OPINION OF ADVOCATE GENERAL JACOBS
delivered on 6 April 1995 *

1. On 22 April 1994 the Commission applied to the Court seeking a declaration pursuant to the second paragraph of Article 225 of the EC Treaty that the Hellenic Republic had made improper use of the powers provided for in Article 224 of the Treaty in order to justify the unilateral measures adopted on 16 February 1994 prohibiting trade, in particular via the port of Thessaloniki, in products originating in, coming from or destined for the former Yugoslav Republic of Macedonia and imports into Greece of products originating in or coming from that Republic, and that by so doing it had failed to fulfil its obligations under Article 113 of the Treaty and under the common export rules laid down in Council Regulation (EEC) No 2603/69 of 20 December 1969, [1] the common import rules laid down in Council Regulation (EEC) No 288/82 of 5 February 1982, [2] the arrangements applicable to imports into the Community of products originating in the Republic of Bosnia-Herzegovina, the Republic of Croatia, the Republic of Slovenia and the former Yugoslav Republic of Macedonia, laid down in Council Regulation (EC) No 3698/93 of 22 December 1993, [3] and the Community transit rules laid down in Council Regulation (EEC) No 2726/90 of 17 September 1990. [4]

Salient facts

2. During the course of 1991 the Federal Socialist Republic of Yugoslavia began to break up into five parts. On 25 June 1991 Slovenia and Croatia declared independence. On 17 September 1991 the former Yugoslav Republic of Macedonia ('FYROM') did likewise. Then, on 16 October 1991, Bosnia-Herzegovina made a declaration on its sovereignty. That left Serbia together with Montenegro and Kossovo as one unit. A civil war broke out in Croatia and then in Bosnia-Herzegovina, where it continues today.

3. Of importance to this case are Articles 3 and 49 of the FYROM Constitution which provided, before amendment:

'Article 3

The territory of the Republic of Macedonia is indivisible and inalienable.

* Original language: English.

1 — OJ, English Special Edition 1969 (II), p. 590.

2 — OJ 1982 L 35, p. 1.

3 — OJ 1993 L 344, p. 1.

4 — OJ 1990 L 262, p. 1.

The existing borders of the Republic of Macedonia are inviolable.

They may only be altered in accordance with the Constitution.'

'Article 49

The Republic shall safeguard the status and rights of citizens of neighbouring countries who are of Macedonian origin and of Macedonian expatriates, shall assist their cultural development and shall promote relations with them.

The Republic shall safeguard the cultural, economic and social rights of citizens of the Republic abroad.'

4. On 17 November 1991 Articles 3 and 49 of the FYROM Constitution were amended as follows:

'Amendment I

1. The Republic of Macedonia has no territorial ambitions with regard to neighbouring countries.

2. The borders of the Republic of Macedonia may only be altered in accordance with the Constitution, and with the principle of good will and generally recognized rules of international law.

3. Point 1 of this amendment shall be added to Article 3; point 2 replaces the third paragraph of Article 3 of the Constitution of the Republic of Macedonia.'

'Amendment II

1. In so doing the Republic shall not interfere with the sovereign rights of other States nor in their internal affairs.

2. This amendment shall be added to the first paragraph of Article 49 of the Constitution of the Republic of Macedonia.'

5. Greece has complained of certain actions on the part of FYROM from the moment of its independence. Greece considers that FYROM has promoted the idea of a unified Macedonia, encompassing territories in Greece itself including the city of Thessaloniki. In particular, Greece objects to FYROM's use of certain Macedonian

symbols and of the name 'Macedonia', which Greece regards as part of its own cultural patrimony.

6. On 16 December 1991 the Council of the European Communities, at an Extraordinary Ministerial Meeting on European Political Cooperation, issued two declarations, one on Yugoslavia and one on 'Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union'. The former declaration stated:

'The Community and its Member States also require a Yugoslav Republic to commit itself, prior to recognition, to adopt constitutional and political guarantees ensuring that it has no territorial claims towards a neighbouring Community State and that it will conduct no hostile propaganda activities versus a neighbouring Community State, including the use of a denomination which implies territorial claims.'

7. In September 1991 the Arbitration Commission of the Conference on Peace in Yugoslavia had been created in the context of the Conference on Yugoslavia, composed of five judges who are presidents of constitutional courts (or equivalent institutions) of Member States and presided over by Robert Badinter, President of the French Conseil Constitutionnel.

8. On 11 January 1992 the Arbitration Commission of the Conference on Peace in Yugoslavia issued Opinion No 6 'on the recognition of the Socialist Republic of Macedonia by the European Community and its Member States', which concluded that:

'The Republic of Macedonia satisfies the tests in the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union and the Declaration on Yugoslavia adopted by the Council of the European Communities on 16 December 1991;

... the Republic of Macedonia has, moreover, renounced all territorial claims of any kind in unambiguous statements binding in international law;

... the use of the name 'Macedonia' cannot therefore imply any territorial claim against another State; and

... the Republic of Macedonia has given a formal undertaking in accordance with international law to refrain, both in general and pursuant to Article 49 of its Constitution in particular, from any hostile propaganda

against any other State: this follows from a statement which the Minister for Foreign Affairs of the Republic made to the Arbitration Commission on 11 January 1992 in response to the Commission's request for clarification of Constitutional Amendment II of 6 January 1992.'

9. The Council Presidency announced on 15 January 1992 that Slovenia and Croatia were to be recognized and made the following official declaration:

'As regards the two other Republics which have expressed a wish to become independent (Bosnia-Herzegovina and FYROM), a number of important problems remain to be resolved before the Community and its Member States may reach a similar decision.'

10. On 2 May 1992 the Council of the European Communities made public the decision according to which the Community and its Member States were prepared to recognize FYROM 'as a sovereign and independent State, within its present borders, under a name which is acceptable to all the parties concerned'.

11. On 27 June 1992 the European Council at Lisbon declared that the Community was prepared to recognize FYROM within its present borders under a denomination which did not include the term 'Macedonia'.

12. The Council Presidency then sent a 'Special Representative of the Presidency' to Skopje, the capital of FYROM, and to Athens to establish the bases for an agreement between the two parties on which recognition of FYROM by the Community could be based and which would comply with the Lisbon Declaration of 27 June 1992.

13. In August 1992 the Parliament of FYROM adopted as the emblem on the national flag the 'sun of Vergina', a sixteen-point motif of the sun and its rays which adorned the golden larnax containing the bones of Philip II found in 1977 at the old Macedonian capital Aigai, now Vergina in Greek Macedonia. Greece regards that symbol as quintessentially Greek and in consequence requested FYROM not to use it on its flag and repeated its requests that FYROM should renounce territorial claims against Greece and cease all hostile propaganda.

14. The Special Representative of the Presidency submitted his report to the European Council meeting at Edinburgh on 11 and 12 December 1992. He noted that FYROM was prepared to adopt the denomination

'Republic of Macedonia (Skopje)' for all international requirements, to conclude a treaty with Greece confirming the inviolability of their common borders, to amend Article 49 of its Constitution so as to remove any reference to the protection it would afford to the 'status' and the 'rights of citizens of neighbouring countries who are of Macedonian origin' and to conclude with Greece a treaty of good relations.

15. No agreement was reached at the European Council meeting in Edinburgh.

16. On 7 April 1993 the United Nations Security Council in Resolution 817 recommended to the General Assembly that FYROM should be admitted to the United Nations Organization under the name of 'the former Yugoslav Republic of Macedonia', 'pending settlement of the difference which has arisen regarding its denomination'. The Co-Chairmen of the Steering Committee of the International Conference on the Former Yugoslavia, Mr Vance and Lord Owen, endeavoured to mediate, resulting in a draft treaty 'Confirming the Existing Frontier and Establishing Measures for Confidence-Building, Friendship and Neighbourly Cooperation'. No party signed the draft.

17. Six Member States of the European Union recognized FYROM in December 1993 and established diplomatic relations with it. The United States of America recognized FYROM on 8 February 1994.

18. On 16 February 1994 the Greek Government adopted the measures which are the subject of these proceedings, applying them to all goods except those vital for humanitarian purposes, such as food and pharmaceutical products, and closed its consulate in Skopje.

19. The Greek Government proceeded to inform the Council and other Member States of the measures taken. The Presidency of the Council formally advised the Member States on 21 February 1994 of the nature of the measures adopted and the reasons given for them. On 23 February 1994 the Permanent Representative of the Hellenic Republic sent a letter explaining the measures to the Secretary General of the Commission. The President of the Commission had already sent a letter to the Greek Government on 22 February 1994 inviting it to justify the measures in the light of the Treaties and stating that the Commission had serious doubts as to their compatibility with Community law.

20. The Prime Minister of Greece responded on 25 February 1994 with a description of the background to the measures and stated that their adoption had become inevitable owing to the intransigence of FYROM and the consequential risk for Greece. On

26 February 1994 the Greek Government addressed a memorandum to the Commission setting out the justification of the measures adopted on 16 February 1994 in both international law and Community law. The memorandum stated that the manner in which sanctions were imposed on Southern Rhodesia, South Africa and Argentina indicated that the Member States were competent in such matters and not the Community. It mentioned the judgment of the Court in *Commission* v *Council*[5] from which the Greek Government deduced that the matter did not fall within the ambit of Article 113 of the EC Treaty even if the measures had repercussions on trade. Finally, the Greek Government relied on Article 224 of the Treaty and stated that that article provided a general safeguard clause empowering Member States to take unilateral measures when, as in this instance, there was 'serious international tension constituting a threat of war'. The Greek Government stated that that article was concerned only with consultation in order to resolve problems regarding the functioning of the common market and not with any consequences which the measures might have for third countries.

21. The Commission repeated its reservations in a letter of 3 March 1994 addressed to the Greek Foreign Affairs Minister. It repeated the argument that the measures infringed the common rules on imports into the Community of products from non-member States, the rules on exports to non-member States and the common transit rules. The Commission also alluded to the harm caused to the legitimate interests of numerous exporters established in the Community whose lorries and goods had been stopped in Greece and to the systematic verification of several containers of Community food aid sent by non-governmental agencies consequent upon decisions adopted by the European Council.

22. The Greek Secretary General for Community Affairs responded by a letter of 15 March 1994, in which he reiterated the position of the Greek Government and added:

'If the Commission can show that the measures which have been adopted by the Greek authorities have the effect of distorting competition in the common market, the Greek Government is prepared to examine how these measures can be adjusted to the rules laid down in the Treaty, as provided for in the first paragraph of Article 225.'

23. On 21 March 1994 the Commission wrote to the Greek Prime Minister stating that, as Greece had relied on political considerations to justify the measures, the matter should be examined as a matter of urgency by the ministers in the context of foreign policy and common security. Only with such

5 — Case 45/86 [1987] ECR 1493.

an opinion of the ministers, the Commission stated, could it assess the manner in which Greece had used Article 224 of the Treaty and the repercussions on the functioning of the common market.

24. The issue was discussed on 27 March 1994 at the informal Council meeting held at Ioannina. The Greek Government maintains that at that meeting no agreement was reached and no decision taken. The Commission maintains, however, that the discussions showed that Greece had failed to establish that there existed a threat of war or a serious internal disturbance affecting the maintenance of law and order as averred by the Greek Government.

25. On 22 April 1994 the Commission lodged the application which commenced the present proceedings, seeking a declaration in the terms mentioned above. The Commission also lodged, on the same day, an application for an interim order to suspend the application of the Greek measures. The Court dismissed that application by an order of 29 June 1994. [6]

The legal issues

26. The Commission seeks a declaration that Greece has made improper use of the powers provided for in Article 224 of the Treaty by imposing an embargo on trade with FYROM and that, in doing so, Greece has failed to fulfil its obligations under Article 113 of the Treaty and under Council Regulations Nos 2603/69, 288/82, 3698/93 and 2726/90.

27. Article 224 of the Treaty provides:

'Member States shall consult each other with a view to taking together the steps needed to prevent the functioning of the common market being affected by measures which a Member State may be called upon to take in the event of serious internal disturbances affecting the maintenance of law and order, in the event of war [or] serious international tension constituting a threat of war, or in order to carry out obligations it has accepted for the purpose of maintaining peace and international security.'

6 — Case C-120/94 R *Commission* v *Greece* [1994] ECR I-3037.

28. Article 225 of the Treaty provides:

'If measures taken in the circumstances referred to in Articles 223 and 224 have the effect of distorting the conditions of competition in the common market, the Commission shall, together with the State concerned, examine how these measures can be adjusted to the rules laid down in the Treaty.

By way of derogation from the procedure laid down in Articles 169 and 170, the Commission or any Member State may bring the matter directly before the Court of Justice if it considers that another Member State is making improper use of the powers provided for in Articles 223 and 224. The Court of Justice shall give its ruling *in camera*.'

29. In order to determine whether the application should be granted a number of issues must be examined.

30. First, it is necessary to decide whether the action taken by Greece would, in the absence of the safeguard clause contained in Article 224, be contrary to Community law, in particular the provisions of Community law cited in the application.

31. Second, if the action taken by Greece is found to be contrary to the aforesaid provisions, it will be necessary to determine whether Greece could invoke Article 224 for the purpose of justifying its action on the ground that it was designed to counter 'serious internal disturbances affecting the maintenance of law and order' or 'serious international tension constituting a threat of war'.

32. Third, if Greece could invoke Article 224, it will be necessary to determine, in accordance with the second paragraph of Article 225, whether Greece has made improper use of the powers provided for under Article 224.

The question whether the action taken by Greece would be contrary to Community law in the absence of the safeguard clause contained in Article 224 of the Treaty

33. The Commission observes that the common commercial policy provided for in Article 113 falls within the exclusive competence of the Community. It cites Opinion 1/75 of 11 November 1975, [7] the judgment in *Donckerwolcke and Schou* v *Procureur de la République* [8] and Opinion 2/91 of 19 March 1993. [9] The Commission deduces from that

7 — [1975] ECR 1355, p. 1363.

8 — Case 41/76 [1976] ECR 1921, paragraph 32 of the judgment.

9 — [1993] ECR I-1061, paragraph 8.

case-law that the existence of an exclusive Community competence deprives the Member States of any parallel competence in the field of commercial policy.

34. On the basis of that exclusive competence, the Community has established common rules for imports from non-member States. At the time when the application was lodged, those rules were contained in Council Regulation (EC) No 518/94 of 7 March 1994 (as regards products other than textiles) [10] and in Council Regulation (EC) No 517/94 of 7 March 1994 (as regards textile products). [11] Those regulations replaced Council Regulation No 288/82 which is referred to in the Commission's application. [12] Regulation No 518/94 has itself been replaced by Council Regulation (EC) No 3285/94 of 22 December 1994. [13]

35. Under Article 1(2) of Regulation No 3285/94 imports into the Community from non-member States are in principle to take place freely and may not be subject to quantitative restrictions. However, Article 24(2) allows Member States to impose prohibitions and restrictions in terms similar to those applicable to trade between Member States by virtue of Article 36 of the Treaty. Articles 2(1) and 26(2) of Regulation No 517/94 contain corresponding provisions as regards textile products. Similar provisions were contained in Articles 1(2) and 21 of Regulation No 288/82 and in Articles 1(2) and 18(2) of Regulation No 518/94.

36. Imports from Bosnia-Herzegovina, Croatia, Slovenia and FYROM are governed by the special provisions of Council Regulation No 3698/93 of 22 December 1993. [14] Article 1 of that regulation provides:

'Subject to the special provisions laid down in Articles 2 to 8, products other than those listed in Annex II to the Treaty establishing the European Community and in Annex A to this Regulation, originating in the Republics of Bosnia-Herzegovina, Croatia and Slovenia and the former Yugoslav Republic of Macedonia, shall be admitted for import into the Community without quantitative restrictions or measures having equivalent effect and exempt from customs duties and charges having equivalent effect.

...'

10 — OJ 1994 L 67, p. 77.

11 — OJ 1994 L 67, p. 1.

12 — Cited above in paragraph 1.

13 — OJ 1994 L 349, p. 53.

14 — Cited above in paragraph 1.

37. Article 2 provides:

'The import duties, namely the customs duties and levies (variable components) applicable on import into the Community of the products listed in Annex B shall be those indicated for each product in the said Annex.'

38. Common rules on exports to non-member countries are laid down in Council Regulation No 2603/69 of 20 December 1969, [15] which provides that exports are in principle free, subject to the possible adoption of safeguard measures in the event of shortages of essential goods. Article 11 of the regulation again contains provisions similar to those of Article 36 of the Treaty.

39. Common rules on the transit of goods through the territory of a Member State, including goods imported from non-member States, are laid down in Council Regulation No 2726/90 of 17 September 1990. [16] Those rules are essentially of a technical nature and deal in particular with the documentation that must accompany goods during their transit through the territory of the Member States. Implicit in those rules is the principle that goods imported from outside the Community may pass through the territory of one Member State (such as Greece, for example) on the way to their final destination in the territory of another Member State. Article 5(3) of the regulation provides:

'This Regulation shall apply without prejudice to the prohibitions and restrictions on importation, export and transit issued by the Member State, to the extent that they are compatible with the three Treaties establishing the European Communities.'

40. In my view, it cannot be doubted that the embargo imposed by Greece on trade with FYROM is in principle incompatible with the provisions of Community law cited by the Commission, unless it can be regarded as falling within the scope of the safeguard clause contained in Article 224 of the Treaty. The basic principle of the common commercial policy under Article 113 of the Treaty is that the territory of the Member States constitutes a single customs territory with uniform rules governing the importation of goods from, or the export of goods to, countries not belonging to the Community. The external frontier of the Community is in principle indivisible for customs purposes. By conferring exclusive competence on the Community in the field of commercial policy the Member States have surrendered the power to adopt unilateral measures restricting trade with the outside world, except in certain circumstances defined by Community law.

15 — Cited above in paragraph 1.

16 — Cited above in paragraph 1.

41. The adoption of a unilateral embargo on trade with a non-member country is, moreover, contrary to the general provisions of the Council regulations governing trade with non-member States (cited above in paragraphs 34 to 39). It is true that some of those regulations (Regulations Nos 288/82, 517/94, 518/94, 3285/94 and 2603/69) contain provisions which permit derogations on grounds similar to those found in Article 36 of the Treaty. Greece has not however invoked those provisions and it is in any event questionable whether they are apt to cover the type of measure in issue. Moreover, Regulation No 3698/93, which deals specifically with imports from FYROM and the other States created as a result of the disintegration of Yugoslavia, does not contain any clause equivalent to Article 36 of the Treaty.

42. Greece argues that the embargo on trade with FYROM falls outside the scope of Article 113 on the ground that it was not conceived as an instrument of commercial policy but was designed to bring political pressure to bear on FYROM. I am not persuaded by that argument. In my view, the decisive element is not the purpose of the embargo but its effects. A measure which has the effect of directly preventing or restricting trade with a non-member country comes within the scope of Article 113, regardless of its purpose. Moreover, as the Commission has pointed out, that is borne out by the Community's practice. On several occasions the Council has relied on Article 113 as the legal basis for regulations imposing economic sanctions on non-member States for reasons of foreign policy rather than commercial policy. [17]

43. Although Greece argues that the embargo on trade with FYROM lies outside the scope of Article 113 of the Treaty, it is important to note that Greece has none the less accepted from the outset the need to rely on Article 224 of the Treaty in order to establish the compatibility of the embargo with Community law. Article 224 was expressly invoked in the memorandum of 26 February 1994 which the Greek Government addressed to the Commission concerning the measures taken against FYROM on 16 February 1994 (see Annex 12 to the application). In that memorandum the Greek Government argued that FYROM's conduct towards Greece had created international tension constituting a threat of war and that Article 224 was the only Treaty provision under which a solution to the problems caused in the functioning of the common market could be sought, by means of the consultations provided for therein.

17 — Council Regulation (EEC) No 596/82 of 15 March 1982 amending the import arrangements for certain products originating in the USSR, OJ 1982 L 72, p. 15; Council Regulation (EEC) No 877/82 of 16 April 1982 suspending imports of all products originating in Argentina, OJ 1982 L 102, p. 1; Council Regulation (EEC) No 2340/90 of 8 August 1990 preventing trade by the Community as regards Iraq and Kuwait, OJ 1990 L 213, p. 1; Council Regulation (EEC) No 3155/90 of 29 October 1990 extending and amending Regulation (EEC) No 2340/90 preventing trade by the Community as regards Iraq and Kuwait, OJ 1990 L 304, p. 1; Council Regulation (EEC) No 945/92 of 14 April 1992 preventing the supply of certain goods and services to Libya, OJ 1992 L 101, p. 53; Council Regulation (EEC) No 1432/92 of 1 June 1992 prohibiting trade between the European Economic Community and the Republics of Serbia and Montenegro, OJ 1992 L 151, p. 4. See also the comments of Advocate General Lenz in Case 45/86 *Commission* v *Council* (cited above in note 5), at paragraph 62 of the Opinion.

The question whether Greece may invoke Article 224 of the Treaty in order to justify the embargo on the ground that it was designed to counter 'serious internal disturbances affecting the maintenance of law and order' or 'serious international tension constituting a threat of war'

44. In *Johnston* v *Chief Constable of the Royal Ulster Constabulary* [18] the Court stated that Article 224 of the Treaty concerns 'a wholly exceptional situation'. In fact, Article 224 envisages three exceptional situations in which a Member State may take measures that are capable of affecting the functioning of the common market. It may take such measures: (a) in the event of serious internal disturbances affecting the maintenance of law and order, (b) in the event of war or serious international tension constituting a threat of war or (c) in order to carry out obligations it has accepted for the purpose of maintaining peace and international security. The third of those situations is not of course relevant in the present case. The first two are both invoked by Greece. I shall examine first whether Greece could take measures against FYROM which would be incompatible with the ordinary rules of the Treaty in order to prevent serious internal disturbances affecting the maintenance of law and order.

45. One issue that must be resolved in this context concerns the relationship between the reference in Article 36 of the Treaty to public security and the reference in Article 224 to serious internal disturbances affecting the maintenance of law and order. The Commission contends that the two provisions are analogous and that the Court's case-law on the restrictive interpretation of Article 36 is therefore applicable to Article 224.

46. In my view, the analogy between Articles 36 and 224 should not be taken too far. It is true that in the *Johnston* case [19] the Court bracketed together Articles 36 and 224 along with the other Treaty articles containing derogations in relation to public security (namely, Articles 48(3), 56(1) and 223). After observing that all those provisions 'deal with exceptional and clearly defined cases' the Court stated, in paragraph 26 of the judgment, that 'because of their limited character those articles do not lend themselves to a wide interpretation'. Certainly it is correct to say that Articles 36 and 224 must both be construed strictly since they derogate from the ordinary rules of the Treaty. That much the two provisions have in common. There are, however, important differences. In the first place, whereas the situations covered by Article 36 (and by Articles 48(3) and 56(1)) may be described as exceptional, those covered by Article 224 are, as the Court recognized in paragraph 27 of the *Johnston* judgment, *wholly* exceptional. That is confirmed by the fact that Article 224 has so rarely been invoked, while recourse to Article 36 is relatively common. A second difference relates to the

18 — Case 222/84 [1986] ECR 1651, paragraph 27 of the judgment.

19 — Cited above in note 18.

breadth of the possible derogations permitted by the two articles. Article 36 permits derogations from one aspect of the common market (admittedly a fundamental one); Article 224, on the other hand, permits derogations from the rules of the common market in general.

47. When Article 224 speaks of 'serious internal disturbances affecting the maintenance of law and order', it must in my view be read as envisaging a breakdown of public order on a scale much vaster than the type of civil unrest which might justify recourse to Article 36. What seems to be envisaged is a situation verging on a total collapse of internal security, for otherwise it would be difficult to justify recourse to a sweeping derogation which is capable of authorizing the suspension of all of the ordinary rules governing the common market.

48. In the present case it is clear that Greece has failed to establish that in the absence of the trade embargo decreed against FYROM civil disturbances would take place on such a scale that the means at its disposal for maintaining law and order would be insufficient. Greece claims, in its defence, that practically the entire Greek population is protesting against FYROM's attempt to subvert Greece's national identity and that the organization of demonstrations in which the majority of the population takes part, with calls for the closing of the frontier and fears about the possibility of war with FYROM, naturally creates a risk of serious internal disturbances affecting the maintenance of law and order, disturbances which the State could not quell, on account both of the scale of the demonstrations and of their motive, namely the protection of Greece's national identity.

49. Those assertions are not, in my view, of such a nature as to establish that the authorities in Greece were actually faced with serious internal disturbances against which the authorities would have been unable to take effective action without the adoption of economic sanctions against FYROM. Greece's claims regarding the organization of massive demonstrations are vague and unsubstantiated. No details have been provided about specific disturbances of public order. Greece has not in fact come anywhere near establishing the massive breakdown of public order needed to justify recourse to Article 224 on grounds of serious internal disturbances affecting the maintenance of law and order. I conclude that Greece was not entitled to invoke Article 224 on such grounds.

50. The next question is whether Greece was entitled to invoke Article 224 on the ground of war or serious international tension constituting a threat of war. That question is far more complex and raises the fundamental issue of the scope of the Court's power to exercise judicial review in such situations. Clearly it cannot be argued — and indeed it is not argued by Greece — that the matter is non-justiciable. It is plain from the terms of Article 225 of the Treaty that the Court has power to review the legality of action taken by a Member State under Article 224; logically that must include the power to review whether the conditions for invoking Article 224 are satisfied. The scope and intensity

of the review that can be exercised by the Court is however severely limited on account of the nature of the issues raised. There is a paucity of judicially applicable criteria that would permit this Court, or any other court, to determine whether serious international tension exists and whether such tension constitutes a threat of war. The nature of the problem is encapsulated in remarks made by an English judge in a rather different context: 'there are ... no judicial or manageable standards by which to judge these issues, or to adopt another phrase ... the court would be in a judicial no-man's land.' [20]

51. It is also interesting to note that the courts in the Federal Republic of Germany, which are exceptionally reluctant to admit that any action taken by the executive branch of government should be immune to judicial review, recognize that in the field of foreign and security policy the intensity of the review may be severely curtailed by the absence of any appropriate legal criteria capable of judicial application. [21]

52. War is by nature an unpredictable occurrence. The transition from sabre-rattling to armed conflict can be swift and dramatic, as even the most cursory review of recent history demonstrates. Few would have predicted in the Spring of 1982, when a group of Argentinian scrapmen began to dismantle a disused whaling station on the island of South Georgia, that the United Kingdom and Argentina would soon be at war over the Falkland Islands. Not many can have foreseen, in the Summer of 1990, when Iraq began to move troops towards the border with Kuwait, that a conflict on the scale of the Gulf War would ensue. And only the most clairvoyant could have suspected in the mid-1980s that Yugoslavia would in a few years be engulfed in a series of bitter civil wars.

53. It is in the light of these considerations that the Court must evaluate the arguments of the parties concerning the threat of war. The Commission recognizes that there is a war in the Balkans and a risk that the war may spread to other regions of the Balkans which are at present relatively calm. The Commission recognizes that there is a grave political conflict between Greece and FYROM. The Commission denies however that FYROM's conduct towards Greece can reasonably be regarded as constituting a threat of war. The Commission contends that FYROM is a small country in the midst of an economic crisis, with few foreign currency reserves and extremely modest military forces compared with those of Greece, which moreover benefits from the security guarantee deriving from membership of NATO.

20 — Per Lord Wilberforce, in *Buttes Gas and Oil Co v Hammer* [1982] AC 888, p. 938.

21 — See Franck, *Political Questions/Judicial Answers: Does the Rule of Law Apply to Foreign Affairs?* Chapter 7.

54. I should like to emphasize at this point that it is not for the Court to adjudicate on the substance of the dispute between Greece and FYROM. It is not for the Court to determine who is entitled to the name 'Macedonia', the star of Vergina and the heritage of Alexander the Great, or whether FYROM is seeking to misappropriate a part of Greece's national identity or whether FYROM has long-term designs on Greek territory or an immediate intention to go to war with Greece. What the Court must decide is whether in the light of all the circumstances, including the geopolitical and historical background, Greece could have had some basis for considering, from its own subjective point of view, that the strained relations between itself and FYROM could degenerate into armed conflict. I stress that the question must be judged from the point of view of the Member State concerned. Because of differences of geography and history each of the Member States has its own specific problems and preoccupations in the field of foreign and security policy. Each Member State is better placed than the Community institutions or the other Member States when it is a question of weighing up the dangers posed for it by the conduct of a third State. Security is, moreover, a matter of perception rather than hard fact. What one Member State perceives as an immediate threat to its external security may strike another Member State as relatively harmless.

55. That issues of national security are primarily a matter for the appraisal of the authorities of the State concerned has been emphasized by the European Court of Human Rights in relation to Article 15 of the European Convention on Human Rights, which allows Contracting States to take measures derogating from their obligations under the Convention 'in time of war or other public emergency threatening the life of the nation'. In *Ireland* v *United Kingdom* [22] the Strasbourg Court stated:

'It falls in the first place to each Contracting State, with its responsibility for "the life of [its] nation", to determine whether that life is threatened by a "public emergency" and, if so, how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it.'

56. The factors alluded to by the Commission may make the prospect of war between Greece and FYROM unlikely. However, if the matter is looked at from Greece's subjective point of view and if due weight is attached to the geopolitical environment and to the history of ethnic strife, border disputes and general instability that has characterized the Balkans for centuries, including of course the series of armed conflicts that have engulfed the former Yugoslavia in

22 — Judgment of 18 January 1978, ECHR, Series A, vol. 25 (1978), pp. 78 and 79.

recent years, then I do not think that it can be said that Greece is acting wholly unreasonably by taking the view that the tension between itself and FYROM bears within it the threat — even if it may be long-term and remote — of war.

57. I stress once again that it is not necessary to pronounce on the rights and wrongs of the dispute between Greece and FYROM or to take sides on the issue of who is entitled to the name 'Macedonia' and the Macedonian symbols. But it is necessary to look at matters from the Greek perspective for the reasons given above. Greece's position is, as I understand it, that FYROM, as a newly created independent State characterized by great ethnic diversity, is attempting to foster a sense of national identity, in order to weld together its heterogeneous population, by cultivating among its citizens a Macedonian consciousness and instilling into them a belief that they are the heirs to the ancient kingdom of Philip and Alexander. Greece regards that, rightly or wrongly, as the theft of a part of Greece's own national identity. Moreover, Greece points to the use of text books in schools showing maps of Macedonia which include, in addition to the present territory of FYROM, the Pirin district of Bulgaria and a portion of Greek territory stretching as far south as Thessaloniki and Mount Olympus. Greece's apparent long-term fear is described in a pamphlet entitled 'Macedonia: more than a difference over a name', which was issued by the Greek Secretariat General for Press and Information in April 1994 (Annex 1a to the defence, at pp. 11 and 12):

'... a new generation is being educated in FYROM believing that territories belonging to neighbouring countries form part of their "fatherland" and have been unjustly detached from it. Accordingly, it is not difficult to presume that the new generation — and the generations to come — will nurture feelings of aggressiveness, vindictiveness and revanchism towards "usurping" neighbours.'

58. It may be that Greece's fears are entirely unfounded, as indeed the Commission infers from, amongst other things, the fact that the Constitution of FYROM, in its amended version, allows FYROM's frontiers to be altered only in accordance with the principle of good will and the generally recognized rules of international law. But what matters is not so much that Greece's fears may be unfounded but rather that those fears appear to be genuinely and firmly held by the Greek Government and, it would appear, by the bulk of the Greek people. Where a government and a people are fervently convinced that a foreign State is usurping a part of their cultural patrimony and has

long-term designs on a part of their national territory, it would be difficult to say that war is such an unlikely hypothesis that the threat of war can be excluded altogether. If such matters were to be judged exclusively by what external observers regarded as reasonable behaviour, wars might never occur. It is often, however, the subjective assessment of the parties to the dispute which is decisive.

59. Additional factors in the present case are the long history of border disputes in the Balkan region and the instability that has plagued the territory of the former Yugoslavia since the disintegration of that State. It is impossible to ignore the fact that a series of civil wars has taken place in that territory as a result of the ethnic and religious differences that divide its population. The geopolitical environment in which Greece has to operate is not easy. As to the Commission's argument that the action taken by Greece is likely to increase tension and thus adversely affect the internal and external security of Greece, that is very much a political assessment of an eminently political question. There are simply no juridical tools of analysis for approaching such problems. There is no legal test for determining whether a Member State which has a dispute with a third State is more likely to bring that dispute to a successful conclusion by a policy of dialogue and friendly persuasion than by economic sanctions.

60. Having regard to the extremely limited nature of the judicial review that may be carried out in this area, I conclude that it would be wrong to rule that Greece could not invoke Article 224 of the Treaty on the ground that there was no serious international tension constituting a threat of war.

The question whether Greece has made improper use of the powers provided for in Article 224

61. It is first necessary to determine the scope of the judicial review that may be exercised by the Court under Article 225. The Commission recognizes that the intensity of that review may be limited on account of the wide margin of appraisal enjoyed by the Member States under Article 224.

62. The Commission maintains however that, apart from that reservation due to the nature of the subject-matter, the Court possesses, in cases brought under Article 225, its normal powers to review the legality of a Member State's acts. The Court may for example, according to the Commission, enquire not only whether an act constitutes a misuse of power (*détournement de pouvoir*) but also whether it is vitiated by a manifest error of appraisal or whether it is contrary to general principles of law, such as the

principles of equal treatment or proportionality. Greece maintains, on the other hand, that the expression 'improper use' in Article 225 of the Treaty means the same as 'misuse of powers' in Article 173. Greece observes that the same expression is in fact used in the two articles in the Greek, German and Dutch versions of the Treaty. Greece deduces from that terminology that the Court's power of review under Article 225 is extremely limited and that the Member State which invokes Article 224 can only be said to have made an improper use of its powers under that provision if it claims that its action is designed to achieve an object encompassed by the terms of Article 224, whereas its real purpose is to achieve a different object.

63. Irrespective of the question whether the concept of 'improper use' (*usage abusif*) of powers in Article 225 is identical to the concept of 'misuse of powers' (*détournement de pouvoir*) in Article 173, it is clear that the scope of the judicial review to be exercised under Article 225 is extremely limited — not just because of the terminology of that and the preceding article but also because of the nature of the subject-matter.

64. Article 224 recognizes that foreign policy remains essentially a matter for the individual Member States, at least under the original version of the Treaty. The Member States retain ultimate responsibility for their relations with third States. Notwithstanding the cooperation pursued within the framework of the provisions introduced by the Single European Act and the Treaty on European Union, it is still for each Member State to decide in the light of its own interests whether to recognize a third State and on what footing to place its relations with such a State.

65. If a Member State considers, rightly or wrongly, that the attitude of a third State threatens its vital interests, its territorial integrity or its very existence, then it is for the Member State to determine how to respond to that perceived threat: for example, by diplomatic pressure, by the severing of sporting and cultural links, by economic sanctions or even by military action. It is not for the Court of Justice to criticize the appropriateness of the Member State's response, and to say that the chosen course of action is unlikely to achieve the desired aim or that the Member State would have a better prospect of successfully defending its interests by other means. Once again there are no judicial criteria by which such matters may be measured. It is difficult to identify a precise legal test for determining whether a trade embargo is a suitable means of pursuing a political dispute between a Member State and a third State. The decision to take such action is essentially of a political nature.

66. Articles 224 and 225 recognize that, if a Member State opts for economic measures as

a means of bringing pressure to bear on a third State, such measures may have repercussions on areas which are the subject of legally binding Community policies, such as the common commercial policy and the common market itself. Those articles recognize that the autonomy left to Member States in the field of foreign policy is in stark contrast to the integration achieved in the field of economic and commercial policy. Those articles attempt to define the outer limits of the autonomy left to Member States in the field of foreign policy, bearing in mind that that autonomy may 'affect the functioning of the common market' (Article 224) and may 'distort the conditions of competition in the common market' (Article 225).

67. The sole limit placed on the autonomy of the Member States is that they may not make 'improper use' of their powers. Clearly a Member State would be using its powers improperly if its real purpose in imposing an embargo on trade with a third State was not to prosecute any political dispute with the third State but to protect its own economy or the interests of domestic traders. There is no suggestion that that is the purpose of the embargo imposed by Greece on trade with FYROM.

68. Beyond that it is not easy to see how a Member State could be said to be making improper use of its powers under Article 224 when it imposes economic sanctions on a third State with which it is in dispute. The Commission contends that Greece is making improper use of its powers because the purpose of the embargo is not to repel a threat of war from FYROM but simply to bring pressure to bear on FYROM in the political dispute between those countries. That argument is misconceived; it seeks to demonstrate, not that Greece is making improper use of its powers under Article 224, but that Greece cannot invoke that article at all because the requirement of serious international tension constituting a threat of war is not fulfilled. Once it is accepted that that requirement is satisfied, it cannot be argued that Greece is misusing its powers simply because it is attempting to bring pressure to bear on the third State with which it is in dispute. On the contrary, that is precisely the sort of purpose contemplated by Article 224 when it allows Member States to take measures which are capable of affecting the functioning of the common market, in order to deal with serious international tension constituting a threat of war.

69. The Commission also refers to the principles of equal treatment and proportionality. The breach of those principles might certainly render improper an otherwise lawful exercise of the powers provided for in Article 224. If, for example, Greece imposed a

discriminatory ban on trade with FYROM, allowing exports of Greek products but prohibiting exports of products from other Member States or discriminating arbitrarily between different classes of goods or traders, that might well constitute an improper use of powers. No-one has argued that such is the case.

70. As for the principle of proportionality, there are few areas of Community law, if any at all, where that is not relevant. The Commission considers that the embargo infringes the principle of proportionality because it is excessive in relation to the threat to Greece's interests posed by the conduct, on the part of FYROM, of which Greece complains. The Commission contends that the embargo imposed by Greece is in any event excessive because it threatens the very existence of FYROM, in particular by cutting off oil supplies. The Commission suggests that a partial embargo limited to military material and strategic supplies would be sufficient. Greece, on the other hand, argues that its action is proportionate because food and medical supplies are excluded from the embargo.

71. Doubtless many informed commentators would agree with the Commission that Greece's conduct constitutes an overreaction and that Greece could better protect its interests by diplomatic methods. But that view rests on a political analysis which the Court is ill equipped to carry out.

72. As to whether such a view can properly be based on the legal principle of proportionality (as opposed to a political appraisal of the appropriateness of Greece's action), it is first necessary to determine what interests are to be taken into account in the balancing exercise implied by the proportionality test. In my view, it is clear from the structure of Articles 224 and 225 that the interests which must be weighed in order to determine whether Greece's action is disproportionate are the interests — *Community* interests — which are recognized in the wording of those articles, namely the functioning of the common market and the preservation of undistorted competition. It is not disputed that the damage sustained by those interests as a result of the contested measures is slight. The embargo affects a tiny percentage of the total volume of Community trade and is unlikely to have any perceptible impact on the competitive situation in the Community. Greece cannot therefore be said to have made an improper use of its powers under Article 224 on grounds of proportionality.

Conclusion

73. Accordingly, emphasizing that in the circumstances of this case it is not open to the Court to take a view on the merits of the issues between Greece and FYROM, I am of the opinion that the Court should:

(1) dismiss the application;

(2) order the Commission to pay the costs, including the costs of the application for interim measures.