2. Orders the United Kingdom of Great Britain and Northern Ireland to pay the costs.

Kutscher Mertens de Wilmars Mackenzie Stuart Pescatore Sørensen

O'Keeffe Bosco Touffait Koopmans

Delivered in open court in Luxembourg on 4 October 1979.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE GENERAL REISCHL DELIVERED ON 11 SEPTEMBER 1979 [1]

Mr President,
Members of the Court,

On 9 March 1977 the Fishing Nets (North-East Atlantic) Order 1977 was issued in the United Kingdom. Designed to protect certain species of fish and brought into force on 1 April 1977, the order contains provisions governing the mesh size of fishing nets to be used for certain species of fish and the size of what are known as by-catches, that is to say catches of species of fish which in themselves are protected but which are unintentionally taken up together with unprotected species when authorized nets are used.

In autumn 1977 the "Cap Caval", a French ship, infringed these provisions whilst fishing, mainly for prawns it seems, in English territorial waters. The ship was intercepted on the edge of a prawn-fishing area and its owner was sentenced to a fine by a British court because the ship was using nets whose mesh did not comply with the requirements — only small-mesh nets were aboard — and because the limit authorized for by-catches had been exceeded: on the master's estimate they amounted to 61 % of the total catch, whereas 20 % is the amount permitted by the British order mentioned above.

This resulted in an action against the United Kingdom under Article 170 of the EEC Treaty by the French Government, which considers that the

1 — Translated from the German.

British order is incompatible with Community law, for various reasons which I shall discuss presently.

In accordance with the third paragraph of Article 170, the Commission gave the British Government the opportunity to submit its observations on the complaints made against it. As justification the latter relied on the decision in Joined Cases 3, 4 and 6/76 *(Kramer and Others,* judgment of 14 July 1976, [1976] ECR 1279), according to which Member States are fully entitled to take measures for conservation of fishery stocks. It also pointed out that the order had been adopted to implement Recommendation No 5 of the Commission set up under the North-East Atlantic Fisheries Convention, hence in application of a measure which was binding on the Member States. It was not, therefore, a unilateral measure within the meaning of Annex VI to the Hague Resolution of 3 November 1976, which reads 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 commission 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 measure shall not prejudice the guidelines to be adopted for the implementation of Community provisions on the conservation of resources."

According to the British Government's interpretation of this decision, there was no reason for the Commission's approval to be sought and the United Kingdom claims that, last but not least, it must be conceded that the measures in question are not discriminatory and above all they may be regarded as reasonable since they are certainly appropriate in the light of Article 6 of Council Regulation No 350/77 laying down certain interim measures for the conservation and management of fishery resources (Official Journal L 48, 19 February 1977, p 28), which provides as follows:

"The percentage of by-catches of demersal species authorized in fishing for industrial purposes by the laws or regulations of the Member States adopted in accordance with the North-East Atlantic Fisheries Commission Recommendation No 5 is reduced from 25 to 20 % as from 1 April 1977.

. . . . . "

Opposing that view, the Commission maintained in a reasoned opinion which it gave on 22 March 1978 that in fact the Hague Resolution imposed an obligation on the British Government to seek the approval of the Commission because the disputed order was not limited to implementing Recommendation No 5 but — quite apart from the question of the purpose of the catch — had exceeded the terms thereof. Moreover, it had a duty under Article 3 of Council Regulation No 101/76 (Official Journal L 20, 28 January 1976, p. 19) to notify other Member States and the Commission of the measures it intended

to adopt. Since it did neither, it must be declared that the United Kingdom had failed to observe the rules of Community law.

On those grounds, the French Government brought the matter before the Court of Justice. In the application it asked the Court to declare that the British Order of 9 March 1977 was not a measure which the British Government was legally bound to take under the terms of the North-East Atlantic Fisheries Convention, and to declare also that the order was illegal under Community law.

The British Government opposed the submissions outlined above in the proceedings before the Court, in which the Commission was participating as intervener on behalf of the French Government. During a hearing by the Commission on 2 February 1978 the British representative unsuccessfully sought approval of the order. The Commission, however, insisted that the order should be amended to comply with the recommendation it had made restricting by-catches to 40 % and the British Government submitted an official request to the Commission on 3 July 1978 to approve an amendment of the disputed order. This amendment was then made in the Fishery Nets (North-East Atlantic) (Variation) Order 1978 dated 7 July 1978, to the effect that no restriction was to apply to by-catches in prawn-fishing.

My opinion on the dispute is as follows:

1. First, the doubts cast by the British Government on the application as it was formulated in the written procedure must be examined.

They are not without foundation. According to Articles 170 and 171 of the EEC Treaty an action such as the present one can only be for a declaration that a Member State has failed to fulfil obligations under the Treaty — which of course means Community law as a whole. That being so, I do not think it possible — and this affects the second head of the claim — for the Court of Justice to declare a national rule of law illegal in such proceedings. In any case the national courts are in a position to do so. Similarly, I do not think it possible to make declarations concerning obligations imposed by the North-East Atlantic Fisheries Convention, either to the effect that it did not *compel* the British Government to make the disputed order, or to the effect that the British measures are not even within the ambit of the Convention. In proceedings such as the present the only yardstick available to the court is Community law or measures to which the latter refers, such as provisions which have been adopted by the Community and are therefore also binding on it. This Convention is not in that category, even though when it was denounced by the Member States of the Community who were party to it, either late in 1977 or on 7 and 24 February 1978, they gave as their reasons that it should be adapted to the new legal situation — the extension of the territorial waters to 200 nautical miles — and that therefore the Community must be given an opportunity to become a party thereto in its own right.

Apparently the French Government has realized this, too. At all events this, it seems to me, is the reason why in the oral procedure the discussion referred only to a declaration that by making the

order of 9 March 1977 the United Kingdom had failed to fulfil obligations under Community law. We should therefore consider the application only as so varied.

2. Two objections are made against the British Government:

(a) In making the order in question it failed to observe the procedure prescribed by Community law, namely Annex VI to the Hague Resolution of 3 November 1976 to which reference has already been made and Article 3 of Regulation No 101/76, which provides that 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. Earlier the French Government had also claimed that because the Community had exercised its powers relating to the conservation of fishery resources no power to make rules remained at the national level, but this view was not apparently maintained in the oral procedure, and the French Government admitted itself that the Community measures which had been adopted were fragmentary and incomplete, confined in fact to certain areas and certain species of fish, so that even after issuing Regulation No 350/77 the Council had not exercised its powers to the full.

(b) Exception is also taken to the content of the British order. As far as the fish stocks it affected are concerned, it was not justified on scientific grounds, and the by-catch percentage allowed must be regarded as excessively strict. The order is, moreover, discriminatory, has a damaging effect on the objectives and functioning of the common organization of the market in fishery products — namely on pricing and market supplies; furthermore it is prejudicial to the negotiations to be held between the Commission and non-member countries concerning agreements on conservation measures and fishing rights in the Community's territorial waters.

The United Kingdom relies in its defence — rejecting, of course, the objections concerning the content of the order — principally on its view that the Hague Resolution and Article 3 of Regulation No 101/76 apply only to purely unilateral measures adopted by a State on its own initiative, and not to those which — as in the present instance — are adopted in implementation of international agreements.

To this the French Government replies that the British Government can no longer rely on the North-East Atlantic Fisheries Convention because the United Kingdom itself now partly disregards it. The French Government is also of the opinion that the Hague Resolution in any case extends to actions which involve more than merely enacting the recommendations of the North-East Atlantic Fisheries Convention in national laws.

3. Before I examine the dispute in more detail, I think it would be advisable to recall the relevant case-law up to the present date together with a few fundamental observations which are pertinent to the case in hand.

(a) First, the judgment of 14 July 1976 in Joined Cases 3, 4 and 6/76 (*Kramer*) is important; it concerns measures

adopted by the Netherlands in fulfilment of obligations under the North-East Atlantic Fisheries Convention, namely, regulations to implement a recommendation on fishing for sole and plaice which the Contracting States were required to make under Article 8 of the Convention. On the ground that the Community had not yet fully exercised its powers in the sector of the protection of fishing grounds and the conservation of the biological resources of the sea, the judgment made it clear that, on the one hand, Member States had the power — admittedly only during a transitional period — to assume obligations under the Convention and to ensure that they were carried out. On the other hand, however, the Member States were already bound by Community obligations, in particular those under Article 5 of the EEC Treaty. Whilst the decision went no further, that meant that the Community must not be hindered in exercising its duties under Article 102 of the Act of Accession, which says that from the sixth year after accession at the latest, the Council, acting on a proposal from the Commission, shall determine conditions for fishing with a view to ensuring protection of the fishing grounds and conservation of the biological resources of the sea. In addition, the Member States were bound to ensure that any catch restrictions were so formulated that their effect on the functioning of the common organization of the market in fishery products was kept to a minimum.

(b) The judgment deliverd on 16 February 1978 in Case 61/77 *(Commission* v *Ireland* [1978] ECR 417) is also important. There also it is stated that 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 to take appropriate conservation measures. But it is emphasized in the judgment that the duty to co-operate, which is imposed by Article 5 of the EEC Treaty, must be observed; in Annex VI to the Hague Resolution there is a general statement to the effect that the Member States are allowed to adopt appropriate conservation measures *in collaboration* with the Commission.

(c) Lastly, interlocutory order No 61/77 R, made on 22 May 1977 in the same case ([1977] ECR 937), on an application under Article 83 of the Rules of Procedure is also relevant. It points out that it is vital not to jeopardize the efforts being made within the Community to formulate a common fisheries policy and not to prejudice the position of the Community in international negotiations. It is also worth noting in relation to Annex VI to the Hague Resolution that it sets up a procedure to enable compromise solutions to be reached *by common consent.*

4. The crucial question in this dispute — to which I shall now turn my attention — is clearly to decide what duties arise for the Contracting States under Annex VI to the Hague Resolution. Even the British Government has no difficulty in agreeing that it created legal obligations. According to the submissions we have heard up to now, what remains to be decided is whether the procedure set out in the Hague Resolution, which the British Government, as it agrees, did not

observe, had also to be followed when national measures were adopted in execution of obligations under the North-East Atlantic Fisheries Convention.

A preliminary point to be decided is whether the United Kingdom is entitled to rely on this Convention at all. The French Government doubts whether it is, on the ground that the United Kingdom at that time no longer applied the Convention without reserve, but had partially denounced it. It refers to a British Note dated 27 January 1977, in which it was stated that the recommendation on measures of control — which provides that infringements of the Convention shall be notified to the relevant home-country, which will then prosecute its own nationals — would no longer be applied owing to the extension of territorial waters to 200 nautical miles; the United Kingdom would thenceforth take direct action against French ships which failed to comply with the rules of the Convention. I believe, however, that we do not need to consider this question further, and that we can leave open the question of the interpretation of Article 13 of the Convention — which refers to the fact that "each Contracting State shall take in its territories and in regard to its own nationals and its own vessels appropriate measures. . ." and of the Revised Scheme of Joint Enforcement of the North-East Atlantic Fisheries Commission, concerning international controls outside territorial waters. It may be assumed — and here I am anticipating the results of my consideration — that even if the United Kingdom were still in a position to rely on its obligations under the Fisheries Convention — because it had faithfully carried out all the other recommendations, a fact which might well be decisive — it was certainly not thereby dispensed from following the procedural requirements laid down in the Hague Resolution.

Consequently there is no need either in this case to consider the position with regard to obligations under the Hague Resolution when recommendations of the Commission set up under the Fisheries Convention are simply adopted into the body of national laws, in which case there is no national exercise of discretion and no national evaluation; however, permit me to say — restricting myself to this comment — that the Commission has submitted sound reasons for being consulted even in those cases, so as to ensure, for instance, that no essential point has been passed over, or that no inadmissible additional elements find their way into the national legislation. The fact is that we are clearly not concerned here with the type of case where recommendations on fishery matters are merely enacted into domestic law. That is clear from the British Government's statement of defence. As the Court knows, the defendant relies principally on the Fisheries Commission's Recommendations No 2 and No 5. However, it is clear that Recommendation No 2 contains only provisions concerning the mesh size of nets for catching certain types of fish, but nothing concerning by-catch limits. In order to support this conclusion, therefore, the British Government had to rely on the duty imposed by Article 13 of the Convention to see that it is put into effect; according to this, each Contracting State is to take appropriate measures to ensure the application of the provisions in question. The British Government is of the opinion that the rule it has made — exclusion of the

defence that the small-mesh nets were being carried solely for the purpose of catching certain kinds of fish where more than 20 % of the catch is fish for which larger nets are prescribed — is clearly to be considered as a measure to facilitate the application of Recommendation No 2. As far as Recommendation No 5 is concerned, it does of course contain provisions concerning the amount of the by-catch allowed; but they refer exclusively to fishing for industrial purposes, as does Regulation No 350/77, which reduced the percentage prescribed in Recommendation No 5 to 20 %. To get past this clear distinction the British Government had to fall back on the spirit and purpose of the recommendation, claiming that its application to catches of fish destined for human consumption was equally logical. But one cannot ignore the fact that the threat posed by the by-catches takes on quite a different aspect where fishing for human consumption is concerned, and the French Government has supplied figures concerning the relevant by-catches. In the light of this, and the fact that the British Government has again had to rely on what it considers to be the meaning and spirit of all the recommendations on fishing — even those which are *not* relevant here — to support its interpretation, this is certainly not mere adoption by national legislation of provisions from the Fisheries Convention, but rather applying them on the basis of a latitude of appreciation and approach which other Member States might use in quite a different way. And it is clear that the practice of British courts in this respect prior to the making of the disputed order varied considerably from case to case.

Once this is accepted I think there can be no doubt that Annex VI to the Hague Resolution also catches measures such as these, and not just purely national measures which are adopted without any reference whatsoever to international obligations. Several considerations support this strict interpretation of the Hague Resolution in fact. There are, for instance, the decisions made by the Court, which I have already mentioned, clearly enunciating the principle that Member States must act in accordance with the interests of the Community, and stressing that in cases of doubt regard must be had to the interests of the Community whenever appropriate. The Commission has made it clear that this must be so in the case of measures for the conservation of fish stocks, when it pointed out that in many cases stocks of fish, which move from place to place, belong as it were to several Member States together, and that it is therefore advisable, in order to ensure the effectiveness of protective measures, for any action to be, as far as possible, Community-based or at least co-ordinated, and for the Community organs which do in any case always consult the other Member States when applying the Hague Resolution, to participate. It should also be noted that Annex VI to the Hague Resolution starts with the principle that unilateral measures are prohibited. So one cannot but accept that in the event of an exceptional breach the relevant rules of law and those serving the protection of Community interests must be given a generous interpretation. They should be

applied whenever even a small necessity for them appears, and that is undoubtedly the case when international obligations are being fulfilled subject to a margin of discretion, because any divergent application would entail the risk that it will become more difficult to elaborate common rules and that the necessary negotiations with non-member countries will be prejudiced. Lastly, some weight should also be given to the circumstance that in November 1976 there were no less than 23 recommendations under the Fisheries Convention, but no word is said of them in Annex VI. This is certainly enough to justify the conclusion that within the meaning of that Annex anything other than a Community measure must be held to be a "unilateral measure". In my opinion it is obvious that no other conclusion can be drawn from the preamble to Regulation No 350/77 either. Admittedly the point being discussed here is that the conservation measures being applied by the Member States in the fishing zones off their North Sea and North Atlantic coasts depend in particular on international commitments. It is also striking that the same statement of grounds contains a reference to the procedure set out in Annex VI to the Hague Resolution.

That means, in my opinion, that all that can be decided concerning the British order now in question is that its adoption infringed Community law, if only because the Commission was not concerned in its adoption — there was no consultation and no effort was made to obtain the Commission's approval — and that therefore the complaint that the United Kingdom has failed to fulfil its obligations under the Treaty is justified.

As to what precisely the procedure should be according to Annex VI and, in particular, whether this obligation is nothing more or less than a specific expression of the obligations which arise under Article 5 of the EEC Treaty, this does not in fact need to be considered further. However, I should just like to make the following points briefly, since they were discussed at length in the proceedings:

It is clear that the duty entails more than merely informing the Commission in order to enable it, where necessary, to institute proceedings for failure to fulfil obligations under the Treaty. Since the sense and purpose of Annex VI are obviously to ensure a minimum of co-ordination between national measures, or in certain circumstances between a multitude of national measures, and in doing so to take into account both the future elaboration of a common policy and relationships with non-member countries, this rule — as the case-law has already demonstrated — requires *collaboration* with the Commission, including a genuine readiness to seek out solutions which are acceptable to the Community. The country which is consulting the Commission must be prepared, then, to accept modifications to the measures it intends to take, and is certainly prevented from putting them into effect directly after a first draft has been rejected by the Commission. Even if Annex VI does not expressly mention the necessity for the commission's approval or a thoroughgoing right of veto the French Government is correct in saying that the text of the provision comes extremely close to such legal definitions. That is a question which may be examined more closely one day in a case in which it is really decisive.

5. The British Government is also reproached on the ground that it has infringed Article 3 of Regulation No 101/76, which gives each Member State a duty to notify other Member States and the Commission of any alterations they intend to make to fishery rules laid down pursuant to Article 2 — that is to say, to national rules covering fishing in sea-waters under the sovereignty of that State. This, too, does not require further comment in the light of the results of the foregoing examination. However, I do not wish to conceal my opinion that this complaint is also justified.

The fact that the rules in question were phrased in quite general terms suffices to show this. Neither the text of nor the preamble to the order offers any indication that these might be anything other than measures intended to facilitate the implementation of recommendations in the context of the Fisheries Convention. It is also clear that the duty of notification in Article 3 of Regulation No 101/76 rests on considerations which correspond to those set out in Annex VI to the Hague Resolution, and that as a consequence all the considerations relating thereto may be advanced in relation to Article 3, too. Since the United Kingdom made the notification required only after the order was made, it may be said on those grounds that this constituted a breach of Article 3 of Regulation No 101/76 also, and this certainly applies to the whole content of the order, that is, not merely to Article 6 (3) thereof, which is what the French Government originally concentrated on.

6. Now all that remains are the complaints attacking the content of the order. I think this is another point which need not be examined after all that I have said. If the questions raised are not to be completely ignored, however, the following brief remarks may be made:

(a) It is difficult to maintain that the necessity for a rule of the kind here in dispute has not been demonstrated in principle. It should be pointed out, however, that a similar measure was adopted by the French Government (regulation dated 31 December 1976), though with different by-catch limits, namely 80 %. There was also a proposal from the Commission in January 1978 in which yet another by-catch limit (40 %) was envisaged.

(b) It is probably not possible to give any final answer to the question whether the British measure is to be regarded as excessive. We do not have all the necessary technical data for that. Nor is it sufficient to rely on Article 6 of Regulation No 350/77 since it relates only to fishing for industrial purposes. Nor can one simply rely — against the British order — on the proposal of the Commission already mentioned, which the British Government has emphasized was not accepted by it and which mentioned only a compromise figure devoid of scientific basis as, originally, 20 % was the figure discussed. In this respect it is interesting to note, however, that the Commission's proposal relating to a transitional period also envisaged other measures — different mesh-sizes, provisions governing the size of fish — so that it does not seem appropriate to

extract a single aspect of it for comparison with the British measure, which does not require a minimum fish-size. It is also of interest to note that the Commission's proposal for a final solution — as has been argued without dispute — is on the whole more severe than the disputed British order.

(c) As far as jeopardizing negotiations with non-member countries is concerned, it is important to note that the Commission itself has stated that this does not really apply in the case of the British order. As regards prejudice to the purposes and functioning of the common organization of the market in fishery products — the effects of the British measure on the price and supply position — no other details have been submitted to support the conclusion that the Treaty has been infringed in that respect, too.

(d) Lastly, I come to the accusation of discrimination, made on the ground that no account was taken of the fact that French fishermen are also bound to observe a minimum fish-size in their catches by virtue of the French regulations — compelling them, unlike British fishermen, to increase the by-catches. Here I should like to restrict my comments to pointing out that I think it doubtful whether on that ground a national rule which is generally valid may be said to cause unacceptable discrimination. However, there is no need to go into this question more fully in the present proceedings.

7. Permit me to conclude my remarks by repeating that the complaint brought by the French Government is well-founded. It is also clear, on the basis of the claim as last formulated, that the Government of the United Kingdom has failed to fulfil its obligations under Community law in unilaterally making the Fishing Nets (North-East Atlantic) Order 1977. As the applicant has succeeded in its claim, the United Kingdom must be ordered to pay the costs of the proceedings as requested in the application; it remains only to say that each party must bear its own costs incurred by the intervention, as no claim has been submitted with regard to them.