OPINION OF ADVOCATE GENERAL TESAURO

delivered on 31 March 1992 *

Mr President,
Members of the Court,

1. Council Regulation (EEC) No 3094/86 of 7 October 1986 laying down certain technical measures for the conservation of fishery resources [1] applies, pursuant to Article 1(1), 'to the taking and landing of fishery resources occurring in all maritime waters under the sovereignty or jurisdiction of the Member States'. The sole exception to that principle is provided for by Article 6(1)(b) of Title III, on the 'prohibition of fishing', under which even salmon and sea trout in some regions of the high seas, that is to say in waters not under the sovereignty or jurisdiction of the Member States as coastal states, '*may not be retained on board or be transhipped, landed, transported, stored, sold, displayed or offered for sale, but shall be returned immediately to the sea when taken*'. [2] That provision was adopted in implementation of the Convention for the Conservation of Salmon in the North Atlantic (hereinafter 'the Convention on Salmon'), signed in Reykjavik on 22 January 1982, [3] by which the Community undertook to prohibit salmon fishing in some areas of the high seas.

It is precisely the interpretation of Article 6(1) of Regulation No 3094/86 that is the subject-matter of the questions referred by the Kriminal-og Skifteret di Hjørring (Denmark), which were raised in criminal proceedings against a Danish national, P. M. Poulsen, the captain of a Panamanian fishing vessel.

In essence, the Court is called on to decide whether, under Community law, a Member State must prosecute one of its nationals, the skipper of a vessel flying the flag of a non-member State, on the ground that the vessel in question was fishing for salmon in an area of the high seas in which the prohibition laid down in Article 6(1) of Regulation No 3094/86 applies. If not, the question arises whether the fact that the vessel with its cargo of salmon on board then crossed the territorial waters of the Member State in question and/or puts in at a port of that State, albeit claiming to be in distress, constitutes in itself an infringement of Article 6(1) of Regulation No 3094/86 justifying the confiscation of the cargo by the Danish authorities and the imposition of criminal penalties.

2. The facts are simple and not in dispute. In 1989, Mr. Poulsen, a Danish national resident in Denmark, sold the fishing vessel 'Onkel Sam' of which he was the owner, and received a final cessation premium pursuant to Council Regulation (EEC) No 4028/86 of 18 December 1986 on Community measures

* Original language: Italian.
1 — OJ 1986 L 288, p. 1.
2 — My italics.
3 — OJ 1982 L 378, p. 25.

to improve and adapt structures in the fisheries and agricultural sector. [4]

The fishing vessel in question was purchased by Diva Navigation Corp., a Panamanian company wholly owned by J. U. Poulsen, the vendor's brother. J. U. Poulsen hired his brother as the vessel's skipper and in addition four other Danish nationals as crew members. It should be pointed out that all members of the crew are paid in Denmark, that the fishing vessel operates out of a Danish port (Hirtshals) and that although the catches are unloaded in Poland, the owner is paid for them through a Danish company.

In the fishing season that opened at the beginning of 1990, the 'Onkel Sam' fished for salmon in the North Atlantic (more specifically in region 1) in an area of the high seas subject to the prohibitions on fishing contained in the Convention on Salmon and thus in Regulation No 3904/86. With its cargo on board, the fishing vessel in question then began its return journey to Poland, which can involve traversing maritime zones under Danish jurisdiction. Problems with the fuel supply to the engine which arose during the journey together with adverse weather conditions forced the skipper to enter the Danish port of Hirtshals in order to carry out the necessary repairs. It was while the 'Onkel Sam' was in Hirtshals that it was inspected by the Danish fisheries control authorities.

4 — OJ 1986 L 376, p. 7.

Following that inspection, the public prosecutor brought criminal proceedings against P. M. Poulsen under Article 6(3) of Danish Law No 661 of 25 September 1986 under which 'any person who contravenes or attempts to contravene Community regulations on fisheries is liable to a fine'. The public prosecutor confiscated the catch, which was then sold on the Danish market.

3. The Public Prosecutor claims that the prohibition laid down in Article 6(1) of Regulation No 3094/86 is applicable to Mr Poulsen in so far as the 'Onkel Sam' has no genuine link with the country of registration; all the applicable criteria suggest that the link is in fact with Denmark. In any event, Article 6(1) of Regulation No 3094/86 was infringed since the fishing vessel had, in Danish waters, retained on board, transported and stored a cargo of salmon caught in the prohibited region. Mr Poulsen, on the other hand, considers that Article 6(1) of Regulation No 3094/86 is not applicable to a fishing vessel flying the flag of a non-member country; both the fishing vessel and the cargo of salmon are in fact the property of a Panamanian company and are subject to the legislation of that State; moreover, the fishing vessel took refuge in the Danish port only because it was in distress.

In order to enable it to give judgment in these proceedings the national court referred to the Court of Justice for a preliminary ruling five questions by means of which it essentially seeks to establish:

(a) Whether the prohibition in question applies to all Community nationals, regardless of the country of registration of the fishing vessel on which they work and of the place in which the fishing vessel itself is located;

(b) Whether that prohibition also applies to a Panamanian company, the owner of the fishing vessel, whose catch was brought only temporarily into the territory of the Community.

If the reply to the first question is in the negative, the national court asks:

(c) Whether registration in a non-member country must be respected even in the case of a fishing vessel with the characteristics of the one at issue;

(d) In the area in which a fishing vessel flying the flag of a non-member country is caught by the prohibition on the transport and retention on board of a cargo of salmon: in an exclusive economic zone, territorial waters or inland waters;

(e) Finally, what are the consequences under Community law in a case such as the one at issue in which the fishing vessel in question took refuge in a Community port because it was in distress.

4. Even from a superficial reading of these questions and from the facts themselves it is clear that a number of fundamental principles of general international law are at issue or, in any event, must be closely scrutinized namely: the freedom to fish on the high seas, navigation in the territorial waters of another State and the related right of innocent passage, the exercise by a coastal State of criminal jurisdiction over foreign vessels, the 'immunity' of a vessel that has taken refuge in a foreign port because it is in distress, and finally the respect to be paid to flags of convenience.

In other words, the questions submitted in the present case necessarily involve the recognition of a number of rules of the international law of the sea, which must be taken into account in the interpretation of Article 6(1)(b) of Regulation No 3094/86. It is clear, in fact, that the provision in question cannot but be interpreted in conformity with the applicable rules of international law.

That having been said, I will now turn to the questions submitted by the national court. In order to do so systematically, I shall deal with the second question last.

Question 1

5. In its first question, the national court asks whether Article 6(1)(b) of Regulation No 3094/86 applies to all Community nationals regardless of the nationality of the

vessel on which they work, and consequently also to the skipper of the 'Onkel Sam' in so far as he is a Danish national.

Let me point out first of all that Article 6(1) of Regulation No 3094/86 contains a series of prohibitions designed to protect salmon and sea trout, ranging from the prohibition on fishing in waters under the jurisdiction of the Member States or even in areas of the high seas subject to international agreements (Article 6(1)(b)), to the prohibition on landing and selling the catch. Some of those prohibitions concern activities which take place at sea; for example, the prohibition on fishing and the prohibition on the retention on board of the cargo and thus the resulting obligation to return to the sea any fish caught by chance; others involve a shore-based activity: for example the prohibition on landing, transportation, storage and offering for sale.

Even though the prohibitions on the landing, displaying, transport (on land) and offering for sale of salmon all serve the purpose of the regulation and of the prohibition on fishing, it is clear in my view that the problem raised by the national court with its first question does not arise in real terms in connection with the abovementioned prohibitions on activities which presuppose that the fish have been landed. In fact, the problem does not arise either in concrete terms, since it emerges in the present case that the fish was landed only when it was confiscated, or in abstract terms, since it is common ground that on land any prohibition may indeed be applied to natural persons, whether foreign or Community nationals, irrespective of the nationality of the vessel from which they disembarked. The problem arises solely because the cargo remained on board and was not landed or sold.

6. That having been said, the first question is therefore limited to the prohibition on fishing and on retaining the catch on board. I should also point out that in areas of sea not under the jurisdiction of the coastal State the well-known doctrine of the freedom of the high seas will be fully applicable. Under that principle, since the government powers of all States converge there, the exercise of such power is dependent on the nationality of the vessel; in other words, States may not exercise public power over foreign vessels. That means that a prohibition on fishing and on retaining on board the catch in an area of the high seas may be imposed only by the legislation of the flag State of the vessel, which in turn may depend on the observance of an international agreement. [5] The flag State is also entitled to expect other States to refrain from interfering in any way in the life on board and in the activities of the vessel, subject to exceptions which are not relevant in the present case.

On the other hand, when a vessel is not on the high seas, its activities are governed in part also by the legislation of the coastal State, in the present case by a Community regulation.

What is entirely out of the question is that any importance should be attached in this

5 — See the 1958 Geneva Convention on the High Seas, in particular Articles 2 and 6.

regard to the law of the State to which any given part of the crew belongs. If there is a prohibition, it concerns, as applicable law, the vessel with all its crew members and resources, the so-called travelling community, irrespective of whether the area of sea in which the vessel is located is the high seas or under the jurisdiction of the coastal State.

That is a basic and irrefutable principle and it is frankly surprising that it has been called in question albeit with proper restraint, in these proceedings. It need hardly be added that the special nature of the Community regulation cannot change the scope of the problem.

If that were not the case, it would be possible to imagine a situation in which the members of the crew of a certain nationality were not subject to the prohibition and could, for example, fish freely whereas seafarers or passengers on the same vessel but with a different nationality would be subject to the prohibition and could not therefore fish. That would obviously be an entirely paradoxical situation and one which is in any event entirely unknown to the law of the sea hitherto.

The same 1958 Geneva Convention on fishing on the high seas stated, supererogatorily, that its provisions apply to vessels and not to crew members (Article 14); the irrelevance of the nationality of the fishermen in relation to that of the vessel had already been made clear. [6]

7. If the present case is looked at more closely, what is also striking is the fact that the fishing of salmon in question was carried out in an area of the high seas by a Panamanian vessel. A prohibition on fishing in that area could therefore result only from Panamanian legislation, where appropriate in accordance with an international convention to which Panama is a party. It is common ground that that situation does not apply in the present case since Panama is not a party to the Convention on Salmon.

Accordingly, it is quite clear that the prohibition on fishing laid down by the Convention and by Article 6(1) of Regulation No 3094/86 did not apply to the 'Onkel Sam'. Whether the captain or the cabin boy or the entire crew of the 'Onkel Sam' were nationals of Denmark or Peru or the Philippines is entirely irrelevant.

However, the parties to the Convention on Salmon did in fact foresee the circumstances at issue in the present case and also considered it expedient (Article 2(3) of the Convention on Salmon) to 'invite the attention' of third states when their vessels 'affect adversely' the attainment of the conservation objectives pursued. It is not fortuitous that that is precisely what happened with the Panamanian vessels, whose flag State, following protests from the countries which are

6 — See the judgment of 7 September 1910 in the Anglo-American case concerning fishing in the northwest Atlantic: UNRIAA, XI, p. 167 et seq.

signatories to the Convention, ended up prohibiting fishing for salmon in the area of the North Atlantic in question.

That was the only way to prohibit a Panamanian vessel and the members of its crew from fishing on the high seas: the prohibition must be imposed by the flag State, whose legislation is exclusively applicable to the activities of the vessel on the high seas.

I therefore consider that Question 1 must be answered emphatically in the negative since it cannot reasonably be argued that Community law, and in particular the prohibition on the fishing of salmon and on the retention on board of the catch, can apply to one or more members of the crew of the 'Onkel Sam' and not apply to the vessel itself; that is true irrespective of the area of sea in which the vessel is located.

8. Moreover, the documents before the Court indicate that when the Danish Government itself, prior to the material time, was asked whether a ship flying a non-Community flag, even with a Danish crew, could lawfully fish in the area of sea in question, it had repeatedly — and correctly — given an affirmative reply and that reply was approved by the Commission itself.

The Commission, with evident unease, advances contrary arguments which are clearly unfounded.

The argument that Article 15 of Council Regulation (EEC) No 2241/87 of 23 July 1987 establishing certain control measures for fishing activities [7] allows the Member States to impose penalties on its own nationals working on vessels not subject to the prohibition on fishing, in so far as the legislation of those States contains rules on supervision which are stricter than those of the Community, is unfounded. That argument is manifestly contradictory since an individual on a vessel which is not subject to the prohibition on fishing is fully entitled to fish and thus does not deserve *any* penalty, since the necessary infringement of a rule is absent.

Equally unfounded is the argument that Article 14(1) of the same Convention on salmon is a sufficient basis for the imposition of penalties on Community nationals working on vessels of countries which are not parties, since that provision, without any intention of derogating from the applicable international law, confines itself to providing penalties in order to ensure the correct implementation of the convention; the penalties are thus imposed for non-compliance with the prohibition on fishing and against those who have infringed it, therefore once again on the assumption that the vessels concerned are subject to the prohibition. On the other hand, the abovementioned reference pursuant to Article 2(3) is provided for for vessels of third countries. Nor is it possible to leave out of account the principle *pacta tertiis neque iuvant neque nocent.*

7 — OJ 1987 L 207, p. 1.

It need hardly be pointed out, then, that the judgment of the Permanent International Court of Justice in the *Lotus* case, [8] cited during these proceedings, is of no avail. That case concerned the jurisdiction of the courts of the country of the victim of a collision which occurred on the high seas between a French vessel and a Turkish vessel and not the existence of an offence, which was in fact presumed; the case concerned still less the law applicable to the two vessels involved, French law and Turkish law respectively. [9] Moreover, the principle that the courts of the country of the victim have jurisdiction, which even then was highly questionable, was expressly contradicted by the Geneva Convention on the High Seas (Article 11).

As for the academic example of a bullet fired in one State that hits a man on the other side of the border, that example is so inappropriate that it does not merit comment.

Question 3

9. Since the regulation cannot therefore apply to Community nationals working on a non-Community vessel, it must be determined whether under certain circumstances it is possible to deem the vessel to be a Community vessel. In its third question the national court is in fact essentially asking whether the 'Onkel Sam' must indeed be considered a Panamanian vessel or whether it can be regarded as a Danish vessel since the company which owns it, formally under Panamanian law, has entirely Danish interests behind it, the crew is Danish and the State of refuge is normally Denmark. In short, the problem is one of flags of convenience.

Much has been written and said on the phenomenon of flags of convenience, which started in the stormy years of prohibition and spread in particular at the beginning of the Second World War when neutrality limited the mercantile activities of vessels flying the United States flag but not that of vessels flying the flag of Honduras, Costa Rica or Panama, regardless of whether American interests were behind them. After the phenomenon had become established in better times and the economic advantages discovered, the phenomenon was often criticized, if only in the emotional wake of very serious incidents. The legal antidote to it was also loudly proclaimed, and summed up in the descriptive term of 'genuine link', established as a limit on the freedom of States to grant their flags.

However, the words do not find the necessary and precise counterpart in precedents, either in arbitration or in conventions. Indeed, the statement that 'it is for each sovereign State to decide to whom it will grant

8 — PICJ, judgment of 7 November 1927, A Series, No 10 p. 25 et seq.

9 — In that regard it should be pointed out that in its judgment in *Lotus*, the Permanent Court nevertheless reaffirmed the principle according to which 'apart from certain special cases which are defined by international law, vessels on the high seas are subject to no authority except that of the State whose flag they fly'.

the right to fly its flag' [10] has not so far been disputed as regards its substantive content. In the *I'm Alone* case, in which a vessel, belonging to United States interests but registered in Canada, was smuggling alcohol into the USA and for that reason was 'captured' by the Coast Guard, the capture was held to be unlawful. [11]

The International Court of Justice, in an advisory opinion delivered on the composition of the Committee for Maritime Safety of the intergovernmental consultative organization on maritime organization (IMCO) did not express a contrary opinion. On that occasion, in fact, the Assembly of the IMCO had ruled out the inclusion of Panama and Liberia among the countries with the greatest fleet tonnages, as members of the Committee, because there was no genuine link between the majority of the vessels and those countries, which in fact granted flags of convenience. The Court firmly and categorically rejected that argument stating that such a method for appraising the ranking of a nation that possesses a merchant fleet was neither safe nor practical, and found no support whatsoever in the case-law, in international literature, maritime terminology or in the international agreements on safety at sea. [12]

When an attempt was made to codify the law of the sea, the United Nations' Commission on International Law sought to introduce into the 1958 Geneva Convention on the High Seas the principle that States may disregard the nationality of the flag of a vessel when there is no genuine link with that State, from the point of view in particular of relevant ownership and the composition of the crew. The result was Article 5 of the Convention, which, as the Court is aware, turned the question of the *genuine link* around and required the flag State actually to exercise its governmental power and control over vessels to which it grants nationality. Nor has the attempt to interpret Article 5 differently met with success: by way of example the above-mentioned advisory opinion of the International Court of Justice may be mentioned.

The Montego Bay Convention on the Law of the Sea of 10 December 1982, finally, while not yet in force, confirms the comments made above in so far as it provides that when one State regards the control exercised over a vessel as inadequate, it can 'signal the fact' to the flag State, and the latter 'shall carry out an investigation and take, where appropriate, the necessary measures to remedy the situation' (Article 94(6)).

Thus the nationality of the vessel is that of the flag State, in the present case Panamanian. That nationality must clearly be respected in so far as it is consistent with the Panamanian legislation on the requirements for immatriculation of vessels, even if the capital of the company that owns the vessel, constituted under Panamanian law, depends on exclusively Danish interests. That means

10 — Judgment of 8 September 1905, Permanent Arbitration Court, Great Britain v France (the Muscat Dhows Case), UNRIAA, XI, 92 et seq.

11 — Judgment of 5 January 1935, UNRIAA, III, 1617 et seq.

12 — ICJ Opinion of 8 June 1960, Reports 1960, p. 169: *ICJ Mémoires*, Case on the composition of the Maritime Safety Committee of the IMCO, p. 23.

that governmental power lies in principle with the flag State, subject to the limits connected with international agreements and the exercise of the governmental power of the coastal State in areas which are not the high seas.

That line of argument is precluded in particular as regards the exclusive economic zone, in which the coastal State's legitimate claims cannot concern the navigation per se of foreign vessels (it is in principle the high seas), but only activities subject to special rules (fishing, scientific research, artificial installations) *carried out in that area of sea.* [13] That is not the case in these proceedings since the fishing took place outside the exclusive economic zone.

Question 4

10. In its fourth question the national court asks as to the areas of the sea in which the prohibition contained in Article 6(1) of Regulation No 3094/86 on the *transport and retention on board* of a cargo of salmon caught in the area of sea to which the Convention on Salmon refers can be enforced against a fishing vessel from a third country.

The prohibition on the retention on board of the fish cannot in my opinion by separated from the prohibition on fishing. A vessel not subject to the prohibition on fishing will not be under an obligation to return the fish to the sea, though that is required by the provision of the regulation in question, and will therefore have the right to retain it on board: *tertium non datur.* That means that a cargo of fish caught lawfully is an entirely lawful cargo.

If that is true, which in my view is indisputable, it is difficult to argue that a coastal State can make claims when the vessel must cross from the high seas, where it lawfully caught and just as lawfully retained on board the cargo, to an area of seas under the jurisdiction to a greater or lesser extent of the coastal State.

11. It is also precluded, and just as radically, for the coastal State to enforce the prohibition on retaining on board a cargo of fish lawfully caught on the high seas when the vessel merely traverses the territorial sea; that is true irrespective of the sea conditions and of the 'health' of the vessel.

Indeed, the powers which the coastal State has in principle in its territorial sea are in fact equivalent to those that it has in its territory, but they have always been limited with regard to the so-called innocent passage of vessels flying the flag of another State. While it is under a duty to comply with the rules on navigation, a foreign vessel has a right of (innocent) passage in the territorial sea of a coastal State, either to traverse it or to enter its inland waters or to put out to sea (Articles 14 and 17 of the Geneva Convention on the Territorial Sea and the Contiguous Zone).

13 — See in particular Articles 58 and 73 of the Montego Bay Convention which must be considered to reflect international customary law.

Passage is innocent whenever the vessel in transit does not use the territorial sea of a coastal State in order to commit an act which 'disturbs the peace, good order or security of the coastal State' (Article 14(4)). If passage is not innocent, the coastal State may take all steps necessary to prevent it (Article 16). The duty of the coastal State to tolerate and not hinder innocent passage thus does not affect the State's freedom as regards everything pertaining to the regulation of navigation, the innocent control of passage and in general the utilization of the waters and their resources. [14]

In the Geneva Convention, again in the section concerning innocent passage, it is also stated that the exercise of the coastal State's criminal jurisdiction is legitimate when the consequences of an offence 'extend' to the coastal State or disturb the peace of that State or 'good order' in the territorial sea (Article 19); those are all situations which are far removed from the mere retention on board of a cargo of fish lawfully caught on the high seas.

In substance, the exercise of the coastal State's power of government concerns the rules applicable to navigation and to the remaining maritime activities, rules to which all vessels, even foreign ones, are evidently subject; it also concerns those events which, although they take place on board the vessel, exceed its confines and prejudice the life and interests of the community in the territory. That is why a vessel which merely traverses the territorial sea of the coastal State, and in so doing respects the rules of navigation and does not carry out any activity which is either prohibited (fishing for example) or likely to interfere with or disturb the normal course of life of the community on shore, has a right of passage. In the final analysis, the innocence (in relation to the abovementioned provisions of international law) of the passage of a Panamanian vessel which merely traverses Danish territorial sea with a cargo of salmon lawfully caught on the high seas cannot in my view reasonably be called in question. I do not consider that the retention on board of such a cargo can prejudice the peace, good order or the security of the coastal State.

That means that the Community prohibition on the retention on board of salmon may not be applied to a Panamanian vessel which lawfully caught the salmon on the high seas when the said vessel is merely traversing Danish waters.

12. The result must also be the same as regards the entry of the 'Onkel Sam' into a Danish port in so far as I consider that the Community prohibition on the retention aboard of salmon lawfully caught on the high seas is again inapplicable; provided obviously that it is established that the cargo remained on board and that no member of the crew attempted to land it, display or offer it for sale on land, as has been established, in my view, in the present case.

14 — In this regard, it is perhaps worth emphasizing that Portugal's proposal, made at the 1958 Conference, that innocent passage should in general be linked to observance of the legislation of the coastal State, was rejected (United Nations' Conference on the Law of the Sea, *Official Documents*, vol. III, Doc. C.1/L.26, p. 236).

Even in general terms the idea that foreign vessels are fully and unconditionally under the jurisdiction of the port State is contradicted by old established practice, the most famous expression of which is the decision of 28 October 1806 of the French Council of State in the cases of *the Sally* and *the Newton*. [15] On that occasion it was held that a crime that concerned only the vessel and its crew did not permit the local authorities to intervene unless the intervention was requested or the tranquillity of the port was prejudiced. In short, the exercise of governmental power over foreign vessels in the territorial sea depends, as has already been pointed out, on whether the events are internal or external to the vessel.

That principle has been widely applied. For example, the Supreme Court of the United States of America, in *Lauritzen* v *Larsen*, [16] confirming earlier case-law (*Wildendess* and *US* v *Flores*), stated that 'all matters of discipline and all things done on board' that do not disturb the peace and tranquillity of the port must remain within the jurisdiction of the flag State. The resolution of the Institut de Droit International of Amsterdam (1957) reads as follows: 'The coastal State may exercise its judicial competence over delictual acts committed on board a vessel during its sojourn in the internal waters of that State. ... However, according to widely accepted practice, judicial competence is not exercised in penal matters with respect to acts committed on the vessel which are not of a kind to disturb public order. Nor, in general, is judicial competence exercised in matters of civil jurisdiction which relate to the internal order of the vessel'. [17]

Thus when the United States sought to apply its prohibitionist legislation even to foreign vessels moored in its ports, vigorous protests were made by practically every State, including Denmark, which claimed that the American claim was contrary to international law and practice. [18] And the *Liquor Treaties* which settled the dispute recognized the right of foreign vessels to retain on board alcoholic beverages *intended for other countries*. [19]

The situation considered above, namely the retention on board of goods that are prohibited under the legislation of the port State, shows clearly that in the absence of factors which allow the State in question to infer an intention to land the goods in question and introduce them into its territory, and provided that the vessel remains extraneous to the Community on shore, national legislation and jurisdiction may not be extended to the vessel in question.

15 — *Bulletin de Lois*, 1806, No 126, p. 602 et seq. The subsequent national case-law in this field shows that the principle laid down by the French Council of State has been broadly accepted and applied. See, for example, the national decisions reported in the *American Journal of International Law*, 1929, Suppl., No 23, p. 323 et seq.; and, more recently, the judgment of 7 February 1974 of the District Court, Naples (*Giurisprudenza Italiana*, 1974, II, p. 513 et seq.).

16 — 1953 U. S., 345, 571.

17 — *Annuaire de l'IDI*, 1957, p. 487.

18 — Particularly revealing in that regard are the protest notes sent to the United States Government by all the countries concerned (see the *American Journal of International Law*, 1929, Suppl., cited above, p. 309 et seq.); in those notes it was emphasized in particular that the jurisdiction of the port State 'should not extend beyond restricting acts which might disturb public order' (Belgium) and that it was not lawful to prohibit the transport of alcohol 'not intended for importation into the United State' (Denmark).

19 — On that point see Quadri, *Diritto Internazionale Pubblico*, Naples 1968, p. 744, and *Le Navi Private nel Diritto Internazionale*, Milan 1935, p. 95; Jessup, *The Law of Territorial Waters and Maritime Jurisdiction*, New York, 1927, p. 77 et seq.

Nor do I consider that the solution I suggest would render the provision of the regulation at issue entirely ineffective, as has been argued in the course of these proceedings.

First, compliance with the fundamental principles of international law is not of secondary importance. Moreover, the effectiveness, as regards salmon caught by non-Community vessels which are not subject even *aliunde* to the prohibition on fishing, derives from the prohibition on landing the catch. Secondly, as already mentioned, the Danish government itself *in tempore non suspecto* anticipated the facts of the present case and expressly recognized their lawfulness; and, as has already been pointed out, no distinction can be made between infringement of the prohibition on fishing and infringement of the prohibition on retaining the catch on board.

The foregoing considerations lead inevitably to the following conclusions: the Community prohibition on retaining on board a cargo of salmon caught on the high seas may not be applied to a vessel flying the flag of a non-member country, that caught the salmon lawfully. That is true whether the vessel is in the exclusive economic zone, in the territorial sea or even, in principle, in the port, provided at least that the fishing vessel remains extraneous to the community on shore, in other words provided that the retention of the salmon on board remains entirely internal to the vessel in question. It is for the national court to determine whether that is in fact the case.

Question 5

13. Does a fishing vessel of a non-member country that takes refuge in a Community port claiming to be in distress enjoy immunity? In other words, is it possible for it to retain on board a cargo of salmon caught in an area prohibited by Regulation No 3094/86 without thereby incurring penalties imposed by the port State?

Such a question obviously presupposes that the coastal State is competent to inspect a fishing vessel of a non-member country moored in its port, and — in particular — to prosecute the captain of that fishing vessel for having on board such a cargo of salmon, even when there is no proof at all of an intention to land and sell the salmon in question in the Member State in question. As I have just said, in my opinion, unless there is any evidence to that effect (of an intention to sell or at least land the salmon), a State must refrain from bringing a criminal action against the captain of the fishing vessel in question.

In any event, there is, moreover, no doubt that under general international law, a vessel in distress may take refuge in a port, even when it may not normally enter that port, a

situation which certainly does not apply in the present case since the port of Hirthals, the port in which the 'Onkel Sam' took refuge, is the same one in which the fishing vessel in question normally 'rests'.

International law also accepts distress as a ground for excluding the unlawfulness of a breach of an obligation under international law; [20] and the example used repeatedly is precisely that of the rule which allows vessels to take refuge in the territorial sea and/or ports of a foreign State when it is damaged or in other hazardous circumstances. That situation is expressly provided for by Article 14(3) of the Geneva Convention on the Territorial Sea and the Contiguous Zone (reproduced, in so far as the present case is concerned, by Article 18(2) of the Montego Bay Convention), according to which it is accepted that foreign vessels, in the exercise of the right of innocent passage, may stop and anchor in the territorial sea only if it is part of the normal exercise of navigation or was rendered necessary 'en état de relâche forcé ou de détresse' ('in cases of *force majeur* or distress').

When a vessel is in such a situation, the literature is almost unanimous in considering that the vessel in question cannot be subject to the laws of the port State on the ground alone that it entered the port, unless, obviously, the alleged activities took place in territory under the jurisdiction of the State in question. [21]

In conclusion, it is for the national court to determine whether in the present case there was a situation of distress, whether or not the 'Onkel Sam' was forced to enter the Danish port by the state of the engine and/or of the weather. Since Community law does not define the scope of the concept of distress at issue in the present case, the national court must have recourse to international precedents, which are certainly not lacking. [22]

Question 2

14. In the light of the foregoing, I consider that the reply to the second question is covered by the previous replies since the coastal State cannot have a power of confiscation over a cargo of fish lawfully caught and introduced only temporarily by a Panamanian vessel into the territorial sea or internal waters; that is particularly so when the entry into port is due to distress.

Nor is there any point considering, as the Commission does, Regulation

20 — See Article 32 of the draft articles of the International Law Commission on the international responsibility of States, which defines distress as a situation of extreme danger in which the person who has committed the breach of an obligation under international law finds himself 'when that person has no other means of saving his own life or the lives of those in his care (see in the UN *Annuaire de la Commission du Droit International*, 1979, II, Part II, p. 149).

21 — See on all the literature O'Connell, *The International Law of the Sea*, Oxford 1984, volume II, p. 853 et seq.

22 — See, for example, the precedents cited by De Lapradelle, Politis, *Recueil des Arbitrages Internationaux*, Paris 1905, I, p. 686 et seq.; and Gidel, *Le Droit International Public de la Mer*, 1981, vol. II, p. 89 et seq.; finally, more recently, the judgments of 22 April and 9 May 1990 of the Spanish Supreme Court (Contencioso-Administrativo, Sala 3a, *Repertorio de Jurisprudencia Aranzade*, Nos 3328 and 3807 respectively).

No 2241/87 on the control required of the Member States. Those controls, as has already been pointed out, concern the infringement of the Community rules on fishing. Therefore, they can apply to a vessel of a non-member country only in so far as the fishing took place in waters subject to the Community rules. That is not so in the present case since the 'Onkel Sam' fished on the high seas and did not therefore infringe the Community prohibition on fishing.

15. On the basis of the foregoing considerations, I therefore propose that the Court should reply to the questions referred by the national court as follows:

(1) Article 6(1) of Regulation (EEC) No 3094/86 must be interpreted as meaning that it does not apply to the members of the crew when it is not applicable to the vessel on which they are employed, irrespective of the area of sea in which the vessel is located.

(2) The nationality of a vessel is that of the country in which it is legitimately registered, even when the company which owns it has foreign interests behind it, the crew is entirely foreign and the port of habitual refuge is foreign.

(3) Article 6(1) of Regulation (EEC) No 3094/86 must be interpreted as meaning that the prohibition on retaining on board a cargo of salmon lawfully caught may not be applied to a vessel that merely traversed the exclusive economic zone and the territorial sea of a Community State and which entered a port only temporarily, particularly when there is a case of distress; it is for the national court to ascertain such circumstances.