OPINION OF ADVOCATE GENERAL JACOBS
delivered on 19 November 1992 *

My Lords,

1. This case raises for the first time the question of sanctions for breaches of the safeguards provisions of the Euratom Treaty (hereafter 'the Treaty'). The action has been brought under Article 146 of the Treaty by Advanced Nuclear Fuels GmbH, which requests the annulment of two decisions of the Commission imposing a sanction under Article 83(1). The applicant manufactures nuclear fuels at its plant in Lingen, Ems, in the Federal Republic of Germany, and is the subsidiary of a company based in Richland, Washington (USA). In what follows I shall refer to those two companies as 'ANF Lingen' and 'ANF Richland' respectively; however, until 28 January 1987 ANF Lingen was registered with the name of 'Exxon Nuclear GmbH'. The case arises from an incident occurring in May 1990 in which nuclear material was inadvertently exported from Germany to the United States ('the incident').

2. By Article 83(1) of the Treaty, in the event of an infringement of the obligations imposed on persons or undertakings by Chapter VII of Title Two of the Treaty, the Commission may impose the following sanctions:

'... in order of severity:

(a) a warning;

(b) the withdrawal of special benefits such as financial or technical assistance;

(c) the placing of the undertaking for a period not exceeding four months under the administration of a person or board appointed by common accord of the Commission and the State having jurisdiction over the undertaking;

(d) total or partial withdrawal of source materials or special fissile materials.'

3. The decisions challenged in these proceedings are the following:

(1) Commission Decision 90/413/Euratom of 1 August 1990 relating to a procedure in application of Article 83 of the Euratom Treaty (OJ 1990 L 209, p. 27); and

(2) Commission Decision 90/465/Euratom of 20 August 1990 relating to the appointment of a board responsible for imple-

* Original language: English.

menting Commission Decision 90/413/Euratom (OJ 1990 L 241, p. 14).

The decision of 1 August 1990 placed ANF Lingen, as regards part of its operation, under the control of a board of administrators for a period of four months, pursuant to Article 83(1)(c) of the Treaty, while the decision of 20 August 1990 appointed the three administrators in question and fixed the dates of their mission. Thus, it is in substance the first decision which is the subject of challenge; if that decision is annulled, the second decision will fall with it. In what follows, therefore, I shall refer simply to 'the contested decision', meaning the decision of 1 August 1990.

4. ANF Lingen claims that the contested decision is unlawful, and bases that conclusion on three alternative submissions. The applicant argues that:

(1) the incident did not give rise to any infringement of the obligations imposed by Chapter VII;

(2) the sanction was unlawful because any infringement had already ceased by the time the sanction was imposed; and

(3) even if a sanction under Article 83(1)(c) can be imposed after the infringement has ceased, the sanction imposed was disproportionate in the circumstances.

If, contrary to the applicant's first two submissions, the Court should find that a sanction could be imposed, the applicant requests that the Court substitute, for the sanction imposed by the Commission, the lesser sanction of a warning pursuant to Article 83(1)(a). It is to be noted that by virtue of Article 144 of the Treaty the Court has unlimited jurisdiction as regards, in particular, sanctions imposed under Article 83 of the Treaty, and it may therefore modify any sanctions imposed by the Commission.

5. In what follows, I will first set out in greater detail the relevant Community provisions, before turning to the incident and its aftermath. I shall then discuss whether the Commission's response was justified.

The Community provisions

6. Chapter VII (Articles 77 to 85) of Title Two of the Treaty is entitled 'Safeguards'. The safeguards in question relate to the security of nuclear materials rather than to health and safety, which is the subject of a separate chapter of the Treaty (Chapter III of Title Two).

7. By Article 2(e) of the Treaty, the Community has the task of making certain, by appropriate supervision, that nuclear materials are not diverted to purposes other than those for which they are intended, and it is to be noted that the intended use of materials must be declared to the Euratom Supply

Agency under Article 60 of the Treaty. Article 77 accordingly provides that:

'In accordance with the provisions of this Chapter, the Commission shall satisfy itself that, in the territories of Member States,

(a) ores, source materials and special fissile materials are not diverted from their intended uses as declared by the users;

(b) the provisions relating to supply and any particular safeguarding obligations assumed by the Community under an agreement concluded with a third State or an international organization are complied with.'

The expressions 'ores', 'source materials' and 'special fissile materials' are defined in Article 197 of the Treaty; 'special fissile materials' include, in particular, any substance containing enriched uranium. It may be noted that, by virtue of Article 86 of the Treaty, all special fissile materials which are produced or imported by a Member State, a person or an undertaking and are subject to the safeguards provided for in Chapter VII, are the property of the Community.

8. By Article 78, anyone operating certain kinds of installation must declare to the Commission the basic technical characteristics of the installations, to the extent necessary for the attainment of the objectives of Article 77, and the Commission must, to the same end, approve the techniques to be used for the chemical processing of irradiated materials. By Article 79:

'The Commission shall require that operating records be kept and produced in order to permit accounting for ores, source materials and special fissile materials used or produced. The same requirement shall apply in the case of transport of source materials and special fissile materials.

...

The nature and the extent of the requirements referred to in the first paragraph of this Article shall be defined in a regulation made by the Commission and approved by the Council.'

Article 81 gives the Commission the power to send inspectors into the territories of Member States. By the second paragraph of Article 81, such inspectors shall have access at all times:

'to all places and data and to all persons who, by reason of their occupation, deal with materials, equipment or installations subject to the safeguards provided for in this Chapter, to the extent necessary in order to apply such safeguards to ore, source materials and special fissile materials and to ensure compliance with the provisions of Article 77. ...'.

By Article 82, second paragraph, inspectors are responsible for obtaining and verifying the records referred to in Article 79, and for reporting any infringement to the Commission. The Commission has powers under the third paragraph of Article 82 to issue directives to the Member States, calling upon them to take measures to bring to an end any such infringement. Article 83, which enables

the Commission to impose sanctions on persons or undertakings in the event of an infringement of the obligations imposed on them by Chapter VII, has already been cited in paragraph 2 above.

9. The procedures for the application of the provisions of Chapter VII were revised and codified in Commission Regulation (Euratom) No 3227/76 of 19 October 1976 concerning the application of the provisions on Euratom safeguards (OJ 1976 L 363, p. 1), hereafter 'the regulation'. Although only Article 79 of the Treaty confers on the Commission an express power to adopt a regulation, Regulation No 3227/76 is based on Articles 77, 78, 79 and 81.

10. Part I (Articles 1 to 8) of the regulation deals with the declaration of the technical characteristics of an installation and the adoption of 'particular safeguard provisions' for the installation. Articles 1 to 5 provide for the declaration of characteristics, and Article 6 provides for the communication to the Commission of certain other information. By Article 7, acting on those declarations and communications:

'the Commission shall specify in the "particular safeguard provisions" the procedures by which the persons or undertakings concerned shall meet the requirements in relation to safeguards imposed on them. ...

...

The "particular safeguard provisions" shall also lay down ... the conditions requiring advance notification of shipments and receipts of nuclear material.'

By Article 8, the 'particular safeguard provisions' referred to in Article 7 are drawn up by means of an individual decision of the Commission, after consultation with the person or undertaking concerned and the appropriate Member State. In the case of ANF Lingen, the 'particular safeguard provisions' in force at the time of the incident were adopted by a decision of the Commission dated 5 June 1985. A copy of that decision was supplied by the Commission at the request of the Court.

11. Part II (Articles 9 to 23) of the regulation deals with the accounting and control systems for nuclear materials which are required to be established pursuant to Article 79 of the Treaty, and Part III (Articles 24 to 28) deals with the advance notifications which are required in the event of the export or import of source or special fissile materials to or from a non-member State.

12. Article 1 of the contested decision alleges an infringement of Articles 10 and 11 of the regulation, and of Article 24 of the regulation in conjunction with paragraph 1.3.2 of the 'particular safeguard provisions' applicable to ANF Lingen. The Commission confirmed at the hearing that the reference to paragraph '3.1.2' of those provisions in Article 1 of the contested decision is a typographical error, and that the reference to paragraph '1.3.2' in the recitals to the decision is correct.

13. It is to be noted, first of all, that Article 9 of the regulation provides that:

'The persons and undertakings referred to in Article 1 shall maintain a system of accounting for and control of nuclear materials. This system shall include accounting and operating records and, in particular, information on the quantities, nature, form and composition of these materials in accordance with the requirements of Article 21 [which contains detailed rules concerning notifications and records], their actual location, the particular safeguarding obligation, and the way in which the persons or undertakings concerned have stated that they intend to use such materials ...'.

By Article 10:

'The accounting records shall show in respect of each material balance area [as defined in Article 36 of the regulation]:

(a) all inventory changes, so as to permit a determination of the book inventory at any time;

...'.

By Article 11:

'The operating records shall include, if appropriate, for each material balance area:

(a) those operating data which are used to establish changes in the quantities and composition of the nuclear material;

...'.

By Article 36(r), a 'material balance area' is an area in which the conditions are such that the balance of nuclear material can be established, and by Article 36(m) the 'book inventory' of a material balance area is the algebraic sum of the most recent physical inventory and all subsequent inventory changes.

14. Article 24 provides that:

'(a) The persons and undertakings referred to in Article 1 which export source or special fissile materials to a non-member State shall give advance notification to the Commission of every such export. ...

...

However, advance notification is required only:

(i) where the consignment exceeds one effective kilogramme;

(ii) where the "particular safeguard provisions" referred to in Article 7 so specify, in the case of installations habitually transferring large total quantities of materials to the same State, even though no single consignment exceeds one effective kilogramme.'

Finally, the recitals to the contested decision refer also to a breach of Article 32, according to which:

'Any person or undertaking engaged, within the territories of the Member States, in carrying or temporarily storing source or special fissile materials during shipment may accept them or hand them over only against a duly signed and dated receipt. ...'

It is clear however that that provision is concerned exclusively with the obligations of carriers or those temporarily storing materials; the contested decision does not in fact allege any infringement of Article 32 on the part of ANF Lingen itself.

15. As I have already mentioned, the 'particular safeguard provisions' applicable to ANF Lingen were laid down by a Commission decision of 5 June 1985, which replaced a previous decision of 1 December 1980. The annex to that decision sets out, pursuant to Article 7 of the regulation, the procedures by which ANF Lingen is to meet safeguard requirements imposed by the Treaty, the content of the communications required under Article 6, and the conditions in which advance notification is required of shipments and receipts of nuclear material. As regards the latter conditions, paragraph 1.3.2 of the annex requires advance notification of exports to a non-member State even in the case of consignments not exceeding one effective kilogramme, pursuant to Article 24(a) of the regulation (and similarly in the case of imports, pursuant to Article 25(a)). The notion of an 'effective kilogramme' of nuclear material is defined in Article 36(o) of the regulation; the Commission confirmed at the hearing that the export at issue in the present case did not exceed that amount. By paragraph 2.1 of the annex, ANF Lingen is designated as a 'material balance area', and paragraph 2.2 specifies the key measurement points for determining the flow and stocks of nuclear materials, pursuant to Article 7(a) of the regulation. Paragraph 3 lays down detailed obligations concerning the accounting and operating records required to be kept under Articles 10 and 11 of the regulation, and subsequent paragraphs deal with reporting procedures, with procedures for the taking of physical inventories, with containment and surveillance measures, and with sample-taking for safeguard purposes (compare Article 7(b) to (e) of the regulation).

16. It is to be noted that the obligations arising under the above provisions may also be enforced by national laws or regulations of the appropriate Member State; the Commission has the power under Article 83(3) of the Treaty to make any recommendations to Member States concerning such national provisions. In the case of Germany, the current national provisions are contained in the Atomgesetz of 23 December 1959, in the version of 15 July 1985 (BGBl. I p. 1565). The operation of an installation for the processing of nuclear materials requires authorization under Article 7 of the Atomgesetz, and is subject to supervision under Article 19. By Article 19(3), the supervisory authorities can issue instructions to enforce, in particular, conditions attached to such authorizations. In practice, therefore, the internal operating

regulations governing safeguard procedures at an installation are drawn up under the supervision of the national regulatory authority, which can also require their amendment from time to time. In the present case, the appropriate national authority is the Ministry of Environment of Lower Saxony; as we shall see, the Ministry made use of its powers under Article 19(3) to issue instructions to ANF Lingen on 23 May 1990.

17. It can be seen that safeguard procedures at nuclear installations within the Community are subject to regulation at three distinct levels. In the first place, general obligations are imposed on persons and undertakings by Chapter VII of Title Two of the Treaty and its implementing regulation. Secondly, the Commission adopts 'particular safeguard provisions' under Article 8 of the regulation, imposing requirements in respect of a particular installation. Finally, the national supervisory authorities retain competence to impose their own regulatory requirements, insofar as such requirements are compatible with the aims of the Treaty; indeed, by Article 192 of the Treaty, they are obliged to do so to the extent necessary to ensure fulfilment of the obligations arising out of the Treaty or to facilitate the achievement of the Community's tasks.

The incident and its aftermath

18. The material facts giving rise to the incident are not in dispute between the parties, and are summarized in section I of the recitals to the contested decision.

19. In order to carry on its manufacturing operations, ANF Lingen regularly receives shipments of nuclear material from ANF Richland. On 8 May 1990, at its plant in Lingen, a box was removed from one of two containers on a loading pallet holding a total of four boxes of enriched uranium dioxide, two to each container. After that operation had been completed, the pallet, still containing three of the four boxes, was temporarily placed in an area of the plant adjacent to the storage area for empty containers. By an oversight, the pallet was not returned to the store for non-empty containers, and on 11 May 1990 the two containers on the pallet were mistakenly loaded along with a consignment of empty containers destined for shipment to Richland via Seattle. The employee responsible for the loading operation observed that the two containers were labelled 'radioactive'. However, believing them to be part of the consignment of empty containers, he replaced those labels with ones indicating that the containers were empty. The containers arrived in Richland on 15 May 1990, and after a routine examination the presence of radioactive material was discovered. An examination of the seals on the containers revealed that no material had been removed in transit.

20. The incident was notified by ANF Lingen to the Safeguards Directorate at the Commission on 16 May 1990, and to the Euratom Supply Agency on 17 May 1990. The Ministry of Environment of Lower Saxony was also informed, and conducted its own investigation of the incident at the applicant's plant on 23 May 1990. On the same day, the Ministry issued instructions to

the applicant, under Article 19(3) of the Atomgesetz, requiring a clearer demarcation of the storage area for empty containers from the unloading area, and requiring stricter rules to be observed regarding the removal of markings on containers. Both of those measures were to be incorporated into the internal operating regulations of ANF Lingen, and were to be implemented immediately. At the same time, and on its own initiative, the applicant made further improvements in its safeguard procedures.

21. On 31 May and 1 June 1990, the applicant's plant was visited by the Commission's inspectors. As the Commission stated in its letter to the applicant dated 29 June 1990, the object of the inspection was to check that the technical characteristics of the installation were in conformity with those previously declared to the Commission, to check the book inventory and determine the physical inventory, to carry out quantitative checks on part of the physical inventory, and to check that any special controls under Community agreements with third States had been observed. In the same letter the Commission informed the applicant that, from the report of its inspectors, it was not able to satisfy itself, concerning the incident, that the fissile materials in question had been used on the territory of the Community only as declared by their users. It seems that by that statement the Commission intended to convey that the incident had prevented it from carrying out its task under Article 77(a) of the Treaty (cited above at paragraph 7). In the letter the Commission also alleged that the incident had given rise to a breach of Articles 24, 10(a), 11(a) and 32 of the regulation.

22. A second visit by the Commission's inspectors took place on 4 July to 6 July 1990. During that second inspection further checks were carried out, and by a letter dated 1 August 1990 the Commission informed the applicant that the inspection gave rise to no particular observations on the part of its Safeguards Directorate. As the Commission explains in its defence, that statement was intended to express that it was now satisfied that the incident was an isolated case, and that the physical inventory now sufficiently corresponded to the book inventory (see also the eighth paragraph of section II. C of the recitals to the contested decision). Thus, the Commission was able to satisfy itself that no other material was missing from the applicant's installation. As we have seen, on the same date the Commission adopted its decision to impose a sanction of administration under Article 83(1)(c) of the Treaty. Article 2 of that decision placed ANF Lingen under administration for a period of four months 'as regards aspects connected with the safeguards mentioned in Chapter VII, Title Two, of the Treaty'. The further decision of 20 August 1990 appointed a board consisting of three administrators and fixed the dates of their administration (21 August to 21 December 1990).

23. Before that sanction was imposed, ANF Lingen had the opportunity of stating its case at a hearing which took place in Brussels on 13 July 1990. The representative of ANF Lingen explained the background to the incident and described the new procedures which had been put into effect to ensure such an incident would not recur, namely the introduction of dosimetric checks on empty containers, a system of double checks on container markings, and a

clear separation of empty from full container zones. A computerized system of controls of empty containers would be introduced. New internal operating regulations for the installation had been drawn up, and would be forwarded to the Commission. According to the statement made by the applicant in its reply, the new internal regulations were communicated to the Commission on 23 July 1990.

24. ANF Lingen's application for annulment of the Commission's decisions was lodged on 6 October 1990. It is to be noted that, by virtue of the second subparagraph of Article 83(2) of the Treaty, appeals against any of the sanctions imposed under Article 83(1) have suspensory effect unless the Court orders otherwise on application by the Commission or any Member State concerned. The Commission made such an application on 15 November 1990, and the Court granted immediate enforcement of the sanction by an Order of 7 December 1990 [1990] ECR I-4499. In its observations on the Commission's application, ANF Lingen pointed out that although it had, by a letter of 8 October 1990, given its assent to the administrators completing their assignment, that assent had been given without prejudice to the claims made in its application. It is clear, in fact, that when the Court granted immediate execution of the sanction, it was in reality doing no more than confirming the agreement between the parties that the administrators should serve out their term, in order that the merits of the Commission's decision could be examined in the context of the present proceedings.

25. The administrators appointed by the Commission drew up an assessment report on 19 December 1990, pursuant to Article 3(3) of the contested decision. On 6 February 1991 the Commission addressed a communication to ANF Lingen on the implementation of Decision 90/413/Euratom of 1 August 1990 (OJ 1991 C 46, p. 3). Copies of both the report and the communication were forwarded to the Ministry of Environment of Lower Saxony, which on 25 April 1991 in turn forwarded a copy of the report to ANF Lingen. By an application lodged on 4 February 1991, ANF Lingen had requested the Court to order copies of the assessment report to be provided both to ANF Lingen and to the Court. By an Order of 20 March 1991, the Court rejected the request that a copy of the report be provided to ANF Lingen and joined to the substance of the case the request that a copy of the report be provided to the Court. However, both of those requests clearly became redundant when the report was forwarded to ANF Lingen by the Ministry of Environment, and annexed by ANF Lingen to its reply lodged at the Court on 29 May 1991.

26. From that report, it appears that the board of administrators made four visits to ANF Lingen's installation, on 29 August, 20 and 21 September, 29 and 30 October, and 13 and 14 December 1990. Each visit is the subject of a file note describing the progress of the administration. It is clear from those notes that the administrators and the representatives of ANF Lingen were jointly concerned to elaborate an improved system of safeguard procedures at the installation, by means of a series of amendments to the internal operating regulations and the introduction of a computerized system of control. The outcome of the administration is summarized in the communication of 6 February 1991, which concludes in the following terms:

'... the Commission recognizes that the task of the board, which had been expressly confined to duties connected with safeguards, actually resulted in the following:

— checking and amending of the internal regulations in this area, and

— supervision of their implementation and monitoring of their application.

The Commission therefore considers that the task given to the board of administration has been successfully completed and that the aim it was set, namely "to guarantee that mistakes of this type do not recur", has been achieved.'

27. I now turn to the questions at issue in this case. It will be recalled that the applicant has raised three objections to the Commission's decision to impose the sanction of administration. In the first place, the applicant claims that its obligations under the Treaty were not breached as a result of the incident; it contends, secondly, that the sanction of administration could not be imposed in respect of an infringement which had already ceased; and it submits, finally, that the sanction was in any event disproportionately severe. In what follows I shall discuss each of those submissions in turn.

Infringement of the Treaty

28. It will be recalled that the inadvertent shipment of nuclear materials to ANF Richland resulted from two failures of safeguard procedures at the applicant's installation. First, containers containing fissile materials were not sufficiently segregated from the area designated for the storage of empty containers. Secondly, the 'radioactive' markings on the containers, which should have functioned as a warning signal, were ignored, and indeed removed, by the employee responsible for loading the containers. The applicant does not dispute that those errors were committed; it denies, however, that either error amounted to an infringement of its obligations under Chapter VII of Title Two of the Treaty. In its view, the incident gave rise, at most, to a breach of its internal operating regulations, in particular the regulation ANFG-10.105 of 14 October 1987 governing the handling of containers of uranium dioxide.

29. In order for a sanction to be imposed under Article 83(1) of the Treaty, it is sufficient for at least one obligation under Chapter VII of Title Two to have been infringed. In the event, the contested decision alleges, as we have seen, three such infringements, namely breaches of:

(1) Article 10(a) of the regulation,

(2) Article 11(a) of the regulation, and

(3) Article 24 of the regulation, in conjunction with paragraph 1.3.2 of the 'particular safeguard provisions' drawn up for ANF Lingen.

As I have already mentioned, although the recitals to the decision suggest that the incident also gave rise to a breach of Article 32 of the regulation, the body of the decision does not allege any breach of that provision on the part of ANF Lingen itself. In what follows, therefore, I shall consider only the allegations of breaches of Articles 10, 11 and 24.

30. The Commission points out that Article 10(a) of the regulation requires accounting records to be kept which show 'all inventory changes'. It is clear that, as a result of the inadvertent shipment of materials which took place in the present instance, the records will have shown a quantity of material present in the material balance area which had in fact been removed from the area, and that the records were accordingly inaccurate at least for a period between 11 and 15 May 1990. Similarly, Article 11(a) provides that the operating records must include those operating data which are used to establish changes in the quantities of nuclear material. In the present case, an operation leading to the removal of material from the material balance area was not immediately recorded in the operating records; that, in the view of the Commission, necessarily amounted to a breach of Article 11(a). The applicant, on the other hand, suggests that the temporary inaccuracies in its accounting and operating records were not due to any breach of its accounting obligations, but were consequences instead of a breach only of its internal operating regulations governing the handling of containers.

31. Contrary to the view of the Commission, it does not seem to me beyond doubt that the incident amounted to a breach of the applicant's obligations under Articles 10 or 11 of the regulation. As we have seen, those provisions specify the content of the obligation to maintain a 'system of accounting for and control of nuclear materials' which is laid down by Article 9, and further specified, in the case of ANF Lingen, in paragraph 3 of the applicable 'particular safeguard provisions' (see paragraphs 13 and 15 above). It is not clear however that an obligation to keep a proper system of accounts is infringed by a temporary inaccuracy in those accounts caused by the accidental loss of material. It is to be observed furthermore that Article 18 of the regulation makes provision for a special report to be drawn up and communicated to the Commission where:

'... as a result of any unusual incident or circumstances, it is believed that there has been or might be a loss of nuclear material in excess of the limits specified for these purposes in the "particular safeguard provisions" referred to in Article 7'.

It might therefore be argued that where, as a result of an unusual incident, there has been an accidental loss of material, the obligations imposed by Part II of the regulation are sufficiently discharged by the communication of such a report to the Commission as soon as the incident comes to light.

32. It seems to me, on the other hand, that the Commission is on firmer ground when it

asserts that the incident gave rise to a breach of Article 24 of the regulation. It will be recalled that Article 24(a) requires undertakings to give advance notification to the Commission of every export of source or special fissile materials to a non-member State. It is not disputed that the materials covered by that prohibition include the enriched uranium dioxide which, as a result of the incident, was inadvertently exported to the USA. It will be recalled, furthermore, that notification under Article 24 is required even where the consignment exported does not exceed one effective kilogramme, where the 'particular safeguard provisions' applicable to the installation in question so provide. In the case of ANF Lingen such provision is made by paragraph 1.3.2 of the applicable 'particular safeguard provisions' (see paragraph 15 above).

33. The applicant submits that Article 24 does not extend to unintended exports of nuclear materials, and that in such a case it is sufficient if the Commission is notified as soon as the exportation is discovered, rather than in advance of shipment. It seems to me however that, unlike perhaps the obligations imposed by Articles 10 and 11 of the regulation, which might be understood merely as spelling out a primary obligation to maintain a proper system of accounts, the obligation laid down by Article 24 is absolute and unconditional. It is true that the obligation imposed by that provision would presumably not extend to a case where, for example, nuclear material was stolen from an undertaking's installation and then exported to a non-member State, or where the material was diverted in the course of shipment: in such a case, the exportation in question could not be said to have been made by the undertaking, and the obligations of the latter would be limited to preparing a special report under Article 27 of the regulation (which serves a similar purpose to the report prepared under Article 18). Where however an undertaking transfers nuclear material in a consignment of containers which it itself sends to a non-member State, the undertaking must, it seems to me, be regarded as having made an export requiring advance notification under Article 24(a).

34. Thus, for the purposes of Article 24 of the regulation, the incident gave rise to an export of special fissile materials on the part of ANF Lingen, and in failing to give advance notice of such an export the applicant was in breach of Article 24. Accordingly, since it is clear that that provision must be regarded as further defining the obligations of undertakings under Article 79 of the Treaty, it follows that the applicant was in breach of its obligations under Chapter VII of Title Two of the Treaty.

35. I conclude therefore that the applicant's first submission fails; it is accordingly necessary to consider the other grounds advanced for the unlawfulness of the contested decision.

Past and continuing breaches

36. As we have seen, the applicant argues that even if the incident gave rise to an infringement of the Treaty, the Commission was still not entitled to impose a sanction under Article 83(1), since any infringement had already ceased by the time the sanction was imposed. Drawing an analogy with the

sanctions for breach of competition rules which are referred to in Article 87(2)(a) of the EEC Treaty, the applicant argues that sanctions imposed under Article 83(1) Euratom should be compared to 'penalty payments' rather than to 'fines', in the sense that they are designed to put an end to a continuing breach rather than being imposed in respect of a past infringement.

37. In my view that argument cannot be accepted. There is nothing in the wording of Article 83 to suggest that sanctions are permitted only in the case of continuing breaches. As the Commission points out, sanctions imposed under Article 83 clearly have the aim of preventing a future recurrence of Treaty infringements, and not only that of bringing to an end a current infringement, and are in that respect more analogous to 'fines' than to 'penalty payments': compare Case 44/69 *Buchler* v *Commission* [1970] ECR 733, at paragraph 49 of the judgment. Such an interpretation of the Commission's powers under Article 83 of the Treaty is confirmed by Article 83(4), according to which:

'Member States shall ensure that sanctions are enforced and, *where necessary*, that the infringements are remedied by those committing them' (my emphasis).

That provision shows that sanctions must still be enforced, even where it is no longer necessary to remedy a continuing infringement. It would seem to follow that a sanction may be imposed even when the infringement is not continuing.

38. Nor, in my opinion, can any distinction be drawn in that regard between sanctions imposed under Article 83(1)(c) and the other sanctions imposed under that paragraph. The primary purpose of placing an undertaking under administration, pursuant to Article 83(1)(c), is clearly to ensure the better functioning of safeguard procedures at the installation. The improvement of safeguard procedures may however be necessary as much in order to prevent a possible recurrence of a past infringement as to put an end to a continuing breach. In my view, therefore, the sanction of administration may in principle be imposed whenever a breach of an obligation under Chapter VII has been established, whether or not the infringement is continuing at the time of the imposition of the sanction.

39. It does not seem to me, moreover, that an infringement of the obligation to give advance notification of export is in any way cured by the giving of a later notification. The purpose of Article 24 is to keep the Commission informed in advance of the movement of nuclear materials, a purpose which is not fulfilled by a notification made after the event. Thus, if an unnotified exportation of materials has occurred a breach of the Treaty has been established, notwithstanding any subsequent notification to the Commission.

40. I accordingly reach the conclusion that the applicant's first two grounds for annulment of the contested decision are to be rejected. It remains to consider the applicant's third ground, according to which a

sanction of administration, imposed under Article 83(1)(c) of the Treaty, was in all the circumstances disproportionately severe.

Proportionality of the sanction

41. It will be recalled that placing under administration is, in increasing order of severity, the third of the four sanctions which can be imposed under Article 83(1). It appears that the applicant does not enjoy any special benefits which could be withdrawn under Article 83(1)(b). The applicant therefore suggests that if any sanction is to be imposed as a result of the incident, the appropriate sanction is the issue of a warning pursuant to Article 83(1)(a) rather than a placing under administration pursuant to Article 83(1)(c).

42. A Community measure satisfies the principle of proportionality only where it is both appropriate and necessary to the objective pursued; that is to say, only where it is established, in the first place, that the means it employs to achieve its aim correspond to the importance of that aim and, in the second place, that they are necessary for its achievement: see Case 66/82 *Fromançais* v *FORMA* [1983] ECR 395, at paragraph 8 of the judgment; Case 15/83 *Denkavit Nederland* v *Hoofdproduktschap voor Akkerbouwprodukten* [1984] ECR 2171, at paragraph 25. The applicant attacks the proportionality of the sanction imposed by the Commission in both those respects. First, it argues that the choice of sanction was inappropriate, because it was based upon an exaggerated view of the seriousness of the alleged infringements; and, secondly, that the sanction of administration was unnecessary to achieve the Commission's stated goal, which was to ensure that an incident of a similar type would not recur in the future. I shall consider both of those points in turn.

(1) *Did the Commission exaggerate the seriousness of the infringement?*

43. As we have seen, the applicant's first submission, on the issue of proportionality, is that the contested decision is based upon an inflated view of the seriousness of the incident. It must be observed however that such an exaggeration, even if established, may not in itself be decisive of the central issue in this case, namely the validity of the decision to impose a sanction of administration. If, as the Commission claims, a four-month period of administration was necessary to ensure that an incident of a similar type could not recur, a claim which will be examined below, it would be difficult indeed to argue that the means chosen were out of proportion to the importance of that aim. For the inadvertent exportation of nuclear material to a non-member State cannot be regarded as a trifling matter, undeserving of the efforts required to prevent a recurrence of such an event with the highest degree of assurance available. In those circumstances, therefore, it does not seem to me that it can be argued that the Commission should have contented itself with a lesser degree of security. The possibility remains, none the less, that the seriousness of the incident may have been exaggerated by the Commission.

44. The applicant argues, in the first place, that the errors giving rise to the incident concerned a single area only of its operation,

namely the handling of incoming and outgoing containers. The various infringements alleged by the contested decision were, at best, secondary consequences of that original error. In the applicant's view, therefore, the decision is based upon an inflated account of the incident giving rise to the sanction, one which creates the impression that several independent kinds of safeguard procedure had been violated, whereas in reality the incident arose from the negligence or inattention of two only of its employees.

45. It seems to me that there is some merit in that submission. Even if the incident gave rise, as the Commission claims, to breaches of three distinct provisions of the regulation, rather than to an infringement of Article 24 alone — a proposition which, as we saw above at paragraphs 31 to 34, is open to doubt — it is clear none the less that there was in substance a single failure in the applicant's safeguard procedures. Thus, even if the incident amounted to a technical breach of Articles 10 and 11 of the regulation, as well as to a breach of Article 24, the former breaches were secondary consequences of a primary failure to prevent material being shipped in a consignment of empty containers. As I have already observed, however, that could not in itself be a sufficient reason for regarding the sanction of administration as disproportionately severe, since that single failure was in itself a sufficiently serious matter to merit the most strenuous measures necessary.

46. The applicant suggests, in the second place, that the Commission was at no point prevented by the incident from carrying out its task under the Treaty. As the applicant points out, such an allegation is made in section II. C of the recitals to the contested decision, according to which:

'... the facts established made it impossible for the Commission to carry out the task assigned to it in Article 2(e) of the Treaty, namely to "make certain, by appropriate supervision, that nuclear materials are not diverted to purposes other than those for which they are intended".'

It seems to me that it would be difficult to deny that the Commission was obstructed in its task during the period between 11 and 16 May 1990, when the Commission was unaware that a quantity of nuclear material had been lost from the applicant's installation. That state of affairs was however an inevitable consequence of the applicant's breach of Article 24 of the regulation, which is one of a series of provisions laid down for the purpose of facilitating the Commission's task under Article 77 (and hence under Article 2(e)) of the Treaty. Thus, the reason that prior notice is required before nuclear material is exported to a non-member State is precisely in order that the Commission can be kept informed at all times of the quantities of material present in the territory of the Community, so that it can in turn carry out its task under Articles 2(e) and 77 of the Treaty. The infringement of Article 24 of the regulation to which the incident gave rise was merely the specific way in which that task was temporarily obstructed.

47. As we have seen, on 16 May 1990 the Commission was notified of the amounts of material exported, and after its second

inspection of the installation on 4 July to 6 July 1990 the Commission was able to satisfy itself that there had been no other loss of nuclear material. It is clear, therefore, that the obstruction of the Commission's task during the period 11 to 16 May 1990 cannot be regarded as an aggravating factor in assessing the seriousness of the infringement of Article 24 which has been established. Once again, however, it seems to me that the validity of the sanction is not affected, since the applicant's infringement of Article 24 was already a sufficient reason for taking the measures necessary to prevent a recurrence of the incident.

48. Finally, it is to be noted that there is a dispute between the parties as to whether the incident gave rise to the export of a strategically significant quantity of nuclear material. According to the statement in section II. C of the recitals to the contested decision:

'The serious nature of the infringement is further reinforced by the fact that it involved a significant quantity, in terms of weight, of enriched uranium, which could very easily be further enriched to levels where it would be of strategic value.'

That statement is contested by the applicant, who argues that the degree of enrichment of the material in question was not such as significantly to facilitate the task of enriching it to levels possessing a strategic value. The applicant also suggests that a potential thief in search of nuclear material is unlikely to look for such material in containers labelled 'empty'. It does not seem to me that there is sufficient evidence before the Court to decide whether the incident did in fact give rise to the danger of a strategically significant loss of material. As I have already emphasized, however, the inadvertent export of nuclear material to a non-member State must in any event be regarded as a matter sufficiently serious to justify the imposition, under Article 83(1) of the Treaty, of whichever of the available sanctions is necessary to ensure that such an event does not recur. I now turn therefore to the question whether it was indeed necessary to impose, for that purpose, a four-month period of administration.

(2) *Was the sanction necessary?*

49. In discussing whether the sanction of administration was necessary to achieve the Commission's aim, it must first be considered what powers the Commission would have enjoyed in the absence of such a measure. As we have seen, the Commission has extensive powers of inspection under Articles 81 and 82 of the Treaty, which give its inspectors a right of access to places, data and persons to the extent necessary to apply safeguards and ensure compliance with the provisions of Article 77, and in particular to verify the records referred to in Article 79. Thus, inspectors have a general duty to verify, as necessary, any accounts, records or notifications made by those responsible for operating an installation, and to check in particular the state of the physical inventory at any given time. It is clear, on the other hand, that inspectors do not have any power to issue instructions to the undertaking concerned, even where an infringement of the

obligation to keep proper records is established. The inspectors must report any such infringement to the Commission, which may in turn issue a directive requiring the Member State concerned to take the necessary measures to bring the infringement to an end: see the third paragraph of Article 82.

50. We have also seen that the Commission has a power to specify appropriate safeguard procedures in the 'particular safeguard provisions' it adopts for an individual installation: see Article 7 of the regulation, cited in paragraph 10 above. It does not however appear that those provisions are intended to amount to a complete specification of the procedures applicable at the installation in question. The detailed implementation of safeguard procedures is a matter for the internal operating regulations of the undertaking, which are drawn up by the undertaking concerned under the supervision of the national regulatory authorities.

51. In the present case, when the procedural errors which gave rise to the incident came to light, it became necessary to amend the relevant internal operating regulations so as to ensure that an incident of the same type would not recur. As we have seen, initial amendments were made on the instructions of the Ministry of Environment of Lower Saxony as soon as the incident was reported. It appears however from the report of the Commission's administrators that further refinements of the safeguard procedures were elaborated during the course of their administration: see paragraphs 2 to 7 of the file note of 2 October 1990, paragraph 3 of the file note of 5 November 1990, and paragraph 2 of the file note of 19 December 1990. From the latter, it appears that a final version of the new internal regulations was presented to the administrators at their fourth visit on 13 December 1990. Attached to the administrators' report are copies of a new internal regulation ('Prozessvorschrift') ANFG-10.203, dated 14 December 1990, which replaces regulation ANFG-10.105; three further regulations ANFG-10.203 dated 14 December 1990, replacing previous versions issued on 26 October 1990 (see Annex 1 to the report); and an internal regulation ('Transportvorschrift') ANFG-10.201, dated 10 October 1990, which replaces a previous version issued on 3 September 1990 (see Annex 2). I cannot therefore accept the applicant's suggestion that all necessary amendments to the internal operating regulations had already been made before the sanction was imposed on 1 August 1990. The Commission was in any event entitled to take the view, at the time of the imposition of the sanction, that additional improvements might be seen to be necessary in the course of an administration. As I have already observed, inspectors appointed under Article 81 of the Treaty would not themselves have had the power to instruct the applicant to issue or modify internal operating regulations.

52. It is true that the applicant's willingness to co-operate with the Commission in the elaboration of improved safeguard procedures is not in dispute. Thus, the Commission has not suggested that its administrators received anything other than the full co-operation of ANF Lingen in what appears to have been a joint effort of refining and improving safeguard procedures at the plant and drawing up plans for a computer-

ized control system. Contrary to the submission of the applicant, however, it does not seem to me that the readiness of the latter to comply with any recommendations made by the Commission could be sufficient in itself to demonstrate that a period of administration was unnecessary. For the possibility always existed of a conflict of view between the applicant and the Commission as to what might be appropriate. Given that the administrators did in fact have the power to issue instructions — a power which derived only from their appointment as administrators — it was clearly in the best interests of the applicant to offer its full co-operation. In view of the power enjoyed by the administrators, the applicant ultimately had no choice but to follow their final recommendations. It is true that the applicant's readiness to do so is made clear in paragraph 1.6 of the administrators' report, which states that 'all the administrators' recommendations were followed'. For the reason just given, however, no significance is to be attached to the choice of the word 'recommendations' ('Empfehlungen'), rather than the term 'instructions' used in the Commission's communication of 6 February 1991. In any event, it will be observed that the file note of 2 October 1990 uses more categorical language ('La mission d'administration a imposé ... La mission insiste ... La mission va préciser ces exigences ...').

53. Nor can I accept the argument, put forward by the applicant in its reply, that in substance no administration ever took place, on the ground that the board had confined itself to four visits, each lasting for one or two days and consisting for the most part of inspections of the installation and amicable discussions with the applicant's staff. It cannot in my view be held against the Commission that the administration it imposed was conducted with discretion and tact, or that it proceeded without acrimony: that would, if anything, be evidence of the proportionality of the measure.

54. It does not seem to me, therefore, that the sanction can be said to have been unnecessary in the light of its declared purpose, namely to ensure that the new internal operating regulations for the applicant's installation were such that an incident of the same type could not recur. The Commission was entitled to take the view that only a period of inspection, discussion and reflection lasting several months, in conjunction with a power on the part of the administrators to issue instructions if and where necessary, would be sufficient to achieve its intended aim. Thus, in my view the decision to impose a period of administration, as opposed to issuing a warning or ordering a further series of inspections, was well within the power of appraisal enjoyed by the Commission in exercising its powers under Article 83(1).

55. I reach the conclusion, therefore, that the third ground advanced by the applicant for the annulment of the contested decision also fails.

56. That conclusion is not affected, in my view, by the fact that the Commission has subsequently imposed the lesser sanction of a warning, pursuant to Article 83(1)(a) of the Treaty, in respect of infringements committed by another undertaking. At the hearing, the applicant referred to the sanction imposed in respect of infringements of the

accounting and reporting requirements of the regulation which were committed by the United Kingdom Atomic Energy Authority (UKAEA) at the uranium scrap/residue recovery plant at its Dounreay installation: see Commission Decision 92/194/Euratom of 4 March 1992 relating to a procedure in application of Article 83 of the Euratom Treaty (OJ 1992 L 88, p. 54). It is to be noted however that, in that case, the UKAEA itself decided to suspend operations at the plant, which closed down immediately after the completion of a physical inventory. As the recitals to the Dounreay decision observe, at the bottom of p. 57:

'... taking into account that the operation ... has been suspended ... and there is therefore no immediate danger of a recurrence of the failures as long as the plant is not operating, the appropriate sanction to impose is that laid down in Article 83(1)(a) of the Treaty.'

Article 2(4) of the decision states, furthermore, that the Commission will consider imposing a further sanction 'if any of the failures listed in Article 1 is not rectified when the ... plant has resumed its normal operation ...'. As the Commission pointed out at the hearing, the present case is different from the Dounreay case in that ANF Lingen continued normal operations after the incident had come to light, as it did throughout the period of administration.

Conclusion

57. In my opinion, therefore, the application for annulment of the Commission's decision to impose a sanction under Article 83(1)(c) of the Treaty must fail.

58. Since the application must in my view fail, the appropriate order is for the costs to be borne by the applicant.

59. I am accordingly of the opinion that the Court should:

(1) dismiss the application;

(2) order the applicant to pay the costs.