OPINION OF MR ADVOCATE GENERAL REISCHL DELIVERED ON 29 SEPTEMBER 1982 [1]

Mr President,
Members of the Court,

The questions now before the Court arise by way of a reference for a preliminary ruling in criminal proceedings in which Mr Kerr, the captain of a British fishing vessel, is charged with contravening Danish Order No 88 of 10 March 1978 on the limitation of catches for the fishing zone off Greenland.

That order laid down, *inter alia*, total catch-quotas for various species of fish in various areas of the Greenland fishing zone. Under Article 8 of the Order in conjunction with Annex II thereto, catch-quotas were allocated amongst Greenland, Denmark, France and the Faeroe Islands for shrimp fishing within the 200 nautical mile fishing zone off West Greenland. According to Article 10 of the Order, a breach of its provisions was punishable by a warning or a fine.

On 12 June 1978, Captain Kerr's trawler "MV Goth" was fishing for shrimps in ICNAF [International Commission for the North-West Atlantic Fisheries] area 1A — 1F in Greenland coastal waters at a point west of Holsteinsborg in the fishing zone between 12 and 200 nautical miles from the Greenland base-lines. The captain was in possession of a licence issued on 14 April 1978 by the British Minister for Agriculture, Fisheries and Food permitting the ship to catch 475 tonnes of shrimps after 6 June 1978 in ICNAF sub-area 0 — 1.

Following repeated requests by the Danish fishery authorities to cease fishing the vessel was finally arrested on 16 June 1978. Captain Kerr admitted that he was acting in breach of the Order and agreed "under protest" to pay a fine of DKR 80 000 and to forfeit DKR 41 500 corresponding to the value of the catch of shrimps. At Captain Kerr's request, the matter was brought before the Grønlands Landsret [Provincial Court, Greenland] which by judgment of 14 November 1979 ordered the defendant to pay a fine of DKR 100 000, for breach of the provisions of the said order on the limitation of shrimp catches as well as to forfeit DKR 41 150.

Both the defendant and the Public Prosecutor appealed against that judgment to the Østre Landsret [Eastern Division of the High Court].

The defendant contends that Danish Order No 88 constitutes an infringement of Community law in particular inasmuch as it accords different treatment to fishermen from various Member States in the Greenland fishing zone between 12 and 200 nautical miles from Greenland base-lines. Such discrimination on grounds of nationality is contrary to Article 7 of the EEC Treaty, as well as to Articles 1 and 2 (1) of 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); those articles prohibit differences in the treatment of Member States in respect of fishing and expressly guarantee equal access for the fishing vessels of a Member State to fishing grounds under the sovereignty or within the jurisdiction of other Member States. Although in principle it is undeniable

1 — Translated from the German.

that total catch-quotas for the conservation of fish stocks may be fixed by national legislation, quotas cannot be allocated on the basis of what are known as traditional rights that is to say in the light of previous fishing patterns in an area, since such rights are largely abolished by the EEC Treaty. Furthermore, the Order — which the defendant claims is unlawful — could not be legalized by the Commission's approval thereof which was given only on 20 November 1978.

The Public Prosecutor, on the other hand, takes the view that at the time in question the Member States were at liberty to adopt measures for the conservation of fish stocks, and, in connection therewith, to establish a system of quotas in order to fix a ceiling on catches by the individual Member States. Catch-quotas for shrimps were allocated by the Order amongst the Member States on the basis of previous shrimp catches in that area and corresponded to the Commission's proposal for the allocation of fishery resources for 1978. Consideration of the traditional fishing patterns of the Member States in the areas in question was justified on objective grounds also because the purposes of the measures, according to the preamble to Regulation No 101/76, was *inter alia* to ensure that those who live by the fishing industry are assured of a fair standard of living. Finally, another factor militating in favour of the view that the Order is compatible with Community law is that the measure was notified to and approved by the Commission in accordance with the procedure laid down in Annex VI to the Hague Agreement.

To enable it to decide whether Order No 88 of 10 March 1978 is compatible with Community law, the 16th Chamber of the Østre Landsret stayed the proceedings and by judgment of 29 October 1981 referred to the Court, pursuant to Article 177 of the EEC Treaty, the following questions for a preliminary ruling:

"1. Is it compatible with the provisions of the EEC Treaty, in particular Article 7 thereof, for a Member State to have enacted in 1978 national measures on fisheries dividing the total allowable catch of a specified kind of fish in a specified, limited area of the State's fishing zone on the basis of previous fishing of the same nature in the area so that the Member States which carried out such fishing before the entry into force of the measures were allocated a catch-quota whilst the vessels of other Member States were excluded from such fishing?

2. Did the provisions of Articles 1 and 2 (1) of Council Regulation (EEC) No 101/76 of 19 January 1976 laying down a common structural policy for the fishing industry preclude a Member State from enacting in 1978 national measures on fisheries dividing the total allowable catch of a specified kind of fish in a specified, limited area of the State's fishing zone on the basis of previous fishing of the same nature in the area so that the Member States which carried out such fishing before the entry into force of the measures were allocated a catch-quota, whilst the vessels of other Member States were excluded from such fishing?"

My opinion on those questions is as follows:

1. In the light of the rules on fishing in force in 1978, the court making the reference has, in its questions, deliberately focused on the problem — to which the Court of Justice has not yet expressly addressed itself — whether in 1978 a Member State was entitled to divide a total allowable catch for the conservation of a given species of fish in a specific area of its fishing zone between *individual* Member States and non-member countries on the basis of "traditional fishing patterns".

Since the Court of Justice has already frequently had occasion, most recently in Case 32/79,[1] to assess the relevant provisions of Community law which were in force before the expiry on 1 January 1979 of the transitional period provided for by Article 102 of the Act of Accession, I can refer, as far as the legal position is concerned, to its earlier judgments and to the opinions which I have delivered in those cases. In that regard, I would merely mention that, according to the case-law of the Court, the Community is responsible for the adoption of conservation measures in the fishing zones of the Member States which were extended on 1 January 1977 to 200 nautical miles off the North Sea and North Atlantic coasts of those States. Following the considerable increase in sea territory as a result of the enlargement of the Community, Article 102 of the Act of Accession had as its purpose merely to introduce a fresh transitional period in which the Council was to adopt the necessary conservation measures. However, as long as the Council took no action in that respect, the *Member States* had the right and the duty, as the Court has repeatedly held, to adopt the necessary conservation measures for the waters within their jurisdiction in the common interest and in *accordance with the substantive and procedural rules of Community law,* which include those resulting from Annex VI to the Hague Resolution adopted by the Council on 3 November 1976 and from the subsequent Council Resolution of 31 January 1976.

Since in March 1978 the Council failed to adopt any conservation measures for the protection of shrimp stocks in the contested area, the Kingdom of Denmark had the power — on this point all the parties to the proceedings are agreed — to enact the necessary conservation measures and, accordingly, to fix a total allowable catch. Moreover, all the parties to the proceedings also agree that the Danish Government also complied with the *procedural* requirements laid down in the Hague Resolution and in the Council Resolution of 31 January 1978, inasmuch as it sought the Commission's approval for the proposed measure as early as 1 March 1978 and consulted it at every stage of the procedure.

2. With regard to the *substantive* provisions of Community law, however, the defendant in the main proceedings as well as the United Kingdom and the Netherlands Governments are doubtful whether the allocation of catch quotas by the Order in question can be reconciled with the principle of equal treatment, as laid down in particular by Article 7 of the EEC Treaty and Article 2 (1) of Regulation No 101/76, which is an overriding principle of Community law.

Whilst Article 7 of the EEC Treaty prohibits in principle any discrimination on grounds of nationality, Article 2 (1)

1 — Judgment of 10 July 1980 in Case 32/79 *Commission* v *United Kingdom* [1980], p. 2403.

of Regulation No 101/76 provides, by way of a concrete expression of that prohibition, that the rules applied by each Member State in respect of fishing in the maritime waters under its sovereignty or within its jurisdiction may not lead to differences in the treatment of other Member States, whose fishing vessels must be granted equal conditions of access to and use of the fishing grounds situated in the territorial waters of all the Member States.

Thus the question arises whether the fixing by a Member State of different annual catch-quotas in the fishing zone adjacent to its coast for other Member States which engage in fishing — as was done in the order at issue in the present case — is compatible with Community law, and, as the case may be, whether consideration of traditional fishing patterns in the area does not lead to discrimination against other Member States in the allocation of quotas.

In that connection, the Netherlands Government has very serious doubts as to whether a coastal State has any power whatever to allocate catch-quotas to individual Member States within a total allowable catch fixed for the conservation of a given fish stock in its fishing zone. In its opinion, that right and the verification of compliance with the system of quotas should be vested exclusively in the States of registration which reached agreement amongst themselves with the participation of the Commission. If the coastal States and the States of registration were to fix different quotas, a clash between the two conflicting systems might ensue to the detriment of fishermen.

Those contentions call for the general observation that although in certain circumstances, such as those obtaining in the *Kramer*, [1] *van Dam* (I) [2] and *van Dam* (II) [3] cases, it was considered permissible under Community law for a State of registration to fix quotas for its own fishermen, that factor does not entail the unlawfulness or the other principle, namely the fixing of catch-quotas by the coastal State, where such a solution appears to be more appropriate on practical grounds. A common fisheries policy must, as the Court has repeatedly held, take account of the fact that the size and number of fish stocks cannot be adjusted at will to demand. Over-fishing of individual stocks can, however, be effectively prevented only if total allowable catches are fixed and divided into quotas, the verification of which must be guaranteed. The fixing of catch-quotas and their allocation amongst the individual Member States are inextricably bound up with the conservation measure itself, namely the fixing of a total allowable catch. If, however, no agreement thereon emerges within the Council, the Member States may, according to Annex VI to the Hague Resolution, adopt "appropriate measures to ensure the protection of resources situated *in the fishing zones off their coasts*".

The unequivocal inference that those conservation measures also include the fixing of catch-quotas and their allocation amongst the individual Member States may ultimately be drawn from the Council Resolution of 31 January 1978

1 — Judgment of 14 July 1976 in Joined Cases 3, 4 and 6/76 *Kramer and Others* [1976] ECR 1279.

2 — Judgment of 3 July 1979 in Joined Cases 185/78 to 204/78 *van Dam en Zonen and Others* [1979] ECR 2345.

3 — Judgment of 2 June 1981 in Case 124/80 *van Dam en Zonen* [1981] ECR 1447.

in which it is stated that "national measures ... could ... be taken" only in so far as they are "strictly necessary for the conservation and *management* of fishery resources". Therefore, it cannot be disputed that both the coastal State and the States of registration may fix catch-quotas and verify them, whilst Community verification of the measures concerned is always assured by the prescribed consultation procedure. Finally, that also rules out the possibility that, as the Netherlands Government thinks, conflicting catch quotas may be fixed by the individual Member States.

3. Those considerations in themselves suffice to show that the other objections raised by the United Kingdom, and by the Netherlands and French Governments, to the effect that the fixing of catch-quotas and their allocation amongst the individual States with fishing interests should be regarded not as conservation measures but merely as administrative measures, are unfounded. The Resolution of 31 January 1978, to which I have referred demonstrated that the Council is also of the opinion that the fixing of a total allowable catch is to be viewed in conjuction with the economic exploitation thereof when the national measures concerned are examined in order to determine whether they are compatible with Community law. Moreover, the Convention on Future Multilateral Cooperation in the North-West Atlantic Fisheries (Official Journal 1978, L 378, p. 1), signed by the Community on 24 October 1978, is also based on the assumption that the fixing of total allowable catches is inseparable from their allocation in the form of catch-quotas, whilst the International Fisheries Commission is responsible for the management and conservation of fishery resources. Last but not least, the Commission, too, recognizes that the conservation and management of fishery resources are closely related, as is shown by its proposals thereon: see, for example, the proposal for a Council regulation establishing a Community system for the conservation and management of fishery resources of 8 October 1976 (Official Journal 1976, C 255, p. 3), as most recently amended by the Commission proposal of 6 March 1981 (Official Journal 1981, C 141, p. 6).

4. The inference that the Member States are also empowered to fix catch-quotas can be drawn from the case-law of the Court. Thus it was expressly stated in Joined Cases 3, 4 and 6/76 *Kramer* [1], already cited, that: "the Community has at its disposal, on the internal level, the power to take any measures for the conservation of the biological resources of the sea, *measures which include the fixing* of catch-quotas and their allocation between the different Member States". Consequently — and this should be stated in order to meet the objection raised by the French Government — Article 4 of Regulation No 101/76 which empowers the Council to adopt measures for the conservation of fish stocks must be interpreted along the same lines. If, however, the Council has taken no action, as in the present case, that power may, according to the case-law of the Court, be exercised by the Member States.

5. Accordingly, it remains to consider whether the prohibition of discrimination laid down by Community law, as stated in Article 7 of the EEC Treaty and in Article 2 (1) of Regulation No 101/76, was not infringed by the fact that the quotas were allocated on the basis of

1 — Judgment of 14 July 1976 in Joined Cases 3, 4 and 6/76 Kramer and Others [1976] ECR 1279.

previous fishing patterns with the result that *not all* the fishing vessels of the Member States had *equal access* to the contested fishing grounds.

However, since the Court of Justice has consistently held in its decisions that discrimination is to be regarded as prohibited only where there is an objective differentiation, unjustified by any specific consideration of fact, in the present case it is necessary merely to consider whether, in the light both of the objectives of a common fisheries policy and of the way in which it operates, apportionment of the total allowable catch in the manner provided for by the contested Order was in fact justified.

In the opinion of the United Kingdom in particular, it was unnecessary in the present case to allocate catch-quotas amongst the individual Member States in order to prevent the total allowable catch from being exceeded. In its view, that aim could have been achieved just as well if not more successfully either on the basis of equal access to fishing grounds for all fishing vessels up to the total allowable catch limit imposed or by means of a licensing system, likewise open to all the fishing vessels of the Member States, or by computation of the total number of fishing vessels involved.

Against that argument, it is necessary in the first place to point out, as the Commission has done, that the fixing of a total allowable catch for a specific species of fish automatically raises several problems: first of all compliance with such a restriction on catches must be guaranteed by effective verification; secondly, the burden resulting from the restriction on catches must be shared equitably by the fishermen; thirdly, rational use of the total allowable catch must be guaranteed.

However, as regards the *effective verification of the total allowable catch* — which is all the more necessary when, as in the present case, a fish stock is involved which also extends into the fishing zone of a non-member country — it cannot be disputed that the allocation of quotas amongst individual Member States constitutes an effective and accordingly in practice a justified means of control. It ensures, in particular, that the individual States of registration are also under an obligation to verify the catch-quotas allocated to them. If all the fishing vessels of the Member States were to enjoy equal access to fishing grounds, such verification by an individual Member State would on the other hand prove exceedingly difficult, not to say impossible, quite apart from the considerable administrative burden which a licensing system open to all would entail.

The solution suggested by the United Kingdom would not, moreover, as the Danish and French Governments have also observed, ensure the attainment of the other objectives — *equitable allocation of catches and rational exploitation of total quotas* — which must be taken into account when a total allowable catch is allocated. If all fishermen were assured of wholly unrestricted access, it would lead to the more favourable treatment of those who are the first to fish in a given area and entail the risk that it might be necessary to close the fishing grounds prematurely, possibly to the detriment of fishermen who have hitherto earned their livelihood, either wholly or in part, from the fish stocks in question. Therefore, a licensing system open to all fishermen would, in those circumstances, be more harmful to those who have traditionally

fished in the areas in question than to those who have not so far fished there and thus do not have to sustain any losses as a direct result of the restriction on catches.

Finally, if quotas were allocated amongst those Member States whose fishermen have either in the past or in the current fishing season shown no interest in fishing in the area, or if the number of fishing vessels were taken into account, there would be a danger that the catch-quotas might not be used up which would be irreconcilable with a rational use of resources. The "harmonious ... development of [the fishing] industry within the general economy" and the promotion of the "rational use of the biological resources of the sea" — objectives which must be pursued according to Article 1 of Regulation No 101/76 — could scarcely be attained by such measures.

On the other hand, the total allowable catch available to the Community may be more effectively allocated on a reasonable basis amongst the Member States, in the light of the objectives referred to, by the application of the three criteria set out in the Council Declaration of 30 May 1980 on the common fisheries policy (Official Journal 1980, C 158, p. 2) as well as in the preamble to the Commission's proposal of 24 July 1980 for a Council regulation concerning the distribution among the Member States of the total catch possibilities available to the Community in 1981 of stocks or groups of stocks occurring in the Community fishing zone (Official Journal 1981, C 224, p. 11). Those are the criteria — regard being had especially to traditional fishing patterns, to the special needs of regions where the local populations are particularly dependent upon fishing and the industries allied thereto, and to the loss of catch potential in the waters of non-member countries — which the Commission had already taken as a basis, in accordance with its express assurance, in the proposal which it laid before the Council concerning the allocation of the total allowable catch fixed for 1978 in respect of the shrimp stocks at issue.

6. There can be no doubt that the contested Order No 88 of 10 March 1978 on the limitation of catches for the fishing zone off Greenland is, in any event as regards the allocation to Greenland, Denmark, France and the Faeroe Islands of catch-quotas for shrimps in the fishing zone in question, consistent with the proposal laid before the Council by the Commission. Consequently, it is also necessary to proceed on the assumption that those criteria were also taken into account when the national conservation measure was enacted following wide-ranging consultations with the Commission. Since the national measure entered into force before the expiry of the transitional period introduced by Article 102 of the Act of Accession, there was ultimately no need from the procedural point of view for the Commission's prior approval, either express or implied.

Furthermore, it follows from the fact that the national measure is consistent with the conservation measure proposed by the Commission that the legality of the former cannot be called in question by the argument that it takes excessive account of traditional fishing patterns without, on the other hand, taking into consideration the loss of catch potential sustained by British fishing vessels in the waters of non-member countries. As the Commission rightly points out in that regard, a compensating adjustment cannot be made whenever individual catch-quotas are allocated but only in the light of a *comprehensive appraisal* of the management of fish stocks in the fishing zone of the Community as a

whole. When, however, the Commission assures us that the United Kingdom's loss of catch potential in the waters of non-member countries has been compensated for to a sufficient extent in the management of other fish stocks, there is no reason to doubt that statement.

Nor can it be denied moreover that if the harmonious development of the fishing industry within the general economy of the Community is to be achieved, traditional fishing patterns must be considered alongside the other two criteria as an *objective distinguishing factor.* In particular, the significance of that factor, which moreover was taken into account by the *Atlantic Fisheries Commissions* in all their recommendations, was indirectly recognized also by the Court of Justice in Cases 61/77, [1] 32/79 [2] and 804/79. [3]

In particular, the opposite conclusion cannot, as the defendant in the main proceedings contends, be drawn from the Court's judgment in Case 812/79, *Burgoa,* [4] concerning *inter alia* the lawfulness of Council Regulation (EEC) No 341/78 of 20 February 1978 (Official Journal 1978, L 49, p. 1) and of Council Regulation (EEC) No 1376/78 of 21 June 1978 (Official Journal 1978, L 167, p. 9) which both make the exercise of fishing rights by Spanish ships in Community waters conditional on the issue of a licence. In that case, the Court of Justice expressly ruled that those regulations are interim measures adopted by the Community under its own rules within the framework of the relations established between the Community and Spain in order to resolve the problems inherent in the extension of exclusive fishery limits and in order to ensure reciprocal access by fishermen to the waters subject to such measures. Therefore, the conclusion cannot be drawn from that judgment that the Court of Justice refused to recognize the rights which derive from traditional fishing patterns.

7. That the Commission based its proposal to fix catch-quotas for 1978 on fishing carried on in the contested area in *1976,* should likewise not be a ground for criticism. It must be borne in mind in that regard that no corresponding recommendations were made by the International Fisheries Commission for the North-West Atlantic for the allocation of the total allowable catch fixed in respect of the shrimp stocks in question, that the fishing of those stocks had only just begun and that 1976 was the most recent year for which reliable figures were available concerning the catches of the various fishing fleets in the contested area.

Finally, since United Kingdom fishing vessels had not hitherto fished for shrimps in the contested area, no traditional fishing patterns had been established in their case. That is still the case notwithstanding the fact that the United Kingdom Government had entered into negotations with the Danish Government concerning the allocation of

1 — Judgment of 16 February 1978 in Case 61/77 *Commission* v *Ireland* [1978] ECR 417.

2 — Judgment of 10 July 1980 in Case 32/79 *Commission* v *United Kingdom* [1980] ECR 2403.

3 — Judgment of 5 May 1981 in Case 804/79 *Commission* v *United Kingdom* [1981] ECR 1045.

4 — Judgment of 14 October 1980 in Case 812/79 — *Criminal proceedings against Burgoa* [1980] ECR 2787.

catch-quotas since, as the Danish Government rightly points out, those were merely bilateral talks in which a quota for *1977* was to be fixed.

8. Since it has now also been established that the allocation of quotas set out in the Commission's proposal and in substance incorporated by the Danish Government in its Order No 88 of 10 March 1978 cannot be criticized on the ground that it constitutes an infringement of Community law as it stood at the time, there is no longer any need to consider the question raised by the United Kingdom whether any infringement can be remedied by the subsequent express approval of the Commission.

9. In conclusion, therefore, I propose that the questions raised should be answered as follows:

It is compatible with the principle of equal treatment established by Community law, in particular in Article 7 of the EEC Treaty and in Article 2 (1) of Council Regulation (EEC) No 101/76 of 19 January 1976 laying down a common structural policy for the fishing industry, for a Member State to have apportioned by national measures on fisheries before the expiry of the transitional period introduced by Article 102 of the Act of Accession the total allowable catch of a given species of fish in a precisely delimited area of its fishing zone *inter alia* on the basis of past catches of that species of fish in the area, in so far as the Council had not adopted any corresponding conservation measures and the national measure was enacted following prior consultation of the Commission and in accordance with its proposals.