5. Articles 34 and 85 of the Treaty do not prevent a Member State from adopting a policy restricting or prohibiting exports of oil to a non-member country on the basis of Article 10 of Regulation No 2603/69. Such a policy does not specifically affect exports to other Member States and is not intended to provide a particular advantage for the national production or for the domestic market of the Member State concerned; nor is it likely, in itself, to restrict or distort competition within the common market.

6. Even after the end of the transitional period and the adoption of Regulation No 2603/69 Article 4 of the Council Decision of 9 October 1961, in conjunction with the Council Decision of 16 September 1969, requires a Member State contemplating a change in the state of liberalization of its exports to non-member countries to give prior notice to the other Member States and the Commission. A Member State which fails to give prior notice, delays in doing so or does so in an inadequate manner fails to fulfil its obligations under those Council decisions, but that failure does not create individual rights which national courts must protect.

7. The fact that no Community institution challenges the legality of a policy adopted by a Member State restricting trade with non-member countries cannot in itself have any effect on the compatibility of that policy with Community law.

## OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN
delivered on 10 December 1985

*My Lords,*

This reference under Article 177 of the EEC Treaty raises important questions, at the heart of which is the compatibility with Community law of the United Kingdom's policy in 1981 as to the export of crude oil, in the instant case to Israel.

On 31 January 1979, after Iran had ceased to export crude oil, and when supplies to many States were threatened, the United Kingdom Secretary of State for Energy announced in a written parliamentary answer the steps which his Government intended to take to deal with the crisis. He added 'The Government will expect oil companies exporting North Sea crude to do so in the markets of our partners in the

International Energy Agency and in the European Community. This expectation in no way cuts across the maintenance, to the extent possible, of any existing patterns of trade outside those regions.' A copy of the Minister's statement was given to a meeting of the Committee of Permanent Representatives of the Member States of the Community the day after it was made to the United Kingdom Parliament.

That policy was confirmed from time to time by Ministers in the Government which came into power in 1979. It was made clear that the Government disapproved of the exporting of crude oil (though not refined petroleum products) to countries not falling within the three categories mentioned in the initial policy statement, whether such exports were direct, or were routed via countries included in the three categories. No precise list was given of the countries falling in the third category, but a Government Minister on 8 December 1983 told Parliament that Finland and certain Caribbean countries fell within it. Israel was not a country falling in any of the three categories and prior to April 1981 Ministers on at least two occasions confirmed to Parliament that exports to Israel were not approved.

This policy was not incorporated in legislation or in a Ministerial Order under legislative powers. It was not strictly a 'ban', though it has in these proceedings often been referred to as such; the Government's firm attitude was, however, clearly an effective deterrent as the facts of the present dispute illustrate.

Bulk Oil (Zug) AG, the applicant in proceedings in the English High Court in which the reference is made, is incorporated in Switzerland; Sun International Limited and Sun Oil Trading Company, the respondents, are members of a group owned ultimately by Sun and Company, which is incorporated in Delaware, USA.

By an agreement made by exchange of telexes on 13 April 1981 Sun agreed to sell to Bulk two cargoes per quarter of 500,000-550,000 barrels at seller's option of Brent, Ninian or Forties crude oil with delivery f.o.b. at Houndpoint or Sullom Voe as appropriate, the first cargo to be lifted in mid-May 1981. Both Houndpoint and Sullom Voe are in the United Kingdom. The agreement contained the following clause:

'Destination: Destination free but always in line with the exporting country's Government policy. United Kingdom Government policy, at present, does not allow delivery to South Africa.'

It was at all times Bulk's intention that the oil be shipped to Israel. On 19 May 1981 it gave to Sun instructions 'Gibraltar for orders', which were unacceptable to Sun. The original supplier, BP, refused to supply when it discovered that Israel was the true destination. On 9 July 1981 Sun treated the contract with Bulk as at an end and subsequently claimed damages for breach of contract against Bulk in an arbitration before Mr Richard Yorke QC. In an interim award he found for Sun on the basis that the British Government's policy was not invalid under Community law and he later assessed the damages at about USD 13 million. He held, however, that if the issues of Community law had been decided in Bulk's favour, his decision would have been that Sun was in breach of contract. An application was then lodged with the High Court with a view to a reference for a preliminary ruling being made under Article 177 as to those issues, since the arbitrator himself could not make the reference. The High Court referred the following six questions to the Court:

'(1) (a) Did the Agreement of 11th May 1975 between the European Economic Community and the State of Israel ('the Agreement') as adopted by Council Regulation

1274/75 ('the Regulation') upon its proper construction:

(i) preclude the imposition of new quantitative restrictions or measures having equivalent effect on exports between the United Kingdom and Israel and if so

(ii) preclude the imposition of the same on the export of crude oil from the United Kingdom to Israel;

(iii) otherwise preclude the inclusion in a contract between two individuals of a provision which prevented the export of crude oil from the United Kingdom to Israel during the period April 1981 to July 1981 inclusive ('the relevant period')?

(b) Do the provisions of Council Regulation 2603/69 affect this answer?

(2) If so, would a measure in the form of a policy ('the policy') held to have been adopted by the United Kingdom of precluding the export of North Sea crude oil to countries other than Member States of the EEC, countries in the International Energy Agency and countries with which there was, at the time of the introduction of the policy, an existing pattern of trade, and so precluding the direct export of North Sea crude oil to Israel, have been justified under Article 11 of the Agreement and the Regulations in the circumstances ruling at the relevant period? And would such a measure have constituted a means of arbitrary discrimination or a disguised restriction on trade between the contracting parties under that Article?

(3) If relevant in the light of the answers to Questions (1) and (2):

(a) Do the relevant provisions of the Agreement and the Regulations have direct effect so as to enable an individual to rely on them;

(b) Can an individual rely on them against another individual at all;

and

(c) Can an individual rely on them against another individual in circumstances where the two individuals in question have entered into a contractual arrangement, a condition of which requires compliance with the policy of a Member State which contravenes those provisions?

(4) If relevant in the light of the answers to Questions (1), (2) and (3), having regard to Council Regulation 2603/69, was the adoption of the policy incompatible with the EEC Treaty either wholly or insofar as it sought to affect or preclude the export of crude oil from the United Kingdom to Israel because the Treaty precluded the United Kingdom from adopting such a policy either:

(i) at all, or

(ii) without having notified to, consulted with and/or gained the approval of the Commission and/or the Council of the Ministers of the European Communities?

(5) If the adoption of such a policy was incompatible with the Treaty:

(a) Do the relevant provisions of the Treaty have direct effect so as to enable an individual to rely on them?

(b) Can an individual rely on them against another individual at all?

and

(c) Can an individual rely on them against another individual in circumstances where the two individuals in question have entered into a contractual arrangement, a condition of which requires compliance with the policy of a Member State which contravenes those provisions?

(6) Are the answers to the foregoing questions affected by the fact that no objection has been expressed about the legality of the policy by either the Council of Ministers or the Commission of the European Communities?'

Following an agreement between the European Economic Community and the State of Israel dated 11 May 1975, the Council made Regulation (EEC) No 1274/75 (Official Journal 1975, L 136, p. 1). The aim of that agreement was, *inter alia*, to promote through the expansion of reciprocal trade, the harmonious development of economic relations between the EEC and Israel and to contribute '... by the removal of barriers to trade, to the harmonious development and expansion of world trade'.

So far as imports are concerned, it is explicitly provided by Article 3 that no new customs duties or charges having equivalent effect and no new quantitative restriction on imports or measure having equivalent effect are to be introduced in trade between the Community and Israel. Existing charges are either immediately abolished or to be phased out.

In relation to exports, Article 4 provides that no new customs duty or charge having equivalent effect is to be introduced. There is no express prohibition in that or any other article of quantitative restrictions on exports.

Article 11, however, provides that 'The Agreement shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified' on certain grounds. The argument that these words presuppose that quantitative restrictions on exports were otherwise precluded was rejected by the Court in relation to an analogous agreement with Spain which contained the same words (Case 225/78 *Procureur de la République* v *Bouhelier* [1979] ECR 3151). It seems likely that in including the equivalent of Article 36 of the EEC Treaty in the Israeli Agreement, it was overlooked that Article 3 gave effect both to Articles 12 and 30 of the EEC Treaty, but that Article 4 gave effect only to Article 12 and not to Article 34. As Mr Advocate General Capotorti put it 'it is unthinkable that prohibitions of such importance should be deduceable from a rule which has a different object' (see p. 3164).

That position is accepted by Bulk. Accordingly, although the effect of the Government's policy, in my view, constituted 'a quantitative restriction on exports' within the meaning of the EEC Treaty (Cases 249/81 *Commission* v *Ireland* [1982] ECR 4005 and 222/82 *Apple and Pear Development Council* v *Lewis* [1983] ECR 403) the Israeli Agreement did not expressly or impliedly prohibit quantitative restrictions on exports or measures of equivalent effect.

Bulk argues, however, that the British Government's policy infringes Article 25 of the Agreement which, *inter alia*, obliges the contracting parties to 'refrain from any measure likely to jeopardize the attainment of the objectives of the Agreement'.

If regard is had only to the Preamble and Article 1 of the Agreement, it might be argued that a ban by the Community on

exports by the Community or by Member States to Israel was prejudicial to the aims set out. In my view, it is plainly wrong to look only at the Preamble and Article 1. The parties to the Agreement have chosen not to prohibit quantitative restrictions on exports but only on imports. That choice must be taken as limiting or defining the method of achieving the general aim set out in the Agreement. Restrictions on exports fall outside the agreement even if imposed by or with the consent of the Community; their adoption is not to be taken as 'a measure likely to jeopardize the attainment of the objectives of the Agreement'. Restrictions on exports adopted by a Member State, even if not authorized by the Community, cannot be seen, either, as constituting such a measure. In my view the British Government's policy was not in breach of Article 25 of the Agreement.

It is also argued, on the basis of the Court's decision in Case 22/70 *Commission* v *Council* [1971] ECR 263, that by adopting Regulation No 2603/69 (Official Journal English Special Edition 1969 (II) p. 509) and by making the Israeli Agreement, the Community had entered the field of trade relations between the EEC and Israel. Again reliance is placed in particular on the Preamble to and Article 1 of the Agreement. It is said that accordingly Member States are prohibited from introducing new quantitative restrictions on the export of oil to Israel — a result not inconsistent with the decision in *Bouhelier* which was concerned with pre-existing restrictions.

Although *Bouhelier* was in fact concerned with pre-existing restrictions, I do not read the Court's judgment as based on the distinction between 'old' and 'new' restrictions. Nor, whatever be the position under the Regulation, do I consider that the Community, by the Israeli Agreement, has taken over the whole field of trade with Israel when it has specifically left open the possibility of restrictions on exports. Accordingly the adoption by a Member State of such restrictions, or a policy seeking to achieve that exports of oil shall not be made to Israel, is not preempted by the Israeli Agreement itself.

Accordingly, in my view the EEC-Israeli Agreement did not render invalid or preclude the policy adopted by the British Government.

On that basis it is not necessary to consider whether the policy was justified under Article 11 of the Agreement; on the opposite view, similar, if not identical, considerations would arise to those which arise under Article 11 of Regulation No 2603/69 with which I deal subsequently.

If I had come to the view that the Agreement did prohibit new quantitative restrictions on exports to Israel, I would not have accepted the contention put forward that crude oil falls outside the Agreement altogether. It is true that the definition of 'originating products' in Article 1 (2) of Protocol No 3 does not apply to crude oil and other products. It does not, however, follow that because no definition is given for this purpose in relation to oil, oil is excluded from the Agreement, any more than the fact that no definition is given of crude oil in Article 3 of the Community Regulation on origin (Council Regulation No 802/68 (Official Journal 1968, L 148/1)) means that crude oil is not covered by the EEC Treaty. That crude oil does fall within the Agreement seems to me to be indicated (a) by Article 5 of and Annex C to Protocol No 2 to the Agreement by which Israel was required to abolish quantitative restrictions on imports of crude oil according to the timetable laid down in Annex D to that Protocol and (b) by Council Regulation No 2818/77 (Official Journal 1977, L 331, p. 21) which imposes annual ceilings on certain products 'orig-

inating in Israel' including, although not crude oil, other petroleum products which are not included in the definition of 'originating products' contained in Protocol No 3.

Finally, even if Article 25 (1) of the Agreement can be construed so as to prohibit the adoption by a Member State of quantitative restrictions on exports, it does not seem to me that the obligation is spelled out with sufficient clarity or certainty for it to be relied on by individuals in the domestic courts of Member States. It corresponds broadly to Article 5 of the EEC Treaty, which, taken by itself and without reference to other precise Articles, cannot, in my opinion, be relied on by the individual in such domestic courts. (Cases 78/70 *Deutsche Grammophon* v *Metro* [1971] ECR 487 at p. 499; 9/73 *Schlüter* v *Hauptzollamt Lörrach* (1973) ECR 1135 at p. 1161; and 141/78 *France* v *United Kingdom* [1979] ECR 2923 at p. 2942).

The second matter for consideration is whether the Government's policy contravened Council Regulation (EEC) No 2603/69 on establishing common rules for exports. The preamble recognizes that after the transitional period 'the common commercial policy must be based on uniform principles, *inter alia*, as regards exports'. Because exports are almost completely liberalized in the Member States it is 'possible to accept as a Community principle that exports to third countries are not subject to any quantitative restriction, subject to the exceptions provided for in this Regulation and without prejudice to such measures as Member States may take in conformity with the Treaty'; 'certain products should be provisionally excluded from Community liberalization until the Council shall have acted to establish common rules in respect of those products'.

Articles 1 and 10 of the Regulation give effect to these aims:

'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.'

'10. Until such time as the Council, acting by a qualified majority on a proposal from the Commission, shall have introduced common rules in respect of the products listed in the Annex to this Regulation the principle of freedom of export from the Community as laid down in Article 1 shall not apply to those products.'

The Annex includes under headings 27.09 and 27.10 petroleum oils and crude oil.

On the face of it, and looking at this Regulation alone, Member States are plainly entitled to apply their existing policies, including restrictions, in respect of the export of crude oil. Can they introduce new restrictions subsequent to the date of the Regulation? It is argued that they cannot do so under the Regulation. Stress is laid on the fact that the preamble recites the importance of examination at Community level. Then it is said that the preamble makes it clear that it is to apply to all products so that Article 10 does not exclude crude oil from the Regulation, it merely provides that the obligation of liberalization does not apply, *inter alia*, to crude oil. Thus it is said that all the provisions of Articles 2 to 9 apply to crude oil.

Articles 2 to 5 of the Regulation lay down requirements for notification and consultation and enable the Commission to require Member States to supply statistical data and to exercise surveillance under a procedure established by the Commission. Article 6

empowers the Commission to make the export of a product subject to the production of an export authorisation; Article 7 empowers the Council to adopt appropriate measures to prevent a critical situation from arising owing to a shortage of essential products, or to remedy such a situation. By Article 8, which was in force until the end of 1974 (Council Regulation No 2747/72, Official Journal 1972, L 291, p. 50), a Member State which considered that protective measures were necessary could only take them individually on an interim basis until the Commission took a decision and consultation was to take place while such measures were in force to ensure that they were still justified.

New measures, it is said, cannot be taken otherwise than in accordance with these provisions. Articles 5 to 9 apply because Article 10 only exempts products in the Annex from the principle laid down in Article 1. It does not exclude the application of Articles 2 to 9.

Moreover, reliance is placed on the fact that the products in the Annex are those in respect of which a restriction was in operation on the part of at least one Member State, and as Member States have lifted restrictions so products have been deleted from the Annex.

Bulk relies in support of its argument (a) on Commission Decision 79/365 (Official Journal 1979, L 85, p. 44) relating to the monitoring of exports of untreated calf and bovine hides (products included in the Annex) which Decision is based on Article 5 of the Regulation; (b) on the limited derogation accorded to Ireland at the time of its accession in relation to exports of certain wood products (products included in the Annex) by virtue of Article 133 of, and Annex VII to, the Act of Accession, which it is said would have been unnecessary if Ireland was free to export these products and (c) Regulation No 1934/82 (Official Journal 1982, L 211, p. 1) which, (i) in its preamble states that 'it should also be specified more clearly that the restrictions maintained in force under Articles 1 and 10 of Regulation (EEC) No 2603/69 are applied only by the Member States indicated in respect of the products listed in the Annex with the exception of certain products in the energy sector,' and which (ii) substituted a new Article 10 whereby 'the principle of freedom of export from the Community as laid down in Article 1 shall not apply to those products for the Member States mentioned in the Annex or the following products for all Member States: 27.09 petroleum oils and oils obtained from bituminous minerals, crude'. This, it is said, shows that only existing restrictions and not new restrictions were exempted.

Despite the force of Bulk's arguments, I do not consider that Regulation No 2603/69 is to be read in the way Bulk contends. The structure of the Regulation raises difficulties but it seems to me that for the purposes of Article 1 three kinds of exception could be 'applied in conformity with the Regulation,' viz.: (i) those which are the subject of specific action by the Commission, the Council or the Member State under Title III 'Protective Measures'; (ii) those which relate to products excepted from the principle of liberalization by virtue of Article 10; and (iii) those which are justified on one of the grounds specified in Article 11. It seems to me impossible to say that a Member State could not until 1974, when Article 8 lapsed, introduce restrictions on exports included in Article 10 otherwise than by way of interim measures under Article 8, or that it must await action by the Council or the Commission under Articles 6 or 7. That would deprive Article 10 of any substance. The measures which may be taken under Title III are additional to those which may be taken in respect of products

excepted from the principle of liberalization. It seems to me that the intendment of the Regulation is that Title III should apply to goods not falling within Article 10 but in respect of which specific measures are called for in special situations.

If I had come to the opposite view, i.e. that it is possible that protective measures may be taken under Articles 6 to 8 in respect of goods falling within the Annex, then that would, in my opinion, not deprive Member States of their discretion to act independently and to take measures other than those specified in Title III.

I read Articles 2, 3 and 4 of Title II as being essentially ancillary to Title III. A Member State is only obliged to notify the Commission under Article 2 if it considers that 'protective measures within the meaning of Title III might be necessary'. Under Article 3 consultation must be held, so far as relevant to this point, within four working days following receipt of the notification provided for in Article 2 (i.e. when the Member State considers that protective measures within the meaning of Title III might be necessary).

If, as I think, Title III does not apply to excepted products, then Articles 2, 3 and 4 cannot apply to them either. If, on the other hand, measures can be taken under Title III in respect of excepted products, then Articles 2, 3 and 4 only apply where a Member State considers that protective measures 'within the meaning of Title III' might be necessary. That would only apply where a Member State instead of acting independently under the discretion left to it by the Regulation as a result of Article 10 chose to set in motion the measures contemplated by Title III. I do not read the obligations in Articles 2, 3 and 4 as applying to steps taken by a Member State acting in respect of products excepted from the policy of liberalization by Article 10.

It is arguable that, if consultations under Article 3 are dependent on notification under Article 2, Article 5 of the Regulation, which requires Member States to supply statistical data on market trends and to exercise surveillance over exports, can only apply to products not included in the Annex. On the other hand, if the proper reading of Article 3 is that consultations are not dependent on notice under Article 2, it is equally arguable that 'measures' under Article 5 can apply to products not in the Annex so long as consultations take place 'before the introduction of any measure pursuant to Articles 5 to 7'. Since Article 5 is not in issue in this case it is unnecessary to decide the question. If it were necessary to decide it, I would, on the basis of the present arguments, consider that Article 5 did not apply to products included in the Annex, and that the Commission can obtain the information relating to products included in the Annex by other routes.

On this basis it is clear why Article 10 refers only to Article 1. It was unnecessary to refer to the other Articles because they did not in any event apply to products not included in the principle of liberalization.

It does not seem to me that the arguments based on the Irish Act of Accession or on Commission Decision 79/365 conclude the matter in issue in this case the other way. The provision as to wood products may have been inserted as a compromise or for clarity on the entry of a new member; at the time of Ireland's accession, it was in any event an 'old' and not a 'new' restriction.

Decision 79/365 was either made validly, because Article 5 (though not necessarily the other Articles in Titles II and III) applied to products included in the Annex, or erroneously.

Nor is the argument based on the preamble to Regulation No 1934/82 sufficient to displace what I regard as the correct reading of Regulation No 2603/69. The words 'restrictions maintained in force' are capable of being construed as covering new restrictions introduced only by the Member States indicated in respect of specific products, or by all Member States in respect of certain products in the energy sector. The wording of the new Article 10 is plainly capable of covering new restrictions. I do not consider that this Regulation should in any event be relied on to construe the earlier Regulation; it has moreover no effect on the facts in dispute in this case.

Accordingly in my opinion the United Kingdom was not obliged to notify under Article 2 of Regulation 2603/69. Article 10, assuming it was validly made, exempted crude oil from the policy of liberalization; the United Kingdom was free, so far as that Regulation was concerned, to adopt the policy which it did adopt.

It has been argued that if the Government's policy was otherwise contrary to the Agreement or Regulation No 2603/69, it was justified under Article 11 of each of them on grounds of public policy or public security, unless it constituted a means of arbitrary discrimination within the meaning of the Agreement. In the light of the Court's judgment in Case 270/80 *Polydor* v *Harlequin Records* [1982] ECR 329, these two Articles may not necessarily have the same scope even if the wording is similar. The provisions of the Agreement may be wider in their effect than those of the Regulation.

Reference has been made to Case 72/83 *Campus Oil* v *Minister for Industry and Energy* [1984] ECR 2727, where it was held that a restriction on imports of petroleum products from other Member States may be justified under Article 36 of the EEC Treaty on grounds of public security in so far as it is necessary to maintain essential supplies. The Court did not, however, say in that case that Article 36 gives unlimited powers to impose restrictions of this kind — the restrictions adopted must not be greater than those needed to ensure minimum supply requirements.

That decision is not directly in point in this case since there the restrictions concerned trade between Member States and were adopted in order to protect Ireland's own requirements. Here the restriction is not said to be necessary to protect the United Kingdom's requirements for oil but in order to assist the other Member States of the Community and parties to the International Energy Agreement, none of which apparently asked for this restriction to be adopted. The restriction included in the Government's policy did not apply in any event to refined petroleum products: instead it 'encourages the adaptation of refinery infrastructure within the participating countries to make optimum use on a continuing basis of the particular characteristics of United Kingdom North Sea crude oil' (United Kingdom observations in the reference).

It seems to me clear that a restriction on the exporting of crude oil is capable of being justified on grounds of public security. There may, further, be force in the contention that this particular policy was justified in 1979 when there was a shortage of oil and uncertainty as to future supplies. By 1981 the position had changed and there was a surplus of crude oil. I accept the argument that since the position could easily change again it would not be right to say that because the precise circumstances of 1979 no longer existed, the policy can no longer be justified. A longer-term view may have to be taken. Yet at a time of surplus the situation has to be reassessed and it equally cannot be right to say that once a policy is justified on grounds of public security it is justified in perpetuity or even indefinitely. This seems to me to be a question largely for a national court to decide and here the arbitrator has expressed his view on it. On the material before the Court it does not seem to me that it can be decided whether this policy continued to be justified at the relevant time. If such a decision had to be taken now I would be of the view that the material available to this Court does not establish that the restriction was justified on the grounds of the public security of the United Kingdom in 1981. On the other hand because of the reasons for the adoption of this policy I would not accept that, if it were otherwise within Article 11, the policy was taken out again as constituting arbitrary discrimination.

It is said further that the United Kingdom's policy was in any event in breach of Article 113 of the Treaty, and that if Article 10 of the Regulation has the effect which I consider that it has, that Article was invalid.

In the context of the Treaty as a whole, the importance of establishing after the transitional period a common commercial policy 'based on uniform principles, particularly in regard to ... the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalization, export policy ...' hardly needs to be emphasised.

It is clear that the United Kingdom Government's policy was a measure of commercial policy. It is also clear on the decisions of the Court that the common commercial policy is a matter for the Community and that Member States do not enjoy concurrent powers in the area of that policy; 'full responsibility in the matter of commercial policy was transferred to the Community by means of Article 113 (1)' (Case 41/76 *Donckerwolcke* v *Procureur de la République* [1976] ECR 1921 at 1937. See also Cases 37 and 38/73 *Sociaalfonds* v *Indiamex* [1973] ECR 1609; *Opinion 1/78* [1979] ECR 2871). 'To accept that the contrary were true would amount to recognising that, in relations with third countries, Member States may adopt positions which differ from those which the Community intends to adopt and would thereby distort the institutional framework, call into question the mutual trust within the Community and prevent the latter from fulfilling its task in the defence of the common interest (*Opinion 1/75* [1975] ECR 1355 at pp. 1363-1364).

Even on this basis, however, it must be open to the Community to authorize Member States on a provisional basis to take independent action. Such action is not the assertion of a concurrent or rival power with or against the Community; it is the exercise of a power conferred or recognized by the Community.

The common policy of the Community in respect of exports is set out in Regulation No 2603/69; that policy includes a freedom for Member States for the time being to act

independently in respect of specified products. One of those is crude oil and on the face of it the United Kingdom was able within the common policy to impose restrictions, or to adopt a policy to the same effect.

Bulk contends, however, that the Council could not lawfully grant an authorization of the kind granted here, since such authorization can only be granted on a specific consideration of the facts of the case and here that was not done. In other words Article 10 was *ultra vires* the Council.

As I see it the Council proceeded on the basis that Member States already applied restrictions in respect of certain products, some though not all of which were of minor economic significance; those were excluded from liberalization on a temporary basis — the object being to move to further liberalization by reducing the list of products in the Annex, as was in fact done. For the reasons given in the Court's judgment in *Campus Oil*, crude oil and petroleum products occupy a special position in contemporary industrialized society; particular considerations apply to some Member States as, e.g., proposals to modify the Annex show that they did to France and as they did to the United Kingdom. It was no doubt, at any rate in part, for these reasons that crude oil and petroleum products were included in the Annex. Although clearly care has to be taken to ensure that the common commercial policy is not undermined by unjustified exceptions, these are in my view sufficient reasons for the policy adopted by the Community in the Regulation. It does not follow, as Bulk argues, that, if the Council can for adequate reasons provisionally exempt some products from the principle of liberalization, it is thereby given the right to exempt all, or so many that the policy really is reduced to naught. Any attempt to do so by the Council would raise different considerations in regard to vires. Such is not the present case.

Accordingly I do not consider that Article 10 of the Regulation is invalid as being outside the Council's margin of appreciation in laying down a common commercial policy for the purposes of Article 113.

Was, however, the policy otherwise unlawful because the United Kingdom failed to give prior notification of its intention to adopt it, or to consult with the Community institutions before it adopted the policy? It is not suggested that there was prior notification or consultation though Coreper was informed, and the Commission's representative was aware, of the policy at the meeting the day after the statement in the House of Commons.

The Commission relies on the Council Decision of 9 October 1961 (Official Journal 1961, p. 1273), which lays down a consultation procedure with respect to certain commercial policy measures, and the Council Decision of 25 September 1962 on a programme of action in matters of a common commercial policy (Official Journal 1962, p. 2353).

Article 4 of the Decision of 1961 provided as follows:

'A Member State contemplating changes in the state of its liberalization in relation to third countries shall give the other Member States and the Commission prior notice thereof.

In such cases, prior consultations shall be held at the request of a Member State or of the Commission, except in urgent cases, where consultations shall take place after the event.'

The programme of action adopted by the Decision of 1962 stipulated in so far as is relevant that 'the consultation procedure introduced by Council Decision of 9 October 1961 will apply to any measure amending the rules governing exports to third countries currently in force in any of the Member States'.

I cannot accept the Commission's view that these two Decisions were in force in 1979 and are still in force today. They were based solely on Article 111 which related only to the transitional period. Accordingly, at the end of that period when their legal basis lapsed, it seems to me that the Decisions lapsed also. The wording of the preamble to the 1961 Decision bears this out clearly since it refers only to the transitional period. Even if, as the Commission argues, this did apply, the obligation under Article 4 of the 1961 Decision is in general terms. The statement made by the British Government that 'the Government will expect . . . ' was notified one day after it was announced. Precisely when the policy affected current operations is not clear. What is clear is that Member States and the Commission knew of it and no request for consultations under Article 4 was made and no objection received. It seems to me impossible to say that the delay, if such it was, can invalidate the policy. Further, as its title shows, the Decision of 1962 merely instituted a programme of action. With respect to quantitative restrictions on exports, the Decisions have now been replaced by Regulation No 2603/69.

Reference has been made to Council Regulation No 388/75 on notifying the Commission of exports of crude oil and natural gas to third countries (Official Journal 1975, L 275, p. 1) and its implementing Regulation, namely Commission Regulation No 2678/75 (Official Journal 1975, L 275, p. 8). However, these Regulations only require the notification of the quantities of exports of these products, not of policies or measures adopted or to be adopted by the Member States in relation to such exports. Article 1 (1) of the Council Regulation provides, it is true, that 'Member States shall add to their notifications any comments they may have'. Yet this does not oblige Member States to explain why exports are not being made to particular countries.

Reference has also been made to the Council Resolution of 9 June 1980 concerning Community energy policy objectives for 1990 and convergence of the policies of the Member States (Official Journal 1980, C 149, p. 1). In point 2 of that Resolution the Council 'requests the Member States to submit to the Commission each year their energy policy programmes up to 1990'. That would, as I read it, cover measures such as the export ban in issue here. Nevertheless, in my view this Resolution is not one which 'makes specific the duties of cooperation which the Member States assumed under Article 5 of the EEC Treaty when they acceded to the Community' (Case 141/78 *France* v *United Kingdom* [1979] ECR 2923 at p. 2942).

Finally, on this aspect of the case, it is said that an obligation to notify and consult arises from the principle expressed in such cases as Case 804/79 *Commission* v *United Kingdom* [1981] ECR 1045; Case 269/80 *Regina* v *Tymen* [1981] ECR 3079.

In the first of those cases the Council had adopted interim measures relating to the conservation of fishery resources. The Commission had proposed definitive measures for the Council to adopt pursuant to Article 102 of the Act of Accession, but the Council, at the relevant time, had not been able to agree on those measures. By the Hague Resolution the Council agreed that Member States could introduce interim measures. 'Before adopting such measures the Member State concerned will seek the approval of the Commission which must be consulted at all stages of the procedure. Any such measure shall not prejudice the guidelines to be adopted for the implementation of the Community provisions.' The United Kingdom notified proposed measures but was told that they should not be introduced without the approval of the Commission.

In its judgment in Case 804/79 the Court ruled that after the transitional period, Member States were not free to exercise any independent power in respect of conservation. Since the Council had not acted, the measures in force at the end of the transitional period had to be maintained. In view of these facts and the guidelines which had been issued, the Court held that, before adopting any measures, Member States must seek the approval of the Commission 'which must be consulted at all stages of the procedure'. They must not take any steps which jeopardised the objectives of the Treaty or which were subject to objections, reservations or conditions formulated by the Commission. The United Kingdom was found not to have undertaken any adequate consultation and to have introduced the measures 'in spite of the Commission's objections'.

I have set out the issues in that case because of the importance attached to it by Bulk at some length to show how different is the present case. There was here no failure to act by the Council — the crucial fact in Case 804/79. The Council had here adopted Regulation No 2603/69. There was no equivalent of the Hague Resolution obliging consultation. There were no guidelines in respect of products excepted under Article 10 of Regulation No 2603/69. The Commission had not made any objections, reservations or conditions. It does not seem to me in these circumstances that the fishery cases lay down a rule applicable to the present case.

I conclude that in all the circumstances there was no obligation on the United Kingdom to consult the Community institutions or other Member States before adopting its policy in relation to crude oil. Although I consider that as a matter of comity there was an obligation to notify the adoption of the policy, that obligation was fulfilled by the notice given to the Coreper meeting the day after the statement in Parliament. If contrary to my view the obligation to notify under the 1961 and 1962 Decisions continued after 1969, or arose under Regulation No 2603/69, I would equally have concluded that that obligation was satisfied by the notice given.

Bulk next contends that the United Kingdom's policy contravened Article 34 of the Treaty since it applied to indirect exports to Israel and thereby prevented the exports of crude oil to other Member States which were re-exported to Israel. It may be that if the British policy prevented oil being shipped to Rotterdam because other oil sent from the United Kingdom and put in free circulation in the Netherlands had been

reshipped to Israel, there would be a breach of Article 34 subject to the application of Article 115 of the Treaty. That, however, does not mean that the policy in so far as it applies to exports directly to Israel, or via a third State to Israel, is contrary to Article 34. The validity of the policy must be seen in relation to its specific application. The whole policy does not infringe the Article because it could be applied in a way which violates the Article (see Cases 314-6/81 and 83/82 *Procureur de la République* v *Waterkeyn* [1982] ECR 4337). Here the original destination was said to be 'Gibraltar for orders'. Gibraltar is to be regarded as part of the United Kingdom for this purpose by virtue of Article 227 (4) of the Treaty. There was thus no restriction 'on exports between Member States' within the meaning of Article 34.

Next it is said that the destination clause of the contract, incorporated by reference to United Kingdom Government policy, was contrary to Article 85 of the Treaty. Bulk also maintains that the policy contravened Article 85 read with Articles 3 (f) and 5 of the Treaty, and Articles 12 and 25 (1) of the Agreement, which reflect Articles 5 and 85 of the Treaty, in that it was calculated to encourage and did encourage action which was contrary to those Articles.

In my view this particular agreement between Bulk and Sun did not have as its object or effect the prevention, restriction or distortion of competition within the common market. It is, therefore, not within Article 85. In so far as the destination clause was included in this contract in compliance with Government policy it cannot, for the same reason, constitute a breach of Articles 3 (f), 5 and 85 of the Treaty on the part of the United Kingdom.

For my part I would not read Article 12 of the Agreement as including the imposition of quantitative restrictions on exports which, in my view, are not prohibited by the Agreement. It would be extraordinary to introduce by the back door of Article 12 a limitation deliberately left out of Article 4 of the Agreement. For the same reason, there can be no breach of Article 25 of the Agreement by the Member State.

By its final question, the High Court asks whether the answers to the questions are affected by the fact that no objection has been expressed about the legality of the policy by either the Council or the Commission. Such a failure to object would not be relevant to any breach of the Treaty or the Agreement (Case 43/75 *Defrenne* v *Sabena* [1976] ECR 455 at p. 475). It would only be relevant if, contrary to my view, approval or consultation were necessary. A failure to react could constitute approval or an indication that no consultation was required or thought necessary.

The question raised as to the direct effect of the provisions of the Agreement and the Treaty do not arise on the conclusion which I have reached. Since the provisions of a Regulation may be relied on between individuals in national litigation, if they are sufficiently clear and precise, I would have accepted that had Regulation No 2603/69 been invalid such invalidity could be relied on by Bulk in the national litigation. As Mr Justice Bingham put it in his judgment in making the reference:

'The reference in the clause to "the exporting Government's policy" must in my view be taken to mean the exporting country's lawful Government policy. I

cannot accept that Bulk's *prima facie* right to export to Israel could be properly restricted by reference to a policy which Her Majesty's Government were not lawfully entitled to adopt or pursue.'

If, on the other hand, I had come to the view that there was an obligation to notify or consult under Articles 2 and 3 of Regulation No 2603/69 I should not have considered that such a breach invalidated the policy, for the reasons given, *mutatis mutandis*, by Mr Advocate General Reischl in the final paragraphs of his Opinion in Cases 181 and 229/78 *Van Paassen* v *Staatssecretaris van Financiën* [1979] ECR 2063. Nor do I consider that, if it were possible to read into the Agreement, by virtue of Articles 4, 11 and 25, a bar on restrictions on exports, such obligation would be sufficiently clear and precise as to be directly applicable between two individuals litigating in a national court.

Articles 34 and 85 can clearly be relied on between individuals. Whether Article 113 can be relied on, and if so in what circumstances, is a difficult question which, since on my view it does not arise, I do not deal with.

Accordingly, in my view the questions referred should be answered on the following lines:

(1) The Agreement of 11 May 1975 between the European Economic Community and the State of Israel did not prohibit the imposition, subsequent to its coming into effect, of quantitative restrictions on exports between the Community or Member States and Israel.

(2) Article 10 of Council Regulation No 2603/69 empowered Member States to impose, subsequent to the Regulation coming into effect, quantitative restrictions on exports of products listed in the Annex to that Regulation. An individual may rely on this Regulation against another individual with whom he has entered into a contract, when a condition of that contract requires compliance with a measure or the policy of a Member State made or adopted in accordance with the terms of that Regulation.

(3) Articles 3 (f), 5, 34, 85 and 113 of the Treaty do not prohibit the imposition by Member States of restrictions on the exporting of goods included from time to time in the Annex to that Regulation.

The costs of the parties to the national proceedings fall to be dealt with by the national court. The Commission and the United Kingdom must bear their own costs.