legislation laying down as conditions for the registration of a fishing vessel in their national registers the requirement that the owners, charterers and operators of the vessel be nationals of that Member State or companies incorporated in that State and that, in the latter case, at least 75% of the capital in any such company be held by nationals of that Member State or by companies fulfilling the same conditions and that 75% of the directors of every such company be nationals of that Member State.

Since it is not based on the nationality of persons, the common fisheries policy, even though it incorporates a system of national fishing quotas, cannot justify a derogation, in relation to the registration of fishing vessels, from the prohibition of all discrimination on grounds of nationality.

REPORT FOR THE HEARING
in Case C-246/89 *

I — The national legislation at issue and the pre-litigation procedure

(a) *The legislation governing the registration of fishing vessels until 30 November 1988*

1. Under the Merchant Shipping Act 1894 ('the 1894 Act'), fishing vessels and other boats could be registered as British vessels if they were wholly owned either by British subjects or by a company incorporated and having its principal place of business in some part of Her Majesty's dominions. Nationals of other States could set up such a company. This regime is still in force with respect to merchant vessels, subject only to certain amendments which are not material to this case.

(b) *The legislation governing the registration of fishing vessels since 1 December 1988*

2. The statutory system governing the registration of British fishing vessels was altered by Part II of the Merchant Shipping Act 1988 ('the 1988 Act') and the Merchant Shipping (Registration of Fishing Vessels) Regulations 1988 (S. I. 1988 No 1926, hereinafter referred to as 'the 1988 Regulations'). It is common ground that the United Kingdom amended the previous legislation in order to put a stop to the practice known as 'quota hopping' whereby — according to that State — its fishing quotas are 'plundered' by fishing vessels flying the British flag but lacking any genuine link with the United Kingdom.

* Language of the case: English.

3. Section 13 of the 1988 Act provided for the establishment of a new register of all British fishing vessels including those registered in the old register maintained under the 1894 Act. However, only fishing vessels fulfilling the conditions laid down in section 14 of the 1988 Act may be registered in the new register.

4. The first two subsections of section 14 of the 1988 Act read as follows:

'(1) Subject to subsections (3) and (4), a fishing vessel shall only be eligible to be registered as a British fishing vessel if —

(a) the vessel is British-owned;

(b) the vessel is managed, and its operations are directed and controlled, from within the United Kingdom; and

(c) any charterer, manager or operator of the vessel is a qualified person or company.

(2) For the purposes of subsection (1)(a) a fishing vessel is British-owned if —

(a) the legal title to the vessel is vested wholly in one or more qualified persons or companies; and

(b) the vessel is beneficially owned —

(i) as to not less than the relevant percentage of the property in the vessel, by one or more qualified persons, or

(ii) wholly by a qualified company or companies, or

(iii) by one or more qualified companies and, as to not less than the relevant percentage of the remainder of the property in the vessel, by one or more qualified persons.'

5. Subsection 7 of section 14 provides as follows:

'(7) In this section —

"qualified company" means a company which satisfies the following conditions, namely —

(a) it is incorporated in the United Kingdom and has its principal place of business there;

(b) at least the relevant percentage of its shares (taken as a whole), and of each class of its shares, is legally and beneficially owned by one or more qualified persons or companies; and

(c) at least the relevant percentage of its directors are qualified persons;

"qualified person" means —

(a) a person who is a British citizen resident and domiciled in the United Kingdom, or

(b) a local authority in the United Kingdom; and

"the relevant percentage" means 75% or such greater percentage (which may be 100%) as may for the time being be prescribed.'

6. The 1988 Act and the 1988 Regulations came into force on 1 December 1988. However, under section 13(3)(b) and section 58 of the 1988 Act in conjunction with section 66 of the 1988 Regulations, the validity of registrations made under the previous Act was extended for a transitional period until 31 March 1989.

(c) *The pre-litigation procedure*

7. Taking the view that the nationality requirements enshrined in sections 13 and 14 of the 1988 Act infringed Articles 7, 52 and 221 of the EEC Treaty, the Commission requested the United Kingdom, in a letter dated 16 March 1989, to submit its observations pursuant to the first paragraph of Article 169 of the EEC Treaty within one month of the receipt of the letter. The Commission also asked the United Kingdom to suspend the implementation of the 1988 Act and in particular the effects of the establishment of the new register for fishing vessels, pending a solution to the problem in accordance with Community law.

8. The United Kingdom replied by a letter dated 21 April 1989 in which it contested the opinion of the Commission and also declined to suspend the application of the relevant provisions of the Act.

9. On 29 May 1989, the Commission issued a reasoned opinion, in which it requested the United Kingdom to take the necessary measures to put an end to the infringement complained of within three weeks of the notification of the opinion.

10. The United Kingdom replied by letter of 19 June 1989, once again taking issue with the position of the Commission.

11. Those were the circumstances in which the Commission brought this action for failure to fulfil obligations.

II — Written procedure and conclusions of the parties

12. The Commission's application was received at the Court Registry on 4 August 1989.

13. By a separate document, also lodged at the Court Registry on 4 August 1989, the Commission of the European Communities made an application pursuant to Article 186 of the EEC Treaty and Article 83 of the Rules of Procedure by which it sought, as it explained at the hearing, an order requiring the United Kingdom to suspend the application of the nationality requirements enshrined in section 14(1)(a) and (c) of the 1988 Act, read in conjunction with paragraphs (2) and (7) of that section, as regards the nationals of other Member States and in respect of fishing vessels which until 31 March 1989 were pursuing a fishing activity under the British flag and under a British fishing licence. By order of 10 October 1989 the President of the Court upheld that application. The United Kingdom gave effect thereto, pending judgment in the main action, by the Merchant Shipping Act 1988 (Amendment) Order 1989, which came into effect on 2 November 1989.

14. By two orders of 4 October 1989 the Kingdom of Spain was granted leave to intervene in support of the Commission's conclusions and Ireland was granted leave to intervene in support of the United Kingdom's conclusions.

15. 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.

16. The *Commission*, as applicant, claims that the Court should:

— Declare that, by imposing the nationality requirements enshrined in sections 13 and 14 of the Merchant Shipping Act 1988, the United Kingdom has infringed Articles 7, 52 and 221 of the EEC Treaty;

— Order the United Kingdom to pay the costs of the proceedings.

17. The *Kingdom of Spain*, as intervener, claims that the Court should:

— Declare that the United Kingdom has failed to fulfil its obligations;

— Order it to pay the costs, including those relating to the intervention of the Kingdom of Spain.

18. The *United Kingdom*, defendant, claims that the Court should:

— Dismiss the Commission's application;

— Order the Commission to pay the costs.

19. *Ireland*, as intervener, claims that the Court should:

— Dismiss the proceedings;

— Award costs against the Commission, including the costs of the intervention of Ireland.

III — Submissions and arguments of the parties

20. The *Commission* considers that the requirements enshrined in the 1988 Act relating to the nationality of owners and operators of British fishing vessels and to the nationality of shareholders and directors of companies owning or operating such fishing vessels constitute discrimination on grounds of nationality. They are as such prohibited by the general rule of Article 7, as well as by the more specific provisions of Articles 52 and 221 of the EEC Treaty.

21. As to Article 52, the refusal to register as British fishing vessels boats owned, chartered, managed or operated by nationals of other Member States, whether natural or legal persons, deprives those nationals of their right to establish themselves in the United Kingdom in order to pursue their fishing activities under the same conditions as nationals of the United Kingdom. Moreover, the nationality requirements concerning the shareholders and directors of companies deprive those same foreign nationals of the right to set up, and act as directors of, companies in the sea fisheries sector in the United Kingdom. Finally, those same requirements also restrict the possibility for companies of other Member States, within the meaning of Article 58, to exercise sea fishing activities from the United Kingdom by way of agencies, branches or subsidiaries.

22. As far as Article 221 of the Treaty is concerned, the British provisions concerning the control of qualified companies discriminate against nationals of other Member States wishing to purchase shares in companies owning, chartering, managing or operating British fishing vessels.

23. The general and specific prohibitions on all forms of discrimination on the grounds of nationality also apply fully to fisheries and trade in fishery products, since the relevant articles of the Treaty contain no derogations from this fundamental principle.

24. The Commission goes on to reply to a number of arguments put forward by the United Kingdom during the pre-litigation procedure. Since those arguments have been incorporated in the United Kingdom's defence, the Commission's views thereon will be set out below after the description of the United Kingdom's argument.

25. In its defence the *United Kingdom* starts by describing the historical background to the Common Fisheries Policy and sets forth the measures taken by the United Kingdom since 1983 to tackle the registration of Spanish fishing boats in the British register. It states that the British Fishing Boats Act 1983 and the British Fishing Boats Order 1983, under which at least 75% of the crew of a British fishing boat were required to be of British or other Community nationality, only extended to vessels fishing within British fishery limits because of the problems of enforcement outside United Kingdom jurisdiction. The United Kingdom points

out that by letter of 1 March 1983 it informed the Commission of the problem created by the registration of Spanish vessels and of its intentions in that regard and asked it to put forward measures which would enable the problem to be resolved. It repeated this request on 1 March 1984 but the Commission took no action. The United Kingdom informed the Commission of the measures which it was to apply as from 1 January 1986 with regard to fishing licences (measures which are the subject of Case C-3/87 *Agegate*, and Case C-216/87 *Jaderow*). Finally, faced with the Commission's persistent failure to take any action and the damage inflicted on the British fishing industry by vessels owned by Spanish interests, the United Kingdom passed the 1988 Act.

26. As far as the latter point is concerned, the United Kingdom considers that the overfishing against certain United Kingdom quotas (such as, in particular, the quotas for hake and megrim) between 1985 and 1988 results wholly or mainly from the activities of the 'Anglo-Spanish' vessels and the difficulties of monitoring or policing their activities. Recorded landings by those vessels in Spain during that period constituted a high proportion of the available United Kingdom quotas for the ICES (International Council for the Exploration of the Sea) areas in question (43 to 81% and 25 to 60% of the United Kingdom quotas for hake and megrim respectively). The damage caused by the activity of those vessels has in particular affected sensitive regions in South West England and South West Wales. Since the coming into effect of the 1988 Act, restrictions (monthly restrictions, designations of 'pressure stocks', fishing closures, etc.) relating to the management of quotas previously affected by the activity of the 'Anglo-Spanish' vessels have been relaxed and even, in some cases, abolished altogether.

27. As regards the legal aspect of the case, the United Kingdom argues (a) that the EEC Treaty cannot be regarded as depriving Member States of their competence under international law to determine the nationality of their vessels, including the determination of such nationality by reference to the nationality of the owner; and (b) that, in any event, the provisions of the 1988 Act are justified by the common fisheries policy including in particular the system of catch quotas and the need to ensure its effectiveness. In support of that view, the United Kingdom puts forward the following arguments.

28. The grant of nationality to a ship is a matter of international concern which goes beyond the confines of the Community. The grant of a flag has many legal implications (determination of applicable law in particular in the fields of civil or criminal liability, safety, fisheries, employment and social security) and places onerous duties on a State (control in administrative, technical and social matters).

29. International law recognizes that it is for each State to determine the conditions upon which it grants its nationality to ships, subject to there being a genuine link between the flag State and the vessel. The United Kingdom refers in that connection

to Article 5(1) of the 1958 Geneva Convention on the High Seas ('the 1958 Convention'), which reads as follows:

'Each State shall fix the conditions for the grant of nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship; in particular, the State must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.'

30. That provision is part of the international public order and applies to all ships which sail on the seas. A similar provision (Article 91(1)) is contained in the United Nations Convention on the Law of the Sea 1982 ('the 1982 Convention').

31. The phrase 'genuine link' in Article 5(1) of the 1958 Convention was inspired by the decision of the International Court of Justice in the *Nottebohm* case (ICJ Rep 1955 p. 4). The International Court held that Liechtenstein was not entitled to protect a German national who had validly acquired Liechtenstein nationality by naturalization after a very brief period of residence in Liechtenstein as against Guatemala, where he had lived for many years.

32. The nationality of the owner of the vessel is also recognized in international law and in the practice of States as the principal criterion for establishing the necessary link between the flag State and the vessel. This is clear from the commentary of the International Law Commission on what became Article 5 of the 1958 Convention. It is also clear from Article 8 of the United Nations Convention on Conditions for Registration of Ships, signed in Geneva in 1986 ('the 1986 Convention') but not in force, under which Contracting States undertake to adopt 'appropriate provisions for participation by that State or its nationals as owners of ships flying its flag or in the ownership of such ships and for the level of that participation'. The nationality of the owner is the criterion applied by all the Member States of the Community.

33. The United Kingdom points out that if the flag is not granted in accordance with international law, third countries may not recognize the vessel as genuinely bearing the nationality of the flag which it purports to fly (it refers here to the separate opinion of Judge Jessup in *Barcelona Traction, Light and Power Company Limited* (ICJ Reports, 1970 p. 3, at p. 189).

34. In those circumstances, Community law cannot deprive Member States of their competence to determine the conditions for the grant of their flags to vessels.

35. The Court of Justice recognized that principle in its judgment in *Pesca Valentia* (judgment of 19 January 1988 in Case 223/86 *Pesca Valentia* v *Minister for Fisheries and Forestry* [1988] ECR 83, paragraph 13). The same view was taken by Mr Advocate General Mischo in Case C-216/87 *Jaderow* (*The Queen* v *Ministry of Agriculture, Fisheries and Food*, ex parte *Jaderow Ltd*

[1989] ECR 4509, Opinion, paragraph 7). The same position is reflected in the third recital in the preamble to Council Regulation (EEC) No 101/76 of 19 January 1976 laying down a common structural policy for the fishing industry (Official Journal 1976 L 20, p. 19), which states that Community fishermen must have equal access to and use of fishing grounds in maritime waters coming under the sovereignty or within the jurisdiction of Member States 'subject to certain specific conditions concerning the flag or the registration of their ships'.

36. In the United Kingdom's submission, Articles 7, 52 and 221 of the Treaty cannot be interpreted as *ipso facto* sweeping away the principal criterion applied by international law and by all the Member States for the grant of the right to fly a particular flag. It puts forward the following arguments in that connection:

(a) the principle of non-discrimination presupposes the existence of the concept of nationality; but Article 7 does not prevent a Member State from deciding who are eligible to be its nationals or from deciding which vessels are entitled to fly its flag;

(b) the numerous domestic and international implications flowing from the grant of a flag distinguish the position from the normal situation of 'establishment'; consequently there can be no question of any infringement of Articles 52 and 221 of the Treaty;

(c) there is an additional reason for considering that there is no infringement of Article 52: the criterion of the owner's nationality does not prevent nationals of other Member States from establishing themselves in the United Kingdom to operate fishing vessels; it only prevents them from doing so under the British flag;

(d) to require Member States to depart from the universally recognized criterion of the owner's nationality would place Community law in conflict with international law, which is to be avoided; in contrast, as a matter of general principle the EEC Treaty is to be interpreted in a manner consistent with international law;

(e) every Member State adopting nationality requirements consistently with international law would be in breach of Community law, presumably since the end of the transitional periods laid down by the EEC Treaty or by the Acts of Accession; again such conflict is to be avoided;

(f) to outlaw the criterion of the nationality of the owner which is currently in general use would leave it wholly unclear what criterion the Member States should adopt instead.

37. Lastly, the United Kingdom observes that the problems of the flag may be resolved by harmonization of laws and international agreement, or even the adoption of a Community flag, rather than by blunt application of Articles 7, 52 and 221 of the Treaty.

38. The United Kingdom goes on to state that, in the event that, contrary to its view, Articles 7, 52 and 221 of the Treaty could apply to the grant of a flag, it submits that the provisions of the Common Fisheries Policy and in particular the quota system constitute a derogation from those articles

and that the 1988 Act falls within the scope of that derogation. It puts forward the following arguments in that connection.

39. The system of national catch quotas inherently involves some derogation from the principles of free movement between Member States and equal access to fishing stocks. Under Council Regulation (EEC) No 2057/82 establishing certain control measures for fishing activities (Official Journal 1982 L 220, p. 1), which was consolidated by Regulation No 2241/87, as subsequently amended by Council Regulation No 3483/88, fish catches subject to a quota are to charged against the quota of the State whose flag the vessel is flying. If vessels registered in one Member State could freely change to the flag of another Member State and, as a result, obtain access to the quotas of that State, the aim of the quota system, which is to ensure a fair distribution of the available fisheries resources among the Member States for the benefit of their fishing regions and industries allied thereto, would be frustrated. Unlike most other economic activities, fishing takes place at sea, outside the territory of any Member State and the vessel is free to move from territory to territory at will. Registration of the vessel in a particular Member State does not necessarily guarantee that the vessel in fact has a real economic link with the fishing community of that Member State.

40. At the time when Regulations Nos 2057/82 and 170/83 were adopted, all the Member States applied to registration similar nationality requirements to those laid down in the 1988 Act. It is inconceivable that the Member States would have agreed, after years of negotiations, to a common fisheries policy based on rules of registration that were themselves incompatible with Community law. It is hard to imagine the Member States reaching an agreement had they known that the basis of quota system was liable to be circumvented. Moreover, in the judgment in *Pesca Valentia* (cited above) the Court recognized that it was competent to the Member States to adopt legislation regarding the grant of the flag.

41. In his Opinion in Case C-3/87 *Agegate* (*The Queen* v *Ministry of Agriculture, Fisheries and Food*, ex parte *Agegate Ltd* [1989] ECR 4459), Mr Advocate General Mischo recognized that the quota system itself derogated from certain rules of Community law and in particular from the principle of free access (paragraphs 73 to 83 of the Opinion).

42. The argument to the contrary put forward by the Commission is unfounded. In the first place, it is not correct to regard the quota system as secondary legislation, which, as such, cannot derogate from the Treaty. Regulation No 170/83, which introduced the quota system, amends Article 100 of the 1972 Act of Accession and forms an important part of the 1985 Act of Accession.

43. Secondly, it appears from the judgment of 29 November 1978 in Case 83/78 *Pigs Marketing Board* v *Redmond* [1978] ECR 2347, that where the aim in question is the attainment of the objectives of the common agricultural policy, the agricultural objectives of the Treaty take precedence over the other provisions.

44. In any event, in the judgment of 20 April 1978 in Joined Cases 80 and 81/77 *Société Les Commissionnaires Réunis S.à r.l.* v *Receveur des Douanes*; *S.à r.l. Les Fils de Henri Ramel* v *Receveur des Douanes* (hereinafter referred to as '*Ramel*') [1978] ECR 927, the Court expressly recognized the possibility of derogations from or exceptions to the Treaty if they arise expressly or by necessary implication. Such derogations have been authorized by case-law (for example, the judgments of 14 July 1976 in Joined Cases 3, 4 and 6/76 *Kramer* [1976] ECR 1279, of 4 December 1986 in Case 205/84 — on insurance — *Commission* v *Germany* [1986] ECR 3755, of 2 February 1988 in Case 61/86 *United Kingdom* v *Commission* [1988] ECR 431, and of 27 September 1988 in Case 51/87 *Commission* v *Council* [1988] ECR 5459).

45. The Commission communication of 19 July 1989 on a Community framework for access to fishing quotas (Official Journal 1989 C 224, p. 3) marks a shift from the position previously adopted by the Commission in this area. In paragraph 2.6 of that communication the Commission states that 'given the present and foreseeable state of fishery resources in the Community and the degree to which fishing fleets have so far been restructured, the full-scale liberalization of the activities of the undertakings must be ruled out for the time being'.

46. The report of the European Parliament entitled 'Blue Europe' (doc. A 2-0319/88) is to the same effect where it states that 'if freedom of establishment were to be fully applied in the fisheries sector, it would create a serious economic, social and political crisis in the Community's maritime regions'.

47. The 1988 Act is designed precisely to ensure that the fish quotas allocated to the United Kingdom actually enure to the benefit of persons for whom they are intended. In the fisheries sector, ownership and fishing are clearly linked. Thus there is no necessary dichotomy between 'the owners' on the one hand and 'the fishermen' on the other. Moreover, the owners of fishing vessels can legitimately be regarded as part of the fisheries community which the Common Fisheries Policy is designed to support.

48. In the judgment of 16 June 1987 in Case 46/86 *Romkes* v *Officier van Justitie* [1987] ECR 2671, the Court held that the system of national quotas was not prohibited by Article 7. It follows that the conditions introduced by the 1988 Act, whose sole object and effect is to support the Common Fisheries Policy, are not discriminatory either.

49. Lastly, the United Kingdom argues that if any national of another Member State could establish himself in another Member State and, without more, exercise the same right to fish as that enjoyed by the nationals of that latter Member State, it would not only be the quota system which would be undermined. This would also be true of the rules applicable to local communities particularly dependent upon fishing and industries allied thereto referred to in Annex VII of the 1976 Hague Resolution ('the Hague preferences'), the reserved coastal zone, the carefully balanced fisheries mechanisms set out in Articles 156 to 166 and 346 to 353 of the 1985 Act of Accession and the effort made by the Member States with regard to the restructuring of their fishing fleets pursuant to the Community's multi-annual programmes.

50. The *Commission* states *in limine* that in 1983 when Spain was not yet a member of the Community the United Kingdom did not take appropriate measures to exclude 'Anglo-Spanish' vessels from its fishing fleet, apparently because those vessels fished mainly in areas to the west of Ireland and mostly for species such as hake for which there was a much better market in Spain than in the United Kingdom. It would also appear that the traditional British fleet had not previously fished for those stocks and was at that time still unable to exploit them fully. Accordingly, the United Kingdom is scarcely in a position to criticize the Commission.

51. As a result of the existence of serious problems relating to the functioning of the quota system which can arise in particular in situations which are frequently referred to by the term 'quota hopping', the Commission submitted proposals to the Council with respect to the control of landings which led to the adoption of Regulation No 3483/88 of 7 November 1988 (Official Journal 1988 L 306, p. 2); in addition, in its communication of 19 July 1989 on a Community framework for access to fishing quotas (cited above), the Commission indicated a number of measures which Member States may legitimately take in connection with the quota system.

52. The overfishing of certain United Kingdom quotas as a result of the activity of the 'Anglo-Spanish' vessels reveals inadequacies in the monitoring and policing of those vessels by the responsible authorities of the United Kingdom. Council Regulation No 2241/87 (Official Journal 1987 L 207, p. 1), as amended by Council Regulation No 3483/88 (cited above), affords appropriate monitoring facilities in that connection; moreover, in the event of serious violations of quota management rules there is nothing in Community law to prevent the vessels concerned from losing their registration or flag. Moreover, it is for the United Kingdom to take full account of the particular needs of the regions of South West England and South West Wales in allocating the United Kingdom quotas among British fishing vessels. Lastly, the cessation of the activity of the 'Anglo-Spanish' vessels since the entry into force of the 1988 Act did not have the effect of increasing, for certain of the zones concerned, landings by 'genuine' British vessels. What is more, in view of the high prices prevailing on markets in Spain, it is probable that, in the case of some stocks, fish caught under the United Kingdom quotas would continue to be landed in Spain even if they were caught by 'genuine' British vessels.

53. The Commission considers that, whilst it is a present a matter for the Member State concerned to determine whether a vessel has the right to be registered in that State, to fly its flag and to have its nationality, that State is none the less bound to comply with the principles and provisions of Community law, including Articles 7, 52 and 221 of the EEC Treaty. The Commission is not hostile to any nationality requirement, as the United Kingdom claims. It is sufficient for the owner of the vessel to have the nationality of one of the Member States.

54. The Commission points out in this connection that in its communication on a Community framework for access to fishing

quotas (cited above) it recognized that the responsibility of the operator of a fishing vessel must be traceable through the undertaking's having in the Member State in which the main base of the operations concerned is located an onshore administrative unit.

55. The genuine link which is required to exist between the ship and the flag State under the 1958 and 1982 Conventions does not give the Member States the power to enact their own laws with regard to flagging without having regard to the requirements of Community law. It follows from the wording of those Conventions that the purpose of the link is simply to enable the flag State to exercise its jurisdiction and control in technical, administrative and social matters.

56. Apart from this, in the event of a conflict between the 1958 Convention and the EEC Treaty *(quod non)* Article 5 of the 1972 Act of Accession, read together with Article 234 of the Treaty, required the United Kingdom to take all appropriate steps to eliminate any such incompatibilities.

57. Moreover, in relations between Member States rights and obligations arising from the 1958 Convention cannot prevail over the obligations of Member States under the EEC Treaty. This principle is, moreover, explicitly recognized in Article 30 of the 1958 Convention, which provides that 'the provisions of this Convention shall not affect conventions or other international agreements already in force, as between States Parties to them'.

58. Measures taken by a State in order to ensure that ships flying its flag have a genuine link with it do not by any means need to contain nationality requirements such as those in the 1988 Act. The Commission considers that the United Kingdom is scarcely in a position to claim otherwise, since until 1988 the right to the flag of fishing vessels was governed by the far less restrictive provisions of the 1894 Act, which continue to apply to merchant ships. Effective control by the flag State over vessels flying its flag should be exercised by regular inspections by the competent authorities by that State, without any discrimination as regards the nationality of the owners or operators of the vessels concerned.

59. The Commission recognizes that in international practice — also within the Community — the participation by the flag State or its nationals in the ownership of ships flying the flag of that State is widely considered to be one of the important elements for ensuring a genuine link between a State and ships flying its flag.

60. However, nothing in international law requires States to adopt such nationality requirements. The existence of a 'genuine link' can be ensured by other means. The Commission refers in that connection to an extract from 'The International Law of the Sea' by Professor O'Connell and to a passage from the commentary of the International Law Commission on what became Article 5 of the 1958 Convention.

61. In response to a claim made by the United Kingdom on the basis of the

separate opinion of Judge Jessup in the *Barcelona Traction* case (see point 33 above), the Commission argues that where the means used by a State to ensure the existence of a 'genuine link' with its vessels are compatible with international law, other States may not decline to recognize the flag granted by that State.

62. The argument that the Member States may not infringe Community law as a result of their legislation on the registration of ships was accepted during the negotiation of the 1986 Convention. The Member States of the Community participating in the negotiation of that Convention declared that they could sign it only in conformity with the EEC Treaty. The Commission submitted to Council a communication and a proposal for a Council decision containing the same reservation. The Council has not yet acted on that proposal and no Member State has ratified, or even signed, the Convention.

63. In addition, contrary to the view taken by the United Kingdom, Article 8 of the 1986 Convention does not reflect pre-existing international law. Unlike the 1958 Convention, neither the preamble to the 1986 Convention nor the body of the Convention indicates that the Convention or Article 8 is purely declaratory.

64. Neither paragraph 13 of the judgment in *Pesca Valentia* (cited above) nor Mr Advocate General Mischo's remarks in his Opinion in Case C-216/87 *Jaderow* (paragraph 7), support the United Kingdom's view with regard to the Member States' competence with regard to the grant of their flag. Paragraph 13 of the judgment in *Pesca Valentia* is an uncontroversial description of Regulation No 101/76, which was in issue in that case; the Advocate General's remarks must be regarded as *obiter dicta*, since the right to the flag was not in issue in *Jaderow*.

65. There is no analogy between the nationality of persons and the nationality of fishing vessels. The fact that Article 5(1) of the 1958 Convention uses the term 'nationality' does not alter this. The Commission refers in this connection to the view expressed by Professor O'Connell in 'The International Law of the Sea' (Volume II, 1983-1984, p. 752).

66. In view of this, the grant of the flag to fishing vessels cannot escape the prohibition set out in Article 7 of the Treaty. The fallacy of the United Kingdom's argument to the contrary is demonstrated by an analogy with companies: national provisions relating to the constitution of companies do not escape the prohibitions in Articles 7, 52 and 221 of the Treaty.

67. The same applies to the right of establishment, Article 52 applies to the grant of the flag to fishing vessels, because they are mere instruments which nationals of other Member States — be they natural or legal persons — use in the exercise of the right of establishment. In other words, if nationals of other Member States established in the United Kingdom are not allowed to register and operate their fishing vessels as British fishing vessels, then they are denied access

on a non-discriminatory basis to the fishing activities to which they are entitled under Article 52.

68. In practice it would be impossible in the majority of cases for nationals of other Member States established in the United Kingdom to operate their fishing vessels from that country under the flag of another Member State.

69. The Commission put forward in its application a series of arguments with a view to refuting the United Kingdom's view that the common fisheries policy and in particular the quota system contain derogations from the principles of the Treaty. It supplemented those arguments in its reply by an appraisal of the judgments delivered in the meantime in the *Agegate* and *Jaderow* cases.

70. The Commission maintains in that regard that neither the common fisheries policy nor the quota system derogates from Articles 7, 52 and 221 of the Treaty.

71. In the first place, there is no provision in the Treaty authorizing any derogation by the common fisheries policy from the principles of the Treaty. On the contrary, that policy, like the common agricultural policy, is based on Article 43 of the Treaty.

72. Contrary to the statements of the United Kingdom, no authority can be found in the Opinions of Mr Advocate General Mischo in the *Agegate* and *Jaderow* cases for the proposition that the Member States may, pursuant to some implied derogation in the EEC Treaty in relation to the quota system, discriminate against nationals of other Member States.

73. Similarly, whilst the 1985 Act of Accession confirms the existence of the common fisheries policy, including the quota system, nothing in that Act contains, explicitly or by implication, a derogation from the fundamental principles of the EEC Treaty which are at issue in the present case.

74. In the Commission's view, the quota system, which was established by Community secondary legislation (Regulation No 170/83), cannot by itself authorize derogations from the Treaty. That is the lesson to be drawn from the judgments of 20 April 1978 in *Ramel* (cited above) and of 13 December 1983 in Case 218/82 (concerning rum), *Commission* v *Council* [1983] ECR 4063. None of the judgments relied on by the United Kingdom supports its view that the quota system may be recognized — as the Court has recognized other fields of Community secondary legislation — as derogating from the fundamental principles 'by necessary implication'.

75. On the other hand, it was held in the judgment of 16 June 1987 in Case 46/86 *Romkes* (cited above), that the system of quota allocation was compatible with Article 7 of the EEC Treaty.

76. Furthermore, Article 5(2) of Regulation No 170/83, which requires Member States to determine the detailed rules for the utilization of the quotas allocated to them, states explicitly that such rules should be made 'in accordance with the applicable Community provisions'. In particular, Member States must respect the principles

of equality and non-discrimination among producers (Article 40(3) of the Treaty). This appears from the judgments of 25 November 1986 in Joined Cases 201 and 202/85 *Marthe Klensch and Others* v *Secrétaire d'Etat à l'Agriculture et à la Viticulture* [1986] ECR 3477, and of 26 April 1988 in Case 207/86 *Apesco* v *Commission* [1988] ECR 2151.

77. The United Kingdom's claim that the quota system implies by its nature a measure of derogation from the principles of the Treaty, in particular from the principle of freedom of establishment, for otherwise the system would be frustrated, is completely without foundation. In the present state of Community law, the Member States control the fishing capacity of their fleet. As a result, they are free to limit or even reduce the fishing capacity of their fleet on a non-discriminatory basis; moreover, under the Community's structural policy they are even encouraged to do so. On the other hand, a Member State which unilaterally allows the capacity of its fleet to increase cannot for that reason claim an increase in its quota allocation, as the Court confirmed in the judgment in *Romkes*, cited above.

78. Similarly, the United Kingdom's argument based on the Commission's communication on a Community framework for access to fishing quotas (cited above) is unfounded. The passage quoted by the United Kingdom does not refer to restrictions on the right of establishment but to the liberalization of the activities of undertakings in the fishing industry, which must be controlled or restricted by measures that are objectively justified and non-discriminatory.

79. Lastly, the Commission states that the judgments of 14 December 1989 in the *Agegate* and *Jaderow* cases contain no authority for the proposition that the quota regime exempts the Member States from prohibitions in the Treaty. In particular, although in the judgment in *Jaderow* the Court held that a Member State might impose conditions designed to ensure that there was a real economic link between vessels benefiting from its quotas and the Member State in question, it also emphasized the very narrow delimitation of that link. In addition, in the judgment in *Agegate*, the residence requirement imposed on members of fishing crews was held to be incompatible with Community law; the same must apply *a fortiori* to the nationality requirement imposed on persons caught by section 14 of the 1988 Act.

80. In any event, the judgments in the *Agegate* and *Jaderow* cases are concerned with the measures which the Member States are allowed to take in connection with the quota system. The contested nationality requirements govern the eligibility for registration and thus the access to all fishery activities, including fishing for stocks not under national quotas. To allow Member States to restrict the registration of fishing vessels by such requirements would thus go beyond the scope of the quota system. Furthermore, unlike restrictive licence conditions, which are dependent on the current system, restrictions on the registration of vessels might continue to exist even if the present quota system were replaced by a more integrated system.

81. The United Kingdom's contention that the common fisheries policy was negotiated in the knowledge that all the Member States' registration rules included nationality requirements is incorrect, since it confuses

the nationality of vessels, which is indeed an integral element in the present system of national quotas, with the nationality requirements for owners and operators of such vessels, which are subject of the present litigation.

82. There are no grounds for believing that the Hague Preferences, the rules on fishing in coastal zones, the fisheries rules arising under the 1985 Act of Accession or Community policy on the restructuring of fishing fleets could justify the application of the nationality requirements contested in the present case. In any case, any particular requirement which might be justified by the aim of one or other of these regimes could only be accepted if its application were strictly limited to the regime concerned.

83. The Commission notes that its arguments on the nationality requirements enshrined in the 1988 Act were accepted, albeit on a *prima facie* basis, by the President of the Court in his order of 10 October 1989, cited above.

84. In its rejoinder, the *United Kingdom* states that prior to August 1987 Community law provided no method whereby a Member State could obtain details of landings by its vessels in other Member States. Council Regulation No 2241/87 (cited above) sought to remedy this by requiring fishing vessels to report their catch and landings to their flag Member States, but in fact it was not until Council Regulation No 3483/88 (cited above), with which the Court had to deal in its judgment of 27 March 1990 in Case C-9/90 *Spain* v *Council* [1990] ECR I-1383, that a satisfactory solution was found to that problem. However, in so far as the activity of the 'Anglo-Spanish' vessels has not been brought to an end by those measures but merely monitored, the damage caused to the indigenous British fishing fleet has continued.

85. Even if, following the passing of the 1988 Act and the resultant cessation of the activity of the 'Anglo-Spanish' vessels, the quotas against which those vessels had until then been fishing were not fully exploited by the genuine British fishing fleet, those quotas would have a considerable value for the purposes of quota exchange under Article 5(1) of Council Regulation No 170/83.

86. In any event, it would be impossible to put an end to the abuse known as quota hopping without discriminating against nationals of other Member States taking part in such practices.

87. The United Kingdom then describes the implications of accepting the Commission's position on the question of the Member States' competence to grant their flag. The solution adopted for fishing vessels should also be applied to merchant vessels and aircraft. More specifically as regards merchant vessels, the solution put forward by the Commission would have the effect of making pointless the transitional period laid down in Council Regulation No 4055/86 (Official Journal 1986 L 378, p. 1); that regulation was intended to phase out national flag reservation for the maritime carriage of goods. By the same token, in so

far as a national airline of one Member State would have the right to obtain the flag of other Member States, it would be eligible to operate internal air services within each Member State on the same conditions as the local national airlines.

88. The 'means' suggested by the Commission to replace the criterion of the owner's nationality are unsatisfactory. The suggestion that a genuine link between a flag State and its ship can *ipso facto* be established by virtue of the ship owner being a national of another Member State is plainly inconsistent with international law. The same is true of the suggestion relating to the establishment of a permanent onshore administrative unit. This token presence would be open to abuse and result in Member States' flags being no more than 'flags of convenience'. Moreover, it is in practice very difficult to distinguish between a letter-box company and a genuine place of business. Consequently, this suggestion cannot be regarded as being an adequate solution to the practice of circumventing the quota system by means of access to the flag of one or more Member States.

89. The criterion of the nationality of the owner is part of customary international law. Article 234 of the Treaty does not apply to customary international law. As the Court held in the judgment of 4 December 1974 in Case 41/74 *Van Duyn* v *Home Office* [1974] ECR 1337, the Treaty cannot be assumed to disregard, in the relations between Member States, principles of international law. The Community cannot unilaterally change customary international law.

90. The Commission's claim that vessels are mere instruments which persons use in the exercise of their right of establishment ignores the legal significance of the grant of a flag. The need for a genuine link is justified by the fact that the nationality of the ship affects the vessel itself, all the persons on board, other vessels and all countries with which the vessel comes into contact. For these reasons ships are fundamentally different from companies. Moreover, whereas Article 58 of the Treaty makes express provision for companies, the Treaty makes no mention of ships and aircraft.

91. It is above all in view of the numerous obligations attaching to the grant of the flag both domestically and internationally that the Commission communication to the Council of 3 August 1989 entitled 'A future for the Community shipping industry' (COM (89) 266 final, paragraph 55 et seq.) rejected the idea of replacing the various Member States' registers by a Community register of shipping.

92. The United Kingdom refers to the General Programme for the abolition of restrictions on freedom of establishment (Official Journal, English Special Edition,

Second Series, IX, p. 7) and points out that access to a Member State's flag is not among the restrictions which were to be abolished under that programme. It follows that the grant of the flag is different in nature from the right of establishment. Similarly, the right to have a secondary establishment, which the Court recognized in the judgment of 12 July 1984 in Case 107/83 *Ordre des Advocats au Barreau de Paris* v *Klopp* [1984] ECR 2971, is hard to reconcile with the grant of the flag.

93. The United Kingdom reiterates that the 1988 Act does not infringe Article 52 of the Treaty, because it does not prevent nationals of other Member States from establishing themselves in the United Kingdom and operating their fishing vessels from there, provided that they do so under their own flag. It points out that this is done both in the sector of merchant shipping, subject to Articles 61 and 75 of the Treaty, and in the airlines sector.

94. In any event, the fact that the activity carried on — in this case access to the quotas of other Member States — constitutes an abuse does not constitute a legitimate reason justifying 'establishment' within the meaning of the Treaty. This follows from the judgment of 27 September 1988 in Case 81/87 *The Queen* v *H. M. Treasury and Commissioners of Inland Revenue,* ex parte *Daily Mail and General Trust PLC* [1988] ECR 5483.

95. As regards the arguments concerning the Common Fisheries Policy, the United Kingdom points out that in the judgment of 14 December 1989 in *Jaderow* (cited above) the Court recognized that the quota system involves a permitted derogation from the principle of equal access.

96. Lastly, in view, on the one hand, of the quota system established by Regulation No 170/83 and, on the other, of the fisheries restrictions contained in the 1985 Act of Accession, it is necessary to protect the Member States' legitimate expectation that the concepts of 'flying the flag' or 'registered in a Member State', which are left in the Community provisions to be defined in national law, would not be affected by the provisions of the Treaty.

97. The *Spanish Government* argues that although fishing vessels flying the flag of a Member State or registered in a Member State are concepts which are left to the legislation of the Member States to define, as the Court held in its judgment of 19 January 1988 in *Pesca Valentia* (cited above), that does not mean that Member States may adopt provisions in that regard which infringe the provisions of the Treaty and, specifically, the prohibition of discrimination on grounds of nationality. It refers in that regard to the judgment of 25 November 1986 in *Klensch* v *Secrétaire d'Etat à l'Agriculture et à la Viticulture* (cited above).

98. The nationality requirements enshrined in the 1988 Act are contrary to Articles 7, 52 and 221 of the Treaty. The fundamental principles arising under those provisions and in particular under Article 52 require the elimination, not only of restrictions and discrimination with regard to the exercise of occupational activities, but also of any obstacle which might impede the effective exercise of the freedom to exercise such activities. This is clear from the general programmes adopted by the Council on 18 December 1961. There is no point in establishing oneself in a Member State if subsequently it is not possible to pursue the activity with a view to which one became established.

99. Any derogation from the Treaty rules on freedom of establishment must fall within the cases listed in Articles 55 and 56. Those provisions must be interpreted strictly.

100. As regards the claim that the Common Fisheries Policy permits certain derogations from the Treaty, the Spanish Government maintains that there is no Treaty provision that permits the common fisheries policy to be regarded as a special case. Consequently, the rules of the Treaty also apply to the common fisheries policy. This follows from the judgment of 20 April 1978 in *Ramel* (cited above) and from the judgment of 29 March 1979 in Case 231/78 *Commission* v *United Kingdom* [1979] ECR 1447.

101. Furthermore, the provisions of secondary legislation regarding fisheries also require that the rules adopted by a Member State be 'in accordance with the applicable Community provisions' (Article 5(2) of Regulation No 170/83) and non-discriminatory with regard to other Member States in so far as they should ensure for all fishing boats from other Member States 'equal conditions of access to and use of the fishing grounds situated in the waters' coming under the sovereignty or within the jurisdiction of that State (Article 2(1) of Council Regulation No 101/76 of 19 January 1976 laying down a common structural policy for the fishing industry, Official Journal 1976 L 20, p. 19).

102. In particular, the quota system established by Council Regulation No 170/83 is simply a measure for conservation of fishery resources and not a means of partitioning the market and establishing barriers to the free movement of persons and the freedom of establishment within the Community. Consequently, the quota system does not permit a Member State to adopt restrictive measures incompatible with the Treaty reserving economic advantages deriving from its quotas to its own national economy and in particular to its own fishing industry and to economic sectors dependent thereon.

103. Lastly, the nationality requirements enshrined in the 1988 Act are incompatible with the principle of proportionality and the principle that legitimate expectations are to be protected.

104. *Ireland* argues that Community law has not yet impinged upon the right, in principle, of a Member State to determine the conditions for access to its shipping register by adopting to that end conditions as to nationality such as those laid down in the 1988 Act.

105. Articles 7, 52 and 221 of the Treaty presuppose that nationals of Member States on whom those provisions confer rights maintain their respective nationalities when exercising their rights to free movement. Nowhere in the Treaty is there a provision which entitles a person to change his own nationality. A similar situation obtains with regard to the 'nationality' of shipping, including fishing boats.

106. In any event, in view of the conduct of Spanish fishing interests, which constitutes an abuse, the appropriate measures taken by the Member State affected by that conduct in order to bring it to an end are objectively

justified and non-discriminatory. If this is correct, there has been no infringement of Article 7, 52 or 221 of the Treaty.

107. Should the Court consider that the nationality requirements at issue are contrary to Article 52 of the Treaty, Ireland argues that they are justified having regard to Article 56 of the Treaty. If this argument were accepted then the Commission's case based on Articles 7 and 221 of the Treaty would also fall.

108. Ireland also considers that if the Commission's views with regard to the registration of fishing vessels were to be accepted, this would undermine the Community's structural policy in the fisheries sector.

109. The judgments of 14 December 1989 in *Agegate* and *Jaderow* (cited above) are not material to the decision in this case, since they are concerned with the compatibility with Community law of conditions in respect of fishing licences whereas this case is concerned with the issue of the jurisdiction of the Member States to determine the conditions for the registration of fishing vessels in their shipping registers.

C. N. Kakouris
Judge-Rapporteur