OPINION OF MR ADVOCATE GENERAL LENZ
delivered on 23 April 1991 *

Mr President,
Members of the Court,

A — Facts

1. After British fishery limits had already been extended to 12 nautical miles in 1964, the defendant in the present case extended the waters under its sovereignty from a three-mile zone to a 12-mile zone with effect from 1 October 1987.

2. Since there are in the latter zone so-called low-tide elevations (which were not covered by the three-mile zone) and since the Territorial Waters Order in Council 1964 stipulated that such elevations were to determine the baseline from which the 12-mile limit is to be measured, the 1987 Act also had the result that the baselines in some maritime areas were shifted further out to sea than before, to which, apparently, there can be no fundamental objection in public international law (a minor dispute which did arise in this connection during the oral procedure need not detain us any further).

3. As far as the fishing rights of other Member States within the six to 12 mile zone are concerned, the defendant takes the view that the changes introduced had the further result that those areas shifted in accordance with the alteration to the baseline.

4. As we know, the Commission does not consider this justified. It takes the view that for those fishing rights, which are now mentioned in Article 6 of Regulation No 170/83 establishing a Community system for the conservation and management of fishery resources,[1] the baseline in force on the day on which that regulation entered into force (27 January 1983) is determinative and that subsequent alterations must be regarded as acts which could not properly affect those fishing rights.

5. At this juncture I should first point out that, after Regulation No 2141/70 of the Council of 20 October 1970 laying down a common structural policy for the fishing industry[2] had already provided that the rules applied by each Member State in respect of fishing activities carried on in the maritime waters under its sovereignty or within its jurisdiction must not result in differences in treatment of other Member States (this was subsequently stated in Regulation No 101/76 of 19 January 1976[3]), provision was made in the act governing, *inter alia*, the accession of the defendant to the Community for a departure from this principle of equal access to fishing waters. Under that provision (see Article 100 of the Act of Accession), Member States were authorized, until 31 December 1982, to restrict fishing in waters

* Original language: German.

1 — OJ 1983 L 24, p. 1.
2 — OJ, English Special Edition 1970 (III) p. 703.
3 — OJ 1976 L 20, p. 19.

under their sovereignty or within their jurisdiction, situated within a limit of six nautical miles (which could be extended under Article 101 to 12 nautical miles for certain areas), to vessels which traditionally fished in those waters and which operated from ports in that geographical coastal area. According to Article 100(2), however, Article 100(1) and Article 101 were not to prejudice the special fishing rights which each of the original Member States and the new Member States might have enjoyed on 31 January 1971 in regard to one or more other Member States. If a Member State extended its fishing limits in certain areas to 12 nautical miles, Article 100(3) provided that the existing fishing activities within 12 nautical miles had to be so pursued that there was no retrograde change by comparison with the situation on 31 January 1971.

6. Such a derogation was maintained in Regulation No 170/83, to which I have already referred. Under Article 6(1) of that regulation, Member States were authorized, as from 1 January 1983 and until 31 December 1992, to retain the arrangements defined in Article 100 of the 1972 Act of Accession and to generalize up to 12 nautical miles for all waters under their sovereignty or jurisdiction the limit of six miles laid down in that article.

7. Article 6(2), however, also provides that (in addition to the activities pursued under existing neighbourhood relations between Member States) the fishing activities under the arrangements established in paragraph (1) of that article are to be pursued in accordance with the arrangements contained in Annex I to the regulation, which fixes for each Member State the geographical zones within the coastal bands of other Member States where those activities are pursued and the species concerned.

8. Since the Commission, as we know, failed to convince the United Kingdom that its own view (which, as the Court is aware, is also shared by the French Republic) was correct, proceedings were then commenced under Article 169 of the EEC Treaty. We are now faced with the question whether the Court can in fact uphold the Commission's application and declare that by applying in certain areas, for the purposes of the fisheries arrangements fixed for the coastal waters of the United Kingdom in Annex I, together with Article 6(2), of Council Regulation (EEC) No 170/83 of 25 January 1983 establishing a Community system for the conservation and management of fishery resources, new baselines which are shifted further out to sea than those in force on 25 January 1983, the United Kingdom has failed to fulfil its obligations under the EEC Treaty.

9. Of particular importance for the view put forward by the Commission (this much only is mentioned at the moment) is the acknowledgment that Article 6 of Regulation No 170/83 (like Article 100 of the Act of Accession) provides for a derogation from the principle of *equal access* to fishing waters which is important for the Community. If this is accepted, albeit to some extent at the price of maintaining existing fishing rights, then there is certainly no possibility that the latter can be given a restrictive interpretation according to which adverse changes brought about by the shifting of baselines have to be accepted. The Commission also stresses that, when the derogation was continued in Regulation No

170/83, all the details were carefully negotiated and particular attention was paid to achieving a balanced allocation of fishing activities between the coastal States and other Member States which took account of all relevant interests: this certainly excluded unilateral alterations, even those made by measures permitted under public international law; the overall scheme, to which fishing quota rules also belong, was to be amended only by an act of the Council.

B — Opinion

10. If we consider what is to be made of the opposing arguments put forward by the defendant, we arrive at the following individual conclusions.

11. 1. First of all, it must be acknowledged — the Commission also accepts this — that, in view of the multiplicity of Community regulations involving bands of coastal waters of various widths (three, four, six, 12-mile zones), it must be assumed that the baselines which determine those zones are in fact ambulatory lines and that any alteration to them also has consequences for Community law. This is particularly true in the case of Council Regulation No 3094/86 laying down certain technical measures for the conservation of fishery resources,[4] on which the defendant placed particular emphasis because it is based on Regulation No 170/83 (see Article 9 of Regulation No 3094/86 which prohibits certain fishing methods in the 12-mile zone or the three-mile zone of a number of Member States).

4 — OJ 1986 L 288, p. 1.

12. This does not, however, logically lead to the conclusion that the situation is the same with all Community regulations in which baselines are involved, quite irrespective of their regulatory content. After all, it should be remembered that many of the Community regulations, in respect of which even the Commission accepts the existence of ambulatory baselines, deal with measures relating to structural policy and the conservation of fishery resources. The nature of the matter is such as to dictate that those regulations should have the widest possible sphere of application, something to which ambulatory baselines can contribute, and in particular it is important that they should apply in the same way to all those engaged in fishing.

13. A distinctive feature of the provisions concerned in the present case, however, is that they establish for certain waters a special regime (consisting of exclusive fishing rights for fishermen from the coastal State and special fishery rights for a number of other Member States). If the baselines could be altered, leading to the shifting of fishing zones, discriminatory effects would certainly be conceivable, precisely because fishing areas accessible to certain Member States prior to an alteration in baselines would thereafter become the exclusive reserve of fishermen from the coastal State. Bearing this in mind (and let us not forget that the Commission took up this issue because interested parties in a number of Member States having special fishing rights in British coastal waters claimed that they had incurred serious damage), it is indeed conceivable to construe relevant provisions relating to coastal zones extending from baselines differently than would appear appropriate in the case of many other provisions in which baselines also play a part, even where there is no *express* provision.

14. 2. It must also be recognized that on the face of it there may be something in the point that *Annex II to Regulation No 170/83*, which refers to Article 7 of that regulation, made it perfectly clear, by its reference to latitude and longitude, that a permanent, immutable zone was involved. The defendant believes that if this result had also been intended for Annex I to the regulation and in the light of Article 6 thereof, a similar way of making the matter clear would have been chosen and reference would not have been made to maritime waters determined by baselines (which may be ambulatory under public international law).

15. It must however be pointed out in this regard that Article 7 of Regulation No 170/83 and Annex II thereof deal with conservation measures (regulation of access to certain zones by means of a licensing system) which apply equally to all those concerned and that, moreover, the area in question extends well beyond the 12-mile zone, so that a method of delimitation other than that of reference to baselines was technically necessary.

16. Another point which might also be regarded as evident is that, as regards the quite different problem of demarcating the zones with special fishing rights, which stretch like a *belt* around Great Britain, considerable difficulties would have arisen in demarcating precisely according to latitude and longitude the relevant areas for the various Member States. One glance at the sea chart submitted to the Court with the statement of defence (Annex XVI) makes this clear. This is probably why in Annex I (apart from precise lateral limitations) reference was simply made to zones of coastal waters, which, of course, does not exclude a presumption of unalterability, if the remainder of the regulation suggests this.

17. Referring to the fact that in Annex II to Regulation No 170/83 the 'Shetland box' is based in two places on the 12-miles line, the defendant further argues that it is difficult to imagine proceeding here on the basis of two different methods of demarcation (one for the 'Shetland box' using ambulatory baselines and one for special fishing rights using fixed baselines) and that it would have made sense in this case to lay down special provisions to deal with this problem (but which do not exist), to which it may simply be replied that — if I have correctly understood the position from the charts submitted to the Court — other Member States enjoy no special fishing rights at all in the 'Shetland box' region. The danger of confusion mentioned by the defendant is therefore non-existent and there was thus no need to lay down special provisions concerning those maritime areas for which the 12-miles line is of importance in the 'Shetland box'.

18. 3. As the Court is aware, the defendant attaches particular significance to a number of *considerations based on public international law.*

19. Its starting point is the connection between Article 6 of Regulation No 170/83 and Article 100 et seq. of the Act of 22 January 1972 concerning the Conditions of Accession. It points out that in Article 100 of that Act the terms 'waters under . . . sovereignty' and 'baselines' are used, and that both are determined by

public international law (in particular, the London Convention of 9 March 1964 and the Geneva Convention of 29 April 1958), since Community law has no particular provisions on the matter which would justify the conclusion that the baselines are ambulatory lines. It also contends that the special fishing rights which are referred to in Article 100(2) of the Act of Accession and which must be maintained in accordance with Regulation No 170/83 (as may be gathered from the preamble to that regulation) have their origin in public international law (in the 1964 London Convention and in bilateral agreements). However, since for the latter a method of identification and localization was used like that applied in the Annex to Regulation No 170/83, it must be assumed — because there is nothing else expressly provided — that principles of public international law may also be applied in the interpretation of Regulation No 170/83.

20. I believe, however, that it can be shown without great difficulty that those arguments do not shake the Commission's view and that there are indeed a number of weighty considerations which bear out its correctness and which so far have not been discussed.

21. (a) The first, fundamental, point to be made is that it may not necessarily be deduced from the absence of an express provision (in the sense of the Commission's position) — to the effect that the baselines in force on 27 January 1983 apply for the purposes of Annex I to Regulation No 170/83 — that that regulation cannot possibly have this meaning.

22. While it is certainly desirable that the legislature should express its intent as clearly as possible (and it does so with agreeable frequency), it is not uncommon in legal practice for the true meaning of provisions to be elicited through intricate interpretation using a wide range of criteria. That is also the way in which to proceed in the present case and if in the light of compelling considerations (pertaining to the content and the general scheme of the provisions), it emerges that those provisions can have only the meaning which the Commission considers correct (we shall see that there are such considerations), then, of course, the regrettable shortcoming in them pointed out by the defendant has no decisive importance.

23. (b) It must also be noted, in view of the use of concepts of public international law in Community instruments and the clearly existing connection between the London Fisheries Convention of 9 March 1964, on the one hand, and Article 100 of the Act of Accession and Regulation No 170/83, on the other, that in such a situation it may not be automatically assumed that public international law has simply been incorporated into Community law. Rather, the question immediately arises whether and to what extent there has been a modification of concepts of public international law pursuant to the Community law in which they are embedded, in particular because Community law 'constitutes a new legal order of international law'[5] which, in the relations between the Member States, has clear precedence over obligations arising under public international law (as was held, for example, in the judgment in the *Tome* and *Yurrita* cases[6]).

5 — Judgment of 5 February 1963 in Case 26/62 *Van Gend en Loos* [1963] ECR 1.

6 — Judgment of 8 December 1981 in Joined Cases 180 and 266/80 *José Crujeiras Tome* v *Procureur de la République* and *Procureur de la République* v *Anton Yurrita* (Fisheries — Rights of non-member countries) [1981] ECR 2997.

24. Viewed in this light, it is indeed significant (apart from the fact that Article 10 of the London Convention also includes a proviso in favour of Community law) that the relevant Community law in the present case and the rules of public international law are governed by quite separate principles. While the normal position under the London Convention is that the coastal States have exclusive fishing rights within a 12-mile zone and fishing rights of other Contracting States in that area are regarded rather as exceptional, the distinguishing feature of Community law in this area is the principle that all Member States have equal access to fishing waters and the right of coastal States to reserve fishing rights to themselves in specific zones (which, incidentally, first occurred in the Act of Accession, since the derogation provided for by Article 4 of Regulation No 2141/70 never came into operation for want of implementing provisions) can be regarded as nothing more than a temporary derogation. This, of course, is of considerable importance for the interpretation of the rules concerned, in the sense that anything which restricts access to coastal zones, which must in principle be equal for all (including, therefore, special fishing rights which other Member States already have there), must receive particularly close scrutiny with reference to Community law, and, conversely, anything which militates in favour of preserving such special rights carries special weight.

25. (c) Even if the existence of a certain connection between the regime established by the London Fisheries Convention and the rules concerned here cannot be denied, it is none the less plain that the latter rules are not merely a continuation of the former.

26. It is noteworthy that Article 100(1) of the Act of Accession refers to fishing in the six-mile zone by vessels 'which . . . *traditionally . . . operate from ports* in that geographical coastal area', whereas the London Convention (in Article 2) refers to the *coastal State's* exclusive right to fish in the six-mile zone.

27 Furthermore, it may be pointed out that in the relations between the former Member States pursuant to Regulation No 2141/70 the principle of equal access to fishing waters applied from 1 February 1971 onwards and only after its repeal by Article 100 of the Act of Accession were the rules in force up to 31 January 1971 continued.

28. It is also worth noting that Article 100 of the Act of Accession refers not only to fishing rights but also, in paragraph (3), to '*fishing* activities' and that Regulation No 170/83 refers only to *fishing activities* in specified zones without any reference to the position on 31 January 1971, which was governed by the London Convention.

29. Those points undoubtedly suggest that the detailed rules for the application of the London Convention (including ambulatory baselines) cannot necessarily be assumed to be operative in Community law.

30. (d) That they are indeed to be regarded as foreign elements in this context is made

clear on the other hand by a number of other considerations.

31. (aa) Article 100(2) of the Act of Accession (the provisions of which were in a way to be continued in Regulation No 170/83, so that it may be assumed that the regulation should not at least fall short of the standard set by the Act of Accession) refers to special fishing rights which might have been enjoyed on 31 January 1971. If that date alone suggests the fixing of a situation with which ambulatory baselines and shifting fishing zones are irreconcilable, then it is also clear that if such shifts are permitted, fishing rights may be eroded or even reduced to *rights devoid of substance*. The representative of the French Government pointed this out very clearly at the hearing when he referred to the wide variety of fish in various maritime waters and to the very different traffic situations in the different fishing areas (which naturally have an effect on fishing activities) and reminded the Court that in areas situated further from the coast fishing activities are, at least in the case of smaller vessels, influenced by weather conditions and by the distance from safe ports.

32. (bb) The same point may be made with regard to the term *'fishing activity'* used in Regulation No 170/83, which refers to specific areas with specific resources. This activity can in fact easily become relative or total *inactivity* if the fishing areas in question shift as a result of changes to the baselines and those entitled to fish are forced to pursue their fishing activities in unfamiliar areas.

33. (cc) I also consider significant the abovementioned rule contained in *Article 100(3)* of the Act of Accession (even though it is clear that it is not applicable to the British measure of 1987 with which we are here concerned). Since it was directed that, in the event of a Member State extending its fishing limits to 12 nautical miles, existing fishing activities had to be so pursued 'that there [was] *no retrograde change* by comparison with the situation on 31 January 1971', this can only be understood as strict adherence to the position existing at that time. Given that rule, one is bound to agree that, had those who drafted the Act of Accession considered at the outset that ambulatory baselines based on principles of public international law were of fundamental relevance, they would have considered appropriate a similar standstill provision, such as that contained in Article 100(3), for the event that such baselines might be updated (and fishing areas thereby shifted).

34. (dd) In accordance with the dictum that Community legislation must be interpreted in the light of its legal context as well as its subject-matter and purpose (see the judgment of the Court in Case 61/77 *Commission* v *Ireland* [7]), I also consider important the fact that Regulation No 170/83 does not simply refer to the situation existing on 31 January 1971, that is to say, it does not merely reproduce the rules contained in Article 100 of the Act of Accession: it *specifies* the protected fishing activities exactly (according to areas,

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

periods and even species of fish); quite clearly, therefore — evidently after protracted and difficult negotiations — there has been a meticulous elaboration and adaptation of the rules. Furthermore, it should not be overlooked that the regulation (whose title refers to the 'conservation and management of fishery resources') also contains provisions on catch quotas as part of an overall scheme and is thus attempting, having regard to all those aspects, to achieve for a period of 10, possibly 20,[8] years what is certainly a delicate balance of interests.

35. Thus, the idea of ambulatory baselines is indeed difficult to reconcile with the consequence that in places considerable changes in fishing activities occur. It would amount to disregard of the principle, expressed in Article 4 of the regulation, of guaranteeing relative *stability of fishing activities* in the Member States and would also entail a danger for the common conservation policy, because it may be assumed that fishermen from other Member States who lose their traditional fishing areas will switch to other areas (which are generally accessible anyway) and will there risk overfishing.

36. (ee) Finally, some useful guidance on interpretation can also be gleaned from the declaration on Annex I to Regulation No 170/83 made by the Council and the Commission, which states that, so long as the system defined in Article 6(1) remains in force, Annex I may be amended by way of a regulation of the Council, acting on a proposal from the Commission, following *a joint application by the Member States directly affected.* If it was considered appropriate to emphasize this and in particular the need for joint action by States with coastal zones and those enjoying special fishing rights, the only possible conclusion is that the balance of interests established in the regulation is not to be imperilled through *unilateral* measures (which include those measures which may be provided for in public international law in another context).

37. 4. If, then, the considerations examined thus far lead us to the conclusion that the interpretation of Regulation No 170/83 that the Commission considers correct is to be preferred to the defendant's position and, that, therefore, for the purposes of Article 6(2) regard should be had to the baselines existing at the time when the regulation entered into force, it can also be demonstrated that a number of other considerations put forward by the defendant do not alter this conclusion.

38. (a) This is true of the contention that if invariable baselines were accepted with regard to Regulation No 170/83 whilst ambulatory baselines are permitted in other areas of Community law, that is to say, if two *different 12-mile zones* were accepted, this would confuse the authorities whose task it is to apply the Community rules and might also create practical difficulties in the making of maritime charts.

39. I find it difficult to imagine how the existence of different geographical areas of application in relation to different regimes could overstrain the administrative auth-

8 — See the eighth recital in the preamble to Regulation No 170/83 and Article 8 thereof.

orities and individuals concerned. Special charts can be produced for different types of purposes without inordinate problems and, moreover, it is difficult to see how the absence of special Council provisions with regard to the relationships existing between such different regimes should create insoluble difficulties. After all, the Commission referred in this connection to the Belgian Decree of 28 January 1988, which is based upon the Commission's position, and this reference cannot simply be dismissed on the ground that the decree has little practical effect in view of the characteristics of the Belgian coast and the negligible alterations made to Belgian maritime charts during the last 10 years. On the contrary, if there is a question of practical difficulties, then ambulatory baselines would in fact contribute to them, because they would create *uncertainties for fishermen*, who would be forced to abandon familiar fishing grounds.

40. (b) Nor can any decisive weight be attached to the defendant's argument that it has made numerous alterations to the baseline over many years without encountering any objections and that since 1971 fishing zones have also shifted in other Member States (including France) owing to shifts in baselines.

41. One important point here, as France's representative stressed emphatically without contradiction at the hearing, is that there have been no changes in the baseline *affecting traditional fishing activities* brought about by that Member State. The most important point, however, is that it is not, of course, the practical application of rules which relate to baselines which can be the most important factor, but solely what is required by the meaning and the objectives of the Community rules. Besides, it may be assumed that the fact that there were no Community reactions in the past to the redrawing of baselines may be explained by the fact that changes in baselines due solely to *natural* changes in low-tide elevations had no, or at least no appreciable, effects on fishing activities. Now, however, evidently as a result of the extension of territorial waters from three miles to 12 miles, a change of such magnitude has occurred that complaints have been made to the Commission about persistent interference with fishing activities and it has therefore been decided to examine the problem thoroughly.

42. (c) In so far as the defendant further contends that the view taken by the Commission entails a disadvantage for it (whereas the position today would certainly correspond to its viewpoint had it extended the limit of its territorial waters to 12 miles in 1971), this contention likewise cannot lead to a different conclusion, nor the point that with ambulatory baselines a balancing of interests could be expected in the long term (because baselines may, of course, shift in a landward direction).

43. First of all, as the defendant itself points out, none of the original or future Member States had 12-mile territorial limits at the beginning of 1971. Secondly, it is not at all certain that the balancing of interests expected by the defendant would in fact occur, for it should not be forgotten that the rules concerned may remain in force only until 1992[9] and that the redrawing of

9 — See Article 8 of the regulation.

baselines can have quite a different effect on fishing areas. Furthermore, it is difficult to accept that a landward shift of fishing areas due to natural occurrences (the disappearance of sandbanks) would be the same in extent as the shift which occurred in the opposite direction following the extension of territorial waters in 1987 and which the defendant believes to be proper.

44. (d) I also fail to see how the defendant's references to the judgments of the Court in Cases 61/77 *Commission* v *Ireland*, and 38/77 *Enka*,[10] can be relevant in any way to the present case.

45. In the first of those two judgments, the Court did indeed rule that the extension of fishing waters by national measures also affected the scope of Regulation No 101/76. But it must be remembered that that regulation lays down a common structural policy and joint conservation measures, in other words, rules on fishing activities which apply without distinction to all those concerned and under which problems such as those now before us did not arise.

46. In the second case, *Enka*, concerning the interpretation of a Community regulation (on the value of goods for customs purposes), the Court explained that it had to follow a Convention on the valuation of goods for customs purposes to which all the Member States were contracting parties, but this result was dictated by the fact that the Community regulation in question reproduced the provisions of the Convention almost word for word. The difference in the present case, however, is that the rules of public international law governing fishing rights (laid down in the London Convention and in bilateral agreements) were based on a different principle than the Community law rules and that the straightforward adoption of the conclusions indicated by the agreements drawn up under public international law would not therefore be appropriate.

47. (e) Finally, as regards the argument that natural factors (erosion) led to an inward displacement of the baseline and that on grounds of public international law this cannot be without significance for the demarcation of areas with special fishing rights (because an equal shift in the outer limits of the fishing waters is absolutely necessary), I find this an equally unconvincing argument for recognizing ambulatory baselines in the area now concerned.

48. Even where such circumstances occur, the areas in which other Member States enjoy special fishing rights may still be considered immovable, as the representative of the Commission correctly pointed out at the hearing. The crucial point here is quite simply that fishing waters have been extended since 1977 to 200 nautical miles. Thus, even if it should be considered imperative on grounds of public international law to alter the outer limits of fisheries jurisdiction to reflect a change in

10 — Judgment of 23 November 1977 in Case 38/77 *Enka BV* v *Inspecteur der Invoerrechten en Accijnzen* (Value for customs purposes — Costs of warehousing) [1977] ECR 2203.

baselines, this does not affect fishing rights established in the 6 to 12-mile zone — in other words, Community law can take precedence without difficulty in this sphere because there is no possibility of conflict with public international law.

C — Conclusion

49. 5. To summarize, then, I would conclude that the Commission's case is supported by the more convincing arguments and that the Court should accordingly uphold its application and declare that by applying in certain areas, for the purposes of the fisheries arrangements fixed for the coastal waters of the United Kingdom in Annex I, together with Article 6(2), of Council Regulation (EEC) No 170/83 of 25 January 1983 establishing a Community system for the conservation and management of fishery resources, new baselines which are shifted further out to sea than those in force on 25 January 1983, the United Kingdom has failed to fulfil its obligations under the EEC Treaty. In view of this outcome, the defendant is also to be ordered to pay the costs, including those incurred by the party intervening in support of the Commission.