OPINION OF ADVOCATE GENERAL JACOBS

delivered on 24 September 1996 *

1. The present case is one of three cases referred to the Court concerning the implementation of economic sanctions against the Federal Republic of Yugoslavia (Serbia and Montenegro) in the context of the war in the former Yugoslavia. [1] Those sanctions included a ban on all exports, with the exception of certain essential commodities such as medical supplies, and a financial embargo. Centro-Com is an Italian company which was permitted to export certain medical products to the Republics of Serbia and Montenegro. Payments for those exports were to be made from an account held by the National Bank of Yugoslavia with Barclays Bank (London). Centro-Com did not however receive full payment because of a change in the United Kingdom's policy on releasing Serbian funds: because of new information suggesting abuse of the system of export permits the United Kingdom Government decided to impose the requirement that such exports be made from the United Kingdom, with a view to ensuring the effectiveness of the sanctions. In proceedings before the English courts Centro-Com challenges that change in policy, partly on the basis of Community law. The questions referred to this Court concern the effect of the Community's common commercial policy and the sanctions regulations adopted by the Council on a Member State's policy concerning payments for permitted exports.

Legal background

2. In the course of the war in the former Yugoslavia the Security Council of the United Nations adopted a number of resolutions requiring UN member States to take various embargo measures and other sanctions. [2] In Resolution 757 (1992), adopted on 30 May 1992, the Security Council condemned the failure of the authorities in the Federal Republic of Yugoslavia (Serbia and Montenegro) to take effective measures to fulfil the requirements of Resolution 752 (1992) demanding an end to the fighting in Bosnia and Herzegovina. It consequently adopted a trade embargo and a financial embargo.

3. The trade embargo was defined in paragraph 4 of Resolution 757 (1992), where the

* Original language: English.

1 — See Case C-84/95 *Bosphorus Hava Yollari Turizm ve Ticaret A. S. v Minister for Transport, Energy and Communications, Ireland and the Attorney General*, [1996] ECR I-3953; Case C-177/95 *Ebony Maritime*, [1997] ECR I-1111.

2 — See also my Opinion of 30 April 1996 in *Bosphorus*, cited in note 1.

Security Council decided, in so far as material:

'that all States shall prevent:

...

(c) The sale or supply by their nationals or from their territories or using their flag vessels or aircraft of any commodities or products, whether or not originating in their territories, but not including supplies intended strictly for medical purposes and foodstuffs notified to the Committee established pursuant to Resolution 724 (1991), to any person or body in the Federal Republic of Yugoslavia (Serbia and Montenegro) or to any person or body for the purposes of any business carried on in or operated from the Federal Republic of Yugoslavia (Serbia and Montenegro), and any activities by their nationals or in their territories which promote or are calculated to promote such sale or supply of such commodities or products'.

4. The financial embargo was defined in paragraph 5 of the resolution, where it was decided:

'that all States shall not make available to the authorities in the Federal Republic of Yugoslavia (Serbia and Montenegro) or to any commercial, industrial or public utility undertaking in the Federal Republic of Yugoslavia (Serbia and Montenegro), any funds or any other financial or economic resources and shall prevent their nationals and any persons within their territories from removing from their territories or otherwise making available to those authorities or to any such undertaking any such funds or resources and from remitting any other funds to persons or bodies within the Federal Republic of Yugoslavia (Serbia and Montenegro), except payments exclusively for strictly medical or humanitarian purposes and foodstuffs'.

5. As can be seen paragraph 4(c) requires notification to the Committee established pursuant to Resolution 724 (1991) in the case of permitted medical supplies. The general tasks of that Committee were set out in paragraph 5(b) of that resolution, which was adopted on 15 December 1991. There the Security Council:

'*Decides* to establish, in accordance with rule 28 of its Provisional Rules of Procedure, a Committee of the Security Council consisting of all the members of the Council, to undertake the following tasks and to report

on its work to the Council with its observations and recommendations:

(i) To examine the reports submitted pursuant to subparagraph (a) above [referring to Resolution 713 (1991)];

(ii) To seek from all States further information regarding the action taken by them concerning the effective implementation of the embargo imposed by paragraph 6 of Resolution 713 (1991);

(iii) To consider any information brought to its attention by States concerning violations of the embargo, and in that context to make recommendations to the Council on ways of increasing the effectiveness of the embargo;

(iv) To recommend appropriate measures in response to violations of the general and complete embargo on all deliveries of weapons and military equipment to Yugoslavia and provide information on a regular basis to the Secretary-General for general distribution to Member States'.

6. It appears that that Committee, commonly referred to as the Yugoslavia Sanctions Committee and consisting of representatives of States which are members of the Security Council, has developed into an important standing body for the day-to-day supervision of the enforcement of the sanctions. [3]

7. The Community took various measures aimed at giving effect to the resolutions adopted by the Security Council. In issue in the present case is Council Regulation (EEC) No 1432/92 of 1 June 1992 prohibiting trade between the European Economic Community and the Republics of Serbia and Montenegro, as amended by Council Regulation (EEC) No 2015/92 of 20 July 1992 (hereafter 'the Sanctions Regulation'). [4]

8. The preamble of the Sanctions Regulation refers to the dramatic developments in Bosnia-Herzegovina and to the intervention of the Republics of Serbia and Montenegro in the internal affairs of the Republic of Bosnia-Herzegovina. [5] It states that the Community and its Member States, meeting within the framework of political cooperation, have decided that measures have to be taken to dissuade the Republics of Serbia and

3 — See M. P. Scharf and J. L. Dorosin, 'Interpreting UN sanctions: the rulings and role of the Yugoslavia Sanctions Committee', *Brooklyn Journal of International Law* (1993), pp. 771 to 827.

4 — OJ 1992 L 151, p. 4 and OJ 1992 L 205, p. 2 respectively. The amendments broaden the permitted exports so as to include commodities and products for essential humanitarian need, thereby implementing Resolution 760 (1992) of 18 June 1992.

5 — See recitals one to six of the preamble.

Montenegro from further violating the integrity and security of the Republic of Bosnia-Herzegovina and to induce them to cooperate in the restoration of peace and dialogue in the region. [6] It subsequently refers to Resolution 757 (1992), establishing an economic embargo, and concludes that the Community's economic relations with the Republics of Serbia and Montenegro must be halted. [7] It states that the Community and its Member States have agreed to have recourse to a Community instrument, *inter alia* in order to ensure a uniform implementation throughout the Community 'of certain of these measures'. [8] The Sanctions Regulation was based on Article 113 of the Treaty.

9. The Sanctions Regulation provides, so far as material:

'*Article 1*

As from 31 May 1992, the following shall be prohibited:

...

(b) the export to the Republics of Serbia and Montenegro of all commodities and products originating in or coming from the Community;

(c) any activity whose object or effect it is to promote, directly or indirectly, the transactions mentioned under ... (b);

... .

Article 2

The prohibitions of Article 1 shall not apply to:

(a) the export to the Republics of Serbia and Montenegro of commodities and products intended for strictly medical purposes and foodstuffs notified to the Committee established pursuant to Resolution 724 (199[1]) of the United Nations Security Council, as well as the export to these Republics of commodities and products for essential humanitarian need, which has been approved by the said Committee under the simplified and accelerated "no objection" procedure;

...

6 — See the seventh recital.

7 — See the eighth and ninth recitals.

8 — See the 10th recital.

(c) any activity whose object or effect it is to promote, directly or indirectly, the transactions mentioned under (a) ... ;

... .

Article 3

Exports to the Republics of Serbia and Montenegro of commodities and products for strictly medical purposes or for essential humanitarian need as well as foodstuffs shall be subject to a prior export authorization to be issued by the competent authorities of the Member States.

... .'

10. The Sanctions Regulation contains no explicit provisions on the financial embargo or on payments for permitted exports.

11. In the present case there is also argument concerning the Community's general rules on exports. Council Regulation (EEC) No 2603/69 of 20 December 1969 establishing common rules for exports (hereafter 'the Export Regulation') [9] sets out a 'Basic principle' in Article 1:

'The exportation of products from the European Economic Community to third countries shall be free, that is to say, they shall not be subject to any quantitative restriction, with the exception of those restrictions which are applied in conformity with the provisions of this Regulation.'

12. Article 11 of the Export Regulation provides:

'Without prejudice to other Community provisions, this Regulation shall not preclude the adoption or application by a Member State of quantitative restrictions on exports on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value, or the protection of industrial and commercial property.'

9 — OJ, English Special Edition 1969 (II), p. 590, as last amended by Council Regulation (EEC) No 3918/91, OJ 1991 L 372, p. 31.

13. The United Kingdom implemented the above resolutions and the Sanctions Regulation by the Serbia and Montenegro (United Nations Sanctions) Order 1992, made by HM The Queen by Order in Council on 4 June 1992, pursuant to Section 1(1) of the United Nations Act 1946. Article 3 of that Order prohibits any person from supplying or delivering any goods to a person connnected with Serbia and Montenegro, except under the authority of a licence granted by the Secretary of State. Article 4 prohibits all exports from the United Kingdom to any destination in Serbia or Montenegro, except under the authority of a licence granted by the Secretary of State. Article 10 deals with financial transactions:

'(1) Except with permission granted by or on behalf of the Treasury, no person shall

(a) make any payment or part with any gold, securities or investments; or

(b) make any change in the persons to whose credit any sum is to stand or to whose order any gold, securities or investments are to be held, where any such action is action to which this article applies.

(2) Action to which this article applies is action which is likely to make available to or for the benefit of any person connected with Serbia and Montenegro any funds or other financial or economic resources, whether by their removal from the United Kingdom or otherwise, or otherwise to remit or transfer funds or other such resources to or for the benefit of any person connected with Serbia and Montenegro.

(3) Any permission granted by or on behalf of the Treasury under this article may be granted either absolutely or subject to conditions and may be varied or revoked at any time by, or on behalf of the Treasury.'

14. The Order does not itself state any of the principles upon which the Treasury would act in deciding whether to grant permission for any such funds to be removed from the United Kingdom. Those principles were made clear on behalf of the Treasury by a Bank of England notice dated 8 June 1992. Paragraph 10 of that notice, in its version in

force at the time of the facts, states, in so far as material:

'The Bank of England will consider specific applications for permission to debit Serbian Accounts for any other purposes, including:

...

(c) payments for charitable or humanitarian purposes.'

The facts and the main proceedings

15. Centro-Com is a trading company incorporated in Italy. Its main business is the supply of pharmaceutical goods. Between 28 July and 16 December 1992 Centro-Com was granted approval by the UN Yugoslavia Sanctions Committee to export from Italy to Sanitas in Montenegro 14 consignments of medical goods and to Montefarm in Montenegro one consignment of blood-testing equipment. Sanitas and Montefarm are wholesalers of medical goods. Centro-Com also obtained from the competent Italian authorities the export authorization required by Article 3 of the Sanctions Regulation. Between 15 October 1992 and 6 January 1993 Centro-Com exported all 15 consignments of goods from Italy to Montenegro, via the Italian customs control at Trieste.

16. Centro-Com was to receive payment for the above transactions from a deposit account held by the National Bank of Yugoslavia with Barclays Bank, London. That account was frozen in application of Article 10 of the Serbia and Montenegro (United Nations Sanctions) Order 1992, [10] except for payments from the account permitted by or on behalf of the Treasury. At the time it was United Kingdom Government policy to allow blocked Serbian accounts in the United Kingdom to be debited in payment for United Nations approved medical and humanitarian exports to Serbia from the United Kingdom or any other country. Barclays Bank applied to the Bank of England for permission to debit the account in favour of Centro-Com with the money due for each of the exported consignments. Each application was made by a separate letter, and all of them were made before 29 January 1993. By 24 February 1993 11 out of the 15 applications had been approved by the Bank of England, and Barclays Bank had paid the relevant sums to Centro-Com.

17. While the Bank of England was processing the applications the Foreign and Commonwealth Office began to receive reports

10 — Cited at paragraph 13.

about abuse of the system of permissions granted by the UN Yugoslavia Sanctions Committee for goods to be supplied to Serbia and Montenegro. There were persistent reports from the Sanctions Assistance Mission in Hungary of mis-description of goods and of the unreliability of documents issued, or apparently issued, by the UN Yugoslavia Sanctions Committee. The Mission commented that the system was impossible to control effectively at the border. Moreover, in the previous three months there had been a very considerable increase in the use of funds held in the United Kingdom for payment for goods exported, with UN approval, from other countries to Serbia. The United Kingdom Government also became aware of similar concerns in other countries about the inadequacy of the sanctions. France had apparently introduced a policy prohibiting completely the release of frozen funds to pay for any exports to Serbia.

18. The Treasury then took the decision to change its policy, so as to permit payment from Serbian funds held in the United Kingdom of goods within the excepted categories only if they were exported from the United Kingdom. The Bank of England announced that change of policy to Barclays Bank by a letter dated 25 February 1993, in which it stated:

'Henceforth, favourable consideration will not be given to applications for permission to debit Serbian accounts with banks in the United Kingdom in payment for the export of goods of any description to Serbia from any country other than the United Kingdom.'

The same change of policy was described in a further supplement to the Bank of England notice of 8 June 1992, [11] issued on 26 April 1993. A main reason for the change was stated to be that the Department of Trade and Industry could apply tight controls over goods exported from the United Kingdom, so as to ensure that those goods actually matched the documents relating to them. It was made clear on behalf of the Bank of England in the proceedings before the English courts that the Bank did not consider that Centro-Com itself had been responsible for any breach of sanctions.

19. Following the change of policy the Bank of England refused the four outstanding applications by Barclays Bank to make payments out of the account of the National Bank of Yugoslavia to Centro-Com. Centro-Com then challenged the legality of the new policy and in particular its application to the payments for the four consignments. It applied for judicial review before the High Court (Queen's Bench Division, Divisional Court). Centro-Com claimed, among other things, that the new policy was contrary to Community law, in particular Article 113 of the Treaty and the Sanctions Regulation,

11 — Cited at paragraph 14.

Article 7 of the Treaty (now Article 6) and Article 30 of the Treaty. The Divisional Court refused Centro-Com's application in its judgment of 6 September 1993,[12] and Centro-Com appealed against that judgment to the Court of Appeal. The Court of Appeal also rejected Centro-Com's arguments based on Articles 7 and 30 of the Treaty, but as regards the arguments based on the Community's common commercial policy and on the Sanctions Regulation the Court of Appeal felt that it was not confident to decide itself on some of the issues raised. It referred to the Court the following questions:

'1. Is it compatible with the common commercial policy of the Community and, in particular, Article 113 of the Treaty and Council Regulation (EEC) No 1432/92 ... for Member State A to adopt national measures which prohibit the release of funds located in Member State A but belonging to a person in Serbia or Montenegro in circumstances where:

(1) release of the funds is sought to pay a national of Member State B for goods exported by him from Member State B to Serbia or Montenegro;

(2) (a) the goods have been formally approved as intended strictly for medical purposes by the United Nations Sanctions Committee pursuant to UN Security Council Resolution 757;

(b) they have been exported pursuant to a prior export authorization issued by the competent authorities of Member State B pursuant to Regulation 1432/92;

(3) the national measures permit the release of funds in payment for the export of such goods from Member State A itself where the export authorization referred to at paragraph 2(b) above has been issued by the competent authorities of Member State A; and

(4) Member State A has decided that the adoption of such national measures is necessary or expedient for enabling UN Security Council Resolution 757 to be effectively applied?

2. Is the answer to Question 1 affected by the provisions of Article 234 of the EC Treaty?'

12 — See [1994] 1 CMLR 109.

The first question

20. By its first question the Court of Appeal essentially asks whether the United Kingdom's change in policy with respect to the release of funds in payment for permitted exports to Serbia and Montenegro, as described above, is compatible with the Community's commercial policy, including the Sanctions Regulation. As this question raises some difficult and novel issues, it may be convenient to set out first the main arguments submitted to the Court on this question.

21. Centro-Com refers to the Court's case-law on the exclusive competence of the Community in the field of commercial policy, [13] and points out that Article 113 is to be construed widely. [14] The Sanctions Regulation put into effect a common commercial policy for exports to Serbia and Montenegro. Centro-Com acknowledges that that regulation was adopted in a specific political and foreign policy context, but that cannot, in its view, alter the very nature of the measures the Community was called on to adopt. The Community exercised its exclusive competence over trade matters, and no further competence is left to the Member States in the specific field where the Community instrument was enacted.

22. Even if the regulation left the Member States competent to implement UN sanctions beyond the limits of its provisions, that competence should always be exercised by the Member States in such a way as not to contradict the basic aims and purposes of the regulation, nor to affect its uniform application, nor to affect any other provisions of Community law or any right stemming therefrom. Centro-Com takes the view that the disputed policy change does contradict Article 113 of the Treaty and the Sanctions Regulation. The fact that the financial embargo, provided for in paragraph 5 of Resolution 757 (1992), [15] was not expressly reproduced in the regulation cannot be viewed as a recognition of competence of the Member States in that respect. Centro-Com claims that the subject-matter of paragraph 5 has been dealt with in the Sanctions Regulation by the catch-all clause in Article 1(c), which prohibits 'any activity whose object or effect it is to promote, directly or indirectly, the transactions mentioned under (a) or (b) ...'.

23. Centro-Com further argues that, under Community law, the right to trade with foreign entities is nothing other than a specific aspect of a fundamental right to economic freedom. In so far as the Sanctions Regulation permitted certain exports it created an individual right to trade. Centro-Com

13 — Opinion 1/75 [1975] ECR 1355, at 1363 to 1365; Case 41/76 *Donckerwolcke* v *Procureur de la République* [1976] ECR 1921, paragraph 32 of the judgment; Case 174/84 *Bulk Oil* v *Sun International* [1986] ECR 559, paragraph 31 of the judgment.

14 — Opinion 1/78 [1979] ECR 2871, paragraph 45.

15 — Cited at paragraph 4.

exported the goods in full accordance with the provisions of Community law, and is therefore fully entitled to receive payment for the transactions. The refusal by the United Kingdom authorities to release the funds violates the fundamental right of Centro-Com to trade with foreign entities. National authorities cannot impose any further conditions than those specifically laid down by the regulation. They cannot discriminate by differentiating according to the Member State of exportation.

24. Centro-Com's submissions are supported by the Italian Government, the Dutch Government, the Belgian Government and the Commission.

25. The Italian Government takes the view that national provisions concerning payments for exports directly affect commercial transactions and therefore come within the scope of the common commercial policy. The Sanctions Regulation, which was based on Article 113 of the Treaty, must be implemented in a uniform manner. If the goods have been acknowledged to be intended for strictly medical purposes by the UN Yugoslavia Sanctions Committee (Article 2(a) of the regulation) and if the competent authority of a Member State has granted an export authorization, the export prohibition laid down in Article 1(b) of the regulation is not applicable. The Member States may not unilaterally introduce conditions other than those in the regulation for the purpose of further restricting the circumstances in which the prohibition does not apply. In a field covered by Article 113 of the Treaty the Member States have no power to adopt different or subsequent provisions liable to alter the uniformity of action required of all the Member States. The disputed change in policy cannot be justified on grounds of enabling Resolution 757 (1992) to be effectively applied: if one Member State takes the view that the measures adopted by the Community are inadequate, it must take steps to have those measures amended, and it cannot act unilaterally. Further, the measures taken by the United Kingdom necessarily assume that the export controls which the Sanctions Regulation requires the authorities of the Member States to carry out are inefficient. The sort of 'monopoly of control' established by the disputed change in policy, besides being incompatible with the principles of the common commercial policy, is damaging to the authorities of the other Member States.

26. The Dutch Government takes the view that, because the Sanctions Regulation does not concern financial services, the Member States retained competence to lay down rules regarding the provision of financial services to the Republics of Serbia and Montenegro. However, national competences must be exercised in accordance with the rules of Community law. The requirement that permitted exports be made from the United Kingdom disadvantages exporters established in other Member States, in so far as payment through funds held in the United Kingdom is provided for. The disadvantage is increased by the fact that London is a major financial market-place. Such difference in treatment

amounts to indirect discrimination on the basis of nationality and is incompatible with Article 6 of the Treaty. The difference in treatment cannot be justified by the necessity to enforce the embargo as strictly as possible. The requirement imposed by the United Kingdom could be used in relations with third countries, but in relations between the Member States the principle of mutual recognition of export authorizations applies. Further, if doubts were to arise on the authenticity or exactitude of an export authorization granted by another Member State, mutual assistance could be sought on the basis of Council Regulation (EEC) No 1468/81 of 19 May 1981 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs or agricultural matters. [16] The requirement imposed by the United Kingdom is therefore disproportionate.

27. In the view of the Dutch Government the disputed measure is also not in accordance with the Sanctions Regulation. The principles of non-discrimination and proportionality are binding on the Council and an interpretation of the regulation which amounts to a breach of those principles cannot be correct. That conclusion is reinforced by Articles 7a and 73b of the Treaty: there exists a single market for movement of capital and for payments which may not be split up again by measures adopted so as to give effect to economic sanctions. In so far as the regulation permits certain exports it should be possible for producers and traders from all the Member States to export on equal terms.

28. The Belgian Government takes the view that a prohibition on the transfer of funds in payment for exports of goods falls within the competence of the Community in respect of commercial policy. It relies on Opinion 1/94 where the Court stated that an embargo relating to the export and import of goods could not be effective without the suspension of transport services, so that such suspension was to be seen 'as a necessary adjunct to the principal measure'. [17] Similarly, a prohibition on the transfer of funds related to a sale may be seen as an adjunct to the prohibition on the export of goods. Conversely, with exceptions made in favour of exports of humanitarian goods there must be corresponding exceptions to prohibitions on financial transfers. Member States should not adopt unilateral measures to reduce the risks of fraud in applications for export authorizations. Possible difficulties should be examined by the Community authorities and a common position should be adopted. Unilateral measures may have the effect of diverting trade.

29. The Commission acknowledges that the Sanctions Regulation does not cover directly the freezing of financial assets. However, the

16 — OJ 1981 L 144, p. 1.

17 — [1994] ECR I-5267, paragraph 51.

regulation did set up a system for the authorization of permitted exports, by requiring that the UN Yugoslavia Sanctions Committee approve the export and that the competent Member State issue an export licence. The establishment of those two conditions ensured a harmonized approach to the application of the exceptions permitted by Resolution 757 (1992). In the Commission's view, there is a clear link between the possibility of effecting exports within the excepted categories and the possibility of receiving payments in respect of such exports. The possibility of receiving payment is, in fact, ancillary to the possibility of exporting.

30. The Commission also recalls that the prohibition on exports imposed by the Sanctions Regulation constituted a derogation from the general rules on exports contained in the Export Regulation. The Commission submits that the requirement imposed by the United Kingdom in this instance comes close in effect to a total ban on trade and therefore constitutes a measure having equivalent effect within the meaning of Article 1 of the Export Regulation. Further, the United Kingdom cannot in principle rely on Article 11 of the regulation, which permits the Member States to impose restrictions on certain grounds, including public policy and public security. The Commission takes the view that similar principles should apply here to those which apply to Article 36 of the Treaty: Member States cannot take unilateral measures where there exist harmonized rules. [18] It is only to the extent that the United Kingdom can demonstrate that the objective of the unilateral measure was not met by the Community measures that such a unilateral measure might be justified. The Commission notes that in the present case there is no suggestion that competent Member States were issuing export licences on an improper basis or that this aspect of the system was not functioning properly. The Commission also refers to the possibilities of mutual assistance and exchange of information between the competent authorities.

31. Even if the United Kingdom's action could in principle be justified on the basis of Article 11 of the Export Regulation, it would in the Commission's view still be subject to the test of proportionality, and a blanket prohibition would appear to fail that test.

32. The Commission also analyses Article 224 of the Treaty, but concludes that the United Kingdom's action is not justified on the basis of that provision either. The Commission further takes the view that the disputed measure amounts to covert discrimination on the basis of nationality, which does not appear to be justified by objective circumstances, and is thus in breach of Article 6 of the Treaty.

33. The United Kingdom contends that the disputed change in policy is compatible with the common commercial policy and with the

18 — See Case 72/83 *Campus Oil* [1984] ECR 2727, paragraph 27 of the judgment; see also Case 35/76 *Simmenthal* [1976] ECR 1871; Case C-2/82 *Delhaize Frères* v *Belgian State* [1983] ECR 2973.

Sanctions Regulation. It advances three main arguments in support of its position, each of which it claims to be conclusive.

34. The first argument is that the disputed measures were adopted pursuant to national competence in the field of foreign and security policy. The United Kingdom takes the view that measures adopted to perform obligations under the UN Charter are pre-eminent examples of matters falling within the field of foreign and security policy. Such matters are outside the scope of the EC Treaty. It is true that the Council adopted the Sanctions Regulation, but the adoption of that regulation is to be seen as implementing at Community level the exercise of national competence in the field of foreign and security policy, not as a denial of such competence or as a means of displacing it.

35. The Treaty on European Union, which entered into force after the Sanctions Regulation was adopted, confirms that matters of foreign and security policy remain outside the EC Treaty and within the competence of the Member States. It is true that new powers in the field of sanctions are provided for in Articles 73g and 228a of the EC Treaty, introduced by the Treaty on European Union. Where action relating to the common foreign and security policy calls for economic sanctions to be adopted by the Community, Articles 73g and 228a now provide a specific basis for those sanctions. But according to the United Kingdom, while Member States must of course comply with any measures adopted under those provisions, the adoption of such measures does not have the effect of removing national competence in the field to which the measures relate.

36. The United Kingdom's second argument is that restrictions on the release or movement of assets do not fall within the scope of the common commercial policy. The EEC Treaty did not contain any specific provisions concerning the movement of capital or payments between the Community and third countries (in contrast with intra-Community movement, where the provisions on capital and payments were separate from those on free movement of goods and of services). Again the Treaty on European Union clarified the position by introducing Articles 73b to 73h, which deal with the movement of capital and payments not only between Member States but also between Member States and third countries. The existence of such a separate set of provisions makes it clear that those matters fall outside the scope of the common commercial policy. [19] It is plain in the United Kingdom's view that the amendments of the Treaty on European Union did not alter and were not intended to alter the scope of Article 113, and the limited scope of the Sanctions Regulation, which extends only to non-financial matters, is itself a reflection of the limited scope of Article 113.

19 — See Opinion 1/94, cited at note 17, paragraphs 48 to 52 on transport services.

37. Thirdly, the United Kingdom argues that the disputed measures are not incompatible with the common commercial policy. It first considers the Export Regulation, and questions whether a restriction on the release of assets held in a UK bank account could possibly constitute a quantitative restriction on exports as prohibited by Article 1 of the Export Regulation. Even if that restriction were to constitute such a quantitative restriction, it would fall within the derogation contained in Article 11 of the regulation. The United Kingdom refers to my Opinions in *Richardt*, [20] and in *Werner* and *Leifer*, [21] where I considered that the Member States had a large measure of freedom in relation to such issues as public security and the protection of health and life of humans. Resolution 757 (1992), together with the findings of the Court of Appeal in the present case, provide the clearest possible evidence that the actions of the United Kingdom authorities were justified by considerations of public security and the health and life of humans.

38. The Sanctions Regulation did not prohibit the disputed measures either. The measures related to implementation of an aspect of Resolution 757 (1992) that was not covered at all by the regulation. It must have been intended that Member States should be free to adopt the measures required to implement aspects of the resolution that were not covered by the regulation. If authorization were needed for such measures, it can and must be implied. It is unthinkable that the Community would have left the Member States without the power to comply with their obligations to give full effect to the resolution.

39. I will now examine in turn the various issues raised by the first question. I will address those issues against the backdrop of the United Kingdom's three main arguments: the argument on national competence in the field of foreign and security policy, the scope of the common commercial policy and the impact of the Sanctions Regulation and the Export Regulation.

The argument on national competence in the field of foreign and security policy

40. As noted, the United Kingdom argues that it was within its power to adopt the measures in issue pursuant to national competence in the field of foreign and security policy. It is indeed undisputed that both before and after the entry into force of the Treaty on European Union the Member States retained competence in that field, and that the Community has no general power to develop a common foreign and security policy. However, it is also undisputed that national competences have to be exercised in

20 — Case C-367/89 [1991] ECR I-4621.

21 — See paragraphs 41 and 58 to 61 of my Opinion in Case C-70/94 *Werner* and Case C-83/94 *Leifer* [1995] ECR I-3189.

accordance with the rules of Community law. The application of those rules cannot be evaded by a mere reference to considerations of a foreign or security policy nature. That is confirmed by the Court's judgments in *Werner* and *Leifer*. Those cases concerned restrictions on exports of so-called dual-use goods in application of German legislation which had a clear security policy dimension. The Court was asked whether Article 113 of the Treaty and the Community's legislation on exports precluded such restrictions. The Court referred to the requirement of a non-restrictive interpretation of the concept of common commercial policy, and stated that: [22]

'a measure such as that described in the national court's question, whose effect is to prevent or restrict the export of certain products, cannot be treated as falling outside the scope of the common commercial policy on the ground that it has foreign policy and security objectives.

The specific subject-matter of commercial policy, which concerns trade with non-member countries and, according to Article 113, is based on the concept of a common policy, requires that a Member State should not be able to restrict its scope by freely deciding, in the light of its own foreign policy or security requirements, whether a measure is covered by Article 113.'

22 — Cited at note 21, paragraphs 10 and 11 of the judgment in *Werner*. See also paragraphs 10 and 11 of the judgment in *Leifer*.

41. I will analyse the concept of a restriction on exports, and in particular whether the disputed measures are covered by that concept, below. At this juncture it must however be emphasized that, according to the Court, the sole fact that a measure serves a foreign or security policy objective does not mean that it cannot come within the scope of the common commercial policy. That position seems fully justified to me. Many measures of commercial policy may have a more general foreign or security policy dimension. When for example the Community concludes a trade agreement with Russia, it is obvious that that agreement cannot be dissociated from the broader political context of the relations between the European Union, its Member States, and Russia.

42. Embargo measures themselves are perhaps the best examples of commercial policy measures which essentially aim to attain foreign policy objectives. It is true that following the amendments made by the Treaty on European Union (which were not yet in force at the material time), there is now a specific legal basis in Article 228a of the EC Treaty for the adoption of embargo measures, supplemented by Article 73g on the movement of capital and on payments. Those amendments may have removed embargo measures from the scope of Article 113 of the Treaty. However, they also demonstrate that the Community has the competence to adopt such measures, and by establishing an express link with the common foreign and security policy envisaged in the Treaty on European Union they reinforce the point that the Community can adopt measures having a foreign or security policy

dimension. The introduction of Article 228a does not indicate that the Community could not previously (as it did) impose economic sanctions on the basis of Article 113 of the Treaty. The opposite appears to be the case. Article 228a codified a firmly established practice, clearly designed to be further developed, and now given a more specific Treaty basis.

43. The United Kingdom's argument on national competence in the field of foreign and security policy also appears to suggest that the Member States have more leeway in interpreting, applying, or supplementing Community acts which have a foreign or security policy dimension than they have in respect of other Community acts. Such a view cannot be accepted. The interpretation of a Community act depends on its objectives, its terms and its context. The fact that it has a foreign or security policy dimension may therefore have an impact on its interpretation, but it does not in principle mean that the Member States have more leeway. Indeed the practice of adopting embargo measures by way of a Community regulation is in part inspired by the concern to ensure a uniform implementation of such measures. The preamble to the Sanctions Regulation at issue in the present case confirms that in terms which are reproduced in many sanctions regulations. [23]

23 — See paragraph 8 above.

44. I conclude that the fact that the Member States retain competence in the field of foreign and security policy is of no assistance in answering the question whether the disputed measures adopted by the United Kingdom are compatible with the common commercial policy.

The common commercial policy and payments

45. It is well established by the case-law that the concept of common commercial policy must be broadly understood; moreover the enumeration in Article 113 of the subjects covered by the common commercial policy is non-exhaustive. [24] It is also well established that, since full responsibility for commercial policy was transferred to the Community by Article 113(1), national measures of commercial policy are permissible only if they are specifically authorized by the Community. [25]

46. At issue in the present case is whether measures concerning payments for exports to third countries are covered by the common commercial policy. If that question

24 — Opinion 1/78, cited at note 14, paragraph 45; recently confirmed in Opinion 1/94, cited at note 17, paragraph 31, and in *Werner*, cited at note 21, paragraph 9 of the judgment.

25 — *Donckerwolcke* v *Procureur de la République* and *Bulk Oil* v *Sun International*, both cited at note 13; *Werner*, cited at note 21, paragraph 12 of the judgment; *Leifer*, cited at note 21, paragraph 12 of the judgment.

were to receive an affirmative answer, the disputed measures would be permissible only if they were specifically authorized by the Community. A range of different views were expressed on the issue. At one end of the spectrum is the Italian Government's position that national provisions concerning payments for exports directly affect commercial transactions and therefore come within the scope of the common commercial policy. At the other end is the United Kingdom's position that restrictions on the release or movement of assets do not fall within the scope of the common commercial policy.

47. The United Kingdom rightly points out that the EEC Treaty, in the version applicable at the material time, did not contain any provisions concerning the movement of capital or payments between the Community and third countries. The only provision on payments was Article 106 of the Treaty, which provided in its first paragraph for the liberalization of payments connected with the movement of goods, services or capital between the Member States. On that basis it could be argued that the Treaty distinguished between trade and payments generally. I am not convinced however that that argument carries much weight: the counter-argument would be that external payments were covered by the common commercial policy, since no distinction was made as regards external trade.

48. At the level of Community legislation it would appear that the basic instruments of the common commercial policy are largely silent on the question of payments for imports or exports. The Export Regulation does not refer to payments, and Council Regulation (EEC) No 288/82 of 5 February 1982 on common rules for imports, [26] applicable at the material time, merely provides at Article 21 that it shall not preclude 'special formalities concerning foreign exchange'.

49. The Community's policy on economic sanctions appears to confirm that payments were not considered to come within the scope of Article 113. As we have seen, the Sanctions Regulation contains no provisions dealing with the financial embargo and it contains no explicit provisions on payments for permitted exports. [27] The argument advanced by Centro-Com that Article 1(c) of the regulation is a catch-all clause which deals with the financial embargo defined in paragraph 5 of Resolution 757 (1992) is clearly untenable. Article 1(c) concerns activities whose object or effect is to promote prohibited imports or exports. However, the financial embargo was not confined to payments for imports or exports, but concerned all transfers of funds and of all other financial or economic resources. It may also

26 — OJ 1982 L 345, p. 1.

27 — See paragraph 10 above.

be noted that paragraph 5 of the resolution exempts 'payments exclusively for strictly medical or humanitarian purposes and foodstuffs', a provision which was not included in the Sanctions Regulation.

50. Similarly, it would appear that measures concerning financial transactions have also been excluded from other embargo measures adopted by the Community under Article 113 of the Treaty. [28]

51. When interpreting the concept of common commercial policy it is also apposite to consider the international context. [29] The General Agreement on Tariffs and Trade ('GATT') does contain provisions referring to payments. Article I, concerning General Most-Favoured-Nation Treatment, applies to 'customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports' (see paragraph 1). Article XV concerns Exchange Arrangements, a matter which obviously affects payments for exports and imports. Its provisions generally refer to cooperation with the International Monetary Fund. Article XV(4) provides that 'Contracting Parties shall not, by exchange action, frustrate the intent of the provisions of this Agreement'. Further, there is Article XII on quantitative restrictions for balance-of-payments purposes. Although those provisions illustrate the obvious link between trade and measures affecting payments, they do not directly address the liberalization of payments.

52. Against that background it seems to me that there is no justification for the view that, as a matter of principle, all measures concerning payments which may affect exports from or imports into the Community were covered by the common commercial policy, and that the Member States could only adopt such measures if there was a specific authorization by the Community. It is true that decisions on payments may affect exports and imports. That is not however sufficient to bring them within the scope of the common commercial policy.

53. However, while I do not accept that all measures concerning or affecting payments come within the scope of the common commercial policy, it cannot as a matter of principle be excluded that the common commercial policy may affect certain measures regarding payments. The need for measures adopted in the framework of the common

28 — See for example Council Regulation (EEC) No 3155/90 of 29 October 1990 extending and amending Regulation (EEC) No 2340/90 preventing trade by the Community as regards Iraq and Kuwait, OJ 1990 L 304, p. 1, discussed by P. J. Kuyper, 'Trade Sanctions, Security and Human Rights and Commercial Policy', in M. Maresceau (ed.), *The European Community's Commercial Policy after 1992: The Legal Dimension*, Martinus Nijhoff, 1993, pp. 387 to 422, at pp. 395 to 396.

29 — See Opinion 1/75, cited at note 13, at p. 1362; Opinion 1/94, cited at note 17, paragraphs 40 and 41.

commercial policy to be effective (the principle of effectiveness or *effet utile*) may for example impose limits on the powers of the Member States to regulate payments. If there were a Community regulation stating that all imports into the Community from China were free, a national rule providing that no payments should be made to Chinese citizens or companies would obviously interfere with the proper functioning of that regulation. Such a national rule could be regarded as a restriction on imports, incompatible with the regulation.

54. The example goes to show what I consider to be the real issue in the present case: did the Community rules on exports to the Republics of Serbia and Montenegro preclude the United Kingdom from adopting the disputed measures, or were those measures permitted under those rules? I consider it more appropriate to consider that issue, rather than the abstract question of competence. A similar approach was adopted by the Court in *Werner*. [30] In that case the referring court had generally asked whether Article 113 of the Treaty precluded national provisions on foreign trade requiring export licences. The Court did not however reply in the abstract, but examined the scope of the Export Regulation.

30 — Cited at note 21.

55. Before I turn to examine the scope of the Sanctions Regulation and of the Export Regulation with a view to resolving that issue, I should however point out that the position has changed since the entry into force of the Treaty on European Union. At present, payments between Member States and third countries are covered by Article 73b(2) of the EC Treaty, which provides that:

'Within the framework of the provisions set out in this Chapter, all restrictions on payments between Member States and between Member States and third countries shall be prohibited.'

56. External payments are also mentioned in Article 73g of the Treaty, which provides:

'1. If, in the cases envisaged in Article 228a, action by the Community is deemed necessary, the Council may, in accordance with the procedure provided for in Article 228a, take the necessary urgent measures on the movement of capital and on payments as regards the third countries concerned.

2. Without prejudice to Article 224 and as long as the Council has not taken measures pursuant to paragraph 1, a Member State may, for serious political reasons and on

grounds of urgency, take unilateral measures against a third country with regard to capital movements and payments. The Commission and the other Member States shall be informed of such measures by the date of their entry into force at the latest.

The Council may, acting by a qualified majority on a proposal from the Commission, decide that the Member State concerned shall amend or abolish such measures. The President of the Council shall inform the European Parliament of any such decision taken by the Council.'

57. For the purpose of the present case, however, I do not think that anything can be inferred from those provisions. The fact that there are now explicit provisions on payments does not exclude that, before the entry into force of those provisions, payments were to some extent covered by the common commercial policy. It certainly does not exclude the possibility that Community legislation adopted in the framework of the common commercial policy may have imposed limits on national measures concerning payments for imports from or exports to third countries.

The scope of the Sanctions Regulation and of the Export Regulation

58. Article 1(b) of the Sanctions Regulation prohibits exports to the Republics of Serbia and Montenegro. Article 2(a) states that that prohibition shall not apply to the export of certain categories of products, and Article 2(c) exempts any activity whose object or effect it is to promote such exports. Those provisions do not state in so many words that those exports are free. However, as the Commission argues in its written observations, the exception made in Article 2(a) implies that those exports are governed by the Community's general rules on exports, laid down in the Export Regulation. Clearly, the prohibition of exports to the Republics of Serbia and Montenegro derogated from the rules of the Export Regulation, in particular Article 1 which provides that exportation from the Community to third countries shall be free. In so far as that prohibition does not apply to certain categories of exports, the rules of the Export Regulation must continue to apply.

59. Article 1 of the Export Regulation specifies that free exportation means that products 'shall not be subject to any quantitative restriction, with the exception of those restrictions which are applied in conformity with the provisions of this Regulation'. The

issue therefore is whether the disputed measures amount to a restriction on exports incompatible with that provision. Since I regard the arguments for and against to be finely balanced, I will consider both positions.

60. Article 1 was interpreted by the Court in *Werner* and *Leifer*. [31] In those cases the question arose whether national measures requiring a licence for the exportation of certain products fell within the scope of Article 1. The Court rejected the German Government's view that Article 1 prohibits only quantitative restrictions on exports and not measures having equivalent effect. The fact that Article 34 of the Treaty, concerning free movement of goods within the Community, distinguishes between quantitative restrictions on exports and measures having equivalent effect, was considered not to be relevant for the interpretation of the Export Regulation. The Court stated that in the interpretation of the regulation it was necessary to consider not only its wording but also the context in which it occurs and the objectives of the rules of which it is part. The Court considered that: [32]

'A regulation based on Article 113 of the Treaty, whose objective is to implement the principle of free exportation at Community level, ... cannot exclude from its scope measures adopted by the Member States whose effect is equivalent to a quantitative restriction where their application may lead, as in the present case, to an export prohibition.'

61. The Court found support for that interpretation in Article XI of the GATT, which refers in its first paragraph to 'prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures'.

62. In my Opinion in those cases I similarly took the view that, even if it is arguable that Article 1 does not apply to all measures having equivalent effect, it must certainly be regarded as prohibiting measures whose effect is tantamount to a total ban on specific categories of exports. [33]

63. I am not however convinced that in *Werner* and *Leifer* the Court intended to

31 — Cited at note 21, paragraphs 17 to 23 of the judgment in *Werner*, paragraphs 18 to 24 of the judgment in *Leifer*.

32 — See paragraph 22 of the judgment in *Werner* and paragraph 23 of the judgment in *Leifer*.

33 — See paragraph 31 of the Opinion.

adopt a broad interpretation of Article 1 of the Export Regulation. In particular, I do not think that the broad notion of measures having equivalent effect which is the cornerstone of the Court's case-law on the free movement of goods within the Community should be extended to exports to third countries. Article 1 refers only to quantitative restrictions, and does not mention measures having equivalent effect. If the objective of the Regulation were to eliminate all barriers on exports to third countries in a manner similar to the removal of barriers to intra-Community trade, the least one would expect is an explicit reference to the concept of measures having equivalent effect. It is moreover obvious that the elimination of barriers to intra-Community trade serves to establish an internal market, and that the Export Regulation does not have the aim of extending the internal market to third countries. In that respect a parallel may be drawn with cases such as *Polydor* v *Harlequin Record Shops*, [34] where the Court emphasized that the prohibition of measures having equivalent effect to quantitative restrictions on imports, included in free trade agreements concluded between the Community and third countries, is not to be interpreted as broadly as Article 30 of the Treaty. Since the Export Regulation does not aim to establish an internal market or even a free trade area, and since it does not mention the concept of measures having equivalent effect, it is clear in my view that a broad interpretation of the prohibition of quantitative restrictions is not called for. Such a broad interpretation seems particularly inapposite in the context of the embargo against the Republics of Serbia and Montenegro. Here the permission to export is an exception to the general prohibition of imports and exports, and derogations are not to be interpreted extensively.

64. However, even on a narrow interpretation of the rule of free exportation it is clear in my view that it covers certain restrictions on payments. As we have seen, Centro-Com submits that the right to trade with foreign entities is nothing other than a specific aspect of a fundamental right to economic freedom. While I am not persuaded that there is a fundamental right to export, the Sanctions Regulation and the Export Regulation, directly applicable as they are in the Member States, do create rights and obligations for individuals. From the perspective of those rights a restriction on payments for exports can, and should, be regarded as a restriction on exports as such, as I will demonstrate.

65. It is questionable whether the right to export is a fundamental right. [35] It is not contained in the Treaty as such (although

34 — Case 270/80 [1982] ECR 329.

35 — But see E. U. Petersmann, 'Constitutional Principles Governing the EEC's Commercial Policy' in M. Maresceau (ed.), cited at note 28, pp. 21 to 61, at pp. 40 to 41.

Article 110 does set the aim of 'the progressive abolition of restrictions on international trade'), and as I have explained it does not have the broad scope of the freedom to trade within the Community. Further, it has not been suggested that the right to export is fundamental in terms of the constitutions of the Member States or the European Convention for the Protection of Human Rights and Fundamental Freedoms. The Court does regard the right to pursue an economic activity as fundamental, [36] but that right is obviously far broader than the specific right to trade with foreign entities.

66. In any event, on the above interpretation of the relationship between the Sanctions Regulation and the Export Regulation those regulations did create, for the benefit of nationals and companies of the Member States, the right to export permitted supplies to the Republics of Serbia and Montenegro, under the conditions laid down in the Sanctions Regulation. Such exports were, provided that the procedure laid down in Article 2(a) and Article 3 of the Sanctions Regulation was followed, 'free' in terms of Article 1 of the Export Regulation. From the perspective of individuals and companies seeking to benefit from that freedom to export, it is clear that such a freedom has to encompass payments. The Commission has stated that payments are ancillary to export transactions. Even that expression, however, is not strong enough. The exportation of goods is a commercial transaction which involves the supply of goods in return for payment. Both elements are essential to the transaction, and therefore also to the common commercial policy. The common commercial policy is not concerned with the mere movement of goods across the Community's external borders. It is concerned with international trade, i. e. commercial transactions between Community and non-Community companies. Where that policy provides for a rule of free exportation, that rule must prohibit restrictions on payments just as much as restrictions on the actual supply of goods. Otherwise such a rule cannot be effective, since the Member States would in fact be allowed to thwart its application by imposing restrictions on payments, which might be equivalent in effect to restrictions on the supply of certain products.

67. That does not mean that all measures which may affect the receipt by exporters in the Community of payments for exports are prohibited by the rule of free exportation. The position is the same here as with restrictions on the supply of goods: only actual restrictions are prohibited. In respect of payments, what the Court stated in *Werner* and *Leifer* as regards measures of equivalent effect could be restated as follows:

'A regulation based on Article 113 of the Treaty, whose objective is to implement the

36 — See Case C-280/93 *Germany* v *Council* [1994] ECR I-4973, paragraph 78 of the judgment.

principle of free exportation at Community level, ... cannot exclude from its scope measures adopted by the Member States whose effect is equivalent to a quantitative restriction because it prevents the receipt of payment in return for particular export transactions.'

68. On that view, the disputed policy adopted by the United Kingdom does amount to a restriction on exports incompatible with the rule of free exportation of permitted exports. The policy prevented the release of Serb funds held in banks in the United Kingdom in payment for exports from and permitted by other Member States. For those exports, no payment could be obtained from funds in the United Kingdom. Payment could of course be made by other means, but that is not in my view sufficient to disqualify the policy as a restriction on exports. The policy did operate as a restriction on particular export transactions.

69. The question then arises whether the policy can be justified on the basis of Article 11 of the Export Regulation, which refers to public security and the protection of the health and life of humans. In general I am inclined to agree with the Commission's analogy with harmonization of national legislation aimed at furthering the free movement of goods within the Community, and the reduced scope for recourse to Article 36 of the Treaty which results from such harmonization. The Sanctions Regulation contains precise rules on permitted exports, including the requirement of an export authorization by the competent authorities of the Member States. Where a Member State considers that the effective application of the sanctions requires further action it may not, in my view, disregard export authorizations granted by other Member States. That is particularly so where, as in the present case, there are no clear indications that such authorizations were granted in any inappropriate way. As we have seen, the main concern behind the United Kingdom's change in policy was the reliability of documents issued by the Yugoslavia Sanctions Committee, and not the export authorizations granted by other Member States. Moreover, the report of the Sanctions Assistance Mission to Hungary which partly inspired the change in policy contains a passage which suggests that the system of Community licensing was functioning properly:

'If the exemption authority system is to continue [on the] present scale then urgent reconsideration of the method of control is required. An accountable document providing a clear audit trail should be introduced along the lines of the E. C. licensing systems.' [37]

37 — See the judgment of the Divisional Court, cited at note 12, paragraph 8.

70. Nevertheless the assumption underlying the change of policy appears to be that exports from the United Kingdom could be authorized in circumstances where exports from other Member States should not be. In that respect an argument was based on the recent judgment in *The Queen* v *Ministry of Agriculture, Fisheries and Food* ex parte *Hedley Lomas (Ireland) Ltd.* [38] That case concerned the Ministry's refusal to issue licences for the export to Spain of live animals for slaughter on the ground that their treatment in Spanish slaughterhouses was contrary to Council Directive 74/577/EEC of 18 November 1974 on stunning of animals before slaughter. [39] The Court decided that Community law precludes a Member State from invoking Article 36 of the Treaty to justify a limitation of exports of goods to another Member State on the sole ground that, according to the first State, the second State is not complying with the requirements of a Community harmonizing directive which pursues the objective which Article 36 is intended to protect but does not lay down either any procedure for monitoring their application or any penalties in the event of their breach. The Court recalled in particular that: [40]

'The fact that the Directive lays down no monitoring procedure or penalties simply means that the Member States are obliged, in accordance with the first paragraph of Article 5 and the third paragraph of Article 189 of the Treaty, to take all measures necessary to guarantee the application and effectiveness of Community law .... In this regard, the Member States must rely on trust in each other to carry out inspections on their respective territories ... .

A Member State may not unilaterally adopt, on its own authority, corrective or protective measures designed to obviate any breach by another Member State of rules of Community law ... .'

71. However, I do not think that the general issue whether the disputed change in policy was justified needs to be resolved in the context of the present case. In any event, justification on the basis of Article 11 is subject to observance of the principle of proportionality. As the Court explained in *Leifer*, Article 11 'must be interpreted in a way which does not extend its effects beyond what is necessary for the protection of the interests which it is intended to guarantee'. [41] That requirement is clearly not fulfilled in the circumstances of the present case. Centro-Com entered into its transactions with Sanitas and Montefarm before the disputed change in policy. It obtained both the approval of the

38 — Case C-5/94, judgment of 23 May 1996.

39 — OJ 1974 L 316, p. 10.

40 — Paragraphs 19 and 20 of the judgment.

41 — Cited at note 21, paragraph 33 of the judgment.

UN Yugoslavia Sanctions Committee and its export authorization from the Italian authorities before that change. And it also exported the goods well before the Treasury took the disputed decision. In those circumstances, which are not contested and which are implied in the question referred by the Court of Appeal, the refusal to grant the applications to release funds for payment to Centro-Com could not in any way serve the aim of preventing circumvention of the sanctions through the system of export permits. If there was justification for the change in policy, it was limited to exports made after the announcement of that change. Only for such exports could it be argued that the new policy might improve the effectiveness of the sanctions by combating the abuse of the system of export permits. Where all relevant events, including the actual exports and the lodging of the applications for the release of funds, took place before the change in policy was announced, the objective of an effective implementation of the export ban could not be served by a decision not to release funds.

72. On the first question, I therefore conclude that in the context of the present case the decision not to release funds is incompatible with the combined provisions of the Sanctions Regulation and the Export Regulation.

The second question

73. By its second question the Court of Appeal seeks to know whether the answer to the first question is affected by the provisions of Article 234 of the Treaty. In issue is the first paragraph of Article 234, which provides that:

'The rights and obligations arising from agreements concluded before the entry into force of this Treaty between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of this Treaty.'

74. It is settled case-law that: [42]

'the purpose of the first paragraph of Article 234 of the Treaty is to make clear, in accordance with the principles of international law, that application of the Treaty does not affect the commitment of the Member State concerned to respect the rights of non-member States under an earlier agreement and to comply with its corresponding obligations'.

75. The Court has also stated that, in order to determine whether a Community rule

42 — Case C-324/93 *Evans Medical and Macfarlan Smith* [1995] ECR I-563, paragraph 27 of the judgment. See also Case 10/61 *Commission* v *Italy* [1962] ECR 1; Case C-158/91 *Levy* [1993] ECR I-4287.

may be deprived of effect by an earlier international agreement, it is necessary to examine whether that agreement imposes on the Member State concerned obligations whose performance may still be required by non-member States which are parties to it, and that in proceedings for a preliminary ruling it is not for this Court but for the national court to determine which obligations are imposed by an earlier agreement on the Member State concerned and to ascertain their ambit so as to be able to determine the extent to which they thwart application of the relevant provisions of Community law. [43]

76. The United Kingdom argues that in the present case it is required by the Charter of the United Nations to ensure an effective implementation of the measures adopted by the Security Council under Chapter VII of the Charter, in particular Resolution 757 (1992). Article 25 of the Charter provides that the Members of the United Nations agree to accept and carry out the decisions of the Security Council, and Article 103 provides that, in the event of a conflict between the obligations of the Members of the United Nations under the Charter and their obligations under any other international agreement, their obligations under the Charter shall prevail. In the United Kingdom's view, its decision to change the policy on the release of Serb funds in payment for permitted exports was required by those provisions, because that decision was necessary to ensure an effective implementation of Resolution 757 (1992).

77. Centro-Com, the Commission, the Italian Government and the Belgian Government argue that there is no conflict between the relevant provisions of Community law and Resolution 757 (1992). They point out that the Community regulation was adopted precisely to give effect to the resolution, and that both have the same effect, namely to authorize the export of products for humanitarian purposes. In my view, it is difficult to see how there could be a conflict in the particular circumstances of the present case, where the export had not only been authorized but had also been effected before the measures were adopted. According to the Court's case-law, however, it is for the referring court to decide this issue. It should do so, of course, in the light of the interpretation to be given to the relevant provisions of Community law, in particular the Sanctions Regulation and the Export Regulation.

78. The appropriate reply to the second question is that measures such as those in issue in the present case are compatible with Community law only if they are necessary in order for the Member State concerned to comply with obligations towards non-member States laid down in an agreement concluded prior to entry into force of the Treaty or to accession by that Member State.

43 — *Evans Medical and Macfarlan Smith*, paragraphs 28 and 29 of the judgment.

Conclusion

79. Accordingly, I am of the opinion that the Court should give the following reply to the questions put by the Court of Appeal:

(1) Measures adopted by a Member State which prohibit the release of funds located in that Member State but belonging to a person in the Republics of Serbia and Montenegro are incompatible with Council Regulation (EEC) No 1432/92 of 1 June 1992 prohibiting trade between the European Economic Community and the Republics of Serbia and Montenegro and with Council Regulation (EEC) No 2603/69 of 20 December 1969 establishing common rules for exports, in circumstances where:

(a) the measures in issue permit the release of funds in payment for the export of goods, permitted by Regulation No 1432/92, only if the exports took place from the Member State which adopted the measures and if the export authorization required by that regulation has been issued by the competent authorities of that Member State;

(b) the Member State has decided that the adoption of such measures is necessary or expedient for enabling United Nations Security Council Resolution 757 (1992) to be effectively applied;

(c) release of the funds is sought to pay a national of another Member State for goods exported by him from that Member State to the Republics of Serbia and Montenegro;

(d) the goods have been formally approved as intended strictly for medical purposes by the United Nations Sanctions Committee pursuant to United Nations Security Council Resolution 757 (1992), and they have been exported pursuant to a prior export authorization issued by the competent

authorities of the Member State of exportation pursuant to Regulation No 1432/92; and

(e) the above authorizations were obtained, the goods were exported and the applications to release the funds were made before the measures in issue were adopted.

(2) Those measures are compatible with Community law only if they are necessary in order for the Member State concerned to comply with obligations towards non-member States laid down in an agreement concluded prior to entry into force of the Treaty or to accession by that Member State.