during landings or transhipments in its ports to initiate proceedings against those responsible, subject to the possibility of transferring such proceedings to the flag State, if the latter so agrees, along with the prospect that catches which have been unlawfully landed or transhipped may be counted against the quotas of the Member State which has failed to comply with that obligation, also cannot be criticized, in so far as such measures are no more than the practical application of the joint responsibility of Member States to monitor the system of catch limitations.

REPORT FOR THE HEARING
delivered in Case C-9/89 *

I — Facts and Procedure

1. *Relevant law and background to the case*

Council Regulation (EEC) No 170/83 of 25 January 1983 establishing a Community system for the conservation and management of fishery resources (Official Journal 1983, L 24, p. 1) initiated a common fishery policy for the conservation of the biological resources of the sea and their balanced exploitation. The 12th recital in the preamble states that a Community system should be accompanied by the institution of an effective system of supervision of activities in the fishing grounds and on landing. Pursuant to the regulation the total allowable catch (TAC) for each stock or group of stocks for the Community is divided between the Member States. Article 5(2) requires the Member States to determine the detailed rules for the utilization of the quotas. On that basis the Member States may set up individual fishery licencing schemes.

When Regulation No 170/83 entered into force control measures for fishing activities had already been provided for by Council Regulation (EEC) No 2057/82 of 29 June 1982 establishing certain control measures for fishing activities by vessels of the Member States (Official Journal 1982, L 220, p. 1), as amended on various occasions, most recently by Council Regulation (EEC) No 4027/86 of 18 December 1986 (Official Journal 1986, L 376, p. 4).

Pursuant to Article 11 of Regulation No 170/83, Regulation No 2057/82 was replaced by Council Regulation (EEC) No 2241/87 of 23 July 1987 establishing certain control measures for fishing activities (Official Journal 1987, L 207, p. 1). For the purposes of clarity the latter regulation codified Regulation No 2057/82 following changes made in relation to inspection and control.

* Language of the case: Spanish.

The aim of the measures provided for by the new regulation is *inter alia* to ensure observance of fishing restrictions; according to the third recital in the preamble they must include measures concerning the inspection and monitoring by the Member States' authorities of all fishing vessels, including the vessels of non-member countries, at sea and in port, and all activities whose monitoring would enable compliance with the regulation to be checked. Article 1 is worded as follows:

'1. In order to ensure compliance with all the regulations in force concerning conservation and control measures, each Member State shall, within its territory and within maritime waters subject to its sovereignty or jurisdiction, monitor fishing activity and related activities. It shall inspect fishing vessels and all activities whose inspection would enable verification of the implementation of this regulation, including the activities of landing, selling and storing fish and recording landings and sales.

2. If the competent authorities of a Member State observe, as a result of monitoring or inspection carried out by them under paragraph 1, that the relevant rules concerning conservation and control measures are not being complied with, they shall take penal or administrative action against the master of such a vessel or any other person responsible.

3. In order to ensure that inspection is as effective and economical as possible, Member States shall coordinate their control activities and shall introduce measures whereby their competent authorities and the Commission may be regularly informed on a reciprocal basis of the experience acquired.'

Article 9 provides *inter alia* that before the 15th of each month, Member States must notify the Commission of the quantities of each stock or group of stocks subject to TACs or quotas landed during the preceding month. Within 10 days the Commission must inform the Member States of the notifications which it has received from the other Member States. Article 11 provides that catches of a stock subject to quota made by fishing vessels flying the flag of a Member State are to be charged against the quota applicable to that State, irrespective of the place of landing. Each Member State must determine the date from which the catches of a stock subject to quota are to be deemed to have exhausted the quota applicable to that stock. As from that date, it must provisionally prohibit fishing for that stock by its vessels as well as the retention on board, the transhipment and the landing of fish. The Commission decides when to apply the definitive prohibition.

In order to enable Member States to obtain, at their request, more rapid and more detailed information on the landings of their vessels in another Member State, the Council extended the control measures on landings in other Member States by Council Regulation (EEC) No 3483/88 of 7 November 1988 amending Regulation No 2241/87 establishing certain control measures for fishing activities (Official Journal 1988, L 306, p. 2). It had found that fishing vessels of a Member State frequently landed their catches in a Member State other than that of their flag. Where a licencing scheme had been established by the Member State of the flag or registration, experience had shown that the Member State concerned might encounter difficulties in monitoring its own vessels landing or transhipping its catches in a port or maritime waters of another Member State.

Regulation No 3483/88 adds a new provision, Article 9a, to Regulation No 2241/87, providing for a system of information exchange between the Member State of landing or transhipment and the Member State of the flag. At the latter's request information concerning the landings or transhipments in the ports of another Member State must be supplied by the Member State of landing or transhipment. The information must include the name and external identification letters and numbers of the vessel, the quantity of the particular stock landed or transhipped by the vessel and the date and place of the landing or transhipment and it must be provided within four working days of the landing or transhipment.

Regulation No 3483/88 also amends the former regulation by adding Articles 11a to d.

Article 11a prohibits vessels registered in a Member State which subjects fishing activities to a licencing system from catching, retaining on board, transhipping or landing without a licence fish subject to a quota. The Commission and the other Member States must be informed of the quota in question as well as of the issue of a licence and the name and external identification letters and numbers of the licensed vessel.

Article 11b allows the Member States to subject their own fishing vessels to additional control measures where the latter have failed to comply with the rules concerning conservation or control measures. The measures may provide that, for a maximum of one year from the recording of the infringement, catches from a stock or group of stocks subject to a quota allocated to that Member State may be landed or transhipped in a port or within the maritime waters of another Member State or of a third country only if the vessel has on board a document certified by the Member State of registration and stating that the latter has inspected the vessel within the preceding two months. The Commission and the other Member States are to be informed of the name and external identification letters and numbers of the vessel and the quota concerned.

Where the competent authorities of the Member State of landing or transhipment observe that there has been an infringement, Article 11c provides that they must take against the master of the vessel concerned, or against any other person responsible, penal or administrative action such as is likely effectively to deprive those responsible of the economic benefit of the infringement. A Member State may transfer proceedings in relation to the infringement to the competent authorities of the Member State of registration where the transfer is more likely to secure the intended result. Article 11c(2) provides that if the Member State of landing or transhipment does not take penal or administrative action or transfer proceedings in relation thereto, the landing or transhipment may be counted against the quota allocated to that Member State according to the so-called management committee procedure.

2. *Procedure*

The Kingdom of Spain's application was received at the Court Registry on 13 January 1989.

The written procedure followed the normal course. The Kingdom of Spain decided not to lodge a reply.

By orders of 26 April and 17 May 1989 the Commission and the United Kingdom were given leave to intervene in support of the conclusions of the Council.

Upon hearing the report of the Judge Rapporteur and the views of the Advocate General the Court decided to open the oral procedure without any preparatory enquiry.

II — Conclusions of the parties

The Kingdom of Spain, the applicant, claims that the Court should:

(i) declare void Council Regulation No 3483/88 of 7 November 1988 amending Regulation No 2241/87 establishing certain control measures for fishing activities;

(ii) order the Council to pay the costs.

The Council, the defendant, contends that the Court should:

(i) dismiss the application as unfounded;

(ii) order the Kingdom of Spain to pay the costs.

The Commission and the United Kingdom, the interveners, support the Council's contentions.

III — Submissions and arguments

(a) *Preliminary observations*

The Spanish Government's application claims in essence that the contested regulation seeks to transfer to the Member State of landing responsibilities which belong to the Member State whose flag the vessel flies or where it is registered.

The Commission observes as a preliminary that the application is based on the notion that the system previously applicable required only the State whose flag the vessel flies to ensure observance of the rules limiting catches. That notion is wrong. In that respect the Commission explains that the common fisheries policy has always been based on the principle that Member States are jointly responsible for applying control measures. In view of the importance of the effectiveness of the control system at the Community level infringement of the control rules should be subject to proceedings at the Community level as already provided for in Article 11b in conjunction with Article 1a and supplemented by the new Article 11c of Regulation No 2241/87. Since the Community rules classify not only catching but retention on board, transhipping or unloading fish unlawfully caught as an infringement, the Member State in whose waters or territory such activities take place is bound to take proceedings even if the catches were made outside the waters falling under its sovereignty or jurisdiction.

Quotas will be exceeded if fishing has not been prohibited in good time or if the vessels continue to fish and land or tranship

unlawfully because the system of penalties is ineffective. The consequences for the Member State whose flag the vessel flies are very severe: commencement of proceedings for infringement, compensation of Member States adversely affected by a charge on future quotas and withdrawal of Community financing for stocks falling under the common organization of the market and catches in excess of the national quota. That is why the Commission considers that the cooperation of all Member States in the functioning of the control system is indispensable for the development of the fisheries policy.

The United Kingdom alleges that in practice, Member States having vessels registered in their territories but making landings in another Member State did not receive sufficient and prompt information about such landings and were often ignorant of them, at least until it was too late to prevent overfishing of their own quotas. The problem was exacerbated by a practice known as 'quota hopping', whereby fishing vessels registered in one Member State and fishing against its quotas are effectively owned and controlled by interests in a second Member State and normally land their catches in that second Member State. The United Kingdom has experienced particular problems caused by a substantial fleet of vessels registered in the United Kingdom but owned by Spanish interests and making landings in Spain.

(b) *Information supplied by the Member State of unloading (Article 9a)*

The Spanish Government observes that the requirement to supply information relating to landings and transhipments within a period of four working days places all responsibility for the fishery control measures on the Member State in which the landings occur. A Member State which receives a larger number of fishing vessels than other Member States thus bears the economic cost of the control measures; it must set up fresh means of control. However, every Member State should be responsible for checking the quotas which are allocated to it; such an obligation cannot be transferred to another Member State.

The Council, the United Kingdom and the Commission allege that the Spanish Government's criticisms are of a political rather than legal nature; they cannot constitute a ground for annulment under Article 173 of the EEC Treaty.

The Council points out that the Court held in its judgment of 30 September 1982 in Case 317/81 *Howe & Bainbridge* v *Oberfinanzdirektion Frankfurt am Main* [1982] ECR 3257 that although difficulties caused by the application of a Community provision may be relevant to its interpretation they are not of such a nature as to call its validity in question. Moreover, the judgment of 25 May 1982 in Case 96/81 *Commission* v *Netherlands* [1982] ECR 1791 stated that the Member States are obliged, by virtue of Article 5 of the EEC Treaty, to facilitate the achievement of the Commission's tasks which consist of ensuring that the Community provisions are applied.

The United Kingdom adds that the obligation of Member States to record and check the landings in their territories by all Community vessels predated the introduction of Article 9a: that obligation derives

already from Articles 1 and 9 of Regulation No 2241/87 (which have not been amended).

The Commission observes that the Member State of registration must determine the date its quota is exhausted on the basis of the information reaching it from various channels about the catches of every vessel. Article 9a allows it to check the correctness of the information received directly from its own vessels pursuant to Commission Regulation (EEC) No 2807/83 of 22 September 1983 laying down detailed rules for recording information on Member States' catches of fish (Official Journal 1983, L 276, p. 1). That date must be fixed in order to enable the Member State of registration to ban provisionally its vessels from fishing one or more stocks. Since the consequences of failure and the means of monitoring which the Member State of the flag had before the adoption of Regulation No 3384/88 were out of proportion, Article 9a was indispensable for the maintenance of a system of effective monitoring.

(c) *Checking licences by another Member State (Article 11a)*

The Spanish Government states that the power which has been given to a Member State other than that of the flag to check licences appreciably alters the general system of fishing licences. According to Article 5(2) of Regulation No 170/83 it is for the Member States to determine the detailed rules for the utilization of their quotas and to specify the terms for the grant of licences. Article 11a makes the system of licences a matter for the Community by requiring the Member State of landing to act as custodian of the system of licences established by another Member State. However, a Member State's responsibility for the application of its own system of licences cannot be transferred to another Member State.

The Council, the United Kingdom and the Commission state that power to adopt, as part of the common fisheries policy, measures intended to conserve the resources of the sea belongs to the Community, as the Court held in its judgment of 5 May 1981 in Case 804/79 *Commission* v *United Kingdom* [1981] ECR 1045. The fishing licence systems are simple management techniques of the Community quota system which as management measures are expressly provided for by Article 5(2) of Regulation No 170/83. In consequence, the detailed rules for utilization of the quotas laid down by national legislation are adopted in the exercise of a Community power delegated to the Member States. According to the defendant and the interveners, that legal situation shows that the attitude of the Spanish Government is contrary to the principle of Community cooperation whereby Member States should afford each other mutual assistance in the application of Community law.

(d) *Additional control measures in relation to recalcitrant vessels (Article 11b)*

In the Spanish Government's view Article 11b requires a vessel which has been guilty of an infringement of Community or national provisions, before selling its catches in a Member State other than that of registration, to return to the Member State of

the flag to submit to an inspection and obtain a certificate enabling it to land and sell its cargo in the port of its choice.

The produce of sea fishing must be treated as having all been caught in the territorial waters of the country of registration of the vessels which caught them. Landing and sale of fish from a vessel in the port of a Member State other than that of the flag thus constitutes export. In those circumstances Article 11b constitutes a measure having an effect equivalent to a quantitative restriction on export such as is prohibited by Article 34 of the EEC Treaty for it creates obstacles to the export of fish from vessels dubbed recalcitrant.

That was also the view put forward by the Commission in its observations in the judgment of 14 December 1989 in Case C-216/87 *The Queen* v *Ministry of Agriculture, Fisheries and Food ex parte Jaderow* [1989] ECR 4509. United Kingdom legislation subjecting the grant of fishing licences to a requirement to land and sell 50% of catches in a United Kingdom port must in the Commission's view be regarded as a measure of equivalent effect to a restriction contrary to Article 34 of the EEC Treaty. It is true that the Court has consistently held that Article 34 covers national measures the object or effect of which is specifically to restrict export patterns and thus to establish a difference in treatment between a Member State's domestic trade and its export trade so as to ensure a special advantage for its national production or domestic market. However, in the *Jaderow* case the aim and effect of the United Kingdom measure was to ensure an economic advantage for the United Kingdom by favouring industry and employment in that country.

Article 11b has the same objective. Owners of fishing vessels cannot in fact take advantage of higher prices offered in Member States other than that of the flag. The provision at issue is thus contrary to the principle of free movement of goods.

The Council, the United Kingdom and the Commission are of the opinion that Article 11b does not constitute a measure having an effect equivalent to a quantitative restriction on export. The view put forward by the Commission in the *Jaderow* case does not support a different approach. That case was concerned with a national provision preventing in respect of a particular quantity any direct export to other Member States; the object of the measure was to ensure that vessels carried on their business from the United Kingdom. On the other hand Article 11b provides only that fishing vessels may be required to have on board a document certifying that they have been inspected within the last two months; in addition it applies only to vessels which have already committed infringements. Such a restriction imposed on a limited class of vessels is not disproportionate to the aim pursued, namely stricter control.

Moreover, the Court has held that Article 34 of the EEC Treaty covers national measures the object or effect of which is specifically to restrict export patterns and thus to establish a difference in treatment between a Member State's domestic and export trade to the detriment of the production and trade of other Member

States. To infringe Article 34 of the Treaty the national measure must have a protectionist aim. Article 11b can in no way be classed as that kind of measure.

The United Kingdom adds that inspection at two-monthly intervals in the Member State of registration can be carried out when the vessels concerned have to visit that Member State at any time for other reasons such as the replacement of crew or supplies.

(e) *Proceedings by the Member State of landing (Article 11c)*

The Spanish Government argues that a Member State has no power to sanction infringements committed outside its territory by vessels flying a foreign flag. Spanish law provides that it applies only on Spanish territory.

Moreover, the penalty of loss of part of the quota, as provided for by Article 11c should proceedings not be taken, is a measure disproportionate to the object pursued. It is for each Member State to manage its own quotas and to ensure the correct application of the licensing scheme. Another Member State should not be penalized for conduct for which it is not responsible.

The proceedings to fix the quantities of fish to be counted against the quota of the Member State of landing are brought at the request of the Member State of registration which is alone able to request the Commission to act. A Member State, however, should not be subject to such a serious penalty as a result of a decision adopted by the Commission according to the management committee procedure. Articles 169 and 170 of the EEC Treaty provide a remedy for failure to fulfil Community obligations and those provisions contain procedural guarantees. In consequence proceedings at the sole request of a Member State are not allowed.

The Council, the United Kingdom and the Commission state that Article 11c is is no way *ultra vires* but is consistent with the system of the Treaty. The fact that Article 11c imposes a task of additional control on the Member State of landing follows from the principle of cooperation and shared responsibilities which is at the basis of the common fisheries policy.

The Spanish Government misrepresents Article 11c when it claims that it requires the Member States of landing to sanction vessels which have committed offences. That provision rather creates an obligation to take proceedings pursuant to the principle laid down in Article 1(2) of Regulation No 2241/87. Those proceedings must be conducted according to the relevant provisions of the national law of the Member State of landing while observing the division of powers between the Community and the Member States. An alternative solution would have been to provide for the State of landing to transfer responsibility for taking proceedings to the State of registration.

The strictly territorial concept of the right to impose sanctions relied on by the Spanish Government is incompatible with the principle of the *lex loci delicti commissi* of international law in relation to liability for

offences. According to the rules of the common fisheries policy the essential act is not the catch but the landing or transhipment. There is in consequence a substantial link between the place of the offence and the law which will in principle be applied, namely that of the State of landing. Moreover, Spanish Law No 53/1982 on offences in relation to fishing expressly provides that it applies to all administrative offences committed in relation to fishing in the waters under Spanish jurisdiction.

In the present case the *ratio legis* is to ensure uniform application of Community law, in particular the control measures. According to the judgment of 21 September 1983 in Joined Cases 205/82 to 215/82 *Deutsche Milchkontor* v *Federal Republic of Germany* [1983] ECR 2633, Member States must ensure that Community regulations are implemented in their territory. In so far as Community law does not include common rules the national authorities must act according to the rules of their national law while reconciling its application with the requirements of Community law. The Court has consistently held that the principle of proportionality requires that the measures of the Community institutions must not exceed the limits of what is appropriate and necessary to achieve the desired aim. There is no alternative means of ensuring observance of the fishing quota system: to count the quantities against the quota of the Member State of landing appears the most appropriate formula since it is directly related to the aim pursued.

The management committee procedure whereby the reduction of a quota in the event of infringement of Article 11c is to be decided is not contrary to Articles 169 and 170 of the EEC Treaty, in the first place because counting against the quota of the Member State of landing is not in the nature of a penalty but must be regarded as a management measure in the same way as that already provided for by Article 11c. If a Member State has tolerated unlawful landings the management of the quotas of the Member State of registration is frustrated; in that event the Member State of landing which is responsible for the fact that the quota is exceeded must have the excess counted against its own quota. With regard to the management committee procedure, it is of interest to point out that that procedure also applies to reductions in the quotas of Member States should fishing activities be stopped by the Commission; there is provision for consultation of the two Member States concerned. Thus every provision is made to ensure that the interests of the State of landing are observed.

T. Koopmans
Judge-Rapporteur