which no conservation measures were being implemented within the sea zones referred to – which would be contrary to the Hague Resolutions and would result in much more serious consequences than those which would flow from the measures in question – or else would amount to asking the Court to enforce by an order the terms of a proposal which was never adopted by the Council,

P. Pescatore

Judge-Rapporteur

OPINION OF MR ADVOCATE-GENERAL REISCHL DELIVERED ON 21 MAY 1977 [1]

Mr President,
Members of the Court,

Under Article 38 of the EEC Treaty the common market for agriculture governed by Title II of Part Two of that Treaty also includes fisheries. The first comprehensive rules in this sector were contained in Regulation (EEC) No 2141/70 and Regulation (EEC) No 2142/70 of the Council of 20 October 1970 (OJ, English Special Edition 1970 (III), pp. 703 and 707) which were replaced by Council Regulation (EEC) No 100/76 of 19 January 1976 on the common organization of the market in fishery products (OJ L 20 of 28. 1. 1976, p. 1) and Council Regulation (EEC) No 101/76 of 19 January 1976 laying down a common structural policy for the fishing industry (OJ L 20 of 28. 1. 1976, p. 19). Article 2 (1) of Council Regulation (EEC) No 101/76 provides that:

'Rules applied by each Member State in respect of fishing in the maritime waters coming under its sovereignty or within its jurisdiction shall not lead to differences in treatment of other Member States.

Member States shall ensure in particular equal conditions of access to and use of the fishing grounds situated in the waters referred to in the preceding subparagraph for all fishing vessels flying the flag of a Member State and registered in Community territory.'

Further provisions as to fishing rights are contained in Articles 100 to 103 of the Act concerning the Conditions of Accession and the Adjustments to the Treaties. Of particular relevance in the present instance is Article 102 of that Act which provides that:

'From the sixth year after accession at the latest, the Council, acting on a proposal from the Commission, shall determine conditions for fishing with a view to ensuring protection of the fishing grounds and conservation of the biological resources of the sea.'

On 30 October 1976 the Council adopted at The Hague a number of resolutions whereby as from 1 January 1977 the Member States extended the limits of their fishing zones to a distance of 200 miles from their North Sea and North Atlantic coasts by means of concerted action. In conjunction with those resolutions the Commission made the following statement which is set out in Annex VI to the Hague Resolutions:

'Pending the implementation of the Community measures at present in preparation relating to the conservation

1 – Translated from the German.

of resources, the Member States will not take any unilateral measures in respect of the conservation of resources.

However, if no agreement is reached for 1977 within the international fisheries Commissions and if subsequently no autonomous Community measures could be adopted immediately, the Member States could then adopt, as an interim measure and in a form which avoids discrimination, appropriate measures to ensure the protection of resources situated in the fishing zones off their coasts.

Before adopting such measures, the Member State concerned will seek the approval of the Commission, which must be consulted at all stages of the procedures.

Any such measures shall not prejudice the guidelines to be adopted for the implementation of Community provisions on the conservation of resources.'

The Council specifically approved that statement.

At the same time the Council adopted a resolution on certain fundamental principles of the internal fisheries system in which it recognized the necessity of controls and effective measures to further the reconstitution and protection of the fishing grounds and furthermore the necessity of solving the problem of coastal fisheries, in particular in economically underdeveloped regions, and of regulating fishing rights within the coastal zone. In this connexion the Council confirmed the particular problems of Ireland and the requirement of progressive and continued development of the Irish fishing industry.

After the attempts made subsequently to achieve at least a provisional settlement of the problem of the maintenance and conservation of fish stocks had proved to be unsuccessful on 14 February 1977 the Irish Foreign Minister informed the Commission that the Irish Government had decided to adopt unilaterally the conservation measures which it regarded as necessary. On 16 February 1977 the Irish Minister for Fisheries made the two orders which are the object of the action for infringement of the Treaty brought by the Commission and of the application for interim measures lodged at the same time. In the Sea Fisheries (Conservation and Rational Exploitation) Order 1977 fishing within a certain zone around Ireland was prohibited while in the Sea Fisheries (Conservation and Rational Exploitation) No 2 Order 1977 fishing boats not exceeding 33 metres in length or having an engine power not exceeding 1 100 horse-power were exempted from the prohibition.

After further attempts to reach agreement within the Council had proved to be of no avail the Irish Government notified the Commission in a letter of 4 April 1977 that it was putting into force the measures of 16 February 1977 with effect from 10 April 1977. On 2 May 1977 the Commission initiated the proceedings against Ireland for infringement of the Treaty which have led to the present application and the application for interim measures.

My opinion with regard to the application for the adoption of interim measures is as follows:

1. I cannot accept the view of the Irish Government that interim measures are not permissible in proceedings under Article 169 of the EEC Treaty which relate to a legislative measure of a Member State. There can be no doubt that the final decision given in proceedings for the determination of an infringement of the Treaty can require the Member State concerned to revoke or amend legislative provisions. The provision of Article 186 of the EEC Treaty whereby the Court of Justice may in any cases before it prescribe any necessary interim measures is moreover

expressed in very general terms and lays down no exceptions for certain types of procedures or measures. It is therefore not evident why Article 186 of the EEC Treaty should not be applicable in proceedings relating to infringement of the Treaty.

2. A fundamental prerequisite for the adoption of interim measures is that there exists a certain degree of probability that the application in the main action is well founded. In my opinion this has been sufficiently shown at least in respect of the allegation of discrimination against fishing vessels of the other Member States by the Irish measures. In this respect there is no need to examine whether it is necessary to obtain the formal approval of the Commission to the measures under Annex VI to the Hague Resolutions. Under the quite unequivocal text of Annex VI even measures of this kind may under no circumstances be of a discriminatory nature. In the light of the figures submitted by the Commission it can be assumed that only one or two Irish fishing vessels were affected by the Irish orders. On the other hand almost all the Netherlands vessels and approximately one quarter of the French fishing vessels which had previously been active in the area in question are excluded from fishing in this sea area in future. Particularly if it is borne in mind that the greater distance from the fishing grounds makes the use of larger vessels more appropriate this suggests that the effect is to discriminate against fishing vessels of those Member States even if the text of the relevant Irish order makes no reference to the nationality of the individual vessels. At least in the present factual situation and at the present stage of the proceedings therefore the Irish orders at issue appear to conflict with Article 2 (1) of Council Regulation (EEC) No 101/76 of 19 January 1976 and with Annex VI to the Hague Resolutions with the result that for this reason alone the action for infringement of the Treaty might be regarded as well founded.

As interim measures are justified on that ground alone there is no need in this connexion to examine the question whether the Irish orders go beyond the aim of conserving fish stocks.

3. Contrary to the view of the Irish Government the urgency for a decision as to the applicability of the Irish orders already results alone from the fact that the orders are being applied in practice and that in implementation thereof fishing vessels infringing those orders have been seized and criminal proceedings have been commenced against their owners.

4. An important pre-condition for the adoption of interim measures is that they be necessary to prevent serious and irreparable damage.

In this respect the Commission alleges that negotiations with third countries on matters relating to fisheries have been hindered by the Irish measures. However in my opinion it has not shown sufficiently that these negotiations have reached so advanced a stage with regard to catch quotas and the like that they can in any way be prejudiced by the Irish measures. A pre-condition for the negotiations with third countries is in addition that there first exist within the EEC unambiguous and clear rules on fishing zones and possibly protective measures such as catch quotas, close seasons and protected zones. In this connexion in particular I should like to point out however that it does not appear to have been shown sufficiently that the internal establishment of a common policy with regard to the structure of the fishing industry has been hindered precisely by the Irish measures. By their whole nature those measures are merely of an interim nature and are only intended to cover the period until effective conservation rules have been adopted.

In so far as the Commission considers that owing to the Irish measures the danger exists that other areas of the sea

may be over-fished because the fishing vessels avoiding the prohibited area will seek alternatives there, the Commission has not produced sufficient factual evidence for that argument. In addition it should be pointed out that in the final analysis any restrictive measure in *one* fishing area, and the Commission admits that such measures are necessary, may have effects on other fishing areas.

If no interim order were adopted and if the Irish measures remained in force substantial and irreparable damage could arise from the fact that in the case of France a substantial and in the case of the Netherlands a crucial proportion of the fishing vessels which have up to now fished in the henceforth prohibited zone are excluded from that area for a long period. *Prima facie* the statistics submitted by the Commission appear to support this impression. The facts are however to some extent contested by the Irish Government; for example according to the Irish figures only about one half of the Netherlands boats which are listed in the statistics have any intention at all of fishing in Irish waters according to past experience. In addition, after very close examination of the statistics doubts may be felt as to the conclusions drawn by the Commission. In this respect the following questions appear to me to be important: to what extent and during what periods have the excluded boats actually fished in Irish waters? In so far as these boats have been excluded because they are now too large to what extent could they be replaced by smaller vessels? In my opinion it is necessary to have complete certainty on these questions and to know the extent of the threatened damage which is a pre-condition for the adoption of interim measures.

This is particularly important as I am of the opinion that the adoption of an interim order such as that applied for in the present proceedings should be preceded by a weighing of the relative merits which also takes account of the threatened irreparable damage which would arise if the interim order applied for was granted, that is in the present case if the Irish measures were temporarily suspended. In this respect it is quite clearly not possible to overlook the fact that if the Irish orders are suspended without being replaced by other effective measures, if possible for a long period, considerable and possibly also irreparable danger for the fish stocks in Irish waters would ensue.

Until the true extent of the damage which in fact threatens the Netherlands and French fishing industry by virtue of the Irish measures is apparent I do not believe that it is possible to undertake the weighing of the merits which I believe is absolutely necessary. For that reason at the present time I do not propose the suspension of the Irish measures as it has not become evident in the course of the proceedings that they could immediately be replaced by effective unilateral measures whose conformity with the Treaty is not open to doubt. In my opinion it has also not been shown that *immediate* replacement by multilateral measures within the Community appears possible.

I propose rather that by means of a preparatory enquiry and in accordance with Article 85 in conjunction with Article 84 (2) of the Rules of Procedure the damage actually threatening the Netherlands and French fishing industry should be ascertained as necessary by seeking information from both governments.

In any event I may at this stage point out that if the preparatory enquiry, which in my opinion would only require a few days, reveals the threat of

substantial damage the weighing of the merits referred to above would lead me to propose the suspension of the Irish orders for a certain period by means of an interim order. I would urge that a time-limit be set because the parties concerned would thereby be given an opportunity and perhaps also the encouragement for swift negotiations for an effective, appropriate and thus also a durable alternative solution.

If the Court does not agree with my proposal to institute a preparatory enquiry I request that the proposal set out here be regarded as an alternative proposal.