In Joined Cases 180 and 266/80

REFERENCES to the Court under Article 177 of the EEC Treaty by the French Cour de Cassation [Court of Cassation] for a preliminary ruling in the proceedings pending before that court between

JOSÉ CRUJEIRAS TOME

and

THE PROCUREUR DE LA RÉPUBLIQUE [Public Prosecutor] (Case 180/80),

and by the Tribunal de Grande Instance [Regional Court], St Nazaire, in the proceedings pending before that court between

THE PROCUREUR DE LA RÉPUBLIQUE

and

ANTON YURRITA (Case 266/80),

on the validity of Council regulations laying down certain interim measures for the conservation and management of fishery resources applicable to vessels flying the flag of Spain,

THE COURT

composed of: J. Mertens de Wilmars, President, G. Bosco, A. Touffait and O. Due (Presidents of Chambers), P. Pescatore, Lord Mackenzie Stuart, A. O'Keeffe, T. Koopmans, U. Everling, A. Chloros and F. Grévisse, Judges,

Advocate General: F. Capotorti
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure and the observations submitted pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and procedure

1. The facts of the main proceedings may be summarized as follows:

(a) Case 180/80

It appears from the documents before the Court that on 16 September 1978 the Spanish trawler *Uricen Uno,* registered in San Sebastián under No SS 1-2322, was discovered fishing beyond the 12-mile limit in the 188-mile band of sea which constitutes the French economic zone created by Decree No 77-130 of 11 February 1977 issued pursuant to Law No 76-655 of 16 July 1976.

The master of the vessel, José Crujeiras Tome, who admitted that he did not hold a valid licence as required by the applicable Community rules, was ordered by judgment of the Tribunal de Grande Instance, Lorient, of 5 October 1978 to pay a fine of FF 4 000 and to forfeit his trawling gear and the proceeds of his catch for contravening the fishing regulations inside the French economic zone.

(b) Case 266/80

Anton Yurrita, the master of the Spanish trawler *Ondarrutarra,* registered under No BI 4.22 in Ondarroa, was charged on 17 October 1980 before the Tribunal de Grande Instance, St Nazaire, with fishing without a licence inside the French economic zone, in the 188-mile band of sea beyond the 12-mile limit.

2. The provisions of the regulations and international agreements involved in the two cases may be summarized as follows:

(a) Community rules on fishing applicable to vessels flying the flag of Spain

Pursuant to the Council Resolution of 3 November 1976 on certain external aspects of the creation of a 200-mile fishing zone in the Community with effect from 1 January 1977 (Official Journal 1981, C 105, p. 1) the Member States of the Community extended their fishing zones with effect from 1 January 1977 to 200 miles off their North Sea and North Atlantic coasts. Since then the exploitation of fishery resources in those zones by fishing vessels of non-member countries has been governed by a series of interim Community measures relating to each of the countries concerned. The measures were adopted pending the conclusion of outline agreements on fisheries between the Community and those non-member countries.

The provisions applicable to vessels flying the flag of Spain were laid down initially by Council Regulation (EEC) No 373/77 of 24 February 1977 (Official Journal 1977, L 53, p. 1). The validity of those provisions was subsequently extended and certain amendments were made.

The rules applicable during the period in question in Case 180/80 were laid down in Council Regulation (EEC) No 341/78 of 20 February 1978 laying down certain interim measures for the conservation and management of fishery resources applicable to vessels flying the flag of Spain, for the period from 21 February to 31 May 1978 (Official Journal 1978, L 49, p. 1). The period of validity of that regulation was extended until 30 September 1978 by Council Regulation (EEC) No 1744/78 of 24 July 1978 (Official Journal L 203, p. 1).

Article 2 of Regulation No 341/78 is worded as follows:

"1. Fishing shall be subject to the granting of a licence, issued by the Commission on behalf of the Community, and to compliance with the conservation and supervisory measures and other provisions governing fishing in the zones referred to in Article 1.

2. Fishing quotas, the number of licences which can be issued to vessels flying the flag of Spain, and the maximum number of vessels in possession of a licence which may fish at the same time within a particular zone, are laid down in the Annex."

The rules applicable during the period in question in Case 266/80 are to be found in Council Regulation (EEC) No 1719/80 of 30 June 1980 laying down, for 1980, certain measures for the conservation and management of fishery resources applicable to vessels flying the flag of Spain (Official Journal 1980, L 168, p. 27).

According to the preamble to that regulation, the Community and Spain consulted each other, under the procedure laid down in the Agreement on Fisheries signed by the Community and Spain on 15 April 1980, on the conditions for fishing by the vessels of each of the parties in the fishing zone of the other party during 1980, and on completion of those consultations the Community delegation undertook to recommend that the Community authorities adopt for that period certain measures authorizing Spanish vessels to fish in the fishing zones of the Member States covered by Community rules on fisheries.

Articles 1 and 2 of Regulation No 1719/80 are worded as follows:

"Article 1

The only catches which vessels flying the flag of Spain are authorized to make during the period 1 January to 31 December 1980 in the 200-mile fishing zone of the Member States covered by Community rules on fisheries shall be those set out in Annex I, within the quantitative limits laid down therein and caught under the conditions laid down by this Regulation.

Article 2

1. Fishing shall be subject to the holding on board of a licence, issued by the Commission on behalf of the Community, and to compliance with the conservation and supervisory

measures and other provisions governing fishing in the zone referred to in Article 1.

2. The number of licences which may be issued to vessels flying the flag of Spain shall be as laid down in point 3 of Annex I."

(b) International agreements

According to its preamble, the Geneva Convention of 29 April 1958 on Fishing and Conservation of the Living Resources of the High Seas (United Nations Treaty Series, Vol. 559, No 8164) is intended to solve, by means of international cooperation, the problems involved in the conservation of the living resources of the sea, which are exposed to the danger of being over-exploited. The Convention contains, in particular, the following provisions:

"Article 1

1. All States have the right for their nationals to engage in fishing on the high seas, subject (a) to their treaty obligations, (b) to the interests and rights of coastal States as provided for in this Convention, and (c) to the provisions contained in the following articles concerning conservation of the living resources of the high seas.

2. All States have the duty to adopt, or to cooperate with other States in adopting, such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas.

Article 6

1. A coastal State has a special interest in the maintenance of the productivity of the living resources in any area of the high seas adjacent to its territorial sea.

Article 7

1. Having regard to the provisions of paragraph 1 of Article 6, any coastal State may, with a view to the maintenance of the productivity of the living resources of the sea, adopt unilateral measures of conservation appropriate to any stock of fish or other marine resources in any area of the high seas adjacent to its territorial sea, provided that negotiations to that effect with the other States concerned have not led to an agreement within six months.

2. The measures which the coastal State adopts under the previous paragraph shall be valid as to other States only if the following requirements are fulfilled:

   (a) That there is a need for urgent application of conservation measures in the light of the existing knowledge of the fishery;

   (b) That the measures adopted are based on appropriate scientific findings;

   (c) That such measures do not discriminate in form or in fact against foreign fishermen."

France and Spain ratified the Convention in 1970 and 1971 respectively.

The London Fisheries Convention of 9 March 1964 (United Nations Treaty Series, Vol. 581, No 8432) defines the common aspects of a fisheries regime for the 6-mile zone measured from the baseline and for the zone between 6 and 12 miles from that line.

Each of the Contracting Parties recognizes the right of the other Contracting Parties to establish the fishery regime described in the Convention (Article 1 (1)). Articles 2, 3 and 5 of the Convention provide as follows:

"Article 2

The coastal State has the 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

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 1 January 1953 and 31 December 1962.

Article 5

1. Within the belt mentioned in Article 3 the coastal State has the power to regulate the fisheries and to enforce such regulations, including regulations to give effect to internationally agreed measures of conservation, provided that there shall be no discrimination in form or in fact against fishing vessels of other Contracting Parties fishing in conformity with Articles 3 and 4.

2. Before issuing regulations, the coastal State shall inform the other Contracting Parties concerned and consult those Contracting Parties, if they so wish."

Article 10 provides that nothing in the Convention is to prevent the maintenance or establishment of a special regime in matters of fisheries between *inter alia* the Member States of the European Economic Community.

France and Spain ratified the Convention in 1965.

Within the framework of the *voisinage* arrangements provided for in Article 9 (2) of the London Convention, France and Spain, by an exchange of notes of 20 March 1967, concluded a General Agreement on Fishing. With regard to the rights of Spanish fishermen to fish in the waters under French jurisdiction, Article I (b) of the Agreement provides as follows:

"In the 6 to 12-mile zone off the French coasts, Spanish nationals shall have a permanent right to fish:

— for all species on the Atlantic coast from the mouth of the Bidassoa as far as the parallel which passes through the northernmost point of Belle-Ile."

Following the extension by the Member States of the Community of their fishing zones to 200 miles on 1 January 1977, the Commission of the European Communities embarked upon a series of negotiations on fisheries agreements to be concluded between the Community and non-member countries, including Spain. An agreement with Spain was initialled on 23 September 1978 and signed on 15 April 1980. That Agreement was approved on behalf of the Community by Council Regulation (EEC) No 3062/80 of 25 November 1980 on the conclusion of the Agreement on Fisheries between the European Economic Community and the Government of Spain (Official Journal 1980, L 322, p. 3). On completion of the ratification procedure in Spain, the

Agreement entered into force on 22 May 1981 (Official Journal 1981, L 204, p. 34).

Pursuant to Article 12 thereof, pending its entry into force, the Agreement applies provisionally as from the date of signature, namely 15 April 1980.

Articles 2, 3 and 4 of the Agreement are worded as follows:

"Article 2

Each Party shall grant access to the fishing zone falling under its jurisdiction to the fishing vessels of the other Party under the conditions laid down by the following Articles.

Article 3

1. Each Party shall determine each year, for the fishing zone falling under its jurisdiction, subject to adjustments necessitated by unforeseen circumstances, and on the basis of the need for rational management of the biological resources:

   (a) the total allowable catch for individual stocks or complexes of stocks, taking into account the most reliable scientific information available to it, the interdependence of stocks, the work of appropriate international organizations and other relevant factors;

   (b) after appropriate reciprocal consultations, the catch allotted to the fishing vessels of the other Party and the zones in which these catches may be made. The two Parties shall have as their objective the attainment of a satisfactory balance between their respective fishing possibilities in the fishing zones falling under the jurisdiction of the other Party.

   In determining these possibilities, each Party shall take into account:

   (i) the advantage of preserving the traditional characteristics of fishery activities in the frontier coastal areas;

   (ii) the need to minimize the difficulties encountered by the Party whose fishing possibilities may be reduced in the course of achieving the abovementioned balance;

   (iii) all other relevant factors.

2. Each Party shall be able to take any other measures to ensure the conservation and rational management of resources in the fishing zones falling under its jurisdiction. Such measures when taken following the annual fixing of the other Party's fishing possibilities, should not be such as to compromise the effective operation of fishing.

Article 4

Each Party may require that in the fishing zone falling under its jurisdiction fishing by vessels of the other Party shall be subject to licence.

The competent authorities of each Party shall communicate to the other Party the name, registration number and other relevant particulars of vessels requesting authorization to fish in the fishing zone of the other Party. This provision shall also apply to any vessel intended to aid

or assist a fishing vessel in carrying out tasks directly related to the latter's fishing activity. The second Party shall issue licences commensurate with the possibilities for fishing granted under Article 3 (1) (b)."

(c) French legislation

The French legislation applicable in the two cases is embodied in Decree No 77-130 of 11 February 1977, issued pursuant to Law No 76-655 of 16 July 1976. That decree creates an economic zone off the North Sea, English Channel and Atlantic coasts of the territory of the French Republic, from the Franco-Belgian frontier to the Franco-Spanish frontier, from the outside limit of the territorial waters to a line 188 nautical miles beyond that limit.

Article 2 of the decree provides:

"Subject to the provisions of the Treaty establishing the European Economic Community and instruments adopted in implementation thereof, fishing by foreign vessels in the above-mentioned economic zone is prohibited, in accordance with the Law of 1 March 1888 as amended.

However, notwithstanding these provisions, fishing permits may be issued to certain foreign vessels in accordance with the conditions laid down in the Treaty establishing the European Economic Community and the instruments adopted in implementation thereof, by international agreements and by internal French law."

Article 3 lays down the applicable penalties.

3. As regards Case 180/80, it is to be noted that the defendant appealed to the Cour d'Appel [Court of Appeal], Rennes, which by judgment of 11 July 1979 upheld the verdict of the Tribunal de Grande Instance, Lorient, and increased the fine to FF 15 000. The Cour d'Appel rejected the defence's argument based on an application by analogy of the provisions of the London Convention of 9 March 1964 and the Franco-Spanish Agreement of 20 March 1967 concerning the zone between 6 and 12 miles; the court took the view that the creation of economic zones beyond the 12-mile limit in no way constituted an extension of the reserved zone established by the London Convention.

Before the Cour d'Appel, Mr Crujeiras Tome also contended that under the Geneva Convention of 29 April 1958 unilateral measures might not be taken without prior consultation and were not to be discriminatory and that therefore the Community regulations subjecting fishing by Spanish nationals to various conditions, in particular the obtaining of a licence, were not enforceable against him. The Cour d'Appel rejected this argument, stating that new customary law had developed and that the rights conferred by the Geneva Convention had been abrogated by the generalized practice of creating economic or exclusive-fishing zones of 188 miles. Finally, the court took the view that, by accepting the licensing system introduced by the Community rules, Spanish fishermen and the Spanish State itself had recognized the existence of the

French economic zone, of which the EEC was merely the administrator with regard to fishing.

The Cour de Cassation, to which the defendant appealed, stated in the first place that it was not for the ordinary courts of law to declare whether or not an international convention which had not been denounced remained in force. It then expressed the view that in the proceedings before the appeal court a serious difference had arisen:

"on whether, having regard to prior international obligations, the regulations of the Council of the European Communities laying down certain interim measures for the conservation and management of fishery resources applicable to vessels flying the flag of Spain are valid, in so far as they have laid down certain conditions for fishing operations carried out by Spanish nationals in the economic zone established by Decree No 77-1130 of 11 February 1977 and whether, if valid, those regulations are enforceable against Spanish nationals."

By judgment of 7 July 1980 the Cour de Cassation decided to submit that question to the Court of Justice pursuant to Article 177 of the EEC Treaty.

In Case 266/80, the Tribunal de Grande Instance, St Nazaire, referred the same question to the Court of Justice by judgment of 24 October 1980.

4. The judgment of the Cour de Cassation of 7 July 1980 was received at the Court Registry on 25 August 1980.

The judgment of the Tribunal de Grande Instance, St Nazaire, of 24 October 1980 was received at the Court Registry on 1 December 1980.

Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted by the following: the defendant in the main proceedings in Case 180/80, Mr Crujeiras Tome, represented by M. Sabas, of the Lorient Bar, and by J. Tournaire, of the Bayonne Bar; the Government of the French Republic, represented in both cases by Gilbert Guillaume, Director of Legal Matters at the Ministry of Foreign Affairs, acting as Agent; the Government of the United Kingdom, represented by R. D. Munrow, of the Treasury Solicitor's Department, acting as Agent; the Council of the European Communities, represented by Daniel Vignes, Director of its Legal Department, acting as Agent, assisted by Aidan Larkin, an administrator in that Department; and the Commission of the European Communities, represented by its Legal Adviser, Jacques Bourgeois, assisted by François Lamoureux, a member of its Legal Department.

By order of 8 April 1981, the Court decided to join Cases 180/80 and 266/80 for the purposes of the oral procedure and the judgment.

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.

II — Summary of the written observations submitted to the Court

The *defendant in the main proceedings in Case 180/80, Mr Crujeiras Tome,* refers in

the first place to the conflict which, in his opinion, exists between, on the one hand, the Community regulations laying down certain interim measures for the conservation and management of fishery resources applicable to vessels flying the flag of Spain and, on the other hand, certain provisions of the London Fisheries Convention of 9 March 1964, the Franco-Spanish Agreement of 20 March 1967 and the Geneva Convention of 29 April 1958 on Fishing and Conservation of the Living Resources of the High Seas.

By unilaterally imposing a restrictive regime only upon Spanish nationals, the Community regulations in question are in breach of the principle of non-discrimination laid down in the London Convention and the Geneva Convention, and are contrary to the freedom to fish conferred by the Franco-Spanish Agreement. In this respect, Mr Crujeiras Tome makes particular reference to:

— Article 7 of the Geneva Convention, which provides that a coastal State may not unilaterally adopt conservation measures if they "discriminate in form or in fact against foreign fishermen", and

— Article 5 of the London Convention, which prohibits, in the belt between 6 and 12 miles, any discrimination in form or in fact against fishing vessels of other Contracting Parties fishing there in accordance with Articles 3 and 4 of that Convention.

Moreover, he refers to the permanent right conferred on Spanish fishermen by Article I (b) of the Franco-Spanish Agreement to fish for all species in the belt between 6 and 12 miles off the French coasts.

Mr Crujeiras Tome considers that the conflict between those provisions must be resolved in accordance with the general principle laid down in Article 30 (4) (b) of the 1969 Vienna Convention on the Law of Treaties and adopted in Article 234 of the EEC Treaty in the following terms:

"The rights and obligations arising from agreements concluded before the entry into force of this Treaty between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of this Treaty."

According to the judgment of the Court of 14 October 1980 (Case 812/79 *Attorney General* v *Burgoa* [1980] ECR 2787), Community institutions are under a duty not to impede a Member State in the performance of its prior obligations. As may be seen in particular from a memorandum from the Legal Department of the Council of the European Communities of 15 July 1977, to which the attention of the Cour de Cassation was drawn, the same principle applies to the rules of secondary law. The Convention of 9 March 1964 and the Agreement of 20 March 1967 antedate the entry into force of the Community regulations at issue and cannot therefore be affected by them. Mr Crujeiras Tome adds that in his opinion the method resorted to in the interim rules unilaterally imposed on Spanish nationals is not the proper way to resolve the conflict between the provisions referred to. The only way to obviate that conflict is for negotiations to take place between France and Spain.

As regards the nature of the restrictions imposed on Spanish fishermen, Mr

Crujeiras Tome states in the first place that the Community regulations adopted since 1977 make fishing by Spanish vessels in the 6 to 12-mile zone and in the 12 to 200-mile zone subject to the requirement of a temporary licence for each vessel, which is granted restrictively and unilaterally, by the Commission for a limited area. In addition strict and complex quotas are imposed. Thus the Community rules are incompatible with the right granted to Spanish fishermen by the Franco-Spanish Agreement to fish freely, on a permanent basis, for all species in the area defined in the Agreement.

Mr Crujeiras Tome goes on to observe that the Community regime is contrary to the principle of non-discrimination embodied in Article 5 of the London Convention inasmuch as it applies only to Spanish nationals. The quota system imposed on Spanish fishermen is not applied to French vessels and certainly not in the same way. Furthermore, advance control by means of a licensing system does not extend to every person fishing in the same zone, but is applied only to Spanish fishermen. Subsequent control by means of checking of catches by the vessels of Member States was not introduced in the Community until the adoption of Council Regulation (EEC) No 753/80 of 26 March 1980 laying down detailed rules for the recording and transmission of information concerning catches taken by fishing vessels of the other Member States (Official Journal 1980, L 84, p. 33). Finally, the various procedures for implementing the licensing system impose on Spanish fishermen constraints to which French fishermen are not subject, even when checks are carried out after catches are landed.

Thus identical situations are treated differently contrary to the London Convention. In fact, Article 11 of that Convention, which provides that in certain circumstances a coastal State may exclude particular areas from the full application of Articles 3 and 4 in order to give preference to the local population, constitutes the only exception to the principle of non-discrimination embodied in Article 5. Article 10 of the Convention, which provides for the possibility of a special regime as between Member States of the Community, is not intended to authorize the coastal State or any party exercising the rights conferred on it to oust vessels protected by the Convention from their habitual fishing grounds, but merely to allow access to the area in question for vessels of other Member States of the Community which cannot claim to exercise the long-standing rights referred to in Article 3 of the Convention.

As regards the geographical scope of the international agreements to which he refers, Mr Crujeiras Tome takes the view that, having regard to their rationale, they must, if they are to be effective, apply not only to the 6 to 12-mile zone, to which they expressly refer, but also to the 12 to 200-mile exclusive economic zone.

In this regard, he states that pursuant to the Law of 24 December 1971 "French territorial waters extend 12 miles from the baselines". The French economic zone, which, by virtue of Law No 76-655 of

16 July 1976 and Decree No 77-130 of 11 February 1977, extends "from the limit of the territorial waters to a line 188 miles beyond that limit" is therefore covered by the expression "any area of the high seas adjacent to its territorial sea" contained in Article 7 of the Geneva Convention of 29 April 1958.

Hence that article, which does not allow a coastal State unilaterally to adopt the appropriate conservation measures unless they are free of any discriminatory effect against foreign fishermen, is specifically applicable to the French economic zone.

The London Convention of 9 March 1964 supplemented and clarified the Geneva Convention regarding the habitual fishing rights of the nationals of the countries which signed it. It applies therefore to the zone extending from the 6-mile limit to the high seas and in particular to the 12 to 200-mile zone where Spanish fishermen have always exercised habitual fishing rights.

The same is true of the Franco-Spanish Agreement of 20 March 1967. The preamble to that Agreement refers expressly to an extension of the reserved fishing areas to 12 miles, subsequently given effect in France by the Decree of 7 June 1967. The 12-mile limit adopted by the Agreement does not constitute a rigid frontier, since the mutual rights based on the recognition of fishing customs under Article V of the Agreement are also confirmed beyond that limit. The geographical scope of the Franco-Spanish Agreement therefore extends from 6 miles to the present boundary of the sovereignty of the two States.

As regards the duration of the international agreements referred to, Mr Crujeiras Tome emphasizes that they have not expired and have not been abrogated or denounced. Although undeniably the situation has evolved since 1958, the changes which have taken place do not justify recourse to the *rebus sic stantibus* rule and certainly cannot affect the principles of non-discrimination and consultation laid down in those agreements.

In the light of those considerations, Mr Crujeiras Tome considers that the Community regulations laying down interim fishery measures are invalid and in any case are not applicable to Spanish fishermen in the 12 to 200-mile zone.

He adds that, in so far as those regulations may be declared valid, the Court of Justice lacks jurisdiction to decide whether they are enforceable against Spanish nationals, since such a question involves interpretation by the Court of provisions of international law which bind Member States outside the framework of Community law (cf. judgment of 27 November 1973 in Case 130/73 *Vandeweghe* [1973] ECR 1329).

The *French Government* points out in the first place that despite the distinction drawn in the orders for reference between the "validity" and the "enforceability" of the Community regulations involved, the question is essentially one of determining whether, having regard to the rights of the parties concerned under the relevant treaties, the regulations were valid and might therefore serve as a basis for legal proceedings.

It goes on to observe that in its view, having regard to the order for reference in Case 180/80, it seems doubtful that the Court de Cassation wished to refer to the Court of Justice the problem of the compatibility of the Community regulations with the Geneva Convention of 29 April 1958 on Fishing and Conservation of the Living Resources of the High Seas. Moreover, that Convention was not signed by the Federal Republic of Germany, Italy or Luxembourg, and it was not ratified by Ireland and cannot therefore bind the Community. Furthermore, it has been outstripped by the development of an international custom enabling coastal States to declare an exclusive fishing zone extending 200 miles from their coasts; it was against that background that the Community created its fishing zone and adopted the regulations at issue. In those circumstances, the Geneva Convention could not affect the validity of those regulations.

The same conclusion is unavoidable with regard to the London Convention of 9 March 1964 and the Franco-Spanish Agreement of 20 March 1967, which do not relate to the 12 to 200-mile zone where the events in issue in these two cases took place. In that respect, the French Government endorses the opinion expressed by Mr Advocate General Capotorti in Case 812/79 *(Attorney General* v *Burgoa* [1980] ECR 2809). The Advocate General in fact relied on the unequivocal terms of the Convention, which refer only to the 6 to 12-mile zone, and he excluded any analogous application of the Convention to the zone between 12 and 200 miles.

As regards Case 266/80, the French Government draws attention to the fact that at the time of the events in issue the outline Agreement on Fisheries signed by the Community and Spain on 15 April 1980 was provisionally applied in accordance with Article 12 thereof. In this connection it emphasizes that the modern practice of applying treaties provisionally is recognized by Article 25 of the Vienna Convention on the Law of Treaties, which provides that:

"1. A treaty ... is applied provisionally pending its entry into force if:

(a) the treaty itself so provides; or

(b) ...

2. ... the provisional application of a treaty ... with respect to a State shall be terminated if that State notifies the other States between which the treaty is being applied provisionally of its intention not to become a party to the treaty."

Accordingly, if a treaty is applied provisionally it is effective even before entering into force, since the Contracting Parties have given a reciprocal undertaking immediately to apply it on a provisional basis.

In the circumstances, Council Regulation (EEC) No 1719/80 of 30 June 1980 was lawfully founded on the outline Agreement on Fisheries signed on 15 April 1980 by the Community and Spain. As from that date, the provisions of that Agreement superseded all contrary provisions of the London Convention and of the Franco-Spanish Agreement. It is therefore sufficient for the Court, in Case 266/80, to establish that one instrument has replaced the others and to infer from that the necessary conclusions regarding the question raised.

For the *United Kingdom* it is clear that the London Convention and the Franco-Spanish Agreement deal with the 6 to 12-mile zone and are therefore irrelevant to the present cases, which arose outside the 12-mile limit.

As regards the Geneva Convention, the United Kingdom sees no reason to depart from the Court's reasoning in Case 812/79 *(Attorney General* v *Burgoa* [1980] ECR 2787), where it was stated that the new relations between the Community and Spain, on which the interim regime established by the Community was based, were superimposed on the regime which previously applied to the fishing zones in order to take account of the general development of international law regarding fishing on the high seas (see paragraph 24 of the decision). Such a conclusion is even more appropriate with regard to Regulation No 1719/80 which is applicable in Case 266/80. In fact, when that regulation was adopted, on 30 June 1980, relations between the Community and Spain had already been formalized by the signature, on 15 April 1980, of the outline Agreement on Fisheries. Moreover, before adoption of that regulation, the procedure laid down by the Agreement had been followed regarding consultations on conditions for fishing by vessels of the Community and Spain in each other's fishing zones during the year 1980.

The *Council of the European Communities* points out that the three international conventions referred to in these proceedings were concluded during a transitional period after the entry into force of the EEC Treaty but before the establishment of the common fisheries policy. According to a consistent line of decisions of the Court, the Member States were able validly to enter into international commitments during that period, provided that such commitments were of a transitional nature (cf. judgment of 14 July 1976 in Joined Cases 3, 4 and 6/76 *Kramer* [1976] ECR 1310).

The Council is of the opinion that as far as the London Convention is concerned, that condition is fulfilled by Article 10 thereof. That article provides that "Nothing in the present Convention shall prevent the ... establishment of a special régime in matters of fisheries: (a) as between States Members ... of the European Economic Community ...". In fact the Member States signed the London Convention subject to the condition that it was not to prevent the establishment of a common fisheries policy. Consequently, although the London Convention is not binding upon the Community as such, Article 10 thereof constitutes a "stipulation on behalf of others", upon which the Community is entitled to rely. On that point, the Council refers to Article 36 of the Vienna Convention of 23 May 1969 on the Law of Treaties, according to which: "A right arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third State, or to a group of States to which it belongs ... and the third State assents thereto."

Moreover, the Council takes the view that the London Convention and the Franco-Spanish Agreement create rights only in the 6 to 12-mile zone and do not apply beyond the 12-mile limit. With regard to the contention that, in parallel with the extension of the fishing zones, the regime set up by the London

Convention was extended to 200 miles, the Council refers to the proceedings of the Conference on the Law of the Sea at which the formulation of historic rights as rights enforceable against a coastal State within its 200-mile limit was invariably rejected.

With regard to the influence in this case of the Geneva Convention of 29 April 1958 on fishing, the Council refers once more to the Conference on the Law of the Sea, and to the practive followed by States in affirming that since 1975 a new customary rule of international law has developed, enabling coastal States to reserve for themselves all fishing rights in a zone adjacent to their territorial waters extending as far as 200 miles. The Council is of the opinion that the Geneva Convention may not be regarded as applying to the zone covered by the new custom and is not therefore capable of preventing the application of the Community provisions.

The *Commission of the European Communities* considers that the solution adopted in the judgment of 14 October 1980 in Case 812/79 (*Attorney General* v *Burgoa)* is general in scope regarding the validity of the Community regulations in question, irrespective of whether the events at issue took place within or beyond the 12-mile limit. It emphasizes that according to that judgment, it is not necessary, in order to assess the validity of the interim measures adopted by the Community, to have regard to the regime applicalbe before the entry into force of the Community provisions. In fact those provisions are based on the new relations between Spain and the Community established following the extension of the fishing zones to 200 miles.

In the alternative, the Commission maintains that the Community regulations are compatible with the provisions of the London and Geneva Conventions.

In that respect, it states in essence that the Community licensing system constitutes an appropriate method of supervising the enforcement of conservation measures in accordance with Article 5 of the London Convention; in particular it ensures observance of catch quotas by the vessels of non-member countries which, as a rule, return to their ports of origin to land their catches. In that respect, the Commission refers also to Article 10 of the London Convention.

As regards the principle of freedom to fish on the high seas embodied in the Geneva Convention of 29 April 1958, the Commission refers to Article 86 of the new draft convention on the law of the sea and states that the principle applies only to the high seas, defined by positive customary law as "all parts of the sea not comprised within the exclusive economic zone, the territorial sea or the internal waters of a State ..." Moreover, the expression "area of the high seas adjacent to its territorial sea" contained in Article 7 of the Geneva Convention, to which the defendant in the main proceedings in Case 180/80 refers, is a transitional concept applied in the period between adoption of the Geneva Convention and the establishment of the new rules resulting from the proceedings of the Conference on the Law of the Sea, and has now disappeared from positive customary law.

As regards enforceability of the Community regulations against Spanish fishermen, the Commission refers in particular to the prior consultations

between the Community and Spain, which were the subject of dispute before the national courts.

Those consultations in fact took place at the time of the negotiations on the outline Agreement on Fisheries between the Community and Spain, which commenced in December 1976.

Thus, in accordance with Article 5 (2) of the London Convention, the prior consultation on the licensing system — the most contested aspect of the Community provisions — took place well before the introduction of that system by Council Regulation (EEC) No 746/77 of 5 April 1977. The Commission further points out that the term "consult" does not imply that a prior agreement must be reached.

As regards Case 266/80, it also appears from the fourth recital in the preamble to Regulation No 1719/80 that consultations took place in accordance with the procedure laid down in the outline Agreement, the provisions of which applied provisionally with effect from 15 April 1980.

Finally, the Commission mentions the cooperation of the Spanish authorities — which commenced before the events in issue took place — for the implementation of the interim provisions, particularly with regard to the issue of fishing licences which is carried out through the Spanish Mission to the Communities.

III — Oral procedure

At the sitting on 24 June 1981 oral argument was presented by the following: for Mr Crujeiras Tome, the defendant in Case 180/80, J. Tournaire, of the Bayonne Bar; for the Government of the French Republic, Gilbert Guillaume, Director of Legal Matters at the Ministry of Foreign Affairs, acting as Agent; for the Council of the European Communities, Daniel Vignes, Director of its Legal Department, acting as Agent; and for the Commission of the European Communities, François Lamoureux, a member of its Legal Department, acting as Agent.

The Advocate General delivered his opinion at the sitting on 15 September 1981.

Decision

1 By judgments of 7 July 1980 and 24 October 1980, which were received at the Court on 25 August 1980 and 1 December 1980 respectively, the French Cour de Cassation [Court of Cassation] (Case 180/80) and the Tribunal de Grande Instance [Regional Court], St Nazaire, (Case 266/80) referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question as to whether, having regard to prior international obligations, the regulations of the Council of the European Communities laying down certain interim measures for the conservation and management of fishery

resources applicable to vessels flying the flag of Spain are valid, in so far as they have laid down certain conditions for fishing operations carried out by Spanish nationals in the economic zone established by French Decree No 77-130 of 11 February 1977 (Journal Officiel de la République Française of 12 February 1977, p. 864) and whether, if valid, those regulations are enforceable against Spanish nationals.

2 The question was raised in criminal proceedings against the masters of two fishing vessels registered in Spain, who were charged with fishing, in an unspecified manner, in waters within the French economic zone, without being in possession of a fishing licence.

3 José Crujeiras Tome, the defendant in the main proceedings in Case 180/80, was discovered fishing on 16 September 1978 in the zone between 12 and 200 nautical miles from the baselines. At that time the prohibition on fishing in that zone without a licence issued by the Commission on behalf of the Community was laid down in Council Regulation (EEC) No 1744/78 of 24 July 1978, extending certain interim measures for the conservation and management of fishery resources applicable to vessels flying the flag of Spain to 30 September 1978 (Official Journal 1978, L 203, p. 1).

4 Anton Yurrita, the defendant in the main proceedings in Case 266/80, was fishing in the same zone on 17 October 1980; at that time the prohibition on fishing in that zone without a Community licence was contained in Council Regulation (EEC) No 1719/80 of 30 June 1980 laying down for 1980 certain measures for the conservation and management of fishery resources applicable to vessels flying the flag of Spain (Official Journal 1980, L 168, p. 27).

5 In both cases the defendants in the main proceedings maintain that the Community regulations which they are alleged to have contravened are invalid or in any event inapplicable as against them, being incompatible with the rights upon which they may rely in consequence of international commitments previously entered into between France and Spain.

6 For that purpose, they rely, first, upon the London Fisheries Convention of 9 March 1964 (United Nations Treaty Series, Vol. 581, No 8432), which, since it recognized traditional fishing rights in the 6 to 12-mile zone, must, according to the defendants, be understood as meaning that, after the extension of fishery limits, the same regime extends up to 200 miles; secondly, they rely upon the Geneva Convention of 29 April 1958 on Fishing and Conservation of the Living Resources of the High Seas (United Nations Treaty Series, Vol. 559, No 8164), according to which unilateral conservation measures may not be adopted without prior consultation and must not be discriminatory in character.

7 It was in order to deal with those arguments that the national courts referred to the Court of Justice the question of the validity of Regulations Nos 1744/78 and 1719/80 and the enforceability thereof against Spanish nationals.

8 The scheme for the conservation of the resources of the sea was established by the Community at a time when international law in relation to fishing was undergoing profound changes. It was in order to take into account the general development of international law at that time that the Member States decided, by concerted action agreed upon within the Council, to extend their fishing limits to 20 miles from the baselines. By a resolution of 3 November 1976 on certain external aspects of the creation of a 200-mile fishing zone in the Community with effect from 1 January 1977 (published in Official Journal 1981, C 105, p. 1), the Council, having stressed the need for immediate action by the Community to protect the legitimate interests in the sea areas most threatened as a result of the extension of fishing limits by non-member countries, decided that as from 1 January 1977 the exploitation of fishery resources in those areas by fishing vessels of non-member countries was to be governed by agreements between the Community and the non-member countries concerned.

9 In the same resolution, the Council instructed the Commission to start negotiations immediately with the non-member countries affected by the Community conservation with the interests of fishermen traditionally operating in the waters in question. Negotiations between the Commission and Spain were commenced on 3 December 1979. They led to the

Agreement on Fisheries between the European Economic Community and the Government of Spain, which was initialled on 23 September 1978 and signed on 15 April 1980 (Official Journal 1980, C 263, p. 1).

10 Pending the outcome of those negotiations, and to meet an urgent need, the Community, as soon as it had defined its conservation policy, adopted a number of interim provisions applicable for short periods, extending the Community system of catch quotas to all fishermen of non-member countries, including the Spanish.

11 Pursuant to Article 228 of the EEC Treaty, the Agreement was approved on behalf of the Community by the adoption of Council Regulation (EEC) No 3062/80 of 25 November 1980 (Official Journal 1980, L 322, p. 3). The Agreement entered into force on 22 May 1981 (Official Journal 1981, L 204, p. 34); it was applied provisionally, pursuant to Article 12 thereof, by the Community and Spain as from the date of signature.

12 The Agreement allows each of the parties to adopt, within the fishing zones under its jurisdiction, the measures necessary to ensure rational management of the living resources of the sea, including measures fixing catch quotas and requiring that fishing be subject to licence.

13 The justification for the use of the licensing system lies in the need to fix catch quotas; catches taken by the fishing vessels of non-member countries cannot be checked in the adjacent coastal ports since those vessels normally return to their ports of origin to land their catches.

14 It should be noted that Regulation No 1719/80 was adopted at a time when the above-mentioned Agreement was already being provisionally applied by the Community and Spain. As may be seen from the preamble to the regulation, the Community and Spain consulted each other under the procedure laid down in the Agreement on the conditions for fishing by the vessels of each of the parties in the fishing zone of the other party during 1980.

15 Regulation No 1744/78, which was adopted during the final stage of the negotiations between the Community and Spain on the text of the Agreement, is one of a series of Community regulations which, pending conclusion of the Agreement with Spain and agreements with other non-member countries, laid down certain interim conservation measures. Those regulations were adopted during the negotiations and related to the same matter.

16 It should be emphasized that throughout the period of application of the interim measures adopted by the Community the Spanish authorities cooperated in ensuring their implementation. In particular, as may be seen from the documents before the Court, they were involved in the issue of the Community licences and took part in discussions on procedures for the application of the interim measures, including rules governing the substitution of vessels and the equivalence of licences.

17 In such circumstances it is not necessary to examine whether the provisions of the London Convention, the letter of which limits its territorial scope to the zone extending 12 miles from the baselines, may possibly apply to the zone extending from 12 to 200 miles, or to ascertain whether the interim conservation measures adopted by the Community fulfilled the requirements, such as prior consultation, laid down by the Geneva Convention.

18 It may in fact be seen from the foregoing that the interim regime established by the Community under its own rules falls within the framework of the relations established between the Community and Spain in order to resolve the problems inherent in conservation measures and the extension of fishery limits and in order to ensure reciprocal access by fishermen to the waters subject to such measures. Those relations were substituted for the regime which previously applied in those zones in order to take account of the general development of international law in relation to fishing on the high seas and the increasingly urgent need to conserve the living resources of the sea.

19 In those circumstances, the provisions of Regulations Nos 1744/78 and 1719/80, in so far as they applied to the fishing zone extending from 12 to

200 miles from the baselines, were part to of the progressive creation of new reciprocal relations between the Community and Spain in the field of sea-fishing which were substituted for the regime previously applicable to fishing on the high seas.

20 Accordingly, Spanish fishermen may not rely on prior international agreements between France and Spain in order to prevent the application of the interim regulations adopted by the Community in the event of any incompatibility between the two categories of provisions.

21 It follows from the foregoing that consideration of the question raised has disclosed no factor of such a kind as to affect the validity of Regulations Nos 1744/78 and 1719/80 and that those regulations are enforceable against Spanish nationals.

Costs

22 The costs incurred by the French and British Governments and by the Council and the Commission of the European Communities, which submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the proceedings pending before the national courts the decision on costs is a matter for those courts.

On those grounds,

THE COURT

in answer to the question submitted to it by the French Cour de Cassation by judgment of 7 July 1980 and by the Tribunal de Grande Instance, St Nazaire, by judgment of 24 October 1980, hereby rules:

Consideration of the question raised has disclosed no factor of such a kind as to affect the validity of Council Regulation (EEC) No 1744/78 of 24 July 1978 extending certain interim measures for the conservation and management of fishery resources applicable to vessels flying the flag

of Spain to 30 September 1978 (Official Journal 1978, L 203, p. 1) or Council Regulation (EEC) No 1719/80 of 30 June 1980 laying down for 1980 certain measures for the conservation and management of fishery resources applicable to vessels flying the flag of Spain (Official Journal 1980, L 168, p. 27). The provisions of those regulations are enforceable against Spanish nationals.

Mertens de Wilmars Bosco Touffait

Due Pescatore Mackenzie-Stuart O'Keeffe

Koopmans Everling Chloros Grévisse

Delivered in open court in Luxembourg on 8 December 1981.

A. Van Houtte J. Mertens de Wilmars

Registrar President

OPINION OF MR ADVOCATE GENERAL CAPOTORTI

(see Case 181/80, ECR 2984)