2. Orders the United Kingdom to pay the costs of the action including those of the interveners.

Kutscher O'Keeffe Touffait Mertens de Wilmars Pescatore

Mackenzie Stuart Bosco Koopmans Due

Delivered in open court in Luxembourg on 10 July 1980.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE GENERAL REISCHL DELIVERED ON 21 MAY 1980 [1]

Mr President,
Members of the Court,

The procedure for a declaration that a Member State has failed to fulfil its obligations under the Treaty on which I am giving my opinion today concerns serveral fisheries measures unilaterally adopted by the Government of the United Kingdom. I shall, therefore, before describing the measures in detail, briefly recall once more the relevant provisions of Community law on fishery products, the scope of which has already been defined in some instances by the Court of Justice in Joined Cases 3, 4 and 6/76 (*Cornelis Kramer and Others*, judgment of 14 July 1976 [1976] ECR 1279), Case 61/77 (*Commission of the European Communities* v *Ireland*, judgment of 16 February 1978 [1978] ECR 417), Joined Cases 185 to 204/78 (Criminal proceedings against *Firma J. van Dam en Zonen and Others*, judgment of 3 July 1979 [1979] ECR 2345) and Case 141/78 (*French Republic* v *United Kingdom of Great Britain and Northern Ireland*, judgment of 4 October 1979).

The powers of the Community to adopt Community rules on the conservation and management of fishery resources are based on Articles 3 and 38 *et seq.* including Annex II to the EEC Treaty.

Articles 98 to 103 of the Act concerning the Conditions of Accession and the Adjustments to the Treaties annexed to the Accession Treaty of 22 January 1972 contain additional provisions on fishery products. In particular, Article 102 of the Act concerning the Conditions of Accession and the Adjustments to the Treaties provides that, from the sixth

1 — Translated from the German

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

On 19 January 1976 the Council adopted Regulation (EEC) No 100/76 on the common organization of the market in fishery products (Official Journal L 20 of 28 January 1976, p. 1) and Regulation (EEC) No 101/76 laying down a common structural policy for the fishing industry (Official Journal L 20 of 28 January 1976, p. 19), which repealed the corresponding regulations, Regulation (EEC) No 2142/70 (Official Journal, English Special Edition 1970 (III), p. 707) and Regulation (EEC) No 2141/70 (Official Journal, English Special Edition 1970 (III), p. 703).

The provisions of Regulation No 101/76 which are relevant to this case provide as follows:

"Article 1

Common rules shall be laid down for fishing in maritime waters and specific measures shall be adopted for appropriate action and the co-ordination of structural policies of Member States for the fishing industry to promote harmonious and balanced development of this industry within the general economy and to encourage rational use of the biological resources of the sea and of inland waters.

Article 2

1. 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.

2. Member States shall notify other Member States and the Commission of the existing laws and administrative rules and regulations in the field referred to in the first subparagraph of paragraph 1 together with those arising out of application of the provisions referred to in the second subparagraph of that paragraph.

3. ...

Article 3

Member States shall notify other Member States and the Commission of any alterations they intend to make to fishery rules laid down pursuant to Article 2.

Article 4

Where there is a risk of over-fishing of certain stocks in the maritime waters referred to in Article 2, of one or other Member State, the Council, acting in accordance with the procedure provided for in Article 43 (2) of the Treaty on a proposal from the Commission may adopt the necessary conservation measures.

In connexion with the extension of the fishing zones in the North Sea and the North Atlantic to 200 miles as from 1 January 1977, the Council agreed in The Hague on 30 October 1976, or rather on 3 November 1976, to a Commission declaration which forms Annex VI to the Hague Resolution and is worded as follows:

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

On 18 February 1977 the Council subsequently adopted Regulation (EEC) No 350/77 laying down certain interim measures for the conservation and management of fishery resources (Official Journal L 48 of 19 February 1977, p. 28), which remained in force until the end of 1977.

After the negotiations in the Council on further intra-Community rules on the conservation and management of fishery resources had failed the Council agreed at its meeting on 30 and 31 January 1978 to a Commission declaration worded as follows:

"The Council failed to reach agreement at this meeting on the definition of a new common fisheries policy but agreed to resume examination of these matters at a later date. Pending the introduction of a common system for the conservation and management of fishery resources, all the delegations undertook to apply national measures only where they were strictly necessary, to seek the approval of the Commission for them and to ensure that they were non-discriminatory and in conformity with the Treaty".

The individual fisheries measures adopted by the Government of the United Kingdom must be considered against this background.

The Commission's first complaint is directed against a restriction on fishing for herring in what is known as the Mourne Fishery. This area lies within Division VII (a) of the Irish Sea defined by the International Council for the Exploration of the Sea and extends for 12 miles from the baselines off the east coast of Northern Ireland and Ireland between 53° and 55° latitude North. In this area what is known as collective fishing was carried on, in that Irish fishermen could fish in British waters and vice versa.

Article 3 of Council Regulation (EEC) No 1672/77 of 25 July 1977 laying down interim measures for the conservation and management of certain herring stocks (Official Journal L 186 of 26 July 1977, p. 27) laid down a prohibition on direct fishing for herring for the remainder of 1977 for the area in question between 53° 20′ latitude North and 54° 40′ latitude North. Article 7 of that regulation provided that the Member States "shall take, as far as is possible, all necessary steps to ensure compliance with the provisions of this regulation within the maritime waters under their sovereignty or jurisdiction and covered by the Community rules on fisheries".

These provisions were extended until 31 January 1978 by Regulation (EEC) No 2899/77 (Official Journal L 338 of 28 December 1977, p. 5).

In addition, the Commission, starting on 17 October 1977, submitted to the Council a series of proposals for regulations which likewise provided for a total allowable catch of 0 tonnes for the area in question but which were not adopted by the Council (see COM 77/524 of 17 October 1977; COM 78/6 of 18 April 1978, Official Journal C 144 of 19 June 1978, p. 1, and of 15 June 1978, Official Journal C 167 of 12 July 1978, p. 1). Article 3 of the last Commission proposal in this connexion (COM 78/206, Official Journal C 160 of 6 July 1978, p. 3) contains the same rules for 1978 as those laid down for 1977 in Article 3 of Regulation (EEC) No 1672/77.

By letter of 18 September 1978 the Government of the United Kingdom sought the approval of the Commission for conservation measures in the area described, in accordance with Annex VI to the Hague Resolution. The Herring (Restriction of Fishing) Regulations (Northern Ireland) 1978 (Statutory Rules of Northern Ireland No 277), which were adopted on 18 September 1978 and came into force on 20 September 1978, provided for a total ban on herring fishing for the rest of 1978 in the Mourne Fishery within British fishery limits between 55° latitude North and 54° latitude North. Only boats of under 35 feet in length were exempted from that prohibition and could until 27 October fish a maximum of 400 tonnes of herring in a half-mile wide coastal strip between 54°10' latitude North and 54° latitude North off the Northern Irish coast of County Down. In addition it was provided that fishing was to be closed to all fishing boats before 27 October when 400 tonnes of herring had been landed by the small boats. After this catch quota had been prematurely filled, the Government of the United Kingdom repealed the exemption described as from 26 September 1978 by the Herring (Restriction of Fishing) (Amendment) Regulations (Northern Ireland) 1978 (Statutory Rules of Northern Ireland No 286).

The second complaint of the Commission is directed against the introduction of a licensing system, the temporary closure and the introduction of catch quotas in the Isle of Man and the waters off the west coast of the United Kingdom in Division VII (a) defined by the International Council for the Exploration of the Sea.

Article 1 of Council Regulation (EEC) No 1779/77 of 2 August 1977 laying down interim conservation and management measures for herring fishing in the North Sea (Official Journal L 196 of 3 August 1977, p. 4), which was also extended until 31 January 1978 by Regulation (EEC) No 2899/77, prohibited direct fishing for herring from 1 October to 19 November 1977 in the area defined therein. Article 2 of that regulation provided for catch quotas for France, Ireland, the Netherlands and the United Kingdom for the remainder of 1977.

The Government of the United Kingdom issued on 8 August and brought into force on 12 August 1977 the Herring (Irish Sea) Licensing Order 1977 (Statutory Instrument No 1388) and the Herring (Isle of Man) Licensing Order 1977 (Statutory Instrument No 1389). The first of those orders prohibited fishing for herring by British boats in the

Irish Sea, whilst the second introduced a prohibition on fishing for herring in various parts of the fishery around the Isle of Man for British fishing boats, fishing boats registered in the Isle of Man and Irish fishing boats. The Irish fishermen were mentioned because they possess historic fishing rights recognized in the London Fisheries Convention of 1964 within the 12-mile limits of the Isle of Man in an area south-west of the Isle of Man between 6 and 12 miles. Both orders provided for the issue of fishing licences by the competent British ministries or the Isle of Man authorities.

The Commission was notified of those orders, together with a series of other measures, in a letter of 13 February 1978 containing no express request for approval in accordance with Annex VI to the Hague Resolution.

Only on 17 August 1978 did the British Government seek the Commission's approval for measures which were to come into force on 21 August in agreement with the Government of the Isle of Man and which were intended to control fishing in the waters in question. In this connexion the catch quota for British and Isle of Man fishing gear was to be restricted to a total of 8 100 tonnes including herring caught before 21 August. In addition, under those orders fishing by United Kingdom and Isle of Man boats was to be controlled by the issue of licences. 120 licences were to be issued to United Kingdom fishing boats on the basis of the historic exercise of fishing rights. Moreover, it was announced that the Government of the United Kingdom would also issue licences for those boats which fished in waters other than those off the coast of the Isle of Man and which possessed a licence for the waters off the Isle of Man. The licence system was in addition to provide for a daily catch quota, for the notification of all catches upon landing in certain ports. Finally, the telex message also contained the announcement that fishing would be closed from 24 September to 31 December 1978. The ban on fishing was then imposed, as regards the United Kingdom fisheries in the zone described, by the Irish Sea Herring (Prohibition of Fishing) Order 1978 (Statutory Instrument No 1374) of 20 September 1978; in this connexion the territorial waters around the Isle of Man were not affected.

These measures adopted by the United Kingdom were not approved by the Commission.

Finally, the Commission's third complaint is directed against the unilateral extension of what is known as the Norway Pout Box by the Government of the United Kingdom. In this fishery, which lies off the north coast of the United Kingdom, there is, *inter alia*, industrial fishing for pout. In this connexion a large proportion of immature fish of other species of fish which live on the sea bottom and are fit for human consumption are caught as by-catches. Council Regulation (EEC) No 350/77 of 18 February 1977 laying down certain interim measures for the conservation and management of fishery resources (Official Journal No L 48 of 19 February 1977, p. 28) for that reason prohibited fishing for Norway pout from 21 February 1977 to 31 March 1977 in the part of the North Sea described in that regulation. The area, which lies

between 56° and 60° latitude North, was thereby restricted to the east by the Greenwich meridian. By Regulation (EEC) No 1673/77 of 25 July 1977 amending Regulation (EEC) No 350/77 as regards the prohibition of fishing for Norwegian pout (Official Journal L 186 of 26 July 1977, p. 30) the Council then provided for a ban on fishing in respect of the same area from 1 September to 15 October 1977, which was extended until 31 October 1977 for part of that area by Council Regulation (EEC) No 2243/77 of 11 October 1977 prohibiting fishing for Norway pout (Official Journal L 260 of 13 October 1977, p. 1).

When this period expired the Government of the United Kingdom issued on 31 October 1977 the Norway Pout (Prohibition of Fishing) (No 3) Order 1977 (Statutory Instrument No 1756) which came into force on 1 November 1977 and prohibited all fishing for Norway pout in the area described.

For 1978 the Commission submitted to the Council on 14 October 1977 a proposal for a regulation laying down technical measures for the conservation of fishery resources (Official Journal C 278 of 18 November 1977, p. 8), which provided, in the version amended by the Commission proposal of 1 December 1977 (COM 77/646 Final), for an extension of the Norway Pout Box to 1° longitude East in the first and last quarters of 1978. This proposal was, however, replaced as early as 16 January 1978 by a further proposal (COM 78/7 Final) which was intended to lead to a reduction in by-catches by other measures.

When this proposal was not adopted by the Council, the Government of the United Kingdom sought by letters of 3 and 20 July 1978 the Commission's approval of a conservation measure which provided that the area in question was to be extended at its eastern limits, so far as the British fisheries extended, to 2° longitude East from 1 October to 31 March of each year. Although approval was not granted, the Government of the United Kingdom issued on 20 September 1978 the Norway Pout (Prohibition of Fishing) (No 3) (Variation) Order 1978 which came into force on 1 October 1978 and laid down the measures which had been notified.

By letter of 27 October 1978 the Commission then initiated against the United Kingdom the procedure laid down in Article 169 of the EEC Treaty and found that the United Kingdom had failed to fulfil its obligations under the EEC Treaty by adopting the unilateral fisheries measures described. The Government of the United Kingdom however rejected this complaint by letters of 8 December 1978 and 2 January 1979, taking the view that none of the measures complained of were incompatible with Community law. The Commission subsequently delivered to the United Kingdom on 17 January 1979 a reasoned opinion under the first paragraph of Article 169 of the EEC Treaty which was served on 22 January 1979 and in which the United Kingdom was requested to take all necessary measures to comply with the opinion within 14 days.

When the United Kingdom had refused to comply with the opinion the Commission brought the matter before the Court of Justice on 27 February 1979 and applied for a declaration that the United Kingdom had failed to fulfil its

obligations under the EEC Treaty in the ways described in the application and for an order that the United Kingdom should pay the costs.

The Kingdom of Denmark, the French Republic, Ireland and the Kingdom of the Netherlands intervened in the procedure in support of the Commission.

I adopt the following viewpoint on the measures which form, for practical purposes, three separate procedures:

I — The Mourne Fishery

The Commission, supported in particular by the French Republic, is of the opinion that the United Kingdom has, by adopting the Herring (Restriction of Fishing) Regulations (Northern Ireland) 1978, failed from several points of view to fulfil its obligations under the EEC Treaty. In its view only a total ban on fishing for herring in the Mourne Fishery would have constituted a measure appropriate and thus also permissible under Community law for the protection of the herring stock in that area. The catch quota of 400 tonnes which was permitted after 19 September and which at any rate accounted for 6% of the total estimated herring stock there at the beginning of the year is incompatible with the conservation measures recommended by the International Council for the Exploration of the Sea which were moreover also reflected in the Commission's proposals.

The Commission claims that the fact that the Commission was informed of the intended measures only less than 36 hours before they came into force, without giving reasons for the 400-tonne exemption provided for, must be regarded as a further infringement. Finally, the restriction to small boats which were the only ones able to make use of the exemption at all led to discrimination against fishermen of other Member States who could hardly reach the fishing grounds in question in corresponding small boats.

Regardless of these objections, the Commission takes the view in addition that the fishery in question should have been closed as soon as possible after the International Council for the Exploration of the Sea had recommended this and when, after the expiry of the relevant Council regulation on 31 January 1978, no further agreement was reached within the Council. For this reason the United Kingdom was under a duty under Community law to prohibit direct fishing for herring in the Mourne Fishery from 6 February 1978 at the latest, the date on which Ireland closed its own waters pursuant to a Commission proposal and with the Commission's approval.

The Government of the United Kingdom on the other hand justifies its actions by stating that the International Council for the Exploration of the Sea proposed that a total prohibition on fishing for herring should be adopted in the area in question in 1978 and 1979. The United Kingdom complied with this recommendation by totally prohibiting direct fishing for herring in the Mourne Fishery within its fishing limits from 26 September 1978. The exemption permitting boats of under 35 feet in length to fish up to 400 tonnes of herring within half a mile of the County Down coast until 27 October 1978 at the latest was merely an interim measure introduced to reduce the

economic and social hardships which would have arisen for the coastal fishermen owing to the fishing ban.

Moreover, the ban on fishing and the exemption were applied equally to all fishermen.

As a result of the appearance of several British trawlers in the area in question the United Kingdom Government was forced to act quickly and could for this reason seek the Commission's approval of the measures which it had proposed anyway only two days before those measures came into force.

The Governement of the United Kingdom states that it must also concede to the Commission that it is possible that the fishery in question should have been closed earlier but the damage which has occurred cannot be attributed to the delay in closure.

1. In appraising these submissions it seems to me to be appropriate first to deal with the claim that the conservation measures were introduced belatedly. In this connexion it is necessary first of all to bear in mind that this situation comes within the transitional period laid down in Article 102 of the Act concerning the Conditions of Accession and the Adjustments to the Treaties which, as the Commission established in Joined Cases 185 to 204/78, *Firma J. van Dam en Zonen and Others,* judgment of 3 July 1979 [1979] ECR 2345, only expired on 31 December 1978. In addition it is necessary to take into consideration the fact that the Council had already adopted in July 1976 by means of Regulation (EEC) No 1672/77 the protective measures provided for in Article 102 of the Act concerning the Conditions of Accession and the Adjustment to the Treaties and Article 4 of Regulation (EEC) No 101/76 and that no further agreement was reached on further Community protective measures with regard to the period after 31 January 1978. Whereas the question involved in the previous case-law of the Court of Justice in fisheries cases was always whether and under what conditions the Member States *might* adopt unilateral protective measures as long as the Community had not exercised its powers to adopt such measures, the Court of Justice must decide in this case whether and under what conditions the Member States *must* adopt conservation measures when the Council had exercised its power to adopt such measures and was prevented from adopting further Community rules because no agreement was reached.

In its previous judgments, in particular in Joined Cases 3, 4 and 6/76, *Cornelis Kramer and Others,* and Case 61/77, *Commission of the European Communities* v *Ireland,* the Court of Justice pointed out that the Community has power to adopt conservation measures. In particular in the case of *Commission of the European Communities* v *Ireland* (Case 61/77) it stated clearly that "in so far as this power has been exercised by the Community, the provisions adopted by it preclude any conflicting provisions by the Member States". The Court of Justice continued in that case by stating that "on the one hand, so long as the transitional period laid down in Article 102 of the Act of Accession has not expired and the Community has not yet fully exercised its power in the matter, the Member States are entitled, within their own jurisdiction, to take appropriate conservation measures without prejudice, however, to the obligation to cooperate imposed upon them by the Treaty, in particular Article 5 thereof".

Whilst in this judgment it only becomes clear by implication that, as long as the Community has not yet fully exercised its powers, the Member States also have,

in addition to the right to adopt conservation measures, certain duties to fulfil, this is explained in the judgment in Joined Cases 185 to 204/78, *Firma J. van Dam en Zonen and Others,* according to which in order to avoid a legal vacuum, "during the year 1978 the Member States had the right and the duty to adopt, within their respective spheres of jurisdiction, any measure compatible within Community law to protect the biological resources of the sea".

Nor of course, as the British Government correctly points out *inter alia,* may such a legal vacuum arise if the Community, which is in principle responsible, is prevented from adopting further protective measures. For that reason the Member States must in this case have the power and the duty to adopt the necessary conservation measures and in so doing, and this much has already been said above, the requirements of Community law must be complied with.

As the Commission, the Government of the United Kingdom, the Government of the French Republic and the Government of the Kingdom of the Netherlands also point out, this duty clearly flows from Article 5 of the EEC Treaty. It is indeed necessary to agree with the Government of the United Kingdom when it emphasizes that there is no need to have recourse to that provision if the duties of cooperation of the Member States are made specific in special provisions such as for example Annex VI to the Hague Resolution, the Council Resolution of 30 and 31 January 1978 and Regulation (EEC) No 101/76, which in this connexion are *leges speciales* in relation to the basic provision laid down in Article 5 of the EEC Treaty. The Court of Justice stated *inter alia* to this effect in its judgment of 4 October 1979 in Case 141/78 (*French Republic* v *United Kingdom*) that Annex VI to the Hague Resolution "in the particular field to which it applies, makes specific the duties of co-operation which the Member States assumed under Article 5 of the EEC Treaty when they acceded to the Community". The importance of these duties of co-operation flowing from Article 5 of the EEC Treaty in addition to the special provisions mentioned above becomes clear however in the same judgment in which the Court of Justice states that "performance of these duties is particularly necessary in a situation in which it has appeared impossible, by reason of divergencies of interest which it has not yet been possible to resolve, to establish a common policy and in a field such as that of the conservation of the biological resources of the sea in which worthwhile results can only be attained thanks to the co-operation of all the Member States".

The basic provision laid down in Article 5 thus makes it clear that the duties of the Member States were not exhausted in the Treaty establishing the European Economic Community or the Act of Accession but that the Member States continue beyond that to have a binding responsibility for the further development of the Communities which represents a real legal obligation (see Case 6/64, *Flamino Costa* v *ENEL,* judgment of 14 July 1964 [1964] ECR 1253; Case 22/70, *Commission* v *Council,* judgment of 31 March 1971 [1971] ECR 263; Case 78/70, *Deutsche Grammophon Gesellschaft mbH* v *Metro-SB-Großmärkte GmbH & Co. KG,* judgment of 8 June 1971 [1971] ECR 487; Joined Cases 51 to 54/71, *International Fruit Company NV and Others* v *Produktschap voor Groenten en Fruit,* judgment of 15 December 1971 [1971] ECR 1107; Case 30/72, *Commission* v

Italian Republic, judgment of 8 February 1973 [1973] ECR 161). For this reason the provision is, as the Danish and the Netherlands Governments in particular emphasize, especially important so long as the common fisheries policy has not yet been laid down.

Under the first sentence of the first paragraph of Article 5 of the EEC Treaty, Member States must take "all appropriate measures, whether general or particular, to ensure fulfilment" of primary and secondary Community law. In this connexion Regulation (EEC) No 101/76 and Article 102 of the Act of Accession provide for the adoption of conservation measures. For this reason, as the Court of Justice emphasized in its judgment in the *Kramer* case, measures for the limitation of catches of fish and the possibility of taking such measures form an integral part of the general system of a common fisheries policy. One of the objectives of such a common fisheries policy, which forms part of the common agricultural policy, is however, as may already be deduced from Article 39 (1) of the EEC Treaty, *inter alia* to stabilize markets and ensure the availability of supplies. In this connexion both the nature of the product concerned and its production conditions must be taken into account.

It is obvious that the result of measures which do not provide for any limitation on catches is that this production is marked by a fall which would seriously jeopardize supplies to consumers. In this connexion in view of the difficult situation with regard to some fish stocks it is in the interests of fishermen and of consumers too for the Community to be under a duty to adopt conservation measures until the endangered stocks have recovered. As expressed in the judgment in the *Kramer* case (Joined Cases 3, 4 and 6/76), the decisive factor is that the measures are necessary in order to ensure in the long term a steady, optimum yield from fishing. The Court of Justice also held in that judgment that the only way to ensure the conservation of the biological resources of the sea both effectively and equitably is through a system of rules binding on all the States concerned.

Although the duty of the Community to adopt conservation measures is clear, it follows, in view of my statements concerning Article 5 of the EEC Treaty, that the Member States must assume this duty if the Community, which is *per se* responsible for the adoption of such measures, is prevented from doing so.

This conclusion may, finally, be deduced from a further consideration based upon the findings of the Court of Justice in the *Kramer* case (Joined Cases 3, 4 and 6/76). In its judgment in this case the Court of Justice explained that already at that time those Member States participating in international agreements were not only under a duty "not to enter into any commitment within the frame of those conventions which could hinder the Community in carrying out the tasks entrusted to it by Article 102 of the Act of Accession, but also under a duty to proceed by common action within the Fisheries Commission". It may be deduced from this that the Member States must be all the more under a duty of common intra-Community action in the adoption of conservation measures which must be introduced within the context of a Community fisheries policy when the Community has already exercised its powers in this sphere on the basis of Article 102 of the Act of Accession.

If however they take action on the basis of Community law and not, as the British Government submits, on the basis of their own national law, they must also protect the interests of the Community. The Community interest is however expressed *inter alia* in the recitals of the preamble to Council Regulation (EEC) No 100/76 in which it is stated that "implementation of this common organization must also take account of the fact it is in the Community interest to preserve fishing grounds as far as possible". If conservation measures are necessary, appropriate measures must be adopted *at the same time* for all waters in the fishery in question because of the special characteristics of fishing, in particular owing to the danger of a switch to fishing in different waters coming within the jurisdiction of the Member States, so as to ensure a consistent policy for the maintenance and management of herring fishery. Expressed another way, the interests of the Community are only protected if the situation is not altered by differing national provisions when the Community has had no opportunity to lay down common rules for the sea area thenceforth coming within its jurisdiction.

As we know however, the Government of Ireland introduced on 6 February 1978 a total ban on direct fishing for herring in the waters coming within its jurisdiction in the Mourne Fishery in question after the Community conservation measure had expired at the end of January, on the basis of the proposal put forward by the International Council for the Exploration of the Sea and after consultation of the Commission and the other Member States in accordance with Annex VI to the Hague Resolution and the Council Resolution of 30 and 31 January 1978. If the measures were necessary in the area, the British Government would also have been under a duty, in view of the foregoing, to provide for corresponding measures for the area in question.

However, the decisive requirement for the adoption of conservation measures is, as I have already indicated, that they are *necessary*, in other words that the fish stocks have already been considerably reduced in a given area or there is a direct danger of over-fishing and without restrictions and protective measures reproduction, and thus future supplies, is endangered.

The British Government claims as regards this question that the danger of over-fishing first became acute at the beginning of the main fishing season in the middle of September 1978 when several British trawlers appeared in the area in question. During the time beforehand, in other words from January until the adoption of the ban on fishing, only coastal fishery of a negligible amount took place in that area.

As against this submission it is necessary, however, to point out, together with the Commission, that the difficult situation of the Mourne herring stock, which was threatened with extinction, was known at the latest from the time of the report by the International Council for the Exploration of the Sea of March 1977. In that report it was also for that reason recommended that fishing for herring should be prohibited in the area in question between 53° 20′ latitude North and 54° 40′ latitude North from 30 June 1977. This proposal by the scientific body recognized by all Member States was then reflected in Council Regulation (EEC) No 1672/77 of 25 July 1977 which was extended until 31 January 1978 by Council Regulation (EEC) No

2899/77 and prohibited fishing for herring in that area. It also follows from a further report by the International Council for the Exploration of the Sea of March 1978, in which it was recommended that the ban on fishing for herring should be maintained in the area in question and the closed area should be extended to 55° 00′ latitude North, that the critical situation of that stock continued. As a result the Commission provided in all the proposals for regulations which I quoted in the statement of the facts, and finally in its proposal of 6 July 1978 (COM 78/206), for a prohibition on fishing for herring in that area. The need for a complete closure was ultimately, and the Netherlands Government also points out this fact, realized by eight Member States at several meetings of the Council in January 1978. Only the British Government was unable to give its agreement to solutions which were based on the proposals put forward by the Commission and approved by the remaining eight Member States.

As follows from a report by the International Council for the Exploration of the Sea dated 28 to 30 September 1978 (Report of the Herring Assessment Working Group for the Area South of 62° North) the estimated total catch of Mourne herring in 1978 until the date on which the report was drawn up was approximately 2 350 tonnes. In this connexion, however, it is necessary to take into consideration the fact that it is impossible to ascertain whether this total was fished within the area described and that in addition a considerable proportion thereof, as the Irish Government concedes, was also caught by Irish fishermen after the closure of the waters coming within Irish jurisdiction. At any rate it is certain, and the British Government also admits this, that until the final closure of the waters coming within the jurisdiction of the United Kingdom on 26 September 1978 402.75 tonnes of herring were fished by British fishing boats in the Mourne Fishery. This amount, however, still represents a proportion of 6% of the herring stock in the Mourne Fishery estimated at 5 866 tonnes by the International Council for the Exploration of the Sea at the beginning of 1978. I do not need to emphasize in particular that in this connexion the fact that Irish fishermen continued to fish for herring in the area in question even after the closure of the Irish waters cannot justify the failure to close the waters coming within British jurisdiction.

For this reason I am certain that the United Kingdom of Great Britain and Northern Ireland has already failed to fulfil its obligations under the EEC Treaty by not closing the waters coming within its jurisdiction in the Mourne Fishery to fishing for herring within a reasonable period after the expiry of the conservation measures adopted under Community law and after the closure of the Irish part of the Mourne Fishery on 6 February 1978.

2. This statement enables me to be relatively brief in the appraisal of the further objections relating to the framing and effects of the Herring (Restriction of Fishing) Regulations (Northern Ireland) 1978 which came into force on 20 September 1978. In this connexion it is solely necessary to decide whether and to what extent the measures adopted unilaterally by the Government of the United Kingdom in September 1978, in other words during the transitional period laid down in Article 102 of the Act of Accession, are compatible with

the requirements laid down in Community law. In solving this problem I can base myself on case-law which has already been established.

Under Regulation No 101/76, Annex VI to the Hague Resolution, the declaration of the Council of 30 and 31 January 1978 and the case-law of the Court of Justice which I have quoted in the statement of the facts, only measures which are absolutely necessary, appropriate and non-discriminatory are permissible for the fishing grounds and for the conservation of the biological resources of the sea. In addition, these may only be interim measures subject to a time-limit, the effects of which on the functioning of the common organization of the market in fishery products must be restricted to a minimum and which may not infringe the general principle of proportionality.

In addition it follows from Articles 2 and 3 of Regulation No 101/76 and from Annex VI to the Hague Resolution recognized by all the Member States as well as from the Council declaration of January 1978 that a Member State which intends to introduce such measures must seek the approval of the Commission which must be consulted at all stages of the procedure and that it must in addition inform the other Member States of intended changes.

As regards the British measures in question, such measures were absolutely necessary for the protection of the herring stock threatened with extinction in the Mourne fisheries between 54° and 55° latitude North.

As regards the suitability of the measures, the Commission and the Danish, French and Netherlands Governments take the view that the measure for the protection of the herring stock was unreasonable since, contrary to the recommendation made by the International Council for the Exploration of the Sea and the proposals put forward by the Commission, a specific area was exempted from the ban on fishing, although only for a certain period.

On the other hand, the British Government points out the fact that the fishery was fully closed and an exception was made in favour of coastal fishermen only because of the urgent need to introduce the ban on fishing for a short interim period.

This submission by the British Government is not, however, convincing, since as we have seen, only a complete closure of the fishery in question, which should have been closed as early as February 1978, would have been appropriate for the protection of the endangered herring stock according to the recommendations of the International Council for the Exploration of the Sea. It was certainly necessary to guarantee coastal fishers a reasonable income for economic and social reasons without this task, however, being part of the conservation measure. If the British Government had consulted the Commission as to the intended closure in good time the Commission, as the French Government also points out in particular, would have had to take care to secure the economic position of the coastal fishermen by other means without there being a need for unilateral interim rules. Moreover, Community law only permits national *conservation* measures but not measures which may only be adopted uniformly from the point of view of social and regional policy or the grant of aid.

3. Finally, the Commission and the other interveners regard the exemption which reserved fishing for herring only to boats of under 35 ft in length as discrimination against other Member States which is not permissible under Community law.

It seems to me to be sufficient with regard to the legal appraisal of this objection to refer to the judgments of the Court of Justice in Case 61/77, *Commission* v *Ireland* and in the case of *Minister for Fisheries* v *C. A. Schonenberg and Others* (judgment of 16 February 1978 [1978] ECR 473). The facts upon which these cases were based were that Ireland had, by an order, prohibited fishing in a fishery off its coast. A further order exempted from this prohibition *inter alia* fishing boats whose registered length did not exceed 33 metres. The Court of Justice held in the case of *Minister for Fisheries* v *C. A. Schonenberg and Others* that Article 7 of the EEC Treaty, Article 2 of Regulation (EEC) No 101/76 and, in so far as they have a bearing on the problem, Articles 100 and 101 of the Treaty of Accession, preclude a Member State from adopting measures of the kind provided for in the Irish orders concerned. In view of the consistent case-law of the Court, according to which the rules on equal treatment enshrined in Community law not only prohibit obvious discrimination on the ground of nationality but also all disguised forms of discrimination which in fact lead to the same result through the application of different distinguishing criteria, this must of course also apply to the present case.

4. Finally, thus, a word remains to be said with regard to the complaint that there was no due consultation. The British Government concedes that the consultation, barely two days before the measure in question came into force, was rather belated but wishes the delayed consultation to be excused owing to the urgency as a result of the appearance of British trawlers. In addition it claims that no practical importance may be attached to the short space of time since all those concerned were convinced of the need for a ban on fishing.

It would, of course, be necessary to agree with the latter argument if the conservation measure adopted were identical with the Commission's proposal. Nevertheless, in these cases too, as follows from the judgment of the Court of Justice in Case 141/78, *French Republic* v *United Kingdom*, in contrast to the view taken by the British Government, the other Member States and the Commission must, however, be informed *beforehand* of the adoption of conservation measures.

If, however, as in this case, a Member State intends to bring into force measures which differ from the Commission proposal, it must, as follows in particular from Annex VI to the Hague Resolution, seek the approval of the Commission, which must be consulted at all stages of the procedures. However, so that the Commission can approve the proposed measure taking into account the requirements of Community law, it must be informed in due time. There is no need to point out in particular in this connexion that the short space of time of two days was not sufficient for this. Nor is the reference of the British Government to the urgency of

the measure capable of justifying the delay in seeking the Commission's approval since, as we have seen, the United Kingdom should in any case have adopted the necessary conservation measures earlier.

II — Northern Irish Sea and Isle of Man Fishery

The Commisson complains that the British Government has, by its conduct in this area in 1977 and 1978, failed in several respects in its obligations under Community law.

1. First, the British Government omitted, at the time when the Community rules were still in force, to inform the Commission and other Member States of the precise details of the application of the licensing system introduced by the Herring (Irish Sea) Licensing Order 1977 and the Herring (Isle of Man) Licensing Order 1977. Apart from the agreement of 23 July 1977 between the British Government, the Irish Government and the Isle of Man authorities, no document relating to the proposed system was submitted to the Commission. However, that agreement, to which Ireland in the end did not give its consent, envisaged *inter alia* that the Isle of Man authorities should issue 24 licences for fishing within the Isle of Man 12-mile zone. Moreover, except as otherwise provided, no boat was to be allowed to fish for herring in the whole zone in question unless it held a licence to fish within the Isle of Man 12-mile zone. Finally, the Isle of Man licences were to impose on the owners of the boats the obligation of landing all catches, for the purposes of supervision, at specified ports. From that agreement and a series of other indications the Commission draws the conclusion that, if they had wished to avail themselves in 1977 of their historic rights of fishing within the Isle of Man 12-mile zone, Irish boats were also made subject to a licensing system in the waters within the sovereignty of the United Kingdom, over which, in regard to fisheries policy, Community powers were at any event established. To that extent, Irish boats were at a disadvantage compared with French and Dutch boats which fished in the same zone and were not subject to any licensing system. Finally, the Commission points out that while both 1977 orders, approval of which was moreover not sought, authorized the authorities to issue licences, they contained no indication of the policy to be followed in so doing.

A corresponding complaint of inadequate information is also raised in regard to the practice followed by the British and Isle of Man authorities in 1978. On 30 May 1978 the Irish Permanent Representation informed the Commission that, after the expiry of the relevant Community rules in January of that year, the United Kingdom and the Isle of Man authorities had agreed upon a new programme of action for herring fishing in the zone in question and had put the same into effect on 15 May 1978 without informing the Commission and the Irish Government. The programme, which had been orally communicated to the Irish authorities, was said to be largely comparable to the 1977 agreement with

the exception that, *inter alia*, the total allowable catch had been fixed at a lower level than in 1977, a greater number of British and Isle of Man boats were to be licensed and only boats with a licence for Isle of Man waters were to be allowed to land fish on that island. In addition, the representatives of the United Kingdom had indicated that Irish boats would be arrested should they attempt to fish in Isle of Man waters without a licence. It had been possible to gather, further, from a "hint" given by a British official that the same was to apply to fishing by Irish boats in British waters. The Commission had not been given information about the administration of this action programme or of the grant of licences and appropriate inquiries had always produced inadequate replies.

Even the telex of 17 August 1978 cast no light on that question, which is an important one for all the Member States concerned.

The Commission is accordingly of the opinion that the United Kingdom provided for the issue of licences in disregard of the procedure provided for under Community law, namely, Annex VI to the Hague Resolution, quoted above, and Article 3 of Regulation No 101/76, and thereby failed in its obligations under Article 5 of the EEC Treaty.

On the other hand, the Government of the United Kingdom points out that, for the 1977 fishing season, catch quotas were fixed for the area in question by the Council in Regulation No 1779/77. Article 4 of that regulation placed on Member States the duty of taking, so far as possible, all necessary measures to ensure compliance with that provision. The licensing system was introduced only in compliance with that stipulation, in order to check that the quotas decided upon by the Council were observed. Thus no new conservation measures were introduced which should have been notified under the provisions of Community law mentioned above. After the agreement did not come into force because the Irish Government refused to accept any form of licensing, the United Kingdom took steps to ensure that *its own* fishermen did not exceed the quotas laid down by the Council. Except for the coastal waters of the Isle of Man, the prohibition on fishing applied only to British vessels and no restrictions of any kind were provided for as regards vessels of other Member States. With the exception of Irish boats, the latter had in any event no fishing rights in the waters of the Isle of Man. After the Community rules expired on 31 January 1978 it proved necessary for the United Kingdom to take measures of its own within its fishery waters. It was therefore decided to retain for 1978 also a licensing system which, apart from some details such as the number of licences issued, was essentially the same as that for 1977. For that year also, no licences were required of fishermen of other Member States and they were able to fish unimpeded in the area in question. Finally, neither in 1977 nor 1978 did an Irish fishing vessel apply for a licence to fish in the waters of the Isle of Man.

In considering the question whether the United Kingdom has failed in its

obligations under Community law by inadequately informing the Commission and other Member States about the administration of the licensing system introduced by the orders in dispute it appears to me to be appropriate briefly to indicate once again the *ratio* of the relevant procedural provisions of Community law. As I have already stated, the conservation of fish stocks depends upon the marine ecology within the whole of the Community's 200-mile zone. A sensible Community policy in the field of the conservation and management of the resources of the sea thus makes it essential that, in the absence of a comprehensive system of Community rules, the Commission be at least in a position to ensure that unilateral measures by Member States do not lead to an unjustified prejudicing of the interests of the Community and of other Member States. The active co-operation of the Commission is important in order to keep the differences between national fishery rules as small as possible. In order that the Commission may perform that task, Annex VI to the Hague Resolution prescribes that before taking a unilateral measure for the conservation of fish stocks the Member State concerned must seek the approval of the Commission, which must be consulted at all stages of the procedures. Such *cooperation* (cf. the judgment of the Court in Case 61/77, *Commission* v *Ireland)* requires however clear and timeous information about the proposed measures.

In that regard, contrary to the view of the British Government, it cannot be relevant whether the introduction of new conservation measures is intended or whether only the implementation and control of a catch restriction sanctioned under Community law are involved. It must be pointed out in this connexion that Annex VI to the Hague Resolution opens with the principle that unilateral measures are prohibited. As I have already set forth in my opinion in Case 141/78 *French Republic* v *United Kingdom,* that obliges one to accept that in the event of an exceptional breach the rules of law serving to protect Community interests must be broadly construed. They should always apply even when only some degree of necessity for them is apparent. Such a necessity arises however merely from the Community's interest in learning how its rules are being implemented and whether national measures do not exceed that which is necessary for achieving the rules of Community law. For that reason Article 4 (2) of Regulation No 1779/77 also provides that "The checks carried out by the Member States shall be reported at regular intervals to the Commission".

All the more importance, however, attaches to such a duty of providing information, which duty, having regard to what has been said, must also apply even as regards those measures which merely serve to control the State's own nationals, when the Commission entertains the suspicion that the measure could have a discriminatory effect as regards another Member State and accordingly expressly makes specific inquiries about the administration of the licensing system. Grounds for such an assumption were given *inter alia* by the fact that in the agreement of 23 July

1977 the issue of licences for British fishery waters was linked to the obtaining of licences for the Isle of Man 12-mile zone. Besides that, there were a series of other indications, the details of which I do not wish to go into, on the basis of which it could not be ruled out that Irish boats would also be made subject to licences in British waters. That is further indicated by the fact that no biological reason existed for fixing quotas for Irish catches *only* in the waters of the Isle of Man since the *same* fish stock was located inside and outside those waters. From that point of view, rules on quotas would not have had much point. But even if one assumes that the Irish were in fact to be subject to a catch quota within Isle of Man waters alone, that would have meant discrimination against British and Isle of Man fishermen, for whom a uniform catch quota for both the British as well as the Isle of Man waters was provided. Finally, even the telex of 17 August 1978, by which the British Government asked the Commission for approval of the measures which it wished to take in agreement with the Government of the Isle of Man in order to regulate the herring catch in 1978 within the British fishing limits in the Irish Sea including the waters around the Isle of Man, did not clarify those questions. It is true that there is mention therein of issuing 120 licences to vessels from the United Kingdom on the basis of their traditional fishing activity. It is further stated that the British Government will issue licences for waters other than those around the Isle of Man and that the vessels to be licensed will be the same as those which have received the licences to fish in the waters adjoining the Isle of Man. Further, fish were to be permitted to be landed only at particular ports without its being expressly specified which ports were involved. The telex contains, however, no statement about how the issue of licences to Irish fishermen, who had fishing rights within the Isle of Man waters, would be administered.

From these indications it follows readily that the Government of the United Kingdom failed in its obligation to co-operate with the Commission under Annex VI to the Hague Resolution in that it did not give the Commission sufficiently clear information about the measures introduced in 1977 and 1978.

For the same reasons, the allegation of a contravention of Article 3 of Regulation No 101/76, which obliges Member States to notify other Member States and the Commission of any alterations they intend to make to fishery rules laid down pursuant to Article 2 of the Regulation, is also well-founded. Since that duty of notification clearly originates in considerations corresponding to those of Annex VI to the Hague Resolutions, all the conclusions reached in that regard may also be applied as respects the said Article 3. In this connexion it should be noted merely that *all* Member States bmust be notified of any proposed alterations. The introduction by the two 1977 British Orders of a licensing system constituted, on any view, an alteration to the previous system of rules without, in this connexion, its being important whether they could be classified as conservation measures. All the other Member States were also not informed of that alteration.

2. Having made these observations, which related to the procedure provided for under Community law, I am now able to turn to the complaints which relate to the content of the measures adopted by the Government of the United Kingdom.

I should like to begin with those objections which appear to me to be clear both as a matter of fact and as a matter of law.

a) Thus the complaint is made against the Government of the United Kingdom that, as announced in the telex of 17 August 1978, it unilaterally laid down catch quotas for the high season, lasting from mid-August to approximately the end of September, which were not based on the Commission's proposal of 1978 and to which the other Member States concerned had not agreed either. Even if it had been permissible for the British Government to rely upon the recommendation of the International Council for the Exploration of the Sea it none the less did not have the right to lay down catch quotas for other Member States according to its own concepts. It is said that, in so far as Member States were empowered to adopt unilateral measures, Annex VII to the Hague Resolution was also binding upon them by virtue of Article 5 of the EEC Treaty. The United Kingdom had a particular duty thereunder to consult the Commission before allocating a catch quota for Irish boats and should also have allowed Irish fishing vessels a larger quota than in 1977 and earlier years.

In answer thereto the Government of the United Kingdom states that the Advisory Committee on Fishery Management of the International Council for the Exploration of the Sea recommended in May 1978 that the total allowable catch of herring from the Irish Sea in 1978 should be reduced from 12 500 tonnes to 9 000 tonnes. The United Kingdom Government also brought the necessity and the urgency for such a reduction to the attention of the Council by a memorandum of 20 July 1978. Since, however, agreement on a common fisheries policy could not be reached at the following meeting, the British Government and the Isle of Man Government endeavoured unilaterally to restrict the catch for the year 1978 within British fishery limits to 9 000 tonnes. In doing so a catch quota was laid down only for British vessels and for boats from the Isle of Man but not, however, for fishing vessels of other Member States. The quota of 8 100 tonnes was based upon the traditional structure of the fishing industry in the Irish Sea as also expressed in Council Regulation No 1779/77. Those measures were notified to the Commission on 17 August 1978 together with a formal request for approval in accordance with Annex VI to the Hague Resolution. Annex VII to this resolution merely contains a declaration of intent which cannot affect the legality of provisional national measures.

In considering this submission it must be stated first of all that the British Government's argument to the effect that it laid down catch quotas only for its own fishermen and Isle of Man fishermen cannot justify its conduct. This is shown by the mere fact that it reserved 8 100 tonnes for its own and Isle of Man fishermen while at the same time the total allowable catch was reduced from 12 500 tonnes to 9 000 tonnes. This is equivalent to an allocation of 90% to its

own fishermen and a total of 10% for fishermen from Ireland, France and the Netherlands. The British Government is correct in stating that that percentage ratio was also the basis of the allocation of catch quotas between the said Member States laid down by the Council in Regulation No 1779/77, though the Council there assumed a total allowable catch of 13 200 tonnes. However, according to the Commission's proposal of 17 October 1977 (COM (77) 524) for the year 1978, assuming a total allowable catch of 12 500 tonnes, only 74.2% was designated for United Kingdom and Isle of Man fishermen while the remaining 25.8% was to be reserved for Irish, French and Dutch fishermen. In detail, a share of 17% as opposed to 7.6% in the previous year was fixed for Irish fishermen, a share of 2.9% as opposed to 1.5% for French fishermen and a share of 5.7% as opposed to 0.83% for Dutch fishermen. In regard to that division it is stated in the preamble to the Commission's said proposal that:

"The overall catch that may be taken by the Member States has to be shared equitably; ... for the distribution it is therefore important to take into account the vital needs and the economic development possibilities to coastal populations, particularly dependent on fishing and related industries".

From that wording, which refers indirectly to Annex VII to the Hague Resolution, it becomes especially clear that the quotas should be allocated from social and economic points of view. As has already been seen, such measures may be appropriately introduced only by the Commission in the framework of a common policy but not by Member States alone in the framework of unilateral measures taken without the co-operation of the Commission.

Since the Commission did not give its approval to the British measures, the unilateral fixing of catch quotas by the British Government must be regarded as being conduct contrary to the Treaty without its being necessary to enter into the further question whether Annex VII to the Hague Resolution is binding only on the Community institutions or on Member States as well. That apart, the Commission was asked to give its approval only four days before the coming into force of the measure and, since a weekend also fell within that interval, it had no opportunity at all to state its position prior to its coming into force:

b) The next complaint is also connected with the reduction of the total allowable catch to 9 000 tonnes; the Commission complains that the Government of the United Kingdom has, by the premature closing of the fishery on 24 September 1978, excluded from those waters fishermen of other Member States who traditionally fished those waters after that date whereas British and Isle of Man fishermen traditionally pursued their fishing activity there prior to that date. French and Dutch fishermen in particular were accordingly put at a disadvantage as compared with their British colleagues by the early closing, which was not called for on biological grounds.

As against that, the British Government refers to the fact that the International Council for the Exploration of the Sea recommended as early as May 1978 a reduction to 9 000 tonnes. It submits that, since at the time in question that catch had been achieved, the closure was

also appropriate and necessary. The Irish Sea Herring (Prohibition of Fishing) Order 1978 ultimately prohibited fishing by all fishermen, regardless of their nationality, and was accordingly not discriminatory.

In contrast to this it is necessary, however, to point out the fact that the International Council for the Exploration of the Sea had not recommended a specific date for the closure of the waters in question. As a result of this the Commission also refrained in its proposal for 1978 from reducing the total allowable catch laid down by it from 12 500 tonnes to 9 000 tonnes during the current fishing year. Without its being necessary to give a ruling as to the necessity and the appropriateness of such a unilateral reduction it may however be stated that through the closure ordered as from 24 September 1978 for the rest of the year the United Kingdom in fact divided the catch quotas between its own fishermen and fishermen from other Member States. This is indicated very clearly by the catches for 1978 which the British Government itself communicated to us. Thus the United Kingdom and the Isle of Man fishermen alone accounted for 90.6% of the total catch of 8 458 tonnes. Irish fishermen had only fished 7.2% of the catch until that date, French fishermen 1.03% and Netherlands fishermen 1.16%. These percentages, which correspond approximately to those laid down by the Council for 1977 in Regulation No 1779/77 but not to those laid down by the Commission for 1978, show clearly that the closure on the date in question had the effect of a unilateral distribution of the catch quotas which, as has already been shown, should not have been carried out without the Commission's approval. In this connexion it is necessary to bear in mind the fact that British fishermen and fishermen from the Isle of Man went fishing in the waters in question from as early as February and once more, after a short break, from the middle of May, whereas fishermen from the other Member States as a rule filled their quotas, which were at any rate relatively small, in the last week of September and the period after 19 November. The British Government, however, closed the waters early when it could see on the basis of the licensing system that its own fishermen had already fished a quota of approximately 90% of the total catch. To this extent the closure of the waters on 24 September for the rest of the year, which was not recommended by the International Council for the Exploration of the Sea in that form, had discriminatory effects on the fishing boats of the other Member States.

There remain accordingly the complaints relating to the effects which the licensing system introduced is alleged to have had in particular on the catches of Irish fishermen in the waters coming within the jurisdiction of the United Kingdom. In my opinion, however, insufficient evidence has been brought with regard to most of the charges in this connexion.

This applies in particular to the view that Irish fishermen were automatically also subject to a catch quota for herring fishing in British waters if they had applied for a licence to catch herring within the 12-mile area of the Isle of Man on the basis of their historic rights. Nor for this reason is it certain that they were confronted with the choice of

accepting such a quota or of losing their historic rights. In addition, it does not seem to me to have been shown that Irish fishermen were not allowed to land on the Isle of Man herring which they had caught outside the 12-mile area around the Isle of Man, without a licence.

As regards the measures within the 12-mile area around the Isle of Man, I refer first to Article 227 (5) (c) of the EEC Treaty in the version of Article 26 (3) of the Act concerning the Conditions of Accession and the Adjustments to the Treaties; it provides that "This Treaty shall apply to the Channel Islands and the Isle of Man only to the extent necessary to ensure the implementation of the arrangements for those islands set out in the Treaty concerning the Accession of New Member States to the European Economic Community and to the European Atomic Energy Community signed on 22 January 1972". Protocol No 3 to the Act concerning the Conditions of Accession and the Adjustments to the Treaties on the Channel Islands and the Isle of Man makes specific the principle that the Treaties only apply to the Channel Islands and the Isle of Man, as separate territories which are dependencies of the British Crown but do not form part of the United Kingdom, to the extent to which this is necessary for the implementation of the arrangements defined in that protocol. The aim of this protocol is primarily to prevent deflections of trade whilst maintaining the close economic link between the islands and the British mainland. So far as agricultural products and products processed therefrom are concerned, which are the subject of a special trade regime, the second subparagraph of Article 1 (2) of the Protocol which is relevant in this connexion provides that "Such provisions of Community rules, in particular those of the Act of Accession, as are necessary to allow free movement and observance of normal conditions of competition in trade in these products shall also be applicable". Under Article 100 of the Act of Accession traditional rights existing on 31 January 1971 are in principle preserved.

As this Court has, however, heard, the Isle of Man was granted a 12-mile fishing area by the British Government as early as 1964, in other words before the accession of Great Britain. For this reason, and all the parties seem to be in agreement on this point, the fishermen of other Member States, except for the Irish, did not fish in that area either. If therefore Irish fishermen were subject in this connexion to a licensing system in that area they did not suffer discrimination as compared with British fishermen since the same rules applied to them. There was no discrimination against Netherlands and French fishermen, as in my opinion the British Government correctly points out, because they were not allowed to fish in the area in question at all.

Thus there only remains to examine the question whether the requirement that the fish caught in that area should only be landed in the British and Isle of Man ports listed in the licences adversely affects the free movement of goods guaranteed by the EEC Treaty under Protocol No 3 to the Act of Accession also as regards the Isle of Man.

The British Government wishes this question to be answered in the negative by pointing out the fact that the landing requirement is a necessary measure in

order to check that the conservation measures, for which the Isle of Man authorities alone are responsible, are complied with. In my opinion it is unnecessary to decide in this case the question whether only the Isle of Man authorities are responsible for pure conservation measures which cannot be brought within the free movement of goods. It is, on the contrary, necessary to state, and I will restrict myself to this, that the landing requirement relates not only to the conditions of "production" but also to sale and thus jeopardizes the free movement of goods. Since Community law is applicable in this connexion these measures should not have been introduced without the approval of the Commission.

III — Extension of the Norway Pout Box

In this case the Court must decide whether, and if so, subject to what conditions, the United Kingdom was entitled, by means of the Norway Pout (Prohibition of Fishing) (No 3) (Variation) Order 1978, unilaterally to extend, for specified periods, the so-called Norway Pout Box, within which fishing for the species in question was temporarily prohibited, eastwards by two degrees of longitude within the waters subject to its sovereignty.

In the area under discussion British fishermen fish predominantly for haddock and whiting which are intended for human consumption. On the other hand, the Norway pout, a small fish which is not suitable for human consumption, is fished for in this zone predominantly by the Danish fishing fleet, using small-mesh nets, for the purposes of industrial processing. Fishing with small-mesh nets has the result that considerable quantities of juvenile haddock and whiting are also landed as by-catches, which leads to a reduction in the species caught predominantly by British fishermen.

The Commission and the Dutch and French Governments therefore take the view that the unilateral extension of the so-called Norway Pout Box, in which fishing for *that* fish is prohibited for certain periods, is not a conservation measure since none of the stocks under discussion is truly in danger. In the end result, advantages are conferred by the measure in question on British fishermen and their customers at the expense of the Danish fishing fleet. It is submitted that the reconciling of the various interests of the Member States involved is, however, a question of economic policy, which is exclusively a matter for the Community. By adopting the measure in question the United Kingdom unilaterally pre-empted an important decision which could only have been taken at Community level on the basis of a Commission proposal. The British measure, moreover, had a disruptive effect upon the Community's external relations in that the Community was obliged to re-negotiate agreements relevant to this matter with Norway and the Faeroes. However, even if the extension of the Norway Pout Box were to be regarded as a measure for the protection of the biological resources of the sea, the conditions for the validity of such a measure laid down in Annex VI to the Hague Resolution and the Council declaration of 30 and 31 January 1978, and elaborated in the case-law of the Court, were not satisfied.

On the other hand, in the view of the Government of the United Kingdom, the extension of the Norway Pout Box represents a genuine conservation measure. Such a measure is not dependent upon a particular species' being threatened with extinction but is, rather, to be taken in order to ensure the greatest possible exploitation of a stock. However, the restriction on industrial pout fishing has the result that a greater number of haddock and whiting reach the age of reproduction and that a greater total allowable catch may therefore be achieved in future years. The measure is also based on scientific recommendations for the protection of the fish stocks in question, in particular on the reports by the International Council for the Exploration of the Sea. It does not follow from the fact that a restriction on fishing may affect one particular fishing industry more than another that it is not, on that account, a conservation measure. On the contrary, every real conservation measure is, in its nature, an economic measure at the same time. Moreover, the extension of the pout box caused no appreciable difficulties in external relations since the relevant agreements with Norway and the Faeroes have not yet been formally adopted by the Council.

In judging the lawfulness of the extension of the pout box I would again point out, under reference to my remarks on the Mourne Fishery, that at the time when the measure in question came into force, in September 1978, fisheries policy within the 200-mile zone was fundamentally a matter for the Community. During the transitional period provided for in Article 102 of the Act of Accession, the Member States had merely the power, and in some cases possibly the duty, derived from Community law, to adopt *protective* measures for the conservation of the biological resources of the sea so long as the Community has not acted or can act no further. As the Court stressed in the *Kramer* case, measures for the limitation of catches of fish, and the possibility of taking such measures, form an integral part of the system of a common organization of the market in fishery products established by the relevant regulations, but the effect of those measures, having been accepted from the outset by the Community rules themselves, cannot be equated with the disruptive effects, which are contrary to Community law, of national measures which are unrelated to the objectives of Community rules and are thus unlawful. According to that judgment, permissible measures of protection are only such measures as "in the long term . . . are necessary to ensure a steady, optimum yield from fishing" and the effects of which on the functioning of the common organization of the market are kept to a minimum.

According to the judgment in the *Kramer* case, the answer to the question whether a measure limiting agricultural production impedes trade between Member States depends on the global system established by the basic Community rules in the sector concerned and on the objectives of those rules, in which connexion the nature and circumstances of "production" of the product in question should also be taken into consideration. I have already set forth the basic Community rules, which are

expressed, in particular, in Regulation No 101/76, Annex VI to the Hague Resolution, the Council Resolution of 30 and 31 January 1978 and the case-law of the Court which I have already cited. If the substantive conditions there mentioned are satisfied, the Member State concerned must, in addition, seek the approval of the Commission, which must be consulted at all stages of the procedures. Those procedural requirements are to ensure that no material point is overlooked and that there are no additional impermissible matters in the national rules. If, however, the substantive requirements of the basic Community rules are not satisfied, a restriction on trade between Member States exists, which may not be adopted unilaterally but, at most, with the *express* approval of the Commission. In such a case, the consulting State is barred from putting the proposal submitted into force without the approval of the Commission. That obligation, as the Commission and the said interveners point out, arises from the second paragraph of Article 5 of the EEC Treaty in terms of which Member States shall abstain from any measure "which could jeopardize the attainment of the objectives of this Treaty".

If the requirements under Community law are regarded separately, it is not necessary, in my opinion, to decide whether the extension of the pout box is to be considered as a conservation measure or as an economic one. All parties are agreed that at the time of the extension the species under discussion in the said zone were not threatened with the danger of extinction. It is likewise not in dispute that at the time in question there was over-fishing in this zone in the sense that an excessive quantity of juvenile fish of the species suitable for human consumption was being caught as by-catches. To that extent it must be conceded in favour of the British Government that the rules in question reduced the catch of juvenile fish of the said species and, to that extent, served to ensure in the long term an optimum yield of fish intended for human consumption. That is not to say, however, that the extension of the zone in question is to be regarded as a permissible conservation measure *under Community law.*

Unilateral measures are permitted only when they are strictly necessary and appropriate in the sense that, in the absence of the *specific* protective measures, there is a threat to the reproduction of particular species of fish, and thus to supplies to consumers. That was not however the case at the time when the British measures were adopted. First, none of the species of fish under discussion was threatened with extinction. While the relevant 1977 report of the International Council for the Exploration of the Sea contains an examination of the possible effects of various extensions of the Norway Pout Box it does not make any recommendation in favour of the adoption of a prohibition on fishing for Norway pout. Nor, contrary to the view of the British Government, does a clear recommendation to that effect emerge from the 1978 report of the Advisory Committee on Fishery Management of the International Council for the Exploration of the Sea in which no reference was made to the Norway Pout Box. Finally, in its 1979 report, the International Council for the Exploration of the Sea states quite clearly that it is not empowered to make recommendations

relating to the Norway Pout Box so long as there is no serious conservation problem in regard to the stocks of haddock and whiting in the area.

However, the relevant proposals which the Commission submitted to the Council demonstrate that the extension of the pout box was also not in accordance with Community interests either. In none of those proposals was an extension of the pout box alone envisaged. In order, as it is put in the recitals of the preambles to the proposals, "to prevent discrimination and distortion of competition between Member States", the Commission envisaged *inter alia* in the last proposal made by it on 16 January 1978 (COM (78) 7 final) three different measures for preventing the over-fishing of haddock and whiting stocks, namely, a prohibition on catching Norway pout with small-mesh nets, the fixing of a maximum by-catch of 10% of the total quantity of fish as well as a total allowable catch and the allocation of quotas for haddock and whiting. As may be inferred from the proposals themselves, and as the Commission has also assured the Court, those measures were to have been introduced in order to harmonize so far as possible the economic interests of the fishing industries of the various Member States concerned in a balanced fashion. However, as I have already pointed out, that problem may only be resolved in the context of action by the Community, taking account of the economic and social interests of all Member States concerned, and not by way of a unilateral national measure.

The extension of the pout box not only leads to an increase in the yield of *one* fishing industry but at the same time to the exclusion of *another* fishing industry from a particular zone for particular seasons by promoting the commercial interests of fishermen who catch fish for human consumption at the expense of those who fish for industrial purposes. Finally, the fact that this measure is one of economic policy is particularly illustrated by the fact that, without my wishing to enter into the details of the calculations, both the British and Danish governments have presented comprehensive calculations of the profits and losses for the fishing industries concerned.

Contrary to the view of the Government of the United Kingdom, a different inference may not be drawn from the fact that the Commission approved the Norway Pout (Prohibition of Fishing) (No 3) Order 1977. That national measure merely continued for a short period until the end of 1977 the preceding Community measure which provided for a pout box up to 0° (see Regulation No 2243/77). Such a continuation was, furthermore, proposed by the Commission on 24 October 1977 (COM 77/546), but likewise without an extension to 2°.

The absolute necessity for an extension of the pout box as a measure for conserving the haddock and whiting stocks in that zone is called in question moreover by a series of further facts. Mention may be made only that at the Council meeting in January 1978 eight Member States were in favour of an enlargement of mesh sizes in order to counter the danger of over-fishing whilst the United Kingdom — for whatever reasons — voted against that measure. If, however, the Government of the United

Kingdom had been convinced of the absolute necessity for a protective measure, it could at least have agreed to that solution even if, in its opinion, the proposed mesh size would not have contributed to complete protection of the fish stocks in question.

Mention may also be made that since the said Council meeting the eight other Member States reduced their rules on by-catches in industrial fishing from 20 to 10 % in accordance with the Commission's proposals. Without waiting for the results of that measure, that is, without the need for a further measure having already been established, the United Kingdom announced as early as July of that year the introduction of an even more drastic measure.

It being thus established that the unilateral extension of the pout box was neither appropriate nor absolutely essential, in order for it lawfully to come into force, it would, having regard to what has already been said, have required to have the *express* approval of the Commission. Since, as is widely known, that was not given, it may be held that a finding of an infringement of Community law is justified on that ground alone.

I may therefore be brief in considering the further grounds of complaint.

Thus the criticism, in particular, that by extending the pout box the United Kingdom thereby failed to fulfil its obligations under Community law in respect that, in practical terms, it forced the Community to re-negotiate the fishery agreements with Norway and the Faeroes, might well also be justified. On that point it is sufficient to mention that in the field of fisheries policy the Community alone is in a position to assume and carry out contractual obligations affecting the whole sphere of application of the Community legal system (see the judgment of the Court of 31 March 1971 in Case 22/70 *Commission* v *Council* [1971] ECR 263). Under the second paragraph of Article 5 of the EEC Treaty Member States are under a duty to abstain from any measure which could jeopardize the attainment of the objectives of that Treaty. As the Court has heard from the Commission, the Community was constrained to re-negotiate the agreements which had been entered into at that time with Norway and the Faeroes. Contrary to the opinion held by the British Government, this matter does not depend on whether the agreements had already been formally adopted by the Council; what is alone decisive is that agreement to put the agreements into effect existed between the contracting parties.

It further remains to be stated, together with the Commission and the Danish Government, that, since the measure in question is in essence unwarranted, it constitutes unlawful discrimination against the Danish fishing fleet. As has been seen, by the extension of the zone in question Danish pout fishing boats are excluded from their traditional fishing grounds within waters subject to British sovereignty, whereas the measure does not have the same effect on British fishing vessels which, in that area, mainly fish for haddock and whiting. Nor are such covert forms of discrimination which, by the application of other distinguishing criteria, in fact lead to the

same result as overt discrimination, permissible under the rules regarding equality of treatment enshrined in Community law.

Finally, it should also be mentioned, for the sake of completeness, that the Norway Pout (Prohibition of Fishing) (No 3) (Variation) Order 1978, which brought about the extension of the zone in question, is not limited as regards time and may not therefore be regarded as an interim measure. According to the British Government, the measure none the less satisfies that test since, in the event of a relevant Community measure being adopted, national law would in any case become inapplicable by reason of the pre-eminence of Community law.

Were that argument to be followed, all national measures adopted in the field of the Community's powers and not limited in time would have to be categorized as interim measures since they are valid only until Community rules are adopted. On that interpretation the requirement of Community law that national rules be limited in time or characterized as interim would be pointless. For that reason, as well as for reasons of legal certainty, it must be held, in my opinion, that national measures adopted in the field of fisheries policy, which in principle comes within the powers of the Community, must be expressly limited in time or characterized as interim measures.

Since, accordingly, the requirements of Community law were not satisfied, the unilateral extension of the Norway Pout Box should only have taken place with the express approval of the Commission. A finding of an infringement of Community law on the above-mentioned ground is thus called for already, without its being necessary to enter into the further question whether the United Kingdom duly consulted the Commission at all stages of the planned introduction of the measure in question.

IV — The application lodged by the Commission is therefore well founded. I therefore conclude that the Court should declare, for the reasons set out in detail above, that the Government of the United Kingdom has failed to fulfil its obligations under Community law:

1. In the Mourne Fishery:

   (a) By not closing the waters in that area coming within British jurisdiction to fishing for herring within a reasonable period after the expiry of the conservation measures adopted under Community law;

   (b) By permitting, even after the closure, an exemption, limited in time and quantity with regard to part of the British fishing grounds and in respect of boats of under 35 ft in length, from the prohibition on fishing for herring;

   (c) By failing, because of the measures described above, to comply duly and in good time with its duties of consultation laid down under Community law;

2. In the Northern Irish Sea and Isle of Man Fishery:

   (a) By not giving the Commission and the other Member States sufficient information on the licensing system introduced for 1977 and 1978;

   (b) By unilaterally and without the approval of the Commission fixing catch quotas by reducing the quotas from 12 500 tonnes to 9 000 tonnes and by prematurely closing that area to fishing for herring on 24 September 1978;

   (c) By jeopardizing the free movement of goods by issuing licences for herring fishing by Irish fishermen within the 12-mile limit of the Isle of Man which were linked with a condition that the fish should be landed on that island;

3. By unilaterally and without the Commission's approval extending the Norway Pout Box to 2° longitude East by the adoption of the Norway Pout (Prohibition of Fishing) (No 3) (Variation) Order 1978 which came into force on 1 October 1978.

Since the application has been successful, the United Kingdom must also be ordered to pay the costs of the action, including those of the interveners.