fishing industry, under which all laws and administrative rules and regulations determining the rules applied by each Member State in respect of fishing in the maritime waters coming under its sovereignty or within its jurisdiction must be notified to the other Member States and the Commission, together with any alterations which it is intended to make in the fishery rules so laid down, and on the other hand, Annex VI to the Resolution on fishing adopted by the Council at The Hague on 30 October 1976 and formally approved on 3 November 1976. That resolution, in the particular field to which it applies, makes specific the duties of co-operation which the Member States assumed under Article 5 of the EEC Treaty when they acceded to the Community. Performance of these duties is particularly necessary in a situation in which it has appeared impossible, by reason of divergences of interest which it has not yet been possible to resolve, to establish a common policy and in a field such as that of the conservation of the biological resources of the sea in which worthwhile results can only be attained thanks to the co-operation of all the Member States.

Thus the institution of measures of conservation by a Member State must first be notified to the other Member States and to the Commission; a Member State proposing to bring such measures into force is required to seek the approval of the Commission, which must be consulted at all stages of the procedure.

3. Annex VI to The Hague Resolution in the words of which "the Member States will not take any unilateral measures in respect of the conservation of resources", except in certain circumstances and with due observance of certain requirements, must be understood as referring to any measures of conservation emanating from the Member States and not from the Community authorities. The duty of consultation arising under that resolution thus covers also measures adopted by a Member State to comply with one of its international obligations in this matter.

In Case 141/78

FRENCH REPUBLIC, represented by Guy Ladreit de Lacharrière, Director of Legal Affairs at the Ministry for Foreign Affairs, acting as Agent, and Pierre Péré, Secretary of the Ministry for Foreign Affairs, acting as Assistant Agent, with an address for service in Luxembourg at the French Embassy,

applicant,

supported by

THE COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, John Temple Lang, acting as Agent, with an address for service in Luxembourg at the office of its Legal Adviser, Mario Cervino, Jean Monnet Building, Kirchberg,

intervener,

V

UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND, represented by W. H. Godwin, Under-Secretary (Legal), Treasury Solicitor's Office acting as Agent, assisted by T. H. Bingham, Queen's Counsel, and P. J. Langdon-Davies, Barrister, with an address for service in Luxembourg at the Embassy of the United Kingdom,

defendant,

APPLICATION for a declaration that by adopting on 9 March 1977 and by bringing into force on 1 April 1977 the Fishing Nets (North-East Atlantic) Order 1977, the United Kingdom has failed, in the sea fisheries sector, to fulfil its obligations under the EEC Treaty,

THE COURT

composed of: H. Kutscher, President, J. Mertens de Wilmars and Lord Mackenzie Stuart (Presidents of Chambers), P. Pescatore, M. Sørensen, A. O'Keeffe, G. Bosco, A. Touffait and T. Koopmans, Judges,

Advocate General: G. Reischl
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the procedure and the conclusions, submissions and arguments of the parties may be summarized as follows:

I — Summary of the facts

On 20 October 1970, the Council of the European Communities adopted, in

application in particular of Articles 42 and 43 of the EEC Treaty, Regulation (EEC) No 2141/70 laying down a common structural policy for the fishing industry (Official Journal, English Special Edition 1970 (III), p. 703) and Regulation (EEC) No 2142/70 on the common organization of the market in fishery products (Official Journal, English Special Edition 1970 (III), p. 707).

Articles 98 to 103 of the Act concerning the Conditions of Accession and the Adjustments to the Treaties annexed to the Treaty, known as "the Accession Treaty" of 22 January 1972, contain provisions relating to fisheries; in particular Article 102 provides that the Council, acting on a proposal from the Commission, shall determine, from the sixth year after accession at the latest, conditions for fishing with a view to ensuring protection of the fishing grounds and conservation of the biological resources of the sea.

On 19 January 1976, the Council adopted Regulation (EEC) No 100/76 on the common organization of the market in fishery products (Official Journal L 20, p. 1) and Regulation (EEC) No 101/76 laying down a common structural policy for the fishing industry (Official Journal L 20, p. 19). The first of those regulations repeals Regulation No 2142/70 and the second Regulation No 2141/70.

On 8 October 1976 the Commission submitted to the Council a proposal for a regulation establishing a Community system for the conservation and management of fishery resources (Official Journal C 255, p. 3).

At its meeting on 30 October 1976 in The Hague, the Council adopted and formally approved on 3 November 1976 a resolution to the effect that as from 1 January 1977 the Member States would, by means of concerted action, extend the limits of their fishing zones to 200 miles off their North Sea and North Atlantic coasts and that as from the same date the exploitation of fishery resources in those zones by fishing vessels of third countries would be governed by agreements between the Community and the non-member countries concerned. The Council accordingly instructed the Commission forthwith to start negotiations with the non-member countries concerned in accordance with the Council's directives and decided on concerted action by the Member States for the purpose of future proceedings of the international fisheries bodies, in particular the International Commissions for North-West Atlantic Fisheries, North-East Atlantic Fisheries and South-East Atlantic Fisheries.

On the same occasion the Council approved a statement of the Commission (Annex VI to the resolution) in the following terms:

"Pending the implementation of the Community measures at present in preparation relating to the conservation of resources, the Member States will not take any unilateral measures in respect of the conservation of resources.

However, if no agreement is reached for 1977 within the international fisheries commissions and if subsequently no autonomous Community measures could be adopted immediately, the Member States could then adopt, as an interim measure and in a form which avoids discrimination, appropriate measures to ensure the protection of resources situated in the fishing zones off their coasts.

Before adopting such measures, the Member State concerned will seek the approval of the Commission, which must

be consulted at all stages of the procedures.

Any such measure shall not prejudice the guide-lines to be adopted for the implementation of Community provisions on the conservation of resources."

Fisheries problems were again discussed by the Council on 15 and 16 November 1976.

On 3 December 1976 the Commission submitted to the Council a proposal for a regulation laying down interim measures for the conservation and mangement of fishery resources; at its meeting on 13 and 20 December 1976 the Council failed to reach agreement on that proposal.

On 20 December 1976, the Commission submitted to the Council a supplementary proposal for a regulation on conservation measures; on 14 January 1977 it submitted to the Council a further proposal for a regulation defining certain interim fisheries resource conservation measures. The Council, at its meeting on 18 January 1977, was unable to reach agreement on the Commission's proposals.

On 18 February 1977, the Council adopted Regulation (EEC) No 350/77 laying down certain interim measures for the conservation and management of fishery resources (Official Journal L 48, p. 28).

On 9 March 1977 the Minister of Agriculture, Fisheries and Food and the Secretaries of State for Scotland and Northern Ireland, in exercise of the powers conferred upon them in particular by the Sea Fish (Conservation) Act 1967, made an order entitled the Fishing Nets (North-East Atlantic) Order 1977. The order came into operation on 1 April 1977.

The order prohibits the carrying, in a specified area of the Atlantic and Arctic Oceans and seas adjacent thereto, in any British or foreign fishing boat within British fishery limits of certain small-mesh nets, the minimum size of the mesh of which varied according to the waters concerned. The order authorizes the carriage of small-mesh nets for taking certain unprotected species, including prawns; however, such authorization does not apply when the protected species represent more than 20% of the catch involved.

On 1 October 1977 the French trawler "Cap Caval" was boarded within British fishery limits whilst using small-mesh nets, the proportions of the fish in the hold on inspection being approximately 2.9 tonnes of white fish and 1.8 tonnes of prawns.

The master of the trawler, Emile Maréchal, was summoned before the Pembroke Magistrates' Court and was convicted on 4 October 1977 of carrying on board his trawler nets of too fine a mesh and sentenced to a fine of £150 plus £50 costs.

By a note of 13 October 1977 the Government of the French Republic referred to the Commission of the European Communities, in accordance with the second paragraph of Article 170 of the EEC Treaty, the question whether the British order of 9 March 1977 was in conformity with Community law.

The United Kingdom Government submitted its written observations to the Commission on 23 December 1977.

On 2 February 1978 the Commission held a hearing during which the

Government of the French Republic and the Government of the United Kingdom were given the opportunity to submit their own case and their oral observations on the other party's case.

On 22 March 1978, in accordance with the third paragraph of Article 170, the Commission delivered a reasoned opinion in which it found that the United Kingdom was in breach of its obligations under the EEC Treaty.

II — Written Procedure

By an application lodged on 14 June 1978, the French Republic, in pursuance of the first paragraph of Article 170, referred to the Court of Justice the failure attributed to the United Kingdom in the field of sea fishery by bringing into force the order of 9 March 1977.

By an order of 25 October 1978, the Court, in pursuance of the first paragraph of Article 37 of the Protocol on the Statute of the Court of Justice of the EEC, allowed the Commission of the European Communities to intervene in support of the conclusions of the French Republic.

The written procedure followed the normal course.

On 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.

It did however invite the Government of the United Kingdom to supply it with further information regarding the procedure on 4 October 1977 before the Pembroke Magistrates' Court; this request was complied with within the prescribed period.

Further, at the request of the Court, the Government of the French Republic provided further information regarding the subject-matter of its action and the exact content of its conclusions.

III — Conclusions of the parties

The *Government of the French Republic* claims that the Court should declare that the United Kingdom, by bringing into force the order of 9 March 1977 entitled "The Fishing Nets (North-East Atlantic) Order 1977", has failed to fulfil its obligations under the EEC Treaty; that the aforesaid order is illegal under Community law and does not constitute a measure which the United Kingdom Government was legally bound to take by virtue of its commitments under the North-East Atlantic Fisheries Convention of 24 January 1959 (hereinafter referred to as "the Convention").

The *Commission* claims that the Court should declare that the United Kingdom, by failing to seek the Commission's approval under Annex VI to the Hague Resolution of 30 October 1976 and to notify the order in question to the Commission under Article 3 of Regulation No 101/76, has failed to fulfil its obligations under the EEC Treaty.

The *Government of the United Kingdom* contends that the Court should dismiss the French Government's claims and order it to pay the costs.

IV — Submissions and arguments of the parties during the written procedure

The *Government of the French Republic* states in particular in support of its application that the British order of 9 March 1977 does not represent the

discharge of any obligation stemming from the Convention, is contrary to Community law since it was adopted in a matter reserved for the competence of the Community and was brought into force in disregard of the requirements arising for Member States from Annex VI to the Hague Resolution and constitutes an excessive protective measure.

(a) The British order does not constitute a measure implementing a recommendation adopted in the context of the Convention.

The British order contains provisions which do not follow from Recommendation No 5: that recommendation does not cover fish catches intended for human consumption but those made for industrial processing; it only makes it mandatory for ships engaged in fishing for industrial purposes not to have on board more than 25% of species which should be caught with large-mesh nets.

Nor can Recommendation No 2 of the Convention which limits the use of small-mesh nets, be relied on to justify the British measure; although it lays down the principle that that type of trawl-net may not be used to fish for species other than those listed in the schedule, it does not make any mention of percentages.

There is therefore no basis for the United Kingdom's claim that the order of 9 March 1977 constitutes an implementation measure deriving from obligations contracted under the Convention; nor can it base its action on the application of the whole body of rules laid down by the Convention.

In a verbal note dated 27 January 1977 the British Government gave notice that the recommendation of the Convention concerning supervision was no longer applicable. It is impossible to concede to it the right to claim in good faith that it has an obligation to apply the Convention rules whereas it appears that at other times it is quite prepared to refrain from applying some of those rules.

Moreover the order in dispute cannot be justified by a unilateral interpretation by the British Government of the Convention recommendations as a whole, including those which have no direct connexion with the subject in question. Since each of the Convention recommendations refers to a well-defined sphere of activities, each one must be applied separately. The Convention recommendations cannot be interpreted "as a whole" at will by each State, which would lead to totally arbitrary measures.

At all events, the Convention recommendations cannot constitute the legal basis for national measures, so far as the United Kingdom is concerned, after 31 December 1977 (the date on which its denunciation of that Convention became effective).

(b) Since the British order of 9 March 1977 was not a measure implementing

the rules laid down in the Convention it constitutes a unilateral act which is illegal under Community law, of which it respects neither the letter nor the spirit.

It is clear from the provisions of Community law that the order in question encroached on an area which belongs to the competence of the Community in breach of certain rules already adopted by the Community.

The Community's power in matters regarding the conservation of marine species derives in particular from Article 3 (d) of the EEC Treaty, the combined terms of Article 38 (3) and Annex II to the Treaty, from Articles 39 to 46 thereof, from Regulations Nos 2141/70 and 2142/70 and from Article 102 of the Act of Accession. It is obvious from all those provisions that the Community has power to adopt measures within the Community in the field of the conservation of fishery stocks. Moreover the Court of Justice has established, in particular in its judgment of 14 July 1976 (Joined Cases 3, 4 and 6/76, *Cornelis Kramer and Others*, [1976] ECR 1279), that the Community also enjoys the capacity to enter into international commitments for the conservation of the resources of the sea.

Having over-riding power in fishery matters, the Community has adopted a number of regulations and established procedures which, in an initial period, admit of a concurrent power whereby Member States may take measures concerning fishery but under the supervision of the Commission. The British order did not respect those procedures as established by the Hague Resolution.

In particular, Annex VI to the Hague Resolution stipulates that Member States may, as an exceptional measure, take unilateral measures for the conservation of fishery resources provided that they have previously sought the approval of the Commission, which must be consulted at all stages of the procedure.

The term "unilateral measures" cannot be contrasted with "binding measures"; it is clear from the declaration, from its objective and from the intent of those who drafted it that "unilateral measures" should be construed to mean "non-Community measures"; any conservation measure which is not taken by the Community is therefore a unilateral measure.

As regards the actual scope of the procedure laid down by Annex VI to the Hague Resolution, the expression "seek the approval of the Commission" must be interpreted as having a very binding force; it cannot be restricted to a mere notice given to the Commission, a notice of a draft order. In requiring the approval of the Commission to be sought "at all stages of the procedure" Annex VI means that, if the Commission does not give its approval, the proposed measure will have to be amended. This strict interpretation of the formula has already been made by the Council itself in the written reply to Parliamentary Questions Nos 304/77 and 378/77 and by the Court of Justice in its judgment of 16 February 1978 (Case 61/77, *Commission* v *Ireland*, [1978] ECR 417).

The wording referring to approval has a very strong force so that the British order in dispute is in breach of the

provisions of Annex VI to the Hague Resolution.

By adopting in the order of 9 March 1977 measures contrary to the very provisions of Community law, the United Kingdom has also violated the spirit of that law.

The unqualified assertion that Member States of the Community and the Community itself have concurrent powers does not seem to tally, in the field of sea fisheries, with developments observed in recent years.

Any powers which the States may still have are not only of a residual and provisional character, but furthermore may be exercised only provided their consistency is ensured, at Community level, by the Commission. If, in a purely transitional phase, certain national regulations may subsist, they should be coordinated and brought into line so far as possible in order to avoid contributing to the consolidation of a chequer-board of maritime areas covered by national regulations, whereas the building of Europe calls for an area subject to a body of rules emanating from a single source so that it will be consistent in its content.

Henceforward no national measure may be taken in a field not covered by a Community regulation unless that measure has the full approval of the Commission, and such approval would automatically confer upon it the character of a Community rule; thus such "national" measures should, in fact, be regarded as a decentralized way of implementing Community power.

Respect for the obligation of securing the Commission's assent would, moreover, make it possible to avoid the unilateral adoption of contradictory national rules which, on the one hand, would strike at the very root of the Community's credibility so far as its power to carry out international negotiations is concerned and, on the other hand, would run counter to the spirit of the rules already elaborated.

If each Member State could unilaterally adopt similar regulations which might therefore extend to the entire area under national jurisdiction, the Community would then no longer be in a position to carry on serious negotiations with non-member countries. It would be most prejudicial to the position of the Community in the context of international negotiations were it to appear that Member States have in fact retained the powers which they claim to have transferred to the Community. The co-existence of concurrent powers in fishery matters would also contradict the meaning of certain rules of present Community law. This would be the case with the provisions concerning organizations of the market; thus in the case of prawns, national regulations which varied considerably from one State to another might have an appreciable effect on price levels and the regular supply of markets. Such measures, by virtue of their unilateral and unforeseeable character, would be contrary to the interests of both producers and consumers. Moreover such varying measures would ultimately create disparities between States, depending upon whether the practices adopted were more or less liberal. Above all it is

evident that the persistence of national regulations fosters the adoption of excessive and superfluous measures rendering it difficult for the Community to accomplish its task. In the case of the British order in dispute, it should be stressed that the level of by-catches allowed is set at 20% of the entire catch, whereas the Commission in its proposals to the Council of 28 January 1978, established 40% as the reasonable level. To admit the possibility of continuing to adopt national measures without Community "endorsement" would be tantamount to impeding the Community's efforts to elaborate Community regulations.

Certain changes which have taken place since 1976 make it advisable to re-read the proceedings in the *Kramer* case in the light of the new situation which has arisen. That judgment upheld a limited and transitional power on the part of the Member States in case the Community institutions did not yet fulfil their functions and obligations. It may therefore be considered *a contrario* that when the Community institutions have exercised the power which is theirs there is no room for unilateral measures by Member States; the British order entered into force on 1 April 1977 and the Community had by that date already exercised its power, particularly with regard to by-catches and the mesh size of nets, as is clear from Regulation No 350/77.

Admittedly those rules covered only certain species; but Article 3 of the regulation also states that "the Council ... shall adopt provisions concerning the compulsory use, when fishing for certain species, of nets of larger mesh sizes ... and provisions concerning the carrying of nets of different mesh sizes on board". Thus the Council expressly affirmed its power to regulate the mesh size of nets in future.

(c) The British order of 9 March 1977 constitutes an unreasonable and excessive measure.

The Convention rules contain no actual figures regarding the level of by-catches. The United Kingdom Government, by restricting that level to 20%, whereas a regulation of the French Republic specifies the figure of 80%, has taken an excessive measure. The Commission, in its proposal included in the "compromise" of 28 January 1978 submitted to the Council, established a figure of 40% for by-catches; that proposal met with no opposition from the United Kingdom.

The *Commission* considers that there are two main questions in this case, namely, whether Article 5 of the EEC Treaty, as explained and made concrete by Annex VI to the Hague Resolution, imposes a legally binding obligation on Member States to seek the approval of the Commission before adopting a national fishery conservation measure, and whether Annex VI applies to national measures which are said to facilitate

enforcement of recommendations under the Convention although they are not called for by the recommendations.

(a) Article 5 of the EEC Treaty is legally binding; agreements which would not in themselves be legally binding may be sufficient to make concrete and specific the general legal duty, imposed by Article 5, to co-operate and not to hinder the realization of the objectives of the Treaty.

Article 5 makes it clear that "obligations" may arise from "action taken by the institutions of the Community"; this cannot be confined to regulations, directives and decisions. Moreover the second paragraph of Article 5 makes it clear that there are legal obligations imposed on Member States which do not result from any specific action by the Council or the Commission, but which arise from their general obligation to act in a way consistent with the objectives and spirit of the Treaty. A resolution of the Council, adopted on the proposal of the Commission on an important issue of considerable difficulty for the Community, thus might give rise to legal obligations.

Annex VI to the Hague Resolution imposes obligations on Member States.

The EEC Treaty sets up a Community in which there is a clear obligation to co-operate both in general and in particular to achieve common objectives: moral and political commitments freely and openly entered into by all Member States should be honoured; Member States have a duty to proceed by common action.

Annex VI deals with the exercise of the powers and competence of Member States; its subject-matter is legal, not economic. It lays down a procedure, the object of which is to enable the Commission to ensure that the content of the national measures would not cause legal difficulties.

In so far as Annex VI authorized only non-discriminatory interim conservation measures, it was declaratory of existing Community law. It also declared Community law in so far as it expressed an obligation to seek the Commission's approval.

In a new sphere of law, such as that of the creation of the 200 mile zone, it is particularly important to proceed to common action and to prevent mutually conflicting national laws from being adopted.

Annex VI provided for an interim scheme to deal with a situation of continuing difficulty for the Community. Faced with the inability of the Council to adopt solutions for the problems arising, it was impossible to continue without some new agreement to deal with the new situation: Annex VI provided an immediate practical solution which would be valueless unless it was legally binding.

Other resolutions adopted at The Hague clearly have legal effects; thus the directives given to the Commission for the negotiations with non-member countries gave it a certain negotiating authority although limited in certain

respects. Member States could not legally have acted in a way inconsistent with the legal mandate given to the Commission.

Annex VI was prepared by the Commission and agreed to by the Council. This procedure was comparable to that used for normal Community legislation and safeguards the general Community interest which the requirement of a Commission proposal is intended to protect.

Annex VI was the only Hague resolution dealing comprehensively with the internal fisheries system; if it had been extensively disregarded serious legal problems would have arisen. Control *a priori* to ensure reasonable consistency is clearly much better than control *a posteriori*.

At the meeting of the Council in January 1978 Member States repeated their acceptance of Annex VI and so did the United Kingdom representatives at the hearing of this case held by the Commission on 2 February 1978.

Stocks of fish depend on the whole marine ecosystem; a rational Community policy on conservation and management demands, in the absence of comprehensive Community regulations, that the Commission should be able at least to ensure that national measures do not cause serious problems for the Community. National fisheries measures might injure a fish stock of interest to several States. The Commission's active involvement would be essential to minimize differences in national fisheries laws.

The case-law of the Court confirms that Annex VI must be considered as an agreement on the practical legal obligations of Member States in fisheries matters under Article 5 of the Treaty.

It clearly obliges Member States to seek in good faith the Commission's approval. Member States are therefore obliged to inform the Commission clearly and in good time; the duty to act *bona fide* also requires the Member State concerned to be willing to adapt its proposals in order to obtain the Commission's approval. This is also a legal duty under Article 5 of the Treaty.

(b) All national fisheries provisions must comply with the principles of Community law; also, even national measures having a main purpose already approved by or on behalf of the Community must be so drafted as to go no further than is necessary to achieve that purpose. Pending the adoption of comprehensive Community fisheries regulations, Member States proposing to adopt measures, even primarily designed to give effect to Community regulations or Convention recommendations, should seek the approval of the Commission.

The Commission can co-ordinate national measures and ensure that as a whole they form a reasonably satisfactory system only if they are submitted

for its approval. Such is the case with national measures designed to give effect to Regulation No 350/77; *a fortiori*, national measures designed to give effect to Convention recommendations should be submitted to the Commission under Annex VI. The wider the margin of discretion left to Member States, the more vital it is for them to consult the Commission before implementing recommendations. This is even clearer where, as in this case, the national measure goes further than the recommendation because the British order applies if the by-catch exceeds 20% of the catch whether or not the main catch is intended for human consumption.

Moreover the expression "unilateral" national measures has consistently been used in Community fishery matters to mean national as distinct from "Community measures".

(c) The order in dispute is excessive inasmuch as it cannot be approved by the Commission as a matter of Community policy. If a Member State chooses to adopt a national measure using only one of the requirements which the Commission considers should be used and making it stricter than the Commission's proposals in that respect, the national measure cannot be considered as being compatible with Community ideas on the common fisheries policy.

The *Government of the United Kingdom* recalls the importance, in the framework of a policy of conservation of the resources of the sea, of provisions regarding the dimensions of the mesh of nets determined specifically for different groups or species, and the limitation of "by-catches".

With regard to the legal aspects of this case it should be stated that the criticisms made of the order of 9 March 1977 are unfounded.

(a) Under Article 8 of the Convention the Contracting States undertook to give effect to any recommendation made by the Commission under Article 7; by Article 13 Contracting States agreed to take, in their own territories and with regard to their own nationals and their own vessels, appropriate measures to ensure the application of the Convention.

The order of 9 March 1977 is not a simple enactment into domestic law of Convention Recommendation No 5; it "follows from" those recommendations taken as a whole. The provision limiting the mesh of nets is a fair and reasonable step taken to give effect to what was, beyond argument, the intent of the Convention recommendations. The restriction to 25% by the Convention recommendation, of the by-catch — later reduced to 20% by the Council for EEC waters — it is true, relates to industrial fishery; there is however no logical reason why the by-catch allowance in industrial fishery should be

any different from that in human consumption fishery since the ultimate use of the catch is of no relevance in the task of preventing overexploitation of the stock.

The statement that the United Kingdom does not apply some of the most important Convention rules is incorrect: the United Kingdom has always honoured to the full all recommendations made by the Convention.

The denunciation of the Convention by the Member States of the Community was decided in anticipation of the extension of national limits to 200 miles and on the ground that the Convention was no longer the appropriate means for securing international co-operation in fisheries conservation in the North-East Atlantic area. It may however be seen clearly from the notice issued by the British Government on 21 February 1977 that it was the machinery of the Convention which was felt to require overhaul and not the recommendations made under the Convention.

In any event the recommendations did not cease to be of effect before the denunciation by the Member States took effect at the end of December 1977, that is, after the adoption of the order in dispute.

(b) As regards the compatibility of the order with Community law it is fully accepted that the Community has full power to adopt measures within the Community for the conservation of fisheries stocks as well as the power to make international commitments; however, unless and until the Community exercises its power to adopt conservation measures a residual competence, subject to certain safeguards and procedures, remains in the Member States. This residual competence has been recognized by the case-law of the Court.

Annex VI to the Hague Resolution is merely declaratory of the rights of the Member States in fields in which the Community has not yet operated. Since the date of the Hague Agreement the Community has started to take fishery conservation measures; however, these are not yet in any way comprehensive and their application is limited both by the areas in which they operate and by the species of fish to which they apply. Outside these limits there is a wide field in which the Member States are still free to operate by taking their own conservation measures, so long as they conform to general law. The case-law of the Court has recognized that national conservation measures are permissible so long as the Community's functions are not affected.

The powers of the Member States have not been affected by Regulations Nos 101/76 and 350/77 as long as the Council has not in fact adopted comprehensive fisheries regulations. In particular Member States were not only empowered but obliged by Regulation No 350/77 to alter the maximum by-catch under Resolution No 5 from 25 to 20%. The procedures prescribed in Annex VI to the Hague Resolution were

applicable only to measures independently taken by a single Member State on its own initiative and not to steps reasonably taken by a Member State to give effect to Convention recommendations. The recitals to Regulation No 350/77 acknowledge the sway of national measures deriving from international commitments.

Annex VI stipulates that a Member State shall "seek" the approval of the Commission, not that it shall "obtain" it. By no legitimate process of construction can the word "seek" be given a meaning which it does not ordinarily bear and which nothing in the context indicates as having been intended.

The fact that the Commission's approval is not a prerequisite is confirmed by the Commission's attitude in the *Irish Fisheries* case (Case 61/77), by the reasoned opinion issued by the Commission in this case, by the declaration made by the Vice-President of the Commission responsible for agriculture and fisheries to the European Parliament on 6 July 1977 and by the fact that a number of conservation measures have been introduced by Member States, in particular Denmark and Ireland, without the express approval of the Commission having been first obtained.

The application does not substantiate the suggestion that the order in dispute had or could have an adverse effect on Community negotiations with non-member countries. The Commission itself contests this.

Community law, in particular Article 2 (1) of Regulation No 101/76, Annex VI to the Hague Resolution and the fifth recital in the preamble to Regulation No 350/77, recognizes that Member States may take national conservation measures until a common fisheries policy has been agreed.

(c) The order in dispute does not constitute an excessive measure.

The setting of the by-catch limit at 20% of the entire catch reflects the change effected by Article 6 of Regulation No 350/77 in the Convention by-catch percentage for industrial fishing of 25%.

In its proposal to the Council of 28 January 1978 the Commission proposed various arrangements both for a transitional period and for permanent requirements: not only a limit to the by-catch but also provisions concerning mesh size and minimum length of fish and, by way of permanent arrangement, measures relating to fishing areas.

On this point the view may be taken that the Community proposal constitutes much more rigorous rules than the requirements made by the United Kingdom in the order of 9 March 1977.

V — Oral Procedure

The French Republic, represented by its Agent, Guy Ladreit de Lacharrière, the Commission, represented by its Agent, John Temple Lang, and the United Kingdom, represented by T. H.

Bingham, Q.C., presented oral argument and their replies to questions put by the Court at the hearing on 21 June 1979.

The *Government of the French Republic* stressed the importance of the principles which it was defending in this case in view of the fundamental aims of the Community fisheries policy; it was important that the Court should declare that the British order of 9 March 1977 was contrary to Community law as regards both its substance and the procedure followed.

The *Commission* emphasized that by adopting the measure in dispute the Government of the United Kingdom had also failed to observe Article 3 of Regulation No 101/76 under which Member States are required to notify other Member States and the Commission of any alterations they intend to make to fisheries rules in maritime waters coming within their jurisdiction.

The *Government of the United Kingdom* stated once again that the measure in dispute represented the implementation of obligations assumed under the North-East Atlantic Fisheries Convention and that it was not subject, under Community law, to any duty of notification.

The *Advocate General* delivered his opinion at the hearing on 11 September 1979.

Decision

1 By an application of 14 June 1978 the French Republic, in pursuance of Article 170 of the EEC Treaty, asked the Court to declare that by adopting on 9 March 1977 the Fishing Nets (North-East Atlantic) Order 1977, the United Kingdom has failed to fulfil its obligations under the EEC Treaty.

2 The action brought by the French Republic originates in an incident at sea which occurred on 1 October 1977 when the French trawler "Cap Caval" which was fishing for prawns within United Kingdom fishery limits, was boarded by British fishery protection officers. The master of the trawler was summoned before the Pembroke Magistrates' Court and convicted on 4 October 1977 of infringing the order in dispute, in particular for having used nets of a mesh smaller than the minimum authorized by the order. Following that incident the French Government commenced the procedure under Article 170, first bringing the matter before the Commission in accordance with the second paragraph of that article. On 22 March 1978 the Commission delivered its reasoned opinion in accordance with the third

paragraph of that article. In that opinion the Commission found that by bringing the disputed order into force the United Kingdom was in breach of its obligations under the Treaty. As the United Kingdom did not comply with that opinion the French Government brought the matter before the Court on 14 June 1978.

3 The French Republic claims in particular that the disputed order, which was adopted in a matter reserved for the competence of the Community, was brought into force in disregard of the requirements set out in Annex VI to the Resolution adopted by the Council at The Hague at its meetings on 30 October and 3 November 1976, under which, pending the implementation of the appropriate Community measures, Member States, might, as an interim measure, adopt unilateral measures to ensure the protection of fishery resources on condition that they had first consulted the Commission and sought its approval. As these requirements were not observed by the Government of the United Kingdom the measure adopted is contrary to Community law. In the alternative the French Government also claims that the disputed order is, with regard to the measures adopted, excessive and thus does not constitute a reasonable measure of protection.

4 The French Government's position was supported by the Commission which intervened in the action. In the arguments presented to the Court the Commission stated that the Government of the United Kingdom had also failed to observe Article 3 of Council Regulation No 101/76 of 19 January 1976 laying down a common structural policy for the fishing industry, under which Member States are required to give prior notification of any alterations to fishery rules. Furthermore, the Commission emphasized particularly that Annex VI to The Hague Resolution is a specific expression of the duty of co-operation expressed in general terms by Article 5 of the EEC Treaty. Finally, the Commission claims that the British measures are excessive inasmuch as they involve certain specific conditions, in particular relative to the restrictions on by-catches, which are defined more strictly than in the proposals put forward by the Commission for determining common rules in the matter.

5 The Government of the United Kingdom, without challenging the binding nature of Annex VI to The Hague Resolution, claims that the order in question cannot be described as a "unilateral" measure within the meaning of that resolution since it was adopted in order to secure in the United Kingdom the implementation of the recommendations of the Commission established under the North-East Atlantic Fisheries Convention signed in London on 24 January 1959 (United Nations Treaty Series, Volume 486, 1964, p. 159) and, more particularly, of Article 13 of that Convention under which "each Contracting State shall take in its territories and in regard to its own nationals and its own vessels appropriate measures to ensure the application of the provisions of this Convention and of the recommendations of the Commission which have become binding on that Contracting State and the punishment of infractions of the said provisions and recommendations". According to the British Government the disputed order was adopted so as to ensure the implementation of the recommendations of the Convention as a whole and, more particularly, of Recommendation No (2) relating to the size of the mesh of nets having regard to Recommendation No (5) relating to the proportion of by-catches in industrial fishery. For this reason the order in question thus did not need to be subjected to the consultation procedure laid down in Annex VI to The Hague Resolution. With regard to the substance of the measures instituted by the said order the Government of the United Kingdom explained at length the justification for restrictive measures as regards both the mesh of nets and the restriction on by-catches, the use of small-mesh nets being particularly harmful to the conservation of fish stocks.

6 As the French Government has correctly stated, the order in dispute was adopted in a field which comes within the powers of the Community. Those powers cover all questions relating to the protection of the fishing grounds and the conservation of the biological resources of the sea both in the Community's internal relations and in its relations with non-member States. Those powers are based on Article 3 (d) of the Treaty in conjunction with Article 38 *et seq.* relating to agriculture, including Annex II to the Treaty which includes fisheries within the sphere of the common agricultural policy. Subsequently, the fact that conservation measures were included in the Community's powers was specifically confirmed by Article 102 of the Act concerning the Conditions of Accession and the Adjustments to the Treaties. The foundations of a common policy in fisheries matters were laid by Regulations No 2141/70 of the Council of 20 October 1970 laying down a common structural policy for the fishing industry and No 2142/70 of the

Council of the same date on the common organization of the market in fishery products (Official Journal, English Special Edition 1970 (III), pages 703 and 707 respectively); following the enlargement of the Community those regulations were replaced by Regulations Nos 100 and 101/76 of 19 January 1976 (Official Journal L 20, pages 1 and 19). The Court, for its part, has had occasion to emphasize the scope of these provisions in its judgments of 14 July 1976 (Joined Cases 3, 4 and 6/76, *Kramer and Others,* [1976] ECR 1279), of 16 February 1978 (Case 61/77, *Commission* v *Ireland* [1978] ECR 417) and of 3 July 1979 (Joined Cases 185 to 204/78, *Van Dam and Others).*

7 It follows from the foregoing that the bringing into force of the order in question, inasmuch as it was adopted in a field coming under the powers of the Community, was subject to all the relevant provisions of Community law. In this respect reference should be made more particularly, on the one hand, to the provisions of Articles 2 and 3 of Regulation No 101/76, under which all laws and administrative rules and regulations determining the rules applied by each Member State in respect of fishing in the maritime waters coming under its sovereignty or within its jurisdiction must be notified to the other Member States and the Commission, together with any alterations which it is intended to make in the fishery rules so laid down. Secondly it is necessary to bear in mind the terms of Annex VI to The Hague Resolution, which is worded as follows:

"Pending the implementation of the Community measures at present in preparation relating to the conservation of resources, the Member States will not take any unilateral measures in respect of the conservation of resources.

However, if no agreement is reached for 1977 within the international fisheries commission and if subsequently no autonomous Community measures could be adopted immediately, the Member States could then adopt, as an interim measure and in a form which avoids discrimination, appropriate measures to ensure the protection of resources situated in the fishing zones off their coasts.

Before adopting such measures, the Member State concerned will seek the approval of the Commission, which must be consulted at all stages of the procedures.

Any such measures shall not prejudice the guidelines to be adopted for the implementation of Community provisions on the conservation of resources."

8 The Commission has rightly claimed that that resolution, in the particular field to which it applies, makes specific the duties of co-operation which the Member States assumed under Article 5 of the EEC Treaty when they acceded to the Community. Performance of these duties is particularly necessary in a situation which it has appeared impossible, by reason of divergences of interest which it has not yet been possible to resolve, to establish a common policy and in a field such as that of the conservation of the biological resources of the sea in which worthwhile results can only be attained thanks to the co-operation of all the Member States.

9 It follows from the foregoing that the institution of measures of conservation by a Member State must first be notified to the other Member States and to the Commission and that such measures are in particular subject to the requirements laid down by Annex VI to The Hague Resolution. In other words, a Member State proposing to bring such measures into force is required to seek the approval of the Commission, which must be consulted at all stages of the procedure.

10 It is common ground that these requirements have not been satisfied in this case. The Government of the United Kingdom, however, claims that it was not required to follow that procedure since it applies exclusively in the case of "unilateral measures" of conservation of resources adopted by a Member State and that the measures which are the subject of the disputed order are not "unilateral" measures, inasmuch as they were adopted in order to ensure, within the jurisdiction of the United Kingdom, the undertakings arising for the United Kingdom from the North-East Atlantic Fisheries Convention and the resolutions adopted thereunder.

11 Annex VI to The Hague Resolution in the words of which "the Member States will not take any unilateral measures in respect of the conservation of resources", except in certain circumstances and with due observance of the requirements set out above, must be understood as referring to any measures of conservation emanating from the Member States and not from the Community authorities. The duty of consultation arising under that resolution thus covers also measures adopted by a Member State to comply with one of its international obligations in this matter. Such consultation was all the more necessary in this case since it is common ground, as has been

emphasized by the French Government and the Commission and accepted by the Government of the United Kingdom itself, that the order in question, although carrying out certain recommendations of the North-East Atlantic Fisheries Convention, nevertheless in some respects goes beyond the requirements flowing from those recommendations.

12 It follows from the foregoing that, by not previously notifying the other Member States and the Commission of the measure adopted and seeking the approval of the Commission, the United Kingdom has failed to fulfil its obligations under Article 5 of the EEC Treaty, Annex VI to The Hague Resolution and Articles 2 and 3 of Regulation No 101/76.

13 Having regard to this finding it does not appear necessary to consider the alternative submission made by the French Government regarding the excessive nature of the measures which are the subject of the action.

Costs

14 Under Article 69 (2) of the Rules of Procedure the unsuccessful party shall be ordered to pay the costs. As the United Kingdom has failed in its submissions it must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

1. **Declares that, by bringing into force on 1 April 1977 the Fishing Nets (North-East Atlantic) Order 1977, the United Kingdom of Great Britain and Northern Ireland has failed to fulfil its obligations under the EEC Treaty;**

2. Orders the United Kingdom of Great Britain and Northern Ireland to pay the costs.

Kutscher Mertens de Wilmars Mackenzie Stuart Pescatore Sørensen

O'Keeffe Bosco Touffait Koopmans

Delivered in open court in Luxembourg on 4 October 1979.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE GENERAL REISCHL DELIVERED ON 11 SEPTEMBER 1979 [1]

Mr President,
Members of the Court,

On 9 March 1977 the Fishing Nets (North-East Atlantic) Order 1977 was issued in the United Kingdom. Designed to protect certain species of fish and brought into force on 1 April 1977, the order contains provisions governing the mesh size of fishing nets to be used for certain species of fish and the size of what are known as by-catches, that is to say catches of species of fish which in themselves are protected but which are unintentionally taken up together with unprotected species when authorized nets are used.

In autumn 1977 the "Cap Caval", a French ship, infringed these provisions whilst fishing, mainly for prawns it seems, in English territorial waters. The ship was intercepted on the edge of a prawn-fishing area and its owner was sentenced to a fine by a British court because the ship was using nets whose mesh did not comply with the requirements — only small-mesh nets were aboard — and because the limit authorized for by-catches had been exceeded: on the master's estimate they amounted to 61 % of the total catch, whereas 20 % is the amount permitted by the British order mentioned above.

This resulted in an action against the United Kingdom under Article 170 of the EEC Treaty by the French Government, which considers that the

1 — Translated from the German.