It is for the Member States, which are provided by the Community rules with the means of obtaining rapid information on the actual figures for catches, to organize the rapid collection of information enabling them to order the provisional closure of fishing in good time to prevent the quotas from being exceeded. A Member State cannot plead provisions, practices or situations in its internal legal system to justify a failure to fulfil the obligations in question.

REPORT FOR THE HEARING
in Case C-52/91 *

I — Facts and legislative framework

A — *Legislative framework*

1. *Regulation establishing a Community system for the conservation and management of fishery resources*

By Regulation No 170/83 of 25 January 1983 (hereinafter 'the Regulation establishing the conservation system'), the Council established a Community system for the conservation and management of fishery resources (OJ 1983 L 24, p. 1). Articles 2, 3 and 4 of that regulation permit the Council to limit catches. The volume of catches available is distributed annually between the Member States in the form of quotas. Pursuant to Article 5(2) of the same regulation, the Member States must determine, in accordance with the applicable Community provisions, the detailed rules for the utilization of the quotas allocated to them.

2. *Regulation fixing quotas for 1986*

For 1986 the quotas were fixed by Council Regulation (EEC) No 3721/85 of 20 December 1985 (OJ 1985 L 361, p. 5) (hereinafter 'the Regulation fixing quotas for 1986').

That regulation has been amended on four occasions, most recently by Council Regulation (EEC) No 2374/86 of 24 July 1986 (OJ 1986 L 206, p. 4).

3. *Regulation on the control of fishing activities*

The detailed rules for the utilization of quotas are set out in particular in Council Regulation No 2057/82 of 29 June 1982 (OJ 1982 L 220, p. 1) establishing certain control

* Language of the case: Dutch.

measures for fishing activities by vessels of the Member States (hereinafter 'the control Regulation').

Under Article 1(1) of that regulation each Member State must, within its maritime waters, inspect fishing vessels of all the Member States in order to ensure compliance with all the regulations concerning conservation and control measures. Pursuant to Article 1(2), if an infringement is observed, the competent authorities must take penal or administrative action against the skipper of the vessel.

In addition, under Article 9 of the same regulation, each Member State must notify the Commission each month of the quantities of each stock or group of stocks subject to a quota, landed during the preceding month, indicating the location of the catches and the nationality of the fishing vessels concerned.

Pursuant to Article 10(1) of the same regulation, all catches subject to quota made by fishing vessels flying the flag of a Member State or registered in a Member State are to be charged against the quota applicable to that State, irrespective of the place of landing. Furthermore, under Article 10(2), the Member States must determine the date from which the catches subject to quota made by the fishing vessels flying its flag or registered in that Member State, are to be deemed to have exhausted the quota in question. As from that date, the Member State must provisionally prohibit fishing for that stock or group of stocks and the retention on board, transshipment and landing of fish taken after that date. The Commission must be notified of this measure and it is then to inform the other Member States. Finally, in accordance with Article 10(3), the Commission must, following notification under paragraph 2 or on its own initiative and on the basis of the information available, fix the date on which, for a stock or group of stocks, the catches subject to quota made by the fishing vessels of a Member State are deemed to have exhausted the quota allocated. From that date those vessels must cease fishing, transshipping or landing such catches.

B — *The course of the pre-litigation procedure*

1. *Letter of formal notice*

On 2 October 1986 the Commission sent the Netherlands Government a formal notice relating to the breach of three quotas allocated to the Netherlands for 1986 and to six cases of fishing in quotas which had not been allocated to that country. The Commission reserved the right to amend those figures if it received fresh information. In any case, it asked to be informed of the penal or administrative actions against the skippers of the vessels responsible for those catches.

The Netherlands Government replied by letter of 17 February 1987. While admitting that it had exceeded the quotas, it contended that that was not attributable to non-compliance by the Netherlands with the Community measures for restricting the fishing effort but to reasons beyond the control of the Netherlands Government such as

illegal catches, incorrect declarations by fishermen or by the fact that the national authorities had not been given information concerning landings until after the official closure of fishing. The Netherlands Government went on to give details of the surveillance procedures which it had set up for fishing activities. These procedures had resulted in numerous prosecutions. However, its efforts to impose penal sanctions were impeded by reason of uncertainties concerning the validity of the Community rules concerning quotas, which had led the Arrondissementsrechtbank Zwolle (Netherlands) to refer a question to the Court of Justice for a preliminary ruling (Case 46/86, *Romkes*), a situation which had prevented judgment being given concerning the offences noted.

By letter of 13 May 1987, the Commission sent the Netherlands Government a revised table of the figures relating to the breaches of quotas. That table showed, first, that 14 of the quotas allocated to the Netherlands in 1986 had been exceeded and, secondly, that on 12 occasions Netherlands fishermen had caught fish for which a quota had not been allocated to the Netherlands.

In its reply of 7 July 1987, the Netherlands Government again explained the measures it had taken to ensure compliance with the Community provisions.

2. *The reasoned opinion*

On 21 November 1988 the Commission sent the Netherlands authorities a reasoned opinion concerning the exceeding of 12 quotas, namely those referred to by its letters of 2 October 1986 and 13 May 1987, except for the quotas for fishing for cod and haddock in certain zones, in respect of which the excess was deemed negligible.

The Commission accepts, first, that these excesses may have been caused by the illegal behaviour of certain fishermen. Nevertheless, it considers that there are doubts with regard to Netherlands policy concerning surveillance and sanctions, which does not correctly implement Article 1 of the control Regulation. The Netherlands Government did not inform the Commission that sanctions had been imposed on those committing the offences.

In addition, the Netherlands Government is said to be responsible for not having prohibited catches in time. The fact that the final figures for landings are not known until after the official closure of fishing does not diminish such responsibility. The Netherlands authorities must prove that this circumstance was unforeseen and unforeseeable at the time at which they decided to prohibit fishing, but have not done so.

The opinion concluded that the Netherlands had failed to fulfil its obligations under Article 5(2) of the Regulation establishing the conservation system, and Articles 1 and 6 to 10 of the control Regulation, in conjunction with the Regulation fixing quotas for 1986.

Following the request made by the Netherlands Government on 9 January 1989, which pointed out that the complaints relating to 1986 were the same as those for 1983, 1984

and 1985 in respect of which an action for failure to fulfil obligations had been brought before the Court, this action was suspended until judgment had been given.

Judgment was in fact delivered on 5 October 1989 (Case 290/87 [1989] ECR 3083), and the Commission requested the Netherlands Government, by letter of 30 January 1990, to inform it of the penal or administrative measures taken against the skippers or owners of the vessels which had caught fish for which the Kingdom of the Netherlands did not have a quota or for which the quota had been exceeded.

In its reply of 13 June 1990, the Netherlands Government explained that fishing in quotas which had been the subject of a closure decision or for which the Netherlands did not have a quota was an economic offence and that the persons committing it had all been prosecuted. The delays caused by awaiting the judgment of the Court in the *Romkes* case (Case 46/86 [1987] ECR 267, delivered on 16 June 1987) had all been made up.

II — Written procedure and form of order sought by the parties

On 5 February 1991 the Commission brought this action for failure to fulfil obligations under the Treaty.

The written procedure followed the normal course. Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry. However, it submitted a question to the Commission.

The *Commission* claims that the Court should:

— declare, pursuant to the second paragraph of Article 169 of the EEC Treaty, that, by exceeding as stated above the fishing quotas allocated to the Netherlands for 1986, the Kingdom of the Netherlands has failed to fulfil its obligations under the combined provisions of Article 10(2) of Council Regulation (EEC) No 2057/82 and of Regulation (EEC) No 2374/86;

— order the Kingdom of the Netherlands to pay the costs.

The *Kingdom of the Netherlands* contends that the Court should:

— dismiss the Commission's application; and

— order the Commission to pay the costs.

III — Pleas in law and arguments of the parties

A — *The Commission's application*

At the outset, the *Commission* explains that it withdraws the complaint made in its letter of formal notice concerning fishing in the quotas which had not been allocated to the

Netherlands. It wishes to take account of the fact that those infringements were not repeated in 1987, apart from one or two exceptions. It concentrates its criticism solely on the fact that certain quotas allocated in 1986 were exceeded.

In this connection, the failure by the Netherlands to order a closed period for fishing or the fact that it did not decide to do so in good time does not amount to proper implementation of the obligations laid down by Article 5(2) of the Regulation establishing the conservation system and Article 10(2) of the control Regulation, or by the Regulation fixing quotas for 1986.

In support of its complaints, the Commission examines the 12 quotas to which it referred in its reasoned opinion and divides them into two groups.

1. *The first list*

The first group consists of ten quotas for which the Commission alleges that the Netherlands did not order a provisional closed period for fishing. The Commission states that it had to prohibit fishing on its own initiative at a date when those quotas had already been exceeded.

It criticizes the Netherlands system of registering catches, which it alleges does not reflect landings accurately. To determine the date on which a quota was 'deemed to have been exhausted', the national authorities used as a basis only the current figures for landings, whereas they ought also to have estimated catches which could only have been known later, by taking account, first, of the foreseeable development of fishing and, secondly, the experience of previous years. That applies particularly to the quotas which were shown in Case 290/87, cited above, to have been already exceeded in 1985. The Commission bases this analysis on the judgment given on 20 March 1990, *Commission* v *France* (Case C-62/89 [1990] ECR I-925).

2. *The second list*

The second group comprises two quotas for which, according to the Commission, the provisional prohibition of catches was ordered too late by the Netherlands authorities. For herring in Zones VI (that is, the west of Scotland, west of Ireland and Porcupine Bank), VIIb and c (that is, the Irish Sea), the prohibition was decided upon on 4 November, whereas the registered catches had already exceeded the quota at the end of October. That was also the case for whiting in Zones IIa (EC Zone) (that is, the Norwegian Sea) and IV (that is, the North Sea), fishing for which was prohibited only on 12 December although the registered catches had exceeded the quota at the end of November.

B — *The Netherlands Government's defence*

The *Netherlands Government* acknowledges that certain quotas were exceeded in 1986, but it considers that it did not fail to fulfil its obligations under the Community rules with regard either to the first or the second list furnished by the Commission.

1. *The first list*

With regard to the first list, it disputes the Commission's statement that it did not provisionally prohibit the catching of certain species of fish. In this connection it produces decrees prohibiting the catching of nine of the ten species on the list. A decree of this kind was not issued for the tenth quota, namely that for herring fished in Zones IVc (that is, the southern part of the North Sea) and VIId (that is, the eastern part of the Channel), because the quota was not exhausted until the very end of 1986. However, there would have been no practical purpose in publishing in 1987 a decree prohibiting fishing in 1986.

The Netherlands Government admits, however, that the Commission was notified of only two of these nine decrees. were notified to the Commission. Nevertheless, as there was a provisional closed period for fishing, the objective of Article 10(2) of the control Regulation was achieved in all cases.

The Netherlands Government then explains that when it prohibits fishing, it takes three factors into account: first, the available figures for catches already made and recorded, secondly, the estimates of catches already made but not yet registered and, finally, forecasts of catches which might yet be made before the effective prohibition date. Consequently its decisions are made to a large extent on the basis of estimates or forecasts, which explains why the final figures for catches are different and sometimes higher than the figures known at the date of prohibition.

However, it considers that these breaches of quota cannot be attributed to it. They occurred independently of any action by it. Therefore it cannot be inferred from this that the Netherlands Government has failed to fulfil its obligations under Article 10(2) of the control Regulation. It is clear from the judgment in Case C-62/89 *Commission* v *France*, cited above, that in order to assess the behaviour of national authorities with regard to the provisional prohibition of fishing, the reference framework consists of the figures known to the authorities at the time at which they take decisions. As the final figures for breaches of quota were not available when the Netherlands authorities decided to prohibit fishing, those figures cannot be used against them.

The Netherlands Government then illustrates its remarks by informing the Court, in relation to the first list, of the figures in its possession when the provisional prohibition decisions were taken.

It considers that it cannot decide prematurely to close the fishing period because it has to take account of the fishermen's interests.

2. *The second list*

Regarding the second list, the Netherlands Government contests the Commission's claim that the provisional prohibition was ordered at a time when registered catches already exceeded the quota. It puts forward the same arguments as those in relation to

the first list. Although it may have been found subsequently that certain quotas were exceeded, the Netherlands Government considers that it always took its decisions on closure on a proper basis, that is, by reference to the information available at the time.

In particular, with regard to whiting in Zones IIa and IV, it explains that that quota was increased in the course of the year because of exchanges of quotas with other Member States. It claims that it had hoped for a further increase as a result of other negotiations. When it appeared that that was not possible, it had to decide to prohibit fishing.

C — *The Commission's reply*

1. *The first list*

In its reply, first the *Commission* agrees with the Netherlands Government that, of the ten quotas in the first list, nine were the subject of a provisional prohibition of fishing. The Commission adds that, with regard to the tenth quota, namely that for herring fished in Zones IVc and VIId, it withdraws its complaints because it doubts whether the Netherlands authorities could have taken action earlier.

However, it observes that the Netherlands authorities failed to notify it of seven of these prohibitions, which it was required to do by Article 10(2) of the control Regulation. However, under Article 10(3), the purpose of notification of a provisional prohibition is to enable the Commission to issue, by means of a regulation, a final prohibition and to declare it applicable from the date of implementation of the provisional prohibition.

In any case, these provisional prohibitions of fishing did not succeed in preventing the quotas from being exceeded and therefore did not attain their objective.

With regard to the nine provisional prohibitions of fishing relating to the quotas on the first list, the Commission makes the same complaints as those in its application concerning the quotas of the second list, that is, that the Netherlands authorities did not prohibit fishing in good time. In the Commission's opinion, there are three reasons for the lateness of the prohibitions.

First, the Netherlands authorities have a central collation of information concerning landings only once a month. The Commission does not understand why this information is not available to them more frequently.

Secondly, there is too long an interval between the finding that a quota has been largely used up and that it requires a provisional prohibition of fishing and the actual entry into force of the prohibition. The Commission points out that the information on the basis of which the Netherlands authorities decide to prohibit fishing always related to the catch figures recorded at the end of the preceding month and that they often dated back more than a fortnight. However, the Netherlands Government does not explain why it cannot manage to take action earlier.

Finally, there are certain quotas which, because they have been exceeded in the past, ought to have resulted in stricter management.

The Commission agrees with the Netherlands Government that account must be taken of fishermen's interests but, unlike them, it considers that those interests should not be given priority. The conservation of fish stocks outweighs the complete utilization of the quota and this imposes an obligation on the Member States to take all appropriate measures to prevent quotas from being exceeded, as the Court stated in particular in the judgments in Case C-62/89 *Commission* v *France*, cited above, and in Case C-244/89 *Commission* v *France* [1991] ECR I-163.

2. *The second list*

In connection with the second list, the Commission refers to the case of whiting in Zones IIa (EC Zone) and IV. It notes that the Netherlands authorities had hoped to be able to increase this quota because of exchanges with other Member States. The Commission observes that calculations of this kind were censured by the Court in its judgment in Case C-62/89 *Commission* v *France*, cited above.

D — *Rejoinder of the Netherlands Government*

For the *Netherlands Government*, the reply to the question whether it has failed to fulfil its obligations must be assessed not by reference to the cases in which quotas have been exceeded, but in the light of its vigilance at the time at which it decided to prohibit fishing.

The Netherlands Government contends that, in the absence of Community rules, the detailed rules for the utilization of quotas, and therefore the organization of a monitoring system for them, are the sole responsibility of the Member States. In this connection it relies on Article 5(2) of the Regulation establishing the conservation system and Article 10(1) of the control Regulation.

In support of its argument that the objective of Article 10(2) of the control Regulation has been attained, the Netherlands Government points out that the provisional prohibitions of fishing were ordered by means of binding decisions. Following these, fishermen were informed that fishing for the species concerned must stop.

The Netherlands Government emphasizes moreover that the system of the control Regulation bases the fixing of the date of the prohibition of fishing on a fiction. Pursuant to Article 10(2) of that regulation, the provisional prohibition of fishing actually relates to the fixing of the date on which catches are 'deemed to have exhausted the quota'. Consequently the regulation also proceeds from the assumption that it is impossible for the date of the prohibition of fishing to coincide exactly with that of exhaustion of the quota and that therefore allowance must be made for a margin of uncertainty, which the Commission does not do.

On this point, the Netherlands Government states that there is necessarily some delay between the time of landing and the time of

registering catches. It explains that, under its system, statements of landings are given to the Ministry of Agriculture and Fisheries in principle once a month, normally towards the 15th of the month. In this way the national authorities are kept informed of the state of catches up to the end of the preceding month. It is not exceptional for some time to elapse in the making of the monthly statements. On this point, the Netherlands Government stresses that Article 9(2) of the control Regulation adopts an identical system with regard to notification of landings to the Commission. However, it adds that, if the figures indicate that there is a risk that a quota might become exhausted, it carries out registration in the meantime.

The Netherlands Government also observes that sometimes considerable landings take place in other Member States and that in 1986 there was a time lag in the operation of the system for giving information to the Commission. As a rule, one month was needed before the information relating to the landings by Netherlands fishing vessels in other Member States reached the national authorities, which made it impossible for that information to be taken into account when decisions were made on the provisional prohibition of fishing.

Finally, the Netherlands Government contests the Commission's method which systematically refers to infringements committed in the past. Although the figures for previous years may be useful, they are not decisive. Catches may vary from one year to another because of biological factors or climatic conditions.

Therefore the Netherlands authorities consider that they have always acted in conformity with the approach recommended by the Commission itself in Case C-62/89 *Commission* v *France*, cited above.

IV — Replies to questions put by the Court

A — *Question to the Netherlands Government*

1. *Question*

'The Netherlands Government states in its rejoinder that the registration of catches takes place in principle once a month, but that if there is any indication of a risk that a quota may be exceeded, registration is carried out in the meantime.

The Netherlands Government is asked to indicate the legal basis on which registration is carried out "in the meantime".'

2. *Reply*

'In its rejoinder the Netherlands Government explained the way in which registration of catches was carried out in 1986 in the Netherlands and the bodies involved. In addition, a distinction must be made between the figures relating to landings in the Netherlands and those for landings abroad.

As also pointed out in the rejoinder, the latter figures were compiled by the Commission and then transmitted to the Member States.

Three bodies were concerned in registering the figures for landings in the Netherlands: the Produktschap voor Vis en Visprodukten, the Algemene Inspectiedienst (General Inspection Service) of the Ministry of Agriculture, the Environment and Fisheries, and the Directorate for Fisheries of the said Ministry.

The Produktschap voor Vis en Vis Produkten was responsible ... for processing and registering all the data relating to landings of all species of fish in the Netherlands.

In addition, the data for landings of sole, plaice and cod were also registered by the General Inspection Service. The reason for this is that the national quota for these fish is divided ... into individual quotas.

The Directorate for Fisheries had the task of compiling and registering all data relating to catches in the Netherlands and abroad in order to determine the degree of exhaustion of the national quota. For this purpose the Directorate received in principle each month the figures for catches recorded by the Produktschap voor Vis en Vis Produkten. These figures were communicated more frequently if that was made necessary by the degree of exhaustion of a quota ...

The foregoing observations show that in 1986 it was not so much a matter of intermediate registration, as the Court's question seems to imply, but of intermediate communication of registered data.

The Produktschap voor Vis en Vis Produkten gave these communications in the course of joint management tasks. The Ministry of Agriculture, the Environment and Fisheries may, pursuant to Article 2 of the Visserijwet (Law on Fisheries) of 1963 (Stb. 312) request the assistance of the Produktschap for the purpose of fulfilling obligations imposed or powers conferred by international agreements or decisions of bodies governed by international law. Therefore when the Court enquires more specifically as to the legal basis for these intermediate communications, it is appropriate to refer in particular to the context of Article 2 of the Visserijwet ...'.

B — *Question to the Commission*

At the Court's request, the *Commission* sent it the table of breaches of quotas in 1986, which was annexed to its letter of formal notice of 2 October 1986.

That table shows nine cases of breaches of quotas, whereas the corrective letter of 13 May 1987 lists 26 cases.

R. Joliet

Judge-Rapporteur