SCOTLAND'S FISHING INTERESTS IN THE LIGHT OF THE COMMON FISHERIES POLICY OF THE EUROPEAN ECONOMIC COMMUNITY

A Thesis submitted for the

Degree of Master of Law

by

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CONTENTS

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SUMMARY

An analysis of Scotland's fishing interests within the European Community, together with the careful consideration of the rights of fishermen working off Scotland's shores is the topic of the thesis. Its overall purpose is to assess whether or not Scottish fishermen are, under current European and domestic law, sufficiently well protected in their livelihood or whether they have a livelihood worse than intended by the law. For a wider perspective, the international situation outwith the European Community is also considered, thus showing in the light of cases that the interests of fishermen within the European Community and internationally are closely linked.

The introduction (Chapter 1) outlines in a wide context how the Common Fisheries Policy (CFP) has been formed with examples of how the EC Commission has contributed to develop the fishing industry and how the industry has benefited from the CFP. Chapter 2 is designed to show what the law is and to discuss the significance of the consolidating EC Regulations. Together with Chapter 2, Chapter 3, on case law, describes the legal framework on which the CFP rests and how the practice of the European Court of Justice (ECJ) has dealt with defining the powers and rights of the various parties involved.

This is relevant to the context of Chapter 5 dealing with the Single European Act and the completion of the internal market in 1992. The Single European Act (SEA) is surveyed in some detail to see how the law is likely to change the fisheries market in 1992; specific reference is made to the question of the internal market. The wording of the SEA is compared with the wording of Regulations; the new Title in the SEA, relating to the environment, is discussed as relevant to our subject.

Chapter 4, dealing with Scotland as a special case, is of interest as the legal situation in Scotland involves a question of compatibility or harmonisation with EEC law.

Chapter 6, conclusions, draws the various strands together from the historical background right through to 1992. The conclusion that Scottish fishermen are sufficiently well protected by the law may draw controversy from an industry that clearly believes it is under threat.

The law is as of March 1991.

ABBREVIATIONS

EEC	European Community Cases.
CFF	Community Fisheries Federation.
CFP	Common Fisheries Policies.
CMLR	Common Market Law Reports.
EEC	European Economic Community.
ECJ	European Court of Justice.
ECR	European Court Reports.
EEZ	Exclusive Economic Zone.
EP	European Parliament.
ID	I Dunlop Volume of Session Cases.
JO	Journal Official des Communautés Européennes.
MEP	Member of the European Parliament.
NAFO	North Atlantic Fisheries Organisation.
OJC	Official Journal of the European Communities Communications (Information).
OJL	Official Journal of the European Communities (Legislation).
SEA	Single European Act.
SFF	Scottish Fisheries Federation.
SLEG	Scottish Lawyers European Group
TAC	Total Allowable Catch.

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Single European Act	Commission of the European Communities.
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PART 1

CHAPTER 1

INTRODUCTION

The purpose of the present thesis is to consider whether the fishing industry in Scotland is sufficiently well protected under European Community law. In case of shortfalls, it would be necessary to take them into account if and when the EEC Common Fisheries Policy (CFP) is re-negotiated in the early 1990s. With this in mind, reference is made to the legal situation relating to fishing also in an international context in the light of conventions which exist to protect and promote the industry; efforts by the EEC to regulate fishing with non-community countries outside Community fishing waters are mentioned.

The historical background is intended to outline the problems which the Community faced when establishing the CFP in the 1970s and 1980s. The problems considered within a Community context together with the wider international problems raise questions of major concern to world fishing and to economies with an interest in the fishing industry.

The thesis, beyond the historical background, continues with the examination of current law and of cases at both national and community levels. Some information included in the thesis is based

on interviews with individuals well versed in the subject. In Chapter 5, consideration is given to the effect of the Single European Act (1987) on fishermen's interests.

Prior thereto, case law is considered in Chapter 3. Cases help the rules to emerge, as shown by the quoted judgements. Sometimes in general wording, as the relevant legislation too, they are very valuable for ascertaining the law.

The cases are, however, taken in a systematic rather than a chronological order. General rules quasi systematically emerge through the practice of the ECJ. The law evolves as different points of law are tackled singly as well as interdependently.

Chapter 2, dealing with the legislation, surveys the history of the CFP; the earlier years of interest have been dealt with by R. Wallace in an earlier thesis.(1) EEC legislation, consisting of regulations, links with the contents of Chapter 5 on the Single European Act (SEA) and the completion of the Community internal market at the end of 1992. Nobody as yet appears to be at all certain what the impact of the completed internal market will amount to for the fishing industry; as a new dimension, environmental provisions are included in the SEA. Various options herein quoted give the impression that misgivings exist as to how the future will work out.

Conclusions in Chapter 6 are drawn in general terms, but they make apparent that solutions may have to be sought.

As problems of the fishing industry are very wide and general, we have limited ourselves to specific areas to achieve any worthwhile and legally relevant conclusions. For example, in the late 1980s, inland fish farming has been, particularly in Scotland, a rapidly growing industry. We do not refer to it as a technical question related to the Scottish fishing industry nor to the policing of the sea with modern equipment and technology. Nevertheless, one may rightly assume that such matters will ultimately play an increasingly important role, affecting also the CFP.

The recent case of the Crown Commissioners attempting to impose an additional burden of rent on Scottish fishermen could be a situation unique in the Community. Chapter 3 deals with the question of the law at Community and national levels and attempts to draw up the arguments which might arise. When examining the case law, we deal with the extent to which member states act unilaterally, and how the ECJ has in turn developed its judgements in line with EEC legislation. The abuse by fishermen of member states poaching in non-national waters, referred to in Chapter 3, on case law is referred to with regard to the difficulties encountered in the implementation of the CFP. In the conclusions, it is shown how the

CFP is adopted to protect fishermen's interests in Scottish waters, although not necessarily in line with what the fishermen perceive as being in their best interests.

What are Scottish fishermens' interests? With these points in mind, we can see how the EEC legislation is expected to protect the Scottish fishing industry and how it is applied or disregarded by the national courts and, in particular, the ECJ. It is clear that the first consideration must be that Scottish fishermen receive a reliable income from fishing in Scottish waters. Accurate information regarding income is not available on an individual basis; indeed, the information which is available is with the Department of Agriculture and Fisheries and the Sea Fish Industry Authority in Edinburgh. Economic statistics are dealt with later in the chapter. It can be said, however, that a reliable income can be assured if stocks are maintained, a fair share is allocated to Scottish fishermen and the ECJ ultimately protects these and the ability to sell throughout the EEC is also available. We shall see also in this chapter how their ability to sell and fish in other countries is also retained by Treaty.

Secondly, it is in the interests of Scottish fishermen that their standard of living remains reasonable. Scottish fishermen appear to have little to fear in this respect. As we shall see in Chapter 2

relating to the law, this is written into EEC law. Furthermore, Chapter 3 discussing cases, shows that the ECJ upholds this right of a fair standard of living for fishermen. Thirdly, non-discrimination is a fundamental principle of EEC law. Scottish fishermen, therefore, should enjoy non-discrimination through the allocation of quotas and access to fishing stocks. The contents of EEC legislation shows that Scottish fishermens' interests can be carefully and well controlled and protected.

An important element in Scottish fishermens' interests is the question of the fishing stock. The fish must be protected. EEC law provides for such protection of stocks throughout the community, enabling the ECJ to assert the intended standards applicable to all matters relating to the protection and preservation of stock. The ECJ has acknowledged the powers and the importance of the EEC Commission in regulating the CFP, a matter of relevance to the interests of Scottish fishermen.

These aspects are well discussed and acknowledged in the practice note issued by the Commission communication in 1989 (2), reflecting a desirability of a Community frame of reference:-

"...Since it is virtually impossible to find alternative or additional employment on any significant scale, these constraints must be shared equitably among the fishermen concerned.

The future of the fishing communities depends on both the state of resources and the actual scope for fishing these resources. The relative scarcity of the resources concerned makes it all the more important to agree on the rules governing access thereto.

The rules governing the allocation of quotas, which are based on reference data reflecting the historical position in respect of each stock rather than resources generally, are intended to maintain the socio-economic balance in direct relation to the overall economic conditions governing the exploitation of resources.

2.5. The Community frame of reference must also help to reinforce economic and social cohesion within the Community, in the sense that the special needs of those regions where the population is particularly dependent on fisheries and related industries must be viewed as one of

the basic principles guiding the implementation of the common fisheries policy, and in particular, the allocation of catches.

.... Given the present and foreseeable state of fishery resources in the Community and the degree to which fishing fleets have so far been restructured, the full-scale liberalisation of the activities of undertakings must be ruled out for the time being. The socio-structural environment in which undertakings operate must be safeguarded so that the latter can gradually adjust to market forces in line with the objectives pursued in the fields of rural and regional development.

The environment is sustained in particular by the range of goods and services which all coastal regions have relied on the fishing industry to provide. As this complex human environment gradually changes, a new framework must be found for the relationship between the fishermen themselves and the coastal areas which serve as their natural base".

All the above points are related to and concern the interests of Scottish fishermen. In this light, we can examine the background and see how these interests are protected and preserved within the context of the EEC with reference to EEC legislation and the

willingness of the ECJ to uphold the legislation strictly for the benefit of fishermen, so that we may conclude that the rights are indeed "well protected".

On 25 January 1983 the 10 member states of the EEC agreed a Common Fisheries Policy (3). The EEC Treaty contains an obligation on the Community to agree a CFP. (EEC Article 38). The reason for adopting it was that rules and their enforcement would be inter alia a more efficient way of preserving stocks. There existed too wide a variety of national rules and it was hence desirable to have a common policy to ensure the livelihood of all those employed in the industry. At the same time, there had also been in the early 1970s changes in the international environment with the application of the exclusive 200 mile fishery zone. Progress to implement the CFP took over 13 years. In 1970 the EEC Council had adopted its first fisheries regulations on the common organisation of the market and a structures policy, (which we refer to later in Chapter 3). In the UK, On 28 October 1972, by 356 votes to 244, the House of Commons had approved the motion:

> "That this House approves Her Majesty's Government's decision to join the European Community on the basis of arrangements which have been negotiated".(4)

This motion was passed six weeks before fisheries negotiations between the member-states reached their conclusion.(5) On 12 December 1971 Geoffrey Rippon, the Minister in charge, presented, as reasonable, the adopted agreement to a ten year derogation from the principles of equal access to other waters. Although not of itself part of the development of the CFP, this approach marked an important date in the integration of the UK into the EEC and therewith into the CFP. The EEC agreement was presented by the Minister as being acceptable, while some members of the UK Parliament from fishing constituencies derided the principle as unacceptable. The agreement was never seriously or effectively challenged by the inshore fishing industry. The distant water members of the fishing industry were reliant on the thought of equal access to Norway's waters; the inshore fishing industry, ill organised, derided the idea of the negotiations as unsuccessful but they did not challenge it. It is of interest to note that four fifths of fishing off United Kingdom shores is carried out by Scottish fishermen.

In 1973 the Treaty of Accession, whereby the United Kingdom, beside Ireland and Denmark, joined the EEC, contained specific references to the fishing industry. These are referred to in Chapter 3 on case law. It listed fishery rights for the following 10 years.(6)

John Farnell points out that the outcome of the negotiations in respect of the United Kingdom's role was the inclusion of a short section in the Treaty of Accession,(7) comprising four articles, of which the first, Article 100, contained the essential elements. Therewith, provision was made for a 10 year derogation until 31 December 1982 to the provisions of the basic EEC rule on equal access, whereby members were authorised to restrict vessels fishing in waters under their sovereignty within 6 miles off their coast to vessels which fished traditionally in those waters and which operated from ports in that geographical coastal area.

> "Article 101 defined the areas in which the general 6 mile limit could be extended to 12 miles. In the case of the United Kingdom, this included the waters around the Shetlands and the Orkneys and off the north and east coasts of Scotland."(8)

In April 1975, two months before the referendum in the United Kingdom on whether or not the United Kingdom should stay within the Community, fishermen demanded the 50 miles exclusive zone. By 1975, that is, two years after British accession to the Community in 1973, the fishing industry in the UK had become disillusioned. Norway had decided not to join the Community, and therewith the far distant compensating benefits were no longer available even for the distant

water fleet.(9) It therefore became British fishermens' urgent aim to abandon imports of frozen fish from non EEC countries and re-negotiate the CFP. It was surprising that fishermen did not become the centre of a negative vote in the referendum as they did in Norway. The Conservative as well as Labour parties made light of the issue.(10) It should be noted that 0.14% of the UK workforce was then in the fisheries industry well spread out in different areas. The situation was similar in the other member-states, so that even a doubling of the workforce would have had little effect on numbers having a persuasive weight and influence. The numbers were thus small, but the the passions in the areas affected were strong.

In 1976, the Council of Ministers in its Hague Declaration, agreed to the 200 mile Community zone from 1 January 1977, as a major landmark in the development of the CFP. The Council agreed that:

> "As from 1 January 1977 Member States shall by means of concerted action extend the limits of their fishing zones to 200 miles off the North Sea and North Atlantic Coasts without prejudice to similar action being taken for other fishing zones within their jurisdiction such as the Mediterranean."(11)

In these circumstances the Commission stated:

> "Member States could then adopt, as an interim measure and in a form which avoids discrimination, appropriate measures to ensure the protection of resources situated in fishing zones off their coasts. Before adopting such measures the member states concerned will seek the approval of the Commission which must be consulted at all stages of the procedures."(12)

The Council recorded its agreement to two Statements in Annex 6 to the Hague Resolution. Annexe 6 procedure, as we shall see, has turned out to be the main instrument for implementing Community conservation policies until January 1983, when the first Community conservation system came into being.

The long road of negotiation went on, however, until 1982 when the United Kingdom withdrew its claim to a demarcated preferential zone beyond the 12 mile limit and to the phasing out of historic rights, in return for an overall limit on the number of French trawlers permitted to fish in waters beyond 12 miles of such sensitive areas as north east Scotland. France gave up its previous insistence that the provision of Community law concerning equal conditions of access to all EC waters should apply without reservation from January 1983, in return for the assurance that its existing fishing within 12 miles of the British coast would remain unimpaired:

> "This was of particular importance for Breton fishermen operating off the south west coast, in the Irish Sea, and off the west coast of Scotland. Both sides agreed to call the arrangement temporary in order to minimise political friction at home."(13)

Therefrom sprang the "Hague Preferences", wherewith the Council took into account the vital needs of local communities particularly dependent on fisheries, in which parts of the United Kingdom were to be included. This was effected at a time when states all over the world were claiming exclusive rights. In 1976 the member-states extended their fishing limits to 200 miles along the North Sea and Atlantic coasts. Community vessels were forced into waters leading to intense competition and overfishing; the Community had to regulate consequently the question of a 200-mile zone. All the fishing in this area proved consequently to be a vast problem, but in the Draft Convention on the Law of the Sea 1981 the area was defined as:

> an "area beyond and adjacent to the Territorial Sea."(14)

R.M.M. Wallace points out that the rights of the coastal states do not extend or amount to complete sovereignty but the rights are:

> "... for the purpose of exploring and exploiting, conserving and managing the natural resources whether living or non-living, of the sea bed and sub-soil and the superjacent waters."(15)

In January 1983 the Council of Ministers adopted legislation on all the main aspects of a CFP. These were non-discriminatory Community measures for managing resources; fair distribution of catches, paying special attention to the regions which were highly dependent on fishing; traditional activities and losses from third country waters; effective controls on the conditions applying to fisheries; adoption of structural measures including financial help and long term agreements with third countries. We shall see below how the ECJ has dealt with these matters. It is thought by some that fishing interests are well represented; others are less convinced.

Interviews with professionals undertaken for the present thesis indicate that it is a moot point whether or not fishermen have a good lobby in Brussels. R.M.M. Wallace refers to the fishermen's lobby and considers its influence on the politicians. Individuals in constituencies do lobby hard their local MPs and certainly these MPs are well known and attract publicity for the fishing industry.

R.M.M. Wallace claims that the special factors surrounding the fishing industry, although strongly argued, may not carry substantial weight within the EEC. It needs more than these factors to have a significant lobby.

But interest in the fishing industry was growing because of the potential voting power in the industry:

> "The Conservative Party, principally in order to retain key marginal constituencies on the east coast of Scotland, was prepared to accept a strong line on fisheries policy - its two main themes in this sector were the need for a fair share of fishery resources as well as strong measures to enforce quotas established, including regulation by licensing and fishing effort per vessel. This all-party approach on the fisheries question was to continue for the Labour Government."(16)

As to quantitative numbers or percentages of fishing communities within the political system as a whole, and the political influence of their communication it is well known that the low percentage of fishermen relative to the entire population has had a disproportionately high practical influence at policy and decision-making levels:

> ".... the ultimate victory of the Icelanders ..... in 1975, followed by the generalised spread of 200 mile national fishing zones, means that nearer-water interests now have the ascendancy in the corridors of power. The political influence of such interests, based in a range of marginal constituencies around the UK, is not negligible. In addition, British politicians are aware that fishing stirs potentially vote-swaying emotions in patriotic people not associated with the industry. Consequently, fishing matters in the UK can assume a political importance incommensurate with its relatively small contribution to the national economy"(17)

A view widely expressed is that the fishermen are mainly interested in their work, that they are unable to express themselves clearly and compared with the farmers' union, one of the strongest political lobbies in Europe, they have little ability to organise themselves into a serious lobby to achieve the protection they would wish to have. We do however show in Chapter 5, relating to the Single European Act, that the fishing lobby has some MEPs with the fishing industry very much in mind.

The introduction of the CFP as a means of controlling fisheries and also as a formal way of taking care of fishermen has to be set against the background of fishery resources. It was estimated by the

Food and Agriculture Organisation (FAO), the UN specialised agency responsible for fisheries, that the gap between supply and demand for fish products will rise to 30 million tonnes by the year 2000 from the 1980 level of 8 million tonnes, owing to the increase in population. In 1980 the total world catch for fish and shellfish for human consumption was about 75 million tonnes. This is expected to reach 93 million tonnes by the year 2000.

International treaties have, therefore, been signed. They primarily impose obligations on the contracting states to ensure that the maintenance of living resources is not endangered by overexploitation.

Experience has shown that difficult international problems arise, for example, when the Cod War erupted between the UK and Iceland. Problems should, therefore, be perceived also in an international context, giving thus a wider perspective beyond the context of the EEC. It it noteworthy that it has been far easier for the Community to unite in external agreements than to agree on common internal policies. The EEC has asserted itself in multinational fisheries relations. As the major fisheries power in the North Atlantic, it has been involved in efforts to conserve and manage fish resources. It is not intended in the present thesis to discuss the international law of fisheries in a detailed way. For literature covering it the

reader is referred particularly to D.M. Johnston's book.(18) Reference should, however, be made to some relevant international agreements.

The UN Convention on the Law of the Sea 1982 governing fishing on the high seas has been ratified by 19 nations. It provides for the management and conservation of living resources of the high seas independently from the provisions relating to the coastal rights and "the exclusive economic zone"; it makes it important to respect conservation measures internationally (see further below). Under the Convention on the Law of the Sea, access to the fishing zone of a coastal state may only be permitted by agreement. The agreements achieved can be categorised and are reached between the countries involved. Such international matters are also of considerable concern within the Community. Member-states have adopted a number of agreements and the European Community is a full participant in organisations which attempt to monitor sea fishing under international agreement.

There is a Community arrangement with Norway on a basis of reciprocity, valid for 10 years, signed and concluded as an agreement in 1980. It covers joint and autonomous stocks, and grants to the Community access to fish set quantities fixed annually for cod, haddock, saithe, red-fish, blue whiting and halibut in Norwegian waters while Norwegian fishermen concentrate on mackerel, blue

whiting and prawns in the Community zone. An agreement concluded with Sweden in 1980, officially in force since April 1981, covers joint stocks in the Kattegat waters, and concerns exclusive stocks such as cod, herring and salmon in the Baltic and North Seas.

By virtue of a reciprocal fisheries agreement concluded with Finland in January 1983, Community boats may obtain access to Finnish salmon in the Gulf of Bothnia and Finnish vessels are given small catches of North Sea herring when the TAC is fixed over 100,000 tonnes.

Details on the international relations of the Community, concerning fisheries, can be found in the periodical "The European Community's Fishery Policy", published by the Commission and referred to on Page 8.

They should be remembered because they have an important bearing in relation to agreements outside the 200 mile zone. Fishing off the coast of the USA, Canada and Greenland is regulated by the North Atlantic Fisheries Organisation in force since 1979, while the North East Atlantic Fisheries Convention of 1980 in force since 1982, covers the fishing for blue whiting in the North East Atlantic area beyond zones under coastal states' jurisdiction. The North Atlantic Salmon Convention, with offices in Edinburgh, protects North Atlantic fishing salmon stocks. It encourages protection of stocks through international consultation and co-operation. The Convention represents a balance between the interests of the states of origin (the UK, Ireland, France and Canada) and countries like Greenland and

the Faroes where the salmon is netted commercially in winter.

The North West Atlantic Fisheries Organisation responsible for conservation and organisation of fish resources in the North West Atlantic, beyond coastal states' jurisdiction, provides for adopting regulations including the adoption of the total allowable catch proposals which become binding in 60 days. Inspectors may board all the vessels in the area, a scheme for joint international enforcement ensures that the regulations are observed. There is, however, obviously a problem: non-contracting parties may overfish.

Among other conventions or treaties which serve other purposes, reference may be made to the Convention for the Conservation of Antartic, Marine Living Resources, Convention for the protection and study and scientific use of living resources. The text was finalised in May 1980 and the Community became a member two years later.

The Gdansk Convention on Fishing and Conservation of the Living Resources in the Baltic Sea and Belts, signed in September 1973, came into force in July 1974 with two Community member-states, Denmark and the Federal Republic of Germany, also as contracting parties beside Sweden, Finland, the Soviet Union, Poland and the ex-German Democratic Republic. In November 1982, an amendment to the Convention enabled the Community to accede to it in 1984. Fishing Agreements and other developments since 1986 are recorded in Keesing's directory.(19)

The Commission agreed to examine by 31 March 1988 proposals on possible solutions to the problem of mackerel in the North Sea. UK Fishermen claimed the mackerel were migrating from a zone to the West of Scotland to a zone adjacent in the North Sea this obliged the fishermen to stop fishing; they therefore demanded that the quota be extended to include both zones.

After strong objections had been raised by the German Federal Republic the Commission agreed to allow cod fishing in the German Bight with 100mm mesh nets.

On 17 December 1987 the Commission announced it was starting legal proceedings against the UK for turning away French fishermen from traditional French fishing grounds off the Kent coast. French fishermen had on 26-28 October 1987 blockaded Boulogne and Calais disrupting ferry services in protest at being turned away from these grounds as a result of the Territorial Sea Act 1987 (20) which extended UK territorial waters from 3 to 12 miles. Most EEC countries had 12 mile territorial waters, but the UK legislation also extended the definition of the coast from which these limits are calculated to include the sandbanks exposed at low tide.

In an interview (The Financial Times, 6 March 1987), Sir Antonia Cardoso E Cunha, the then EC Commissioner for Fisheries, stressed the

need for international co-operation agreements with third countries in order to win new fishing grounds for EC fishermen in exchange for EC financial compensation, expertise or oceanographic information.

Fisheries agreements concluded or extended during 1986, 1987 and early 1988 include (i) protocols or amendments to existing agreements initialled in 1986 with Guinea-Bissau, Guinea, Equatorial Guinea and Madagascar, (ii) new fisheries agreements with Gambia, the Seychelles and Mozambique initialled during 1986, (iii) three year fisheries agreements with Angola and Mauritania, initialled in April and May 1987 respectively, (iv) a new protocol to the 1984 Agreement with Sao Tome and Principe, initialled in May 1987 after a 1984 agreement had lapsed in November 1986, (v) a three year agreement, initialled in May 1987, with Dominica (the first between the EC and a Caribbean country), (vi) a three year agreement with the Conors initialled in October 1987, and (vii) a new two year agreement with Senegal, signed in early 1988, to replace a provisional protocol which had applied from 1 October 1986 to 18 February 1988 and was to last two years. Exploratory talks were also started in 1987 with the governments of Kenya, Tanzania and Somalia.

These, as examples, show how very active the EEC is in promoting fishing interests and searching for new fishing areas; developments also show clearly how the EEC does not just look at its member-states' interests and further they also show how the Commission looks at the interests of the EEC within an international

context. Chapter 3 on cases refers to the capacity of the Commission to negotiate such agreements.

The Council of (Fisheries) Ministers at its meeting on February 29 - March 1 1988 agreed in principle to a fisheries agreement with Morocco, initialled by the Commission and Moroccan negotiators in Brussels on 25 February 1988. The four year agreement was provisionally applied as from 1 March 1988 and ended a ban on European Community fishing in Moroccan waters imposed at the beginning of the year upon the expiry of its 1983 fishing agreement with the European Community. Under the agreement, EEC vessels were allowed to catch a total of 95,000 tonnes of fish each year (representing a 10 per cent reduction in fishing activity by Spanish boats). In return Morocco was to receive compensation amounting to 272,000,000 ECUs over the four years as well as licence fees paid by EC fishermen.

It can be clearly seen that the problem of conservation and the control of fisheries, balanced against the interests of individuals and member-states, has generated a carefully balanced policy within an EEC context. The world demand for fish can now, however, only be controlled by international treaties and conventions. On examination of historic development it can be seen that neither the CFP nor international agreements can be seen as static instruments with

mechanisms established on a permanent basis. In 1991 the CFP is to be renewed; it will involve an examination of the coastal member-states and stocks.

The problems outlined above have been recognised for years, as far back as 1975. According to M.M. Sibthorp:

> "All over the world, the intensification and increasing efficiency of distant water fishing has produced a reaction on the part of coastal states anxious to protect their traditional coastal fisheries from depletion and their inshore fishermen from foreign competition. The response with many States has been to extend the limits of the Territorial Sea to 12 miles or even beyond, thereby acquiring the jurisdiction to exclude or regulate foreign fishing boats".(21)

Furthermore, as regards the changing situation in fisheries negotiations, Farnell highlights how the irregular fluctuations on the size of fish stocks would impose great strains on fisheries agreements if exactly reflected on the annual calculation of a fisheries "balance".

> "If a particular stock is in trouble, either alternative fishing of another stock is offered or some assurance is given about renewed fishing once the stock in question reaches an agreed level of abundance. Such an assurance was, for instance, given to Norway in respect of herring when the fisheries in the North Sea and off north west Scotland had to be closed in the late 1970s (and gave rise to considerable discontent when it had to be honoured in June 1983). These understandings, however, clearly require that both parties are committed to a long-term fisheries relationship in which temporary imbalances of fishing will eventually be rectified".(22)

As for Scotland, although on its own not an EEC "member-state", its fishing interests have not been without recognition within the context of the European Community. The UK, in economic and political terms, is the EEC's most important fishing nation. In 1978 a catch of 830,000 tonnes was achieved for human consumption, the largest in the EEC, and a total of 60% of fish caught in EEC waters came from what would have been British fishery limits. The decline of the distant water fleet badly hit ports along the East coast, and from 1975 one large trawler has been built for every nine turned into scrap. Fishing interests are strong in Scotland; records of landings are available from the Scottish Office.(23) Recent statistics show Scotland's current success. The Scottish and UK fishery industry deserve some reference at this point.

There have been changes in the fishing industry throughout the UK since the UK joined the EEC on January 1 1973. Although the title of the present thesis relates to Scottish fishermen, the background should be taken in a UK context and thus in a wider perspective. Technological advances affecting the fishing communities throughout the UK have been substantial over the years. Short-term interests (income from catches) and long-term interests (conservation of resources) have had to be re-assessed, and hence:

> "thinking about the development of fisheries has, therefore, shifted in recent years from increasing the efficiency of fishing operations to planning for stability in the long term, even if this means a short term loss in catches"(24)

Since the beginning of the 1970s the fish takings have changed in volume parallel to quantitative and qualitative changes in the structure of the fishing fleet. Therewith UK interests have been affected considerably. The UK used to have one of the most important diversified fishing industries in Europe. Between 1970 and 1981 there was a growth in the number of fishermen from 21,651 to 23,927. The proportion of part-time fishermen grew over the same period from 19 to 31 per cent of the total. In the Community as a whole, fisheries account for 0.14 per cent of gross domestic product (GDP) as a corresponding indicator of relevance (25).

As regards the catches, there was a total national catch in the UK in excess of one million tonnes during the 1970s, but between 1978 and 1980 there was a drop of around 20 per cent (26). The value of the catches rose fourfold during the 1970s with the average catch prices rising faster than consumer prices in general. In spite of the changes in fishing patterns, the national catch was still used largely for human consumption; but with the loss of distant-water rights, the composition of the catches changed dramatically:

> "For example, Atlantic cod used to make up about one third of the national catch in the first post war decades but had declined to a mere 14 per cent of the total in 1980. The catch of herring, once the mainstay of many a Scottish and east coast fishermen, fell from 168,199 tonnes (live weight) in 1971 to a tiny 11,428 tonnes in 1980 after massive overfishing. Such losses were made good in volume, if not value, by switching to other species such as whiting, saithe and, most notably, mackerel."(27)

It should be noted that when considering trade within Europe there was a considerable export of fish southwards from the rich countries of the north during the period 1960 to 1980 so that Scotland, Norway and the Netherlands exported to England, West Germany, France, Belgium and Italy. (28)

The catch of mackerel rose from 3,647 tonnes in 1969 to 352,574 tonnes in 1979. Over a quarter of this came off North West Scotland but the bulk came from waters off South West England.

There have also been, since 1970, substantial changes in the structure of the fleet following the losses of fishing rights off Iceland. In 1972 there were 168 distant water vessels but by 1980 only 50 had remained. This cutback was counterbalanced by a large increase in medium sized vessels and in small vessels. In 1980 the White Fish Authority reported that British fleets structure had changed as follows: 1982 inshore boats (under 24.4m); 110 nearwater vessels (24.4-33.5m); 85 middle-water vessels (33.5-42.7m) and; 50 distant-water trawlers (over 42.7m).(29)

The remodelling, to cope with the 200 mile medium line Fishing Zone led to a substantial restructuring. The restructuring had a marked impact on the geographical distribution of on-shore activities as well. The large vessels disappeared altogether from Aberdeen and there followed a similar decline of fishermen in Hull, Grimsby and Fleetwood. In 1975 the White Fish Authority estimated that there were about 26,000 employed in fish related industries around the ports of Grimsby, Hull, Aberdeen, Peterhead and Fraserburgh.

In contrast, other fishing Communities around the British Isles held their own or developed during the 1970s. In Scotland, where some 45 per cent of Britain's full-time fishermen were to be found in 1980, employment remained broadly static over the last decade.

The above implied problems which the Scottish fishing industry faced have been put in context in a more general way by R.R. Churchill:

> ".... the general world wide introduction of 200 mile fishing limits in the late 1970s deprived EEC distant-water fleets of many of their traditional fishing grounds ... The distant-water losses relate largely to demersal fish such as cod and haddock, whereas the near-water gains relate to commercially less valuable pelagic fish such as mackerel or to fish .... not having much commercial potential .... Furthermore distant-water vessels which have lost their traditional grounds are not always easily adapted for fishing in near waters, nor is their use for such fishing usually economic"(30)

In addition, in the 1970s came the increase in the cost of oil, dramatically increasing fishermen's costs. The industry is obviously energy intensive. Furthermore, there has been a reduction in the demand for fish.(31)

These difficulties have been added to by the problems related to the 200 mile limits; all that has been mentioned led to difficult protracted negotiations for the evolution of the CFP and the law emerging therefrom.(32)

We have so far dealt with general economic figures of the industry. For an earlier history and more statistics of Scottish fishermen and a comparison with Norwegian fishermen, the reader is referred to the paper written by James R. Coull about Crofter - Fishermen in Scotland (33) which shows in particular the trends in numbers of crofter-fishermen between 1920 and 1967.

However, the most recent information regarding Scottish fishermen is to be found with the Department of Agriculture and Fisheries for Scotland which has a special fisheries economics and statistics unit. Its most recent publication (34) covers the Scottish fishing fleet costs and earnings survey between the years 1977 to 1983. Two points should be specifically mentioned. Firstly, the figures contained therein are based on a return of only about 25% of the fleet. Secondly, these figures have been adjusted from other information available and the estimates are, therefore, published as sample averages. A copy of this is contained in Appendix 4. This publication is the only available information on costs. Bearing in mind the low return from the fleet, an official at the department has described this information as "indicative" and "probably reasonable".

The main results show that in 1982 and 1983 the total earnings and operating profits of the industry began to improve from the depressed levels of 1980 and 1981. The total fleet income was disclosed in 1983 to be approximately £182,000,000 which was an increase of 13% on the previous year on the two previous years. The estimated operating profit in 1983 at £27.7 million was 46% higher than in 1982 and approaching three times the level in 1981. It is worth clarifying further that in response to the surveys carried out in the years 1981 to 1983 amounting to only 25%, there was a considerable variation in the level of response to the survey between different areas in Scotland. The survey points out that the north-east ports of Peterhead, Fraserburgh, Macduff, Buckie and Shetland were very good but the response from the west of Scotland base districts was minimal. The response also varied according to the vessel length.

The information on costs of the fleet after 1985 is not easily available. The Sea Fish Industry Authority in Edinburgh produces statistics which show not the individual performance of fishing vessels, but rather the swings and averages of the entire fishing fleet. For reasons of confidentiality, at the request of the Sea Fish Industry Authority, the 1989 Cost and Earnings Survey cannot be quoted here in full. It gives the figures relating to Scottish fishermen by grouping their interests into vessel lengths. It is unsatisfactory for our purposes that we cannot have a clearer picture of the most accurate statistics, however, the summary following is of interest.

For the shortest vessels (up to 39.9 feet) (12.2m) the total insurance value of the fleet was just under £1m. The average return on capital was 21% up from 13% from the previous year. The total earnings were over £60,000 whereas the total expenses were nearly £46,000, leaving an apparent average net profit per vessel of about £14,000. There is shown an apparent profit after depreciation.

At the other end of the perspective, the survey deals with the largest vessels of 80 feet (24.4m) or over. The figures are different. The insurance value of the group is over £70m. the return on capital is 7% which appears to be down in value from 10% in 1988. Total earnings were estimated at £676,000 and the total expenses came to £508,000 leaving a net profit of around £168,000 per average vessel. The overheads can be listed as fuel and oil, salesmen's commission, harbour dues, boxes, ice, food, travel, gear expenses, repairs, insurance equipment, hire and maintenance, other costs and, of course, depreciation. Estimated depreciation is shown as being the major item which can turn profit into loss.

Another example is the vessel size 55-59 feet (16.8-18.3m). The fleet is insured for £2.5m, the return on capital is 4%, an improvement from the 2% achieved in 1988 and the profit per average

vessel appears to be well under £6,000 before depreciation. There is a considerable variation in profit and loss on each category as shown after depreciation.

The remaining source of information as regards earnings is more recent. Because of the control over landings by Scottish fishermen throughout Scotland, the Department of Agriculture and Fisheries knows precisely what earnings amount to and the publication of "Scottish Sea Fisheries" (35) covers vast areas of activities and earnings but the subject of costs is not covered so the picture is limited. The data on the landings in Scotland is obtained from sales notes completed at the first auction of the fish and additional information on effort and grounds is obtained from the EEC log book completed by the skippers. The quantities are shown in Table 3 (Appendix 10). The various species are divided into the three main groups: demersal, pelagic and shellfish. Demersal species live near the seabed; pelagic are found mainly in shoals near the surface.

The data on vessels as shown in Tables 27, 28, 29 and 30 (Appendix 6, 7, 8 and 9) is obtained from the records kept by the department and updated by reports of officers in the Sea Fisheries Inspectorate based at each of the Sea Fisheries Districts. All vessels actively engaged in commercial fishing and registered under the Merchant Shipping Act 1984 are recorded.

The disposal of fish information in Table 33 (Appendix 11) is obtained by officers of the Sea Fisheries Inspectorate from information supplied by buyers at the point of sale. Klondyking refers to direct landings for immediate export.

Estimates of fishermen employed in Tables 31 and 32 (Appendix 4) both regularly and partially employed, are made at 31 December each year by the Fisheries officers. The information from fish processing plants in each district is available by interview in Tables 34 and 35 (Appendix 12). The 1989 Statistical Table is shortly to be published but was not available in time for this thesis.

Having discussed the statistics, some other points of general interest should also be noted here to complete the background. During the 1970s and the early 1980s agreement on access and quotas in the new CFP proved to be extremely difficult to achieve. Britain continued to press for an exclusive 12 mile zone free from historic rights plus some form of preferential access out to 50 miles as a means of insuring that British fishermen would be able to catch a fair share of the community's TACs. The UK, however, was not to be allowed to introduce preferential fishing zones for the benefit of its displaced distant water fishermen or at the expense of other community citizens.

As already said above, in 1982 a compromise emerged on access to fishing and to the reform of the CFP. The UK agreed that the total elimination of historic rights within the 12 mile limit was politically impossible in a Community context, whereas the other member-states accepted that the UK government needed to achieve a degree of exclusive access for its fishermen greater than that permitted under the existing arrangements.

The allocation of quotas also proved to be elusive, partly because of the fluctuating nature of fish stocks. This required and requires flexible attitudes from those seeking to exploit stocks. Allocations acceptable to all governments, with the exception of Denmark, had been worked out by the early autumn of 1982 and one important trend showed how the UK had improved her position with the proposed share of the most valuable species. Publications do not show what percentage of the total fish available went then to each member-state because it would have been misleading and quotas were therefore shared out on a zonal basis as well as by species and by each member-state.

By January 1983 a comprehensive policy had been put together. It was never thought that the policy would last for a long period of time, but the advantage was that it would lay down a framework within which management systems can be developed and conflicts contained.

The position in 1983 is well summarised by Kapteyn and Verloren Van Themaat (36):

> "Conservation measures and associated quota arrangements were agreed in 1983 in three regulations: the basic regulation setting up a Community system for the conservation and management of fishery resources (37), a regulation laying down technical measures for the conservation of fishery resources (38) and a regulation which established for 1982 and 1983 total allowable catches (TACs), the allocation of the share between the Member States and the conditions under which TACs were to be fished.(39) The TACs are now fixed annually, the global measure for 1989 being contained in regulation 4194/88".(40)

The common organisation for the market for fish products can be found in Regulation 3796/81.(41):

> "In comparison with the common organisations for the market for agricultural products properly so called, Regulation 3796/81 exhibits fewer specific characteristics than is the case with the structural policy for fisheries. It is characterised by guide prices, market standards (quality classification, size or weight, packaging,

presentation and labelling), an arrangement for withdrawal from the market by producers' organisations of fishery products supplied by their members, storage aid, Community producer prices for tuna products, export refunds, special commercial policy powers in the event of disturbance or threat of disturbance with the market and another arrangement for producers' organisations"(42)

There is always concern within the EEC about state aids.(43) We refer to a case on the subject later in Chapter 3, p. 123. It can, however, be shown that Scotland has received a high level of allocated grants. In 1985 the Department of Agriculture and Fisheries exercised under Regulation 355/77 (44) their powers to allocate £7.6 million in grants for 55 projects in Scotland. Out of these grants fisheries projects benefited to the extent of nearly £750,000. In the first allocation for 1986 £6.07 million was allocated for 47 agricultural and fisheries projects. £105,000 was allocated to Scotland's fishery business. So while Scotland is not a Member State, its fishing population carries considerable weight at Community level and substantial sums of money are remitted by way of grants. This is one of the major areas of advantage which Scottish fishermen have achieved by joining the EEC.

It is not surprising that with Scotland being so peripheral within the EEC that, according to Farnell:

> "More than 70% of Scottish landings are transported south of the border for processing, mainly on Humberside. The high cost of transport involved, particularly when one considers that up to 50% of the weight of a landed fish is lost in the course of processing .... is inevitably reflected in the price offered to fishermen at the first point of sale."(45)

On 4 December 1986 EEC Fisheries Ministers agreed to give special privileges to fishermen on the West of Scotland as part of a £600 million Community Aid Programme for Industry. It is understood that around £90 million from the package is to be devoted to encouraging fish farming. The money will also be available for port developments including storage and freezing. Fish farming in Scotland, although not a major topic within the context of the present thesis, must surely be included as a subject of significance in the next decades in Scotland. It is an industry which absorbs grants and loans from Community funds and it is likely that such grants may become an increasing element in Scotland's economy in future years as the industry in Scotland expands.

Included in the EEC, Scottish fishermen have, however, suffered Community restrictions owing to fishing overcapacity in the industry and the necessity of having to adhere to strict guide lines for conservation purposes.

Before leaving the historical background, it is appropriate to refer to the general picture of the change in the industry for Scottish fishermen as a result of EEC membership. It is obvious that, within the EEC, while fishermen are subjected to duties and the restrictions we have discussed, they are at the same time clearly given compensating rights and advantages under EEC law. Such rights and advantages under EEC law must be mentioned.

Whilst overcapacity remains a problem throughout the Community, Scottish fishermen have, theoretically, the benefit of the four freedoms but:

> "it seems unlikely that much use will be made in practice, or indeed has already been made, of the freedoms of movement, establishment and services either by individual fishermen or by fishing companies."(46)

We should remain, however, aware that the individual freedoms exist and are available to Scottish fishermen as a direct result of UK EC membership. Articles 9-37 of the EEC Treaty provide for the free movement of goods between member-states by eliminating customs duties. Community fishermen are protected to some extent against

competition from imports by means of customs duties, a system of reference and free frontier prices as well as some other, more limited, measures.

Fishermen are free under Articles 48-51 to move to another member-state and take up offers of employment and in doing so not be discriminated against because of their nationality in relation to the conditions of their employment (EEC Article 7). Scottish fishermen are free to move with their families and take up employment in another member-state.

Furthermore, self employed nationals can establish themselves in another member-state under the same conditions as nationals of that member-state under EEC Articles 52-58 (Right of Establishment). These rights are complemented by the free movement of capital under Articles 67-73 of the EEC Treaty. It follows that a self-employed fisherman in one member-state is free to move to another and set up a business subject to the rules of that member-state. A discussion on the status of fishermen is to be found in Agegate in Chapter 3, p. 136.

The freedom to provide services (EEC Articles 59-66) is also available, but it is difficult to see how this could be easily used to advantage in the fisheries sector. However, it may be of help when considering transfrontier activities under favourable conditions.

Chapter 2 on the law shows how the structure of the EEC fishing Community has been developed. In general, the regulations dealing with the various aspects of the fishing industry throughout the EEC are designed not only to promote the interests of the consumer, but also to promote the interest of fishermen. Therewith, Scottish fishermen may benefit directly.

A further aspect of EEC membership which is beneficial and puts Scottish fishermen into a better position, are the potential financial benefits. Reference to them has been made earlier (see for example page 37 above). There are several Community programmes which offer financial assistance under the EEC Structural Policy. Generally speaking, the Community aid to the fishing industry falls into different categories, namely, adjusting the capacity of the fleet to the catch potential, building and modernising vessels, developing aquaculture (not dealt with here) and improving the processing and marketing facilities.

The decrease of capacity to the catch potential has been, as already mentioned, most marked in the case of distant-water vessels, especially in the United Kingdom. Financial assistance has been offered under the programme for laying up vessels and for scrapping them; for this purpose millions of Ecus have been set aside. A further measure, intended not to reduce capacity but to redeploy activity, has so far had little effect.

As regards the construction and modernisation of vessels before 1980, financial assistance could be given by the Guidance Section of the European Agricultural Guidance and Guarantee Fund. Also funds were made available to purchase and construct new vessels, and aid came in the form of a subsidy not exceeding 25% of the total value of the investment.

It is clearly in the fishermen's interest if the processing and marketing of fish can be improved and developed. Between 1978 and 1985 just over 90 million Ecus worth of aid was available as granted under Regulation 355/77 for corresponding 439 projects.

Under the Community social policy, questions of vocational training, employment, safety and health at work as well as working conditions may be tackled, but so far there have been no major or concrete proposals in this respect.

The most remarkable feature of EEC fishing industry law is possibly the entitlement of fishermen to a fair standard of living. This is anchored in legislation and, as can be seen from Chapter 3 on the case law. This right is upheld by the ECJ. The existence of such benefits suggest that the Scottish fishing industry has enjoyed theoretical as well as practical benefits.

It can be said that Scottish fishermen appear to have been the direct beneficiaries of a series of advantages available to them, on the basis of UK EEC membership. Churchill, however, probably rightly maintains that there is still some way to go:

> "while increased productivity should improve the standard of living of fishermen, no Community action has yet been taken to improve working conditions of fishermen."

> "A good deal remains to be done therefore. Apart from taking action on working conditions, the Community Institutions need to get to grips with the problem of eliminating such excess capacity which still exists (thus improving productivity) and then making sure capacity does not increase beyond any increase in catch potential."(47)

Footnotes on Introduction

1. Rebecca M.M. Wallace: "The Legal Recognition particularly by International Law and European Community Law of special economic dependency and preferential rights as claimed in relation to Fisheries". Ph.D Thesis, Faculty of Law, University of Glasgow, October 1982.

2. 1990 Practice Note. Access to Fishing Quotas 19 July 1989 1990 2CMLR 97.

3. The European Community's Fishery Policy, Periodical 1/1985. Luxembourg: Office for Official Publications of the European Community Catalogue No. CB-NC-85-001-ENC.

   See also European file: The Common Fisheries Policy of Commission of the European Communities, March 1991 (3/91).

4. Michael Leigh: "European Integration and the Common Fisheries Policy" 1983 (Croom Helm Ltd). Chapter 3 "Enlargement and the CFP". p. 50.

5. Ibid. p. 50.

6. Ibid. p. 50. Articles 100-103 of the Treaty of Accession.

7. John Farnell/James Elles 1984 In Search of a Common Fisheries Policy.

8. Ibid. p.13.

9. Op. cit. note 4 published in Fishing News International, May 1975, p. 56.

10. Op. cit. note 4, p. 51.

11. Michael Leigh adds in the footnotes to his Chapter "A Community at Sea". Op. cit. note 3 above, that the official publication of the Hague Resolution appeared in OJ EC No 105 of 7 May 1981 under the 'C' series, as "information" rather than "legislation". The decision therefore to extend fisheries jurisdiction to 200 miles did not take the form of one of the acts of Council of the Ministers under Article 189 of the EEC Treaty but rather was a resolution "calling upon" Member States to take the necessary action.

12. Ibid. p. 75, and the footnotes on p. 79, it is referred to as being cited in the judgement of EEC v. Ireland Case 61/77 1978 ECR 420.

13. Op. cit. note 7 above, p. 123.

14. Article 55, but Article 57 provides that the breadth of the exclusive economic zone shall not exceed beyond "200 nautical miles from the baselines from which the breadth of the territorial sea is measured".

15. Op. cit. note 1 above, p. 28.

16. Op. cit. note 7 above, p. 86.

17. Mark Wise: The Common Fisheries Policy of the European Community. 1984. Methven, p. 57.

18. On the international law of fisheries with a policy orientated approach see D.M. Johnston, The International Law of Fisheries: A Framework for Policy Orientated Inquiries (1987).

19. Keesing's Contemporary Archives Volume XXXIV, p. 35855.

20. Territorial Sea Act 1987 C. 49 Volume 3 Scottish Current Law Statutes Section 1.

21. M.M. Sibthorp The North Sea Challenge and Opportunity. (Europa Publications, (1975)) p. 107.

22. Op. cit. note 7 above, p. 54.

23. Scottish Office News Releases 0202/87 dated 16 February 1987, 0379/88 dated 11 March 1988, 0253/89 dated 15 February 1989, 0202/90 dated 6 February 1990 and 0165/91 dated 12 February 1991.

Copies are attached. (see Appendix III).

24. Op. cit. note 7 above, p. 3.

25. R.R. Churchill: EEC Fisheries Law. Martinus Nijhoff (1987), p. 7.

26. Op. cit. note 17 above, p. 47.

27. Op. cit. note 17 above, p. 51.

28. Op. cit. note 17 above, p. 28.

29. Op. cit. note 17 above, p. 49.

30. Op. cit. note 25 above, p. 10.

31. Op. cit. note 25 above, p. 11.

32. Op. cit. note 25 above, p. 11.

33. James R. Coull Crofter - Fishermen in Norway and Scotland. O'Dell Memorial Monograph No. 2. Department of Geography, University of Aberdeen 1971.

34. The Scottish Fishing Fleet: Cost and Earnings Surveys. 1977 to 1983. Department of Agriculture and Fisheries for Scotland. Fisheries Economics and Statistics Unit. October 1985.

35. Scottish Sea Fisheries, Statistical Tables 1988. Department of Agriculture and Fisheries for Scotland. First published 1989. 47 Robbs Loan, Edinburgh.

36. P.J.G. Kapteyn/P. Verloren Van Themaat: Introduction to the Law of the European Communities - after the coming into force of the Single European Act. (Kluwer Law and Taxation Publishers,). (2nd edn.) (Laurence W Gormley) 1989, p. 704.

37. Regulation 170/83 OJ1983 L24/1. Amended by Act of Spanish and Portuguese Accession 1985 O JL 1987 L375/1 and Regulation 3472/88 (OJ 1988 L305/12).

38. Regulation 171/83 OJ 1983 L24/14. Amended by the Act of Spanish and Portuguese Accession (1985).

39. Regulation 172/83 OJ 1973 L24/30 most recently amended by Regulation 3953/87 (OJ 1987 L371/99).

40. OJ 1987 L335/1 and Regulation 3472/88 OJ 1988 (L305/12). (The last four footnotes relate to the footnotes in Kapteyn's book).

41. Regulation 3796/81 OJ 1981 L379/1, most recently amended by Regulation 3468/88 OJ 1988 L305/1.

42. Op. cit. note 36 above, p. 704-705.

43. Op. cit. note 6 above, Farnell states (at p. 165) that: "the principal motive for government assistance to the industry has been the need to maintain employment in the peripheral regions in which the European fishing industry is predominantly based. One has only to consider the importance of Scotland, Brittany and Jutland in fisheries terms (all are responsible for over 50% of their national annual landings of fish) and their relative underdevelopment in terms of national income, to see why governments have been ready to provide financial aid to safeguard or develop their fishing industry. In no Community country does employment in fisheries exceed 3% of the working population, or the contribution of the fishing industry to gross national product exceed 0.7%."

44. Regulation 355/77, OJ L51/1 of 15 February 1977.

45. Op. cit. note 6 above, (Farnell) p. 178.

46. Op. cit. note 25, p. 18.

47. Op. cit. note 25, p. 226.

PART II

CHAPTER 2

THE LAW

When considering the problems which may arise in fisheries cases related to Scottish or United Kingdom waters, it is necessary to carry out a close study of what the law actually provides for, how it is structured and how it functions in the field of the relationship between EEC law and national law and how it protects Scottish fishermen. For this purpose we deal (a) with the structure of the relationship and (b) with the history and difficulties and how the law developed. The general structure consists of numerous regulations and various conventions (1) and also some national statutes referred to in the introduction, but the starting point is the Treaty of Rome as a primary source of current law.

When considering the structure of the relationship between EEC law and national law and when considering how EEC law has been formulated we must remember the interest of Scottish fishermen and remember that these laws form the foundations under which Scottish fishermens' interests are protected. We referred to Scottish fishermens' interests in our introduction (Chapter 1) as lying in four specific areas, namely, the reliable income that fishing produces for

fishermen within Scotland, a fair standard of living as an entitlement; in addition, non-discrimination through allocation of quotas and the access of the fishing stocks as a corollary to Scottish fishermens' interests and the preservation of these fishing stocks and the protection afforded to the fish they catch.

In the United Kingdom it was necessary to pass the European Communities Act 1972, so that the EEC Treaty obligations could be transformed into "enforceable Community rights", and to set up the machinery for the implementation of the rules of Community law.

Lasok and Bridge distinguish between "directly" and "indirectly" applicable rules of Community law. In this context, a distinction should be made between the rules which are "directly applicable", that is, rules becoming automatically law upon their enactment as part of the corpus juris of the member-states and the rules which are "directly enforceable" that is rules which have a "direct effect" as far as rights and obligations of a citizen are concerned.(2)

Lasok and Bridge point out: "the message of the Community Court is that certain provisions of the Treaty are by their very nature and purpose directly enforceable in national courts. As they affect

private interests, they create Community rights which as a corollary, correspond to Community obligations imposed upon the member states".(3)

These include, for example, EEC Article 7 which prohibits discrimination on the grounds of nationality, and other Articles like EEC Article 52 concerning the right of establishment which we discussed in the Introduction. As a conclusion, the same authors summarise the relationship between national courts and the ECJ as follows:

> "The relationship between the Community Court and the Judiciary of the member states is delicately poised between the recognition of the independence of the Courts of sovereign states and the need for a uniform application of Community law throughout the Community. It is a problem which, one hopes, will solve itself in the course of time as a result of the consolidation of the Community, though nuances between the styles of the national judiciaries are bound to remain."(4)

Scottish fishermen's rights are anchored in EEC as well as national law, and one has to examine these in the light of the relationship between the two. For this purpose it is necessary to examine the relevant legislation at both levels.

With reference to the legal quality of primary EEC Community law, two requirements have to be observed: firstly, the Community measures must be reasoned, as required by Article 190 of the EEC Treaty. They should state the reasons which motivated the Community to act in the way that it has and they must state the legal provision on which they are based. All Community proposals have to be published in the Official Journal. Secondly, the Community measures must not exceed the competence given to the institutions by the Treaty and they must not be discriminatory, for example in the present context, between groups of fishermen. They must also respect legal general principles such as certainty, which form part of Community Law.

There are a large number of Community rules which have to be adhered to, with which member-states have to comply, when introducing a national law. If a member-state fails to comply with the requirements, then any measure introduced which is questioned will be held to be invalid by the Court and under such circumstances:

> ".... The Court has held that a measure thus rendered invalid may not be enforced against Community fishermen by national courts, and any attempt to do so is contrary to Community Law."(5)

This is shown through the cases in Chapter 3.

The European Community's competence to regulate fishing is contained in Articles 43 and 103 of the EEC Treaty and Article 102 of the 1972 Act of Accession. Article 43 authorises the taking of any fisheries measures which fall within the objectives laid down in Article 39. Measures to conserve and promote fish stocks and to promote fisheries research fall within the objectives of increasing productivity and assuring the availability of supplies; while measures for example to resolve conflicts between fishermen and insure a fair standard of living for them come within the objectives of increasing productivity and ensuring that consumers receive supplies at reasonable prices. The Community's competence to regulate fishing is extensive but, member-states' national competence is very restricted. There are no geographical restrictions on the scope of Article 43. The history of this can be traced over a number of years going back to 1977.

During the first phase from 1970 to the beginning of 1977 there was no regulation of fishing by Community institutions. Although there was power to adopt conservation measures, there was no regulation of fishing by Community institutions. It was clear from the Kramer case (6) that the Member States were permitted to adopt national measures and this was confirmed when, in the Kramer case, Dutch legislation, laying down quotas for sole and plaice, was held to be valid. During the period of 1977 to 1978 member-states not only had the right to take conservation measures but also in certain circumstances had a duty to take them. The legal basis for this duty derived from Article

102 of the Act of Accession, Regulation 101/76, Annex VI of the Hague Resolution and the Council Declaration of January 1978. These provisions, said the ECJ:

> "are based on the two-fold assumption that measures must be adopted in the maritime waters for which the Community is responsible so as to meet established conservation needs and that if those measures cannot be introduced in good time on a Community basis the Member States not only have the right but are also under a duty to act in the interests of the Community".(7)

It is well known, as a general principle, that if there is a conflict between Community law and national law, Community law must prevail. Churchill is of the view that Community Law has exclusive competence in relation to any matter covered by EEC Article 43, which can be almost any matter relating to fisheries management and the conflicts between fishermen. But he also adds that this argument does not hold entirely in that the Community's exclusivity of competence relating to fisheries management is based on Regulation 101/76.(8)

It is interesting to note, within that context, that fishermen's rights are governed by Regulation 2141/70 (now Regulation 101/76)(9) which clearly envisages that member-states can and will enact rules relating to fishing. It cannot be said that Community law has

exclusive competence other than in relation to EEC Article 43. Furthermore, both Regulation 2527/80 and Regulation 171/83 permit member-states in certain circumstances to take conservation measures. Article 18 of Regulation 171/83 provides that a member-state in certain circumstances may take:

> "appropriate non-discriminatory measures" in its waters "where the conservation of certain species or fishing grounds is seriously threatened and where any delay would result in damage which would be difficult to repair".

In such cases the Commission must be immediately informed and then shall confirm, cancel or amend the measure. The Council may then amend the Commission's decision if it wishes.

Under Article 19 of Regulation 171/83, discussed in more detail later below, a member-state may take:

> "measures for conservation and management" of "strictly local stocks of interest to the fishermen".

of that member-state only; and a member-state may:

> "lay down any strictly local conditions or detailed arrangements applying to [its] national fishermen only, designed to limit the catches by technical measures in addition to those defined in the Community Regulations".

Article 20 of Regulation 171/83 provides that member-states may adopt:

> "technical measures" for fishermen of that Member State and "which are intended either to ensure better management and better use of fish....."(10)

There is no reference to any requirement to obtain Commission approval, but this is probably because Commission (implicit or otherwise) approval is one of the legal requirements of Community law anyway. (see p. 58 below).

It must be asked whether the power, which member-states are given by the provisions, is compatible with the ECJ's findings of exclusive Community competence. The Community may be considered to have delegated the exercise of its power to the member-states.

> "The European Court appears to have taken the view that such delegation is permissible provided that the powers delegated do not confer any substantial measure of

discretion on the delegate and provided the Community institutions retain a measure of supervision over the delegate."(11)

Churchill states that the ECJ has also recognised that, on occasions, national legislative measures are in order to fill various lacunae in Community law. These have to be introduced in a manner which is both consistent with the aim of protecting fishing stocks and consistent with the aims of the Community legislation in question.(12)

In summary, therefore, we can so far say that the member-states' competence to legislate regarding fisheries management measures lies in three fields: namely, they can take measures where there are no Community measures enforced, secondly they can take measures based on delegated powers and thirdly, they can take measures to fill any lacunae in Community legislation.

But the case law over the years has laid down a number of requirements which are both substantive and procedural for member-states to adhere to, to be allowed to legislate at all. Notification has to be made to the Commission and other member-states and the notification should be made before a measure is brought into force. In some cases where the powers are delegated there are special notification procedures. Secondly, it is necessary to seek the

approval of the Commission. It would appear that pre-1979 consultation required the Commission to be fully informed and in good time for the proposed measures - whereas after 1979 there was an obligation to consult with Commission which, following 1979 could veto a national measure and it is the Commission which must represent the interests of the Community, Commission approval can be tacit.

National measures must not conflict with existing Community measures because, of course, EEC law overrules national law; nor must there be any threat to the obtaining or functioning of the CFP. The relationship of the national measure to an earlier Community measure has to be close. A member-state may only introduce a measure departing from an earlier Community measure if it can justify it on conservation grounds.

Any measure has to be for genuine conservation purposes and must be non-discriminatory. A national measure has to be necessary and it must be proportionate and it must be interim. Measures must be limited to amending existing measures. They have to be properly published (in agreement with the general principle of legal certainty). National measures governing fishing in a member-state exclusive to a twelve mile zone must not be made less restrictive than they were at the time of accession i.e. 1 January 1973 for the UK. Measures must not affect negotiations with third party states.

No measures falling foul of the provisions relating to free movement of goods would be acceptable and a member-state must not jeopardise the objectives of a proper functioning of the fisheries products market. A full discussion on the subject is available in R.R. Churchill's book.(13)

The above points describe the relationship between EEC law and national law and the requirements of both for the law to be valid. We can now consider first the EEC relevant legislation in detail and then the cases in detail and how the ECJ has come to its decisions.

In its well known judgment in the Van Gend en Loos case the ECJ observed that:

> "the task assigned to the Court of Justice under Article 177, the object of which is to ensure uniform interpretation of the Treaty by national Courts and tribunals, confirms that the states have acknowledged that Community law has an authority which can be invoked by their nationals before those courts and tribunals."(14)

The Treaty of Rome has no specific provision on fisheries and the nearest it gets to a reference is where it defines:

> "Agricultural Products" as being "the products of the soil and of fisheries and of products of first stage processing directly related to these products."(15)

With this as a starting point, the path through the Regulations as amended and consolidated up to the Single European Act (16) (see Chapter 6) can be mapped . It should be noted immediately that the implicit reasoning and the preambles are of great importance in our enquiry. Article 189 of the EEC Treaty gives the authority to issue the Regulations:

> "In order to carry out their task the Council and the Commission shall, in accordance with the provisions in this Treaty, make regulations, issue directives, take decisions, make recommendations or deliver opinions. A Regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States."

Article 190 of the Treaty then goes on to refer to reasoning:

> "Regulations, directives and decisions of the Council and of the Commission shall state the reasons on which they

> are based and shall refer to any proposals or opinions which were required to be obtained pursuant to this Treaty."

The preambles of relevant Regulations show how the CFP was intended to develop. Some argue that the Single European Act and the completion of the internal market at the end of 1992 will effect changes to the CFP; others visualise considerably less changes. The various views are referred to in Chapter 5. A case in which the importance of reasoning was referred to was that of P.F. Stranraer v. Andrew Marshall (17), discussed at length by the Sheriff, and we consider his comments further in Chapter 3.

The extreme difficulties of integration and the events which have been referred to in the chapter (18) dealing with the case law including the numerous cases of hostile attitudes and the intrusions by individuals from one member-state's waters into another member-state's waters make the reasoning underlying and the content of the legislation important. An attempt at codification of the problems of equal access, non-discrimination and related matters like special economic dependency came in 1970 when the principles of a structured CFP were set out in Regulation 2141/70.(19) This Regulation referred to "equal access" and non-discrimination by saying that:

> "The system applied by each Member State in respect of fishing in the maritime waters coming under its sovereignty or within its jurisdiction must not lead to differences in treatment with regard to other Member States".(20)

The Regulation also added:

> "The Member State shall ensure equal conditions of access to an exploitation of the fishing grounds situated in the waters referred to in the preceding paragraph for all fishing vessels flying the flag of a Member State and registered in Community Territory".

The aim of the Regulation is of course contained in the preamble and can be broadly described as being to allow the fishing industry of the Community to develop in a rational manner, to give the fishermen an equitable standard of living and to balance this against the need to exploit the seabed. The French wording of the Regulation clearly states that the fishermen are to be assured of a reasonable standard of living:

> "Considérant qu'il importe que la peche développe d'une manière rationnelle et qu'un niveau de vie équitable soit assuré aux personnes qui en tirent leurs ressources que à

> cet effet il y a lieu d'autoriser les Etats membres à accorder des aides financieres destinees à permettre la realisation de ces objectifs selon des regles communantaires à determiner."(21)

The Regulation recognised the problems of different member-states with different interests such as, special dependency. The Commission, under Article 7, was to report annually on the structure and on measures taken during the year.

The difficulties arising, however, from these desirable objectives were recognised by the Commission as existing throughout the EEC; the problems that naturally arose were the equal access issue and social and economic consequences in areas with a special dependency on fishing. This subject is a major one on its own, to which R.M.M. Wallace has devoted much research.

Scotland, already mentioned, is, in parts, extremely dependent on prosperity coming from fishing. Scottish interests had and have to be protected. The towns of Mallaig and now Peterhead are two of the key centres of the industry in Scotland. The EEC recognised the necessity of giving such protection to various such regions.

Certain areas had such a special dependency on fisheries that more arguments were arising. A compromise between the member-states was achieved on 12 December 1971 with Norway finally consenting to the arrangements on 14 January 1972. The compromise was contained in the Act of Accession.(22) Under this it was agreed that the Council was to adopt proposals by the Commission to allow derogations in force until 31 December 1982. But it was these derogations which, once lifted, would become the source of many difficulties.(23) The Treaty of Accession kept the principle of free access open but it amended Article 4 of Regulation 2141/70. "It was not inconceivable that these derogations would be continued and perhaps even extended."(24)

On 19 January 1976 Regulation 2141/70 was codified by Regulations 100/76 (25) and Regulation 101/76.(26) Regulation 100/76 was an attempt to introduce the common organisation of the market in fishery products. As in the Community, special regions with different requirements exist, the preamble states:

> "Whereas the fishing industry is of special importance to the agricultural economy of certain coastal regions of the Community; whereas that industry provides a major part of the income of fishermen in these regions; whereas it is

therefore advisable to encourage rational marketing of fishery products and to ensure market stability by operating measures."

The next paragraph then recognises the necessity to impose standards: "Whereas one of the steps to be taken to implement the common organisation of the market is the application of common marketing standards to the products concerned; whereas application of these standards should have the effect of keeping products of unsatisfactory quality off the market and facilitating trade relations based on fair competition, thus helping to improve the profitability of production." It is interesting to see the thinking of the Community here, demanding high standards and this is reflected by those looking to the future.

Article 1 laid down a common organisation which established a price and trading system and common rules on competition. It listed the fish that would be included in the regulation.

Title 1 Article 2 provided for marketing standards with an instruction to the Member States to penalise anyone who breached these standards.

Producer organisations were dealt with in Articles 5, 6 and 7. The problems arising from prices are dealt with in the following Articles, while Articles 18 onwards, apart from general provisions, deal with trade with other countries. Legislation and rules were thus clearly emerging.

Regulation 101/76 was brought in at the same time to lay down a common structural policy and it stated in Article 1, that the purpose of the regulation, was:

> "To promote harmonious and balanced development of this industry within the general economy and to encourage rational use of the biological resources of the sea and inland waters."(27)

The preamble raised significant points: the industry was to develop along "rational lines", those living in the industry were to "be assured of a fair standard of living", Member States were to be allowed to give financial aid in accordance with Community rules and this financial aid could be provided by the Community if the aims are within the ambit of the EEC Treaty. There was a call for permanent co-operation between the Member States and the Commission "for the effective co-ordination of these policies."

The preamble made it clear that:

"the Community must be able to adopt measures to safeguard the stocks of fish present in the waters in question".

Non-discrimination is then referred to in Article 2 (28). In Article 4 conservation measures are dealt with. Article 5 lays down the important rules of co-ordinating the structural policies for the fishing industry and lays a burden on the Member States to notify the Commission annually of the structural situation taking into account regional conditions, the nature and extent of measures for structural improvement and the liaison with the market policy. It goes on in Article 6 to make the Commission in turn accountable to the European Parliament and details what should be included in the report laid before Parliament. It will be shown, through the cases which we examine, how the ECJ has upheld the necessity of communicating all actions to the Commission. The Commission is, of course, accountable to the Council in respect of the structure for the fishing industry.

A basic legal and detailed structure for a CFP was thus emerging within the Community. As already described in the Introduction and later in Chapter 3, the difficulties of conflicting interests and regional variations made the legislation difficult to construct. Nevertheless it can be seen from the 1976 Regulations that progress was being made and Scottish interests in the United Kingdom were being taken into account.

In 1976 a Council Resolution (29) was passed for the creation of the 200 mile fishing zone in the Community with effect from 1 January 1977. It became the responsibility of each Member State to extend its own zone to the 200 mile limit and the United Kingdom duly carried this out. The Resolution agreed "on the need to ensure by means of any appropriate Community Agreements that Community fishermen obtain fishing rights in the waters of third countries and that the existing rights are retained." The Resolution went further: "To this end, irrespective of the common action to be taken in the appropriate international bodies, it instructs the Commission to start negotiations forthwith with the third countries concerned in accordance with the Council's directives. These negotiations will be conducted with a view to concluding in an initial phase, outline agreements regarding the general conditions to be applied in future for access to resources...." This clarified the feeling throughout the EEC for the desire for self protection.

It is appropriate to mention here the general terms contained in the Sections of the Fishery Limits Acts 1976 (30). The Act extends, as already stated, British Fishery Limits under Section 1 to 200 miles from the territorial sea base lines of the United Kingdom or to such other lines as is specified by Order in Council or to the median line between those base lines and the corresponding base lines of other countries.

The Act provides that the minister may, by order, designate any country, any areas and any types of fish in which foreign vessels of that country may fish. It prohibits fishing unless so authorised, provides for storage of fishing equipment on foreign boats where not needed, and raises the maximum fine for offences. The licensing requirements may be applied to foreign boats within the limits, as well as to British boats, for the general purpose of regulating fishing as well as to prevent over fishing, and information may be required and fees charged for licences. An example of the current licence is attached to the Appendix of the present thesis.

Section 4 of the 1976 Act extends the power of Section 5 of the Sea Fisheries Act 1968 to regulate sea fishing operations, and is not restricted to giving effect to international conventions. It makes the powers exercisable in respect of foreign vessels fishing within British fishery limits. The penalties are raised substantially, so for example, the contravention of a bylaw formerly would be a fine of £50; now it can be a fine of £1,000. The Act extends to Northern Ireland, and provides that the present boundary between British limits adjacent to Northern Ireland and the limits of the Republic of Ireland shall not be affected.

Following on from the regulations which we have referred to earlier, there are several further amendments which have attempted to modify the CFP. Regulation 2057/82 (31) of 29 June 1982 establishes certain

control measures for fishing activities by vessels of the Member States; this regulation is of great importance since it forms the basis of codification of the existing law. There have, however, been amendments to it and these are contained in Council Regulations 1728/83 (32) of 20 June 1983, Council Regulation 3723/85 (33) and Council Regulation 4026/86 (34) of 18 December 1986. An examination of Regulation 2057/82 (35) shows that it deals with inspection of fishing vessels and their activities, the regulation of catches, the use of fishing gear and all related matters. Article 1 deals with the inspection of fishing vessels, imposing an obligation on Member States to inspect fishing vessels flying the flag of a Member State "in order to ensure compliance with all the regulations in force concerning conservation and control measures." Penal action is authorised if all is not well.(36) If the competent authorities of a Member State observe as a result of an inspection carried out by them "that a fishing vessel flying the flag of, or registered in, a Member State does not comply with the relevant regulations concerning conservation and control measures they shall take penal or administrative action against the skipper of such a vessel."(37) However, these inspections shall be carried out to "avoid undue interference". There must be no discrimination "as regards the sector and the vessels chosen for inspection".(38)

There is an obligation on skippers to keep a log book of their total allowable catches indicating, as a minimum, the quantities of each species caught and kept on board.(39) Title 11 deals with the regulation of catches. The skipper has to submit to the authorities a declaration about the quantity and location of his catches and Member States are to check on the accuracy of these statements.(40) Member States have to notify the Commission of the quantities of each stock by the 15th day of each month.(41) Notifications to the Commission shall indicate the location of the catches and the Commission then has to inform Member States of the notifications received. There then follows detached rules as to what the Commission may do.

Title 11 gives the detailed rules about the regulation of catches; the last title gives further detailed rules.

We have described, above, the difficulties arising from the CFP and in particular the difficulties between competing member-states (See pp. 64). There was little attempt made by those interviewed during the writing of this thesis at the Department of Agriculture and Fisheries to hide their feelings. They regularly referred, as one might expect, to the problems of vessels from other member-states going into other unauthorised waters and, therefore, to the problem of overfishing. The legislation is obviously designed to strengthen the law and the

1982 Regulation codified it up to that date. For an example of how the law has been strengthened we refer back to in Article 1 paragraph 2:

> "If the competent authorities of the Member State observe as a result of an inspection carried out by them under paragraph 1 that a fishing vessel flying the flag of, or registered in, a Member State does not comply with the relevant Regulations concerning conservation and control measures they shall take penal or administrative action against the Skipper of such a vessel.(42)

This paragraph is amended in the Regulation of 20 December 1985 (43) in Article 1 where the above paragraph is repeated at length but at the end are added the following words:

> ".....or, if necessary, any other person responsible".(44)

This must have the effect of giving much wider control and a wider application for penal measures. Presumably the measure is intended to give wider powers to enforce penal measures against the owners of a vessel as well as the crew and exemplifies efforts intended to tighten control measures.

Under Article 3 of the 1982 Regulation, skippers, as we have shown, are obliged to keep records of operations indicating their catches and quantities. These obligations are repeated at length in the 1985 Regulation but in addition there is a further clause which states that:

> "Member States shall take appropriate measures to verify the accuracy of the entries made under paragraph 1".(45)

This additional wording will give powers to local government authorities to take "appropriate measures" to deal with breaches and it will now be the responsibility of the Ministry to take the action which it deems to be appropriate. We shall have to wait to see how the authorities will regard their additional powers but we now see that Member States are obliged to ensure the accuracy of details being monitored, thereby ensuring Regulations are more stringently applied.

A further example for the strengthening of the law can be seen in Article 1 of Regulation 4027/86 which replaces Article 1 (1) and (2) of the 1982 Regulation.(46) The wording is increased and in the 1986 Regulation it is clear that the control of activities is now being further extended to inland activities. Article 1 states that "in order to ensure compliance with all the Regulations in force concerning conservation and control measures each Member State shall

within its territory and within maritime waters, subject to its sovereignty or jurisdiction, monitor fishing activity and related activities. It shall inspect fishing vessels and all activities whose inspection would enable verification of the implementation of this Regulation including the activities of landing, selling and storing fish and recording landings and sales".

The Article goes on to say:

> "If the competent authorities of a Member State observe, as a result of monitoring or inspection carried out by them under paragraph 1, that the relevant rules concerning conservation and control measures are not being complied with, they shall take penal or administrative action against the master of such a vessel or any other person responsible".(47)

The next paragraph is a further widening of powers. Article 2(1) is replaced by the following "1. the inspection and monitoring referred to in Article 1 shall be carried out by each Member State on its own account by an inspectorate appointed by it." The words in the Articles are the same with the words "and monitoring" being brought into the new legislation. The 1986 Regulation appears therefore to strengthen the law and widen the powers and obligations of the Member States to see that the law is adhered to.

The tightening up in the legislation described above reflects concern with the CFP and this concern was made manifest in the reasoning and justification in the preamble to the same Regulation 4027/86.

> "Whereas it is appropriate to clarify the extent of the duty of the Member States to record landings of stock or groups of stock subject to total allowable catches (TACs) or quotas, whether within Community waters or not, and to enable records of such landings to be verified."(48)

Furthermore in the same preamble the regulation says:

> "Whereas, when the Commission or its authorised officials encounter, in carrying out their duties, repeated and unjustified difficulties, the Commission may request of the Member State concerned, in addition to an explanation, the means of fulfilling its task; whereas the Member State concerned is required to ensure fulfilment of its obligations arising from Regulations (EEC) No 2057/82, as amended by this Regulation, by facilitating the achievement of the Commission's task".(49)

So it can be seen that the preamble is effectively voicing the Community's concern about the effectiveness of the CFP at that date. But other measures were considered necessary in 1983. In 1983 the

European Community laid down certain technical measures for conservation of fishery resources. These were primarily contained in Council Regulations of 25 January 1983.(50) They were described as "establishing a Community system for the conservation and management of fishery resources".

But in 1986 a new Regulation for the same purposes was passed in the form of Council Regulation 3094/86 of 7 October 1986.(51) That Regulation consolidated the Regulation for the Conservation of Fishery Resources. Regulation 171/83 (laying down technical measures) had been subsequently amended 6 times and consolidation was necessary. Regulation states in its preamble that:

> "It is therefore necessary for the proper understanding of this Regulation and its effective enforcement that it be replaced by a new Regulation wherein all these modifications are included in a single text".(52)

The preamble to Regulation 3094/86 recognises:

> "certain deficiencies which result in problems of application and enforcement and which should be rectified, notably by introducing definitions of directed fishing for certain species of fish and by defining more precisely by-catches and protected species."(53)

And then comes the recognition of the necessity to tighten the legislation:

> "Whereas the rules concerning fishing within the 12 mile coastal zone should be more precisely defined in terms which are enforceable."(54)

Article 1 and Article 2 deal with the definition of the areas covered and Article 2 deals with the minimum mesh sizes. This is supported by Annex 1 which sets out in detail the minimum mesh sizes and the conditions for fishing. It shows the geographical area, any additional conditions, the authorised target species and the maximum and minimum percentage of target species and protected species. The Regulation goes on to deal in considerable detail with such matters as prohibition of fishing as regards salmon and sea trout, the control of herring and mackerel and the details of the restrictions on certain types of fishing. Articles 10 and 11 deal with processing operations and scientific research respectively. Articles 13 and 14 have changed from Regulation 171/83 (55), a point which we shall examine shortly.

Further Regulations were introduced on 18 December 1986 being 4026/86 (56) and 4027/86.(57) These lay down certain further technical measures which appear to be necessary having taken into account new

information concerning the estimates of losses of catches of sole. The second Regulation detailed further controls and made amendments to Regulation 2057/82. It also reflected concern over quotas:

> "Whereas in this context provision should be made for the possibility of putting a stop to fishing once the TAC quota allocation or share available to the Community is exhausted; whereas, however, reparation should be made for the loss sustained by a Member State which has not exhausted its quota....."(58)

On 28 May 1987 Commission Regulation 1381/87 (59) was brought in establishing detailed rules concerning the marking and documentation of fishing vessels, and Commission Regulation 1382/87 (60) established detailed rules concerning the inspection of fishing vessels.

Further Regulations came into force at the end of 1988 and at the beginning of 1989. Commission Regulation 3798/88 (61) of 24 November 1988 produced detailed rules concerning follow-up reports on projects granted financial aid in the framework of Community measures to improve and adapt structures in the fisheries and aquaculture sector. Styles of the follow-up reports are annexed at the end of the Regulation.

On 20 November 1988 Commission Regulation 3752/88 (62) was passed. It related to the stopping of fishing for mackerel by vessels flying the flag of Ireland and on 21 December 1988 Regulation 4086/88 (63) established for the current year the list of vessels exceeding 8 metres length over-all and permitted to use within certain coastal areas of the Community beam trawls whose aggregate length exceeds 8 metres.

On 1 January 1989 Regulation 4175/88 (64) of 28 December 1988 came into force. It amended Regulation 3137/82 laying down detailed rules for the granting of compensation in respect of certain fishery products. Also Regulation No. 4176/88 (65) of 28 December 1988 laid down detailed rules of application for the granting of flat-rate aid and for certain fishery products. Article 1 gives the purpose: "This regulation lays down detailed rules of application for the granting of flat-rate aid provided for in Article 146 of Regulation No. 3796/81 hereinafter referred to as the basic regulation." The general conditions then follow on.

Reference was made earlier to three points in particular: firstly, that the consolidating Regulations are intended to clarify and codify the existing law in the area being defined; secondly, that the former law appears to have been strengthened by additional words being added

to amend the wording of former Regulations; several examples have been given. Thirdly, the preambles to the Regulations have given the reasoning behind the measures being adopted or amended.

Amended or changed wording has been used to strengthen, or alter the law. The simple change of wording in a Regulation is a matter which we should also examine. Regulation 171/83 of 25 January 1983 (66) was the principal Regulation laying down certain technical measures for the conservation of fisheries. The final provisions of that Regulation as codified by the 1986 Regulation (67) are broadly the same although there are minor changes in the wording. It seems likely that changes in the wording are deliberate efforts to change the law. However, it will only be when the wording is tried before the court that we can be certain. The wording in the 1983 Regulation appears to be clear enough, however, that is the point that gives concern. The wording in the 1986 Regulation can and should be read with a different interpretation. A comparison of the wording in the preambles begs the question as to where the difference is really intended to lie.

Article 13 of the 1986 Regulation replaces Article 18 in the 1983 Regulation. According to Article 18 communications are to be made by the Commission and other Member States "by telex as soon as they are decided on" (68) whereas Clause 3 in Article 13 says that measures are to be communicated "as soon as they are adopted". It may seem

that such a detailed analysis of wording which is so general in any case is unnecessary but it would also appear that the first Regulation was quite clear in its wording, and so it does not appear to be entirely obvious why there should be such a change in the 1986 Regulation. The wording of Clause 6 is also different. The 1983 Regulation instructed that:

> "The Council, acting by a qualified majority, may adopt a decision differing from that of the Commission within 30 calendar days of the matter being referred to it".(69)

The 1986 Regulation refers at Article 13 paragraph 6 to the Council acting by a qualified majority adopting a different decision:

> "Within one month".(70)

There is no reference there to:

> "The matter being referred to".(71)

It is difficult to see what the Commission was intending with the change of wording being in such general terms. It may be that it was intended that the Council may have a greater latitude in time to adopt a different decision which could be of great significance. Article 14 of the 1986 Regulation replaces Article 19 of the 1983

Regulation. Paragraphs 1 and 2 have been restructured in their wording although the same meaning appears to come through. It is difficult under those paragraphs to see why there should have been a change in the wording at all. When referring to fishermen in the 1983 Regulation the words "National fisherman" are used, whereas the wording in the 1986 Regulation is changed to:

> "....such measures which apply solely to the fishermen of the Member State concerned".(72)

The 1986 Regulation requires:

> "Member States shall provide the Commission, on request, with all particulars necessary for an assessment of whether their national technical measures comply with the provisions of paragraph 1".(73)

The 1983 Regulation puts a similar requirement on the Member State but words the paragraph in a different way:

> "At any time and at the request of the Commission, Member States shall provide all the information necessary for assessing the compatibility of the measures referred to in this Article with the Community Law and their conformity with the common fisheries policy."(74)

These are a few of the examples of how the wording has changed. On the face of it one might consider that, in general terms, there has been no change in the law at all; on the other hand, when consideration is given, it must be assumed that an alteration can often mean a substantial change.

There is one further point to note about the drafting. In domestic statutes the wording of statutes can often be extremely complicated causing great difficulties in interpretation. The difference with EEC Regulations is that the Regulations are nearly always worded in very general terms and it is not until a case is brought before the ECJ that it can be seen by the observer that general words can be interpreted with narrow or wide meaning. So the conclusion might be drawn at this stage that there may have been substantial changes in the code referred to in the 1983 Regulation and the 1986 Regulation, although the general meaning remains the same. It is also important to make a reference to the language problem which arises and the emphasis given by the ECJ or the Advocate General to the different interpretation of the same words in different languages.

And so by starting with the EEC Treaty and carrying through the Regulations on a historic basis, one can see how the CFP has emerged.

The reasoning in the preambles of the Regulations that have been detailed clearly reflect the problems arising throughout the Community.

It must be assumed that amending Regulations are designed to strengthen the original codification, although it is not always clear why the general wording is changed to describe a situation almost entirely similar to the very Regulation the amending Regulation is trying to change.

The SEA, dealt with in Chapter 5, contains more general wording. The changes in the wording of the later Regulations might mean substantial changes in the law which are difficult to foresee. A general tightening of the law is, however, anticipated.

In conclusion, we have seen from this chapter how Scottish fishermens' interest are anchored in European law and national law. This provides the foundations under which Scottish fishermen's interests are protected. In the introduction we referred to Scottish fishermens' interest as being an adequate income, a reasonable standard of living, non-discrimination and the preservation and protection of fish stocks. The legal framework in respect of Scottish fishermens' interests, which we have outlined in this chapter, appears to promote the interest which must be described as adequate. The Regulations provide for the preservation and protection of fishing stocks. We have referred to the principle of

non-discrimination, the allocation of quotas and the access to fishing stocks. The insuring of Scottish fishermens' fair standard of living and thus a reliable income are two principles written in to the Regulations. However, as the law is broadly formulated, as we have shown, it needs testing, confirmation, clarification through cases submitted to national courts, but not least the ECJ as the guardian of the EEC under EEC Article 164 to see that in the interpretation and application not only of EEC law, but for our purpose of CFP law, the law is observed and the principles of the rule of law and due process of law prevail. This topic is examined below in Chapter III.

Footnotes to Chapter "The Law"

1. The introduction has referred to various Conventions.

2. Law and Institutions of the European Communities. D. Lasok/J.W. Bridge (4th edn., 1987) (Butterworths), p. 301.

3. Ibid. p. 304.

4. Ibid. P. 330.

5. R.R. Churchill, EEC Fisheries Law, p.108.

6. Officier van Justitie v. Kramer (Joined Cases 3, 4 and 6/76) 1976 ECR 1279 1976 2CMLR 440.

7. Commission v. United Kingdom 1980 ECR 2403 1981 CMLR 219. The text of Annex VI has not been published but the Council confirmed the provisions in a Declaration of 30-31 January 1978 which is reproduced in this case.

8. Loc. cit. note 5, p. 91.

9. Regulation 101/76 L20/19 and Article 100 of the Act of Accession, which refer to the permitted existence of national regulations.

10. Regulation 171/83 as amended by Regulation 2178/84 OJ 1984 L1991/1.

11. Loc. cit. note 5, p. 93.

12. Loc. cit. note 5, p. 94.

13. Ibid. pp. 94-109. All the requirements are discussed in detail.

14. N.V. Algemene Transport & Expeditie onder neming Van Gend en Loos v. Nederlandse Adminstratie Case 26/62 1963 ECR1, p. 12.

15. EEC Article 38(1).

16. Single European Act and 1992 are discussed in Chapter 6, pp. 212-232 below.

17. Procurator Fiscal Stranraer v. Andrew Marshall (1988) 1CMLR 657.

18. Reference is made to Chapter 1 (Introduction) of the present thesis, where events are quoted from Keesing's Contemporary Archives.

19. OJ L236/1 27 October 1970 Regulation 2141/70.

20. Ibid. Article 2(3) provided that member-states were to define, under their own legislation, the maritime waters under their own, sovereignty.

21. Reglement (CEE) 2141/70 du Conseil du 20 Octobre 1970 OJ L236/1. As no corresponding official text to this Regulation exists, the French official text is used for the citation.

22. Article 103 of the Act of Accession which provides that before 31 December 1982 "the Commission shall report to the Council on the economic and social development of the coastal areas of the Member States and on the state of stocks. On the basis of that report, and of the objectives of the common fisheries policy, the Council, acting on a proposal from the Commission," shall examine the provisions which could follow the derogations in force until 31 December 1982. M.M. Sibthorp. (see footnote 24).

23. Article 100(1) of Act of Accession. Accordingly member-states may:

> "Until 31 December 1982 restrict fishing in waters under their sovereignty or jurisdiction situated within a limit of six nautical miles ..... to vessels which fish traditionally in those waters and which operate from ports in that geographical coastal area."

24. The North Sea Challenge and Opportunity Report of a Study Group of The David Davies Memorial Institute of International Studies. Edited by M.M. Sibthorp. Chapter 4: The Present Legal Regime of the North Sea: International Law, p. 112.

25. OJ L1976 L20/1 19 January 1976. This Regulation was a consolidating one. Paragraph 4 to the preamble refers to the provisions and "their complexity and their dispersal among various official Journals. These texts are difficult to use and thus lack the clarity which should be an essential feature of all legislation."

26. OJ L20/19 19 January 1976 Regulation 101/76.

27. Ibid. OJ L20/1 Regulation 101/76.

28. Ibid Article 2. "Rules applied by each Member State in respect of fishing in the maritime waters coming under its sovereignty or within its jurisdiction shall not lead to differences in treatment of other Member States."

29. Proposals from the Commission recommended that Member States should extend their fishing limits round the North Sea and North Atlantic Coasts to 200 miles from 1 January 1977:

> "Communication on Future External Fisheries Policy and Internal Fisheries System Com (76) 500 Final - submitted to the Council 23 September 1976. The Council resolution adopting the 200 mile zone in the Community with effect from 1 January 1977 - OJ no. C105/1 7 May 1981."

The Resolution was dated 3 November 1976.

30. This was effected in the United Kingdom by the Fishery Limits Act 1976. In Ireland it was effected by the Maritime Jurisdiction (Exclusive Fishery Limits) Order 1976.

31. OJ L220/1 29 June 1982 Regulation 2057/82.

32. OJ L169/9 20 June 1983 Regulation 1728/83. This related to the regulation of fisheries of the North West Atlantic Fisheries Organisation which adopted proposals for limiting catches of certain species.

33. OJ L361/42 20 December 1985 Regulation 3723/85. Establishing a further control measures for fishing activities.

34. OJ L376/1 18 December 1986 Regulation 4026/86. Laying down certain measures for the Conservation of fishery resources. There were several other regulations adopted on the same day.

Regulation 4027/86 amending Regulation 2057/82 establishing certain control measures for fishing activities by vessels of Member States (OJ L376/4) of 18 December. Regulation 4028/86 to improve and adopt

structures in the fisheries and agriculture sector OJ L376/7 of 18 December. Various Regulations related to individual Member States numbered 4029 to 4041/86 all of 18 December 1986.

35. OJ L220/1 29 June 1982 Regulation 2057/82. Title 1 Article 1 paragraph 1.

36. Ibid. Article 1 paragraph 1.

37. Ibid. Article 1 paragraph 2.

38. Ibid. Article 2 paragraph 1.

39. Ibid. Article 3 paragraph 1.

40. Ibid. Article 6 paragraph 1.

41. Ibid. Article 9 paragraph 2.

42. Ibid. Article 1 paragraph 2.

43. OJ L361/42 20 December 1985 Regulation 3723/85. OJ L220/1 of 29 June 1982 which amended Regulation 2057/82.

44. Ibid. Article 1 paragraph 1.

45. Ibid. Article 1.

46. OJ L376/4 18 December 1986 Regulation 4027/86 (amending Regulation 2057/82) OJ L220/1 of 29 June 1982.

47. Ibid. Article 1 paragraph 2.

48. Ibid. Preamble paragraph 7.

49. Ibid. Last paragraph of preamble.

50. Regulation 170/83 OJ L24/1 of 25 January 1983. There were other regulations of the same date the details of which need not be discussed here: Regulation 170/83 to 181/83. It was however notable that the reasoning related to the 200 mile fishing zones with effect from 1 January 1977 along the North Sea and North Atlantic coastlines.

51. Regulation 3094/86 OJ L288/1 of 7 October 1986.

52. Ibid. Paragraph 5 in preamble.

53. Ibid. Paragraph 7.

54. Ibid. Paragraph 10 of preamble.

55. Loc. cit. note 48 above.

56. Regulation 4026/86 OJ L376/1, 18 December 1986 amending Regulation 3094/86 OJ L288/1, 7 October 1986.

57. Regulation 4027/86 OJ L376/4, 18 December 1986 amending Regulation 2057/82 OJ L220/1, 29 June 1982.

58. Ibid. Regulation 4027/86 OJ L276/4, 18 December 1986 paragraph 8 of the preamble.

59. Regulation 1381/87 OJ L132/9, 20 May 1987.

60. Regulation 1382/87 OJ L132/11, 20 May 1987.

61. Regulation 3798/88 OJ L339/1, 24 November 1988.

62. Regulation 3752/88 OJ L328/53, 30 November 1988.

63. Regulation 4086/88 OJ L359/35, 21 December 1988.

64. Regulation 4175/88 OJ L367/61, 28 December 1988.

65. Regulation 4176/88 OJ L367/63, 28 December 1988.

66. Loc. cit. note 50, Regulation 171/83 OJ L24/14, 25 January 1983.

67. Loc. cit. note 51.

68. Loc. cit. note 50, Regulation 171/83 OJ L24/20, 25 January 1983 Article 18, paragraph 3.

69. Loc. cit. note 50, Article 18, paragraph 6.

70. Loc. cit. note 51, Article 13, paragraph 6 and OJ L24/20 Article 18, paragraph 6.

71. Loc. cit. note 50, Article 18, paragraph 6.

72. Loc. cit. note 51, Article 14, paragraph 1.

73. Ibid. Article 14, paragraph 3.

74. Loc. cit. note 50, Article 20, paragraph 3.

CHAPTER 3

FISHERIES CASES

A major emphasis in the present thesis is on an examination of the attitude of the ECJ in dealing with legal points concerning fishermen. For this purpose, the various cases submitted to the ECJ are surveyed. While reference to the most recent cases may give a mixed picture, it is clear that certain points of law do emerge. Independently from the fact that the doctrine of precedent does not apply to the practice of the ECJ, reference is often made to decided cases in support of significant points of law. The practice of the ECJ reflects support for the Commission and its control powers with respect to the permanent problem of conserving fishery stocks and co-ordinating the interests of the member-states.

In line with our subject matter, interests of Scottish fishermen in particular and of the U.K. in general as to adequate protection, all the more after Spain's accession to the EC, we consider what the significance of the practice of the ECJ has been. Does the ECJ encourage member-states to protect their own fishermen as and when necessary? What follows below indicates that such protection is not devoid of problems, as the ECJ, dealing with the interpretation and

application of the law has over the years noted how the member-states' competences have tended to diminish in line with the development of the CFP.

Churchill points out that:

> "The Court has performed a useful service in clarifying the permissible scope of national fishery measures, given the absence of Community measures for so much of the time between 1977 and 1983 .... there are times when reading the Court's case law one has the impression that the Court is more interested in this matter than in the good management of the fish stocks in Community waters."(1)

Kapteyn and Van Themaat explain with regard to the preliminary rulings:

> "It must be borne in mind that the Article 177 EEC procedure works because of the mutual confidence which has been fostered between the Community and national judiciaries; co-operation is essential and the Court has always been at pains to stress that the national Courts and it have a joint role in ensuring that Community law is upheld."(2)

The practice of the ECJ should be considered against the background of the accession of Spain and Portugal as new Community member-states. Their accession was preceded by difficult negotiations, and considerable transitional provisions were adopted to coordinate the interests of Spain and Portugal with those of the other member-states. The Spanish fishing fleet alone consisted of some 17,000 vessels and, larger than the entire Community fleet, represented 70% of total Community tonnage. This generated a pressure on various member-states with regard to fishing interests. A number of incidents occurred.

On 7 March 1984 Spanish trawlers were about 100 miles off the French coast in the Bay of Biscay.(3) Shots were fired after a request for a licence check; nine persons were injured. French courts proposed fines of 12,200 French francs for each boat on 15 March for illegal fishing; the fines were paid by the Spanish government. In retaliation, Spanish fishermen burnt thirty foreign lorries; the French reacted by blockading roads at the French-Spanish border.

On 24 July 1985 the Irish navy (4) used guns against the Spanish vessel Veracruz when it was fishing in waters 140 kilometres off South West Ireland, Spanish fishermen were casting their nets illegally and refused to obey instructions to stop for investigation.

A more recent incident was reported in June 1988.(5) Spanish fishermen were bending the rules to make money at the expense of the British fishing fleet. Instead of using their own quotas allocated under the EEC CFP, Spanish fishermen were reported to be fishing in British waters and landing their catches in Spain and Portugal.

Spanish fishermen are alleged to by-pass regulations by buying old British boats or engaging British skippers to man Spanish boats to make Spanish catches technically British. At least one hundred and fifty Spanish boats and some Portuguese boats were reported to be operating in U.K. waters, fishing around the west of Scotland rich in shoals of mackerel. The EEC Commission has been investigating ways and means to stop such abuse.

Such major incidents, complemented by minor ones show that tensions exist between member-states and serious problems may still arise as integration is progresses. The background to fishing disputes is, however, far from being limited to disputes between member-states.(6) France and Canada have a long standing dispute. On 15 April 1988 the Canadian authorities arrested twenty-one persons, including four politicians, from the French island of St. Pierre and Miquelon (off Newfoundland) and impounded their boat for fishing in disputed waters.

France claimed an economic zone of 200 miles around the islands whereas Canada recognised only 12 miles. French vessels had been banned by Canada from using the fishing grounds since late 1987, when France broke off negotiations. The twenty-one persons detained had taken their trawler into the disputed area to draw attention to French claims and were held for two days and then released on 17 April. Both President Mitterand and M. Chirac protested about the incident and in retaliation, both French customs and immigration officials subjected Canadian tourists to searches and delays. On April 26 Canada and France reached an agreement on a formula to submit the dispute over fishing rights south of Newfoundland to non-binding mediation.

What are the rights of member-states when dealing with an immediate fishing problem, such as when a vessel from another member-state encroaches on a member-state's fishing waters? The ECJ has had to deal with such situations when interpreting the law at both international as well as Community levels.

The cases cited below range over a period of fourteen years from 1976 to 1990. The principal points of law are highlighted at some length against the facts as a background; the judgements are quoted whenever they are particularly relevant.

The cases, clarifying certain aspects of the law on fisheries, are also interesting when compared with the text of the Single European Act (see Chapter 5 below). They substantiate and reinforce some important fundamental principles such as: member-states cannot legislate without consultation; they cannot discriminate; they can only contest a Commission decision within the appropriate time limit; when legislating member-states must go through the appropriate procedures and, the earlier cases e.g. (Kramer) serve as a useful authority on the international aspects of fisheries law and on the Commissions's powers within an international context. The cases are not taken in a chronological order but as far as possible, by subject matter, but usually several points of law are discussed. The cases show how the law has changed as to its interpretation and, in particular, help to understand how far Scottish fishermen's interests are protected. Further minor miscellaneous points of law are established from the judgements and there is much discussion on the powers of the EC Commission as monitor of the industry.

The case of R. v. Kent Kirk in 1984 (7) is relatively recent. The ECJ discussed the powers of a member-state to act in place of the Council of Ministers and the legality of retroactivity. Kent Kirk, on board the Danish vessel Sandkirk, started fishing on 6 January 1983 within 12 miles of the British coastline. He was intercepted by H.M.S. Dumbarton and was taken to the port at North Shields. He was taken to the Magistrates Court for the offence of being the master of the Danish fishing boat Sandkirk and for fishing, on 6 January 1983,

"within such part of British fishery limits as lies within 12 miles from the baselines adjacent to the United Kingdom". He was thus accused of being in breach of The Sea Fish (Specified United Kingdom Waters) (Prohibition of Fishing) Order 1982 and acting contrary to Section 5(1) of the Sea Fish Conservation Act 1967 as amended by the Fisheries Act 1981.

Kent Kirk argued that the United Kingdom was not entitled to bring into force the Sea Fish (Specified United Kingdom Waters) (Prohibition of Fishing) Order 1982 because it was discriminatory, and therefore no offence had been committed by him. The submission put to the Court was rejected and an application that a preliminary ruling be requested from the ECJ under EEC (Article 177) was refused. However, when requested by Kent Kirk, the Crown Court did apply for a preliminary ruling under EEC Article 177. The ECJ was requested to answer the following question:

> "Having regard to all the relevant provisions of Community law did the U.K. have the right after 31 December 1982 to bring into force the Order to the extent that that Order prohibits only vessels registered in Denmark from fishing as specified in that Order?"(8)

Regulation 101/76 stipulates that there is to be no discrimination in the treatment of nationals of other member-states. Equal treatment must be afforded for all vessels flying the flag of a member-state.

According to Articles 100 and 101 of the 1972 Act of Accession, derogations from the principle of equal conditions of access for a period of 10 years expiring on 31 December 1982 were authorised; other member-states retained certain rights as between the 6 - the 12 mile area, but no special right was granted to Denmark. Article 100 authorised the member-states to restrict fishing within the 6-mile zone "to vessels which fish traditionally in those waters and which operate from parts in that geographical coastal area". Article 101 extended the limit of 6 miles to 12 miles in certain areas. It was stipulated that these two derogations were not to prejudice the special fishing rights which member-states might have enjoyed on 31 January 1971 and, where fishing was extended to 12 miles, they were subject to the condition that existing fishing activities be pursued.

The United Kingdom exercised that right in an Order with effect to grant other member-states special fishing rights.(9) The 1972 Order specifically excluded Denmark. In January 1983, the EC Council of Ministers adopted Regulations which came into force on 27 January 1983, but some provisions had applied between 1 January 1983 and 26 January 1983.

Article 6(1) of Regulation 170/83 related to the conservation of fisheries and enabled member-states to retain the arrangements defined in the 1972 Accession Act.

The ECJ interpreted Article 6 of Regulation 170/83 and Article 103 Act of Accession in the context of the prosecution of a Danish fisherman who had, on 6 January 1983, fished within 12 miles of the U.K. coast contrary to national legislation, to the effect that only the United Kingdom was entitled to enforce such exclusions until 31 December 1982 and from 25 January 1983, when Regulation 170/83 came into force, but that between these two dates the basic rules of non-discrimination applied to nullify the exclusion rule and the purported retroactive effect of Article 6 was inoperative at least as regards criminal penalties and the failure by the Council to adopt measures did not entitle a member-state to act in its place. It also held that penal provisions may not have a retroactive effect and that where it is clear that a disputed national measure was not intended to achieve a conservation objective, it was not covered by the power of a member-state to take temporary conservation measures. In its ruling the Court expanded on these points by saying:

> "It cannot be concluded from the fact that the Council failed to adopt such provisions within the period provided

> for,..... that the Member States had the power to act in the place of the Council, in particular by extending the derogation beyond the prescribed time limits.
>
> It follows that at the time of the events at issue before the national court, Article 2(1) of Regulation 101/76, which provided for equal conditions of access to waters coming within the jurisdiction of member-States, and, in consequence, the abolition of all discrimination based on nationality against nationals of member-States was fully applicable."(10)

It added:

> "Without embarking upon an examination of the general legality of the retroactivity ... of that Regulation, it is sufficient to point out that such retroactivity may not, in any event, have the effect of validating ex post facto national measures of a penal nature which impose penalties which in fact was not punishable at the time at which it was committed."(11)

The ECJ then referred to Commission v. U.K. (1981) (12) by pointing out that in that case it had ruled how in the absence of Community rules, member-states had the power to take temporary measures for the

conservation of fishery resources in order to avoid "irreparable damage" contrary to the objectives of the Common Conservation policy. The ECJ distinguished, however, this case by stating that in such a situation the disputed measure was not intended to achieve such an objective. The UK, for our purposes, would be able to take appropriate measures if "irreparable damage" was going to be sustained. Scottish fishermen's interests are thus being recognised by the ECJ.

It is clear that disputed national rules, which prohibit access to national waters and which are not intended to achieve an objective of conservation, cannot be covered by the power of member-states, recognised in the ECJ ruling of 5 May 1981, to take temporary conservation measures.

In Commission v. the U.K. (5 May 1981), the United Kingdom was held to be in breach of Community law by legislating "without appropriate prior consultation" with the Commission and in spite of the Commission's objections. In the judgement it was held that the United Kingdom was maintaining discriminatory licences around the Isle of Man again without consultation with the Commission and a member-state was held not to be allowed to exercise powers of its own in respect of conservation in waters under its jurisdiction.

Since the expiry of the transitional period laid down by Article 102 of the Act of Accession, power to adopt, as part of the CFP, measures relating to the conservation of the resources of the sea has belonged fully and definitively to the Community. The judgement further

described the power of member-states as having undergone a substantial change from 1980 since the expiration of the transitional provisions. The judgement stated with reference to the state of the law at the time in question:

> "..... The situation ..... has in the meantime undergone a substantial change by reason of the fact that since the expiration on 1 January 1979 of the transitional period laid down by Article 102 of the Act of Accession, power to adopt, as part of the common fisheries policy, measures relating to the conservation of resources of the sea have belonged fully and definitively to the Community".(13)

It went on:

> "Member States are therefore no longer entitled to exercise any powers of their own in the matter of conservation measures in the waters under their jurisdiction. The adoption of such measures, with the restrictions which they imply as regards fishing activities, is a matter, as from that date, of Community law. As the Commission has rightly pointed out, the resources to which the fishermen of the Member States have an equal right of access must henceforth be subject to the rules of Community law."(14)

The ECJ dealt thus with the question of powers of the member-states in some detail. But this is all in the interests of Scottish fishermen, as we discussed earlier, to have their stocks preserved. The ECJ also upheld the argument that sufficient time must be given for discussion of the proposed legislation with the Commission. The intention to legislate here was notified to the Commission on 21 March, the text of the measures was notified on 19 June and brought into force on 1 July in spite of the Commission's reservations. The measures brought in were deemed to have the effect of preventing fishermen from other member-states to have access to fishery zones which ought to be open to them on an equal footing with British fishermen. The ECJ specifically took up in its judgement the point about apparently endless correspondence and consultation between the United Kingdom government and the Commission, by referring to the obligation upon member-states:

> "to undertake detailed consultation with the Commission and to seek its approval in good faith but also a duty not to lay down national conservation measures in spite of objections, reservations or conditions which might be formulated by the Commission".(15)

In Commission v. U.K. (July 1980) (16) the ECJ had stated that member-states did have a duty to take conservation measures. Where there is a clear need for conservation and measures have expired and

have not been renewed because of disagreement in the Council of Ministers, there is a duty on the member-state to take conservation measures with respect to existing fish stocks, but only in accordance with Community procedures.

Member-states, it was noted in the same case, are obliged to consult with the Commission even if measures are in direct implementation of a Community obligation deriving from an EEC Regulation. Notification must contain a note of the justification and objective, especially if the action to be taken by a member-state adversely affects another member-state. The ECJ then spelt out further obligations for the member-states. Under Regulation 1779/77 Article 4, member-states were under a duty to take the measures necessary to ensure certain provisions were complied with. The United Kingdom raised the question as to whether the duty to consult with the Commission applied to the provisions in that Regulation.

The Court cited the case of France v. United Kingdom (below) in its judgement and said that it had been held in 1970 that:

> "[the] duty is general and applies to any measure of conservation emanating from the Member States and not from the Community authorities."(17)

The judgement continued that the:

> "measures adopted by a Member State in implementation of a Community Regulation are not exempted from the duty of consultation laid down in Annex VI to the Hague Resolutions as well as the duty of notification laid down in Article 2 and 3 Regulation 101/76."
>
> "The reason for this two-fold duty is particularly evident in view of the measures adopted by the United Kingdom which insisted in bringing into force a licensing system the application of which was entirely at the discretion of the United Kingdom and Isle of Man authorities."(18)

The ECJ held that the U.K. had not fulfilled its obligation under the EEC Treaty as regards the Mourne Fishery off Northern Ireland by failing to comply with a duty to consult as required by Community Law in respect of the conservation measures adopted in 1978. The U.K. had coupled those measures with an exception contrary to a recognised conservation need.

The United Kingdom had failed in its obligations of consultation with the Commission as regards the Isle of Man and the northern Irish Sea fishing industry by implementing a 1977 Regulation and invoking licences which had not been notified. The ECJ held that the U.K. had implemented rules wholly at the discretion of the United Kingdom authorities and they had been amended to the detriment of fishermen

of other member-states and that, further, it had not been shown that the detailed rules for the implementation of the measures adopted met a genuine and urgent need for conservation. Co-operation was seen to be lacking which is fatal when dealing with fisheries. Here it can be clearly seen that the ECJ defined the substantial powers given to the Commission to uphold the law and the obligations of consultations imposed on member-states with restricted powers in that they are obliged to comply with Community procedures.

Similar principles of co-operation and correct procedure were discussed in France v. the United Kingdom (1980).(19) The United Kingdom was deemed to have failed in its Community obligations by bringing into force measures relating to mesh sizes without following the procedure of notifying the Commission and other member-states. France contested before the ECJ that the United Kingdom had, by adopting a Local Order regarding mesh sizes, failed to fulfil its obligations under the EEC Treaty. A French trawler, Cap Caval, had been arrested for using mesh sizes smaller than allowed for in the Order.

France claimed that the disputed Order was brought into force in disregard of the requirements set out in Annex VI to the Resolution adopted by the Council at the Hague on 30 October 1976 under which member-states might, as an interim measure, adopt unilateral measures to ensure protection of fishery resources, on condition that they

first consulted the Commission and sought approval. These requirements were said not to have been observed. The Commission intervened in the action, supporting the French government, also claiming the U.K. government had failed to give prior notification.

This case established clearly that the EC Commission is to be consulted when there is a problem over protection of fishing grounds and conservation of resources. National measures are to be evaluated in the light of Community law, including the requirement of notifying the Commission of any alteration to rules relating to maritime waters within a member-state's jurisdiction. The judgement clearly set out the duties of member-states in relation to the Commission:

> "The Commission has rightly claimed that resolution, in the particular field to which it applies, makes specific the duties of co-operation which the Member States assumed under Article 5 of the EEC Treaty when they acceded to the Community. Performance of these duties is particularly necessary in a situation in which it has appeared impossible, by reason of divergences of interest which it has not yet been possible to resolve, to establish a common policy in a field such as that of the conservation of the biological resources of the sea in which worthwhile results can only be attained thanks to the co-operation of all member-states. It follows from the foregoing that the

> institution of measures of conservation by a Member State must first be notified to the other Member States and to the Commission that such measures are in particular subject to the requirements laid down by Annex VI to the Hague Resolution. In other words, a Member State proposing to bring such measures into force is required to seek the approval of the Commission, which must be consulted at all stages of the procedure."(20)

The judgement then referred to the words in Annex VI of the Hague Resolution which states that:

> "the Member States will not take any unilateral measures in respect of conservation of resources".(21)

The judgement added:

> "The duty of consultation arising under that resolution thus covers all measures adopted by a Member State to comply with one if its international obligations in this matter".(22)

And so we have seen in these two cases the way the ECJ has used the

legislation to strengthen the hand of the Commission to preserve fish stock and control the member-states, thus upholding the interests of fishermen throughout the Community.

A further instructive example of a member-state introducing domestic legislation not in conformity with Community legal standards may be found in a case in 1978, two years earlier. In Commission v. Ireland (23) the Commission wrote to Ireland under Article 169, claiming that Ireland was introducing legislation involving discriminatory measures inappropriate to the alleged purpose of conservation. The reasoned opinion of the Commission was contested by the Irish government. The ECJ held that imposing a ban on fishing vessels exceeding a certain size in its extended fishery zone, the effect of which was to hit at Dutch and French vessels but which did not have an effect on British or Irish vessels, was discriminatory and therefore in breach of Community Law.

The ECJ made clear that although the Irish measures were based on apparently objective factors such as size and power of the boats, they were effectively discriminatory. The measure seriously handicapped the fleet of the member-states but not the Irish fleet; in particular France and the Netherlands were hit. The first opinion of the Advocate General spelt it out clearly:

> "Although the Irish measures are admittedly based on objective criteria - the length and the engine power of the fishing boats - the Commission claims that in fact this criterion is discriminatory in that its consequence it to exclude from the geographical zone defined by the orders a considerable number of vessels from other Member States, in particular British, French and Dutch vessels, while it has practically no effect with regard to the Irish fishing fleet which has no more than one or two boats exceeding the specifications laid down....."(24)

The argument submitted by the Commission was:

> "The Commission maintains, on the other hand, that a prohibition of the type introduced by the Irish authorities can only be truly effective in conjunction with a body of other measures aimed at limiting catches and that therefore its most obvious effect is to expel from the wide area covered by the measures in question a considerable proportion of the fishing fleets of the other Member States."(25)

The ECJ made an important reference to covert discrimination:

> "..... the rules regarding equality of treatment enshrined in the Community law forbid not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other criteria of differentation lead in fact to the same result. This certainly applies in the case of the criteria employed in the contested measures the effect of which is to keep out of Irish waters a substantial proportion of the fishing fleets of other Member States which have traditionally fished in those areas whereas under the same measures no comparable obligation is imposed on Ireland's own nationals."(26)

The case is illustrative of how any attempt at discrimination, however subtle, will be struck at by the ECJ and how the subject of discrimination is generally dealt with.

The case of Minister for Fisheries v. C.A. Schonenberg in 1978 (27) involved discrimination by Ireland. In R v. Kent Kirk criminal proceedings as we have seen, were discussed but a fuller discussion of the criminal element is to be found here. Where criminal proceedings are brought by virtue of a national legislative measure, which is held to be contrary to Community Law, a conviction in those proceedings is equally incompatible with Community law. This case would be of relevance to Scottish fishermen if criminal proceedings were brought against them and it could be argued that the U.K. legislation was incompatible with Community law.

In Ireland, Section 35 of the Fisheries (Amendment) Act 1962 conferred powers on the Minister of Fisheries for conservation and management of stock and in particular:

> "Where the Minister having regard to any International Agreement to which the state is a party is satisfied that it is necessary to do so, the Minister may by Order prescribe and adopt such measures of Conservation of fish stocks ..... as the Minister thinks proper".(28)

Any offence against a ministerial order would be subject to a fine and the statutory consequence of conviction would involve the forfeiture of stock and fishing gear. The Irish Minister exercised these powers by virtue of Orders dated 16 February 1977, in force since 10 April 1977. They made it an offence to fish within an exclusive area.

On 29 April 1977 trawlers registered in The Netherlands were arrested for fishing in the exclusive area. The Dutch defendants argued the Irish Orders were incompatible with various provisions of Community law. The Irish court applied to the ECJ for a preliminary ruling under EEC Article 177, asking inter alia:

> "Would a conviction of the defendants by this court on the charges referred to in the Second Schedule hereto be incompatible with Community law?"(29)

The Advocate-General replied that Community law, in particular Article 2 of Regulation 101/76, excludes national measures which result in practice in the fishing fleets of the member-states being treated differently not guaranteeing them equal access to the fishing grounds in the waters under the jurisdiction of the member-states adopting the measures. The rule, contained in Regulation 101/76, constituted a directly applicable provision of Community law. National measures which are incompatible with that principle cannot be applied and cannot therefore form the basis of a criminal conviction. The ECJ applied the opinion of the Advocate-General. It ruled:

> "Where criminal proceedings are brought by virtue of a national legislation measure which is held to be contrary to Community law a conviction in those proceedings in also incompatible with that law".(30)

The criminal element in this case is of interest and has been dealt with by the ECJ.

The ECJ also stated:

> "In the absence of the adoption by the Community of adequate conservation measures ..... the Member States were, at the period in question, entitled to adopt interim measures as regards the maritime waters coming within their jurisdiction, provided that such measures are in accordance with the requirements of Community law."(31)

Further discussion of the powers and duties of the Commission arose in Associacion Professional de Empresarios de Pesca Communitarios (APESCO) v. Commission, (32) where the applicant applied for a declaration that a Commission decision was void. The point at issue was one of discrimination. Judgement was issued on 26 April 1988. The Commission was supported by the Spanish government and by the other interested interveners. The application was for a declaration that the Commission's decision, approving the list of vessels, flying the Spanish flag authorised to fish at the same time during July 1986 in waters falling under the sovereignty of the member-states as constituted on 31 December 1985, was void.

Articles 156 to 166 of the Act of Accession of Spain and Portugal to the EEC contain the transitional rules governing access of vessels flying the Spanish flag to the waters of the former Community of only 10 member-states. The rules provide that 300 Spanish vessels are authorised to fish in former Community waters. However, of 300

vessels only 150 standard vessels are to be authorised to fish at the same time provided they appear on the Commission's list. There is a special definition of "standard vessel".

The lists were to go to the Commission for approval. Approval was given to a list on 24 June 1986. On 25 June the list was notified to APESCO. The association (APESCO) claimed that the list for July 1986 was discriminatory as regards its members. Their vessels had been allocated an average of 12.58 fishing days whereas vessels belonging to the association known as Associacion de Armadores de Buques de Pesca Con Derechos de Acceso a las Pesquerias de la CEE (CEEPESCA) obtained 19.67 days, and so it brought the action in which it asked the ECJ to recognise that the discrimination suffered by vessels belonging to its members should be ended and that its members should be compensated for lost days fishing.

The ECJ dismissed the application for annulment as unfounded and dismissed the rest of the application as inadmissible. APESCO was ordered to pay costs. The Commission claimed the action was inadmissible in so far as APESCO was acting in the name of persons operating at least one vessel that appeared on the contested list. The other members of APESCO were not involved. It was pointed out that the list at issue allocated the right to fish or refused such a right by implication.

When drawing up the lists the Spanish authorities applied a ministerial Order of 12 June 1981 (Official Journal of the Spanish State No. 157 of 2 July 1981). The Commission and all the interveners maintained that in the proceedings APESCO could not ask the ECJ to rule on the compatibility of the Spanish ministerial Order of 12 June 1981 with Community law.

The interveners Ceepesca (Internacional Pesquera Corunesa SA) (Interpesco SA) Miya SA and Lagunak SL maintained that the action was out of time and devoid of purpose because it was brought in August 1986 when the contested list was no longer applicable. Although it was emphasised that the action was brought within the time limit prescribed by Article 173 of the EEC Treaty, APESCO had an interest in challenging the list for 1988 even though it was no longer applicable, in order to prevent a repetition of the alleged illegality in future lists.

APESCO claimed in principle that the Spanish authorities must carry out their selection in accordance with rules of national law. However, in that selection, they must comply with the principle of equality enunciated in Article 40(3) of the EEC Treaty which is binding on member-states when they are adopting measures relating to the common organisation of the agricultural markets pursuant to Community Regulations. It is for the Commission to check whether the national rules applicable to the matter are in conformity with the

principle of equality and, if they are not, to initiate if necessary the procedure provided for in EEC Article 169. The first submission was rejected.

The second submission by APESCO was that the Commission was in breach of the principle of equality when it approved a draft list which granted more fishing rights to some vessels than to others.

It was pointed out here that the Act of Accession lays down a series of rules for the Spanish authorities to comply with and it is the duty of the Commission to check whether the rules have been complied with when approving the lists.

The ECJ held that it was incumbent upon the Commission to check whether the internal rules that the Spanish authorities apply when drawing up the draft lists were compatible with Community law, but it is not its task to examine whether the principle of equality had been complied with in every case. That is a matter for national courts to consider under an EEC Article 177 application for a preliminary ruling. This second submission was thus rejected, but we see here again the powers of the Commission being further defined. The relationship with the national court is likewise referred to.

The Commission's submissions were noteworthy. The Commission shared the view of APESCO that rules on access to Community waters are contained in the Act of Accession and fall within the exclusive jurisdiction of the Community. However, it considered that in exercising the exclusive jurisdiction, the Community may entrust certain tasks to and confer certain powers on the member-states allowing them a greater or lesser margin of discretion. Article 5(2) of Regulation 170/83 provides that each member-state is to set the fishing quota allocated to it.

The Commission claimed the Act of Accession left it to the national authorities to select vessels authorised to fish periodically in Community waters.

A case raising the subject of fishing subsidies and the importance of the attitude of the Commission was that of the Commission v. France 1985 (33). We referred to the question of state aids earlier in Chapter 1 (p.p. 37 and 38). This was an action under EEC Article 93(2) of the EEC Treaty. The ruling was that, if the Commission finds that a member-state has been granting prohibited state aids and issues a Decision under EEC Article 93(2) (1) ordering the state to desist, the state can, under EEC Article 173, bring proceedings for an annulment of the Decision within the time limit.

In this case the Commission issued a Decision finding that French subsidies on fuel oil used by fishing undertakings constituted a state aid prohibited by EEC Article 92(1), and required it to be discontinued. The French government neither complied with the Decision nor brought proceedings for its annulment. When taken to the ECJ the French Government argued that the Commission had not given evidence to prove that the aid in question either affected trade between France and other member-states or distorted or threatened to distort the terms of competition within the Community. The French government also argued that the aid had had no effect to make it incompatible with Article 92(1) of EEC Treaty.

If there is no reaction to the Decision by the Commission, the Decision is held to be final and can be enforced by application to the ECJ. A member-state cannot then attack the Decision. There is a two months time limit. There appears to be no other case relating to state aid and fishing. The necessity of a member-state having to react within the appropriate time limit to a Commission Decision is amply demonstrated here. The ECJ ruled that:

> "..... the French Republic, in failing to comply within the time limit allowed with the Commission decision 83/313 of 8 February 1983 on aid ..... has failed to fulfil an obligation to which it is subject under the Treaty."(34)

The ECJ effectively further restricted the powers of member-states and increased the control exercisable by the Commission in a case which also provided a good discussion of the law. The importance of this case for Scottish fishermen is that state subsidies are carefully controlled and the ECJ has acknowledged powers of the Commission to ensure this. It is another example of the ECJ policing the legislation by giving powers to the Commission and any subsidy is, naturally, the most sensitive subject for their well being and standard of living.

Our case law study would not be complete without a reference to the case of Kramer (1976) (35), for the ECJ made it clear then that the Community could take any measures for conservation including fishing catch quotas and effecting their allocation between member-states. This included power over the member-state's jurisdiction and on the high seas; also, as we have seen, the Community has power to enter into international agreements and obligations. The ECJ further pointed out in respect of conservation that a member-state has the right to ensure application of international commitments within the sphere of its jurisdiction. It is the international element of this case which makes it particularly important; it confirms the Commission's wide powers to bind the Community to international arrangements.

The case arose within the framework of criminal prosecutions brought against certain Dutch fishermen who were accused of having infringed, on certain dates, provisions enacted during the year by the authorities of their state. These provisions were aimed at ensuring the conservation of stocks of sole and plaice in the North East Atlantic.

The provisions were adopted within the framework of the North East Atlantic Fisheries Convention (36) signed on 24 January 1959 to:

> "ensure the conservation of the fish stocks and the national exploitation of the fisheries of the North East Atlantic Ocean and adjacent waters, which are of common concern to them."(37)

The Commission issued a recommendation (38) concerning fishing in the maritime waters covered by the Convention. The Dutch adopted a series of measures to restrict fishing for sole and plaice. The fishermen were charged with having contravened the Dutch rules. The points at issue were whether member-states retained the power to adopt measures such as those at issue, whether such measures are in fact compatible with Community law, and whether only the Community institutions have the power to enter into international agreements in this field.

In its judgement the ECJ said that Article 210 of the EEC Treaty provides that:

> "The Community shall have legal personality."(39)

This means that:

> "in its external relations the Community enjoys the capacity to enter into international commitments over the whole field of objectives defined in Part 1 of the Treaty."(40)

The judgement continued:

> "To establish in a particular case whether the Community has authority to enter into international commitments, regard must be had to the whole scheme of Community law no less than to its substantial provisions. Such authority arises not only from an express conferment by the Treaty, but may equally flow implicitly from other provisions of the Treaty, from the Act of Accession and from measures adopted, within the framework of those provisions, by the Community institutions".(41)

The judgement then takes us through the logical argument:

> ".... the adoption of a common policy in the sphere of agriculture is specially mentioned amongst the objectives of the Community ..... fishery products are subject to the provisions of Article 39 and 46 concerning agriculture. Article 39 specifies, among the objectives laid down for the common agricultural policy, those of ensuring the national development of production and of using the availability of supplies. Under the combined provisions of the first three paragraphs of Article 40, the Community must establish ..... a common organisation of agricultural markets".(42)

The judgement then continued:

> "It follows from these provisions taken as a whole that the Community has at its disposal, on the internal level, the power to take any measures for the conservation of the biological resources of the sea ..... The only way to ensure the conservation of the biological resources of the sea both effectively and equitably is through a system of rules binding on all the States concerned, including non-member countries. In these circumstances it follows from the very duties and powers which Community law has established and assigned to the institutions of the

> Community on the internal level that the Community has authority to enter into international commitments for the conservation of the resources of the sea."(43)

No further comment on this case is necessary other than to note the importance attached to the Community having legal personality. The discussion of the powers described by the ECJ is self-explanatory. The case gives the legal identity to the EEC and therefore to Scottish fishermen working within the Community and therefore puts Scottish fishermen's interests within an international and world context. If Scottish fishermen were not in the EEC they would have no such legal identity. We therefore see here another advantage to Scottish fishermen being within the EEC which we discussed earlier in Chapter 1 and when discussing the freedoms.

We now turn to a recent case at Stranraer Sheriff Court in 1988, Procurator Fiscal Stranraer v. Andrew Marshall (44). The question of the relationship between EEC law and national law is discussed. This concerned discrimination. It also provided an opportunity to discuss reasoning. It should be noted in particular that this was a summary prosecution under Scots law within the framework of which EEC law is applied.

Andrew Marshall, the owner of a British fishing boat within Luce Bay in Wigtown, was charged with carrying in the boat a monofilament gill net contrary to Inshore Fishing (Prohibition of Carriage of Monofilament Gill Nets) (Scotland) Order 1986 Regulation 3 and the Inshore Fishing (Scotland) Act 1984 Sections 2 and 4.(45)

Counsel for the accused agreed that the Order discriminated against U.K. registered fishing boats, but argued that the Order was invalid as it entailed unlawful discrimination in the context of European Community Law. Sheriff Smith, with the agreement of both parties, decided not to refer the point of Community law to the European Court of Justice for a preliminary ruling under EEC Article 177. The Sheriff decided that discrimination on grounds of nationality in Community waters is contrary to Articles 7 and 40(3) of the EEC Treaty. It was agreed that the Order was discriminatory. Furthermore, it was considered that such discrimination could only be justified in certain restricted circumstances. Counsel contended that the Order was invalid and was an example of "reverse discrimination" by one member-state against its own nationals and such discrimination had been recognised as being potentially contrary to Community law in Firma J. Van Dam En Zonen.(46) He argued that to reach the High Seas a Scottish fishing vessel would require to pass through Scottish inshore waters, which was the specified area in the Order, and this could never happen without the owner and master committing an offence.

The Sheriff agreed with this argument. He said:

> "That [the Order] is not a prohibition which effects other nationals of the United Kingdom operating such vessels from English ports or Northern Ireland. That is discriminatory as I understand it. However I also take the view that the Order is not in conformity with Article 19(2). That is the channel by which legislation discriminating against a Member State's own nationals may nonetheless be sanctioned. Here a difficulty arises".(47)

The Sheriff went on to say that the Commission had already expressed the view that it did conform to Article 19(2) of Regulation 171/83 through a "reasoned decision". Somewhat tersely the Sheriff then said:

> "The one thing that the document is devoid of is any reasoning whatsoever"(48)

adding that:

> "the matter accordingly becomes one where the benefit of the Commission's reasons is not available. The Court must therefore proceed unassisted."(49)

The Sheriff concluded that the Order was not one designed to limit catches by "technical means" as required by Article 19 of Regulation 171/83. The aim of the Order was to enable enforcement authorities to deal more effectively with salmon poaching.

The Sheriff dealt at length with the question of consultation with the Commission before Orders can be issued and finally concluded:

> "Whatever discussions may have taken place with appropriate bodies the fact remains that the Commission's agreement to the proposal in detailed form was being sought before they were concluded. That is not consultation as understood by the Courts. Accordingly on this separate ground I hold that the Order in question is ultra vires".(50)

The Order was held invalid under EEC law and the complaint against Marshall was dismissed. Not only, therefore, did the Sheriff challenge the reasoning behind the decision but he also challenged the question arising, as earlier in other cases with respect to consultations necessary with the EC Commission. Although it can be argued that the power of the EC Commission is extensive under present law and it is even further extended under the Single European Act, it should also be added that the power will have to be used within the limits set by law. The case went to the ECJ for a preliminary ruling

on application by the High Court of Justiciary by decision dated 23 November 1988. The case is referred to in the Scottish Law Gazette (51). The ECJ dealt with it as Case 370/88, and a preliminary ruling was issued on November 13, 1990. The questions the ECJ was required to answer were:

(1) Do the provisions of Article 7 or 40(3) of the EEC Treaty or any other provision of Community law prevent a Member State from adopting, with the prior valid approval of the Commission, a measure prohibiting the carriage on a fishing vessel registered in that Member State, while that vessel is within the area of the inshore waters of that Member State adjacent to a part of the coast thereof of a fishing net of a specified type and construction, the use of which is otherwise or not prohibited under Commission legislation, and if so, in what circumstances?

(2)(a) Is Article 19 of Council Regulation 171/83 valid under Community law?

(b) If so, does a measure such as that described in Question 1 properly come within the scope of Article 19?

The case was heard by the 5th Chamber of the ECJ and it held, firstly, that consideration of the matter referred to it could not affect the validity of Article 19 of Regulation 171/83. Conservation measures laid down pursuant to that provision must be compatible with Community law.

The ECJ advised that as far as Article 7 of the Treaty is concerned, it must be observed that that provision does not require member-states to treat their own nationals equally. Consequently, discrimination between fishermen operating from Scottish ports and other British fishermen cannot constitute an infringement of Article 7. A national measure such as the order in question comes within the scope of Article 19(2) of Council Regulation 171/83.

Finally, the ECJ held that neither Article 7 or Article 40(3) of the Treaty nor the principles of Community law prevent a member-state from prohibiting the carriage of a particular type of net on all vessels registered in that state while they are in waters adjacent to its coast.

The ECJ observed that the order affects more the fishermen operating from Scottish ports rather than other British fishermen: the Scottish fisherman was precluded even from using monofilament gill nets where their use is authorised, since they may not carry them in the waters surrounding their home port.

However, this difference in treatment is discrimination contrary to Article 40(3) of the EEC Treaty only if it is lacking sufficient justification and not based on objective criteria. The ECJ decided it was essential for monofilament gill nets to be prohibited because of their particular efficiency. Furthermore, the ECJ stated that the limitations on the right to fish are justified by the general interest of conservation. The freedom to fish is maintained provided the authorised nets are used. This is, therefore, an example of Scottish fishermen's interests being defended, not by allowing them to fish by a method of their choice but by the ECJ insisting on them fishing in such a way as to conserve a species.

Another recent case to take place in Scotland was Procurator Fiscal, Lerwick v. Ejgil Hangaard Olsen & Another(52) which was on a different topic.

This was an appeal by two Danish masters of fishing boats from the Sheriff Court in Lerwick, which was sustained by the High Court of Justiciary in Scotland. The applicants had been engaged in trawling in British water for industrial purposes (forbidden by EEC law) other than for human consumption. The Sheriff Court found them guilty, but on appeal, the court held that it was necessary to have the intention when actually fishing that the catch would go to industrial use and not for human consumption. To establish this, there would have to be established a logical progression of evidence and the Sheriff had not

made sufficient specific findings to meet this logical requirement and therefore there had been no breach of the EEC law. This is another Scottish case where we see the national court applying EEC law with considerable care. The High Court in Scotland is using EEC law to protect fish stocks for human consumption. It was a case that was of importance because of the method of interpretation of the actings of the parties by the ECJ.

Two more cases were reported at the end of 1988. They both involve the United Kingdom and relate to licensing and the law. The topics discussed were of significant importance to all fishermen throughout the Community; they included the rules relating to nationality and residence, the Social Security requirements and the status of crews, their standard of living and how they are remunerated. The cases should be read together as a matter of general law establishing certain principles.

The first is The Queen v. Ministry of Agriculture Fisheries and Food ex parte Agegate Ltd (53) and the point at issue was whether and to what extent Community law precludes member-states laying down conditions such as those related here. It was noted that when exercising the power granted to them to define the detailed rules for the utilisation of their quotas, the member-states may determine which vessels in their fishing fleets will be allowed to fish against their quotas provided the criteria employed are compatible with Community law. Furthermore, they may refuse to let vessels fish if

certain conditions are not fulfilled, e.g., the state, age, or accommodation of fishing vessels in so far as these conditions are not governed exclusively by Community law. The opinion was given by Advocate General Mischo. The case related to the free movement of persons, social security and the composition of fishing crews.

In 1983 the Government of the United Kingdom passed legislation (54) providing that in order to be able to fish within the United Kingdom fishery limits, at least 75% of the members of the crews of British fishing vessels must have British nationality or that of another member-state in the Community. The applicant in the case was Agegate Limited operating the "Ama Antxine" which after being registered in the U.K. flew the British flag. However, the crew were Spanish and were remunerated by a share of the proceeds of sale of the catches. Agegate was a U.K. company having its registered office in London; 95% of its capital was owned by Spanish interests and 5% by British interests.

In January 1986 the company obtained renewal, with effect from 1 January 1986, of a series of licenses for the Ama Antxine. However, the conditions for issuing the licenses were altered to ensure that in the view of the British authorities, vessels fishing for British quotas have a "real economic link" with that country. The conditions were of three kinds. The vessel must operate from the U.K. or the Channel Islands and at least 75% of the crew must be British citizens

or nationals of the EEC resident "on shore" in the U.K. to the exclusion, until 1 January 1993, of Spanish nationals except for spouses of Spanish nationals already installed in the U.K. Furthermore the skipper and crew must be making contributions to the U.K. social security scheme or equivalent in the Channel Islands.

The first question - namely the operation requirement - is dealt with in the second case 216/87 and EEC Article 177 Reference from the High Court of Justice of England and Wales (referred to later below). The remaining questions relating to the nationality, residence and the affiliation of the crew of the vessels to the social security scheme are dealt with here in the light of the interpretation to be given to Articles 55 and 56 of the Act of Accession of Spain and Portugal and to certain other provisions of Community law, including the CFP.

The first question relates to a conflict between freedom to provide services and freedom of movement of workers. This follows from the transitional provision relating to the Act of Accession. The High Court of Justice therefore asked, in its first question:

> "in deciding whether in Community law a share fisherman is a provider of services or a worker, what are the relevant tests to be applied?"(55)

The Advocate General stated that the rules relating to the freedom to provide services may be relevant only if the rules on freedom of movement for workers are not applicable. He discussed the question of remuneration pointing out that the level of remuneration received by a person cannot prevent the person from being classified as a worker.(56) A fisherman is remunerated on the basis of work done by the crew, not what he took from the sea personally. The fact that share fishermen are remunerated on the volume of catches does not deprive them of the status of employees.

Advocate-General Mischo in conclusion said:

> "The single fact that the remuneration of share fishermen depends on the (variable) volume of catches does not therefore deprive them of the status of employees."
>
> "Consequently, I consider the first question referred to the Court should be answered as follows:
>
> A fisherman who performs services for and under the direction of another person in return for which he receives remuneration must be regarded as a worker within the meaning of Article 48(1) of the EEC Treaty, even if his remuneration varies according to the proceeds of the

sale of the catches of fish to which he has contributed and irrespective of how national law or the parties themselves classify their relationship."(57)

The ECJ having considered at length the meaning of the word "share" and the concept of the word "worker". Thus, fishermen come under the freedom of Article 48(1) of the EEC Treaty which we discussed earlier in relation to free movement of workers and the benefits accruing Scottish fishermen by membership of the EEC. This led to the second question to be raised, which was the ECJ agreed with the Advocate-General:

"Can a Member State, in granting, after the accession of Spain and Portugal to the European Communities, a licence to the owner or charterer of a fishing vessel flying the flag of and registered in that Member State rely on Articles 55 and 56 of the Act of Accession of Spain and Portugal [which apply only to workers] and require that:

(1) 75% of the crew of a fishing vessel registered in that Member State flying its flag be EEC nationals resident on shore in that Member State but excluding until 1 January 1993 and Spanish

nationals who are not the spouses or children under 21 of Spanish workers already installed in the Member State issuing the licence; and that

(2) the skipper and all the crew must be making contributions to the social security scheme of that Member State?"(58)

In a general discussion in the ECJ, it was pointed out that Article 55 of the Act of Accession provides as follows:

> "Article 48 of the EEC Treaty shall only apply, in relation to the freedom of movement of workers between Spain and the other Member States, subject to the transitional provisions laid down in Articles 56 to 59 of this Act."(59)

What Article 56(1) provides was stated:

> "Articles 1 to 6 of Regulation EEC No. 1612/68 on the freedom of movement of workers within the Community shall apply in Spain with regard to nationals of the other Member State and in the other Member States with regard to Spanish nationals only, as from 1 January 1993."

Comparison was made with the case of Peskeloglou (60) dealing with German legislation concerning the taking up of employment by nationals of non-member-states. Such employment had been by German law made more restrictive subsequent to Greece's accession to the European Community. Work permits were made harder to obtain. The ECJ stated that the present case did not involve a new measure and the clause excluding Spanish fishermen from 75% of all crews merely made use of Article 56(1) of the Act of Accession to maintain in force, with regard to Spanish nationals, the rules which had always been applicable. The ECJ decided that the questions relating to social security could not be assessed with reference to the Act of Accession, but only with reference to ordinary Community law. On such a basis, the ECJ answered the question as follows:

> "Articles 55, 56 and 57 of the Act of Accession of Spain and Portugal must be interpreted as authorising a Member State to maintain, with regard to Spanish nationals, the same restrictions regarding access to and the pursuit in its territory of paid employment which applied to them before the entry into force of the Act of Accession."(61)

The third question related to nationality and residence. The ECJ considered the terms of Regulation 101/76 (62) which laid down the common structural policy, and referred to the case of Pesca Valentia Limited v. Minister for Fisheries and Forestry, Ireland and the

Attorney General.(63) The ECJ also discussed the powers of member-states. It considered the power by virtue of which each member-state has control over its waters and concluded that the Regulation said nothing to preclude a member-state from enacting a measure concerning the composition of crews flying its flag and fishing in the maritime waters within its jurisdiction.

The Advocate-General pointed out that member-states do have the power to limit the capacity of their fishing fleets to save the catch potential for maintaining the standard of living of fishermen.

Agegate maintained, however, that the quota system established by the Community should not constitute a disguised means of abolishing the principle of equal access to the waters of the member-states, like all common policies, the CFP is based on the principle of non-discrimination.

The Advocate-General, when discussing the law so far as the CFP is concerned, referred particularly to the standard of living of fishermen. He stated:

> "But, since, in the field of fishing, the over fishing of the main species of fish has jeopardised the standard of living of those who live by the fishing industry, very important exceptions to the principle of equal conditions

of access have been introduced, on a transitional basis, by the 1972 Treaty of Accession, various Council regulations and the 1985 Treaty of Accession".

"Thus in a 6 mile zone the Member States are authorised to restrict fishing to vessels which traditionally fish in those waters from parts in the geographical coastal area. The same rule applies as regards waters situated between the 6 mile and 12 mile limits except that in this regard Annex 1 to Regulation 170/83 grants in certain areas to fishermen from other Member States rights defined species by species ..... In the waters falling within the jurisdiction of the Member States, that is to say situated between the 12 mile and 200 mile limits, the Member States may fish only if they observe the catch quotas defined each year, species by species and Member State by Member State ....."(64)

The Advocate-General returned again to the subject of the standard of living as a fundamental principle of the law:

"It is clear from the preambles and provisions of most of the Regulations adopted for the fishing industry that the objective of all these Regulations is that "<u>those</u> who live by that industry should be assured of a fair standard of

living" [fifth recital of the preamble to Council Regulation EEC No. 101/76 of 16 January 1976 laying down a common structural policy for the fishing industry]."(65)

He went on to explain the importance of that provision:

"Clearly this can only mean persons who actually live in a given Member State because if persons who merely pass through the waters under the State's jurisdiction could take a part of its national quotas, the standard of living of the former could be in jeopardy."

"The standard of living of fishermen living in other Member States must be assured by the quotas allocated to those states".(66)

The Advocate-General said:

"It is because of these specific characteristics of the fishing industry and the need to allow the quota system to achieve its aims that the residence condition laid down by the United Kingdom must be considered compatible with Community Law."(67)

Thus, the question of the standard of living of fishermen was dealt with fully by the ECJ. This must establish, for Scottish fishermen, a very substantial point of benefit indeed, as a result of EEC membership and the case shows how the ECJ is particularly strong in upholding the legislation and interests of Scottish fishermen as we have defined them in Chapter 1.

The Advocate-General discussed general matters, including derogations from the Treaty, and returned to the case of Kramer (68) discussed above. He pointed out that in Kramer, the obligation on a member-state to ensure that catches were limited in such a way as to keep any detrimental effects to a minimum was upheld. Such measures, when introduced, were not to jeopardize the objectives of the proper functioning of the Community system.

As regards the residence qualification, the Advocate General pointed out that nationals from non-member-states were not necessarily excluded from fishing, because they could form part of the 25% of the crew not subject to the residence condition. The requirement of permanent establishment is a negation of freedom. The ECJ held, on the important subject of residence, that Community law precludes a member-state from requiring that 75% of the crew of the vessel must reside ashore in that member-state as a condition for authorising one of its vessels to fish against its quotas.

In the recent judgement of 14 December 1989, the ECJ referred to Pesca, (69) confirming Community law does not preclude a member-state from requiring a minimum proportion of the crews of fishing vessels to be Community nationals. There were two consequences of this; firstly, a member-state can require 75% of a crew of a vessel to be nationals of member-states of the Community if the vessel wishes to fish against its quotas, but a member state-cannot insist that 75% of the crew of that vessel must reside ashore in that member-state.

With regard to the question of social security contributions, the ECJ, after considerable discussion, held:

> "Save in those cases where Council Regulation (EEC) 1408/71 otherwise provides, Community law does not preclude a member state from requiring, as a condition for authorising one of its vessels to fish against its quotas, that the skipper and all the crew of the vessel must be making contributions to the social security scheme of that member state". (70)

As we have said, the case of Agegate has thus offered the opportunity for the ECJ to deal with the issues of residence, standard of living, social security contributions and the status of fishermen. This may have considerable bearing on future cases.

In The Queen v. Minister of Agriculture Fisheries and Food ex parte Jaderow Limited and Others (71) Advocate-General Mischo who submitted an opinion on 18 November 1988, it was again in a reference to the ECJ for a preliminary ruling under Article 177 of the EEC Treaty, from the Queen's Bench Division of the High Court of Justice concerning certain conditions for granting of a fishing licence. The question was whether Community law precluded a member-state (when authorising vessels to fish against its quotas) from imposing conditions designed to ensure that the vessel had "a real economic link" with the state in question; from imposing a condition (to ensure the existence of such a link) that the vessel must operate from the territory of that state; from deeming that condition to have been satisfied by landing 50% of a vessel's catch in that member-state's territory, or by the vessel's presence in a port in that member-state on at least four occasions at intervals of at least 15 days in every six months; and from excluding evidence of the existence of a real economic link between the vessel and that member-state, other than that of the presence of the vessel. It was an opinion on:

> "the operating conditions which British fishing vessels fishing against fishing quotas allocated to the United Kingdom must observe". (72)

The Advocate-General took the view that when the authorities of a member-state apply operating conditions so as to exclude consideration of other factors which may be evidence of economic, financial and fiscal links between the vessels, its owners and the member-state in question, the applied conditions do not affect the compatability of the condition(s) in question with Community law.

The conditions with which the Advocate General dealt fell into two categories, (1) the test requiring the periodic presence of each vessel in a port of the country of registration, and (2) the test relating to landings and the sale of catches. The Advocate General referred to international law and interestingly to the Geneva Convention of 29 April 1958 on the High Seas.

The first question might be paraphrased as follows:

> "....where the licence contains conditions (all of which must be satisfied at all times) expressed to be designed to ensure that the vessel has 'a real economic link' with the member state in question, is a licence condition in the following form: 'The vessel must operate from the United Kingdom .... without prejudice to the generality of this requirement a vessel will be deemed to have been so

operating if, for each six month period in each calendar year .... either (a) at least 50% by weight of the vessel's landings .... [must] have been landed and sold in the United Kingdom .....' or (b) other evidence is provided of the vessel's presence in a United Kingdom ..... port on at least four occasions at intervals of at least 15 days .... inconsistent with Community law ..... and in particular is such a condition:

(a) inconsistent with the common structural policy of the fishing industry as set out in inter alia Council Regulation EEC No. 101/76;

(b) inconsistent with the common organisation of the market in fishery products as set out in inter alia Council Regulation EEC No. 3796/81?"(73)

The Advocate-General, dealing with "the landings" and "presence" test, referred to international law and the case of Pesca Valentia Limited v. the Minister for Fisheries and Forestry (74), where the ECJ held that prior to Regulation 101/76:

".... the member states may apply their own rules in

respect of fishing in the maritime waters coming under their sovereignty or within their jurisdiction and define their structural policy for the fishing industry".(75)

The Advocate General concluded:

"Community law does not therefore restrict the power which each Member State has under public international law to determine the conditions on which it allows a vessel to fly its flag."(76)

He then added:

"Secondly, the right of each state to define the conditions to which it subjects authorization for a vessel to fly its flag implies, in my view, the right to require the vessel in question to operate from its ports."(77)

This right cannot be called into question as this concept is re-inforced by Article 5 of the Geneva Convention of 29 April 1958 on the High Seas. This entered into force on 30 September 1962 and the U.K. acceded to it:

"Each state shall fix the conditions for the grant of its nationality to ships, for registration of ships in its territory and for the right to fly its flag .....

> There must be a genuine link between the state and the ship; in particular the state must effectively exercise its jurisdiction and control...."(78)

Article 10 amplifies this control further for safety at sea. The Advocate-General submitted:

> "However it is difficult to see why a Member State could not lay down, at the time of granting licences, a condition to which it could already make a vessel's registration subject."(79)

The ECJ referred to the question of the fair standard of living of fishermen which is still to be regarded as an integral part of the common structural policy.

Further general references were made by the ECJ to Community law, to the Commission's references: The case of discrimination was dismissed and Article 40(3) of the Treaty was qualified as inapplicable in the case.

In a discussion of the positive and negative sides of the principle of "legitimate expectation", including a reference to the case of Christianos v. Court of Justice (80), it was stated (paragraph 23) that:

> "an official may not rely on the principle of legitimate expectation in order to oppose the proper application of a new provision of the staff regulations."

The Advocate-General said:

> "the applicants cannot therefore properly rely on the principle of legitimate expectation."(81)

The Advocate-General when dealing with the question of the power of a member-state to adopt a measure, such as that in question, with reference to Article 5(2) of Regulation 170/83 of 25 January 1983, establishing a Community system for the conservation and management of fishery resources, concluded that:

> "...a national provision which makes the grant of a fishing licence for a fishing vessel flying the flag or a Member State subject to the condition that, in order to be able to fish for species subject to quotas, that vessel must operate from that country and under which the vessel's periodic presence in a port of that country is accepted as proof of compliance with that condition is not incompatible with Community law. Nor is such a condition

unlawful if seen in relation with the two other conditions at issue in Ex parte Agegate which I considered lawful."(82)

The Advocate-General, when discussing the test relating to landings and sale of catches, said without hesitation:

".... I consider this test incompatible with Article 34 of the Treaty relating to quantitive restrictions on exports and measures having equivalent effect."(83)

He went on:

"The origin of fish is thus determined on the basis of the flag or registration of the vessel which catches them..... Consequently the catches of vessels flying the United Kingdom flag constitute goods of British origin and their landing and direct sale in another Member State without passing through British territory constitutes an export."

"It follows that any obstacle to such an export is prohibited by Article 34 of the Treaty. I consider the landings test, as laid down in this case by the United

> Kingdom rules, constituting such an obstacle ..... it makes export more difficult, more time-consuming and more costly."(84)

He distinguished the case in question from others (which we do not need to discuss here) and examined the need to restrict cases to fishing quotas to the population of a member-state dependent on the fishing industry. In this respect his negative submission was:

> "It follows from those provisions that the quota system itself expressly provides for the right of a fishing vessel, first, to land its catches in Member States other than that whose flag it flies as well as directly in non-member country, and, secondly, to tranship them in a port or in maritime waters falling within the jurisdiction of such another Member State.
>
> I therefore consider that a member-state is not entitled to rely on the necessity to restrict "its" quotas or "its" fishermen so as to prevent vessels flying its flag from landing their catches in other Member States or from transhipping them in the ports and maritime waters falling within the jurisdiction of other member-states."(85)

The Advocate-General made a distinction between the case in question and the judgement in Kramer. Whereas in Kramer the quotas themselves were at issue, in so far as owing to the restriction of fishing efforts which they entail, they reduce the quantities of fish available and the quantities that can be traded whereas, in the present case, the U.K. rules accentuate that reduction in the "production" of fish so as to restrict trade in the quantities of fish actually caught.

Having discussed the issues in detail, the ECJ held, firstly, that Community law, as it now stood, did not preclude a member- state from imposing conditions designed to ensure that the vessel had a real economic link with that member-state, provided that the link concerned only the relations between the vessel's operations and the population dependent upon fisheries and related industries; secondly, that in ensuring the existence of such a link, the member-state may impose a condition that the vessel must operate from national ports and that such operation might be evidenced by the landing of a specified proportion of its catches in national ports or by its specified periodic presence in such ports, and that other evidence of a vessel's operating for national ports might be excluded, provided the frequency with which the vessel was required to be present in national ports did not impose an obligation to land the vessel's catches in such ports or hinder normal fishing operations; thirdly, fishing licences were by their nature subject to temporal limits and various conditions, and the fishing industry itself was characterised

by instability and continuous changes; hence, accordingly, operators in the industry could not legitimately expect that Community rules would preclude the introduction of changes in the conditions imposed by national law or practice on the grant of authorisations to fish against national quotas and national legislation or practice. Imposing a new condition was, therefore, not precluded by Community law.(86)

When considering the question of the real economic link, the ECJ said it was necessary to consider the aim of the system of national quotas as an attempt to assure relative stability of fishing activities and to assure each member-state a share of the Community's TAC determined on the basis of the catches on which the traditional fishing activities and the local populations were dependent for fisheries and related industries. As a result, the measures which member-states may adopt, when exercising their powers to exclude certain of the vessels flying their flag from sharing in the utilisation of their national quota, are justified only if they are suitable and necessary for attaining the aim of the quotas. The ECJ said that such an aim may justify conditions designed to ensure that there is a real economic link between the vessel and the member-state in question, if the local population and the people dependent on the fisheries should benefit from the quotas. Consequently, Community law does not preclude a member-state, when authorising one of its vessels to fish against national quotas, from laying down conditions designed to

ensure that the vessel has a real economic link with that member-state, if that link concerns the relationship with the local population dependent on local fishing operations.(87)

As regards the obligation to operate from a national port, the ECJ stated that the condition to which this question relates must be considered to see if it is, in principle, conform with the aim of the quotas and compatible with Community law when it merely involves the obligation to operate habitually from a national port. However, this condition would go beyond the envisaged aim if it were to involve the obligation to depart from a national port on each fishing trip.(88)

As regards the evidence of landing certain proportions of catches and of the vessel's periodic presence in national ports, the ECJ pointed out that the issues are compatible with Community law, not as a condition for the grant of fishing licences but as evidence of the vessel's operation from national ports.(89)

Each of the circumstances in question goes to show that, in accordance with the aim of the system of national quotas, the vessel is expected to operate habitually from a national port and thus provide evidence that it has a real economic link with the populations dependent on fisheries and related industries.

It was, lastly, pointed out by the ECJ that, so far as a "real economic link" is concerned, Community law, as it now stands, does not preclude a member-state from requiring its fishing vessels to have a real economic link with it, not in a general way, but in so far as that link concerns only the relations between those vessels' fishing operations and the populations dependent on fisheries and related industries.(90)

The case involved a considerable amount of law, discussions on the relevant law, reflecting the interest the ECJ has in the CFP. It would appear that Churchill's related criticism is inappropriate. (See above p. 97). Further, the case shows that the member-state, for our purposes, the U.K., retains under Community law, the right to impose conditions for vessels fishing against its quotas and have vessels show a real economic link with the local population in Scotland. This gives stability.

A further leading case is that of Regina v. Secretary of State for Transport ex parte Factortame & Others.(91) It is of great importance for the supremacy of Community law rather than national law in U.K., the topic discussed later in this Chapter (pp.173-176). It went through the English courts to the House of Lords and it was a challenge to the validity of the Merchant Shipping Act of 1988 dealing with legislation and the Merchant Shipping (Registration of Fishing Vessels) Regulations (SI1988 No. 1926).

(The facts of the case are summarised in the Law Society of Scotland's Eurosnippets.(92) The case is also referred to in the Scottish Law Gazette.(93)) The applicants sought a preliminary ruling from the ECJ on whether Community law either obliged or empowered a national court to grant interim protection or rights claimed under Community law.

The applicants are a group of companies incorporated in the U.K. but their directors and shareholders are mostly Spanish. The group owned or managed ninety five deep sea fishing vessels, fifty-three of which had originally been registered in Spain and had flown the Spanish flag. The remaining forty-two were British. Fishing vessels previously registered as British under the 1894 Merchant Shipping Act required to be registered under the 1988 Act subject to a transitional period during which the previous registration could continue in force until 31 March 1989.

When the proceedings began the vessels had failed to satisfy some of the conditions for registration under Section 14(1) of the 1988 Act, either because they were managed and controlled from Spain or by Spanish nationals or because of the balance of beneficial ownership of the shares in the applicant companies was in Spanish hands. The applicants argued that the 1988 Act was incompatible with the EEC Treaty, in particular with respect to Articles 7, 52, 58 and 221 of establishment allowing any Community natural or legal person to

pursue economic activities in any member-state, free from discrimination based upon nationality. The applicant company consequently sought to challenge the legality of the legislation, in so far as it applied to them, on the grounds that it deprived them of "enforceable Community rights" given effect in the U.K. by Section 2(1) of the European Communities Act 1972.

The Divisional Court decided to seek, by a number of questions, the assistance of the ECJ in the form of a preliminary ruling under Article 177 of the EEC Treaty. Furthermore, the Divisional Court, persuaded that the companies faced irreparable damage, granted an interim injunction against the application of the 1988 Act and the 1988 Regulations and granted an order restraining the Secretary of State from enforcing them in respect of the companies, pending the ruling of the ECJ.

Conflicting problems emerged. There was concern about the practice of non-U.K. nationals fishing in U.K. waters because of the damage likely to be inflicted on U.K. fishing stocks and any non-U.K. fishing vessels taking up part of the U.K. fishing quota.

Also, the vessels were not eligible to resume the Spanish flag and fish under the Spanish quota, and it was not considered a viable proposition to lay them up pending the preliminary ruling.

The Secretary of State argued that Community law could not restrict a member-state's right to decide who was to be a national of that member-state or what vessels were entitled to fly its flag. He also argued the legislation did not contravene EC law in so far as it was designed to achieve the objectives of the CFP. The Divisional Court requested a preliminary ruling and ordered interim protection of the directly enforceable Community rights claimed by the companies pending the outcome. The Court of Appeal allowed the Secretary of State's Appeal and set aside the order for interim relief. It found there was no power in English law to grant interim relief against an Act of Parliament or the crown pending a ruling from the ECJ.

In the House of Lords their lordships estimated that the preliminary ruling would not be given for two years and the companies had claimed that unless they were protected by an interim order which enabled them to operate as if they were British registered, they would suffer irreparable damage.

The House of Lords asked whether, irrespective of national rules, Community law may create a jurisdiction and a duty for the national courts for securing effective interim protection of Community rights.

The House of Lords asked whether Community law either obliged or empowered a national court to make an interim order protecting the right claimed by a party for which there is a seriously arguable

claim and whether, if he is not entitled to that right, he would suffer irremediable damage. Furthermore, if Community law does not oblige a national court to grant interim relief, what are the criteria which the court should apply?

The ECJ held that this was clearly an appropriate case for an interim order and that Community law must be fully and uniformly applied from the date of its entry into force and that the national courts have a duty, notwithstanding obstacles arising from national law, to ensure that enforceable Community rights are safeguarded. A national rule which prevented a court from granting a relief, where appropriate, pending a ruling by the ECJ on the substance of the case would jeopardise the effectiveness of Community law.

In its judgement of 19 June 1990 the ECJ said:

> "Community law must be interpreted as meaning that a national Court which, in a case before it concerning Community law, considers that the sole obstacle which procures it from granting interim relief is a rule of national law must set aside that rule".

It follows that the House of Lords must apply this ruling but, more importantly, the national courts have been given the jurisdiction to grant interim relief against an Act of Parliament or against the

Crown where an enforceable Community right is claimed but not yet proved. This, of course, is legally entirely new but it is logical that a national court should now be competent to grant interim protection to a valid claim if, in the absence of such protection, irremediable injury would be caused.

The question which the House of Lords put relating to the criteria for the granting of interim relief was not answered by the ECJ despite the invitation to spell them out. The effects of this judgment are likely to be substantial. In some member-states, such as France, The Netherlands, Luxembourg and the U.K. there is no power temporarily to suspend the application of legislation, through constitutional law. There are member-states where these powers do exist but they are usually subject to conditions and are used sparingly.

The ECJ judgement of 19 June 1990 states that national courts have the right to suspend the application of national law whilst its compatibility with EC law is questioned. The ECJ found that the House of Lords was wrong about its inability to act. Any national law which prevented, even temporary Community rules from having full force, was incompatible with the spirit of EC law.

It should be noted that this is a revolutionary decision in U.K. terms, but in other EC countries the operation of legislation can be suspended pending a challenge to its constitutionality. It appears that the ruling overturns the English rule that a temporary injunction cannot be granted against the Crown.

It is new to extend the supremacy of Community law over clear provisions of primary legislation to cases where the Community law right is not clearly established but rather there is a prima facie case (not necessarily even strong) that such a right exists. However, the case shows Scottish fishermen that any national legislation restricting their rights under Community law will not be upheld by the ECJ.

At the beginning of the present Chapter, it was submitted that the cases throw up miscellaneous points of law, all of which are of great importance, but the main themes running through them are the power of the Commission, the problems of conservation and difficulties between member-states. The remaining cases are also highly relevant when considering Scottish fishermen's interests.

In Commission v. the U.K. (1982), a significant landmark was reached when it was acknowledged, apparently for the first time, that no longer is any member-state unilaterally entitled to exercise any power in any matter of conservation in respect of waters under its jurisdiction. A member-state may not, in the absence of appropriate

action on the part of the Council of Ministers, bring into force any interim conservation measures which may be required by the situation, except as part of a process of collaboration with the Commission.

Discrimination is, of course, bound up with equal access. The latter has to be made available to citizens of all member-states. It should be remembered that the definition of discrimination seems to be rather narrow while at the same time it covers both direct and indirect discrimination. Covert discrimination will apparently always be struck at. It is interesting to note that in the 1982 case of Commission v. United Kingdom not only did the judgement state that fishermen must have an equal right of access but it also pointed out that, as correctly claimed by the Commission, the resources will always be subject to Community law. The same case should be distinguished from EEC Commission v. U.K. (1981) case. In the 1980 case the ECJ stated that where there was a clear need for conservation and EEC measures had expired and had not been renewed, there is a duty on the member-states to take conservation measures. In the 1982 case this appears to have been changed in that member-states are apparently no longer entitled to exercise any powers of their own in the matter of conservation without prior consultation with the Commission.

The case in 1984 of Kent Kirk drew, however, a distinction in comparison with the 1982 case. The judgement in Kent Kirk stated that, in the absence of Community rules, member-states did have the power to take temporary measures to avoid "irreparable damage" contrary to the objectives of the common conservation policy. The ECJ pointed out, however, that the question of irreparable damage did not arise. It is suggested that we are now left with the ruling that member-states are entitled to take temporary measures to avoid "irreparable damage".

It is hard to envisage, with the close ties that member-states have to keep with the Commission and which the Commission has to keep with the member-states, how a situation of "irreparable damage" would arise other than through fishermen flagrantly breaching the rules. This would seem to be more a matter for the policing of Community waters rather than anything else, and no doubt with advances in technology, policing will become increasingly easy and less expensive.

It is reasonable to draw the conclusion that Churchill's comments noted at the beginning of this Chapter (p. 97) are well founded. Even when the ECJ is discussing a technical matter at length, it usually does so in a manner which describes the powers of the member-states.

The question of the method of reference to the ECJ, namely by an application for a preliminary ruling under EEC Article 177 was raised in the recent case of Procurator Fiscal Elgin v. James Cowie.(94) It concerned two skippers of fishing vessels who appeared at Elgin Sheriff Court. It discussed the powers of a Sheriff to exercise the court's rights to refer to the ECJ for a preliminary ruling. The skippers had been charged with a breach of their licences: they had crossed a line of longitude which separated two fishing grounds without informing or reporting to the mainland. The Sheriff decided to apply under EC Article 177 of the Treaty for a preliminary ruling to the ECJ as the skippers of the vessels challenged the charge on the grounds that the licence conditions were not compatible with the EEC Treaty and secondary EEC legislation, because they did not apply equally to everyone fishing in U.K. waters: a non-U.K. national was not subjected to the same conditions as applicable to U.K. nationals.

The question at law, in the case, was whether or not Scottish or U.K. nationals were being discriminated against by virtue of the conditions in their licence. The licences stated that before crossing the line each skipper should contact the Scottish Department of Agriculture and Fisheries by calling Wick Radio Station. The Procurator Fiscal argued that under EEC law, common rules were laid down for the conservation and management of fishing resources, but that how these rules were applied was a matter for the authorities of each individual member-state.

The Procurator Fiscal took the unusual step of appealing against the Sheriff's decision to refer to the ECJ for a preliminary ruling and appealed to the High Court of Justiciary in Edinburgh. It has, hitherto, always been thought that a national Court, in our specific case here the Sheriff Court, has, under Article 177 of the Treaty, absolute discretion to decide whether or not to refer for a preliminary ruling a question of interpretation or application of EC law by the ECJ under Article 164. Such a referral was not a matter for either party in a case to challenge. The Lord Justice Clerk stated:

> "In our opinion, in this respect the law in England is the same as the law in Scotland. This court has jurisdiction to hear an appeal against a decision of a judge of first instance to seek a preliminary ruling. We would add that ... there are rules in Scotland in the Act of Adjournal (Consolidation) 1988 which permit an appeal to this court against a decision of a single judge to seek a preliminary ruling from the European Court of Justice ... Rule 116 contains provisions regarding such a reference ...(95)

It is generally accepted that if a question of European Law involving interpretation and/or application is so obvious as to the answer that it does not need to be referred to the ECJ, a national court need not

refer the matter to the ECJ for a preliminary ruling. This, of course, is the acte clair doctrine which is well referred to by Mathijsen:

> "Requests for preliminary rulings must emanate from national courts or tribunals. The national Court or tribunal may, or when there is no judicial remedy against its decision must, request such a ruling each time it considers that in order to give judgment in a case pending before it, it needs a decision on the question. This can occur when having to apply a community rule, they find themselves confronted with a question concerning this rule. The national Court then suspends the proceedings before it and asks the European Court to solve the question. A distinction must be made between primary Community law in which case only interpretation can be requested, and secondary Community law in which case the Court also has jurisdiction to give a ruling on the validity".(95)

Mathijsen adds that in respect of the decision where the national court must request such a ruling:

> "There are situations where the requirement of the third para of Article 177 does not apply: (1) the question raised is not relevant, (2) the Community measure has already been interpreted by the Court or (3) the correct application of Community law is so clear (acte clair) that there is no room for any reasonable doubt, Case 283/81 CILFIT the Ministry of Health 1982 E.C.R. 3415".(97)

Kapteyn and Verloren Van Themaat's comment on the subject of preliminary rulings:

> "It must always be borne in mind that the Article 177 EEC procedure works because of the mutual confidence which has been fostered between the Community and national judiciaries; co-operation is essential and the Court has always been at pains to stress that the national Courts and it have a joint role in ensuring that Community law is upheld; the Court of Justice is there more as a concerned godfather than as a sergeant-major". (98)

So, if there is any doubt, a national court can use its discretion to refer or not to refer to the ECJ for a preliminary ruling. This discretion appears only, however, to be limited to lower courts because, as Mathijsen again points out in accordance with the EEC Article 177, the reference from the highest court is compulsory.

It does, however, appear from the above cited case that if a higher court feels that the Sheriff's decision was plainly wrong, a higher court would have the authority to overturn a lower court's decision, thereby questioning the absolute right of the lower court to refer or not to refer a point of Community law to the ECJ.

It would seem that the strenuous demands on member-states to notify and discuss with the Commission any proposals that might be necessary, should not be overlooked. It is interesting to note that the Regulations impose heavy obligations on the member-states and that these obligations have been upheld by the ECJ. Looking back to how politicians were vague over the CFP, and remembering how difficult it was to get legislation together, we see how frustrations must exist, yet must be controlled. It is no defence, apparently, for months of correspondence to pass by without any progress being made, for a member-state to claim it was acting in the Community's interest unless "irreparable damage" was avoided.

With all the procedures to be upheld and with the firm line taken by the ECJ, the case law appears to demonstrate that Scottish fishermen's interests are well protected, as part of the protection afforded to all member-states throughout the European Community. Scottish fishermen have little reason for concern.

Any criminal proceedings which are brought under national legislation will not be upheld if the legislation is found to be contrary to EC law.

The question of the conflict and the relationship between EC law and national law refers to the question of the primacy of EC law. J Steiner assesses the ECJ's contribution as to the relationship between Community and national law (99). She particularly deals with the question of priorities between directly effective international law and domestic law, discussing also what would happen if the national courts gave priority to national law:

> "Given the differences from State to State it is clear that if national Courts were to apply their own constitutional rules to the question of priorities between domestic law and EEC law, there would be no uniformity of application, and the primacy of EEC law could not be guaranteed throughout the whole community.
>
> Not only would this weaken the effect of Community law, it would undermine solidarity among the member States, and in the end threaten the community itself".(100)

J Steiner discussion sees the role and contribution of the ECJ as follows:

"Thus as far as the Court of Justice is concerned all EEC law, whatever its nature, must take priority over all conflicting domestic law, whether it be prior or subsequent to Community law. Given the fact that the Court was approaching the matter 'tabula rasa', there being no provision in the Treaty to this effect, on what basis did the court justify its position?"

"The court's reasoning is pragmatic, based on the purpose, the general aims and the spirit of the Treaty. States freely signed the Treaty; they agreed to take all appropriate measures to comply with EEC law (Article 5); the Treaty created its own institutions, and gave those institutions power to make laws binding on Member States (Article 189). They agreed to set up an institutionalised form of control by the Commission (under Article 169 ...) and the Court. The Community would not survive if states were free to act unilaterally in breach of their obligations. If the aims of the Community are to be achieved, there must be uniformity of application. This will not occur unless all states accord priority to EEC law".(101)

Steiner continues:

"Unless Community law is given priority over conflicting national law at once, from the moment of its entry into force, there could be no uniformity of application throughout the Community. Thus, according to the Court of Justice, national judges faced with a conflict between national law, whatever its nature, and Community law, must ignore, must shut their eyes to national law; they need not, indeed must not, wait for the law to be changed. Any incompatible national law is automatically inapplicable".(102)

J Steiner comes to the interesting conclusion that:

"...in a relatively short space of time the courts of Member States, despite their different constitutional rules and traditions, have adapted to the principle of the supremacy of EEC law. Credit for their accepting this principle must go to the European Court, which has supplied persuasive reasons for doing so. However, equal credit must go to the courts of Member States, which have contrived to embrace the principle of primacy in practice without denying in principle that ultimate political and judicial control remains with the Member States".(103)

In the very recent case of J.J. Zwatveld & Others 1990(104), we see how the ECJ will assist a national court in the due process of law. This was a Dutch case where the magistrate was investigating alleged offences against EEC fish marketing regulations through fraudulent manipulation of the fish market at Lauiversoog.

The EEC Commission refused to produce to the court certain reports carried out by its inspectors on the grounds of confidentiality. The magistrate applied to the ECJ for help which, having heard all the views, held that the ECJ had the jurisdiction and the Commission owed a duty to cooperate with member-states under Article 5 EEC and that such a duty was particularly strong when the request for assistance came from a national court attempting to enforce community law.

In addition to handing over the documents requested, the Commission officials should appear unless they could show any evidence why such an appearance would damage the independence of the Commission. In that event, it should return to the ECJ to request an order allowing it to withhold evidence. The Commission therefore is bound to assist the national court with the supply of documentation.

We therefore see close cooperation between national and community law within the courts, all as we saw earlier, when we described Scottish fishermen's interests being embedded in both national and community law. But this case goes further with the ECJ positively helping a

national court to uphold Community law and therefore, in a sense, this helps to complete the picture of how the ECJ will uphold the rights of fishermen within the Community.

In this chapter we have discussed the various cases which have gone to the ECJ. We have seen how references for preliminary rulings under EEC Article 177 have been referred from national courts and how they have been dealt with by the ECJ. We have also discussed the relationship between national law and EEC law and how the courts have adapted between the two, giving priority to community law over national law. We have cited the literature and authorities which have discussed and recognised the primacy of EEC law throughout the whole Community.

Although the ECJ does appear to have gone to some length to define the powers of the various Community institutions in the member-states, we have also seen how it has applied community law to the cases referred and, in doing so, has gone, to a considerable degree, towards upholding the legislation described in Chapter 2, ultimately to the benefit of Scottish fishermen. We have shown how the ECJ has recently upheld the principle of the reasonable standard of living for fishermen written into community law. It has consistently upheld the principle of non-discrimination, giving equal access to fishing rights and it has also consistently upheld the necessity of the protection of fish stocks which, of course, is

ultimately to the benefit, as we discussed earlier, of Scottish fishermen. In judgments, the ECJ has acknowledged the very considerable power of the Commission to manage the fishing industry in EEC waters, hence the structure for the protection of fisheries throughout the EEC and therefore ultimately for the benefit of Scottish fishermen. The conclusion we can therefore draw from the study of the cases, which have come before the ECJ, is that Scottish fishermen's rights can be regarded as safe within the context of our discussion, namely the protection of the fish, non-discrimination and the upholding of the quota system, a reasonable standard of living and a reliable income.

Footnotes on Fisheries Cases

1. R.R. Churchill: EEC Fisheries Law, p. 109.

2. P.J.G. Kapteyn/P. Verloren van Themaat: Introduction to the Law of the European Communities - After the coming into force of the Single European Act. (2nd edn.) (1989), pp. 329-330.

3. Keesing's Contemporary Archives. Record of World Events 1985. Vol. XXX, p. 33589. Various incidents involving the apprehension of both Spanish and French boats continued after March 1984. On 20 October a Spanish trawler sank in the Irish Sea after the Irish Navy fired six hundred rounds of cannon and small arms ammunition in an attempt to board the vessel. The boat was one of more than thirty-two Spanish boats arrested during the year for fishing illegally in Irish waters.

4. Keesing's Contemporary Archives. Record of World Events. Vol. XXXII, p. 34188, European Communities Section. The same paragraph reports that late in November 1985 an Irish Navy patrol fired on five Spanish trawlers fishing in Irish waters and detained two of the vessels in Cork.

5. Sunday Post, 12 June 1988.

6. Keesing's Contemporary Archives. Record of World Events 1988. Vol. XXXIV, p. 35980.

7. Regina v. Kent Kirk. Case 63/83 1984 3 CMLR 522.

8. Ibid. p. 525.

9. The Fishing Boats (European Economic Community) Designation Order 1972. Scottish Current Law.

10. Op. cit. note 7, p. 537, par. 15 and 16.

11. Op. cit. note 7, p. 538, par. 21. The ruling elaborates further on the subject of retroactivity and penal measures.

12. EEC Commission v. United Kingdom (The Irish and French Governments intervening). Case No. 804/79 1982 1 CMLR 543, 1981 ECR 1045.

13. 1982 1 CMLR, p. 570, par. 17.

14. Ibid. par. 18.

15. Ibid. p. 573, par. 31.

16. EEC Commission v. United Kingdom (The Danish, French, Irish and Dutch Government intervening). Case 32/79 1981 1 CMLR 219 10 July 1980, 1980 ECR 2403.

17. 1981 1 CMLR, p. 271, par. 45. Under reference to arrangements applying in 1977.

18. Ibid.

19. France (EEC Commission intervening) v. U.K. 4 October 1979. Case 141/78 1980 1 CMLR 6; 1979 ECR 2923.

20. 1980 1 CMLR, p. 23, par. 8.

21. Ibid. par. 11, Annex VI to the Hague Resolution.

22. Ibid. par. 11.

23. EEC Commission v. Ireland (The Netherlands intervening). Case 61/77 1978 2 CMLR 466; 1978 ECR 417.

24. 1978 2 CMLR, p. 481, par. 16.

25. Ibid.

26. Ibid. p. 517, pars. 78 and 79.

27. Minister for Fisheries v. C.A. Schonenberg and Others. Case 88/77 1978 2 CMLR 519; 1978 ECR 473.

28. 1978 2 CMLR p. 520.

29. Ibid. p. 521. The other questions relating to the preliminary ruling are also set out.

30. Ibid. p. 527: Third Ruling.

31. Ibid. p. 526: First Ruling.

32. Associacion Professional de Empresarios de Pesca Communitorios v. Commission of the European Communities. Case 207/86. Interveners: Kingdom of Spain, Internacional Pesquera Corunesa SA (Interpesco SA) Miya Sa, Lagunak SL, Association de Armadores de Barques de Pesca con Derechos de Acceso a Las Pesquirias de la CEE (CEEPESCA). Citation: 1990 1 CEC 362.

33. EEC Commission v. France. Case No. 93/84, 1985 3 CMLR 169 1985, 3 ECR 829.

34. 1985 3 CMLR, p. 178, par. 10.

35. Officier Van Justitie v. Cornelis Kramer 1976 2 CMLR 440. Case 3/76. The Same v. Hendrik van Den Berg. Case 1976 2 CMLR 440 Case 4/76. The Same v. Kramer En Bais & Co. Case 1976 2 CMLR 440 Case 6/76 1976 ECR 1279 Joined cases.

36. North East Atlantic Fisheries Convention 1959 (NEAFC). It was signed in London by the member-states except Luxembourg and Italy. The Convention entered into force on 25 June 1963. (United Nations Treaty Series Vol. 4086 No. 7078).

37. From the preamble to the North East Atlantic Fisheries Convention.

38. The Fisheries Commission, being the Commission set up under the NEAFC under Article 3, adopted various recommendations relating to fishing for sole and plaice.

39. Kramer. Loc. cit. note 35 above, p. 468, par. 9.

40. Ibid.

41. Ibid.

42. Ibid. p. 469, par. 11.

43. Ibid. p. 469, par. 14.

44. Procurator Fiscal Stranraer v. Andrew Marshall 1988 1 CMLR 657. The case is referred to in the Scottish Law Gazette September 1988. Vol. 56 No. 3, 20 October 1987.

45. Inshore Fishing (Scotland) Act 1984. Scottish Current Law Statutes. Vol. 1 Chapter 26.

46. Officier van Justitie v. Van Dam en Zonen 1979 ECR 2345; 1980 1CMLR350. Joined cases 185-204/78.

47. Marshall. Loc. cit. note 44 above, p. 664, par. 12.

48. Ibid. p. 664, par. 12.

49. Ibid. p. 664, par. 12.

50. Ibid. p. 667, par. 15.

51. Scottish Law Gazette June 1989 Volume 57 No. 2.

52. Procurator Fiscal Lerwick v. Ejgil Hangaard Olsen & Another 1990 3 CMLR 134 before the High Court of Justiciary.

53. The Queen v. Ministry of Agriculture Fisheries and Food ex parte Agegate Limited. Case 3/87. The Weekly Law Reports 27 July 1990 part 28, p. 226.

54. British Fishing Boats Act 1983. Scottish Current Law Statutes, Chapter 8.

55. Loc. cit. note 53 above, p. 240, par. 6.

56. Ibid. p. 241, par. 15.

57. Ibid. p. 241, pars 16 and 17.

58. Ibid. p. 242, par. 18.

59. Ibid. p. 242, par. 19.

60. Case 77/82 Peskeloglou v. Bundesanstalt fur Arbeit, Judgement of 23 March 1985 1983 ECR 1085.

61. Loc. cit. note 53 above, p. 245, par. 40.

62. Regulation 101/76, OJ L20/19, 28 January 1976.

63. Pesca Valentia Limited v. Minister for Fisheries. Case 223/86, 1988 1 ECR 83.

64. Loc. cit. note 53 above, p. 249, pars. 68 and 69.

65. Ibid. p. 250, par. 76.

66. Ibid. pars. 77 and 78.

67. Ibid. p. 251, par. 81.

68. Loc. cit. note 35 above.

69. Loc. cit. note 53 above, p. 264, par. 1.

70. Ibid. note 53, p. 264, par. 3.

71. Regina v. Minister of Agriculture Fisheries and Food ex parte Jaderow Limited and Others. Case 216/87. Weekly Law Reports 27 July 1990 Part 28 p. 265.

72. Ibid. p. 277, par. 1.

73. Ibid. p. 278, par. 2.

74. Loc. cit. note 63 above, Pesca Valentia.

75. Loc. cit. note 53 above, p. 279, par. 6.

76. Ibid. par. 7.

77. Ibid. p. 279, par. 8.

78. Article 5 of the Geneva Convention of 29 April 1958 on the High Seas.

79. Loc. cit. note 70 above, p. 280, par. 12.

80. Christianos v. Court of Justice (Case 33/87) Judgement of 14 June. Unreported.

81. Loc. cit. note 71 above, p. 282, par. 24.

82. Ibid. p. 283, par. 29.

83. Ibid. p. 283, par. 31.

84. Ibid. p. 284, pars. 34 and 35.

85. Ibid. p. 285, par. 45.

86. Ibid. p. 266.

87. Ibid. For the full discussion, see p. 291, pars 21-27.

88. Ibid. For the full discussion, see p. 292, pars. 28-29.

89. Ibid. For the full discussion, see p. 292, pars. 30-32.

90. Ibid. For the full discussion, see pp. 293-294, pars. 33-44.

91. Regina v. Secretary of State of Transport ex parte Factortame & Others. 1990 3 WLR 818.

92. Law Society of Scotland, Eurosnippets June 1989 No. 6 Edition.

93. Scottish Law Gazette, June 1989, Volume 57 No. 2.

94. Procurator Fiscal Elgin v James Cowie 1990 3 CMLR 445.

95. Ibid. p. 453, par. 18.

96. For a general discussion on the subject of preliminary rulings see P.S.R.F. Mathijsen: A Guide to European Community Law (4th edn.) (1985) pp. 66-68.

97. Ibid.

98. P.J.G. Kapteyn/P. Verloren van Themaat: Introduction to the Law of the European Communities - After the coming into force of the Single European Act. (2nd edn.) (1989). (Lawrence W. Gormley), pp. 329-330.

99. Josephine Steiner: Textbook on EEC Law (1988), pp. 30-31.

100. Ibid. p. 31.

101. Ibid. ps. 33-34.

102. Ibid. p. 34.

103. Ibid. p. 39.

104. J.J. Zwatveld & Others (Case C-2/881mm) 1990 3 CMLR 457.

CHAPTER 4

SCOTLAND - A SPECIAL CASE

When considering Scotland's fisheries it is instructive to examine a curious feature which has arisen in the last few years in connection with mainland Scotland (referred to in the introduction of the present thesis). Mainland Scotland and the Islands of Orkney and Shetland have different laws and two separate consequences may arise from this. Firstly, the seabed up to three miles off mainland Scotland is the property of the Crown Commissioners. Secondly, this means that the Crown Commissioners might be entitled, if they chose, to charge rent for fishing boats anchoring on their land.

The Commissioners have claimed rent for fishing on their seabed, and not surprisingly, this has already met with severe criticism and complaints from fishermen who have claimed that they are being charged a rent when other fishermen do not require to pay any similar surcharge. They claim they cannot afford to pay any rent. It is possible that the Crown Commissioners could win this claim through a preliminary ruling by the ECJ under Article 177. Scottish fishermen would have to claim that they deserve equal treatment with fishermen in the rest of the Community, so by paying rent they would be discriminated against and therefore there would be a breach of Community law. Or the Crown Commissioners might argue that if this is an area not specifically governed by Community law, a member-state

may then apply diverging rules. At some stage in the future, should such a charge prove to be lucrative enough, would it not be worth it for them to claim rent and risk being taken to the ECJ? The arguments are strong on both sides.

It has not been part of this study to investigate the ownership of the seabed adjacent to each member-state. It may or may not be unique that the Scottish seabed has only one owner. The interesting point is that one landlord of this size could prove to be the catalyst to take a matter seriously at European level.

A study of the ownership of the foreshore appears to show that the Crown Commissioners could never claim ownership of the seabed. The judicial authority (1) for this appears to be conclusive, (see below). If it can be shown that the ownership of the foreshore off Orkney and Shetland is different, it means that the foreshore adjacent to mainland Scotland could indeed become a matter of interest at European level.

J.M. Halliday, in his book "Conveyancing Law and Practice" (2), takes us back in history to define the tenure in Orkney and Shetland:

> "udal tenure is peculiar to Orkney and Shetland. The title to udal land consisted of natural possession, provable by witnesses, and no written evidence was

> required. Upon the marriage of the daughter of Christian I, King of Denmark, to James III of Scotland, these islands were pledged in security of her dowry."

No date is given. However, Halliday goes on to say that:

> "at least centuries of Scottish possession and administration have created a title of Scottish Sovereignty both de facto and de jure."(3)

In 1567 an Act of the Scottish Parliament (A.P.S. C48 iii41) provided the islands should enjoy their own laws and this Act has not been repealed, so technically owners hold their property by the same title as before. Udal tenure therefore remains unless owners have feudalised their tenures by obtaining charters from the Crown. Similarly, Professor Burns states that:

> "In Orkney and Shetland it appears that salmon fishings are not inter regalia or at least are not presumed to be so under udal law".(4)

For this the author, Professor Burns, cites as authority the case of the Lord Advocate v. Balfour.(5) In this case Lord Johnston sitting in the Outer House of the Court of Session held that the right of fishing for salmon in Orkney is not inter regalia and secondly that

the feudal law as for salmon fishing rights does not apply in Orkney. There were in this case a number of observations in the history of the feudal system on the mainland of Scotland and in Orkney. In his observations Lord Johnston says inter alia:

> "In the First Place by the udal law or law of Orkney as it stood in 1468 and as it stands now except so far as innovate upon, the Crown was not presumed by any fictio juris to have been the original proprietor of the whole territory of the Islands .... The reasoning regarding foreshores in which the judgement of the Court rests in Smith v. Lerwick Harbour Trustees (6) applies with equal force to the present question".(7)

Lastly he says at the end of his observations:

> "The Crown does not maintain that it has fished or let fishings or has interfered to prevent those not deriving right from it from fishing. It is in vain therefore I think to contend that the feudal custom in Scotland has become that of Orkney".(8)

The case of Smith v. Lerwick Harbour Trustees (9) again helps us in our assertion that Orkney and Shetland come under a different law and it emphasises the point in relation to the foreshore which would

appear to be highly relevant. It was established in this case that the law of udal and not of feudal tenure is applicable as well to the foreshore as to the rest of the solum of the Shetland Islands. In this case the proprietor of the dwellinghouse in ground in Lerwick raised an action in 1900 to have it declared that the foreshore ex adverso of these subjects was his exclusive property:

> "Down to the lowest low water mark".(10)

Defences were lodged by persons holding a Disposition granted by the Crown in 1878 of:

> "ALL and WHOLE the right, title, and interest of the Crown the portion of foreshore in question."(11)

The defenders maintained that because the pursuer had not had exclusive possession of the foreshore, the Crown title must prevail.

The Court of Session, however, held that the foreshore like the rest of the solum in Shetland was allodial and that the Crown had no original or radical right of property therein. The Court held that the defenders' title being founded on the assumption that the foreshore was the property of the Crown which, if it was not, was ineffectual in competition with the pursuer's title. The defenders pointed out that no writing at all was required for a udal title. The

right of property and the extent of the property ultimately and always rested on the fact of possession and that the law of prescription applied to udal just as to feudal property. It was argued that the property in the foreshore of Shetland, just as in Scotland, was the Crown's unless the private individual could show a title to it flowing from the Crown or prescriptive possession. Here the pursuer did not pretend to show a Crown grant, hence it was held that he had failed to establish a title by possession. The pursuer also argued that the udal holding was allodial and the allodial holdings were free from the superiority of the Crown. The only property right which the Crown might have was as ultimus haeres. In Scandinavian law and practice the rules was to appropriate the foreshore. The title in this case was in conformity with this purchase. In ancient Icelandic law private property in the foreshore was assumed and the same appropriation of the foreshore was found in Norway where udal tenure still pertained. According to Stair, udal rights can have the same right as infeftments and if that were so, argued the pursuer, the Crown must be excluded and there was no answer to the pursuer's contention.

In his judgement the Lord President said inter alia:

> "If the tenure was then feudal, the presumption would be that the property in the foreshore down to low water mark was vested in the Crown, subject to public uses, and that

> no proprietary right to it could be acquired except by a conveyance flowing immediately from the Crown .... In order to establish such a claim the person making it would, in the absence of an express title flowing directly or indirectly from the Crown, in my judgement require to prove exclusive possession of the foreshore for the prescriptive period upon a Barony or other general title, so as to divest the Crown of the right which it had previously possessed, and the pursuer has not, in my view, adduced evidence of such possession as to bring about this result."(12)

Further Lord Kinnear summarises that the Shetland Islands are governed by udal rather than the feudal system and he quotes Lord Jeffrey in the case of Spence v. The Earl of Zetland:

> "There is not the slightest appearance of it ever having been held that the overlord in these Islands of Shetland had been the original proprietor of all the lands they contain. There is no feudal supremacy and there is not a shadow or trace of an original property in the Lord or Sovereign."(13)

He then quotes Lord Glenlee saying in the same case:

> "As to the udal holding I never heard the most distant idea that it would be considered as having anything in it of feudal right."(14)

Lord Kinnear sums up at the end of his judgement by saying:

> "The result is that the pursuer and his predecessors have held the subjects in dispute for eighty years upon a title which has been made public by registration in the Register of Sasines; and that no competing right can be alleged except upon the assumption, which I hold to be unsound, that the land in question is held feudally of the Crown."(15)

Although it must be conjecture, it is suggested here that if the Commissioners did in fact claim rent and the fishermen in Scotland took the case to the ECJ on the grounds that they were being discriminated against, it is doubtful whether the Court would come down in their favour. The discrimination would not be against nationality since fishermen from all Member States would presumably be treated similarly and the rent would be demanded from all fishermen by the Crown Commissioners. That is always assuming that the Crown Commissioners would charge a flat rate throughout; but that would not necessarily be the logical route to take. It might be that variable rates would be the natural way to charge; but it is thought

that there could be a case under the Common Agricultural Policy referred to both in Chapter 2 dealing with the law and Chapter 3 dealing with the case law, where it is accepted as part of European law that the Member States and the institutions must ensure that fishermen have a reasonable standard of living.

Let us examine the question in more detail. Firstly what is "discrimination"? Equality of treatment has been described as one of the fundamental principles of Community law. In Battaglia v. EEC Commission (16) the subject of discrimination was discussed. Although the case of Battaglia does not relate to fisheries it is a useful and leading case to choose to assess what is meant by discrimination. The question arises as to whether or not Scottish fishermen are being discriminated against. In this case reference was made to the definition of discrimination and it is worthwhile discussing to see what the principles were.

We examine the facts and judgements of Battaglia v. EEC Commission to see how it might help any argument. Dino Battaglia was the applicant and an official of the European Commission at the Ispra Joint Research Centre with an address in Luxembourg. The applicant complained of increased costs of transfers between April and June 1979 entailing a reduction in the remaining remuneration paid to him. The judgement stated in relation to the facts and issues that the

case should be seen against the background of the provisions that in the version in force until 1979 Article 63 of the Staff Regulations of Officials provided that:

> "An official's remuneration shall be expressed in Belgian Francs. It shall be paid in the currency of the country in which the official performs his duties. Remuneration paid in a currency other than Belgian Francs shall be calculated on the basis of the par values accepted by the International Monetary Fund and in force on 1 January 1965."(17)

In accordance with Article 17 of Annex VII to the Staff Regulation an official may have part of his emoluments transferred either regularly or on an exceptional basis to a country other than that in which he performs his duties. Until 31 March 1979 Article 17(4) provided that such transfers were to be made through the institution to which the official belonged, "at the official exchange rate ruling out on the date of transfer." The "official exchange rate" within the meaning of that provision was the last rate accepted by the International Monetary Fund which had not been altered since 1 November 1969.

The applicant complained that the transfers pursuant to Article 17 of Annex VII made at his request through the institution have become more expensive. On 21 June 1979 the applicant submitted a complaint

to the defendant (with the same wording as sixty eight other complaints) objecting to the increased cost of his transfers as from April entailing a reduction in the remaining remuneration paid to him. On 28 September 1979 the Commission rejected his complaint. It was subsequently decided that this case would be treated as a test case.

The Commission claimed that the ECJ should dismiss the action as unfounded and order the applicant to pay the costs, subject to all necessary reservations.

Battaglia in reply claimed the ECJ should:

> "In the alternative appoint a panel of experts who would be instructed to advise the Court on the basis of such information as the parties may be obliged to give it regarding the consequences for officials and servants of the introduction of the amendment to Article 17 of Annex VII to the Staff Regulations as it appears in Regulation 3085/78."(18)

The Commission argued that, as regards the "alleged discrimination" between officials and pensioners, in fact the only legal principle applicable is that there must be no arbitrary discrimination, that is to say, discrimination for which there are no objective grounds and

that the principle of equality is not applicable. The situation of pensioners taken into account in Article 4 of Regulation No. 3085/78 is not the same as, nor even comparable with that of officials who arrange for transfers to be made. In the case of pensioners the new system has entailed a sharp reduction from one month to the next which may be as much as half the amount in line previously obtained from resale of the amount paid in Belgian Francs or German Marks in respect of the pension. On the other hand in the case of serving officials, the increase in the amount of funds required for the transfers is nowhere near that proportion since at most only 35% of remuneration may be transferred.

Battaglia's case is summarised in relation to discrimination as follows:

> "The applicant also complains of the discrimination which, according to him is inherent in the transitional provisions applicable to pensions in view of the fact that no transitional provisions are to the transfers made by the applicant in accordance with Article 17 of the Annex VII to the Staff Regulations. The Commission should, in the discharge of its duty to assist officials of which Article 24 of the Staff Regulations constitutes an illustration, have laid down transitional procedures for compensation by way of an implementing measure which

should have been coterminus with the legal and contractural obligations of the officials. The applicant states the Commission adopted, in favour of certain recipients of allowances for persons treated as dependents, a decision to freeze the amounts allocated for maintenance for a period of five years at the values applicable on 31 March 1979. It should have adopted a similar decision with regard to transfers made as a result of the legal and contractural obligations of officials and servants."(19)

The ECJ then went on to discuss at length the infringement of essential procedural requirements which need not concern us here. The Court delivered the judgement in open court in Luxembourg on 4 February 1982 and the relevant passages for the purposes of discrimination were read as follows:

"The applicant maintains that the absence in the contested regulation of transitional provisions in favour of serving officials similar to those of which pensioners have the benefit breaches the principle of non-discrimination."

"In that respect it is sufficient to point out discrimination in the legal sense consists of treating in an identical manner situations which are different or

identical. The situation of a serving official differs considerably from that of a pensioner, so that there is not discrimination in a case where the Community legislature accords to pensioners treatment which is not identical to that applied to serving officials."

"The same principle applies regarding the alleged discrimination arising from the fact that the Commission's decision to apply for a period of five years a special policy concerning the values to be taken into consideration regarding the cost of maintenance of persons treated as dependents. The matter of transfers may not be treated as the same as the case of the persons referred to by that decision."

"The arguments based on alleged discrimination must therefore be rejected."(20)

It might happen that Scottish fishermen are treated in the same way as fishermen of other member-states who might all be asked to pay rent. This situation could surely not therefore be described as arbitrary. The fishermen of all member-states would be treated in an identical manner in an identical situation but in a different manner because of location in so far as everyone pays rent for being a

tenant. But of course, the charging of rent would have to be considered in the light of the other objectives of the CFP, including conservation and relations with other countries.

It might be possible, presumably, to compensate fishermen for any rent charged, but that would raise an entirely different issue. If it could then be shown that fishermen are indeed being hurt by the charging of rent and that they are no longer assured of "un niveau de vie equitable"(21), it would seem that compensation might get round the problem. They would need to try to show the ECJ that the charging of rent would indeed be contrary to the Treaty of Rome and subsequent Regulations referred to in Chapter 2 and thus a charge would amount to a breach of EC law. Under these circumstances it would be interesting to see how the Crown Commissioners, in the light of a preliminary ruling under EEC Article 177 by the ECJ, would be able to sustain their case. One argument might be for the Crown Commissioners to show that being forbidden to charge a rent for leasing their land would in itself be discrimination and a breach of European law; indeed would it not be severe discrimination against the Crown Commissioners not to allow them to charge rent for their own asset and obtain the maximum benefit available to them?

For a solution at national level one may refer to the example established under EC law as reflected in CNTA v. EEC Commission (22). It was then held that where the Commission abolished, without

warning, compensatory payments, a trader was entitled to be compensated in damages under Article 215 of the EEC Treaty. This case is not without significance in the present context. Here the applicant was the 'Comptoir National Technique Agricole'. The applicant claimed that the withdrawal of the compensatory amounts applicable to colza and rape seeds by Regulation 189/72 (23) had caused it loss, first with regard to seeds receiving aid fixed in advance, and secondly in regard to other items intended for export. Refunds had been fixed in advance. The applicant claimed the ECJ should order the Commission to pay substantial sums together with all other compensation. The Commission asked the ECJ to dismiss the application as inadmissible or, in any event, unfounded.

The Advocate General, A Trabucchi, stated:

> "The Community is therefore liable if, in the absence of an overriding matter of public interest, the Commission abolished with immediate effect and without warning the application of compensatory amounts in a specific sector without adopting transitorial measures which would at least permit traders either to avoid the loss which would have been suffered ... or to be compensated for such loss."(24)

It has become increasingly difficult to decide what is a matter of public interest. If fishermen were charged and then effectively went on strike claiming they had every right in law to do so, there would inevitably be a body of opinion saying that it was a matter of public interest to keep the country's fish supplies going.

The charging of rent by the Commissioners would not of course be a legislative act; presumably the Commissioners would merely announce an immediate charge. The case of CNTA refers to the fact that the disputed measure was, in that case, a legislative act. The Advocate General stated:

> "Since the disputed measure is of a legislative nature and constitutes a measure taken in the sphere of economic policy, the Community cannot be liable for damage suffered by individuals as a consequence of that measure under the provisions of the second paragraph of Article 215 of the Treaty, unless a sufficiently flagrant violation of a superior rule of law for the protection of the individual has occurred."(25)

Fishermen might argue, however, very successfully that a flagrant violation of the Common Agricultural Policy has indeed occurred with

the imposition of rent "without warning" and without "transitional measures ... which would avoid (the) loss", to use A Trabucchi's own words.(26)

The Advocate General went on to refer to amounts of compensation firstly by referring to the fact that compensation was not guaranteed:

> "With regard to the extent of the loss to be compensated it is necessary to take into consideration the fact that the maintenance of the compensatory amounts was in no way guaranteed to the applicant ..."(27)

And he said:

> "The protection which be may claimed by reason of its legitimate expectation is merely that of not suffering loss by reason of this withdrawal of those amounts".(28)

Our case is, however, different in that we are not discussing loss as a matter of law but rather giving fishermen a reasonable standard of living. If our case was about loss, then our grounds could only be stronger.

It is reasonable to assume, taking the above discussion to a conclusion, that fishermen using Scottish waters have not any obligation at Community level to pay rent (which would not be the case at national level), indeed they are entitled to their standard of living. If asked to pay rent they might ask the court to refer the legal point to the ECJ for a preliminary ruling under Article 177 of the EEC Treaty claiming such a demand was a breach of Community law. Although the case of CNTA v. EEC was a matter of change of regulation authorised by the Commission, and therefore the Commission was held responsible, the Commission is also responsible for the implementation of the CAP. The Crown Commissioners would have to be paid from national sources or else by CAP if compensation is provided for under Community law.

FOOTNOTES ON SCOTLAND - A SPECIAL CASE

1. Case law discussed and textbooks cited below.

2. J.M. Halliday Conveyancing Law and Practice, Volume II, p. 93, par. 16-15. (W. Green) (1986).

3. Ibid.

4. Burns Conveyancing Practice, (4th edn.) by Farquhar MacRitchie, p. 337 and Lord Advocate v. Balfour 1907 SC 1360.

5. Lord Advocate v. Balfour 1907 SC 1360.

6. Smith v. Lerwick Harbour Trustees 1903 5F 680.

7. Ibid. 1907 SC 1360, p. 1368.

8. Ibid. 1907 SC 1360, p. 1369.

9. Ibid. Smith v. Lerwick Harbour Trustees 1903 5F 680.

10. Ibid. 1903 5F 680, p. 681.

11. Ibid.

12. Ibid. p. 688.

13. Spence v. The Earl of Zetland 1D 415.

14. Ibid. Smith v. Lerwick Harbour Trustees 1903 5F, p. 692.

15. Ibid. p. 693.

16. Dino Battaglia v. Commission of the European Community. Case 1253/79 1982 1 ECR 297.

17. Ibid. 1253/79, p. 299. The case centred round Article 17 of Annex VII to the Staff Regulations whereby the applicant had a certain portion of his remuneration transferred regularly to France, Belgium and Germany. He filed a complaint regarding the increased costs arising from the change in the wording of the new Article.

18. Ibid. p. 303, reply under "Conclusions of parties".

19. Ibid. p. 315, par. 14.

20. Ibid. p. 322, pars. 36-38.

21. Chapter 2 on the Law discussed the Reglement 2141/70 du Conseil du 20 Octobre 1970 OJ L236/1.

22. Comptoir National Technique Agricole (CNTA) SA v. Commission 1975 1 ECR 533 Case 74/75.

23. Regulation 189/72, 26 January 1972, OJ L24 28 January 1972, p. 25.

24. Op. cit. note 22 above, Case 74/75, p. 550, par. 43.

25. Ibid. p. 546, par. 16.

26. Ibid.

27. Ibid. p. 550, par. 45.

28. Ibid. p. 550, par. 46.

CHAPTER 5

THE SINGLE EUROPEAN ACT (SEA) AND THE COMPLETION OF THE EC INTERNAL MARKET IN 1992

Future developments may be considered in the light of the Single European Act and the overall impact of the completion of the internal market in 1992. Opinions have been expressed as to where the Single European Act will lead the EEC. An examination of it may be relevant to complete the picture of how Scottish fisheries may be affected. There is some anxiety throughout the member-states about 1992; equally, there is also apparent confidence and conviction that it will improve the working of the EEC. The Single European Act, is an agreement between heads of governments,(1) a possible basis for new developments and is seen by many as helping Europe into a single big market, competitive with the rest of the world and able to hold its own against the USA, the Soviet Union, China and Japan. Doubts exist as to how much sovereignty each state will be able to retain thereafter. The SEA is examined, below, from the fishermen's point of view, in the light of the question whether it provides sufficient protection to their livelihood.

The Single European Act, ratified by all twelve member-states, is in force since 1 July 1987. (2) It is the first major modification to the Treaty of Rome. Its purpose is to extend the existing common policies (3) and to break down technical and other barriers in an effort to improve or complete the "internal market." It refers to "the progressive realisation of economic and monetary union". The Act comprises four parts with a preamble which, as with other treaties, is vital for the interpretation of the contents. The member-states undertake to transform their relations and to "have as their objective to contribute together to making concrete progress towards European unity". This European unity is to be achieved both within the Communities and externally in the sphere of foreign policy.

Title 1 consists of three Articles containing the common provisions.(4) Title 2 amends the existing Treaties establishing the European Communities. It is divided into three chapters, the first dealing with the Treaty establishing the European Coal and Steel Community; the second deals with the provisions amending the Treaties establishing the European Community.(5) This Chapter is divided into six subsections, with some, although not all, being relevant to the topic of the present thesis. Chapter 3 amends the Treaty establishing the European Atomic Energy Community and Chapter 4 relates to general provisions. Titles 3 and 4 relate to the sphere of foreign policy. For the purpose of the present thesis, reference will be made to

changes relating to the institutions: the ECJ, the Parliament and the Council of Ministers; to the environment, to see how this ties in directly or indirectly with the fishing industry.

The SEA ambitiously provides for completion of the internal market by 31 December 1992. It is defined thus:

> "The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty."(6)

"Union", "unity" and no "internal frontiers" are, therefore, the words which produce the theme.

The Commission has recently produced a related progress report.(7)

How will the CFP will be affected by it all? As 1992 approaches for the completion of the single market, how should fishermen be adapting? The immediate reaction might be that the Community is to be treated as one state and therefore fishermen from any member-state fish unstopped in any Community fishing waters. This will not be, however, the case, for the breaking down of "internal frontiers" should not affect the control of fishing waters.

James Provan, former MEP for North East of Scotland, (now replaced by Henry McCubbin), has just called for the strengthening of the CFP before 1992. He was reported as saying:

> "The Common Fisheries Policy must be strengthened to ensure that the fishing industry can meet the challenge of a Single European Market. If our industry is to meet the challenge it is essential to produce quality products equal to those which may be offered by our competitors."(8)

He further called for hygiene regulations, to ensure that fish products could be traded freely throughout the Community, and for the reform of the structural policy to include improvements for the marketing and processing sector.

Apparently he sees unity of standards as a prerequisite to fish being freely traded. The quality has to be maintained so that once the barriers are down Scottish fish products will deserve the same benefit as any other product. It was not entirely clear, however, whether Mr. Provan saw 1992 as a "free for all" proposition.

It should be noted, however, that Mrs. Winnie Ewing, MEP for the Highlands and Islands and the only SNP member of the European Parliament, was reported as saying in June 1988 that the Single

European market of 1992 would not affect TAC's quotas and access agreements in the CFP. She expressed concern that 1992 might turn the fishing industry into a "free for all". She is reported to have told a meeting of the European Parliament's fisheries sub-Committee:

> "Whatever happens the limitation on access to waters of the Member States must be continued until 31 December 2002 and well beyond, preferably forever. It would be suicidal for Europe to consider declaring a total liberalisation of fishing activities within the framework of the internal market - particularly when fishing capacities currently exceed resources by 20%."(9)

At the same meeting the German President of the Council of Fisheries Ministers is reported to have assured her that at a Council meeting only one member-state had called for a "free for all" from 1992 and a majority had opposed the idea. He apparently also added that the CFP would continue until at least 2002.

James Provan, in an article in the Press and Journal Newspaper (August 1988), (10) has pointed out how the fishing industry in the North East of Scotland is one of the most vibrant in the whole European Community. With fish landings in 1987 totalling more than £126 million in Aberdeen, Fraserburgh and Peterhead alone, the North

East captured nearly 50% of the U.K. total. He admitted, however, that fisheries conservation law is still not well enough enforced, this may mean he is agreeing that a free for all is unworkable.

He referred again to the completion of the single market and in particular to the necessity of being able to keep the catch in good condition and backed up by efficient landing, processing and marketing sectors. He pointed out also that 1992 means not just finding new opportunities on the European continent. It is the year when the policy will come up for review, with Spain and Portugal coming to the end of their transitional period of Community membership.

For the Scottish fishing industry there seems to be little reason for immediate anxiety. If the views of ex-MEP James Provan are correct and the fishing industry is rejuvenated, one must conclude that the single market could indeed be of benefit to Scottish fishermen. Added to this are the benefits which are likely to arise from the new provisions dealing with the environment.

There can be little doubt that the loss of James Provan to the European Parliament is a disadvantage for Scottish fishermen. He was

able to represent the industry well and his vision of 1992 would have been a great asset to debates in the EP in Strasbourg. So what is the role of the European Parliament under the SEA?

The SEA provides generally for majority voting in the Council of Ministers by an amendment to Article 149 and more economic and social cohesion through the use of the Community structural funds. There is to be (11) "co-operation with the European Parliament." The European Parliament must now be consulted on internal matters. The European Parliament (12) has to be consulted for opinion and the position of the Council of Ministers has to be communicated to the European Parliament.

It must be assumed from the SEA that the European Parliament, although not given the power that it wanted, will now become of greater importance in the future. Therewith, the MEPs in Scotland and in England with fishing interests will take on a new importance for lobbying purposes.

The attitude of the European Parliament to the SEA has been made official. The European Parliament created a "Temporary Committee" to adopt a resolution "Making a success of the Single Act." This was adopted in May 1987.(13) It stated that in support of the Commission's comprehensive study the European Parliament declares:

> "the system of financing must offer adequate guarantees for the achievement of the Single Act's objectives by insuring and strengthening the Community's financial autonomy."

It would appear therefore that the European Parliament has thus welcomed the Act and no doubt the MEPs will exercise the additional powers which they now are acquiring.

It is submitted that as the European Parliament has increased its powers, any representations made to the European Parliament will be likely to have an influence in the future. It should be noted, however, that William Brown, in a recent article,(14) has stated that "Parliament still exercises an essentially consultative role." He adds, "However neither the Council nor the Commission are free any longer to disregard the Parliament's opinion." Mr. Brown appears to be understating the case: the consultation, it is suggested, will have to be wider and the embarrassment to the Council of a major disagreement with the Parliament will surely be profound. A summary of the provisions changing the role of the Parliament is relevant. These provisions relate to the new relationship between the Council and the Parliament, and to a lesser extent the Commission. As referred to earlier in Chapter 2 (p.50), the SEA details the

provisions amending the Treaty establishing the EEC; Section 1 details the Institutional Provisions; Chapter 2 brings in the new majority voting on the Council:

> "The Council shall [act] by a qualified majority on a proposal from the Commission, in co-operation with the European Parliament and after consulting the Economic and Social Committee."(15)

The subsequent paragraphs (16) in that same section continue to bring in amendments concerning "Co-operation with the European Parliament."

Article 7 of the SEA (17) describes in detail the new legislative process and describes the European Parliament's new involvement. It also introduces the powers for the Council of Ministers (18) acting on a qualified majority. This has been described by many as being the best and quickest route to a successful single market. It has been the custom to lobby the politicians on fisheries policy for years, but now the system has been changed and hence an understanding by fishermen of the relationship between the Parliament and the Council is going to be important.

The power, therefore, is there, but it will require organisation by

the MEPs for it to be wielded effectively. What is of particular importance in relation to the Parliament's powers is the change in relation to Association Agreements:

> "The agreements shall be concluded by the Council acting unanimously and after receiving the assent of the European Parliament which shall act by an absolute majority of its component members."(19)

Fishing agreements and association agreements involving fishing interests cannot therefore now be entered into without the prior consultation of the Parliament. It appears that the Parliament (SEA Article 8) can now block "any European State" from coming into the European Community. Before the SEA and under Article 237 of the EEC Treaty the European Parliament had no such power. An MEP from a fishing constituency would hence surely carry considerable weight in a debate relating to the subject. The effect of a member-state entering the Community for the first time with substantial fishing interests would probably bring the forum of debate into the Parliament, as suggested by Mr. Provan.

Turning to the Commission's powers it must be noted that these are extensive. As a recent example, the Commission told U.K. fishing

departments that fishing for sole in the Irish Sea is now prohibited.(20) It is now an offence for any U.K. vessel to retain sole caught in this area. The Council now confers:

> "on the Commission, in the acts which the Council adopts, powers for the implementation of the rules which the Council lays down."(21)

This would appear to give considerable powers to the Commission. The Council does not retain control but the Council:

> "may impose certain requirements in respect of the exercise of these powers."(22)

The Council's decision of 13 July 1987 formalised Article 1 and confers general powers on the Commission for the implementation of the rules laid down. The Commission's powers in fisheries matters will now be therewith further increased.

Perhaps the most discussed change incorporated into the SEA is the increased use of majority voting in the Council of Ministers. How will this affect Scottish fishermen in a European context? As already shown, the fishermen's lobby is important. With the change in the powers of the European Parliament it is more likely to be

rewarding to use MEPs for lobbying purposes in the future. In the past, however, the Council of Ministers has been the key place for decision making and will continue to be so.

These developments appear to give vital protection to fisheries and safeguard conservation provisions. An example of control, recently exercised, can be seen in an article in The Scotsman Newspaper (23) reporting that the Scottish fleet is under threat of an EEC Directive aimed at reducing the tonnage of the British fishing fleet by 1991. Whether or not the Directive in question is worded so that the CFP is generally protected from every side remains to be seen, but the references (below) to the protection of the environment go further.

The next paragraph empowers the Commission or indeed any Member State to:

> "bring the matter directly before the Court of Justice if it considers that another Member State is making improper use of the powers provided for in this Article."(24)

Fundamental for fishermen must be the section devoted to the environment. It states that a new title shall be added to Part 3 of the EEC Treaty. The new addition refers to the action to be taken by the Community:

"Action by the Community relating to the environment shall have the following objectives":

"1. To preserve, protect and improve the quality of the environment";
"2. To contribute towards protecting human health";
"3. To ensure a prudent and rational utilisation of natural resources."(25)

Like other changes and wording in the SEA, these words could hardly be more general but they must clearly strike directly at the CFP. The policy of conservation continues:

"Action by the Community relating to the environment shall be based on the principles that preventive action should be taken, that environmental damage should, as priority, be rectified at source and that the polluter should pay. Environmental protection requirements shall be a component of the Community's other policies."(26)

This paragraph may have profound significance. It is this that could lead to the member-states or the owner of the vessel which causes the pollution by oil or any other substance to be held responsible for the cost of clearing up that pollution. It will be surprising if, in fact, when the next serious accident causing pollution happens, there

would not be tough demands imposed on the offenders. There is a considerable body of opinion which believes now that it should be the owner of the vessel who should become personally liable. Further, referring back to Chapter 2 on EEC law, we should remember here the apparent additional personal responsibility being brought into the legislation, namely with respect to fishermen "or, if necessary any other responsible person." The theme is clearly developing. The recent pollution that happened at Merseyside with the breaking of a Shell pipeline may prove to be a test case. Spokesmen from Shell have been noticeably cautious over their comments on the damage inflicted. It is thought that a claim could arise from this, the burden of responsibility being placed on the owner of the pipeline. It is not an uncommon view that this type of disaster must be accounted for and this may give fishermen a type of claim for loss by pollution which has hitherto not been exercisable.

Article 130R SEA takes the environmental theme further:

> "In preparing its action relating to the environment the Community shall take account of (i) available scientific technical date; (ii) environmental conditions in the various regions of the Community; (iii) the potential benefits and costs of action or of lack of action and (iv) the economic and social development of the Community as a whole and the balanced development of its regions."(27)

The reference to "the economic and social development of the Community as a whole and the balanced development of its regions" must surely be a direct recognition that help must be given to the poorer areas, including areas where there is a special economic dependency on fishing. The reference to "scientific technical data" is important. Recently, (28) EEC Fisheries Ministers were reported as being likely to accept "scientific advice" to reduce the mackerel catch by fifty per cent. It was reported that quotas are normally implemented from 1 January but scientists were claiming that depletion of the stocks is so severe that a 50% cut should be made earlier. The mackerel catch off the Scotland West coast was worth £10 million last year.

In the same article a problem is highlighted. Mr. John Pearson, the European Commission's Director of Resources is reported to have said that his impression was that fishermen do not always trust the information provided by the Commission.

In another article in The Scotsman, Mr. Provan said:

> "I obviously will want to consult the professional men of the industry as to their view of this and there will be many discussions before decisions are taken in December for next years catch."(29)

He said he would examine the Commission's evidence. It is interesting to speculate as to precisely why Mr. Provan intervened like this. Is he trying to explain to constituents that they really must get used to the Commission's findings being acceptable? Perhaps MEPs see themselves in new roles with new powers.

Whatever the answer, "scientific data" is going to be followed most carefully and this appears to be a good example of drastic action being taken strictly in line with the terms of the SEA and the part related to the environment.

Another recent report in The Times (30) provides a good example of how scientific data is of importance and how it leads to conflicts of interest. The report says that many North Sea fishermen could be ruined financially by proposed cutbacks in the size of the haddock catch according to the SFF.

The SFF has stated that limits proposed by the EEC could mean the fleet having to tie up in part for lengthy periods. The United Kingdom is allowed 78% of the EEC's total haddock catch, but under new proposals, the allowance for the EEC and Norway could be cut from 185,000 tonnes to 68,000 tonnes. The U.K. allowance would be 48,000 tonnes. These proposals come in response to advice from scientists who say that catches of haddock and cod must be reduced to conserve

stocks. A spokesman from the SFF said that the economic and social repercussions of such limits would be serious and could lead to a flood of imports.

Thus a conflict arises between the prosperity of the fishermen and the survival of the fish. The Commission will clearly apply strict rules, when scientific data is available to show that the fish are at risk.

Apparently strong controls and rules relating to the environment exist but the above reference should be read in conjunction with the apparent recognition of powers vested in each member-state:

> "the protective measures adopted in common pursuant to Article 130S shall not prevent any Member State from maintaining or introducing more stringent or protective measures compatible with this Treaty."(31)

It is interesting to refer again to an article by the late Lord Fraser of Tullybelton (32) where he pointed out that although the Community intended to legislate with enthusiasm on the subject of the environment, the House of Lords Select Committee has described a Directive on "Dumping at Sea"(33) to be "ill-conceived" and "inappropriate".

Perhaps Article 130T SEA will not be incompatible with the law we have established from an examination of cases in Chapter 3. It is unlikely that Article 130T SEA will be read supporting the opinion that a member-state will be able to intervene on conservation matters where "irreparable damage" was seen by the member-state to be inflicted against the common conservation policy.

Further recognition of each member-state's own autonomy is found in the same sub-section relating to the environment:

> "the previous paragraph [being Article 130R] shall be without prejudice to the Member States' competence to negotiate in international bodies and to conclude international agreements."(34)

We have already learned that the member-states are tied into Community international treaties and this paragraph can be regarded as fully recognising the ability of the Community to negotiate international treaties.

The final paragraph dealing with the environment (35) gives member-states powers to be "more stringent" with the protective measures than the rest of the provisions of the SEA.

What conclusions, then, do we draw from our analysis of the Single European Act? Will Scottish fishermen, as we go into the 1990s, be sufficiently well protected or will the "internal market" competition make matters considerably more difficult for them?

The first, and perhaps simplest, conclusion that must be drawn is that careful representation to the Council of Ministers together with more careful representation to the European Parliament must be the policy for the future for fishermen, after the implementation of the SEA the balance of power has slightly changed. Publicity will become even more essential and pockets of activity throughout the United Kingdom must become more organised since it is likely that an efficient representation to the Minister of Agricultural and Fisheries in the United Kingdom may be insufficient for the future.

The second conclusion is less obvious: it is economic. Business should improve through efficiency but Scottish fishermen must appreciate the changes that will arise. The internal market will become more competitive and in this respect it may be necessary for the Commission to legislate to protect the fish market as suggested by Mr. Provan. The purpose of encapsulating the views and opinions (as expressed by distinguished Europeans) is to show the variety of ideas and thinking with people's visions of 1992. It will be difficult for industry to keep up with the changes and it will be no easier for the Scottish fishing industry.

The third conclusion that can be drawn is again simple. The conservation problems throughout the European Community, and indeed throughout the world, are of paramount importance. The SEA would appear to do nothing to damage the conservation regulations. Indeed it appears to encourage conservation. When the United Kingdom or Scotland has a problem with conservation, one may wonder if it would be possible to invoke Article 36 of the EEC Treaty for protection of the environment, by notifying the Commission of the problems.

The Commission's additional powers should have little effect on the present situation, but it does seem that the enhanced powers of the Members of the European Parliament could be of assistance. Scottish fishermen will have to exercise a much greater role in lobbying their MEPs, who in turn will be able to exercise their powers with respect to both internal and external agreements.

In addition to this, it would appear that Article 130A of the SEA applying to economic cohesion will be no disadvantage to the continuation of the payment of generous grants. In a report in the Glasgow Herald,(36) it was stated that Scotland is to receive £760,000 from the Commission for nine agricultural and fisheries projects. A grant of over £253,000 is to go to a company for the modernisation of fish processing facilities at Fraserburgh. The same report said the United Kingdom was to receive aid totalling £3.46m for twenty seven projects. In such a context, lobbying of Government

ministers will have to continue. The conclusion is, therefore, that there should be no dramatic change with the implementation of the Single European Act, but that Scottish fishermen should be ready to lobby more effectively their MEPs. It may well be, of course, that the MEPs will appreciate the benefits which will arise giving guidance to their constituents.

Footnotes to Chapter 5 - The Single European Act

1. The Berlaymont European Community Law Office published paper dated 31 August 1986 entitled "The Single European Act: Its implications for the internal market and for the development of the European Community". The Single European Act. Bulletin of the European Communities Supplement 2/86.

2. The Single European Act. Bulletin of the European Communities supplement 2/86, p. 1. A copy of the Single European Act is attached to the "Appendices No. I".

3. Title 1, Common Provisions, Article 1, par. 1.

4. The Co-operation Procedure is introduced by Title 11, Chapter 2 Section 1, Article 6, pars. 1-3.

5. Title 11, Chapter 11, Section 1, Article 8.

6. Ibid. Title 11, Section 11, sub-Section 1 "Internal Market", Article 13.

7. SLEG Newsletter, July 1989, with reference to a number of measures: 279, number adopted by July 1989: 119, number on Council table: 113 (10 common position 6 partial adoptions); awaiting Commission adoption: 47.

8. Extract from Aberdeen Press and Journal, 4 October 1988.

9. Extract from Aberdeen Press and Journal, 22 June 1988.

10. Reported in Aberdeen Press and Journal 2 August 1988. James Provan clearly sees the role of the MEP and the whole Parliament as important. In the same article he suggests that the Parliament will become the forum for debate on the future of the CFP and focusing attention on how the current policy can be strengthened:

> "The debate must begin so that the views of individual fishermen, owners, merchants and processors can be heard alongside those of Government and Commission".

He then refers to the critical point:

> "With demand for fish rising worldwide the prospects are promising. However, the full realisation of these prospects depends on the willingness of all those involved in the industry to work together to secure long-term future of our fisheries resources".

11. Article 7, Article 149 of the EEC Treaty is replaced by a new Article 149.

12. Article 7, par. 2.

13. The full debate in the European Parliament is reported OJ Debates of the European Parliament, May and June 1987 No. 2-352/96.

14. The Journal of the Law Society of Scotland, Volume 32, 9 September 1987, p. 337. William Brown is a Scottish Solicitor practising in Brussels.

15. Title 11, Chapter 2, Section 1, Institutional Provisions Article 6, p. 8, par. 8.

16. Pars. 4-7.

17. Ibid. Article 7, p. 9, par. 2(a).

18. Ibid. Article 7, p. 9, par. 2(a).

19. Article 9.

20. This was reported in the Press and Journal 2 September 1988.

21. Article 10, p. 10. Amending Article 145 of EEC Treaty.

22. Ibid. Article 10.

23. Scotsman 11 July 1988. It was reported that the Sea Fish Industry Authority which administers the grant scheme was being asked to consider favourably for immediate approval grant applications which must be technical and financial. The article also said the industry appreciated the need to reduce the tonnage.

24. Ibid. Article 18 supplementing Article 100A, p. 12. par. 4.

25. Sub-Section VI - Environment Article 25 add Title 8 VII Article 130R, p. 16, pars. 1(i)-1(iii).

26. Ibid. p. 16, par. 2.

27. Ibid. p. 3, par. 3.

28. Article in Glasgow Herald on 9 June 1988. The Scotsman 9 June 1988. In the Glasgow Herald, Mr Provan was reported to claim that the restrictions on fishing for mackerel off the West coast would hit almost half the fleet and severely reduce its earnings.

29. Article in The Scotsman 9 June 1988.

30. The Times 25 November 1988.

31. SEA Article 130T, p. 16.

32. Ibid. Journal of Law Society of Scotland March 1987.

33. Proposed Directive 8805/85.

34. Ibid. Article 130R, p. 16 last paragraph.

35. Ibid. Article 130T, p. 16.

36. Glasgow Herald, 2 July 1988.

PART III

CHAPTER 6

CONCLUSIONS

The Scottish fishing industry, a topic of underlying concern in the present thesis, has had to assert its place and promote its interests within a framework laid down by the CFP. It has had to compete and remain competitive in relation to other fishing industries in the EC. From an economic angle, it can be said that the Scottish fishing industry has done well, at least as satisfactorily as the fishing industries of the other regions of the EC. This situation is not least due, as the contents of the present thesis show, to the framework established by the legal order of the EEC, the foundations of which may be defined as the rule of law and the due process of law.

While this legal framework has thus far been developed and has functioned satisfactorily in agreement with the main objectives of the EEC Treaty and the CFP based on it, it has not been able to supply legal solutions to all the challenges of CFP, if only legal solutions are needed to meet the economic, environmental and other challenges in question. The law of the CFP has been able to assert and consolidate the principles of non-discrimination (cf. EEC Art.

7), fair standard of living for the fishing communities (cf. for example, EEC Art. 39(1), coordination of the interests of the EC as a whole with the interests of individual member states, effective implementation of consultation procedures between the EC Commission and the governments of the member states, and the conservation of Community fishing resources. Owing to the complex and evolving nature of EEC law, which also includes the law of the CFP, the implementation of the law has needed further testing and consequent clarification in the light of the authority of the ECJ under EEC Article 164. In this respect the contribution of the ECJ to the law of the CFP has been very valuable. More than that, the ECJ has applied, as in other areas of EEC law, a judicious and dynamic approach to the interpretation of the law, keeping in mind subtle legal and other technicalities involved in each of the cases submitted to its evaluation in the form of a preliminary ruling under EEC Art. 177 or on the basis of other procedures.

With the completion of the internal market at the end of 1992 and the progressive implementation of the SEA, the scene of the CFP will expectedly change. An important element in this respect is, beside conservation measures, concern for and protection of the environment also in conjunction with the CFP. This will possibly involve new policy approaches, new substantive legal rules, new monitoring and supervisory procedures and, not least, supportive consensus by the fishing communities throughout the EC. With respect to such

consensus there seem to exist very serious difficulties, involving the clash or coordination of the fishing industry of the EC as a whole with regard to the conservation (non-depletion) of threatened fishing stocks in the North Sea in particular, on the one hand, and regular income for individual fishermen from regular fishing on the other. Already six years ago in 1985 there had been a serious warning of threat to salmon, to which a serious threat has been added to cod and haddock in particular. In November 1990 (The Times, Nov. 20) "drastic action" was indicated "needed to save fish stocks", because four years of cuts in fishing quotas had failed to prevent stocks of cod and haddock from falling to "levels that may put them beyond recovery". The Commission has acted with the imposition of measures restricting fishing to a very reduced number of days per month with the use of prescribed gear in conformity with Community conservation schemes. On February 14, 1991, in the media a Scottish fisherman was describing how the prescribed measures were being by-passed with the use of narrower undersized mesh for fishing gear, and how instead of landing the prescribed maximum of 50 boxes a day, up to 300 boxes of catch were being landed by Scottish fishermen, as the only possible way for them to secure their economic survival. As a result much small fish was also being caught, damaged and wasted back into the sea, as a direct threat to the badly needed conservation of stocks. Therewith the capability of law to secure the interests of the fishing communities in Scotland seems to have been exposed to scrutiny. Is this, however, a matter really wholly

lying in the realm of law and capable to be regulated by law? The question cannot be totally answered in the negative or the affirmative, for elements of right policies, adequate political support by the fishing communities, and adequate administrative monitoring, supervision and enforcement measures have each to make their contribution. This is a highly complicated challenge which cannot be met solely by Regulations, or preliminary rulings and judgments by the ECJ. An integrated approach from the angles of policies, consensus and effective administrative measures is necessary. Were it not for this serious challenge to the CFP and the protection of Scotland's fishing interests thereunder, the present conclusions on the situation in general and on the role of law in it would have been more positive. Nonetheless, it cannot be denied that Scotland's fishing interests have fared well under the protection given by the CFP thus far; and if the real or latent threat to fishing stocks in the North Sea, as a vital area for the livelihood of Scottish interests, can be met as successfully as the challenge of the coordination of Scottish fishermen's interests with the interests of other fishermen within the EC, then one may look with confidence into the 1990s and into the 21st century. Chapter 4 dealing with the situation of the law of mainland Scotland showed the potential importance of Scotland and possibly other member-states with a similar situation. It was not intended to demonstrate any part of the development of the CFP, but rather to show the interesting conflict of interest which might develop as a result of the ownership

of the seabed. During recent years the fishing industry has changed rapidly in Scotland and it is interesting to envisage what could happen at European level as the industry continues to change. If the Crown Commissioners were to decide rent was to be charged for the water adjacent to the land, it would be a unique situation. We discussed the possible arguments arising out of Scottish waters. It was particularly interesting to note in the last case of Agegate that the ECJ specifically referred to and upheld the point of law about the fishermen's standard of living being reasonable. As for the protection of Scottish interests at an international level, there is no reason for concern, as these interests, as part of the overall interests of the EC as a whole, are well protected within the framework of international agreements and instruments in which the EC participates as a party.

Turning to the ECJ, we have seen that fundamental principles of EEC law will always be upheld, whether it be forbidding any form of national discrimination or ensuring that conservation measures are always enforced. We referred to the matter of judicial precedent but we have seen how case law is developed with reference to other cases.

The surveyed cases show the application of established legal principles. The power of the member states to protect their fishing interests in their own waters seems to have been eroded though not totally. If there is a matter of conservation at issue, there must be

a reference to the Commission. The cases show how the role of the Commission has developed. If the Commission objects to any action by a member-state and if there have been insufficient discussions with the Commission, the Commission's views are likely to be upheld. The obligation of keeping the Commission informed is absolute. The responsibility for development of the CFP is going to lie with the Commission with the ECJ playing a more supportive role.

The external agreements are a recognition not just by the European Community but outside states that world fisheries must be carefully controlled. As such they are probably no less important than internal EEC Regulations. The ECJ has upheld the power of the Commission to negotiate external agreements, justifying the conclusion that the Commission has substantial powers indeed. All this is to the benefit of the long term U.K. fishing interests, including those of Scotland, just as it is to the benefit of every member state.

This takes us back to Mr. Provan's remarks about modernising the Scottish fleet and all the aspects of the fishing industry so that Scotland can take full advantage of the Single Market in 1992.

The world must not suffer from over-fishing. The tight rules to control conservation must therefore play a vital role for Scotland's fisheries: fishermen may complain that their profits are insufficient

from time to time, but it must be assumed that the Commission and indeed the member states when changing the CFP will ensure the preservation of local stocks in the long-term interest of all the member states. It may well be that the tightening of the rules may cause some anguish. If we conclude that Mr. Provan's ambitions for the modernisation of the fishing industry to cope with the single market are correct, we must assume in an international and world context that the other trading blocs will do the same.

The CFP, although far from being perfect, is reasonably clear as to its structure, and the Community itself and the case law show clearly that conservation is of paramount importance.

With the Single European Act already in force and indeed with the CFP about to be re-negotiated around 1992, the internal market and the progress towards it will become, for every member state, a matter of careful negotiation. One may conclude that Scotland, comparable as to fisheries with member state with a substantial fishing industry, is as well protected as it could reasonably expect to be and complaints within the industry will have to be particularly well founded to achieve any major changes.

At the beginning of our conclusions we stated that the CFP and the move towards 1992 contained all the ingredients of conflicting interests and the need for their coordination. A recent example of

this was reported on 12 December 1988. Scotland's North Sea fishermen faced the loss of £40 million in 1989 after a new clampdown on fishing quotas was agreed by EEC ministers. EEC scientists were reported to have recommended a dramatic cut in haddock catches; this has been accepted. The Commission have to act when the scientists advise that there will be a shortage arising of any species, and the Council of Ministers will act in accordance with the necessities. Some individuals in the industry may inevitably be hurt.

The leader in the Financial Times of 13 December 1988 had this to say:

> "The British fishermen's demands for compensation for lost income are understandable and there may be a case for aid if the men cannot find alternative fishing or other income as the season progresses. But compensation either for decommissioning boats or laying them up, which fishermen's organisation are also seeking, should be paid only as part of a rigorously applied and realistically targeted scheme to reduce fleet sizes overall.
>
> The European Commission's target of a three per cent reduction over five years is too small and needs to be

> increased. Meanwhile Member States, which are responsible for deciding what methods to use to reach EC targets, must take fleet reductions much more seriously.
>
> Mr. John MacGregor, Britain's Minister for Agriculture and Fisheries, has spoken of the possible collapse of the North Sea haddock and cod stocks. Unless he and his fellow EC Ministers are prepared to be tougher on fleet size, many more fish species could be at stake."

It appears that public opinion sees the necessity of a structured CFP and it will be of considerable importance to Scottish fishermen as to how the CFP will be restructured.

Lastly, attention should be drawn to the continued importance of the ECJ and the contribution it will continue to make to see that in the interpretation and application of Community law, for our purpose EEC fisheries law, the objectives of the EEC and the maxims of the rule of law and due process of law are maintained. As a result, while political bickering, law breaking and other complications by fishermen, and possibly by member states may from time to time trouble the relatively clear waters of the EC CFP, the economic, political and ultimately legal challenges of the evolving CFP will be

mastered also when the threshold of the completion of the internal market on January 1st 1993 is crossed and the progressive implementation of the SEA continues.