OPINION OF ADVOCATE GENERAL MISCHO

delivered on 20 October 1999 *

1. Although Cases C-62/98 and C-84/98 have not in fact been joined for the purposes of the written procedure and the hearing, they raise sufficient common points to warrant a single Opinion.

2. The Commission has brought two actions for failure to fulfil obligations against the Portuguese Republic, both concerning the implementation of Articles 3 and 4 of Council Regulation (EEC) No 4055/86 of 22 December 1986 applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries, [1] in which the legal arguments relied on by the Portuguese Republic to deny any actual failure to fulfil its obligations are identical.

3. In Case C-62/98 the Commission withdrew part of its complaint in the light of further evidence produced by the defendant in the course of the proceedings and is asking the Court to declare that by neither denouncing nor adjusting the agreement concluded with the People's Republic of Angola ('Angola') so as to provide for fair, free and non-discriminatory access by Community nationals to cargo shares due to Portugal, pursuant to Regulation No 4055/86, the Portuguese Republic has failed to fulfil its obligations under Article 3 and Article 4(1) thereof and under the EC Treaty.

4. In Case C-84/98, the Court is asked to declare that the Portuguese Republic has failed to fulfil the same obligations by neither denouncing nor adjusting the agreement concluded with the Federal Republic of Yugoslavia ('Yugoslavia') so as to provide for fair, free and non-discriminatory access by Community nationals to cargo shares due to Portugal, pursuant to Regulation No 4055/86.

5. Article 1 of that regulation states:

'Freedom to provide maritime transport services between Member States and between Member States and third countries shall apply in respect of nationals of

* Original language: French.

1 — OJ 1986 L 378, p. 1.

Member States which are established in a Member State other than that of the person for whom the services are intended.

...'

Article 3 thereof states:

'Cargo-sharing arrangements contained in existing bilateral agreements concluded by Member States with third countries shall be phased out or adjusted in accordance with the provisions of Article 4.'

Under Article 4 thereof:

'1. Existing cargo-sharing arrangements not phased out in accordance with Article 3 shall be adjusted in accordance with Community legislation and in particular:

(a) where trades governed by the United Nations Code of Conduct for Liner Conferences are concerned, they shall comply with this Code and with the obligations of Member States under Regulation (EEC) No 954/79;

(b) where trades not governed by the United Nations Code of Conduct for Liner Conferences are concerned, agreement shall be adjusted as soon as possible and in any event before 1 January 1993 so as to provide for fair, free and non-discriminatory access by all Community nationals, as defined in Article 1, to the cargo shares due to the Member States concerned.

2. National action in pursuance of paragraph 1 shall be notified immediately to the Member States and the Commission. The consultation procedure established by Council Decision 77/587/EEC shall apply.

3. Member States shall report to the Commission on progress made on the adjustments referred to in paragraph 1(b) ... .

4. When difficulties arise in the process of adjusting agreements to bring them into conformity with paragraph 1(b), the Member State concerned shall inform the Council and the Commission. In cases where agreements are incompatible with paragraph 1(b) and where the Member State concerned so asks, the Council shall, acting on a proposal from the Commission, take appropriate action.'

6. In both cases, the agreement containing *inter alia* the disputed provisions for cargo-sharing was concluded both before 1 January 1987, when Regulation No 4055/86 came into effect, and before the Portuguese Republic joined the European Community.

7. In Case C-62/98, the provision which in the Commission's view is incompatible with Regulation No 4055/86 appears in Article V1 of the agreement of 28 April 1979 between the Portuguese Republic and Angola, ratified by decree of the Portuguese Government of 18 July 1979, whereby 'the contracting parties shall be entitled to participate, on the basis of equal shares, in the carriage of goods by sea between ports of the Portuguese Republic and the ports of the People's Republic of Angola'.

8. In Case C-84/98 the same complaint was made in respect of the second paragraph of Article 3 of the agreement with Yugoslavia of 28 June 1979, ratified by decree of 16 January 1981, which provides that 'the shipping undertakings of both contracting parties shall have the same rights in respect of cargo transport in bilateral trade between the ports of the respective countries'.

9. Whilst this account of the legal context of the respective allegations and arguments of both parties is necessary for assessing the merits thereof, it is not sufficient for, as we shall see, the passage of time is likely to prove an important factor in the discussion. It is therefore necessary first to give a brief chronological summary based on information provided by the parties in their written submissions.

10. In 1990, the Commission contacted the Portuguese authorities regarding bilateral cargo-sharing agreements which were incompatible with Regulation No 4055/86.

11. Subsequently, in 1992 and 1993, it wrote to them about the same matter. In 1993 the Portuguese authorities informed the Commission that the Portuguese Republic had *de facto* waived its right to rely on the cargo-sharing clauses contained in the bilateral agreements concluded with non-member countries and that approaches had been made through diplomatic channels to the non-member countries concerned to remove the provisions in the agreements which were incompatible with Community law.

12. As the Commission was not informed whether those approaches had been successful, in 1994 a formal notice was sent to the Portuguese Republic concerning agreements concluded with European States, including the agreement with Yugoslavia, and in 1995 another formal notice was sent concerning the agreements made with various African countries, including Angola.

13. In reply to those formal notices, the Portuguese authorities pointed out that, inasmuch as they might discriminate against the shipping companies of other Member States, the cargo-sharing clauses were no longer being implemented and the process of amending the agreement had begun, although it was not yet complete.

14. Not satisfied with those replies, the Commission issued reasoned opinions, one in 1995 concerning the agreement with Yugoslavia and one in 1997 concerning the agreements with four African countries, including Angola.

15. In response to those reasoned opinions the Portuguese authorities reported to the Commission on the progress of the negotiations undertaken with a view to adjusting the contested agreements, arguing *inter alia* that, with regard to the agreement with Yugoslavia, the break-up of that State created special problems since the Portuguese Republic had to renegotiate with five successor States. It gave an assurance that the Commission would be kept informed of any progress made or results achieved.

16. The action in Case C-62/98 was brought on 27 February 1998 and that in Case C-84/98 on 27 March 1998. Subsequently, the agreement with Yugoslavia was adjusted in relation to the Republic of Slovenia.

Points of agreement

17. Against that background, I shall now consider the arguments put forward. Although they differ radically on some points, in other respects their views are similar, if not identical. Both the Commission and the Portuguese Republic agree that the aforementioned agreements provide for cargo-sharing which is contrary to the rules laid down by Regulation No 44055/86 and that, in any event, the period during which, notwithstanding the entry into force of the Regulation on 1 January 1987, it was still possible to implement those provisions without infringing the regulation expired on 31 December 1993.

18. They also agree that the Portuguese Republic is under an obligation to take steps to ensure that the clauses concerned cease to be in force.

19. Furthermore, the Commission does not dispute the Portuguese authorities' assertion that in practice, although the cargo-sharing clauses still appear in the agreements and the latter remain in force, their application no longer discriminates against the shipping companies of other Member States. However, there the consensus ends.

The Commission's arguments

20. The Commission takes the view that Regulation No 4055/86 places the Portuguese Republic under an obligation to achieve a result. The latter cannot therefore deny that it has failed to fulfil its obligations by arguing that it is sparing no effort to persuade the non-member countries concerned to amend those provisions which are incompatible with the requirements of Regulation No 4055/86 and that the practical result which the regulation seeks to attain has already been achieved, since the cargo-sharing clauses are no longer being implemented.

21. The deadline laid down by the regulation for ensuring the abolition or adjustment of arrangements made under a binding agreement between a Member State and a non-member country, including cargo-sharing arrangements, is mandatory.

22. A Member State is free to choose, without having to offer any justification, to leave the bilateral agreement in force after removing from it whatever made it incompatible with the requirements of Community law, provided that it achieves the required result before the deadline. Otherwise, it is incumbent on the Member State to resort to the other alternative, that is to say to denounce the agreement containing the cargo-sharing clause which infringes the regulation.

23. The Commission takes the view that the Portuguese Republic really had no justification for refusing to resort to that means of fulfilling its Community obligations since the agreements with Angola and Yugoslavia both contained denunciation clauses and there is no obvious legal reason why they could not be implemented. Furthermore, the six-year period which the regulation grants Member States in order to take action to release themselves from cargo-sharing provisions contrary to Community law was long enough for them to reach a negotiated adjustment of the bilateral agreements by diplomacy.

24. Even though, at a given moment, the Portuguese Republic found itself in the delicate situation of having to abandon the pursuit of diplomatic negotiations, which were moving too slowly towards the desired results, and had to resort to the blunt procedure of unilateral denunciation, that was, in the Commission's view, attributable to the fact that it had not exercised due diligence, in that it did not begin negotiations, notwithstanding reminders from the Commission, until much, if not all, of the time allowed by the regulation for achieving the required result had passed.

25. Furthermore, the Commission is of the opinion that, regardless of the cause of the

difficulties encountered by the Portuguese Republic, according to settled case-law a Member State can no more rely on external difficulties encountered in the process of complying with its Community obligations than take refuge behind internal problems.

26. The Commission also points out that the Portuguese Republic did not see fit to avail itself of the possibilities afforded by Article 4(4) of Regulation No 4055/86, specifically for cases where a Member State encounters difficulties in making adjustments to agreements with third countries.

27. In response to the arguments put forward by the Portuguese Republic and to the questions put to it by the Court, the Commission examined its reasoning in the light of Article 234 of the EC Treaty (now, after amendment, Article 307 EC), which it did not see fit to do in its application, and contends that that article can only reinforce it. In the Commission's view, the rationale of that article is to restrict the impact on the Community legal order of the protection which it affords to non-member countries.

28. It points out that even though the first paragraph of that article seeks to protect the legitimate interests of non-member countries that have concluded agreements under international law with States which subsequently became members of the Community, by providing, in accordance with the 1969 Vienna Convention on the Law of Treaties, that Member States remain bound by obligations in previous contracts, that protection is neither absolute nor unconditional.

29. The effect of the first paragraph of Article 234 of the Treaty is to make an exception to the primacy of Community law, an exception which is in no way intended to be permanent and which, like any exception to that primacy, must be viewed restrictively. Hence, according to the Commission, the first sentence of the second paragraph of that article obliges Member States to take all appropriate steps to remove incompatibilities found between earlier treaties and Community law.

30. In support of that interpretation, whereby the fact that a Member State has a binding bilateral agreement with a non-member country does not allow that Member State any unchecked possibility of disregarding its obligations under Community law, the Commission relies simultaneously on the third paragraph of Article 234 of the Treaty, which states, 'In applying the agreements referred to in the first paragraph, Member States shall take into account the fact that the advantages accorded under this Treaty by each Mem-

ber State form an integral part of the establishment of the Community and are thereby inseparably linked to the creation of common institutions, the conferring of powers upon them and the granting of the same advantages by all the other Member States', and on the Court's decisions which, since the *Commission* v *Italy*[2] case, has always been careful to control strictly the right to denunciation afforded by the first paragraph of Article 234 of the Treaty.

31. As evidence of that stringency, it cites the *T. Port*[3] case, in which the Court held that:

'According to settled case-law (see in particular Case C-124/95 *The Queen* v *HM Treasury and Bank of England ex parte Centro-Com* [1997] ECR I-81, paragraphs 56 and 57), the purpose of that provision is to make clear, in accordance with the principles of international law, that application of the Treaty does not affect the commitment of the Member State concerned to respect the rights of third countries under an earlier agreement and to comply with its corresponding obligations. Consequently, in order to determine whether a Community rule may be deprived of effect by an earlier international agreement, it is necessary to examine whether that agreement imposes on the Member State concerned obligations whose performance may still be required by third countries which are parties to it.

Thus, for a Community provision to be deprived of effect as a result of an international agreement, two conditions must be fulfilled: the agreement must have been concluded before the entry into force of the Treaty and the third country concerned must derive from it rights which it can require the Member State concerned to respect'.

32. With regard to the interpretation of 'all appropriate steps to eliminate the incompatibilities established' within the meaning of the second paragraph of Article 234 of the Treaty, the Commission considers that unilateral denunciation is unquestionably one of those steps.

33. In the Commission's view, that does not mean favouring denunciation. Quite the contrary: it is purely a measure of last resort and the Commission does not dispute that it may have negative consequences, for example where the incompatibility of the agreement with Community law arises from a single clause amongst many which, were they to remain in force, would not cause any problem.

34. Negotiation, whose chances of success can only be increased by mutual assistance between Member States and the adoption of a common attitude required by the second paragraph of Article 234 of the

2 — Case 10/61 [1962] ECR 1.

3 — Joined Cases C-364/95 and C-365/95 [1998] ECR I-1023, paragraphs 60 and 61.

Treaty, is clearly the preferred course of action since it allows an adjustment to be made which safeguards as far as possible the interests of the parties concerned.

35. However, the Commission, relying on the Opinion of Advocate General Lenz in *Asjes and Others*[4] and that of Advocate General La Pergola in *Commission* v *Belgium and Luxembourg*,[5] considers that to exclude denunciation from the appropriate steps would be to fail to take account of the scope of the obligations which Article 234 of the Treaty places on Member States.

36. From that interpretation of Article 234 of the Treaty, the Commission concludes that, far from imposing on Member States obligations which have no basis in the Treaty, Regulation No 4055/86, Articles 3 and 4 of which impose an obligation to adjust or remove any cargo-sharing clauses which are incompatible with Article 1, within a mandatory time-limit, merely reinforced, in a particular context, the existing obligation to take appropriate steps to remove any obstacles which Member States might encounter in order to give effect to the primacy of Community law. Moreover, the essential feature of Regulation No 4055/86 is that it seeks a solution to the problem.

37. Finally the Commission points out that the difficulties faced by Member States as a result of the introduction of the principle of freedom to provide services in maritime transport to or from non-member countries should not be overestimated.

38. There is no question of asking them to abolish cargo-sharing; they merely have to persuade the non-member country to agree that the share attributed to its shipping industry must be open to carriers of other Member States, so that the only right which the non-member country must agree to waive, and which would appear to be quite incidental, is the right to accept in its ports only vessels flying the flag of a particular Member State.

The position of the Portuguese Republic

39. The Portuguese Republic's defence against that line of argument comprises three objections: the first seems to be essentially procedural, being based on the assertion that, because the Commission's charge relies on Regulation No 4055/86 and Articles 189 of the EC Treaty (now

4 — Joined Cases 209/84 to 213/84 [1986] ECR 1425.

5 — Joined Cases C-176/97 and C-177/97 [1998] ECR I-3557.

Article 249 EC) and Article 5 of the EC Treaty (now Article 10 EC), without referring to Article 234 of the Treaty, it is without legal foundation; the second is based on the interpretation which the Portuguese Government believes should be placed on Article 234 of the Treaty as to the exact scope of the obligations it imposes on Member States; and the third focuses on the practical aspects of each case covered by this Opinion, that is to say the manner in which the Portuguese Republic has dealt with the issue of its maritime transport relationships with both Angola and Yugoslavia.

40. In the first paragraph of Article 234 of the Treaty the Portuguese Republic perceives primarily the principle whereby, after joining the European Community, Member States must honour earlier agreements concluded with non-member Countries. That assertion calls for an interpretation of paragraph 2 of that article to the effect that elimination of incompatibilities between an earlier agreement concluded with a non-member country and Community regulations must take the form which, whilst guaranteeing the full effect of Community law, least affects the law of the non-member countries. Thus, there can be no question of interpreting the second paragraph as imposing an obligation on Member States to achieve a specified result, thereby requiring them to remove the incompatibility regardless of the legal consequences and the political cost. In other words, there is no absolute, unconditional obligation. There is only an obligation to use best endeavours. Of course, it remains to be determined whether denunciation falls within that category.

41. The Portuguese Republic considers that since the obligation is merely to use best endeavours and not to achieve a particular result, it cannot be contended that a Member State should be obliged to resort to that brusque course of action. In support of that view, it relies first on the actual wording of the second sentence of the second paragraph of Article 234, explaining that there would be little point in having made provision for mutual assistance between Member States if problems of incompatibility could be resolved by the State concerned taking unilateral action. Second, it relies on the case-law of the Court, as expressed in *Centro-Com*, cited above.

42. The Portuguese Republic has difficulty in reconciling the compulsory nature of the denunciation of an agreement which creates obligations for a Member State that are incompatible with Community law and with the Court's statement in paragraph 61 of that judgment that a Member State may take steps contrary to Community law if those steps 'are necessary to ensure that the Member State concerned fulfils its obligations towards the third country arising

from an agreement made prior to the Treaty or before that Member State joined'.

43. However, the Portuguese Republic does not go so far as to rule out entirely the existence of any obligation to resort to denunciation. It accepts that it applies exceptionally and in' extreme cases, and more specifically if two conditions are met:

— there is total incompatibility between the provisions of the agreement and Community law;

— it is impossible to safeguard the Community interests by means of political or other processes.

44. According to the Portuguese Republic, if that interpretation is applied to the practical aspects of both cases, it necessarily follows that it cannot be accused of failing to fulfil its obligations. The Portuguese authorities have spared no efforts to remove from the agreements concerned those provisions which are incompatible with Regulation No 4055/86 and they cannot be blamed for the fact that it has not yet been possible to complete the adjustment process.

45. In one case, the reasons for which this process has been subject to delay can be found in the civil war in Angola and, in the other, in the complexity of the situation caused by the break-up of Yugoslavia.

46. In seeking to overlook those undeniable facts, the actions brought by the Commission are manifestly premature. Furthermore, it cannot be denied that the interests of the Community have not suffered any actual harm, since the disputed clauses have ceased to be implemented and consequently the shipping companies of the other Member States have not suffered any discrimination.

47. That factual situation and the readiness of non-member countries to renegotiate preclude the view that denunciation has become necessary. It is therefore possible both to agree with the view expressed by Advocate General Lenz in his Opinion, cited above, and to deny, in the two cases raised by the Commission, that there is an obligation to denounce with which the Portuguese Republic has refused to comply.

48. Comparisons cannot be drawn with the situation on which the Court ruled in Joined Cases C-176/97 and C-177/97 because the incompatible agreement at

issue in those cases was concluded after Regulation No 4055/86 entered into force and was therefore not covered by the principles and rules laid down in Article 234 of the Treaty, which refer to earlier agreements.

49. To declare that the Portuguese Republic has failed to fulfil its obligations would presuppose acknowledging that it was under an obligation to denounce, whereas an objective analysis of the context shows that such denunciation, if it falls to be included amongst the appropriate steps referred to in the second paragraph of Article 234 of the Treaty, would, in this case, be both inappropriate and disproportionate.

Assessment

50. Which of those two arguments is correct? First, it should be remembered that the Commission is accusing the Portuguese Republic of having 'failed to fulfil its obligations under Article 3 and Article 4(1) of Regulation No 4055/86'.

51. According to Article 3 'Cargo-sharing arrangements contained in existing bilateral agreements concluded by Member States with third countries shall be phased out or adjusted in accordance with the provisions of Article 4'.

52. Article 4 provides that 'Existing cargo-sharing arrangements not phased out in accordance with Article 3 shall be adjusted in accordance with Community legislation ...'. That article goes on to state the time-limits in which that adjustment must be made.

53. Hence there is an indisputable obligation to achieve a result and accordingly the argument would appear to be confined to the question whether or not that result was achieved.

54. It is therefore quite understandable that, in its application, the Commission should have made no reference to Article 234 of the Treaty. Since the Commission intended to show a failure to fulfil the obligations arising from Regulation No 4055/86, it was entitled to leave it to the Portuguese Republic to rely on that article in its defence and to try to prove that its obligations under the regulation should

be appraised by reference to that provision of primary law.

55. That, in fact, is what the Portuguese Republic has done. Without calling in question the compatibility of the regulation with Article 234 of the Treaty (which would have been the more logical position to adopt), it disputes the obligation to achieve a result contained in the regulation and counters by invoking Article 234 of the Treaty which, in its view, does not contain any such obligation.

56. I must now therefore examine that article. Let me say immediately that I am not entirely satisfied either by the Commission's interpretation thereof or by that of the Portuguese Republic. It is clear from the first paragraph of that article that it does not have the scope attributed to it in so far as it seems to me to be merely declaratory. Even though it was not incorporated in that article, the rule *pacta sunt servanda* — and I hardly need venture to draw attention to its fundamental importance in public international law — is nevertheless binding on the Community and its Member States.

57. To my knowledge, no-one has yet seriously defended the idea that, by creating a regional international organisation — and that is what the European Union certainly is under international law — States could, without recourse to any other procedure, release themselves from the obligation to fulfil earlier commitments to non-member countries. In my view it is therefore wrong to construe the paragraph concerned as having introduced an exception to the principle of the primacy of Community law which, as a principle peculiar to Community law, was in any event irrelevant to the requirements arising from a principle of general public international law.

58. What the Member States could do — and did in the second and third paragraphs of Article 234 of the Treaty — was to commit themselves to taking action, whilst observing the principle *pacta sunt servanda*, in order to ensure that there were no circumstances in which the implementation both of the rules laid down by the Treaties establishing the Communities and of any adopted subsequently by way of secondary legislation, would be blocked by the existence of international agreements with non-member countries. The principle of uniform application of Community law requires that such a situation should not be allowed to continue. In that respect, Article 234 of the Treaty does indeed impose an obligation to achieve a result. However, 'all [the] appropriate steps' which the second paragraph of Article 234 obliges Member States to take can only be those which are regarded as lawful under general international law, but that includes all such steps.

59. In my view, the very idea that the Member States could have given an undertaking to one another to resort to denunciation, thereby incurring liability under international law, is just as indefensible as the contention that, by laying down the rule contained in the second paragraph of Article 234, Member States reserved the right to decide for themselves, alone, without any supervision and on a case-by-case basis, whether or not a step is appropriate, since the structure of the Community is not based on commitments which the parties may choose whether or not to fulfil.

60. Denunciation of a bilateral agreement may indeed be an act which governments find intrinsically repugnant but the principle of uniform implementation of Community law carries with it requirements that should override the diplomatic interests of Member States. In my view it would be rather paradoxical if, having required Member States to ensure that Community law takes precedence even over their constitutional rules, case-law should allow their diplomatic interests, the definition of which is very often somewhat vague, to prevail over that same law.

61. It follows, as Advocate General Lenz observed in his Opinion, that denunciation is bound to be among the appropriate steps in so far as it is admissible under the rules of international law as expressed in the 1969 Vienna Convention on the Law of Treaties.

62. In that regard I must point out that I cannot accept the Commission's assertion that it follows from case-law that Member States cannot invoke external difficulties as an excuse for not observing Community law. On the contrary, in my view a Member State which finds it impossible under public international law to release itself from a previous commitment made to a non-member country cannot be accused of a failure to fulfil its obligations if it has allowed those commitments to take precedence over its obligations under Community law.

63. That is clearly illustrated by the *Centro-Com*[6] case, in which the Court stated: 'According to settled case-law, the purpose of the first paragraph of Article 234 of the Treaty is to make clear, in accordance with the principles of international law, that application of the Treaty does not affect the commitment of the Member State concerned to respect the rights of non-member States under an earlier agreement and to comply with its corresponding obligations'.

64. However, in order for a Member State to rely on Article 234 of the Treaty as a

6 — Cited above (paragraph 56).

defence for not complying with an obligation imposed on it by Community law, it is also essential that the international agreement it invokes to that end genuinely creates obligations whose fulfilment the non-member country is entitled to demand. If that is not the case, and particularly where rights are conferred on the Member State by the agreement, that Member State must, in accordance with the interpretation of Article 234 of the Treaty adopted in the case-law, bow to the primacy of Community law and simply waive the rights it derives from the agreement, thereby enabling it simultaneously to avoid incurring any liability under international law and to fulfil its Community obligations. Paragraphs 60 and 61 of the *T. Port* judgment relied on by the Commission in support of its argument are unequivocal on this point.

65. When applied to the cases before the Court, that case-law means that the Portuguese Republic cannot under any circumstances refuse carriers of other Member States access to cargo shares due to them by taking refuge behind the agreements at issue.

66. However, as I have already indicated, that is not an issue here since the Portuguese Republic has always maintained, without being contradicted by the Commission, that it has ceased reserving to Portuguese carriers the share of trade granted to it by Angola and Yugoslavia, thereby *de facto* guaranteeing the freedom to provide services, provided of course that the non-member countries concerned have no objection to carriers from other Member States unloading or loading in their ports cargoes which, under the terms of the agreements, were to be reserved for Portuguese shipping companies.

67. The issue here therefore comes down to whether a Member State which cannot rely on Article 234 of the Treaty to dispute its fundamental obligation, and which, moreover, does not dispute it since it complies with it *de facto*, is none the less obliged to denounce an agreement made with a third country if it fails to secure adjustment of it by negotiation.

68. Since it cannot be disputed that denunciation, in so far as a Member State may resort to it without incurring liability under international law, is undeniably one of the appropriate steps, it remains to be decided *when* a Member State can be criticised for not having followed that course. It would appear that on this point the parties do not differ radically, although I believe the Commission inclines towards the view that negotiations which become protracted must, after a reasonable period, be regarded as reflecting a refusal to negotiate and that, by relying on the requirement that no other way of safeguarding the interests of the Community must be available, the Portuguese Republic would appear to be seeking to invoke circumstances where, because the contested provision is no longer implemented, the obligation to denounce

could be disputed. I shall return to this last argument later.

69. In my view, denunciation should be regarded as a last resort to be used after a reasonable period has elapsed and a less severe procedure has proved unsuccessful in achieving the result required by Community law.

70. What is the tangible result of applying that principle to the present case? First, I would point out that the agreements with Angola and Yugoslavia each contain an explicit denunciation clause.

71. Second, it should be remembered that the regulation allowed Member States a period of six years in which to remove from bilateral commitments to non-member countries any cargo-sharing arrangements contrary to the provisions of that regulation and that, even allowing for the fact that diplomatic endeavours always take time, that time-limit is unquestionably reasonable in the light of the interpretation I have placed on Article 234 of the Treaty.

72. I should also point out that the Portuguese Republic has not made best use of all the time available to it despite the fact that the Commission had drawn its attention to the need to take action regarding any bilateral agreements which it might have with non-member countries.

73. The civil war in Angola cannot be invoked as a justification. The fact that the Portuguese Republic was finally able to secure an agreement in principle from Angola at the beginning of 1998 implies that, if it had taken action in 1987 or after the Commission wrote to it on 3 December 1992 drawing its attention to the problem for the first time, even the agreement with Angola could have been adjusted in time.

74. It should be remembered that the only sacrifice that such a renegotiation would entail for Angola is that of the right, which the Commission sees as quite incidental, to allow only Portuguese ships to use its ports to transport cargo shares attributable to the Portuguese Republic, the share of trade reserved to its own shipping companies remaining completely unaffected. However, in my view, that is not a genuine right conferred on Angola but rather a mere consequence of the right granted to Portugal to reserve 50% of cargoes for its own shipping companies.

75. The internal troubles in Yugoslavia began only in 1991. The Portuguese Republic should therefore have been able to take advantage of 1987, 1988, 1989 and 1990 to adjust the agreement with that country.

76. As for the argument based on the break-up of that State, it must be pointed out that the Republics of Croatia and Slovenia were recognised by all Member States of the European Union on 15 January 1992 [7] and the Republic of Bosnia-Herzegovina on 7 April 1992. [8] It was not considered necessary to recognise the Federal Republic of Yugoslavia. The former Yugoslav Republic of Macedonia was recognised by the Member States, apart from the Hellenic Republic, in 1993.

77. With regard to most of those States, greater diligence would probably have enabled a successful outcome to have been achieved well before the final date set by the reasoned opinion, that is to say 5 February 1996. However, diplomatic communications proposing adjustment of the agreement which the five republics created from the Federal Socialist Republic of Yugoslavia had inherited were not sent until 23 June 1997.

7 — *EC Bulletin* 1/2 — 1992, p. 115.
8 — *EC Bulletin* 4 — 1992, p. 86.

78. It is true that the Republic of Bosnia-Herzegovina is a special case and, if I were called on to decide whether the Portuguese Republic were at fault, I would be inclined to suggest that the Court should accept that there were considerable mitigating circumstances or indeed that no infringement should be found. However, Treaty-infringement proceedings are entirely objective and I am unable to take that approach.

79. Finally, I must point out, as the Commission has done, that the Portuguese Republic could have relied on Article 4(4) of Regulation No 4055/86 which states:

'When difficulties arise in the process of adjusting agreements to bring them into conformity with paragraph 1(b), the Member State concerned shall inform the Council and the Commission. In cases where agreements are incompatible with paragraph 1(b) and where the Member State concerned so asks, the Council shall, acting on a proposal from the Commission, take appropriate action'. However, the Portuguese Republic did not avail itself of that opportunity.

80. It remains to be seen whether, as the Portuguese Republic maintains, denuncia-

tion of the agreements constitutes a disproportionate requirement and there was in fact no failure to fulfil obligations because, since 1993, it has refrained from invoking the cargo-sharing clauses contained in the agreements, and indeed the Commission does not dispute that fact.

81. On this point, it is interesting to note that in his commentary on Article 234 of the Treaty, Petersmann[9] takes the view that, where it is a right afforded to a Member State by an earlier agreement with a third country that is incompatible with the Treaty, the 'appropriate step' is for the State concerned to waive its entitlement to exercise that right.

82. However, in this case that possibility is negated by the fact that Article 3 of Regulation No 4055/86 expressly requires the progressive phasing out or adjustment of the clauses allocating cargo shares.

83. It would of course be quite possible for a Member State's waiver of its right to reserve to its shipping companies 50% of the cargo shares to which it was hitherto entitled to be very widely publicised to the other contracting States, to national carriers and to shipping companies of the other Member States by means of:

— communications through diplomatic channels to the contracting State;

— an announcement in the *Official Journal* in the same form as the publication of the maritime transport agreements;

— publication of a press release, if necessary with a copy being sent to the national association and the European association of maritime transport undertakings.

84. Publicity for denunciation of the agreement would not be substantially different. It would likewise involve a communication through diplomatic channels, publication of the notice of waiver in the *Official Journal* and the provision of adequate information to the press and appropriate circles.

9 — See E.-U. Petersmann in: Groeben, Thiesing, Ehlermann, *Kommentar zum EU/EG-Vertrag*, Nomos Verlagsgesellschaft, Band 5, p. 572.

85. Nevertheless, in the case of unilateral denunciation, none of those measures would guarantee that the contracting third country would allocate cargoes due to Portugal to a shipping company of another Member State.

86. Apart from the fact that it does not meet the requirements of Articles 3 and 4 of the regulation, that solution would have the disadvantage of not offering economic operators the legal certainty to which they are entitled.

87. Finally, it remains to be seen whether the charge that the Portuguese Republic failed to denounce the agreements can be upheld, given that the provisions allegedly infringed do not expressly impose such a requirement. Article 3 of the regulation places Member States under an obligation to progressively phase out or adjust *the arrangements* relating to cargo shares *contained* in the agreements. However, the Commission accuses the Portuguese Republic of having 'neither *denounced* nor adjusted *the agreements*'.

88. Should the Court adopt the terms used by the Commission and thereby add to the legislation allegedly infringed details regarding the means to be used which are not contained in it?

89. The result prescribed by Article 3, that is to say removal of the disputed clauses, may be achieved either by renegotiating the agreements or by denouncing them.

90. However, it is clear that, not having succeeded, by the end of the period laid down by the regulation, in negotiating the removal or adjustment of the clauses concerned, the Portuguese Republic had no alternative but to denounce the agreements.

91. In my view, the same interpretation should be placed on the operative part of the Court's judgment in *Commission* v *Belgium and Luxembourg*, [10] which states that, by failing 'either to adjust or to denounce' certain agreements, those Member States had failed to fulfil their obligations under Regulation No 4055/86, in particular Articles 3 and 4, paragraph 1 thereof.

10 — Cases C-171/98, C-201/98 and C-202/98 [1999] ECR I-5517.

Conclusion

For the foregoing reasons, I propose that the Court should:

in Case C-62/98:

— declare that, by neither terminating nor adjusting the agreement made with Angola so as to provide for fair, free and non-discriminatory access by all Community nationals to the cargo shares due to the Portuguese Republic, in accordance with Council Regulation (EEC) No 4055/86 of 22 December 1986 applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries, the Portuguese Republic has failed to fulfil its obligations under Article 3 and Article 4(1) of that regulation and under the EC Treaty;

— order the Portuguese Republic to pay the costs;

in Case C-84/98:

— declare that, by neither terminating nor amending the agreements concluded by it with the Republic of Bosnia-Herzegovina, the Republic of Croatia, the former Yugoslav Republic of Macedonia and the Federal Republic of Yugoslavia so as to provide for fair, free and non-discriminatory access by all Community nationals to the cargo shares due to the Portuguese Republic,

in accordance with Council Regulation (EEC) No 4055/86 of 22 December 1986 applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries, the Portuguese Republic has failed to fulfil its obligations under Article 3 and Article 4(1) of the regulation and under the EC treaty;

— order the Portuguese Republic to pay the costs.