it, the Regulation refers to:

(1) The Community's accession to ICCAT, the binding nature of ICCAT's recommendations and the adoption of a recommendation setting catch limitations for bluefin tuna; [34]

(2) the powers conferred on the Council by Article 8(4) of Regulation No 3760/92 to establish the total allowable catches by stock or group of stocks, the share available to the Community, the allocation of that share among Member States and the conditions under which catches may be made; [35] and

(3) the need to set the percentage shares of the Member States. [36]

33 — See, amongst the most recent judgments, those in Case C-316/97 P *Parliament* v *Gaspari* [1998] ECR I-7597, paragraph 26; Case C-288/96 *Germany* v *Commission* [2000] ECR I-8237, paragraph 82; and Joined Cases C-15/98 and C-105/99 *Italy and Sardegna Lines* v *Commission* [2000] ECR I-8855, paragraph 65.

34 — Second recital.

35 — Third recital.

36 — Fourth recital.

21. In my view, that statement of reasons is adequate in the light of the nature of the measure concerned. [37] In the case of legislative measures intended to be of general and temporarily unspecified application, [38] it is enough if the statement of reasons indicates the general situation which led to their adoption and the general objectives which it is intended to achieve, [39] and if the measures refer to the legal rule which forms the basis of the power exercised. [40]

22. The applicant states that, in the preamble to the Regulation, reasons are given for the distribution of the Community quota between the Member States, but none at all for the percentages allocated to them. That observation is correct, but the statement of reasons is not required to contain all the relevant legal and factual aspects, since the crucial point is, as I have indicated, that the reasons which underlie the exercise of power constituted by the decision are duly known by the addressees and by the person called upon to review its legality. Consequently, to determine whether a decision adopted by a Community institution is reasoned, it is also necessary to take into account its context, particularly the legislative context, and the procedure followed for its adoption, with which the Member States may be closely connected. [41]

23. The Italian Republic, which joined ICCAT on 6 August 1997 [42] and was notified, prior to that date, of the adoption of the first recommendation limiting the catches of bluefin tuna, [43] participated in the procedure to draw up the Regulation and was aware of the reasons for the adoption of the provision it is contesting. Accordingly, it is stated in the report prepared by the Committee of Permanent Representatives [44] that the Italian delegation (and also the Greek delegation) expressed a general reservation about the proposal for a regulation and, in particular, about the total allowable catches and the quotas. [45] It also called in question the criteria for distribution because, on the basis of the past catches of the Italian fishing fleet, whatever the period of reference chosen, the Italian part of the Community's total catches would not have been below 30%. [46]

37 — It must be remembered that the statement of reasons required by Article 190 of the Treaty must be appropriate to the measure at issue (see *Germany* v *Commission* and *Italy and Sardegna Lines* v *Commission*, cited above).

38 — As is the case of Article 2(1) of the Regulation, which, from the time it enters into force, distributes among the Member States the share available to the Community of the bluefin tuna stocks in the Eastern Atlantic and the Mediterranean.

39 — See Case C-168/98 *Luxembourg* v *Parliament and Council* [2000] ECR I-9131, paragraph 62.

40 — In this case, Article 8(4) of Regulation No 3760/92.

41 — See Case C-478/93 *Netherlands* v *Commission* [1995] ECR I-3081, paragraphs 49 and 50, and the other judgments to which it refers.

42 — See footnote 16 above.

43 — See point 5 of this Opinion.

44 — See Annex 4 to the application.

45 — Page 6 of the report.

46 — Page 7 of the report.

24. It is clear that the Italian Republic, like the Court of Justice, is fully aware of the reasons why the Council adopted Article 2(1) of the Regulation. It knows the background and objectives of the provision and also knew — before it was approved — the criteria followed for establishing the quota shares set out in it. [47] It cannot therefore complain that the provision lacks a statement of reasons.

B — Subsidiary pleas in law

(a) The alleged derogation from the principle of relative stability

25. In case the allegation that Article 2(1) of the Regulation is not supported by an adequate statement of reasons is not upheld, the Italian Republic puts forward an argument in the alternative and another in the further alternative. The first alleges infringement of Article 43 of the EC Treaty (now, after amendment, Article 37 EC), of the general principles concerning the hierarchy of norms and of Article 8(4)(ii) of Regulation No 3670/92.

26. In the applicant's view, this triple infringement stems from the failure to take account of the principle of relative stability of the fishing activities of the various Member States. Unlike Regulation No 65/98, the preamble to the contested Regulation contains no express reference to Article 8(4)(ii) of Regulation No 3760/92. That omission constitutes an even more serious inadequacy than the one indicated above, since no reasons are given for that departure from the norm.

27. It adds that there is a close link between the jurisdiction and procedure provided for in the first sentence of Article 8(4) of Regulation No 3760/92 and the rules of application contained in the same paragraph. In the contested Regulation the Council derogated from the principle of relative stability contemplated in Regulation No 3760/92 but should have followed the same procedure for its adoption, that is, consulting the European Parliament, as required by Article 43 of the Treaty. By not doing so, the Council committed the infringements alleged in the application.

28. The applicant's argument fails because its premiss is incorrect. It is not true that

47 — At the hearing, the Kingdom of Spain pointed out that the Italian Republic attended the meetings to determine the collective Community position to be adopted within ICCAT, where negotiations were opened which led to the recommendations that subsequently influenced the content of the contested Regulation.

the contested Regulation does not refer to Article 8(4)(ii) of Regulation No 3760/92. We need only read the references and the third recital in the preamble to see that Article 8(4) of the 1992 Regulation is expressly mentioned twice. In that recital it is stated that, under the aforementioned provision, it is the task of the Council to divide up the share available to the Community among the Member States and it thus seems clear that it will do so in accordance with the requirements it imposes and taking into account the provisions of subparagraph (ii), that is, assuring each Member State relative stability of its fishing activities.

29. There is, therefore, neither tacit derogation from the principle of relative stability nor infringement of the 1992 Regulation, of the principle of the hierarchy of norms or of Article 43 of the Treaty.

(b) The manifestly inappropriate nature of the criteria adopted for application of the principle of relative stability

30. The response to the previous plea in law could have been confined to the formal and external aspects, in the terms in which the plea was raised; however, the Council, moving away from the viewpoint taken by the Italian Republic, states that there is not only a reference in the contested Regulation to the provision which requires the principle of relative stability to be taken into account but in addition that principle was actually applied in apportioning the quota of bluefin tuna available to the Community.

31. That is the background to the second argument put forward by the Italian Republic in the alternative to obtain the annulment of Article 2(1) of the Regulation, an argument relating to the actual basis of apportionment.

32. The applicant complains that the Council set the percentage shares in the Community quota of bluefin tuna taking account of the catch figures of a single year, not several years. The percentage allocated to Italy would have been significantly higher if the Council had based its decision on a series of catches stretching back over three, five or eight years, not just those of 1993 or 1994.

33. The Council does not accept that flexibility in determining the reference period to be taken into account is particularly important when stocks are managed

by an international fishing organisation that establishes the quota which the Community receives and must divide between the Member States. The Council believes it acted appropriately by distributing the quota on the basis of the actual catches of bluefin tuna landed by each Member State in 1993 or 1994, since those years had been used as reference years by ICCAT.

34. In my view, the reasons given by the Council should be approved by the Court of Justice. The concept of relative stability is established by Regulation No 3760/92 which, in its preamble, [48] lays down guidelines requiring that the Community share of bluefin tuna be distributed with a view to giving fishing activities greater stability, which will safeguard the particular needs of regions where local populations are especially dependent on fisheries and related activities. [49]

35. Bearing in mind that concept of relative stability, the Court of Justice has pointed out that the aim of the quotas is to ensure for each Member State a share of the total catch allocated to the Community, determined on the basis of the catches from which traditional fishing activities, the local populations dependent on fisheries and related industries of that Member State benefited before the quota system was established. Accordingly, when stocks, of bluefin tuna in this case, are distributed, the interests represented by each Member State must be weighed up. [50] To be effective, this principle, by its very nature, requires that, in the distribution of quotas, each Member State is allocated a fixed percentage. [51]

36. The Council made that allocation in Article 2(1) of the regulation contested by Italy, in which the Member States have retained a fixed percentage of the Community's fishing possibilities, by taking as a reference the total catches landed by each of them in 1993 or 1994, whichever was the higher.

That criterion for distribution, already used in Regulation No 65/98, [52] applies the same parameters as those taken into con-

48 — See the 12th, 13th and 14th recitals.

49 — Tuna-fishing and the hardships suffered by fishermen's families in Sicily are wonderfully portrayed by Giovanni Verga in his novel *I Malavoglia*, which inspired the film *La Terra Trema*, a masterpiece made in 1948 by Luchino Visconti with the help of Franco Zeffirelli and Francesco Rosi.

50 — See the judgment in Case C-4/96 *NIFPO and Northern Ireland Fishermen's Federation* [1998] ECR I-681, paragraphs 47 and 48 (hereinafter 'the *NIFPO* judgment'). The Court of Justice expressed itself in the same terms in its judgments in Case C-3/87 *Agegate* [1989] ECR 4459, paragraph 24, and Case C-216/87 *Jaderow* [1989] ECR 4509, paragraph 238, with reference to Council Regulation (EEC) No 170/83 of 25 January 1983 establishing a Community system for the conservation and management of fishery resources (OJ 1983 L 24, p. 1).

51 — See, amongst others, Case 46/86 *Romkes* [1987] ECR 2671, paragraph 17, and Case C-71/90 *Spain* v *Council* [1992] ECR I-5175, paragraph 15.

52 — Which, incidentally, the applicant did not contest.

sideration during the Community's negotiations with ICCAT, which were embodied in Recommendation 98-5, [53] and has the virtue of incorporating into the Community domestic sphere the experience acquired since its creation by ICCAT, of which several Member States have been members for some time. The thorough knowledge gained about the development of bluefin tuna catches over almost 30 years and the participation of the various Member States which have fleets dedicated to fishing that stock is put to good use but, at the same time, the needs of coastal communities that are dependent on bluefin tuna fishing are not forgotten. [54]

37. We may argue as much as we like about the criterion chosen for allocating quotas, but it falls within the discretion enjoyed by the Council for implementation of the Community's agricultural policy. As a discretionary power, it is subject to judicial review only if there has been a manifest error or misuse of power or if the bounds of the discretion have clearly been exceeded, [55] and no such defect has even been alleged by the applicant in respect of Article 2(1) of the Regulation.

38. In short, the Council has respected the principle of relative stability, and not just formally. The quotas given in Article 2(1) of the Regulation were established using a criterion which does not disregard the true position of the bluefin fishing sector in each Member State. The result was bound to be that different quotas were arrived at, which varied to the same extent as the influence which the fishing of that species has on the different national economies. In this case, what would actually have been discriminatory would have been the setting of identical quotas, treating people in different situations in the same manner. [56]

39. Furthermore, as the Commission correctly points out in its observations, we

53 — See point 11 above. It is not true, as stated in the applicant's reply, that the Council considers the data for 1993 and 1994 inadequate in the cases of Greece and Italy. The Council itself merely stated in its defence (Paragraphs 6 and 7) that those two States requested a revision of the catch figures for those years and that the Commission negotiated the revision within ICCAT.

54 — This is stated in the preamble to Recommendation 98-5 (see the Compendium, p. 58).

55 — See paragraph 42 of *NIFPO*, cited in footnote 50, and the judgment mentioned in it. It should be remembered that its discretion in those circumstances is not limited solely to the nature and scope of the measures to be taken but also, to some extent, to the finding of basic facts (see Case C-179/95 *Spain* v *Council* [1999] ECR I-6475, paragraph 29).

56 — It should be remembered that the prohibition of discrimination requires that comparable situations should not be treated in a different manner unless the difference in treatment is objectively justified (see, for example, *NIFPO*, cited above, paragraph 58) and, accordingly, that people in different situations should not be treated in the same manner.

cannot avoid the fact that the contested Regulation was adopted [57] after the European Community, which is allocated an overall share, [58] had joined ICCAT. It is possible for the Community duly to fulfil its obligations as a member of ICCAT and for consistency in the policy of preserving the bluefin tuna fishing grounds to be maintained only if the same criteria are applied for intra-Community distribution as are followed for the Eastern Atlantic and the Mediterranean as a whole.

2. *Article 2(2) of Regulation No 49/1999 and the part of the Annex thereto relating to bluefin tuna*

A — Absence of a statement of reasons

40. In order to seek the annulment of this provision, the Italian Republic alleges, here too, that there is a failure to state the reasons. The only explanation on this matter contained in the Regulation must be sought in its fifth recital. [59] In the applicant's view, this reasoning is merely ostensible and conceals the true reason for the distribution, which is simply to apply to Spain, Greece and Italy the sanctions imposed by ICCAT for exceeding catch limits during 1997.

41. The reply here should be the same as the one I have suggested above for the alleged lack of reasons for Article 2(1) of the Regulation. In making its complaint, Italy confuses, and improperly combines, two aspects which, although closely related, should not be merged: the existence of the statement of reasons and its correctness. The plea which I am examining now falls under the first heading and the decision taken by the Court must not go outside that context.

42. There is proper reasoning, not only because of the fifth recital in the preamble to the Regulation but also because in other parts of the preamble explanations are given for the contested provision. In the second and eighth recitals reference is made to the obligations assumed by the Community as a contracting party to the Convention and to the establishment by ICCAT of a system of deductions for quantities overf-

57 — As was Regulation No 65/98.

58 — This represents the sum of the former national quotas which have to be distributed.

59 — 'Whereas for 1999 an *ad hoc* distribution among the Member States should be made in view of the special circumstances due to the Community's accession to ICCAT.'

ished which differs from the system laid down in the Community legislation. [60]

43. In any case, the applicant ultimately learned the reasons for the provision at issue and also the procedure followed for arriving at the specific figures contained in the Annex relating to bluefin tuna; therefore, the objective pursued by the requirement that there should be a statement of reasons was achieved.

44. Reference is made to that fact by the Commission, in relation to the *ad hoc* distribution for 1999 and the data and calculations which led to the setting of the catch limits indicated in the annex for that year, which were submitted in detail to the Member States within the Committee of Permanent Representatives, at which the Italian delegate expressed his disagreement. [61]

45. Again, the complaint has no substance. Not only can the grounds for establishing a special distribution for 1999 be inferred from the text of the Regulation itself, but, before its final adoption, the applicant had detailed knowledge of those grounds and of the procedure followed for setting the specific limits stated in the provision it is contesting. [62]

46. Whether or not the reasons put forward by the Council to justify the rule which is now being challenged are correct is a different issue, unconnected to whether or not a statement of reasons exists.

Also irrelevant, because they fall outside the scope of the point at issue here, are the doubts expressed by Italy regarding the correctness of the Community's allocation of 20 165 tonnes of bluefin tuna for 1999 and the fact that what was actually allocated was the 16 136 tonnes shown in the Annex to the Regulation, the deduction of the amounts by which several Member States exceeded the catch limits during 1997 being merely a pretext to conceal the genuine reasons for the distribution. Even if that were so, it would not be possible to invoke the absence of a statement of reasons since the applicant knew the reasons for the decision. Furthermore, its assertion is belied by the facts. We need only turn to ICCAT Recommendation 98-5 which states that, for 1999, the Community was allocated 20 165 tonnes of bluefin tuna. [63]

60 — Council Regulation (EC) No 847/96 of 6 May 1996 introducing additional conditions for year-to-year management of TACs and quotas (OJ 1996 L 115, p. 3).

61 — See Annex 4 to the application.

62 — See point 14 of this Opinion.

63 — See the Compendium (p. 58).

B — The subsidiary pleas in law

(a) Discrimination between Member States

47. The Italian Republic maintains in its application that the sole aim of the exceptional distribution made for 1999 was to treat the Member States differently, without taking into account the principles and rules of Community law and, in particular, Article 8(4) of Regulation No 3760/92.

48. There is one fact which the applicant has not denied at any time, namely that during the 1997 fishing season it exceeded the catch limits allocated to it by 2 666 tonnes. Accordingly, and having regard to the observations I have made above concerning the effects of the Community becoming a member of ICCAT, the criterion for internal distribution chosen by the Council and the scope of the principle of relative stability, I am inclined to think that what would actually have been discriminatory would have been the opposite course of action: failure to take into account, for the distribution, the excess catches landed by several Member States, not only Italy.

In the context of international efforts to conserve and manage Atlantic tuna, and in fulfilment of valid obligations, the Community had its fishing quota reduced for 1999 owing to the fact that several of the Member States had exceeded their catch limits during 1997. Failure to take account, when distributing that quota within the Community, of the excess catches and to deduct them from the Member States responsible would amount not only to discrimination against the Member States which had remained within the set limits but also to infringement of the principle of relative stability, which, as I have already pointed out, requires that regions whose populations depend on fishing may continue to exercise that economic activity in accordance with existing resources. [64]

(b) Retroactive effect of the reductions made in the 1999 fishing quotas owing to excess catches during 1997

49. The applicant questions whether the reduction made in the 1999 quotas owing

64 — The applicant criticises the favourable treatment it considers the French Republic has received because the recommendation adopted in 1995 limiting its catches for the three-year period 1996-1998 was repealed in 1998. This complaint lacks perspective. The only effect of ICCAT's annulment of that recommendation was to increase the volume of catches allocated to France and, accordingly, to raise the threshold of catches designated for the Community, whose quota was the sum of those of the Member States belonging to ICCAT. The annulment of the recommendation benefited not only the French Republic but also the Member States involved, amongst them Italy, since, for want of a better way of putting it, the cake of which they were all to have a slice became larger.

to the excess catches landed during 1997 is lawful, and does so on the basis of four arguments: (a) sanctions for exceeding catch limits imply that the offending Member State bears individual responsibility, and they could not therefore be the subject of the negotiations provided for in Regulation No 65/98, which refers to the actual quotas allocated on a consistent basis to the Member States; (b) in any event, negotiations relating to the reduction of quotas cannot be conducted without the State concerned having the opportunity to defend itself; (c) ICCAT Recommendation No 96-14 regarding over-exploitation during 1997 provides that the amount of the excess is to be deducted in the following season (1998), so it is incorrect to do so for the 1999 season; and (d) the Italian Republic joined ICCAT only a few days after the abovementioned recommendation came into force, which means that it cannot be penalised for exceeding the catch limits during 1997.

50. The third of the above arguments is based on a false premiss. The applicant forgets that ICCAT Recommendation 96-14 was supplemented by the recommendation adopted in Santiago de Compostela in November 1998, according to which the application of a reduction made for exceeding the quota during one season may be deferred to a management period after the one immediately following the period in which the limit had been exceeded if, at the time the limits are fixed, complete data relating to the catches for that period are not available. [65]

51. The reply to the first two arguments must not overlook the fact that when the Community became a party to the Convention for the Conservation of Atlantic tunas, it was subrogated to the position of those of its Member States that already belonged to that international organisation and which, at the same time, transferred to it the responsibility for acting for them within ICCAT. This finding is an unavoidable consequence of the provisions of the second indent of Article 2, Article 3(2), and Article 11 et seq. of the Treaty on European Union, which impose the requirement of a common foreign policy and, more particularly, of the provisions of Article 3 EC (Article 3 of the EC Treaty before amendment) which, in paragraph (e), requires the adoption of a common policy in the spheres of agriculture and fisheries.

52. Once it had become a party to the Convention, the Community was fully entitled to negotiate the allocation of the fishing quota available to it, and also to discuss all the relevant parameters, including over-exploitation by some of its Member States before the accession of the Community. [66]

65 — See point 7 of this Opinion.

66 — Not for nothing are the quotas allocated to the Community for the years 1999 and 2000 the sum of the shares of the Member States which were already members of ICCAT (see footnote ** to Recommendation 98-5; Compendium, p. 58).

53. Regulation No 65/98 authorised the European Commission to negotiate within ICCAT the revision of catch figures for Member States without any limitation and, if necessary, to make a later adjustment to the intra-Community distribution. [67] I have no doubt that, for that purpose, it was essential to weigh up all the relevant information and circumstances, amongst them those relating to over-exploitation and the corresponding deductions made in application of recommendations to which no Member State of the Community — nor Italy, when it joined ICCAT — made any objection at the time.

54. In such a situation there is no chance at all that any Member State will be left defenceless, because, in the negotiations, the Community defends the Community interests which, as far as the common agricultural policy is concerned, are also those of each of its members.

55. The last of the arguments raised by the Italian Republic against Article 2(2) in conjunction with the first table of the Annex to the Regulation also starts from a false premiss in so far as it treats the reduction in fishing quotas provided for in Recommendation 96-14 as a sanction.

56. A sanction, whether penal or administrative, is a legal device whose fundamental objective is to punish — and generally and specifically to discourage — conduct characterised as reprehensible in the relevant legal instrument. [68]

Since the reprehensible conduct is likely to alter the situation, the sanction in the strict sense may be accompanied by additional measures — to make amends and restitution — aimed at restoring the situation which prevailed before the transgression was committed; but such measures are not in the nature of a sanction.

57. If we read carefully the text of Point 2 [69] of ICCAT Recommendation 96-14 and also bear in mind the context in which it was adopted, it is clear that it does not establish a sanction [70] for Member States whose catches exceed their fishing quotas.

67 — See the eighth recital and the third and fourth paragraphs of Article 1.

68 — See the observations I made on this matter in the Opinion I delivered in Case C-387/97 *Commission* v *Greece* [2000] ECR I-5047, point 28 et seq.

69 — Which is the point which concerns us here and is referred to in ICCAT Recommendation 98-13 (see the Compendium, p. 97).

70 — Incidentally, at no time is the word 'sanction' used.

ICCAT's objective is the conservation and management of Atlantic tuna, through the cooperation of the parties in maintaining tuna stocks at levels which allow sustained maximum catches. In pursuit of that objective, where there is 'over-exploitation' it has the power to adopt binding recommendations to limit catches and distribute them between the States which have tuna-fishing fleets. If one of them exceeds the limit, it upsets the balance to the detriment of the others and it therefore becomes necessary, in order to achieve the proposed aims, to restore that balance. Stability is restored by deducting from the quota of the offending State the amount by which it has exceeded the limit. That is the meaning and scope which should be attributed to the measure adopted in Point 2 of ICCAT Recommendation 96-14.

58. No sanction is imposed and, consequently, it is not appropriate to seek to rely on the principle that sanctions must not be applied retroactively. [71] Convincing proof that it is not a punishment is to be found in point 3 of the same recommendation, where provision is made for other measures which could indeed be of that nature, in so far as they seek not to compensate for the damage but rather to punish the offender (by reducing the quota by more than the excess and imposing measures restricting trade).

71 — In *Commission* v *Greece*, cited in footnote 68, the Court of Justice refused to consider the penalty payments imposed under Article 171(2) of the EC Treaty (now Article 228(2) EC) as sanctions and, therefore, did not consider that the principle that sanctions shall not be applied retroactively was applicable (see paragraph 41).

59. Even if the applicant's argument were accepted and the measure in question were acknowledged to be a sanction, it could not be inferred that a deduction from the Italian Republic's quota for 1999 of the quantities by which it had exceeded its quota during 1997 constituted an infringement of the principle which prohibits the retroactive application of sanctions.

60. It should be pointed out that Recommendation 96-14 entered into force two days before Italy joined ICCAT, [72] so it is not possible to speak of retroactive application on a legislative level. When Italy joined the organisation, the recommendation was already a legal reality [73] and, more significantly, although Italy knew of its existence, it did not raise any objections to it during the accession procedure.

61. Nor is there any retroactive effect in respect of the facts, as the applicant claims when it complains that the recommendation was applied to catches landed before

72 — The recommendation entered into force on 4 August 1997 and Italy became a member of ICCAT on 6 August 1997 (see point 7 and footnote 16 of this Opinion).

73 — Once a new member has joined ICCAT, it is subject to the recommendations already adopted and in force. The rule in Article VIII of the Convention, under which it would be necessary to wait six months for the provisions lawfully adopted by ICCAT to become effective for the newly arrived member, does not apply here. The reason is very simple: the process of joining ICCAT implies, unless expressly provided otherwise, acceptance of the whole body of law which implements the Convention and governs the obligations assumed under it by the signatory States, and it is therefore not necessary to grant any period for the submission of objections.

Italy became a member of ICCAT. That view disregards the substance of the transgression with which it is charged. It is, by its very nature, an infringement which is committed only when the fishing limits allocated have been exceeded and which, from that moment, becomes 'persistent' if the catches continue.

62. The Italian Republic, even before it became a member of ICCAT, had undertaken not to exceed the bluefin fishing levels indicated in Recommendation 94-11, since that provision was adopted by the General Fisheries Council for the Mediterranean, to which it belonged, in its Resolution 95/1. [74]

Consequently, for the 1997 season the applicant undertook not to exceed the level of catches landed in 1993 or 1994 (whichever was the higher). It is unimportant how binding that undertaking was since the crucial point is that, when Italy joined ICCAT without expressing any reservations, it became an obligation. As from 6 August 1997 Italy was legally bound to ensure that its catches for that year — whether landed before or after its accession — did not exceed the threshold indicated, [75] in the knowledge that, if it did not comply, the amount of the excess could be deducted from its quota for the following year. [76]

Therefore, it is not possible to allege, on the basis of that argument, infringement of the principle that sanctions must not have retroactive effect, which, in accordance with the principle of legal certainty, requires that nobody should be subjected, after the event, to an unexpected classification of action which, at the time it was taken, was not described as sanctionable. Italy knew, when it acceded to the International Convention for the Conservation of Atlantic Tunas, that it ought not to exceed a specific threshold and that, if it did so, Recommendation 96-14 could be applied to it. [77]

74 — See footnote 8 of this Opinion.

75 — The interpretation to the effect that, in the year in which a new member joins ICCAT, no account should be taken of the catches it lands prior to accession, so that, in order to calculate whether or not it exceeds its catch limits, only those landed afterwards must be taken into consideration, whatever the volume caught prior to accession, implies ignorance of the objectives of the Convention and, to a certain extent, jeopardises their achievement in practice, in that it allows a member to catch a volume of fish higher than that bindingly recommended for the conservation of Atlantic tuna.

76 — By virtue of supplementary Recommendation 98-13, from the 1999 quota.

77 — If, when it joined ICCAT, the Italian Republic had already exceeded its catch threshold, it should have declared that fact in order to avoid a future deduction from its quota and should have made its accession conditional on the non-application of Recommendations 96-14 and 98-13; but it did neither, as became clear at the hearing from the reply given by the representative of the Italian Government to the question which I put to him.

63. In view of the foregoing, none of the infringements which the Italian Republic attributes to Article 2 of the Regulation and the table in its Annex relating to bluefin tuna has taken place and this action for annulment should therefore be dismissed.

VI — Costs

64. The dismissal of the action brought by the Italian Republic means that, under the first paragraph of Article 69(2) of the Rules of Procedure, that State should be ordered to pay the costs.

VII — Conclusion

65. In the light of the foregoing considerations, I suggest that the Court of Justice dismiss the action for annulment brought by the Italian Republic against Article 2, and the table in the Annex relating to bluefin tuna, of Council Regulation (EC) No 49/1999 of 18 December 1998 fixing, for certain stocks of highly migratory fish, the total allowable catches for 1999, their distribution in quotas to Member States and certain conditions under which they may be fished, and order the applicant to pay the costs.