



PRIME MINISTER.  
When you discussed fisheries policy  
with Ministers in June, you  
commissioned this paper.

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Ministry of Agriculture, Fisheries and Food  
Whitehall Place London SW1A 2HH

From the Minister's Private Office

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Bryan Cartledge Esq  
Private Secretary  
10 Downing Street  
London SW1

1 August 1979

Dear Bryan,

COMMON FISHERIES POLICY

In your letter of 19 June you said that the Prime Minister had asked for legal advice on the effect of the Treaty of Accession on our conservation policies. I now attach a paper that my Minister has approved. It has been cleared with the FCO, the Scottish Office and the Lord Advocate's Department but it has not yet been seen in its final form by the Attorney General and the Solicitor General, though it has been sent to them.

I am sending copies of my letter and its enclosure to Paul Lever (FCO), Jim Buckley (Lord President's Office), Bill Beckett (Law Officer's Department), Kenneth McKenzie (Scottish Office) and Martin Vile (Cabinet Office).

Yours sincerely

G R Waters

G R Waters  
Principal Private Secretary

FISHERIES : LEGAL ASPECTS

1. This paper summarises the legal position on certain fishery questions raised at the Prime Minister's meeting on 15 June and draws conclusions for our negotiating strategy. The Annex to this paper analyses the legal position in detail. Both paper and annex have been agreed by the Law Officers.

CONSERVATION

2. The effect produced by Community law and in particular the Treaty of Accession on fisheries conservation policies can be summarised as follows -

- (a) When the Community has exercised powers in relation to any matter, a Member State cannot exercise its own powers in any way which conflicts with the Community measures;
- (b) The Community has power to take fishery conservation measures; but it has not yet exercised that power on any comprehensive basis. When it does so, Member States would have no power to adopt national measures, even in an emergency, in a field covered by a Community measure unless that power had been expressly conferred in the future Community legislation;
- (c) The right of a Member State to take national conservation measures therefore survives for the time being; but that right has been subjected to certain restrictions -
  - (i) The Member State must seek the approval of the Commission beforehand;
  - (ii) the measures must be interim; they must avoid discrimination; and they must be appropriate to ensure the protection of resources; and
  - (iii) the measures must not jeopardise attainment of the objectives of the EEC Treaty.

3. The precise scope for national conservation measures and the precise restrictions that now apply are matters actually or prospectively in issue in the European Court. The Commission, supported by certain other Member States (and with the tacit approval of the rest), claims that national measures require its actual consent. The United Kingdom claims that the Commission is entitled only to be consulted.

ACCESS

4. Community law requires a Member State to give equal access to and use of fishing grounds in its maritime waters to fishing vessels of other Member States, subject to certain transitional derogations (to 31 December 1982) allowing Member States to maintain (i) an exclusive 6 mile belt benefiting their own fishermen and (ii) a special regime in specified areas in a 6-12 mile belt. But if the Community does not take a decision on access to waters by 31 December 1982, the principle of equal access will apply throughout the waters of Member States (subject always to conservation requirements). This would mean in theory that vessels from all Member States could fish in all the maritime waters subject to our sovereignty or jurisdiction - as it is commonly called, "up to the beaches".

CONCLUSIONS FOR POLICY

5. On conservation, the Commission and the Eight have shown themselves determined to limit our right to take national measures. A realistic view must be that they are likely to have some success in this aim in the cases actually and prospectively before the European Court. The precise consequences of any decision would depend on the terms of the Court's judgment (and it is a difficult body to anticipate); but the most likely of the possible adverse outcomes might be that -

(i) some of the measures adopted before 31 December 1978 will be found contrary to Community law for breach of one or more of the restrictions mentioned in paragraph 2(c) above;

(ii) some of the measures adopted after 31 December 1978 (including measures which came into force as recently as 1 July) will be found contrary to Community law either for breach of those restrictions or on the basis that if national measures can be adopted at all after that date, they must have the Council's or the Commission's prior consent.

*see Solicitor  
General's comment  
at Flag B.  
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(The significance of 31 December 1978 is that it is the date by which, under the Treaty of Accession, the Community was required to take its own conservation measures - which it has not done.)

6. The consequence of adverse decisions on any such lines would be that the measures found contrary to Community law would become unenforceable in our domestic courts and that we would, effectively, be precluded from adopting any further national measures (even if based on scientific advice). The result could be to create a serious gap in the law governing fisheries conservation in our waters; and in consequence the pressure on us to protect the stocks by agreeing to Community regulations, in replacement of the invalid national measures, would become very great.

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7. Moreover the only further important measure which the United Kingdom might contemplate (a 'one mesh per voyage' rate) would undoubtedly be blocked at once by Court action. So we have already extracted such negotiating advantage from the 'threat' posed by national conservation measures as is possible. The conclusion must be that in legal and practical terms we would be better served by a Community-wide policy.

8. On access, our political assessment is that the other Member States do not expect 'equal access' as described in paragraph 4 above to come about from 1983. Almost certainly they expect that some kind of special arrangements within a 12-mile belt will continue more or less indefinitely. Nevertheless as the deadline of 31 December 1982 approaches, the negotiating position will be affected by the general realisation of the pressures on us to make arrangements for 1983 and beyond.

9. In summary, and taking into account only the fisheries aspects, our negotiating position on the Common Fisheries Policy can be expected to get weaker as time progresses because of the developments in the legal position described above.

Ministry of Agriculture, Fisheries and Food  
1 August 1979

ANALYSIS OF COMMUNITY LAW ON FISHERIESCommunity Law before Accession

1. Article 38 of the EEC Treaty extends to agricultural products (including the products of fisheries) the Treaty's rules for the establishment of a common market. The objectives of the common agricultural policy, as set out in Article 39, include assuring the availability of supplies. A common organisation of the market in fish was set up by Council Regulation (EEC) No.2142/70, as supplemented by Regulation No.2141/70 establishing a common structural policy for the fishing industry. The content of these Regulations was settled shortly before negotiations for accession started. Regulation No. 2141/70 gave the Community powers to lay down common rules for fishing and to take conservation measures where there was a risk of over-fishing; and it required Member States to co-ordinate their own structural policies and also to allow fishing vessels of other Member States to have equal access to and use of fishing grounds in their maritime waters, subject only to transitional protection for inshore fisheries (Articles 1 to 5).

2. It is a settled principle of Community case law that when the Community takes measures in relation to any matter, any right of a Member State to take measures which relate to the same matter and which could conflict with those measures is automatically abrogated. Further, Article 5 of the EEC Treaty requires Member States to abstain from any measure which could jeopardise attainment of the Treaty's objectives.

3. The Treaty of Accession did not alter the terms of Regulation No.2141/70 but made further provision as described below.

Effect of the Treaty of Accession

4. The Treaty of Accession did three things -

- (a) it gave Member States a 10 year transitional period (to the end of 1982) in derogation of Regulation No.2141/70, enabling them to restrict fishing within a six mile coastal limit (or twelve miles in certain cases) to "vessels which fish traditionally in those waters and which operate from ports in that geographical coastal area" (Articles 100 and 101);
- (b) it required the Council, before 1979, acting on a proposal from the Commission, to "determine conditions for fishing with a view to ensuring protection of the fishing grounds and conservation of the biological resources of the sea" (Article 102);

- (c) it required the Commission and the Council to examine provisions which could follow the transitional derogations (Article 103).

So there are two key dates -

- as respects the principle of access - (a) above - the end of 1982;  
as respects conservation measures - (b) above - the advent of 1979.

Other relevant provisions

5. As from 1 February 1976 Regulations No.2141/70 and 2142/70 were replaced by Regulations No.100/76 and 101/76. The main substantive provisions of Regulation No.101/76 followed those of Regulation No.2141/70; but this regulation omitted transitional savings for inshore fishing and it referred in its recitals to the need to take into account the derogations provided for in the Treaty of Accession. These Regulations represent the present Community fisheries regime.

6. Until the end of 1977, Member States adhered to the North East Atlantic Fisheries Convention (NEAFC) and were obliged to give effect to the Recommendations which the Commission appointed under that Convention issued from time to time. The UK's practice was to make subordinate instruments under domestic legislation.

The Hague Agreement and after

7. The Community had taken no major conservation measures of its own when at the end of 1976 the so-called Hague Agreement emerged. In form, this was a Decision of the Council, providing for the fishery limits of Member States to be extended to 200 miles. This action was taken by the Council after certain non-Member States (Iceland and Norway) had unilaterally asserted jurisdiction up to a 200 mile limit. The Community therefore sought to follow; and it was left to Member States to pass any requisite domestic legislation - which the UK did by enacting the Fishery Limits Act 1976.

8. Immediately before this Act came into force on 1 January 1977, the UK fishery limits had been 12 miles. The inshore fisheries covered by the transitional derogations mentioned in paragraph 4(a) above retained their former significance; and by the method of calculating baselines these could apply to substantial areas of water (like the Minch, off the west coast of Scotland). But

the derogations had no application in the waters outside the former 12-mile limit and running up to the 200 mile limit.

9. The Hague Agreement anticipated the difficulties that might be created by unilateral action on the part of the Member States in the field of conservation. The critical document is Annex VI. In form, Annex VI is a Commission statement to which the Council has recorded its agreement; but it represents a fully enforceable Community obligation. In substance, it did not confer any direct legislative authority on Member States. It recognised an existing legislative authority which it then restricted by stating that pending Community conservation measures, Member States would not take unilateral conservation measures. However (it continued) if no agreement was reached for 1977 within the international Commissions and if no Community measures were subsequently adopted, then Member States could, after seeking the Commission's approval, take unilateral measures which were interim, avoided discrimination and were appropriate to ensure the protection of resources. The Commission was to be consulted at all stages of the procedures.

10. In fact there has been no co-ordinated action as envisaged by Annex VI. No agreement was reached for 1977 within the international Commissions; and the Community has adopted only limited conservation measures. Since 1977, the UK has been taking conservation measures which either (a) were based on NEAFC Recommendations or (b) were justified by scientific advice given by ICES (the International Council for the Exploration of the Seas or (c) were unilateral. However, since Member States ceased to adhere to NEAFC it has become more difficult to justify UK measures based on NEAFC Recommendations, as there is no longer an obligation to comply with such Recommendations. Some of the UK's measures are being challenged either in the European Court (Case 32/79, which is likely to be heard late in 1979) or by way of Article 169 procedure (which will lead shortly to another case in the European Court).

#### Position of the parties

11. The UK's position at the beginning of 1977 was this -
- (a) fish stocks had become generally depleted through over-fishing;
  - (b) UK fishing vessels had been excluded from many of their traditional fishing grounds through the general extension of fishery limits to 200 miles;
  - (c) some 60% of Community fish stocks were in UK waters.

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The need for a high standard of conservation measures in respect of UK waters had therefore become urgent; but at the same time the UK was under pressure from other Member States whose fishermen needed to fish in UK waters in order to gain a livelihood. Moreover the UK may take a broader view of what constitutes a conservation measure than others would endorse - thus what the UK sees as a measure to conserve immature stocks may be seen quite differently by others. Case 32/79 may provide the Court's view on the proper content of a conservation measure; but at present this is a grey area.

12. The Commission bases its policies on the proposition that conservation powers are in the process of passing to the Community. It dislikes the present transitional fragmentation of legislative authority, which means that conservation measures may flow from differing sources - namely from Community action or from action by Member States. In particular, the Commission considers that this casts doubt on the Community's capacity to meet international obligations entered into with non-Member States. So the Commission regards the present powers of Member States as constituting the most transitional of derogations - and for this reason it lays great stress on the duty of consultation arising under Annex VI. The actual words of Annex VI are ".....the Member State.....will seek the approval of the Commission, which must be consulted at all stages of the procedures". The Commission reads this as requiring that its consent must actually be obtained to national measures; and it made a statement to this effect which was included in the minutes relating to a Council decision on fisheries adopted on 9 April 1979. The Commission's interpretation is not accepted by the UK; and a statement recorded this at the Council on 25 June 1979, when a further Council decision was adopted. (These decisions are mentioned further in paragraph 14 below.) In Case 141/78, France v UK, this very question is in issue in front of the European Court; and it arises again on the Article 169 procedure mentioned in paragraph 10 above.

#### Consequences of Community inaction

13. Whatever the political or other reasons may be for this, the Community has not been able to take conservation measures within the time limits contemplated by the Treaty of Accession and by Annex VI (paragraphs 4 and 9 above, respectively). The legal consequences are assessed below - taking Annex VI first because it is of more immediate consequence.
14. There is in fact a difference of opinion over Annex VI. The view preferred by the UK is that Annex VI (which does not itself contain any specific time limit) is capable of running on until it is superseded by measures which Article 102 of the Treaty of Accession required the Community to enact before 31 December 1978. The Community's powers under Article 102 are



likewise capable of running on even though that date has passed. The Commission's view, however, is that Annex VI continues in force not by virtue of its own intrinsic provisions but by virtue of a series of Council decisions taken successively on 19 December 1978, 9 April 1979 and 25 June 1979. The UK maintains that Annex VI remains in force irrespective of those decisions and, as already mentioned, has formally recorded disagreement with the Commission's view; but, for the moment, both routes lead to much the same substantive result.

15. As respects the time limits in Article 103 of the Treaty of Accession, again the Community's powers will run on even if the terminal date passes; but the transitional derogations for inshore fishermen will expire automatically on 31 December 1982. In that event Community law in the coastal belts will revert to the regime laid down by Regulation No.101/76 : this would mean equal access to and use of inshore fishing grounds by fishing vessels of all Member States.

#### Luxembourg Compromise

16. There is a risk that a majority of Member States might favour the adoption of Community conservation measures which would not represent a complete and effective conservation policy but which would be sufficient to abrogate all or some of the Member States' powers, as recognised by Annex VI, to adopt national measures. In this event, a Member State could invoke the Accords of Luxembourg (otherwise known as the Luxembourg Compromise). This is an understanding that where a Member State's vital interests are affected, the voting provisions of the EEC Treaty should not be used to ~~out~~-vote that Member State. It would be open to the UK, should the need arise, to invoke the Accords and refuse to accept a vote.

#### Further Considerations

17. The Community institutions may be disposed to argue that the eventual fisheries regime should reflect the position created by the EEC Treaty in general and the regime contained in Regulation No.101/76 in particular (including equal access to inshore fishing grounds). But nothing in the Treaty of Accession compels this. Certainly the new regime would control the future rights (if any) of Member States to introduce national conservation measures; but there is no legal reason why that regime should not incorporate (say) national powers to restrict fishing within a defined coastal belt.

18. But national powers would have to be framed in a way which respects settled Community principles. Thus to give Member States power to grant protection within a defined coastal belt by virtue of nationality alone would almost certainly be incompatible with the principle against discrimination on grounds of nationality (Article 7 of the EEC Treaty) - although Article 100 of the Treaty of Accession affords a sustainable precedent for according protection to vessels which have traditionally fished in particular waters and operated from ports in a particular coastal area.

### Conclusions

19. The analysis offered in this Annex leads to certain conclusions with implications for UK policy -

- (1) It could become increasingly difficult for the UK to maintain a separate position on conservation. In time proposals will be made for Community measures which would automatically displace national measures. It will be difficult for the UK to object to Community proposals and at the same time to assert the need for conservation. Progressively the UK will lose her freedom of manoeuvre and her right to take national measures.
- (2) Proceedings in the European Court must represent a continuing threat. Some Member States (particularly France) have pressed the Commission to institute proceedings against the UK in a variety of cases. The cumulative effect could in time be to undermine the UK's position - either because cases are lost or because the Court or the Advocates General utter unwelcome obiter dicta or simply because the multiplicity of proceedings creates an unhappy impression.
- (3) Although most of the Member States at present seem ready to contemplate some continuation of the present derogations after the end of 1982, this readiness may start to evaporate as that date - and with it the concept of equal access - draws nearer. They will become increasingly aware of the tactical advantage which this concept gives them in negotiation.

The general conclusion is that the UK's negotiating position will tend to become eroded with the passage of time.

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1 August 1979

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Although part of the Member States at present seem ready to continue some continuation of the present... since the end of 1982, this readiness may start to evaporate as that date... they will become increasingly aware of the tactical advantages which this would give them in negotiation.

The Federal Commission is that the UK's negotiating position will tend to become weaker with the passage of time.

Ministry of Agriculture, Fisheries and Food

1 August 1972