OPINION OF ADVOCATE GENERAL LA PERGOLA

delivered on 30 September 1997 *

I — The questions submitted for a preliminary ruling in this case and their legislative and factual context

1. The five questions submitted for a preliminary ruling in this case have been raised by the High Court of Justice in Northern Ireland, Queen's Bench Division (hereinafter 'the High Court'), in proceedings pending before it between two producers' organisations in Northern Ireland — the Northern Ireland Fish Producers' Organisation (along with the individual fishermen associated with it) and the Northern Ireland Fishermen's Federation — and the Department of Agriculture for Northern Ireland.

By those questions, the High Court is asking the Court of Justice to interpret Article 5 of the EC Treaty (hereinafter 'the Treaty') and to rule on the validity of two measures adopted by the Council in regard to the exploitation of fishery resources.

More precisely, the questions referred by the national court concern, in the order set out below, (i) the validity of Annex VII to the Council Resolution of 3 November 1976 (hereinafter 'the Hague Resolution'), (ii) the validity of Council Regulation (EC) No 3362/94 of 20 December 1994 fixing, for certain fish stocks and groups of fish stocks, the total allowable catches for 1995 and certain conditions under which they may be fished (hereinafter 'Regulation No 3362/94'), [1] and (iii) the interpretation of the principle of Member States' liability for damage which may be caused to individuals through breaches of Community law:

'(1) Is the validity of the allocation to the United Kingdom of its cod and whiting quotas in Area VIIa pursuant to Article 3 of Council Regulation (EC) No 3362/94 dependent on whether Annex VII to the Council Resolution of 3 November 1976 was properly adopted?

(2) If the answer to Question 1 is in the affirmative, was Annex VII properly adopted?

* Original language: Italian.

1 — OJ 1994 L 363, p. 1.

(3) Are the answers to Questions 1 or 2 affected by the fact that Annex VII is a document which is classified as secret and which has not been published or otherwise made available to the parties?

(4) Having regard to all other circumstances, was the fixing of the said quotas by the Council compatible with:

(i) the Common Fisheries Policy, and in particular Council Regulation (EEC) No 3760/92;

(ii) the principle of proportionality?

(5) If the fixing of the said quotas by Regulation (EC) No 3362/94 is invalid, are the applicants entitled to claim damages against the respondent and, if so, what are the conditions for liability?'

2. Before examining the questions submitted by the High Court, it may be useful to recall the provisions of Community law relating to the exploitation of fishery resources and the facts of the case.

3. Under the Treaty, fisheries come within the scope of the common agricultural policy. [2] As we know, the elaboration and implementation of the common organisation of markets for products in the sector was, in a sense, 'suspended' until the end of the transitional period. This may be explained by the special nature of some important practical aspects of fishing, in relation to which deeply rooted and disparate traditions and interests existed in the Member States — one need only think of historical fishing rights in territorial waters and the other powers of coastal States regulated by international maritime law — capable of giving rise to complex problems at both Community and international level.

4. With specific reference to the dominant activity of *maritime* fishing, the common organisation of the markets (hereinafter 'the COM') was first put into effect at an historic juncture marked by a serious economic crisis within the sector: not only had the technical competitiveness of the European fishing industry decreased in the face of rising competition at world level, but catches had also been reduced as a result of the intensive

2 — See Article 38(1) of the Treaty (under which fishery products come within the concept of agricultural products) and Annex II thereto (which includes fish within the scope of the common agricultural policy).

exploitation of fishery resources rendered possible by the huge investments made, in a favourable economic climate, over the ten years from 1958 to 1968.

The task in prospect was to restore the conditions for rational management and to ensure a socially acceptable transition from the national market organisations to that of the Community. That objective has been pursued — as was already the case for other 'agricultural' products *stricto sensu* (that is to say, products derived from cultivation or breeding) — by way of twofold legislative action.

5. A marketing scheme was established which was designed to reconcile the stability of prices of essential products for coastal populations dependent on fishing with the liberalisation of trade sought by the modern industrial and commercial structures within the sector (the so-called COM for fishery products). [3] At the same time, rules governing catches and access to fish resources were laid down, including the conditions for conservation and management, designed to ensure the durable exploitation of such resources (the common structural policy for the fishing industry). [4]

6. However, precisely at the time when the Community was about to establish the internal system of maritime fishing, the entire international legal context was called in question through the extension, by Iceland (in 1975) and other non-member countries with significant fishing areas in the North Sea and the North Atlantic (such as Norway and Canada in 1977), of their respective exclusive economic zones to 200 nautical miles from their coastlines.

That extension suddenly placed in jeopardy Community operators' rights of access to fishing areas and natural resources which were traditionally the subject-matter of the freedoms provided for under the law of the high seas, arousing considerable anxiety on

3 — Based on a common system of prices, common marketing rules (designed to improve the quality of products), incentives to establish producer organizations, the right of equal access to any port in the Community for the purpose of landing catches, and regulation of trade with non-member countries: see Council Regulation (EEC) No 2142/70 of 20 October 1970 on the common organization of the market in fishery products (OJ, English Special Edition 1970 (III), p. 707), repealed — with effect from 1 February 1976 and following the enlargement of the Community — by Council Regulation (EEC) No 100/76 of 19 January 1976 (OJ 1976 L 20, p. 1). The common organization of the market in fishery and aquaculture products is at present governed by Council Regulation (EEC) No 3759/92 of 17 December 1992 (OJ 1992 L 388, p. 1), as subsequently amended.

4 — See Council Regulation (EEC) No 2141/70 of 20 October 1970 laying down a common structural policy for the fishing industry (OJ, English Special Edition 1970 (III), p. 703), repealed — with effect from 1 February 1976 and following the enlargement of the Community — by Council Regulation (EEC) No 101/76 of 19 January 1976 (OJ 1976 L 20, p. 19). With the common structural policy, based on the principle of equal access for fishing boats of a Member State to the maritime zones of other countries in the Community, the Council sought to promote the coordination of uniform national policies and the granting of financial aid for the rationalization of Member States' fishing fleets.

the part of the Governments of the Member States concerned. [5]

7. By the Hague Resolution, referred to above, the Council laid down, in November 1976, a series of guidelines as a matter of principle for the future development of the common fisheries policy. The Hague Resolution was not published in the *Official Journal of the European Communities*. The reason for this given by the Council was that, at the time when the Hague Resolution was adopted, it seemed inappropriate to publish some of its annexes, which contained confidential material regarding instructions given by the Council to the Commission concerning future negotiations by the Community with non-member countries and international organisations. [6]

8. In response to the extension by a number of non-member countries of their exclusive fishing zones to 200 nautical miles from the coastline, the Hague Resolution provided that, with effect from 1 January 1977, the Member States — acting in concert and on a unanimous basis — would also extend to up to 200 nautical miles their respective fishing zones (the external limits of which at the time were 12 miles from the coastline) along their North Sea and North Atlantic coastlines. [7]

9. The Hague Resolution had eight annexes attached to it. Only the first of these was published in the *Official Journal*, albeit more than four years after it had been adopted (in the interim, it had already been published in the 1976 volume of *International Legal Materials*). [8]

For the purposes of the present Opinion, particular importance attaches to Annex VII — which is reproduced in full in the order for reference and is not merely by chance the subject of the first three questions referred by the High Court for a preliminary ruling

5 — It may, however, be noted at this point — so far as is relevant for the purpose of the present Opinion — that Ireland, whose fleet was not sufficiently developed to operate in the waters of non-member countries, was not directly disadvantaged by the losses of catch potential in such waters resulting from the unilateral extension by non-member countries of their exclusive fishing zones to 200 miles from their coastlines.

6 — See footnote 7 below and the portion of the text relating thereto.

7 — See the first recital in the preamble to Council Regulation (EEC) No 170/83 of 25 January 1983 establishing a Community system for the conservation and management of fishery resources (OJ 1983 L 24, p. 1), repealed, with effect from 1 January 1993, by Council Regulation (EEC) No 3760/92 of 20 December 1992 establishing a Community system for fisheries and aquaculture (OJ 1992 L 389, p. 1). Within this 200-mile zone, the Hague Resolution provided that the adoption of any conservation measures which might prove necessary would be a matter for the Community. However, pending the negotiations for the introduction of a Community fisheries system incorporating such measures, the Hague Resolution left intact the power of individual Member States unilaterally to adopt appropriate transitional measures, on a non-discriminatory basis and subject to Commission approval, intended to ensure protection of resources in their respective coastal fishing zones (see footnote 39 below). Moreover, in those zones coming within the jurisdiction of the Member States, fishing by non-Community vessels (see footnote 19 below) was to be governed by agreements between the Community, acting as a single sovereign entity, and the non-member countries concerned. At the same time, the Hague Resolution mandated the Commission to negotiate, on behalf of the Community, agreements with certain non-member countries concerning access for vessels from the Member States to those countries' territorial waters.

8 — See *International Legal Materials*, Vol. XV (1976), p. 1425, and OJ 1981 C 105 of 7 May 1981, setting out the text of the document entitled 'Council Resolution of 3 November 1976 on certain external aspects of the creation of a 200-mile fishing zone in the Community with effect from 1 January 1977'. As is clear from the Council's observations in the present case, the document in question constitutes Annex I to the Hague Resolution.

— entitled 'Draft Council Resolution on certain aspects of the internal fisheries system', and in particular to the third and fourth paragraphs thereof.

In view of the importance of fishing activities to the Irish economy as a whole, Annex VII to the Hague Resolution (hereinafter 'Annex VII') set out, *inter alia*, the Council's intention to apply the provisions of the common fisheries policy — adapted in the light of the Member States' extension of their territorial waters to 200 nautical miles from their coastlines — in such a way as to secure, on the basis of the Irish Government's Fisheries Development Programme for coastal fisheries 1976-1979, the continued and progressive development of the Irish fishing industry.

By Annex VII, the Council also recognised the need to take account, when applying the common fisheries policy, of the specific vital needs of other economically disadvantaged coastal regions in which the local communities are particularly dependent on fishing and the industries allied thereto, namely 'the northern parts of the United Kingdom' [9] and Greenland (to which, however, the Treaty ceased to apply from 1 February 1985). The favourable treatment accorded to such regions is, for the reasons just indicated, referred to in short form as 'Hague Preferences'. [10]

10. Incidentally, Annex VII was referred to in the Council Declaration of 30 May 1980 on the common fisheries policy, [11] by which the Council revealed the guidelines — in particular, and so far as the present context is concerned, regarding the fair distribution of catches — underlying the decisions to be adopted before 1 January 1981 in order 'to ensure that a common overall fisheries policy is put into effect'. [12]

9 — It appears from the case-file that the expression 'northern parts of the United Kingdom' for the purposes of the Hague Preferences comprises Scotland, Northern Ireland, the Isle of Man, and that part of England between the ports of Bridlington and Berwick.

10 — According to the Commission, it was accepted that the special needs of local populations particularly dependent on fishing should be represented by landed quantities of stocks having significant importance for those populations, and it is precisely to those quantities that the reference to 'Hague Preference' applies: see the Commission Staff Working Paper, *Hague Preferences*, SEC(95) 1666, of 9 October 1995, p. 1.

11 — OJ 1980 C 158, p. 2.

12 — Point 2 of the above Declaration states: 'In compliance with the Treaties and in conformity with the [Hague Resolution, the common overall fisheries policy] should be based on the following guidelines:

...

(b) fair distribution of catches, having regard, most particularly, to traditional fishing activities, to the special needs of regions where the local populations are particularly dependent upon fishing and the industries allied thereto [note in the original: "See paragraphs 3 and 4 of Annex VII ..."], and to the loss of catch potential in third country waters [resulting from the general extension of territorial waters to 200 nautical miles from the coastline]'.

11. In the Commission's Communication of 12 June 1980 to the Council (hereinafter 'the 1980 Communication'), [13] containing a proposal on 'quotas for 1980' expressly requested by the Council in the abovementioned Declaration, the Commission proposed for the first time (in Annex III) the fixing of quantitative parameters for calculating Hague Preferences.

For that purpose, the Commission interpreted Annex VII as meaning that, for the purpose of taking account of the vital needs of economically disadvantaged coastal areas, the northern parts of the United Kingdom ought to be guaranteed — for each fish stock — catches equal to those landed in 1975 *by vessels of less than 24 metres*. According to the Commission, landings in Scotland, Northern Ireland and the Isle of Man by vessels of less than 24 metres 'are taken to be the norm at which vital needs are satisfied'. [14]

In contrast, according to the Commission, the granting of Hague Preference to Ireland involved the allocation of catches amounting to *double* the quantities landed in 1975. [15] It has been noted in this regard that the preference allocated by the Community to the United Kingdom was based on quantities determined by way of guarantee, whereas Ireland received an absolute preference. [16]

12. In particular, and with specific regard to the two fish stocks and the fishing area at issue in the main proceedings, the above parameters translated into the following tonnages: for Ireland, 6 954 tonnes per annum for cod and 7 196 tonnes per annum for whiting; for the United Kingdom, 1 223 tonnes per annum for cod and 2 334 tonnes per annum for whiting.

13. Annex VII was once again expressly referred to in the sixth recital in the preamble to Council Regulation (EEC) No 170/83 of 25 January 1983 establishing a Community system for the conservation and management of fishery resources (hereinafter 'Regulation No 170/83'). [17] The adoption of this regulation marked the culmination of the Commission's efforts to achieve an over-

13 — Communication from the Commission to the Council of 12 June 1980 concerning the method of distribution among the Member States of the total catch possibilities available to the Community in 1980 and the guidelines for a structural policy in the fisheries sector, COM(80) 338 final.

14 — Ibid., Annex III.

15 — The more favourable parameter adopted for Ireland must evidently be attributable to the doubling of national catches (from 75 000 registered tonnes in 1975 to 150 000 tonnes in 1979), as well as, it would appear, to the increase in fleet size (by some 300 vessels), provided for, in the context of the extension of the territorial waters of the Member States up to 200 nautical miles from their coastlines, by the Irish Government's abovementioned Development Programme for coastal fisheries, pursuant to which the Council had expressed, in Annex VII, its desire to pursue development of the Irish fishing industry. See R. Wallace, *Special Economic Dependency and Preferential Rights in Respect of Fisheries: Characterization and Articulation within the European Communities*, C. M. L. R. 1984, p. 525, particularly at p. 532. This more favourable parameter has been repeatedly reaffirmed by the Commission in its proposals for annual quotas after 1979 (see footnote 61 below and the part of the text relating thereto).

16 — See Wallace, op. cit. in footnote 15, p. 532.

17 — Cited above in footnote 7. The text of the sixth recital referred to is reproduced in point 15 below.

all fisheries policy, albeit beyond the time-limit of 1 January 1981 (see point 10 above). [18]

The new system, which is designed to 'ensure the protection of fishing grounds, the conservation of the biological resources of the sea and their balanced exploitation on a lasting basis and in appropriate economic and social conditions' (Article 1 of Regulation No 170/83), introduced an important derogation from the principle of non-discrimination on grounds of nationality, [19] which governs access to fishery resources in the maritime territorial waters of the Member States, as well as (in so far as permitted by bilateral international agreements) in the fishing areas coming within the jurisdiction of non-member countries. [20] Moreover, it was precisely to that principle that the over-exploitation of fish resources was probably attributable.

With a view to achieving the abovementioned objectives, Regulation No 170/83 provided for the possibility of adopting appropriate conservation measures relating — according to the circumstances — to individual fish species or to groups of fish species. Such measures were to be based on the available scientific advice, in particular on the reports of the Scientific and Technical Committee for Fisheries set up under the Commission's auspices (see Articles 2(1) and 12 of Regulation No 170/83). [21]

The abovementioned conservation measures included the restriction of fishing effort, in

18 — 'In the period up to 1983 fishing in the Community's 200-mile limit was governed by a mixture of short-term Community conservation measures [for example, Council Regulation (EEC) No 754/80 of 26 March 1980 concerning, for certain fish stocks occurring in the Community fishing zone, the fixing for 1980 of the total allowable catches, the share available for the Community and the means of making the catches (OJ 1980 L 84, p. 36)], a series of injunctions from the Council that Member States conduct their fishing activities in such a way as to take into account the Commission's proposals on total allowable catches, and a host of conservation measures adopted by Member States': see R. R. Churchill, *EEC Fisheries Law*, Dordrecht, 1987, p. 19, footnote 23.

19 — The principle of non-discrimination on grounds of nationality, which follows clearly from Article 6 (formerly Article 7) and Article 40(3) of the Treaty, is confirmed *in subiecta materia* by Article 2(1) of Regulation No 101/76, cited above in footnote 4. Pursuant to that principle, 'Member States shall ensure, in particular, equal conditions of access to and use of the fishing grounds situated in the [maritime waters coming under their sovereignty or within their jurisdiction] for all fishing vessels flying the flag of a Member State and registered in Community territory'.

20 — Without prejudice to the special system of derogation established by Articles 100 to 102 of the Act concerning the conditions of accession to the European Communities of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland and the adjustments to the Treaties (OJ 1972 L 73 of 27 March 1972), under which the Member States were authorized, until 31 December 1982, to restrict fishing in waters under their sovereignty or jurisdiction, within the limit of six nautical miles from their respective coasts (or, for specified coastal regions of the three new Member States and France, within a 12-mile limit), to vessels which traditionally fished in those waters from ports situated in the relevant coastal area. Subsequently, that derogation was extended both temporally (until 31 December 1992 and later until 31 December 2002) and spatially (up to the generally applicable limit of 12 nautical miles) pursuant to Article 6(1) of Regulation No 170/83 and Article 6(1) of Regulation No 3760/92, cited above in footnote 7.

21 — See Commission Decision 79/572/EEC of 8 June 1979 (OJ 1979 L 156, p. 29) and, most recently, Commission Decision 93/619/EC of 19 November 1993 relating to the institution of a Scientific, Technical and Economic Committee for Fisheries (OJ 1993 L 297, p. 25).

particular by limits on catches (Article 2(2)(d) of Regulation No 170/83).

14. Pursuant to Article 3, limits on the exploitation levels which might prove necessary were to be achieved by a system of annual fixing, in the light of the available scientific evidence, (i) of the total allowable catch (hereinafter 'TAC') for each fish stock or group of fish stocks, and (ii) of the relevant quotas available to the Community pursuant to undertakings assumed with non-member countries.

The volume of catches available to the Community was, in turn, the subject of distribution among the Member States 'in a manner which assures each Member State *relative* stability of fishing activities for each of the stocks considered' (Article 4 of Regulation No 170/83; emphasis added).

15. It was precisely with the declared purpose of providing an interpretative aid for the notion of 'relative stability aimed at' that the Council stated as follows in the preamble to Regulation No 170/83:

'... conservation and management of resources must contribute to a greater stability of fishing activities and must be appraised on the basis of a reference allocation reflecting the orientations given by the Council;

... that stability, given the temporary biological situation of stocks, must safeguard the particular needs of regions where local populations are especially dependent on fisheries and related industries as decided by [the Hague Resolution] and in particular Annex VII thereto;

... therefore, it is in this sense that the notion of relative stability aimed at must be understood' (fifth, sixth and seventh recitals in the preamble).

16. Article 5 of Regulation No 170/83 authorised Member States, subject to prior notice being given to the Commission, to exchange all or part of the quotas in respect of a fish species or group of fish species allocated to them.

With regard to the utilisation of quotas allocated by the Member States and the sub-allocation of those quotas among the various sections of the respective national fleets, Article 5 of Regulation No 170/83 confined itself to providing that these operations should take place 'in accordance with the applicable Community provisions'.

17. Council Regulation (EEC) No 172/83 of the same date [22] fixed the TACs for the stocks or groups of stocks in the fishing zones of the Member States, including cod and whiting, and for the share thereof which was available to the Community for 1982.

By Regulation No 172/83, the Council also proceeded, for the first time, with the allocation of that share among the Member States, introducing the so-called 'allocation keys' relating to individual stocks and geographical regions.

18. More precisely, the system of allocation keys consisted in the allocation to individual Member States of absolute quantities expressed in tonnes and corresponding to percentages of the Community share of the TACs.

These allocation keys resulted from the simultaneous taking into account of the factors previously indicated by the Council in its abovementioned Declaration of 30 May 1980 and, in rather more detail, by the Commission in its 1980 Communication (see points 10 and 11 above), that is to say: [23]

(i) traditional fishing activities (assessed on the basis of the average catches made by each Member State in the period 1973-1978); [24]

(ii) the specific needs of areas in which the population is particularly dependent on fishing and its dependent industries (on the basis of the values determined under the Hague Preference in accordance with the parameters set out by the Commission in its 1980 Communication [25]); and

22 — Council Regulation (EEC) No 172/83 of 25 January 1983 fixing for certain fish stocks and groups of fish stocks occurring in the Community's fishing zone total allowable catches for 1982, the share of these catches available to the Community, the allocation of that share between the Member States and the conditions under which the total allowable catches may be fished (OJ 1983 L 24, p. 30). Unlike subsequent annual regulations, Regulation No 172/83 had the purpose, therefore, of allocating quantities for the *previous* year rather than for the following year.

23 — See the fourth recital in the preamble to Regulation No 172/83.

24 — 1978 was the last year for which the Commission, when drafting its 1980 Communication, had complete information at its disposal.

25 — See point 11 above.

(iii) the loss of fishing potential in the waters of non-member countries (as calculated for the reference period 1973-1976). [26]

With specific reference to Fishing Area VIIa determined by the International Council for the Exploration of the Sea — ICES [27] — and to the two Member States concerned for the purposes of the present Opinion, the allocation key — fixed by Annex II to Regulation No 172/83 and resulting from the relationship between the respective 1982 quotas and the Community share of the TAC — was, for Ireland, 46.67% for cod and 39.625% for whiting; the United Kingdom was to be entitled to 42.67% of the available cod resources and to 52.83% of those for whiting. [28]

19. The allocation keys established by Regulation No 172/83 — the validity and proper application of which are not disputed in the main proceedings — were not subsequently amended in the years that followed.

The reason for this must probably be sought in the Commission's Declaration of 1984. In the first place, 'as agreement on a common fishery policy was reached on 25 January 1983 and then only after very long and difficult negotiation, the Commission does not consider that it would be useful to propose to the Council a new allocation key'. Second, 'in interpreting [Article 4 of Regulation No 170/83 dealing with the safeguarding of relative stability of fishing activities as the key for allocating Community catches among the Member States (see point 14 above)], the Council decided that the relative quota distributions which it adopted [by Regulation No 172/83] should form the allocation key for 1983 and subsequent years'. [29]

20. The Community system of conservation and management of fishery resources described above, introduced by Regulation No 170/83, was proposed again — with modifications (which, however, are not relevant for the purposes of the present Opinion) designed to improve and extend the conservation measures previously in force in light of the steady decline in a number of reserves, both within and outside Community waters — by Regulation No 3760/92 [30] establishing a Community system for fisheries and aquaculture, which is at present in force.

26 — The reference to 1976 (rather than to 1978) may be explained by the fact that the general extension by non-member countries of their exclusive fishing zones to 200 miles from their coastlines dated back to that year.

27 — Fishing Area VIIa is situated in the Irish Sea, which separates Great Britain and Ireland.

28 — The fact that the sum total of the allocation keys for the two Member States, for Area VIIa and for each of the two stocks indicated, is less than 100% can be explained by the fact that quotas in this area and for the same stocks had also been allocated to Belgium, France and the Netherlands.

29 — See the answer given by Mr Contogeorgis on behalf of the Commission (9 January 1984) to Written Question No 1077/83 by Mrs Sylvie Le Roux (84/C 38/07) (OJ 1984 C 38, p. 4). For a reference to the 'Council's intention to retain [the 1983 allocation key], which was worked out during lengthy negotiations, for 10 years', see also the Opinion of Advocate General Lenz in Case 46/86 *Romkes* v *Officier van Justitie* [1987] ECR 2671, 2678, in particular at p. 2679.

30 — See footnote 7 above.

It is not by chance that the twelfth to fourteenth recitals in the preamble to that regulation substantially reproduce the text of the fifth, sixth and seventh recitals in the preamble to Regulation No 170/83 (see point 15 above).

21. According to the order for reference, the TACs for cod and whiting had, for the period up to 1989, been set at a high enough level to ensure that Ireland and the United Kingdom would obtain quotas (calculated on the basis of the allocation keys) which would not be lower than those corresponding to their respective Hague Preferences.

The High Court also states that the TACs fixed by the Council for these two stocks in Area VIIa over the period 1983-1989 were well in excess of the corresponding 'historical' international catches recorded by ICES. According to the latter organisation, the maximum sustainable yield of the two stocks in question would produce TACs well below the level necessary to prevent recourse to Hague Preferences.

22. That situation changed — for whiting and cod — as from 1990 and 1991 respectively. As a result, the two Member States have invoked each successive year the Hague Preference mechanism, albeit applied in the amended version resulting from the so-called '1988 political compromise'. [31]

Annual quotas have thus been allocated to Ireland and the United Kingdom which are calculated on the basis of the mid-point between:

(i) the theoretical quotas resulting from application of the allocation keys alone, and

(ii) the notional quotas equivalent to those theoretically resulting from application of Hague Preference (or, should the sum of those notional quotas be greater than the entire amount of the catches available to the Communities, the quotas resulting from the allocation of that amount between all the Member States entitled,

31 — At the Council of Fisheries Ministers in December 1988, the British Government invoked Hague Preference for North Sea haddock — which, in its opinion, entitled the United Kingdom to a quota of 60 000 tonnes for 1989 — in so far as application of the relevant allocation key would have given it a quota for the stock in question amounting to only 48 760 tonnes (in contrast to the 157 560 tonnes allocated to the United Kingdom the previous year). This claim by the United Kingdom, however, aroused opposition on the part of other Member States, which took the view that the factors underlying the Hague Preferences had been incorporated once and for all in the allocation keys established by Regulation No 172/83. The application to the United Kingdom of the Preference for North Sea haddock would thus have involved a double burden for the other Member States. Finally, on a proposal by the Commission, the Council accepted the political solution of allocating to the United Kingdom a quota of 54 380 tonnes, apparently the mid-point between the figure corresponding to the Hague Preference and that corresponding to the allocation key. This compromise solution was subsequently followed in several other cases: see the Commission Staff Working Paper, cited above in footnote 10, pp. 2 and 3, and A. E. Munir, *Fisheries after Factortame*, London, 1991, p. 65.

in proportion to the *percentages of the Community total* expressed by the respective Hague Preferences).

23. It also follows from the order for reference that, while the United Kingdom fleet has, since 1990, used up virtually the full amount of its own quotas of cod and whiting for Area VIIa, the Irish fishing fleet has availed itself only of approximately 30% of its own quotas, using the remaining volume for quota swaps with other Member States (see points 16 and 20 above).

24. The High Court also points out that the overall effect of recourse by the United Kingdom to the Hague Preference mechanism — bearing in mind also the additional fish stocks other than the two which at present concern us — has been largely positive for that State's fleet.

That mechanism has resulted, over the period 1989-1995, in a total gain of 13 700 tonnes (*vis-à-vis* the notional quotas to which the United Kingdom fleet would have been entitled on the basis of the allocation keys alone), even though the reverse is true with regard to the two stocks here at issue, with the United Kingdom having incurred overall losses equivalent to approximately 23% (4 225 tonnes) for cod and approximately 22% (7 130 tonnes) for whiting. [32]

25. In December 1994, the Council, exercising the powers expressly provided for by Article 8(4) of Regulation No 3760/92, [33] proceeded to allocate among the Member States the share of TACs available to the Community for 1995 by adopting Regulation No 3362/94, cited above (see point 1), on the validity of which the Court has been called upon to give a ruling.

More particularly, for the purposes of the present Opinion, the share (equivalent to 100%) of the TACs for cod and whiting available *to the Community* in Area VIIa — determined according to Regulation

32 — According to the order for reference, the losses indicated in the text were significantly offset by the effect of quota swaps made by the United Kingdom, amounting to definitive figures of 1 370 tonnes for cod and 3 450 tonnes for whiting.

33 — Article 8(4) of Regulation No 3760/92 states as follows:
'The Council, acting by qualified majority on a proposal from the Commission:
(i) shall determine for each fishery or group of fisheries, on a case-by-case basis, the total allowable catch and/or total allowable fishing effort, where appropriate on a multiannual basis. These shall be based on the management objectives and strategies where they have been established [by the Council, acting in accordance with the procedure laid down in Article 43 of the Treaty];
(ii) shall distribute the fishing opportunities between Member States in such a way as to assure each Member State relative stability of fishing activities for each of the stocks concerned; however, following a request from the Member States directly concerned, account may be taken of the development of mini-quotas and regular quota swaps since 1983, with due regard to the overall balance of shares;
...
(iv) may also, on a case-by-case basis, determine the conditions for adjusting fishing availabilities from one year to the next;
(v) may, based on scientific advice, make any necessary interim adjustments to the management objectives and strategies.'

No 3362/94 and equal to 5 800 tonnes and 8 000 tonnes respectively — proved to be insufficient to guarantee quotas for Ireland and the United Kingdom which would not be lower than their respective Hague Preferences. [34]

Pursuant to the method of calculation resulting from the '1988 political compromise' described above (see point 22), Regulation No 3362/94 thus allocated to Ireland final quotas of 3 820 tonnes of cod and 4 605 tonnes of whiting and, to the United Kingdom, final quotas of 1 670 tonnes of cod and 3 095 tonnes of whiting. [35]

After the adoption of Regulation No 3362/94, however, the United Kingdom's quotas were the subject of an upward adjustment [36] through swaps made by the British Government with Ireland and the Netherlands pursuant to Article 9 of Regulation No 3760/92.

26. On 5 May 1995, the Department of Agriculture for Northern Ireland notified the Northern Ireland Fish Producers' Organisation (hereinafter 'NIFPO') of the decision allocating fishing quotas for 1995 in respect of Area VII, which is challenged in the main proceedings.

II — The arguments of the parties to the main proceedings and of the national governments and institutions which have submitted observations to the Court

27. The action brought by NIFPO seeks to impugn, not the validity of the method of sub-allocation of the national quotas of cod and whiting applied by the United Kingdom authorities, but rather the validity of the measure constituting the premiss for that allocation, namely Regulation No 3362/94.

34 — That is to say, in the case of cod, 6 954 annual tonnes for Ireland and 1 223 annual tonnes for the United Kingdom, and, in the case of whiting, 7 196 annual tonnes for Ireland and 2 334 annual tonnes for the United Kingdom (see point 12 above).

35 — The figures indicated in the text were arrived at by the following calculation:
(1) theoretical quotas resulting from application of the allocation keys:
Ireland = 5 800 t. x 46.67 % = 2 705 t. cod
8 000 t. x 39.63 % = 3 170 t. whiting
United Kingdom = 5 800 t. x 42.67 % = 2 475 t. cod
8 000 t. x 52.83 % = 4 225 t. whiting;
(2) notional quotas resulting from the application of the Hague Preferences, amended to take account of the fact that the sum of the preferences in absolute terms (equal to 8 177 t. for cod and 9 530 t. for whiting) would have been greater than the entire Community volume available for the two species:
Ireland = 5 800 t. x 85 % = 4 930 t. cod
8 000 t. x 75.5 %= 6 040 t. whiting
United Kingdom = 5 800 t. x 15 % = 870 t. cod
8 000 t. x 24.5%= 1 960 t. whiting;
(3) median figures between (1) and (2), as rounded off:
Ireland = 3 817.5 t. cod, 4 605 t. whiting
United Kingdom = 1 672.5 t. cod, 3 092.5 t. whiting.

36 — Reaching figures of 2 440 and 3 350 tonnes for cod and whiting respectively, on 5 May 1995, when the United Kingdom carried out the provisional allocation of the national quotas among British producer organizations and independent fishing vessels. As a result of subsequent successive swaps, the United Kingdom's quotas for Area VIIa on 1 September 1995 amounted to 2 575 and 3 950 tonnes respectively.

28. According to NIFPO, the validity of the allocation of the quotas among the Member States concerned, effected by the disputed regulation pursuant to the Hague Preference mechanism, is conditional on the proper adoption of Annex VII, which laid down the principles governing that mechanism and which constitutes its sole legal basis.

According to the order for reference, in June 1995 the Council rejected NIFPO's request for access to Annex VII under Council Decision 93/731/EC. [37] In its decision of refusal, the Council pointed out that the resolution and all of its annexes had been formally classified as secret at the time of their adoption, adding that Annex VII was formally adopted as part of the Hague Resolution on the basis of a proper written procedure. [38]

The Court, furthermore, has rejected the request for measures of inquiry made by NIFPO in these proceedings under Article 45 of the Rules of Procedure of the Court, seeking production by the Council and/or the Commission of the 'document known as Annex VII ... together with all other relevant documentation relating thereto' and to its adoption.

29. NIFPO, however, emphasises that Annex VII — in contrast to Annex VI to the Hague Resolution [39] — was entitled '*Draft* Council Resolution ...' [40] and did not contain on its first page any indication of Council approval. Moreover, NIFPO submits that failure to gain access to the document in question deprived it of the possibility of verifying whether it complied with the formal requirements laid down in Article 11 of the Council's Rules of Procedure (signature by the President *in office* and by the Secretary-General). Finally, the binding conditions for approval of Annex VII laid down by the German and Irish Governments in their respective unilateral declarations reproduced at the foot of the annex were never, according to NIFPO, complied with, thereby rendering inoperative the agreement of the two Member States within the Council.

From the foregoing, NIFPO concludes that the Council never formally adopted Annex VII.

37 — Council Decision 93/731/EC of 20 December 1993 on public access to Council documents (OJ 1993 L 340, p. 43), as subsequently amended by Council Decision 96/705/Euratom, ECSC, EC of 6 December 1996 (OJ 1996 L 325, p. 19).

38 — See also the letter of 15 September 1995 from the Council's Legal Service to the Office of the United Kingdom's Permanent Representative to the European Union, annexed by the respondent authority to its own observations to the Court.

39 — Annex VI to the Hague Resolution provided that, pending the implementation of adequate Community measures, the Member States could, as an interim measure, adopt unilateral measures to conserve fish resources, subject to prior consultation with the Commission and to its approval. Annex VI was examined by the Court in its judgment in Case 141/78 *France* v *United Kingdom* [1979] ECR 2923, in which it stated that the Hague Resolution 'in the particular field to which it applies, makes specific the duties of cooperation which the Member States assumed under Article 5 of the EEC Treaty', so that — in the absence of a common policy in the field of conservation of the biological resources of the sea — any conservation measures adopted by a Member State are 'subject to the requirements laid down by Annex VI' (see paragraphs 8 and 9). See also the judgments in Case 32/79 *Commission* v *United Kingdom* [1980] ECR 2403, paragraphs 11, 28 and 56 to 58; Case 804/79 *Commission* v *United Kingdom* [1981] ECR 1045, paragraphs 26 to 38; Case 287/81 *Anklagemyndigheden* v *Noble Kerr* [1982] ECR 4053, paragraphs 16 to 29; and Case 24/83 *Gewiese and Mehlich* v *Scott Mackenzie* [1984] ECR 817, paragraphs 7 to 13.

40 — Emphasis added. NIFPO also points out that Annex I to the Hague Resolution, even though it was entitled 'Draft' in the original documents, was subsequently published under the title 'Council Resolution of 3 November 1976 ...' (see footnote 8 above).

For that reason, the Council could not lawfully have applied it — in derogation, moreover, from the fundamental principles of the common fisheries policy [41] — in Regulation No 3362/94. In addition, the document in question is expressly referred to in the preamble to the basic regulation (Regulation No 3760/92), contrary to the general principle of legal certainty, under which measures that have not been published cannot have any legal effect *vis-à-vis* individuals whose legal position is adversely affected thereby.

30. Furthermore, according to NIFPO, even if Annex VII had been lawfully adopted, it was substantively unlawful, with the result that Regulation No 3362/94 was also unlawful.

First of all, the system of Hague Preferences has, in the view of NIFPO, had the effect, contrary to its stated objectives, of placing at a considerable disadvantage the population in Northern Ireland engaged in fishing, especially in the light of the Northern Ireland fleet's economic dependence on catches of cod and whiting. [42]

The actual operation of that system has impoverished local fishermen, impacting negatively on the relative stability of their fishing activities, contrary to Regulation No 3760/92, and in particular Article 8(4)(ii) thereof, under which the Council, in distributing Community fishing opportunities, must act 'in such a way as to assure each Member State relative stability of fishing activities *for each of the stocks concerned*' (emphasis added).

31. NIFPO also argues that the Hague Preference system is incompatible with the common fisheries policy and the fundamental objectives of Regulation No 3760/92 inasmuch as the *long-term* effects of the indefinite extension of preferences run counter to the derogation, expressly stated to be temporary, which Annex VII allowed to be introduced from that policy and those objectives.

According to NIFPO, the grant of guaranteed minimum quotas of fish resources to Ireland and the northern parts of the United Kingdom, without taking account of the scientific data on the state of the fish stocks concerned, was contrary to the objective of guaranteeing conservation of the available

41 — According to NIFPO, the Hague Preferences introduced a derogation, based on the *temporary* biological situation of fish resources, from the rules of ordinary allocation of quotas of those resources (see the thirteenth recital in the preamble to Regulation No 3760/92).

42 — According to the order for reference, cod and whiting are for the Northern Ireland fleet the second and third most valuable species after nephrops. It is not by chance that 60% and 75% respectively of the total catches of cod and whiting made by the United Kingdom's entire fleet are attributable to the Northern Ireland fleet.

and accessible fishing resources and their rational and responsible exploitation on a sustainable basis. [43]

32. NIFPO submits, in particular, that the discrimination, in terms of the preference levels and parameters, between fishermen in Ireland and those in Northern Ireland — that is to say, between identical categories of producers — is totally unjustified.

Equally illogical, it claims, is the fact that, even though the Irish Government's Development Programme for coastal fisheries — on which the Hague Preference system relating to Ireland was founded — came to an end in 1979 (a year in which the overall catches in Area VIIa were no greater than those for 1975), 20 years later the Irish fleets were still authorised to benefit from quotas that were double those for 1975.

The increase in fishing capacity (fleet sizes) which the Hague Preferences allowed Ireland to achieve [44] is also alleged to be contrary to the general objectives of the common fisheries policy. In particular, the increase in fleet size which was the objective of the abovementioned Development Programme was as a matter of historical record connected to the establishment of the Community fishing zone; according to NIFPO, however, such grounds could not be relied on in the case of the Irish Sea, in which the extension of Irish territorial waters to 200 nautical miles from the coastline was physically impossible.

33. NIFPO argues, finally, that the particular needs of the regions dependent on fishing (pursuant to the figures determined under the Hague Preferences on the basis of the parameters provided by the Commission in its 1980 Communication) had already been taken into account in the determination of

43 — NIFPO's assertion that until 1988 the problems connected with the implementation of the Hague Preference mechanism were circumvented by the fixing to that end of TACs of the stocks concerned at levels higher than those indicated as appropriate by scientific assessments appears to be shared by the Commission's services: see the Commission Staff Working Paper, cited above in footnote 10, p. 2.
Also according to Churchill, op. cit. in footnote 18 above, pp. 113 to 115, in the case of fish stocks subject to overexploitation, the Commission has not always been prepared to reduce the level of TACs at the rate and to the extent suggested by scientific studies, with a view to reconciling the divergent objectives of rapid attainment of long-term biological benefits and containment of short-term socio-economic costs. Nevertheless, it must be recognized in the Council's favour that it has only in exceptional cases further increased the TACs proposed by the Commission for the purpose of satisfying requests by individual Member States. See also the judgment in Case 46/86 *Romkes* v *Officier van Justitie* [1987] ECR 2671, at paragraph 19, discussed in footnote 70 below and in the relevant part of the text.

44 — See Commission Decision 92/594/EEC of 21 December 1992 on a multiannual guidance programme for the fishing fleet of Ireland for the period 1993 to 1996 pursuant to Council Regulation (EEC) No 4028/86 (OJ 1992 L 401, p. 39).

the allocation keys under Regulation No 172/83 (see points 17 and 18 above). [45]

Consequently, the implementation of the Hague Preferences in situations where TACs are falling — involving discriminatory treatment of the Member States concerned to an extent greater than that already allowed by those keys in 'normal' situations — resulted in double counting of the preferences themselves.

34. According to NIFPO, the Hague Preference system established pursuant to Annex VII is also contrary to the principle of proportionality.

First of all, the application of this system has had the effect of *aggravating* the reduction in quotas for fishermen in Northern Ireland following the general decline in the fish stocks concerned. It is no accident that the Irish Sea quotas allocated to the United Kingdom as a whole (without taking account of the swaps with other Member States) decreased, after 1989, by an extent greater than the overall TACs (or, to be more precise, the Community share of the TACs) for the same stocks. [46]

35. Furthermore, Ireland — which has, in recent years, used up only 30% of its quotas increased by Hague Preference (that is to say, catch sizes lower than the quotas resulting from the allocation keys) — passes the benefit of the preferences, through swaps with other Member States, on to categories of fishermen other than those for whom the mechanism was intended, to the detriment of relative stability and traditional fishing activities in the areas directly and originally intended to benefit.

According to NIFPO, the quota swaps made by the United Kingdom — which were voluntary in nature and as such cannot be taken as guaranteed — have offset only partially

45 — NIFPO's argument, as set out in the text, appears to be shared by some Member States, though not by the United Kingdom or Ireland (even though, on a number of occasions, those two States refrained from resorting to their own interpretation of the preference procedure): see footnote 49 below and the text relating thereto. The position of the Commission on this point, on the other hand, is absolutely 'agnostic' ('The Commission is unaware of any authoritative and/or definitive statement to confirm or deny that Hague Preference considerations had been conclusively and finally dealt with in 1983': Commission Staff Working Paper, cited above in footnote 10, pp. 1 to 3; according to Wallace (cited above in footnote 15, p. 533), 'the Hague Preferences expressed in tonnes are incompatible with the [allocation keys, since they] are no longer separately identified in [the annual regulations for the] allocation of quotas among Member States' (footnotes omitted).

46 — According to NIFPO, over the seven years in question the TAC for cod in Area VIIa fell by 61.3%, lower than the reduction registered for the corresponding United Kingdom quota (73.9%); furthermore, the TAC for whiting fell by 56% compared with a decrease of 67.8% in the United Kingdom quota. From the information provided by the order for reference, I calculate that the United Kingdom cod quota came, in percentage terms in relation to the TAC, to 33.55% in 1991 and to 28.8% in 1995, while that for whiting came to 49.2% in 1990 and to 38.7% in 1995.

the losses incurred by the populations affected in Area VIIa. Moreover, future opportunities for such swaps would appear to be rather limited — particularly if in future the TACs continue to fall — given that the United Kingdom is already using up practically 100% of its quotas increased by Hague Preference.

36. In NIFPO's view, it is from the illegality (on account of the clash, as already demonstrated, with the principles of non-discrimination and proportionality, and with the common fisheries policy) of the allocation of fishing opportunities among the Member States, carried out by Regulation No 3362/94, that its own entitlement to compensation for damage against the United Kingdom authorities arises pursuant to the Court's decision in *Francovich*. [47]

Apart from resulting in the loss of significant fishing potential in the years 1991 to 1995, the unlawful reduction (through the effect of Hague Preference) in the quotas to which fishermen in Northern Ireland would otherwise have been entitled compelled them to scale down their own fleet and convert vessels hitherto used to catch cod and whiting so as to adapt them in order to fish for other species not coming within the scope of the preference system.

47 — See the judgment in Joined Cases C-6/90 and C-9/90 *Francovich and Others* v *Italy* [1991] ECR I-5357.

37. According to the applicant organisations, since the determination by Regulation No 3362/94 of the United Kingdom quota for the species in question did not leave the United Kingdom with any discretion in regard to the sub-allocation among national operators, the national act challenged should be treated in the same way as an act transposing a directive.

The test which the Court laid down in *Francovich* is, they argue, satisfied in that the Community rules which have been breached confer clearly identifiable rights on the producers forming part of the applicant organisations; moreover, there is a causal link between the harm suffered by those producers and the breach committed by the Department of Agriculture for Northern Ireland.

38. The United Kingdom authority, the respondent in the main proceedings, submits on the other hand (and its position is supported by the Danish Government, the Council and the Commission) that resolutions — which do not feature among the measures having legal effects envisaged by Article 189 of the Treaty — are only an expression of the Council's *political* will. As such, they are not binding and do not produce legal effects capable of restricting by themselves the legislative competence of the institution.

That does not, however, rule out the Council's discretionary power to take account of the principles laid down in a resolution at the time when a binding measure, such as a regulation, is adopted.

39. With particular reference to the Hague Resolution, the Danish Government and the Commission emphasise that, since neither that resolution nor the preference system which it established has an independent legal status, the Council is not legally obliged, when fixing national quotas, to accede to a request for Hague Preference.

Moreover, it was not Annex VII, but rather the 1980 Communication, already referred to on several occasions (see point 11 above), which set the level of the Hague Preferences to be allocated to Ireland and the United Kingdom.

40. The Irish Government takes a different view, arguing that it follows from the Court's case-law that the Hague Resolution is binding, giving effect as it does to the obligations of cooperation assumed by the Member States under Article 5 of the Treaty (see footnote 39 above).

Since the Council has declared itself to be bound by the Hague Resolution and it has always acted consistently, the principles of the protection of legitimate expectations and regard for the full maintenance of the *acquis communautaire* preclude the Council from departing from the Hague Resolution without Ireland's consent. Since the resolution here at issue is in effect a negotiating mandate adopted by the Council for the common fisheries policy, it (including the provisions of Annex VII thereto) is tantamount to a Treaty principle by implication, to be complied with in the preparation of instruments concerning that policy.

41. In any event, the Irish Government is also in agreement that the criteria set out in Annex VII have been incorporated in the principle of relative stability, contained in a series of binding legal measures adopted subsequently (such as Regulation No 170/83 and Regulation No 3760/92: see points 13 to 15 and 20 above).

42. In addition, it maintains that Annex VII was validly adopted, as the Council's Legal Service has formally declared, even though it was placed in the archives in the version and form which it had when approved, including the title 'Draft Council Resolution'.

43. On the other hand, since it is a non-binding measure and as such not subject to

the requirement of publication, it is not clear why the fact that it was not published should take on the significance alleged by NIFPO.

In particular, the Irish Government argues, there can be no foundation to the alleged legal uncertainty for the applicant organisations as a result of non-publication, since Annex VII is addressed to the United Kingdom, not to the fishermen and producers' organisations in Northern Ireland.

44. The United Kingdom Government also submits — again with the support of the Danish and Irish Governments, the Council and the Commission — that, in view of all the relevant circumstances, the allocation of the national quotas by Regulation No 3362/94 is compatible with Regulation No 3760/92, the general principles of the common fisheries policy and the principle of proportionality.

The Council's broad discretion to adopt measures based on Article 40 of the Treaty relates not only to the nature and scope of the measures to be adopted but also, to some extent and except for cases of manifest error and misuse or abuse of powers, to the establishment of the basic facts.

45. The Danish and Irish Governments and the Council dwell, in particular, on the wide power of assessment under Article 8(4)(ii) of Regulation No 3760/92 which the Council enjoys when proceeding on a case-by-case basis with marginal adjustments to national quotas with a view to achieving an overall balance, while respecting the limits set by the principle of relative stability (of which the specific needs of the regions indicated in Annex VII form an integral part).

While not being legally bound to apply Hague Preferences, the Council ought solely to incorporate the relevant criteria in its assessment in order to find a balanced solution which takes account of the interests of all the Member States.

46. NIFPO, on the other hand, is unable to indicate clearly the manifest errors or misuses or abuses of power which the Council allegedly committed in adopting the regulation in question.

47. In particular, as the United Kingdom Government has pointed out, the argument that Regulation No 3362/94 applied Hague Preferences in disregard of scientific evidence is contradicted by the fact that recourse to those preferences did not result in increased TACs for the stocks in question.

48. Nor, it is argued, is there any force — although this is an assessment not shared by the Danish Government [48] — in the applicant organisations' argument that the specific needs of the regions dependent on fishing, subject to the Hague Preferences, had already been taken into account at the time when the allocation keys were fixed. The objective of the preference mechanism is to provide *additional* protection against a possible reduction in TACs for the species concerned and recourse to that mechanism cannot therefore in any event result in double counting.

In any case, with specific reference to the two stocks at issue, the United Kingdom was allocated in 1995 — through the Hague Preference mechanism, in its amended version resulting from the '1988 political compromise' (see point 22 above) — quotas (even without taking account of swaps with other Member States) which were in excess of the quantities landed in 1975 (that is to say, precisely at the level taken as a parameter by the preferences for the United Kingdom: see point 11 above). That mechanism, therefore, operated to the advantage of local communities particularly dependent on fishing and allied industries in the northern parts of the United Kingdom. However, the opposite (1995 quotas for cod and whiting *lower* than double the quantities landed in 1975) proved to be the case for Ireland.

49. The Hague Preferences constitute an essential element in the general balance, which the Council has sought to achieve, between the various conflicting interests. Consequently, their impact must be assessed as a whole, and not by reference to a particular group of economic operators or stocks: for example, for the purposes of the main proceedings, the impact of the preferences falls to be assessed in relation to the fishermen of all the northern parts of the United Kingdom (rather than only those from Northern Ireland) and to all fish stocks (rather than cod and whiting alone).

In this sense, the quotas which the Council allocated to the United Kingdom — albeit lower than those allocated to Ireland — cannot be regarded as being manifestly disproportionate in relation to the objective of relative stability of fishing activities for all Community operators.

50. Furthermore, as the Irish Government has observed, in quantifying the TACs of the stocks at issue, the Council did take account of the temporary biological situation of fish stocks, contrary to NIFPO's contention. In that regard, the Hague Preferences, which relate only to the allocation of TACs *among the Member States*, could not have any effect.

48 — According to the Danish Government, the significance of the 11th, 12th and 13th recitals in the preamble to Regulation No 3760/92 is that of indicating the actual and definitive incorporation of Hague Preference in the common fisheries policy, and more specifically in the principle of relative stability, by Regulation No 172/83. Consequently, since 1983 there has been no basis whatsoever for arguing that the Hague Resolution and the attendant system of preferences continued to be independently applicable. See also footnote 45 above and the part of the text relating thereto.

51. In the light of the foregoing, the United Kingdom concludes that — since the allocation of quotas by Regulation No 3362/94 was entirely lawful and NIFPO has not argued that the respondent authority acted in breach of Community law — the applicant organisations have no lawful claim to recover damages.

52. Even if, on the other hand, the contested regulation were to be declared unlawful, that conclusion would remain valid (discounting the possibility for NIFPO to seek judicial redress against the Council under Articles 178 and 215 of the Treaty). This is so in view of: (i) the obligation on the United Kingdom to apply that regulation by virtue of the presumption of validity attaching thereto; (ii) the fact that the respondent cannot be held liable for the allocation of the disputed quotas to the United Kingdom; and (iii) the failure by NIFPO to demonstrate the existence of a causal link between the damage complained of and the operation of the Hague Preferences, since, in particular, the problems of the Northern Ireland fleet cannot be attributed in their entirety to the preference system.

III — Answer to the first, second and third questions submitted for a preliminary ruling

53. In my view, the first three questions raised by the High Court — relating to the possible relationship between the (allegedly) irregular adoption and non-publication of Annex VII and the validity of the allocation to the United Kingdom of the two contested quotas under Article 3 of Regulation No 3362/94 — can be discussed and resolved together.

54. It is not difficult to appreciate the frustration that an economic operator, in a legal position similar to that of the applicant organisations or the individual operators associated with them, may experience — in the interpretation of legal measures producing effects, albeit indirectly, in their regard — when faced with a situation in which the legislative sources repeatedly refer back to another measure which is not accessible inasmuch as it is covered by the constraints of confidentiality.

I shall leave aside the question whether or not the denial of access to Annex VII, as decided by the Council in June 1995 (see point 28 above), complies with the criteria laid down by Decision 93/731, cited above. However it may be, I cannot disguise my misgivings in the face of the publication, approved by the Council in May 1981, of Annex I to the Hague Resolution: if those requirements of confidentiality, which in contrast precluded publication of the resolution and the other annexes, were not relevant to Annex I, why was it not published until more than four years after its adoption? On the other hand, if publication of Annex I at that date had become possible precisely because the aspects of confidentiality relating

to the instructions given at the time to the Commission concerning its future negotiations with the non-member countries concerned had disappeared, why were the resolution and the other annexes not also published in 1981?

55. These misgivings notwithstanding, I am not sufficiently convinced by the reasons put forward by NIFPO in contesting the proper adoption of the Hague Resolution (including Annex VII thereto), which the Council, in contrast, states did take place.

The measures of inquiry sought in this regard by the applicant organisations in the main proceedings, and which the Court has refused to order (see point 28 above), were in particular suggestive of what would, in the parlance of common law procedure, be known as — if I may be forgiven the pun — a fishing expedition.

56. I take the view, moreover, that the argument that non-publication of the Hague Resolution could have affected the validity of the measure must be discounted. As the United Kingdom and Danish Governments, the Council and the Commission point out, resolutions do not come within the range of measures that are legally binding, [49] which Article 191 of the Treaty requires be published in the *Official Journal* as a condition for their entry into force. [50]

A resolution, on the other hand, is one of those (no less important) atypical measures, to which the Council and the Commission occasionally resort — albeit in the context of increasing integration between the *legal* systems of the Member States — for the purpose of expressing their own *political* will, specifying the contours of agreements in principle reached within the institution, with a view to preventing such agreements from being called once again in question.

In other words, resolutions (particularly those of the Council) in principle amount to no more than political commitments, the context of which, however, points forward to subsequent development in the legally valid forms contemplated by Article 189 of the Treaty. [51] Various Community

49 — They are no different from recommendations and opinions, which, under Article 189 of the Treaty, 'shall have no binding force'.

50 — Consequently, NIFPO's reference to the principles of legal certainty and protection of the legitimate expectations of individuals in connection with the applicability to them of measures taken by the public authorities would also appear to lack merit.

51 — Consequently, the failure by the Council to respect a time-limit for the adoption of a subsequent decision, which the institution 'set itself' by means of a resolution, does not give rise to an assessment of the Treaty, since the style and form of the measure chosen by the Council for that purpose reveal its intention to create a time-limit different from those envisaged by the Treaty: see the judgment in Joined Cases 90/63 and 91/63 *Commission* v *Luxembourg and Belgium* [1964] ECR 625, in particular at pp. 631 and 632.

policies are in fact derived from resolutions. [52]

57. That does not rule out the possibility that, in regard to their content and other material factors, [53] resolutions may also be legally binding. Such resolutions must, however, be measures dealing with issues which the Council is required to resolve definitively, in the exercise of its own powers, by way of a *statement of position*, rather than in the form or by means of one of the measures defined by Article 189 of the Treaty.

This, as NIFPO points out, follows from the Court's ruling in Case 141/78, [54] which concerned precisely the Hague Resolution. In that judgment, the Court stated that Annex VI to that resolution constituted a specific and concrete expression, in the particular sector of conservation of the biological resources of the sea, of the duty of cooperation laid down in general terms by Article 5 of the Treaty. In other words, according to the Court's case-law, resolutions too form, in the abstract, part of such 'action taken by the institutions of the Community' as is capable of determining obligations for Member States in accordance with Article 5.

58. The above principle, however, is not applicable to Annex VII. On this point, my view diverges from that of the Irish Government and the applicant organisations in the main proceedings.

Annex VI to the Hague Resolution made provision for a procedure under which the Commission could determine that the content of any national conservation measures would not create legal difficulties. By requiring Commission approval and by limiting its power of authorisation solely to national measures aimed at conservation and of a non-discriminatory nature, Annex VI settled, once and for all, the question of the exercise of the powers and competence of the Member States in the matter of the internal fisheries system and therefore unquestionably produced binding legal effects.

The content of Annex VII, which merely paves the way for subsequent decisions and sets out the intentions of the Council (to apply the provisions of the future common policy in such a way as to ensure the continued development of the fishing industry in Ireland and to take account of the vital needs

52 — For instance, the numerous resolutions adopted by the Council since 1974 in the area of information technology, telecommunications and informatics. See also the Council Resolution of 16 September 1986 concerning new Community energy policy objectives for 1995 and convergence of the policies of the Member States (OJ 1986 C 241, p. 1); the Declaration of the Council and the Representatives of the Governments of the Member States of 22 November 1973 on the programme of action of the European Communities on the environment (OJ 1973 C 112, p. 1); the Resolution of the Council and the Representatives of the Governments of the Member States of 22 March 1971 concerning the establishment in stages of an economic and monetary union within the Community (JO 1971 C 28, p. 1).

53 — See the judgment in Case 9/73 *Schlüter* v *Hauptzollamt Lörrach* [1973] ECR 1135, paragraph 40.

54 — See footnote 39 above and the part of the text relating thereto.

specific to the communities dependent on fishing in Greenland and the northern parts of the United Kingdom) is quite separate. Frankly, I fail to see how this mere statement of intent could have given specific and concrete effect to the general obligation on the Member States to cooperate and refrain from placing obstacles in the path of attaining the Treaty's objectives.

59. What came next, however, is important: the undertakings which the Council assumed at the political level through Annex VII — and which it reiterated in the Declaration of 30 May 1980, with specific reference to its own legislative guidelines in regard to fair distribution of catches (see point 10 above) — were in fact transposed in a legally binding form by Regulations No 170/83, No 172/83 and No 3760/92.

Those regulations incorporated, *inter alia*, the principle of safeguarding relative stability of the activities pursued — including the specific needs of the regions whose inhabitants are particularly dependent on fishing and ancillary industries — which is the criterion for the allocation among the Member States of the volume of catches available to the Community.

There was no need to define the principle in question through preparatory resolutions before it had been incorporated in binding measures. Regulations No 170/83, No 172/83 and No 3760/92 could therefore lawfully have laid down the criterion of safeguarding the relative stability of the activities pursued — and, in that context, have converted the preferential rights granted to Ireland and the United Kingdom into figures identical to those suggested by the Commission in its 1980 Communication (see point 11 above) — even if the Hague Resolution had never been adopted (or, *mutatis mutandis*, had been *improperly* adopted).

60. It is true that the preamble to Regulation No 3760/92, Article 8(4) of which forms the basis for the regulation here at issue, contains — as, in its time, the preamble to Regulation No 170/83 also did — an express reference to Annex VII so far as concerns the definition of the needs safeguarded by the objective of stability of fishing activities (see points 15 and 20 above). This, however, is simply a traditional 'stylistic' reference which could have been omitted without any practical effect on the rules laid down by Regulation No 3362/94 and by future annual implementing regulations.

Consequently, if the allocation to the United Kingdom of the quotas relating to the stocks for 1995 was the result of a complex calculation based, at least in part, on the Hague Preferences, [55] it is equally true that the Council carried out that allocation *not in*

55 — See footnote 35 above and the part of the text relating thereto.

pursuance of obligations allegedly deriving from Annex VII (obligations which in fact do not exist), but rather *in implementation of the principle of safeguarding the relative stability of fishing activities* which it laid down in Article 8(4)(ii) of Regulation No 3760/92.

61. That being so, I cannot see how it may be argued, as NIFPO does, that the validity of the allocation to the United Kingdom of its 1995 quotas for cod and whiting in Area VIIa by Regulation No 3362/94 could depend on Annex VII having been properly adopted.

62. I accordingly propose that the Court reply in the negative to the first and third questions raised by the national court and declare that, in the light of the answer to the first question, the second question no longer serves any purpose.

IV — Answer to the fourth question submitted for a preliminary ruling

63. The fourth question referred for a preliminary ruling by the High Court goes to the crux of the problem concerning the limits on the discretionary power of the Community institutions, raised by the applicant organisations in the main proceedings.

64. In its legislative capacity, the Council is called upon to make complex political and economic choices which must reconcile the general Community interest (and frequently conflicting general interests, also in the light of the differing situations of the Member States) with the individual interests of economic operators.

In making such choices, the Council enjoys a wide margin of discretion. The various ways in which it may exercise its discretion vary, more precisely, according to the individual powers reserved to it. [56]

65. Those powers, however, are subject to review by the Court, which seeks to ensure that the Council does not apply them in a manner which is arbitrary or otherwise contrary to the provisions of the Treaty or the general principles of law, such as the principles of equality and proportionality. [57] In particular, the standard governing judicial review of the legality of measures which the Community authorities are competent to adopt *in matters relating to the common agricultural policy* has for some time been set by the Court in its case-law.

56 — See J.-L. Dewost, *Les pouvoirs discrétionnaires du Conseil des ministres*, in *Discretionary Powers of the Member States in the Field of Economic Policies and their Limits under the EEC Treaty* (edited by J. Schwarze), Baden-Baden, 1988, p. 165, in particular at p. 166.

57 — See the Opinion of Advocate General Lagrange in Joined Cases 15/59 and 29/59 *Société Métallurgique de Knutange* v *High Authority* [1960] ECR 1, 11, in particular at p. 13.

In reviewing alleged breaches of legal rules, such as the principle of non-discrimination or that of proportionality, the Court is required to take account of the fact that 'in matters concerning the common agricultural policy the Community legislature has a discretionary power which corresponds to the *political* responsibilities given to it by Articles 40 to 43 of the Treaty. Consequently, the legality of a measure adopted in that sphere can be affected only if the measure is *manifestly inappropriate having regard to the objective* which the competent institution is seeking to pursue'. [58]

Still according to the Court's case-law, 'when the implementation by the Council of the agricultural policy of the Community involves the need to evaluate a complex economic situation, the discretion which it has does not apply exclusively to the nature and scope of the measures to be taken but also to some extent to the finding of the basic facts inasmuch as, in particular, it is open to the Council to rely if necessary on general findings. In reviewing the exercise of such a power the Court must confine itself to examining whether it contains *a manifest error or constitutes a misuse of powers or whether the authority in question did not clearly exceed the bounds of its discretion*'. [59]

Finally, the Court has ruled that 'the legality of a Community act cannot depend on retrospective considerations of its efficacy ... Where the Community legislature is obliged to assess the future effects of rules to be adopted and those effects cannot be accurately foreseen, its assessment is open to criticism only if it appears manifestly incorrect in the light of the information available to it at the time of the adoption of the rules in question'. [60]

66. NIFPO does not contest the legality of the aforesaid objectives pursued by the Council through the regulation now under challenge.

On the other hand, NIFPO invokes the illegal, illogical and inadequate nature of the means employed to pursue those objectives: Regulation No 3362/94 is thus, it argues, invalid as being contrary to the principles of the common fisheries policy (including the

58 — Judgment in Joined Cases C-133/93, C-300/93 and C-362/93 *Crispoltoni and Others* v *Fattoria Autonoma Tabacchi and Donatab* [1994] ECR I-4863, paragraph 42 (emphasis added). See also the judgments in Case 40/72 *Schroeder* v *Germany* [1973] ECR 125, paragraph 14; Case 138/78 *Stölting* v *Hauptzollamt Hamburg-Jonas* [1979] ECR 713, paragraph 7; Case 179/84 *Bozzetti* v *Invernizzi and Ministero del Tesoro* [1985] ECR 2301, paragraph 30; Case 265/87 *Schräder* v *Hauptzollamt Gronau* [1989] ECR 2237, paragraph 22; Case C-350/88 *Delacre and Others* v *Commission* [1990] ECR I-395, paragraph 32; and Case C-331/88 *The Queen* v *Minister for Agriculture, Fisheries and Food and Secretary of State for Health, ex parte Fedesa and Others* [1990] ECR I-4023, paragraph 14.

59 — Judgment in Case 138/79 *Roquette Frères* v *Council* [1980] ECR 3333, paragraph 25 (emphasis added). See also the judgments in Case 166/78 *Italy* v *Council* [1979] ECR 2575 and in Case C-122/94 *Commission* v *Council* [1996] ECR I-881, paragraph 18.

60 — Judgment in *Crispoltoni*, cited above in footnote 58, paragraph 43. See also the judgment in Joined Cases C-267/88 to C-285/88 *Wuidart and Others* [1990] ECR I-435, paragraph 14.

prohibition of discrimination between producers and consumers in the Community) and the principle of proportionality (see points 30 to 35 above).

In particular — as the United Kingdom Government also observed at the hearing — NIFPO is criticising not the system of regional preference in itself, but rather the terms under which such preference was accorded to Ireland *vis-à-vis* the United Kingdom, and is thereby complaining of the resultant discrimination in the treatment of similar situations.

Consequently, in 1994 the Council ought to have disapplied the Hague Preferences and confined itself to calculating the national quotas on the basis of the allocation keys (in which those preferences, it is claimed, had already been incorporated) or ought, at any rate, to have recalculated those preferences, which dated back 14 years and thus no longer constituted a current response to the specific requirements of the protected fishing communities.

67. The arguments of the applicant organisations in the main proceedings do not seem to me to be entirely lacking in persuasive force. They cause us to reflect on the actual impact which the complex set of rules here under examination has had on the 'standard of living for the agricultural community' of Northern Ireland. As I have noted above, those rules were drawn up following lengthy and laborious political negotiations and were probably 'already old at birth'. [61] In particular, they remained in force after 1992, that is to say, beyond the expiry of the initial period originally fixed by the Council for considering any revision proposals. [62] It seems likely that this maintenance of the *status quo* is attributable to the awareness that the start of negotiations for a new agreement would open a 'Pandora's box' of divergent and conflicting national claims, giving rise to practically insurmountable difficulties.

68. On the other hand, judicial review by the Court is directed at the legality, not the appropriateness, of measures the validity of which is at issue: [63] it seems to me that this is the sense in which the reference in the Court's case-law to the correspondence between the Council's discretionary power and the political responsibilities which the Treaty rules confer on it in agricultural matters is to be understood.

61 — It should be borne in mind, in this regard, that the Irish Government's Development Programme for coastal fisheries, under which the Hague Preference system was intended to ensure the continued and progressive development of the fishing industry in Ireland, came to an end in 1979. After that date, however, both the Commission (in its communication of 1980 and in the quota proposals for subsequent years) and the Council (through the adoption of Regulations No 170/83 and No 3760/92, as well as the annual regulations from Regulation No 172/83 to that here in dispute) have substantially continued to follow the parameter of doubling the fishing catches in 1975 (which was taken over by the abovementioned programme as its own objective).

62 — See footnote 29 above and the portion of the text relating thereto.

63 — See M. Waelbroeck and D. Waelbroeck, *Article 173*, in J.-V. Louis, G. Vandersanden, D. Waelbroeck and M. Waelbroeck, *La Cour de Justice. Les actes des institutions*, Brussels, 1993, (2nd edition), Vol. 10, p. 97, in particular at p. 166.

The Council's political decision to retain unchanged — despite the passage of time, the variations which had occurred in the composition of fish resources and the inevitable developments in the socio-economic landscape of the individual Member States — the system for allocation of the catches available to the Community finalised in 1983 thus necessarily remains outside the scope of review by the Court.

69. What, on the other hand, is to be said of the legality of Regulation No 3362/94 and its appropriateness in regard to the objectives which the Council intended to pursue? The aforesaid case-law must be borne in mind. For the regulation in question to be invalid, it is not sufficient that it has actually resulted to some extent in disparity of treatment between Community producers, or imposed on the economic operators concerned heavy burdens in relation to the objectives pursued. [64]

The criterion forged by the Court in its case-law is more complex: in the present case, the Council has a political responsibility and will exceed its discretionary power only in so far as the provisions specifically adopted which discriminate or infringe the principle of proportionality are attributable to a *manifest* error committed by that institution in evaluating the effects of the regulation, *at the time when it adopted it*. The measure will thus be rendered *unlawful* because it proves, *already in abstract terms*, to be inappropriate for pursuing the ends which must justify its adoption.

However, I take the view in this case that it is necessary to leave aside any examination into whether Regulation No 3362/94 is invalidated by the defect of illegality which would result from the measure's *abstract* unsuitability in relation to the objectives pursued by the Community legislature. Here, the regulation under consideration does not, *even in concrete terms*, infringe either the principle of non-discrimination or that of proportionality, as I shall explain below.

70. I take the view, first of all, that the regulation under consideration does not introduce arbitrary differences in treatment between fishermen in Northern Ireland (according to the phrase used by NIFPO; to be more precise, fishermen in the northern parts of the United Kingdom) and those in Ireland.

From that angle, NIFPO criticises the system of Hague Preferences — incorporated, at least implicitly, in Regulations No 3760/92 and No 3362/94 — and questions the justification for the two different quantitative parameters laid down therein, which, according to the Commission and the Council, must be respected if the vital needs of the communities concerned are to be satisfied.

64 — See the judgment in *Crispoltoni*, cited above in footnote 58, at paragraphs 44 to 46.

NIFPO adds that the discrimination outlined between the fishing communities of the two Member States is aggravated by the fact that, since in its view the particular needs of the regions dependent on fishing have already been incorporated in the allocation keys laid down by Regulation No 172/83, the operation of the Hague Preferences in situations where TACs are diminishing would give rise to double counting of those preferences.

71. It seems to me that, on closer scrutiny, the allegation here under consideration is based on a premiss which has not at all been established, namely the *comparability of the situations* of the communities dependent on fishing in Ireland and the northern parts of the United Kingdom. Consider the wording of Annex VII: in that measure, the Council expressed its intention to apply the provisions of the common fisheries policy to be established *in particular* so as to secure the development of the Irish fishing industry and, only concurrently, to take account of the specific vital needs of other economically disadvantaged coastal regions as well. The situations of economic dependence on fishing in the two Member States were therefore not identical in the eyes of the Community legislature. That evaluation justified the lawful allocation of preferential rights differing in their extent.

This conclusion — which makes it unnecessary to examine the issue of the alleged incorporation of the particular needs of the regions dependent on fishing (Hague Preferences) in the allocation keys [65] — is shared by the United Kingdom Government and by authoritative legal commentators. [66] In my view, the arguments of the applicant organisations in the main proceedings, based on the discriminatory nature of the TACs for 1995, must therefore be rejected.

72. With regard to the alleged breach of the principle of proportionality, it is necessary first of all to examine whether the provisions of the contested regulation are appropriate and necessary in relation to the objective of rational and responsible exploitation of fish resources.

65 — Once it has been accepted that the Hague Preferences are not contrary to the prohibition of discrimination between producers in the Community, they clearly do not become discriminatory through the fact of having been relied upon and applied in addition to the allocation keys, the validity and proper application of which are not disputed by NIFPO (see point 19 above).

66 — According to John Farnell and James Elles, officials of the European Commission, 'The reasons behind the different treatment of the regions concerned — a nearly blank cheque for Greenland, a growth target for Ireland, and a minimum guarantee for the northern United Kingdom — were the various stages of development reached by their fishing industries, on the one hand, and the impact on other Community fishermen of granting preferences in each case, on the other. The Scottish fishing industry was long-established, sophisticated, and, some would say, already suffering from severe overcapacity; the Irish industry was much more recent and still undergoing considerable expansion; that in Greenland was in its infancy, although already a major source of local income. More important, however, was the relative inconvenience of each preference. In crude terms, the guarantees offered to Greenland would only seriously affect the German deep sea fleet, and those offered to Ireland would affect parts of the French, Dutch and British fleets. Similar treatment for the northern United Kingdom, particularly off the east coast, would, on the other hand, substantially alter the fishing prospects of most Member States in the Community, and in particular those of France and Denmark, the two most important rivals of the United Kingdom in terms of volume of catches. No such revolution could be contemplated in any serious attempt to arrive at a Community settlement on catch quotas.': *The search for a common fisheries policy*, Aldershot, 1984, pp. 109 and 110. See also Wallace, cited above in footnote 15, pp. 532 and 533.

In my opinion, there is no merit in NIFPO's argument that, by agreeing to Ireland's recourse to Hague Preference (and to that of the United Kingdom, for 'defensive' purposes of containment) for the two stocks in question, the Council in effect ultimately granted to the two States guaranteed minimum quotas of fish resources without taking account of the scientific data relating to the state of the fauna in question.

The truth is that, as the two Governments involved have observed, the application of Hague Preference by Regulation No 3362/94 did not involve an arbitrary increase in TACs for the two stocks, which makes sense. The preference mechanism presupposed rather that the Community share of TACs would be lower than the 'safeguard levels'; apart from this, the mechanism concerns, in any case, only the allocation among Member States of a TAC determined in advance.

Furthermore, the Community institutions no longer have any reason to seek recourse to increases in TACs, in relation to the level suggested by the scientific results, for the purpose of safeguarding the Hague Preferences (on the assumption of course that they did so in the past). Such an interest should have disappeared with the 1988 political compromise, [67] which embodied the solution that the preferences should be applicable *irrespective of the level of the annual TAC for the stock in question* (that is to say, even where the total volume available to the Community is lower than the sum of the preferences in absolute terms).

73. It remains, therefore, to be considered whether Regulation No 3362/94 is proportionate, as it ought to be, to the objective of relative stability of fishing activities. As the Court has ruled (with reference to Regulation No 170/83), 'that requirement of relative stability must be understood as meaning that in that distribution each Member State is to retain a fixed percentage', [68] 'determined essentially on the basis of the catches from which traditional fishing activities, the local populations dependent on fisheries and related industries of that Member State benefited before the quota system was established'. [69]

On the other hand, Article 8(4) of Regulation No 3760/92 provides that annual Community fishing opportunities must be distributed according to criteria designed to guarantee relative stability of fishing activities *of the individual Member States for each of the stocks concerned.*

67 — See footnote 31 above and the portion of the text relating thereto.

68 — Judgment in Case 46/86 *Romkes*, cited above in footnote 43, paragraph 17.

69 — Judgments in Case C-3/87 *The Queen* v *Ministry of Agriculture, Fisheries and Food, ex parte Agegate* [1989] ECR 4459, paragraph 24, and in Case C-216/87 *The Queen* v *Ministry of Agriculture, Fisheries and Food, ex parte Jaderow* [1989] ECR 4509, paragraph 23.

74. Consequently, for the purposes of the main proceedings, the impact of the Hague Preferences on the Council's determination of the two stocks at issue must be assessed in relation to the operators *of all the northern parts of the United Kingdom*, and not — as NIFPO argues — only those of Northern Ireland, notwithstanding their marked dependence on catches of cod and whiting.

75. A further point: in order to claim that Regulation No 3362/94 failed to satisfy the requirement of relative stability, it would have to be shown that the Member State in question was not guaranteed maintenance of the fixed percentage determined by the Council in relation to each of the two relevant stocks (irrespective of where they were fished).

Otherwise, whether in the text of Regulation No 3760/92 or in the Court's case-law, there is nothing to support the assertion that the objective of relative stability must also be satisfied at the level of the individual ICES geographical zones, as the applicant organisations in the main proceedings claim.

For that reason, it seems to me to be irrelevant that the quotas allocated to the United Kingdom as a whole *for the stocks present in the Irish Sea* (including, in particular, cod and whiting) decreased, after 1989, to a greater extent than the overall Community share of TACs for those same stocks, as NIFPO has noted. In order to establish the alleged breach of the parameter of relative stability, NIFPO ought instead to have shown that the total quotas of cod and whiting allocated to the United Kingdom *for all the geographical zones in which its national fleet operates* had decreased to a greater extent than the Community share of the TACs.

76. NIFPO's alternative argument is that the regulation here under consideration is at variance with the principle of proportionality also by reason of the fact that in recent years Ireland had not fully used up the stocks for which it had sought and obtained the benefit of Hague Preference and successively availed itself of those quotas for the purpose of swaps with other Member States, as Article 9 of Regulation No 3760/92 permits. By those means, the benefits invoked by the Irish Government were — NIFPO infers — unjustifiably extended to categories of operators other than those originally protected.

That argument, however, is untenable. The swaps referred to are made against the corresponding catch volumes for other stocks. In addition, the Hague Preferences — although they become specifically operative in relation to the size of the Community share of the annual TAC for individual fish stocks — are not bound to individual stocks. Let us therefore assume that the Irish fleet does not directly exhaust its own annual quota of whiting for Area VIIa — for which it in theory invoked and obtained preference —

and avails itself of it indirectly, and to that end, as a means of exchange for obtaining quantities of herring in Area VIIk, over and above the latter in relation to the quota allocated to it by the Council. I cannot see how in such a case it can be denied that, notwithstanding the swap of the preference, and even thanks to it, the communities of Irish fishermen, considered as a whole, are still able to benefit. The other Member States taking part in the swap will, after all, have had to relinquish other quotas, whether wholly or in part.

I take the view that, in effect, precisely the opposite of what the applicant organisations in the main proceedings argue happens to be true. The swaps under Article 9 of Regulation No 3760/92 may even *promote* greater relative stability of fishing activities, leaving the Member States some freedom of action in regard to the definitive optimum allocation of the national fleet's fishing effort for the year in question, on the basis of the specific needs of the sector. Swaps thus constitute what may be described as a 'safety valve' for the system, providing it with a degree of flexibility. [70]

70 — See the judgment in Case 46/86 *Romkes*, cited above in footnote 43, paragraph 18. In rejecting the argument of Mr Romkes, a Dutch fisherman who was the plaintiff in the main proceedings in that case, to the effect that the Council had breached the requirement of relative stability by allocating to other Member States excessive quotas of the stock in question, which were subsequently used up only in part, the Court emphasized the observations of the Commission, according to which the TAC disputed by Mr Romkes had been fixed at a level much higher than that justified from the biological point of view precisely in order to increase the catch opportunities for Dutch fishermen, since it could easily be foreseen that some States would not have exhausted their quotas, making them the subject of swaps.

The same may also be said with regard to the Council's power, when fixing the annual quotas, to 'determine the conditions for adjusting fishing availabilities from one year to the next', as well as to take account, at the request of the Member States concerned, 'of the development of mini-quotas and regular quota swaps since 1983, with due regard to the overall balance of shares' (see Article 8(4)(ii) and (iv) of Regulation No 3760/92).

I therefore consider that Regulation No 3362/94 is lawful and meets in full the objectives pursued by the Council.

77. I accordingly propose that the Court's answer to the fourth question referred in this case should be that the fixing of cod and whiting quotas for the United Kingdom in Area VIIa pursuant to Article 3 of Regulation No 3362/94 was compatible with the common fisheries policy, including the system established by Regulation No 3760/92, and with the principle of proportionality.

V — Answer to the fifth question submitted for a preliminary ruling

78. In the light of the affirmative answer to the fourth question, the fifth question referred by the High Court for a preliminary ruling is devoid of purpose.

VI — Conclusion

In the light of the foregoing considerations, I propose that the Court reply in the following terms to the questions referred by the High Court for a preliminary ruling in this case:

(1) The validity of the allocation to the United Kingdom of its cod and whiting quotas in Area VIIa for 1995, pursuant to Article 3 of Regulation (EC) No 3362/94, is not dependent on whether Annex VII to the Council Resolution of 3 November 1976 was properly adopted.

(2) In the light of the negative answer to the first question, the second question, as to whether the abovementioned Annex VII was properly adopted, is devoid of purpose.

(3) The answer to the first question is not affected by the fact that Annex VII was classified as a secret document, that it was not published or that it was not made available to the parties.

(4) Having regard to all the other circumstances, the fixing of the said quotas by the Council was compatible with the common fisheries policy, including in particular Council Regulation (EEC) No 3760/92, and with the principle of proportionality.

(5) In the light of the affirmative answer to the fourth question, the fifth question, concerning the existence and conditions of entitlement for the applicants to claim damages against the respondent national authority in the event of the fixing of the above quotas by Regulation (EC) No 3362/94 being invalid, is devoid of purpose.