REPORT FOR THE HEARING
in Case C-146/89 *

I — The facts

1. *The legislative background to the dispute*

(a) International law

Article 3 of the Convention on the Territorial Sea and the Contiguous Zone, signed at Geneva on 29 April 1958 (United Nations Treaty Series, Vol. 516, p. 205, hereinafter referred to as 'the Territorial Sea Convention'), which entered into force on 10 September 1964 and which is binding on certain Member States of the Community, provides that, as a general rule, the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State. Under Article 4(1) of that convention, in localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity, the method of straight baselines joining appropriate points may be employed in drawing the baseline from which the breadth of the territorial sea is measured. Article 4(3) specifies that baselines are not to be drawn to and from low-tide elevations unless lighthouses or similar installations which are permanently above sea level have been built on them.

Article 11(1) of the Territorial Sea Convention defines a low-tide elevation as 'a naturally-formed area of land which is surrounded by and above water at low tide but submerged at high tide', and provides that where such an elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the mainland or an island, the low-water line on that elevation may be used as the baseline for measuring the breadth of the territorial sea. Article 11(2) specifies, however, that where a low-tide elevation is wholly situated at a distance exceeding the breadth of the territorial sea from the mainland or an island, it is to have no territorial sea of its own.

Articles 5, 7(1) and (4) and 13 of the United Nations Convention on the Law of the Sea, signed at Montego Bay on 10 December 1982 (UN Doc A/CONF 62/122, with corrigenda; Tractatendblad van het Koninkrijk der Nederlanden, 1983, No 83), not yet in force, contain provisions substantially similar to those mentioned above.

The Fisheries Convention, signed at London on 9 March 1964 (United Nations Treaty Series, Vol. 581, p. 76, hereinafter referred to as 'the London Convention'), entered into force on 15 March 1966 after a period of provisional application from 18 March 1964. Between 1964 and 1971, it was ratified or approved by all the States

* Language of the case: English.

which are at present members of the Community with the exception of Luxembourg and the Hellenic Republic. Under Article 1 of that convention, each contracting party recognizes the right of any other contracting party to establish the fishery regime described in Articles 2 to 6 thereof, subject to the right to maintain the regime in existence on 9 March 1964 if that regime is more favourable to the fishing of other countries. Article 2 recognizes the coastal State's exclusive right to fish and exclusive jurisdiction in matters of fisheries within the belt of six miles measured from the baseline of its territorial sea.

Article 3 of that convention provides:

'Within the belt between six and twelve miles measured from the baseline of the territorial sea, the right to fish shall be exercised only by the coastal State and by such other Contracting Parties, the fishing vessels of which have habitually fished in that belt between 1st January 1953 and 31st December 1962.'

Article 6 specifies that any straight baseline which a contracting party may draw is to be in accordance with the rules of international law and in particular with the provisions of the Territorial Sea Convention. Under Article 12, read together with Annex I, the convention applies to the waters adjacent to all the coasts of the United Kingdom, including those of the Isle of Man and the Channel Islands.

Finally, Article 10 provides:

'Nothing in the present Convention shall prevent the maintenance or establishment of a special régime in matters of fisheries:

(a) as between States Members and Associated States of the European Economic Community,

...

(d) as between France and the United Kingdom of Great Britain and Northern Ireland in respect of Granville Bay and the Minquiers and the Ecrehos,

...'

Numerous bilateral agreements have since been concluded between the States which are parties to the London Convention with a view to defining the habitual fishing referred to in Article 3.

As far as relationships between the United Kingdom and France are concerned, the general fisheries regime was defined by the Convention for defining the limits of exclusive fishing rights on the coasts of the two countries, signed at Paris on 2 August 1839 (British and Foreign State Papers 1838-1839, Vol. XXVII, p. 983) complemented by, *inter alia*, the Regulations for the guidance of fishermen of Great Britain and France in the seas lying between the coasts of the two countries, signed at London on 24 May 1843 (British and Foreign State Papers 1842-1843, Vol. XXXI, p. 165), by the Declaration

regarding the limits of French fisheries in Granville Bay, signed at London on 20 December 1928 (League of Nations Treaty Series, Vol. LXXXVI, p. 429), by the Agreement regarding rights of fishery in areas of the Ecrehos and Minquiers, signed at London on 30 January 1951 (United Nations Treaty Series, Vol. 121, p. 97), by the London Convention, cited above, and by the Exchange of Notes constituting an agreement concerning the status of certain previous fisheries agreements in relation to the London Convention (London, 10 April 1964, United nations Treaty Series, Vol. 648, p. 73).

(b) Community law

The first paragraph of Article 7 of the EEC Treaty provides that any discrimination on grounds of nationality is prohibited within the scope of application of the Treaty, without prejudice to any special provisions contained therein.

Article 2(1) of Regulation (EEC) No 2141/70 of the Council of 20 October 1970 laying down a common structural policy for the fishing industry (Official Journal, English Special Edition 1970 (III), p. 703), provided that the rules applied by each Member State in respect of fishing in the maritime waters coming under its sovereignty or within its jurisdiction were not to lead to differences in treatment of other Member States. Member States were to ensure in particular equal conditions of access to and use of the fishing grounds situated in those waters for all fishing vessels flying the flag of a Member State and registered in Community territory. Article 3 of that regulation required Member States to notify other Member States and the Commission of any alterations they intended to make to fishery rules laid down pursuant to Article 2.

Article 100 of the Act concerning the conditions of accession and the adjustments to the Treaties annexed to the Treaty concerning the accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the European Economic Community and the European Atomic Energy Community (Official Journal, English Special Edition, 27 March 1972, p. 14, hereinafter referred to as 'the Act of Accession') provides:

'1. Notwithstanding the provisions of Article 2 of Regulation (EEC) No 2141/70 on the establishment of a common structural policy for the fishing industry, the Member States of the Community are authorized, until 31 December 1982, to restrict fishing in waters under their sovereignty or jurisdiction, situated within a limit of six nautical miles, calculated from the base lines of the coastal Member State, to vessels which fish traditionally in those waters and which operate from ports in that geographical coastal area; however, vessels from other regions of Denmark may continue to fish in the waters of Greenland until 31 December 1977 at the latest.

Member States may not, in so far as they avail themselves of this derogation, adopt provisions dealing with conditions for fishing in those waters which are less

restrictive than those applied in practice at the time of accession.

2. The provisions laid down in the preceding paragraph and in Article 101 shall not prejudice the special fishing rights which each of the original Member States and the new Member States might have enjoyed on 31 January 1971 in regard to one or more other Member States; the Member States may exercise these rights for such time as derogations continue to apply in the areas concerned. As regards the waters of Greenland, however, the special rights shall expire on the dates laid down for these rights.

3. If a Member State extends its fishing limits in certain areas to twelve nautical miles, the existing fishing activities within twelve nautical miles must be so pursued that there is no retrograde change by comparison with the situation on 31 January 1971.'

After the accession of the Kingdom of Denmark, Ireland and the United Kingdom, Regulation No 2141/70 was replaced by Council Regulation (EEC) No 101/76 of 19 January 1976 laying down a common structural policy for the fishing industry (Official Journal 1976 L 20, p. 19), Articles 2 and 3 of which contain provisions identical to those of Regulation No 2141/70 mentioned above. However, the seventh recital in the preamble to Regulation No 101/76 points out that, in applying that regulation, the derogations provided for in, *inter alia*, Article 100 of the Act of Accession should be taken into account.

Article 6 of 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), as amended by Article 26 and Annex I, Section XV, paragraph 8 of the Act concerning the conditions of accession of the Kingdom of Spain and the Portuguese Republic and the adjustments to the Treaties (Official Journal 1985 L 302, p. 23), is worded as follows:

'1. As from 1 January 1983 and until 31 December 1992, Member States shall be authorized to retain the arrangements defined in Article 100 of the 1972 Act of Accession and to generalize up to 12 nautical miles for all waters under their sovereignty or jurisdiction the limit of six miles laid down in that article.

2. In addition to the activities pursued under existing neighbourhood relations between Member States, the fishing activities established in paragraph 1 of this article shall be pursued in accordance with the arrangements contained in Annex I, fixing for each Member State the geographical zones within the coastal bands of other Member States where these activities are pursued and the species concerned.'

As far as the coastal waters of the United Kingdom are concerned, Annex I lists a series of areas lying between the six- and 12-mile lines in which the right to fish the species indicated is recognized for France, Ireland, the Federal Republic of Germany, the Netherlands and Belgium.

2. *Origin and development of the dispute*

Section 1(1)(a) of the Territorial Sea Act 1987 extended the breadth of the territorial sea adjacent to the United Kingdom to twelve nautical miles. Section 1(1)(b) provides that the baselines from which the breadth of that territorial sea is measured are to be established by Order in Council. Subsection 4 refers for that purpose to the Territorial Waters Order in Council 1964 and the Territorial Waters (Amendment) Order in Council 1979 and subsection 5 specifies that any instrument which contains a reference to the territorial sea adjacent to the United Kingdom is to be construed in accordance with Section 1 of the Territorial Sea Act 1987.

Article 2(1) of the Territorial Waters Order in Council 1964 provides that, in general, the baseline from which the breadth of the territorial sea is measured is to be low-water line along the coast, including the coast of islands. Article 2(2) provides that low-tide elevations (defined in Article 5(1) as naturally formed areas of drying land surrounded by water which are below water at mean high-water spring tides) are to be treated as islands for the purposes of the Article, provided that they lie wholly or partly within the territorial sea as it would be measured if such elevations were disregarded.

The Schedule to the Fishing Boats (European Economic Community) Designation Order 1983, which indicates the areas lying within the United Kingdom fishing limits where fishermen from other Member States may pursue fishing activities, sets out the same list of areas between six and 12 miles from the baselines as is contained in Annex I to Regulation No 170/83. The first sub-subparagraph of Paragraph 2(1) of that order specifies that the baselines to be considered are those defined in accordance with the Territorial Waters Order in Council 1964.

By a letter of 1 October 1987, the United Kingdom informed the Commission of the entry into force of the Territorial Sea Act on that date. It stated that, following the extension of the territorial sea, certain lowtide elevations within the 12-mile limit would henceforth constitute basepoints from which all maritime zones based on the baselines of the territorial sea, including the territorial sea itself and the six- and 12-mile fishery zones, would be measured. The letter stated that those changes had been described in a Notice to Mariners, a copy of which was enclosed, and that the Member States and other interested nations were being informed via their capitals.

The fisheries authorities of the Member States concerned apparently received letters also dated 1 October containing more detailed information and charts showing the new limits, with a request to forward those charts to the fishing organizations whose

members might be affected by the changes. The United Kingdom authorities also stated that their Fishery Protection Service had been instructed to bring the changed situation to the attention of any vessel fishing illegally inside those new limits. That period of familiarization was to last for two to three months, but any vessel that was a persistent offender might be detained with a view to prosecution.

As from 1 October 1987, the United Kingdom fisheries authorities started to exclude the fishermen of other Member States from the areas which were now to the landward side of the six-mile line. Protests ensued from the fishermen and authorities of the Member States concerned.

By a telex message of 27 October 1987, the Commission requested the United Kingdom, pending a detailed examination of the situation and the adoption of appropriate measures by the Commission itself, not to implement the new legislation in so far as fishing by Member State vessels occurred in areas where it was authorized under Community rules. Discussions were subsequently held between the Commission, the United Kingdom, Belgium and France. As a result of those discussions, the United Kingdom Government announced to the House of Commons on 8 December 1987 that the Fisheries Minister had instructed fisheries enforcement officers to refrain from taking action which might exacerbate or extend the dispute until the legal question was resolved.

By a letter of 11 December 1987, the Commission pointed out that notification of national measures having consequences for the rules applicable to fishing in the maritime waters coming within the jurisdiction of the Member States was obligatory under Articles 2(2) and 3 of Regulation No 101/76, and described the effects of the new measures to the United Kingdom authorities. While recognizing the competence of Member States to define in accordance with international law their territorial sea and the baselines from which it is measured, the Commission considered that the application of the new baselines to the rules laid down in Article 6 of Regulation No 170/83 entailed certain infringements of Community law. The Commission further claimed that the extension of the 12-mile limits reduced the areas in which it was possible to fish the quotas allocated by Community legislation and could thus affect the utilization of those quotas. In conclusion, the Commission requested the United Kingdom to submit its observations in accordance with Article 169 of the EEC Treaty.

In its reply of 7 January 1988, clarified and corrected by letters of 11 and 19 January 1988, the United Kingdom referred to certain informal notifications given to Commission officials in January 1987, that is to say before the new measures were enacted or even introduced, which did not elicit any adverse reaction from the Commission. The United Kingdom contested the Commission's arguments, and rejected its complaints, with regard to the effects of the new measures.

On 9 June 1988, the Commission sent the United Kingdom the reasoned opinion provided for in Article 169 of the Treaty. It maintained that the informal notifications sent by the United Kingdom authorities prior to 1 October 1987 could not be regarded as constituting notification under Article 3 of Regulation No 101/76 and that the United Kingdom had therefore failed to comply with its obligations under Articles 2(2) and 3 of that regulation. The Commission maintained its claim that the measures adopted by the United Kingdom were incompatible with its obligations under Article 6(2) and Annex I of Regulation No 170/83. It reserved the right to examine whether the measures applied between the old and new 12-mile limits were compatible with Community law.

In its letter of 29 July 1988, corrected by a subsequent letter of 8 August 1988, the United Kingdom first expressed its surprise at the Commission's complaint that there had been no notification of the changes to the fisheries rules. The view expressed in the reasoned opinion clearly went further than the Commission's letter of formal notice of 11 December 1987. Moreover, the United Kingdom had on several occasions informed the Commission of its intention to extend the breadth of the territorial sea and of the consequential effects of the new measures on the baselines and on fishing activities. The United Kingdom also rejected the Commission's complaints concerning the compatibility of the new national measures with the fisheries regime defined in Article 6(2) and Annex I of Regulation No 170/83. It was therefore not in a position either to accept or to comply with the reasoned opinion.

II — Written procedure and conclusions of the parties

The Commission's application was received at the Court Registry on 24 April 1989.

By Order of 4 October 1989, the French Republic was granted leave to intervene in support of the applicant's conclusions. The remainder of the written procedure followed the normal course.

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 inquiry.

The *Commission of the European Communities* claims that the Court should:

(i) declare that by applying in certain areas, for the purposes of the fisheries arrangements fixed for the coastal waters of the United Kingdom in Annex I, together with Article 6(2), of Regulation No 170/83, new baselines which are shifted further out to sea than those in force on 25 January 1983, the United Kingdom has failed to fulfil its obligations under those provisions;

(ii) order the United Kingdom to pay the costs of the proceedings.

The *French Republic* claims that the Court should:

(i) declare that by applying in certain areas, for the purposes of the fisheries arrangements fixed for the coastal waters of the United Kingdom in Annex I, together with Article 6(2), of Regulation No 170/83, new baselines which are shifted further out to sea than those in force on 25 January 1983, the United Kingdom has failed to fulfil its obligations under those provisions;

(ii) order the United Kingdom to pay the costs of the proceedings, including those of the intervener.

The *United Kingdom of Great Britain and Northern Ireland* contends that the Court should:

(i) dismiss the application;

(ii) order the applicant to pay the costs.

III — Submissions and arguments of the parties

The *Commission* points out that Article 3 of Regulation No 101/76 requires Member States to notify other Member States and the Commission of any alterations they intend to make to the fishery rules defined in Article 2. It claims that the letter of 1 October was not a timely notice, and did not clearly indicate the consequences of the measures adopted by the United Kingdom for the application of the arrangements provided for by Article 6 of Regulation No 170/83. Nor, because of their deliberately informal nature, could the letters sent by the United Kingdom to certain Commission officials in January 1987 be regarded as proper notification. However, in view of the intention expressed by the United Kingdom of handling the whole difference in a non-confrontational manner, the Commission has decided not to raise this matter in the present action.

With regard to the compatibility of the contested measures with Article 6 and Annex I of Regulation No 170/83, the Commission maintains that those provisions, in so far as they authorize Member States to retain the arrangements defined in Article 100 of the Act of Accession and to generalize up to 12 nautical miles the limit of six miles laid down in that Article, constitute a temporary derogation from the general principle of equal treatment as embodied in Article 7 of the Treaty and implemented for the fisheries sector by Article 2 of Regulation No 2141/70, since replaced by Article 2 of Regulation No 101/76.

The arrangements defined in Article 100 comprise two inseparable parts: wherever Member States avail themselves of their right to restrict equal treatment, and in particular equal access to and use of the fishing grounds situated in the maritime waters coming within their jurisdiction, they must respect the special fishing rights and fishing activities which other Member States enjoyed on 31 January 1971. Before 1983, the fishing rights and activities to be respected were not defined in any greater

detail. Annex I to Regulation No 170/83, which sets out an inventory of the protected rights and activities based on the situation in existence on 31 January 1971 but containing a number of negotiated modifications, represents an important new element.

As a negotiated, redefined and consolidated inventory, the Annex necessarily refers to the geographical zones as they were defined at the date of the adoption of the regulation, on 25 January 1983. Since the limits of those geographical zones are calculated from the baselines of the coastal Member States concerned, the coastal bands mentioned in the Annex must be measured from the baselines as they were in force on 25 January 1983.

The Commission does not dispute that the drawing of baselines remains a matter within the competence of the Member States, but it rejects the United Kingdom's argument that Member States are free, by way of a change in baselines, to modify unilaterally the substance of the fishing activities protected under Community law. The material substance of those activities depends on the geographical location of the waters where they are exercised. The new measures adopted by the United Kingdom have excluded fishermen of other Member States from fishing grounds closer to the coast where they were previously authorized to fish and which are often richer in fish and easier to exploit.

The United Kingdom's contention that Article 6 and Annex I continue a regime of special fishing rights involving coastal belts drawn from ambulatory baselines, in support of which it points to the purpose of Regulation No 170/83, is contrary to the text and system of those provisions. First, the text of those provisions refers not to special fishing rights but to fishing activities, and gives a comprehensive definition of the substance of those activities by fixing the geographical zones and the species concerned and, occasionally, seasonal restrictions. Secondly, Annex I constitutes a derogation for a period of 10 years from the basic principle of equal treatment and equal access, in exchange for respect by the coastal States of fishing rights and practices previously enjoyed by other Member States. To that end, those provisions establish a detailed allocation of fishing activities in coastal waters for the entire period of 10 years from 1983 to 1992, and represent a very important element of the comprehensive agreement reached in the Council on the allocation of all fishing resources, including that of catch quotas.

Member States may not unilaterally modify, even by changes to baselines, that carefully balanced allocation. Even if those lines are established in accordance with international law, international law cannot prevent the Community from prescribing that for the purposes of the arrangements set out in Annex I to Regulation No 170/83 the geographical areas are to be calculated from the baselines as they existed at a particular date. Moreover, when Regulation No 170/83 was adopted, the Council and the Commission recognized in a joint declaration, the text of which is produced, that Annex I would be amended, at the joint request of the Member States directly concerned, by a regulation adopted by the Council on a proposal from the Commission.

The Commission does not see the relevance for the present proceedings of the judgment of 16 February 1978 in Case 61/77 (*Commission* v *Ireland* [1978] ECR 417), to which the United Kingdom refers. It does not contest that Member States may extend their fisheries jurisdiction by shifting their baselines in accordance with international law and that such action will automatically extend the area of application of Regulation No 101/76. But Annex I to Regulation No 170/83 only covers certain coastal waters under Member States' jurisdiction and nothing can prevent the Community from defining those waters by reference to baselines as they exist at a certain date.

It is true that several Community instruments use the term 'baselines'. The Commission does not contend that each of those instances necessarily refers to the baselines as they stood on the date of the adoption of those instruments. On the contrary, it accepts that Community legislation on fishing normally refers to the baselines as they exist from time to time in accordance with the rules of international law. The only exception concerns the application of the arrangements provided for in Article 6 and Annex I of Regulation No 170/83, because of the special nature of the regime set up by those provisions. The very frequency with which baselines are changed for natural reasons, to which the United Kingdom draws attention, reinforces the view that, in the context of that regulation, the continuous application of the baselines existing on 25 January 1983 would better serve the interests of the fishermen concerned, from the point of view both of legal and practical certainty and of the economic and operational stability of the protected fishing activities.

The United Kingdom may not, in that context, rely on the provisions of the London Convention. It is settled law that, in the relations between Member States, Community law supersedes all rights and obligations which Member States could claim under previous international agreements (see the judgment of 14 October 1980 in Case 812/79 *Attorney-General* v *Burgoa* [1980] ECR 2787 and the judgment of 8 December 1981 in Joined Cases 180 and 266/80 *Crujeiras Tome* v *Procureur de la République* and *Procureur de la République* v *Anton Yurrita* [1981] ECR 2997). Moreover, the same principle is explicitly recognized in Article 10 of the London Convention. If, however, the United Kingdom's argument is rather that the London Convention affects the interpretation of the provisions of Regulation No 170/83 on the ground that the fishing activities safeguarded therein have their origin in the habitual fishing activities recognized under Article 3 of the London Convention, then the Commission contends that the Community regime of access to waters and resources is based on principles diametrically opposed to those of that convention.

The London Convention is based on the principle that the coastal State has jurisdiction over fisheries in coastal waters, and the fishing rights of other States constitute an exception. Community law, on the other hand, is based on the principle of equal access and equal treatment for all Member States in all maritime waters. In that system, the derogation is constituted not by the special fishing right of other States but by the right of the coastal State to reserve certain coastal waters for fishing by local fishermen. That derogation is temporary and is mitigated by the coastal Member State's obligation to respect the special fishing rights and all fishing activities of other Member States, as they existed on 31 January 1971.

It may be true that the activities thus protected are derived from the fishing activities recognized under Article 3 of the London Convention and defined under bilateral agreements concluded, as far as the present case is concerned, between the United Kingdom and several Member States. However, after the accession of the United Kingdom those activities were no longer governed by those provisions and related principles (such as the ambulatory nature of baselines), but by the Community regime established by Article 100 of the Act of Accession. In that context, preferential access to coastal waters should be interpreted narrowly since it constitutes a derogation from the basic principle of equal access.

It follows that the London Convention and the principle of ambulatory baselines cannot play a useful role in the interpretation of the regime governing the fishing activities of other Member States in the coastal waters of the United Kingdom. The validity of the argument appears even more clearly in the relations between the six original Member States, where the regime of the London Convention was replaced, with effect from 1 February 1971, by the Community regime of equal access under Article 2 of Regulation No 2141/70. However, the derogation involving exclusive access by the coastal State to its coastal waters, mitigated by the protection of certain fishing activities of other Member States, was introduced only on 1 January 1973 by the Act of Accession. The choice of 31 January 1971 as the date of reference for the maintenance of the activities of the other Member States was a direct result of that situation: the introduction of the regime of equal access on 1 February 1971 had put an end to all special fishing rights under the previous regime where the coastal State had exclusive jurisdiction.

With regard to the outer limit of the coastal belts where Member States may derogate from the principle of equal access, the application of ambulatory baselines would create problems to which Article 100 of the Act of Accession apparently offers no solution. Article 100(3) does not cover situations in which the jurisdiction of a Member State is extended by the effect of an outward shift of baselines. The very nature of the arrangements set up by Article 100 means that the fishing activities which other Member States enjoyed on 31 January 1971 must be respected. Ambulatory baselines are therefore incompatible with the system and purpose of the arrangements set up by Article 100, not only for defining special fishing rights and existing fishing activities but also for defining the outer limit of the area within which Member States may avail themselves of the derogation from the principle of equal access. It appears inevitable to apply the same conclusion to the arrangements which have been laid down by Article 6 of Regulation No 170/83.

The Commission also denies that the limits of the zones in which the special fishing rights referred to in Article 100(2) were exercised should have been calculated on the basis of the baselines existing from time to time. An equally possible, and more plausible, interpretation is that those limits must be calculated on the basis of the baselines existing at that time, that is to say on 31 January 1971. Article 100 prescribes the maintenance of a status quo the substance of which depends on the fishing area defined by reference to the baselines existing on that date.

As regards the technique used by the Community legislator, the Commission cannot accept the United Kingdom's contention that the designation of coastal belts is not an appropriate means of defining immutable maritime areas. Although it might have been useful and even preferable for the Community legislator to have stated explicitly that the geographical areas defined in Annex I must be measured from the baselines as they existed on 25 January 1983, the absence of an explicit provision to that effect is no ground for rejecting the Commission's interpretation as incompatible with the principle of legal certainty.

The example, cited by the United Kingdom, of the 'Shetland Area', for which Article 7 and Annex II of Regulation No 170/83 lay down a licensing system managed by the Commission, is not relevant. Since that area, which is defined on the basis of conservation requirements, covers waters both inside and outside the 12-mile coastal band of the United Kingdom, it is essential to define it by points of latitude and longitude. It is also quite plausible that at the two points where the lines thus defined touch the United Kingdom's fishing limits, a reference to the 12-mile line was made in order to avoid any discrepancies between the conservation regime established in the 'Shetland Area' and the access regime in force within the 12-mile coastal band. The question whether those references are to an ambulatory baseline or to the baseline existing on 25 January 1983 falls outside the scope of the present proceedings.

However, none of the arguments put forward by the Commission for restricting the scope of an exception to the principle of equal access applies to conservation measures applicable to maritime areas defined by reference to baselines (see, for example, Council Regulation (EEC) No 3094/86 of 7 October 1986 laying down certain technical measures for the conservation of fishery resources (Official Journal 1986 L 288, p. 1)). Since such measures apply within those areas to all vessels of all Member States without distinction, it may be accepted, in that context, that references to baselines must normally be understood as referring to baselines as they exist from time to time in accordance with international law.

The Commission also observes that the application of the baselines existing on 25 January 1983 for the purposes of Article 6 and Annex I of Regulation No 170/83 alone, while ambulatory baselines are used for other purposes, should cause no confusion for fishermen or administrative difficulties for the relevant fisheries authorities, as the United Kingdom fears. Proof of this may be found in the Belgian Royal Decree of 28 January 1988, laying down supplementary national measures for the conservation and management of fishery resources (*Moniteur belge*, 4 February 1988, p. 1737): under Articles 1(7) and 15 of that decree, read together, fishing activities within the coastal waters extending to twelve miles from the baselines from which the territorial sea was measured at the time when the Community system for the conservation and management of fishery resources was established are reserved for vessels flying the Belgian flag.

Finally, the Commission points out that the conduct of the United Kingdom also raises

the question of its obligations under Article 100(2) and (3) of the Act of Accession with respect to the fishing activities which other Member States enjoyed on 31 January 1971 in the waters between the old and new 12-mile limits. However, while the exclusion of fishermen of other Member States from the areas listed in Annex I of Regulation No 170/83 provoked strong protests from the fishermen concerned, supported by their national authorities, the other aspect of the problem, concerning the waters situated between the old and new 12-mile limits, did not receive similar attention and little is known about the effect of the new measures on fishing activities of vessels operating in those waters. The Commission, although it considered the application of the new measures to the area thus defined also to be incompatible with the regime established by Article 100 of the Act of Accession, therefore decided not to initiate proceedings under Article 169 of the Treaty in respect of that aspect of the problem pending further information about fishing activities previously exercised in those waters by fishermen of other Member States.

The *French Government* points out, first of all, that its fishermen have historic rights to fish off the coasts of the United Kingdom. Those rights have been recognized in a number of international agreements, and were listed by the United Kingdom authorities in the Fishing Boats (France) Designation Order 1964.

The French Government considers that the new United Kingdom measures are at variance with provisions of Community law, in particular Article 100(3) of the Act of Accession and Article 6 of Regulation No 170/83. Article 100(1) of the Act of Accession provided a temporary derogation from the principle of equal treatment, in exchange for maintaining existing fishing activities as required by paragraphs (2) and (3) of that article. Article 100(3), which provides that if a Member State extends its fishing limits to 12 nautical miles there must be no retrograde change in existing fishing activities within 12 miles by comparison with the situation on 31 January 1971, refers specifically to a situation such as that in the present case.

Annex I to Regulation No 170/83 sets out a detailed inventory, drawn up following the negotiations held at that time, of all the fishing rights enjoyed by each of the Member States on 25 January 1983. By putting into operation in October 1987 measures intended to deny French fishermen access to the zones listed in Annex I to Regulation No 170/83 and thus to prevent the exercise of fishing rights recognized by Community law, the United Kingdom is in breach of its obligations under Community law. The argument that the fishing rights are maintained but are henceforth to be exercised in geographical zones shifted further out to sea cannot be accepted. The seabed and currents in the new zones which the United Kingdom authorities intend to grant fishermen have different characteristics, and those zones are much less rich in fish. Moreover, French fishermen and fishermen from other Member States were already fishing in the new zones further out to sea defined by the United Kingdom. Consequently, not only is

there a reduction in the catch potential as a result of the shifting of the zones, but pre-existing historic rights in respect of the new zones are also diminished or removed and there is a risk of over-fishing in the new zones.

A Member State may not modify unilaterally the substance of the fishing activities in the zones referred to in the Annex of Regulation No 170/83, when Article 100 of the Act of Accession expressly provides for the maintenance of existing rights. Even if it were accepted that equivalent new zones could have been established, a new Council regulation would have been required to amend Annex I in accordance with the joint declaration, to which the Commission refers, made when Regulation No 170/83 was adopted. The principle of the immutability of the geographical zones defined in Regulation No 170/83 must be observed, and the danger that clear and precise provisions might be gradually voided of their substance, merely as a consequence of changes which Member States might impose regarding the delimitation of their territorial waters and thus the position of the baselines determining fishing zones, must be avoided.

The principles of non-retroactivity and legal certainty which emerge from the Court's case-law (see the judgment of 12 October 1978 in Case 10/78 *Belbouab* v *Bundesknappschaft* [1978] ECR 1915 and the judgment of 8 October 1987 in Case 80/86 *Kolpinghuis Nijmegen BV* [1987] ECR 3969; with regard to fisheries, the judgment of 10 July 1980 in Case 32/79 *Commission* v *United Kingdom* [1980] ECR 2403) should be applied in such a situation. As regards the principle of equal treatment enshrined in Article 7 of the Treaty, the French Government points out that, in accordance with the Court's judgment of 5 May 1981 in Case 804/79 (*Commission* v *United Kingdom* [1981] ECR 1045), Community fishermen must have, subject to such exceptions as have been adopted, equal access to the fishing grounds coming within the jurisdiction of the Member States. The Council alone has the power to determine the detailed conditions of such access, and Member States may not modify that legal situation by unilateral measures. Finally, it is clear that Community law, whether primary or secondary, takes precedence in relations between Member States over the provisions of the Territorial Sea Convention or the London Convention.

The *United Kingdom* states, in introduction, that the present proceedings arise from a difference of opinion between the Commission and the United Kingdom concerning the interpretation of Article 6(2) and Annex I of Regulation No 170/83, which can be settled only by a ruling of the Court of Justice, and the most satisfactory means by which this can be brought about is for the Commission to initiate proceedings under Article 169 of the EEC Treaty. It is to be stressed, however, that the present case comes to the Court in a spirit of cooperation, as may be seen from the instructions given by the United Kingdom authorities to fisheries enforcement officers with a view to avoiding any action which might exacerbate or extend the dispute until the legal question is resolved.

The United Kingdom points out that the outermost limits of the maritime waters within the sovereignty and jurisdiction of the Member States, to which the common structural policy for the fishing industry applies, are defined by reference to the baselines from which the territorial waters of the Member States are drawn. Those baselines are to be determined by the

national authorities in accordance with public international law. They are therefore not fixed once and for all but may be subject to change in certain circumstances, such as the appearance or disappearance of low-tide elevations or the extension of the breadth of the territorial sea to encompass low-tide elevations previously lying outside territorial waters.

The Commission accepts that changes in those baselines affect the application of certain provisions of Community law. The United Kingdom submits that such changes are similarly capable of affecting the location of the six- to 12-mile zone within which the fishing activities of vessels of Member States other than the coastal State are protected.

This case falls, it is true, to be decided on the basis of Community law. References by the United Kingdom to international law are to be explained on two grounds. First, the baselines to be used for the delimitation of maritime bands off the coasts of Member States are to be defined in accordance with international law; secondly this case concerns the preservation in Community law of special fishing rights having their origin in international law.

As regards the first point, Article 2 of Regulation No 101/76 defines the maritime areas of a Member State subject to equal access by vessels of other Member States as the maritime waters coming under its sovereignty or within its jurisdiction as described by the laws in force in each Member State.

When, with effect from 1 January 1977, the Member States extended their fisheries limits to 200 miles along their North Sea and North Atlantic coastlines, in accordance with international law, Ireland claimed that the extent of the maritime waters defined in Article 2 of Regulation No 101/76 was limited to those waters falling within the sovereignty and jurisdiction of the Member States when that regulation entered into force. That argument was rejected by the Court in its judgment in Case 61/77 *Commission* v *Ireland*, cited above, in which it held that Article 2 of Regulation No 101/76 must be understood as referring to the limits of the field of application of Community law in its entirety, as that field may at any given time be constituted, and consequently that any extension of the maritime zones in question automatically means precisely the same extension of the area to which the regulation applies. Likewise, in the United Kingdom's submission, an adjustment of the baselines must have an automatic effect on the outer limit of the area within which a coastal Member State enjoys exclusive fishing rights, subject to special rights for the vessels of other Member States. This is particularly the case where that area is defined in terms of six- or 12-mile coastal belts, in contrast to the way in which Community law defines specific and fixed maritime areas under the common structural policy, using references to latitude and longitude.

The practice of the United Kingdom with respect to its baselines is and always has

been in accordance with international law. Those baselines are inherently unstable in a number of areas where they largely consist of offshore sandbanks forming low-tide elevations; they have been changed on numerous occasions in the past, particularly since 1972, leading to both inward and outward movement of the six- to 12-mile belt. As a result, Admiralty Notices to Mariners, new charts or new editions of charts have been issued regularly.

Furthermore, all maritime States may (and, in the case of erosion of low-tide elevations, must) make adjustments to their baselines in accordance with international law, with consequent adjustments to the six- and 12-mile zones for the purposes of the common fisheries policy. The Member States follow that practice: since 31 January 1971, France, Denmark, the Federal Republic of Germany and the Netherlands have modified their baselines, including baselines in areas where the fishermen of other Member States enjoy special fishing rights. Belgium and Ireland extended the breadth of their territorial seas to 12 miles in 1987 and 1988 respectively. The United Kingdom has not been informed that any resulting changes in baselines did not relate to fisheries.

With regard to the second point, namely the relationship between the Community rules and international law, the United Kingdom claims that the sovereignty or jurisdiction of a coastal State over the 12-mile zone arises from the fisheries jurisdiction under the London Convention and from the extension of the territorial sea in accordance with customary international law. Likewise, the special fishing rights referred to in Article 6(2) and Annex I of Regulation No 170/83 have their origin in the habitual fishing activities recognized under Article 3 of the London Convention, which concerned areas between six and 12 miles from the coast, calculated from the baselines as they existed from time to time in accordance with international law — areas which were thus subject to modification as a result of changes to the baselines. The link between the regime established by the London Convention and the Community regime is acknowledged by the French Government itself in its Intervention. There is, moreover, nothing unusual in construing a Community instrument by reference to the international treaty regime which it supersedes (see the judgment of 23 November 1977 in Case 38/77 *Enka BV* v *Inspecteur der Invoerrechten en Accijnzen* [1977] ECR 2203).

The fishing activities referred to in Article 3 of the London Convention were identified in greater detail following bilateral agreements between the States concerned. Since the evidence demonstrating the nature and extent of those fishing activities was largely of a circumstantial character rather than being the subject of extensive documentation, those agreements required discussions and negotiations, a fact to which the United Kingdom attaches a certain significance. In all the agreements entered into by the United Kingdom, the location of fishing rights has proceeded on the basis of, on the one hand, lateral lines drawn from points on the adjacent coast and, on the

other hand, coastal belts of six and 12 miles drawn from baselines subject to adjustment in accordance with international law. Such a technique is indistinguishable from that employed in Annex I to Regulation No 170/83.

The United Kingdom does not assert that the London Convention in any respect detracts from the full force and effect of Community law. It simply provided the jurisdictional basis for the exercise by Member States of sovereignty or jurisdiction between six and 12 miles from their coasts, as well as for the extension of fishing limits in accordance with Article 100(3) of the Act of Accession. The fact that the London Convention and Community law are based on diametrically opposed principles as far as access is concerned does not prevent ambulatory baselines from being common to both regimes.

At the time when the Act of Accession entered into force, a State could extend its fisheries jurisdiction to 12 miles on two legal grounds: first, by exercising its rights under Article 3 of the London Convention and, secondly, by extending its territorial sea. In both cases, all the coastal zones arising out of the exercise by the Member States of the powers they derived from international law could be determined from ambulatory baselines. Since the provisions of Articles 100 and 101 of the Act of Accession were designed to take effect in those areas falling within the sovereignty or jurisdiction of the Member States, they necessarily referred to limits drawn from baselines as they existed from time to time.

When Article 100 of the Act of Accession authorized Member States to derogate from the principle of equal access enshrined in Regulation No 2141/70, provided that any special fishing rights which the other Member States enjoyed on 31 January 1971 were maintained, it was clear that the special rights referred to were those lying between the six- and 12-mile limits, calculated from the baselines existing from time to time. It is also significant that 31 January 1971 was chosen in Article 100(3) as the operative date for identifying existing fishing activities in cases where Member States which had not applied the 12-mile regime provided for under the London Convention (the Federal Republic of Germany, Belgium, Italy and the Netherlands) extended their fishing limits to 12 miles. Thus the position under the London Convention and the bilateral arrangements made pursuant thereto, prior to the entry into force of Regulation No 2141/70, was given continued expression as part of Community law both for the original six and for the new Member States. The Commission is thus mistaken in its submission that in the relations between the original Member States the situation on 31 January 1971 was already governed by the terms of Article 2 of Regulation No 2141/70.

The United Kingdom does not accept that the negotiation and consolidation of protected fishing rights within the framework of Annex I to Regulation No 170/83 had any effect on the definition of baselines. They merely led to a more precise definition of the lateral lines identifying the

limits of the land areas off which those special rights might be exercised, thus constituting a logical progression, in the Community context, from the negotiated arrangements which had hitherto taken place on a bilateral basis. It was not a new departure of the kind contended for by the Commission.

The preamble to Regulation No 170/83 refers clearly to the continuation of the legal position under the Act of Accession. It thus manifests an intent which is inconsistent with the proposition that a major change was contemplated in defining the six- and 12-mile belts.

If, in Annex I to Regulation No 170/83, the Council had wished to define those zones other than by reference to ambulatory baselines on the landward side, it would not have sought to do so by referring to baselines. The Community legislator is familiar with the need in appropriate cases to define particular immutable maritime areas and with the suitability of using points of latitude and longitude for that purpose. Regulation No 170/83 itself provides a convenient example since the 'Shetland Area', licensing in which is administered by the Commission under Article 7, is defined with precision in Annex II by means of points of latitude and longitude, except in two places where recourse is had to the 12-mile line in order to secure unity between the 'Shetland Area' and the special regime applicable within the 12-mile zone. It is to be observed that that purpose would be defeated unless the references to the 12-mile lines in Annex II were interpreted as references to those lines measured from baselines as they exist from time to time. Moreover, if there were two 12-mile zones, one based on fixed baselines for the purpose of defining the 'Shetland Area' and the other on ambulatory baselines for the purposes of the protection of the fishing activities of non-coastal States, the legislator would have had to take steps to deal with the two overlapping but different zones. Regulation No 170/83 contains no such provision.

Furthermore, to use 'frozen' rather than ambulatory baselines would have been so unusual that Regulation No 170/83 might have been expected to contain an express indication that coastal zones and their baselines were being used in a special sense, different from that prevailing in the hundred-odd cases in which the six- and 12-mile zones drawn from 'baselines' are mentioned in Community legislation. The alternative conclusion would be incompatible with the principle of legal certainty.

It is hard to believe that the Council could have intended to establish two different 12-mile zones, one calculated from the baselines existing on 23 January 1983 for the purposes of the protection of the fishing activities of Member States other than the coastal State, and the other measured from ambulatory baselines to be used for other aspects of the common fisheries policy. Those zones would be overlapping but not co-extensive, which would give rise to confusion for those subject to the law, administrative difficulties for those charged with the enforcement of Community rules and complications for the presentation of

charts differentiating between the two 12-mile zones and indicating the legal regimes applicable within each.

The United Kingdom emphasizes that a modification of baselines cannot be regarded as unilateral action. The only baselines which can be applied are those determined by international law, and the Commission itself acknowledges that, in other contexts, reference should be made to ambulatory baselines.

The Belgian Royal Decree of 28 January 1988, to which the Commission refers in order to demonstrate that a situation in which two 12-mile zones co-exist is practicable, is not significant. First, it was made after the events giving rise to the present proceedings had occurred and Belgium had aligned itself with the view advanced by the Commission in these proceedings. Secondly, the fact that Belgium uses the 1983 baselines to measure its six- and 12-mile zones has little practical effect: the Belgian coast is very short, virtually straight and has very few off-lying low-tide elevations, all near the coast, so that changes to the low-water line in recent years — which have been minimal — would have had little appreciable effect on the six- or 12-mile limits. The Belgian enforcement authorities will therefore have little difficulty in policing the two fishing limits since, for practical purposes, they are co-extensive.

The French Government's argument that the United Kingdom's practice of referring to ambulatory baselines in the context of Regulation No 170/83 is contrary to the principles of non-retroactivity and legal certainty should be rejected. The United Kingdom charts the relevant six- and 12-mile zones regularly and with precision, and publishes the charts for the assistance of fishermen. There is no uncertainty or retroactivity in applying objective criteria, even-handedly, in good faith and over many years, in defining the coastal zones.

The Commission acknowledges that the 12-mile zone referred to in Regulation No 3094/86 is to be drawn from ambulatory baselines, but rejects that view in the context of Regulation No 170/83. In the United Kingdom's submission, the more convincing explanation is that there is only one 12-mile zone. This also appears from the preamble to Regulation No 3094/86 which refers, *inter alia*, to Regulation No 170/83 and explicitly mentions the 12-mile coastal zone.

The Commission's argument that the United Kingdom's approach means the extinction of the fishing activities existing on 31 January 1971 carried on between the old and new 12-mile limits, without their being saved by Article 100(3) of the Act of Accession, raises a number of difficulties. But the fact, which the Commission apparently accepts, that Article 100(3) does not apply when a Member State modifies its baselines in accordance with international law merely means that the Community legislator assumed that such problems could be resolved by other means in due course. Therefore, the question whether or not

Article 100(3) applies to the situation arising from the enactment of the Territorial Sea Act 1987 is of no assistance in interpreting Regulation No 170/83.

The United Kingdom further maintains that ambulatory baselines do not have the discriminatory effects alleged by the Commission. There is no discrimination on grounds of nationality, nor any inherently discriminatory effect, but merely a differentiation between different situations on the basis of objective criteria consistent with Community law, such as whether fishermen operate from ports in the geographical coastal area or enjoy special fishing rights.

In conclusion, the United Kingdom reiterates that no violation of Community law has taken place, and observes that any difficulties which may have arisen for fishermen of other Member States have done so as a result of the regime established by the Act of Accession and Regulation No 170/83. The claims made are claims of interest rather than claims of right. But the Court of Justice cannot be called upon to adjust complex arrangements touching an entire economic sector in every case in which a particular group alleges that it has suffered a disadvantage.

G. F. Mancini
Judge-Rapporteur