OPINION OF MR ADVOCATE GENERAL CAPOTORTI DELIVERED ON 15 SEPTEMBER 1981 [1]

Mr President,
Members of the Court,

1. This opinion relates to three cases submitted for preliminary rulings and heard together at the sitting on 24 June this year. The common feature of these cases is that they raise the problem of the validity of Community provisions on fishing applicable to Spanish vessels, having regard to a number of earlier international obligations. But, it should first be pointed out that Joined Cases 180/80 *(Crujeiras Tomé* v *Procureur de la République)* and 266/80 *(Procureur de la République* v *Yurrita)* originate from criminal proceedings pending against Spanish fishermen who fished without a licence in the so-called exclusive economic zone of France, that is to say in the band of sea between 12 and 200 miles from the French coast; whilst Case 181/80 *(Procureur Général près la Cour d'Appel de Pau and Others* v *Arbelaiz-Emazabel)* relates to preceedings pending against another Spanish fisherman charged with fishing without a licence in French territorial waters, in the area between 6 and 12 miles from the coast. This difference is important, as we shall see, with regard to the contents of the earlier international obligations which have to be taken into consideration. I would also mention that the Court has already had occasion to deal with a problem similar to that which arises in Joined Cases 180/80 and 266/80 in its judgment of 14 October 1980 in Case 812/79 *Burgoa* to which I shall refer on numerous occasions.

As regards the facts, I shall confine myself to adding a few details. In the *Crujeiras Tomé* case the unauthorized fishing took place on 16 September 1978; the criminal proceedings were heard at two levels (in the Tribunal de Grande Instance, Lorient, and the Cour d'Appel, Rennes) and both courts found the accused guilty; the reference for a preliminary ruling was made by the French Cour de Cassation by its judgment of 7 July 1980. In the *Yurrita* case, the date of the prohibited fishing was 17 October 1980 and the criminal proceedings are pending before the Tribunal de Grande Instance, Saint-Nazaire, which made its reference to this Court by a judgment of 24 October 1980. Finally, Mr Arbelaiz-Emazabel's vessel was discovered fishing unlawfully on 3 November 1977; the prosecution was conducted before the Tribunal de Grande Instance, Bayonne, and the Cour d'Appel, Pau, which both acquitted the accused, and now it is for the Cour de Cassation to give a decision; it had recourse to the procedure provided for by Article 177 of the EEC Treaty by its judgment of 7 July 1980.

2. I shall deal in the first place with Joined Cases 180 and 266/80. Both national courts, by means of questions in substantially the same form, seek the

1 — Translated from the Italian.

Court's view 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".

I should point out that the "prior international obligations" referred to in the questions are essentially the Geneva Convention of 29 April 1958 on Fishing and Conservation of the Living Resources of the High Seas, the London Fisheries Convention of 9 March 1964 and the Agreement on Fishing between France and Spain of 20 March 1967, as appears from the text of the references for preliminary rulings. The Geneva Convention was relied upon by Mr Crujeiras Tomé at his trial to support his view that measures for the conservation of marine resources could be adopted by a contracting State only after consultations with the other contracting States, and in any case must not be discriminatory. As regards the London Convention of 1964 and the Franco-Spanish Agreement of 1967, which gave Spanish nationals the right to fish within the band of sea between 6 and 12 miles from the French Atlantic coast (in particular in the fishing areas which were customary during the ten-year period from 1953 to 1962), the two persons concerned sought to infer therefrom an analogous right to fish in the waters between 12 and 200 miles from the coast.

3. With regard to the Community regulations involved in this case, it should be remembered that they took the form of *interim* measures for the conservation and management of fishery resources (applicable specifically to vessels flying the Spanish flag) because they were adopted after the extension to 200 miles of the limits of the Member States' fishing zones in the North Sea and North Atlantic (which took place on 1 January 1977), pending the conclusion of agreements between the Community and the non-member countries involved in order to regulate the exploitation of fishery resources in those areas by the fishermen of those countries. The Agreement between the EEC and Spain was initialled on 23 September 1978, was signed on 15 April 1980 and entered into force on 22 May 1981; the provisional regime thus came to an end.

To clarify the interdependence between Community measures and the legislation of the individual Member States in the field in question, it should be remembered that those States extended their fishing zones (to be more precise, their exclusive economic zones) to 200 miles as part of a concerted action based on one of the resolutions adopted by the Council of the European Communities on 3 November 1976 on a common fisheries policy. As from that time the Commission was given the task of conducting negotiations with non-member countries so as to ensure recognition of the rights of Member States over the 200-mile zone and to secure adequate protection of the fishery resources by establishing fishing quotas for the non-member countries. At the same time, Community provisions were

drawn up (and then gradually perfected) with a view to limiting the access of the fishing vessels of certain non-member countries to the 200-mile zone off the coasts of Community countries, determining how much fish should be caught and establishing a control system based on the issue of licences by the Community. Those provisions made the individual Member States responsible for ensuring observance of the fishing quotas; the application of penal sanctions is thereby justified in cases of breach of the limitations imposed on the activity of fishing vessels of non-member States.

I do not think it is necessary to refer in detail to the content of the regulations applicable to Spanish fishing vessels issued between 1977 and 1981. I shall confine myself to indicating that the starting point was marked by Regulation No 373/77 of 20 February 1977 — which laid down the fishing quotas granted to the vessels of a number of non-member States, including Spain — and that a little more than a month later the licensing system was introduced for Spanish fishing vessels by Regulation No 746/77 of 5 April 1977. The numerous regulations which followed, besides extending the duration of the scheme thus introduced, put a number of minor finishing touches to it (number of vessels, control procedures, etc.). The final step was the conclusion of the above-mentioned Agreement on Fisheries between the EEC and Spain which was approved by Regulation No 3062/80 of 25 November 1980.

Although the problems raised in the references for preliminary rulings under consideration relate to the Community provisions which existed before that Agreement was concluded, it should be emphasized that the latter confirmed (on a reciprocal basis) the system of fishing quotas to be determined year by year (Article 3 (1) (b)) and the licensing system (Article 4: it is for each party to decide whether fishing activity should be made subject to licence). Each party is of course accorded the right to adopt, within its own fishing zone, "such measures as may be necessary to ensure that vessels of the other Party comply with the provisions of this Agreement" (Article 7). Finally, it should be noted that, since it was decided that, pending its entry into force, the Agreement should apply provisionally as from the date of signature (Article 12), the activity of Spanish fishing vessels in the fishing zones of Member States was regulated in the period from 15 April 1980 to 22 May 1981 both by the interim Community provisions and by the provisions of the Agreement in question; that fact should make it easier to reach a decision on the substance of the *Yurrita* case.

4. With regard to the question of the validity of the regulations on fishing in the light of earlier international obligations, it is necessary to ask first of all in what circumstances and on the basis of what criteria might the breach of international obligations entail the invalidity of legislative measures adopted by the Community. It seems to me that the answer is as follows: either the enactment of such measures would have to conflict with the Community institutions' obligation not to obstruct the implementation of the commitments of the Member States under agreements entered into *before the Treaty,* in accordance with Article 234, or the supposed breach would have to relate to

international commitments of the Community itself under an agreement which gives individuals who are nationals of a Member State the right to enforce observance thereof by legal proceedings. In fact the Court has recognized, in its judgment of 14 October 1980 in the *Burgoa* case, that Article 234 imposes the negative obligation described above on the Community institutions; and the Court had previously made it clear that the validity of the acts of the Community institutions for the purposes of Article 177 of the EEC Treaty, may be affected by a provision of international law only where that provision is binding on the Community and has direct effect in relation to individuals (judgments of 12 December 1972 in Joined Cases 21 to 24/72 *International Fruit* [1972] ECR 1219 and of 24 October 1973 in Case 9/73 *Schlüter* [1973] ECR 1135). Accordingly, it is essential to ascertain whether the international obligations which are to be used as a basis for testing the validity of the regulations relating to fishing were assumed before or after the entry into force of the EEC Treaty and whether or not they are binding on the Community.

It has been seen that in the criminal proceedings against Mr Crujeiras Tomé counsel for the defence sought to rely in the first place on the Geneva Convention of 29 April 1958 on Fishing and Conservation of the Living Resources of the High Seas, Article 7 of which, whilst authorizing coastal States to adopt measures to conserve marine resources in all parts of the high seas adjacent to their territorial waters, imposed the condition that negotiations had to have been conducted with the other interested States for at least six months without success, and also prescribed that the conservation measures should not discriminate against foreign fishermen. But that Convention was ratified by France in 1970 and by Spain in 1971; therefore, as between those two States, it was concluded after the entry into force of the EEC Treaty with the result that Article 234 is not applicable. In the second place, only five Member States are parties to that Convention (the United Kingdom, Denmark, Belgium, the Netherlands and France); thus the view that the Community has been subrogated to the obligations undertaken by the Member States must in any event be rejected. It is established that, according to the criteria accepted in the above-mentioned judgment of 12 December 1972 in the *International Fruit* case, the Community's subrogation, so to speak, to the obligations of the Member States under an earlier agreement may be admitted only if four requirements are met: that the Member States were all already parties to the agreement when the EEC Treaty was concluded; that it was the wish of those States to pledge the Community to observe the agreement, its aims being shared by the Community; that action should actually have been taken by the Community institutions within the framework of the agreement; and that the other contracting parties should have recognized that powers had effectively been transferred to the Community with respect to the subject-matter of the agreement. In this regard, I would refer the Court to the considerations set out in my opinion of 10 July 1980 in Case 812/79 *Burgoa*. It is clear that none of the conditions referred to above is fulfilled in the case of the Geneva Convention of 29 April 1958.

It has been said, with regard to the applicability of Article 234, that in the case of conventions on matters over which the Community did not start to exercise its powers for some time after the entry into force of the Treaty, the institutions' obligation not to obstruct observance of the commitments entered into by one or more Member States towards one or more non-member States should extend also to the commitments entered into before such powers were exercised. But that view manifestly conflicts with the wording of the first paragraph of Article 234 and with the interpretation accorded thereto in the *Burgoa* judgment; it therefore seems to me to be unacceptable, particularly since the provision in question is one of an exceptional nature, in so far as it ensures on a temporary basis the observance of obligations towards non-member States which are incompatible with Community law. It is true that in the judgment of 14 July 1976 in the *Kramer* case ([1976] ECR 1279) the Court recognized that until the Community had exercised its functions in the matter of conservation of the biological resources of the sea, the Member States had the power to assume international obligations in that field (paragraph 39 of the decision); however, in the same judgment it was stated that the Member States were under a duty to refrain from entering into commitments which might hinder the Community in the subsequent execution of the tasks entrusted to it (paragraph 44 of the decision); and, in any case, no reference was made to Article 234 which is the only article relevant to these proceedings.

It has also been said that the Geneva Convention of 1958, being a codifying convention, is binding on the Community regardless of the criteria laid down in the *International Fruit* judgment of 12 December 1972. I doubt, however, that Article 7 of that Convention reflected and codified the then existing customary law. Moreover, I reiterate the conviction, already expressed in the opinion in the *Burgoa* case, that recent developments in general international maritime law have caused the earlier incompatible provisions, both general and particular, to be abrogated; and it seems to me that provisions such as Article 7 of the Geneva Convention, which deal with the question of conservation of biological resources on the basis of the traditional division between territorial waters and the high seas, can no longer be regarded as being in force now that that division has been rendered extremely uncertain by recognition of the "exclusive economic zone".

The Geneva Convention of 1958 cannot therefore be used as a basis for testing the validity of the Community regulations on fisheries. An examination of the London Fisheries Convention of 9 March 1964 and the General Agreement on Fishing between France and Spain of 20 March 1967 leads to the same conclusion. It should be borne in mind that the latter was concluded within the framework of the London Convention, Article 9 (2) of which provided for the possibility of supplementary agreements between neighbouring States; it is therefore an instrument implementing that Convention. In

any case, the important point is that Article 234 cannot be regarded as applicable to either of those agreements, since both were concluded after the Treaty of Rome (the position was different in the *Burgoa* case since Ireland acceded to the EEC after ratifying the London Convention). Moreover, it cannot be conceded that the Community has been subrogated to the rights and obligations of the contracting Member States, since the conditions inferred from the aforementioned *International Fruit* judgment are not fulfilled. In that regard, I again refer to the reasoning set forth in my opinion in the *Burgoa* case.

One point in particular on which I have already had occasion to express a view deserves to be emphasized. In the 1960s, no Community fisheries policy yet existed and therefore there could be neither any desire on the part of the EEC to regard itself as bound by the London Convention nor any kind of action on the part of the Community institutions within the framework of that Convention. In the 1970s, three new phenomena emerged: the rapid creation of a general international rule permitting extension of a State's exclusive fishing zone to 200 miles from the coast, the decision of the Member States of the Community effectively to extend their respective fishing zones to that distance (at least in the Atlantic and the North Sea) and, at the same time, the opening of negotiations on fisheries between the EEC and the non-member countries concerned, one of which was Spain. I have already said that the Council resolutions on a common fisheries policy were adopted on 3 November 1976; I should emphasize that negotiations with Spain started on 3 December of the same year (the agreement was initialled on 22 September 1978). Thus the interim Community provisions on quotas granted under licence to Spanish fishermen for catches inside the 200 mile limit were adopted and applied at the same time as work was proceeding on the preparation of a new agreement governing relations between the EEC and Spain; and those interim provisions were applied with the cooperation of the Spanish authorities (paragraph 23 of the decision in the *Burgoa* judgment cited above).

On the basis of that combination of circumstances, the Court stated that those provisions fall "within the framework of the relations established between the Community and Spain in order to resolve the problem inherent in conservation measures and the extension of exclusive fishery limits and in order to ensure reciprocal access by fishermen to the waters subject to such measures. Those relations *were superimposed on the regime which previously applied in those zones* in order to take account of the general development of international law in the field of fishing on the high seas" (*Burgoa* judgment, paragraph 24 of the decision). As a result, the Court held that there was no factor of such a kind as to affect the validity of Regulation No 1376/78. In view of the circumstances, exactly the same conclusion is justified with respect to all the interim measures to which the national courts have referred in the present cases, particularly since in the preamble to Regulation No 1744/78, which is relevant to

the *Crujeiras* case, the same reference was made to the envisaged fisheries agreement with Spain as had already been made in the preamble to Regulation No 1376/78, whilst the preamble to Regulation No 1719/80, which is relevant to the *Yurrita* case, made direct reference to the agreement signed on 15 April 1980. It is hardly necessary to add that the arguments relied on with regard to the London Convention are also valid with regard to the supplementary Franco-Spanish Agreement on Fishing; neither should be regarded as effective with respect to the Community and in any case both were superseded at the beginning of 1977, that is to say when negotiations were initiated between the EEC and Spain, and Spain tacitly recognized the 200 mile exclusive economic zone adopted by the Member States and the interim fisheries regime put into effect by the Community institutions.

5. It has been seen that the French courts, besides raising the question of the validity of the regulations which laid down interim measures for the conservation and management of fishery resources applicable to Spanish vessels, also ask, in the alternative (this is to say, in the event of those measures being held valid), whether those regulations can be enforced against Spanish nationals. It can be seen from the grounds set forth in the order for reference made by the French Cour de Cassation that the doubt on this point is connected with the consideration that Spain is not a party to the Treaty establishing the EEC; it is inferred therefrom that the provisions in question should not affect the rights acquired by the Spanish under the London Convention and the Franco-Spanish Agreement of 20 March 1967. But that idea is surely incorrect. Community regulations are not intended to be effective only against nationals of the Member States; on the contrary, the regulations whose applicability is under discussion sought to establish conditions to be applied to Spanish vessels within the 200 mile band of sea adjacent to the coasts of Member States and were therefore principally addressed to the individuals on board those vessels, irrespective of their nationality. It is indisputable that, as it is a question of ensuring the conservation and management of fishery resources in the "exclusive economic zones" of the Member States, the Community was empowered to adopt regulations, since the matter was one of those for which it was given responsibility by the Treaty of Rome (this matter, of course, falls within the area of the common agricultural policy). With regard therefore to the fact that a number of Member States, pursuant to agreements entered into with non-member countries, had assumed obligations towards such countries which might be incompatible with rules laid down by the Community, I would observe that, if the validity of those rules is recognized (for the reasons which I have endeavoured to clarify), the normal effectiveness thereof, as regards determination of the persons to whom they are addressed, cannot be called in question. Thus the regulations concerned, which are valid despite the prior international obligations of one or more Member States, must be regarded as enforceable against Spanish fishermen.

6. I shall now go on to Case 181/80. In that case the French Cour de Cassation wishes to know whether, "having regard to prior international obligations, Regulations Nos 353/77 (373/77 is meant) of

24 February 1977, 746/77 of 5 April 1977, 1416/77 of 28 June 1977, 1709/77 of 26 July 1977 and 2160/77 of 30 September 1977 are valid, in so far as they lay down new detailed rules for fishing operations carried out by Spanish vessels in the reserved fishing zone from 6 to 12 nautical miles and whether, if valid, those regulations are enforceable against Spanish nationals". The structure of this question is very similar to that of the question which I have examined above; but there are two differences. In the first place, this question specifically mentions five regulations which nevertheless are included amongst the "interim measures" on fisheries applicable to Spanish vessels; they are all the regulations which existed before the disputed fishing activity took place. In the second place, the examination of their validity (and of their enforceability against Spanish nationals) is requested because the regulations are at variance with the prior international obligations concerning the fishing zone from *6 to 12 miles from the French coast.* In this case the only international obligations under consideration are those created by the London Convention of 9 March 1964 and by the Franco-Spanish Agreement on Fishing of 20 March 1967; no reference, however, was made to the Geneva Convention of 29 April 1958 on Fishing and Conservation of the Living Resources of the High Seas and it seems to me irrelevant to ask whether the view is thereby implied that that international instrument is not applicable to this case.

I have already observed that the proceedings against Mr Arbelaiz-Emazabel, in the two earlier stages before the Tribunal de Grande Instance, Bayonne, and the Cour d'Appel, Pau, were decided in favour of the accused — the reverse of what happened in the Crujeiras Tomé case. This difference of approach on the part of the French courts in the two cases is partly accounted for by the fact that the London Convention and the Franco-Spanish Agreement of 1967 were, by reason of their content, certainly pertinent to the outcome of the Arbelaiz-Emazabel case, whereas they appear to have been relied upon without justification in the Crujeiras Tomé case. The point is that the fishing activity carried out in an area of French territorial waters between 6 and 12 miles from the Atlantic coast was of a kind such as to be covered both by the London Convention and by the supplementary Franco-Spanish Agreement — both in fact confirmed the fishing rights of Spanish nationals, albeit in different terms, in precisely that area of the sea. However, in order to maintain that fishing activity carried out beyond 12 miles came within the scope of the Convention and Agreement in question it was necessary to deviate from both the letter and the spirit of those instruments by adopting a method of interpretation which I have already criticized in my opinion in the *Burgoa* case.

Consequently, it is necessary to establish whether the provisions of the London Convention and of the supplementary Franco-Spanish Agreement on Fishing have any bearing on this case. It seems to me that they would have a bearing if an examination had to be made of the compatibility of the international obligations deriving from those two diplomatic instruments with the regulations adopted by the EEC between

1977 and 1980 laying down interim measures applicable to Spanish fishing vessels in the 200 mile Atlantic zone. But if the view is taken that the international commitments in question do not in fact affect the Communities and that Article 234 of the EEC Treaty cannot be applied in this case (thus eliminating any obligation on the part of the Community institutions to refrain from hindering observance of those commitments on the part of the Member States), then there is no reason to examine the compatibility of the aforesaid Community regulations with the London Convention and the Agreement between France and Spain of 1967.

In my opinion, the position is exactly as described above. There is no need for me to repeat the reasoning expounded with regard to the *Crujeiras Tomé* and *Yurrita* cases to demonstrate that Article 234 does not apply with respect to agreements concluded after the entry into force of the EEC Treaty and that neither of the two agreements in question may be regarded as binding on the EEC. I should like instead to emphasize that the position adopted in the Court's judgment of 14 October 1980 in the *Burgoa* case is also valid with regard to the regime applicable to Spanish fishing boats in the band of sea between 6 and 12 miles from the Atlantic coasts of the Community. On the one hand, in fact, the Community provisions adopted in 1977 and thereafter have made no distinction between the various bands of sea lying between the coasts and the outer limit of the exclusive economic zone (200 miles); they have established conditions applicable to the whole of the *fishing zones* of the Member States which extend 200 nautical miles from the North Sea and Atlantic coasts. On the other hand, a similarly unitary view of the fishing zones subject to the jurisdiction of the contracting parties (in other words the zones consisting of territorial waters and exclusive economic zones) is found in the agreement negotiated and ultimately signed between the EEC and Spain. Therefore, when the *Burgoa* judgment recognized that the relations established between the Community and Spain with regard to exclusive fishing zones — the interim regime adopted by the EEC falls within the framework of those relations — "were superimposed on the regime which previously applied in those zones" (paragraph 24 of the decision), a statement was made which referred not only to the areas of sea between 12 and 200 miles but also to those between the coast and the 12-mile line.

7. It was contended in Mr Arbelaiz-Emazabel's defence, *inter alia*, that the Franco-Spanish Agreement on Fishing of 1967 was recognized by the Commission in 1977 as being applicable notwithstanding the Community provisions. In this regard the defendant referred to a Note Verbale of 4 July 1977 in which the Commission, in reply to a note from the Spanish Ministry of Foreign Affairs, stated that the fishing rights granted to Spanish fishing vessels within the framework of the transitional regime laid down by EEC Regulation No 746/77 — which would be extended by means of a further regulation — were confined to the waters beyond the 12-mile limit

"without prejudice to the rights conferred by the General Agreement on Fishing between France and Spain of 20 March 1967; within the said zones, Spanish vessels are therefore not permitted to engage in fishing activity, with the exception of the zone referred to in the above-mentioned Agreement". For its part, the Commission stated that that passage in its Note Verbale of 4 July 1977 referred exclusively to the frontier coastal zone (extending three miles from the shore) referred to in paragraph III of the Franco-Spanish Agreement; in fact, this was clarified by a Note Verbale of 29 July 1977 which stated that "the new regulation (No 1709/77), like the earlier regulations, *applies to all the fishing zones under the jurisdiction or sovereignty of the Member States* of the Community, including the zone referred to in paragraph 1 of the exchange of letters constituting the Franco-Spanish Agreement of 20 March 1967, but excluding the coastal fishing zone referred to in paragraph III of the said exchange of letters".

It seems to me that the note of 4 July cannot be looked at separately from that of 29 July and that the two documents, when examined together, do not imply any recognition that the Franco-Spanish Agreement is binding on the EEC. In effect, those notes expressed the Commission's understanding of the territorial scope of the "interim regime" introduced by the Community; and upon close examination the significant fact emerges that the note of 29 July 1977 already treated the legal situation provided for by paragraph I of the Franco-Spanish Agreement as having been superseded by virtue of the interim regime. What should be borne in mind, however, is that for the purposes of this case it is not a question of determining whether the Agreement on Fishing between France and Spain could still be relied upon, as regards relations between the two contracting parties in 1977, or whether the Commission proposed at that time to respect the provisions thereof in part pending the conclusion of negotiations with Spain. The decisive question is whether that Agreement was ever binding on the Community or whether it ever fell within the category of agreements contemplated in the first paragraph of Article 234 of the Treaty of Rome, since it is only in one or other of those cases that the interim Community fishing regime could be invalid, to the extent to which it was incompatible with the aforesaid Agreement. But, in my opinion, there is nothing in the Notes Verbales of 4 and 29 July 1977 to confirm either of the possiblities mentioned.

8. In the course of the proceedings the parties discussed at length a number of problems relating to the provisions of the London Convention — problems which, in view of the line of reasoning followed by me, it would be totally superfluous to examine. It think it is nevertheless relevant to point out that there are valid arguments, of which a brief summary will suffice, against the view that the above-mentioned Convention and the interim fisheries regime set up by the Community as from 1977 are incompatible.

The provision which, so to speak, offsets recognition of the rights of habitual fishermen under Article 3, is Article 5 of the Convention. It empowers the coastal

State to regulate fishing in the band of sea between 6 and 12 miles from the coast, in particular to give effect to internationally agreed conservation measures. The fixing of fishing quotas is thus certainly permitted; and the licensing system may, in my opinion, be regarded as falling within the broadly defined power of coastal States "to regulate the fisheries *and to enforce such regulations*". In this regard, it has been observed that Article 5 lays down a specific condition, namely that there should be no discrimination in form or in fact against the fishing vessels of other contracting parties; however, the fact that Community fishermen are not subject to the requirement of licensing is said to place them in a privileged position. But the Court has already answered that objection, indirectly, by stating *(Burgoa* judgment, paragraph 21 of the decision) that "control of fishing may be achieved by means of a system of fishing licences ... particularly ... where control of the catch cannot be carried out in adjacent coastal ports since fishing vessels from non-member countries normally return to their ports of origin in order to land their catches". The licensing system cannot therefore be considered discriminatory, since it provides an alternative means of control for the purpose of checking catches.

Counsel for Mr Arbelaiz-Emazabel raised the objection that control of Community fishing vessels' catches was introduced by a regulation of later date than those which imposed the requirement of licences on Spanish fishermen (Regulation No 753/80 of 26 March 1980). He also argued that the French authorities had never implemented an effective system of controls to be carried out after landing of the catch. With regard to the first point, however, I would observe that the setting up of the systems of control in question was a matter entrusted entirely to the national authorities until the above-mentioned regulation established various procedures for the recording and transmission of information relating to the catches taken by the fishing vessels of the Member States. With regard to the second point, I would mention that in the oral procedure the Commission denied that the French practice might lend itself to criticism and even went so far as to say that the French system of control is the most advanced in the Community.

It should also be remembered that, even if the position of Community fishermen were to be regarded as "privileged" because they can engage in fishing without the need for a licence, the special treatment accorded to them, in theory, should be regarded as admissible under Article 10 of the London Convention. That article in fact raises no obstacle to the introduction (or continuation) of a special fishery regime in so far as relations between the Member States of the EEC are concerned and the interpretation of any other provision of the Convention should take that safeguard into account.

There has also been discussion, with regard to Article 5 of the London Convention, as to whether the obligation laid down in the second paragraph thereof was respected; that provision requires that before issuing fishery regulations a coastal State must "inform the other Contracting Parties concerned and consult those Contracting Parties if they so wish". It was argued on behalf of Mr

Arbelaiz-Emazabel that that obligation was breached by the issue of Council Regulation No 746/77, since notice of it was not given to Spain until the day after its adoption. In my opinion, however, an obligation such as that contained in Article 5 (2) places each party under a duty to notify the other parties of measures taken by it, so that the other parties can, if appropriate, submit their observations, but the aim in view is not to open negotiations in the strict sense; accordingly, the obligation may be fulfilled without the need for notification of the final text of the instrument which a party intends to adopt. At the hearing, the representative of the Commission stated, without being contradicted, that the Commission had given notice to the Spanish authorities in due time regarding the quotas which were later fixed by Regulation No 746/77. The duty of notification and consultation may thereby be deemed to have been fulfilled.

Finally, I would mention that the defendant in the main proceedings also sought to advance the argument that the rights of traditional fishermen are based on international custom. I have already had occasion to examine this problem in my opinion in the *Burgoa* case and I therefore confine myself to repeating that the fate of traditional fishermen is governed only by agreements, not by general international rules. In any case I am of the opinion that a practice which may have been followed in relations between some States before the exclusive fishing zone was extended to 200 miles could not be relied upon as proof of a rule appropriate to the new legal situation created by the extended limit.

9. In Case 181/80, as in the other cases, the court making the reference wishes to know whether the Community regulations mentioned in the question, if found to be valid, are enforceable against Spanish nationals. In this regard there is no difference between the case now under consideration and the other two; I therefore refer back to the considerations set out above, which I believe demonstrate that the regulations in question, if valid, are without any doubt effective to an extent which enables them to be applied to Spanish fishermen in waters under the jurisdiction of the Member States.

10. In conclusion, I would suggest that the Court, in answer to the questions submitted to it by the French Cour de Cassation in the two judgments of 7 July 1980 referred to at the beginning of this opinion, and by the Tribunal de Grande Instance, Saint-Nazaire, by its judgment of 24 October 1980, should declare that:

(a) Examination of the Council regulations laying down certain interim measures for the conservation and management of fishery resources applicable to vessels flying the flag of Spain has disclosed no grounds on which they might be declared invalid;

(b) The said regulations are therefore enforceable against Spanish nationals who engaged in fishing activity in the specified sea zones during the periods indicated in the said regulations.