2. An action seeking to establish that a Member State has not complied with obligations arising from provisions of the Treaty which the Commission considers to be in force serves to ensure the application of the Treaty, and cannot constitute a misuse of procedure.
3. It cannot be presumed that provisions of the Treaty have lapsed. The Member States agreed to establish a Community of unlimited duration, having permanent institutions invested with real powers, stemming from a limitation of authority or a transfer of powers from the States to that Community. Powers thus conferred cannot, therefore, be withdrawn from the Community and restored to the Member States except by virtue of an express provision of the Treaty.
4. The object of Article 76 of the Euratom Treaty is to permit the supply system to be adapted to changing circumstances, and cannot, therefore, be interpreted as depriving the Community of a means of action designed to achieve one of the objectives of the Treaty. Even an abstention by the Council from exercising the powers which it holds under the second paragraph of Article 76 with a view to adapting the provisions of Chapter VI of Title II of the Treaty in the light of experience, cannot have the effect of causing these provisions to lapse, either immediately or at any subsequent date. Until the Council's decision, the provisions of Chapter VI are only maintained on a temporary basis, so that at any moment there may be substituted for them a set of new provisions constituting a different supply system.
5. It is not possible to justify a failure to fulfil an obligation by invoking the uncertainty of the legal situation in which the defendant Member State found itself.
6. Article 141 does not require that other Member States should have been prejudiced as a condition for the use of the procedure for a declaration of a failure to fulfil an obligation.

In Case 7/71

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, Mr J. P. Delahousse, acting as Agent, with an address for service in Luxembourg at the offices of Mr E. Reuter, Legal Adviser, 4 boulevard Royal,

applicant,

REPUBLIC OF FRANCE, represented by Mr R. Sivan, Ambassador Extraordinary and Plenipotentiary, acting as Agent, assisted by Mr G. de Lacharrière, Minister Plenipotentiary and by Mr Petit, Assistant to the Director of International Relations at the Atomic Energy Commission with an address for service in Luxembourg at the French Embassy, 19-21 rue Notre-Dame,

defendant,

for a declaration that the Republic of France has failed to comply with its obligations under the Treaty establishing the European Atomic Energy Community by refusing to apply the provisions of Title Two, Chapter VI of this Treaty,

THE COURT

composed of: R. Lecourt, President, J. Mertens de Wilmars (Rapporteur) and H. Kutscher, Presidents of Chambers, A. M. Donner, A. Trabucchi, R. Monaco and P. Pescatore, Judges,

Advocate-General: K. Roemer
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — Summary of the facts and procedure

1. By Article 2 (d) of the Euratom Treaty, the Community shall 'ensure that all users in the Community receive a regular and equitable supply of ores and nuclear fuels'. The implementation of this obligation forms the subject-matter of Title II, Chapter VI (Articles 52 to 76), which creates a common supply system for ores, source materials and special fissile materials. The functioning of this system is entrusted to an Agency 'with a right of option on ores, source materials and special fissile materials produced in the territories of Member States and an exclusive right to conclude contracts relating to the supply of ores, source materials and special fissile materials coming from inside the Community or from outside', (Article 52 Euratom Treaty), and with the duty, after balancing demand against supply, of meeting the orders it receives and, where necessary, of sharing out supplies (Article 60).

By Articles 57 to 59, the Treaty regulates the exercise of the right of option, and by Article 64 to 66, that of the exclusive right of the Agency to enter into agreements for the supply of fissile materials coming from their countries. It also regulates certain of the means of cooperation between the Agency and the competent authorities of the Member States. Article 55 requires the Member States to communicate or cause to be communicated to the Agency all the information necessary to enable it to exercise its right of option and its exclusive right to conclude supply contracts. Article 56 requires them to ensure that the Agency may operate freely in their territories, and the third paragraph of Article 70 specifies that the Member States must submit annually to the Commission a report on the development of prospecting and production, on probable reserves and on investments in mining which has been made or is planned in their territories.

2. The authors of the Treaty took into account the possibility of adaptations or modifications of the system they were establishing. For this reason, Article 76 provides that:

> 'On the initiative of a Member State or of the Commission, and particularly if unforeseen circumstances create a situation of general shortage, the Council may, acting unanimously on a proposal from the Commission and after consulting the Assembly, amend the provisions of this Chapter. The Commission shall inquire into any

request made by a Member State.
Seven years after the entry into force of this Treaty, the Council may confirm these provisions in their entirety. Failing confirmation, new provisions relating to the subject-matter of this Chapter shall be adopted in accordance with the procedure laid down in the preceding paragraph.'

This period of seven years expired on 31 December 1964.

In anticipation of this expiry, the Commission at the session on 28 November 1964 submitted to the Council a proposal for the amendment of Chapter VI. At the same session, the representative of France declared that in the absence of a decision of the Council before the end of 1964 confirming the provisions of Chapter VI in their entirety, the French delegation would consider that as from 1 January 1965 the legal position would become completely uncertain, and it should therefore be settled as early as possible during the year.

3. On 24 April 1969 the Commission addressed to the French Atomic Energy Commission (CEA) a letter in which it stated *inter alia:*

'The Commission has been informed of the direct conclusion by the CEA of contracts concerning the import of 3 555 kg of 1.15% enriched uranium coming from the Kahl centre, of quantities of plutonium coming from Canada, of 116 kg of plutonium coming from ENEL[1] and the supply to CNEN[2] of about 2 000 kg of 4.7% enriched uranium.

The Commission reaffirms its view that Chapter VI of the Euratom Treaty relating to supply is still in force.
The Commission observes that the direct conclusion of the above-mentioned contracts constitutes a default in the obligations arising from the provisions of the said Chapter VI, and in particular of Articles 52 and 64, which give the Agency the exclusive right to conclude contracts relating to the supply of nuclear materials coming from inside the Community or from outside, of Article 57, which gives the Agency a right of option on such materials, and of Article 60, which imposes the obligation on users and producers in the Community to inform the Agency of their respective requirements and offers.'

4. In its reply dated 30 May 1969, the French Atomic Energy Commission informed the Commission that it was merely conforming 'to a position adopted at governmental level and officially notified to the institutions of Euratom'.
On 5 January 1970, challenged by the Agency in relation to a delivery of fissile materials coming from Great Britain, the French Government reminded the Commission 'that in the opinion of the competent French Authorities the provisions of Chapter VI of the Euratom Treaty lapsed on 31 December 1964, since these provisions have not up to now been either confirmed or amended by the Council of Ministers of the European Communities in application of Article 76 of this Treaty'.
The Commission replied to the French Government on 12 March 1970 that it did not share that government's view. It added that the annual reports prescribed by Article 70 were no longer being submitted to it, and that, in addition to the contracts mentioned in the letter of 24 April 1969, a contract for the importation into France of natural uranium coming from South Africa had been concluded without the intervention of the Agency. Since it considered that, in failing to observe the requirements of Chapter VI and in instructing the Atomic Energy Commission to dispense with the intervention of the Agency, the French Republic was failing to fulfil

1 — Ente Nazionale per l'Energia Elettrica.
2 — Comitato Nazionale per l'Energia Nucleare.

the obligations imposed on it by the Treaty, the Commission concluded by requesting the French Government, in conformity with Article 141 of the Treaty, to submit its observations to the Commission within a period of 45 days.

In its observations submitted on 20 May 1970, the French Government confirmed its opinion and developed its point of view on the lapse of Chapter VI. It contended, moreover, that the failure of France to apply these provisions had no practical consequence, since their application by the other Member States had from the outset been purely formal, because of the inappropriateness of the majority of these provisions to the existing situation. In pointed out in addition, and in so far as this was relevant, that the contract with South Africa concerned processing work and not the purchase of fissile materials.

As the observations of the French Government did not satisfy the Commission, it addressed to the French Republic a reasoned opinion dated 14 October 1970, inviting it to take the requisite steps to comply with the opinion within a period of 45 days. The opinion repeated the defaults previously alleged, except as regards the contract with South Africa in respect of which it confined itself to censuring the French Government for not having notified this contract to the Agency.

Since the French Government did not comply with this opinion, the Commission brought the matter before the Court of Justice by an action commenced on 10 March 1971.

Upon hearing the report of the Judge-Rapporteur, and the views of the Advocate-General, the Court decided not to hold a preparatory inquiry.

The parties presented oral argument at the hearing on 27 October 1971.

The Advocate-General delivered his opinion at the hearing on 18 November 1971.

II — Conclusions of the parties

The *applicant* claims that the Court should:

'Declare that the French Republic has failed to fulfil obligations under the provisions of Title Two, Chapter VI of the Euratom Treaty, in particular Articles 55, 56, 57, 60, 64, 70 and 75 by failing to comply with, and by preventing the French Atomic Energy Commission from complying with these provisions in the following instances in particular:

— The refusal of the French Republic to submit to the Commission, after 1964, the annual reports on the development of prospecting and production, on probable reserves and on investment in mining which has been made or is planned on French territory;

— The conclusion without the knowledge of the Agency, by the French Atomic Energy Commission of contracts for the importation of 3 555 kg of 1.5% enriched uranium coming from the Kahl centre; of quantities of plutonium coming from Canada; of 116 kg of plutonium coming from the Ente Nazionale per l'Energia Elettrica (ENEL) and the supply to the Comitato Nazionale per l'Energia Nucleare (CNEN) of approximately 2 000 kg of 4.7% enriched uranium;

— The refusal of the French Commission to notify the Agency of the existence of an agreement on the processing of materials imported from South Africa and the quantities of the materials involved in the corresponding transfer;

Order the French Republic to bear the costs.'

The *defendant* contends that the Court should:

'— Declare the action of the Commission inadmissible;

— Alternatively dismiss it;
— Order the Commission to bear the costs.'

III — Submissions and arguments of the parties

The submissions and arguments of the parties may be summarized as follows:

A — The substance of the allegations

The *defendant* contests the substance of the first alleged default and states in this respect that the information referred to in Article 70, which it allegedly did not communicate to the Commission, is published annually in the reports of the French Atomic Energy Commission which are sent to the Euratom Commission.

It does not deny that the import, export and processing contracts were concluded by the AEC without the intervention of the Agency.

The *applicant* replies that the information supplied in the CEA reports does not contain all the information required.

B — The lapse of Chapter VI

1. The *French Republic* alleges that Chapter VI, which it allegedly infringed, had lapsed as from 1 January 1965 or, at the very least, from the end of the reasonable time within which the procedure prescribed by Article 86 should have been implemented.

(a) *The interpretation of Article 76*

The words 'seven years *after*' in Article 76 of the Treaty allow of three possible interpretations; either that the decision to confirm or amend these provisions must be taken before 31 December 1964, or that it must be taken at the latest at this time, or that it must be taken after this date, but within a sufficiently short time, otherwise it would no longer be 'seven years after'. The defendant maintains that the first interpretation is the correct one and that this, moreover, is in conformity with the decided cases of the Court which, in its judgment of 4 February 1965 (20/64 *Albatros* v *Sopéco* [1965] ECR 29) had interpreted the similar words 'when the transitional period has ended' as meaning 'at the latest by the end of the transitional period'.

Nevertheless, even allowing for the widest interpretation of the words 'seven years after' the time-limits set out by the Treaty would be exceeded since more than six years had passed without a decision being taken.

(b) *The consequences of exceeding the time-limits*

The consequences of exceeding the time-limits set out in Article 76 are twofold: the Council is guilty of a failure to act and the Member States are in an equivocal situation.

(i) With regard to the Council's failure to act, it was not obliged to confirm the provisions of Chapter VI but if it did not confirm them it was under an obligation to amend them as the terms of Article 76, 'new provisions shall be adopted', are mandatory. A decision retaining these provisions on a temporary basis does not satisfy the requirements of Article 76.

Therefore the Council's failure to act is established and the Commission would have been justified in initiating against the Council proceedings for a failure to act under Article 148.

(ii) As regards the situation of the Member States, the defendant maintains that they were subject to no clear legal obligation. It cannot be held that the failure to confirm can, after six years, have the same result as confirmation. This would deprive a decision of confirmation of any scope even if the continued application without confirmation was qualified as 'provisional' as opposed to 'definitive' applicability which would be produced by a decision of confirmation.

Moreover, implied confirmation would be contrary to the wishes of the Council which undertook to amend the provisions which had become inappropriate in the opinion even of the Commission.

The applicant itself had not made any proposal that the provisions of Chapter VI should be confirmed. In so far as it seems to seek to have these same provisions confirmed by the means of this present action, it is admitting its own failure to act in that it did not submit to the Council any proposal to this effect.

In these circumstances, the Member States were no longer under an obligation to apply the provisions of Chapter VI all the less so as they had in fact become inapplicable. The Court of Justice has ruled that when, because of the failure of a Community institution to act, a Member State finds itself faced with an equivocal legal situation it cannot itself be found guilty of a failure to meet its obligations (Judgment of 9 July 1970, 26/69, *Commission of the EEC* v *French Republic*, [1970] ECR 565).

The Court has frequently had occasion to make the logical statement that where an institution has failed to take a decision which it ought to have taken, the person to whom this decision should have been addressed cannot be accused of failing to act as though the decision had been taken.

(iii) Doubtless the slowness of the Council led to the creation of a legal void but this fact is not enough to rule out the point of view adopted by the defendant. As this legal void had considerable effects one might be tempted to fill it in by reference to the doctrine of 'l'effet utile'. However, this is not the case, on the one hand because in practice there is no inconvenience, since the provisions which the Commission seeks to maintain have lost all significance, and on the other hand because the provisions giving rise to the legal void have the reasonable and valuable effect of preventing the extension of the purely formal application of inappropriate provisions and obliges the Council to adopt fresh provisions.

In conclusion the defendant states that in such an equivocal situation it cannot be accused of failing to act as though a decision of confirmation, which the Council did not adopt, had in fact been taken.

2. The *Commission* maintains that the provisions of Chapter VI remain in force.

(a) The interpretation of Article 76

The word 'after' cannot be interpreted as referring to a date *before* 31 December 1964 as the authors of the Treaty intended to try out the supply rules for a period of at least seven years. To require the Council to adopt new rules before 1 January 1965 with effect from that date would mean that the initiative to confirm or amend would have to be taken at such a time that the trial period of seven years would have been considerably curtailed.

Moreover, it is erroneous to interpret the word 'after' as meaning 'at the latest at the end of'.

This interpretation given by the Court of Justice in its judgment of 4 February 1965 (Case 20/64, *Albatros* v *Société des Pétroles et des Combustibles Liquides (Sopéco)* [1965] ECR 29) to the phrase 'when the transitional period has ended' in Article 37 of the EEC Treaty may not be transposed to Article 76 as in this provision the event is not the final date for the implementation of obligations imposed on Member States but the date of commencement for establishing an institutional procedure for adopting new provisions which by its very nature implies time-limits.

The Commission believes that it reconciled its obligation to allow the period of seven years to run as far as possible and the necessity to finish on a date as close as possible to the limit of 1 January 1965 by submitting its proposal to the Council on 28 November 1964.

(b) The consequences of exceeding the time-limit

The Commission states that although, in view of the delicate issues raised by the future activities of Euratom, it has a more finely judged opinion than the

French Government in respect of any failure to act on the part of the Council, nevertheless it agrees that exceeding the time-limits set out in Article 76 established a situation which does not represent a correct application of the Treaty. However it cannot concur with the conclusions the defendant draws from this circumstance.

(i) The situation thus created is not equivocal within the meaning of the judgment given by the Court of Justice on 9 July 1970 in Case 26/69. In this case there is only a divergence of interpretation on the legal consequences of the Council's failure to take a decision. The Commission clearly defined its position on this point as from 28 November 1964. For its part as from *November 1965* the French Government adopted a clear position by unilaterally deciding to refuse to be subject to the application of Chapter VI, thus taking the law into its own hands.

(ii) The absence of any decision by the Council cannot, in the opinion of the Commission, mean an implied decision of non-confirmation.

— legal fiction of an implied decision as a consequence of a reasonable period in such an important matter as this is not acceptable. The alternative decisions set out in the second paragraph of Article 76 require in any event an express and formal measure of the Council.

— The defendant is wrong in arguing that if the authors of the Treaty had intended that the former provisions of Chapter VI should continue to apply after the expiry of the time-limit set out in Article 76, they would have inserted this expressly. The argument rebounds on the defendant. If the authors of the Treaty had intended that the initial provisions should cease to be applicable on 1 January 1965 or upon the expiry of any time-limit, they would have provided this expressly.

— Only the idea of provisional applicability ensures sufficient legal continuity for the principle stated in Article 2 of the Treaty and for the logic of the supply scheme which the authors of the Treaty intended to bring closely under Community supervision. The initial provisions set out in Article 222 of the Treaty for the period preceding the entry into service of the Agency confirm that this interpretation is well founded.

— The scheme of the procedural system set out in the second paragraph of Article 76 also requires the concept of provisional applicability. Indeed the fact that any confirmation may be made by a simple majority decision of the Council in contrast with the requirement of unanimity for the adoption of new rules shows that this confirmation can only, *ratione materiae,* relate to provisions which have provisionally remained in force and not to re-enacting a body of law which had earlier lapsed at the end of a time-limit.

— The defendant's objection that the provisional applicability defended by the Commission is comparable to an implied decision of ratification must be rejected.

As from 1 January 1965 the provisional application of the provisions of Chapter VI is essentially of a precarious nature, liable to be altered at any moment, while confirmation would exclude any subsequent alteration. Moreover, in order not to prejudge decisions of the Council, the provisional supply scheme should be applied in such a way that the future developments may be left open as far as possible.

3. In its rejoinder the defendant replies as follows:

(a) Concerning the interpretation of Article 76

It states that the expressions used in Article 76 rule out the possibility that the authors of the Treaty intended to set

out the starting point for the possible use of the procedure for the amendment of Chapter VI.

In its view there was nothing to prevent these amendments being adopted before 31 December 1964 but only brought into force on 1 January 1965. This was the view which the Commission had taken in presenting its proposals to the Council in November 1964.

(b) Regarding the consequences of exceeding the time-limits

(i) The defendant adds that faced with the abnormal situation thus created, the Member States had to redefine their obligations: either they were to consider that the previous rules remained in force indefinitely or else, preferring the interpretation chosen by France, they were to regard these rules as having lapsed. In both cases, however, they did no more than interpret the Treaty without its being possible to allege in one case more than the other that they were taking the law into their own hands.

This difference of opinion could not be resolved by condemning one of the opinions as the Council alone could say whether the former provisions should have been retained or not after more than six years. There was, therefore, an equivocal situation and a Member State could not be required to apply a rule which, for lack of confirmation, was clearly no longer applicable.

(ii) The failure to apply Chapter VI is a consequence of the absence of the confirmation procedure provided as a mandatory requirement by the Treaty. The argument that if the authors of the Treaty wanted the old dispositions to remain applicable they would have taken care to say so cannot be turned back on itself since the mandatory confirmation procedure stands against this.

C — The interest of the Commission in taking proceedings in respect if the failure to fulfil Treaty obligations

1. The *defendant* alleges that the applicant has no interest, whether practical or legal, to take proceedings in respect of the failure to fulfil Treaty obligations.

(a) The judgment sought cannot result in an effective application of the Treaty since the supply conditions of the Community with regard to fissile material have proved substantially different from what had been envisaged at the time of the drafting of the Treaty.

Whereas the provisions of the Treaty were written in the perspective of a period of shortage of uranium which justified the setting up of the Agency, a surplus of natural uranium has subsequently appeared on the world market. Furthermore, the United States has authorized the export of enriched uranium for civil purposes. These circumstances have caused the Community to give up its idea of undertaking a long-term supply policy as the Member States preferred to rely for their supplies on the agreement concluded in 1958 between the United States and Euratom. France on the other hand, anxious not to be dependent on a foreign monopoly, decided to establish an isotope separation plant itself.

From this time it became impossible to apply the original provisions of Chapter VI *in toto* since the other Member States wished to benefit from the 'dumping' prices on the international market rather than to purchase the temporary surpluses at the normal price resulting from the secured supply policy adopted by France.

In these circumstances the Commission openly gave up effectively applying Chapter VI. It encouraged the purchase of natural uranium on the international market by stating, in contravention of Article 60 of the Treaty, that purchasing contracts would be 'regarded as concluded' by it on the condition that they were subsequently notified to it.

It refrained from applying Articles 70 and 72 (on the building up of stocks) of the Treaty.

The Agency merely played a purely formal role in the conclusion of supply contracts for enriched uranium granted

by the American Atomic Energy Commission which held an absolute monopoly for such supplies.

Since the Commission itself had to give up the application of Chapter VI if only in a partial and purely formal manner, the defendant deduces that it cannot be found guilty of any default. Moreover no Member State had suffered any substantial economic prejudice from the attitude of France.

(b) Nor is there any legal interest in finding France guilty since the conditions for the adoption, putting into force, and the application of the new Chapter VI can only be altered by a decision of the Court of Justice.

2. The *applicant* replies that it does have an interest in taking proceedings against the alleged failure to fulfil Treaty obligations.

(a) The provisions of Chapter VI are not inappropriate to the current supply conditions. Access to nuclear minerals and combustible substances remains subject to political conditions which, for reasons of integration and for the sake of a strong negotiating position upon an oligopolistic market, made the retention of the Agency highly desirable.

Chapter VI and in particular the system of joint purchase was not conceived solely in order to deal with a shortage situation (cf. first paragraph of Article 76). This system, which was in the first place based upon the satisfaction of the needs of consumers in order to supply them at the market price (Article 67) precisely enabled this objective to be achieved. The agreement concluded with the USA in 1958 enabled Europe to be supplied with enriched uranium on good terms.

The fact that, according to the applicant, France built its own isotope separation plant to cover the requirements resulting from its military programme in no way affects the interest which existed from the beginning and still exists in dealing with the American monopoly through a system of joint buying. Moreover Chapter VI is an indispensible panel of the triptych, common supply, supervision and ownership, of special fissile materials. The Commission was actively working towards the effectiveness of the safeguard against diversion set out in Chapter VII of the Treaty.

Moreover, the Commission did not fail to prepare a long term common supply policy even if, for reasons of price, it was unable to accept in 1959 an offer from the French Commission for the supply of enriched uranium.

(b) Furthermore the Commission did not content itself with a purely formal application of Chapter VI.

— The fact that the Agency has the exclusive right to conclude supply contracts in no way implies that operators on the market have lost their freedom of judgment. In response to the almost unanimous concern of the interested parties, the Regulation of 5 May 1960 (OJ 1960 777, p. 60) implementing Article 60 of the Treaty, hinges essentially on the action of the Agency on the whole of the information relating to the forecasts of the needs of the users and the available supplies of the producers in both the internal and external markets and on the information on each of these categories.

— For supplies of natural uranium and of thorium, taking into account a period where supply was particularly abundant, Article 5 of the Regulation of 5 May 1960 established a simple procedure putting the users in direct contact with their chosen supplier. This simplified procedure, which until now has not been contested, in no way implies that the Agency renounced the exercise of the duties assigned to it by the Treaty (Articles 52, 60, 67 and 68) and does not mean that the users are given absolute freedom.

Negotiation is only left to the users under the double condition that they respect the general conditions issued by the Agency relating to the content of contracts and that they submit

these contracts to the Agency which, without being strictly speaking a party, is deemed to conclude them if it does not object to them within eight days.

This substantial formality, without which the contracts are void on the ground of public policy, is a means of exercising the exclusive right granted to the Agency by Article 52 of the Treaty.

— For special fissile materials the role of the Agency essentially consists in assuming control of deliveries made under the agreement between Euratom and the United States.

To the complaints of the French Government that the balancing of supply and demand was not applied in this sector, it may be replied that each negotiation by the Community for the revision of the quantitative limits set in the American agreement was always preceded by careful investigations by the Agency amongst the users in the Community who were enabled in good time to make forecasts as to their needs.

The negotiation of the conditions applicable was therefore made in tripartite form (USAEC, Agency, users).

In addition demands from the users did not exceed the maximum available under the Euratom United States Agreement. In this respect the Commission states that it did not authorize the conclusion of contracts establishing commitments of twenty to twenty-five years to the American seller without possibility of giving notice of termination.

— The fact that the Commission proposed an amendment to Chapter VI in no way implies that the provisions of that chapter had no scope and were of no use. Moreover, the proposal left intact the basis of Chapter VI.

— The Agency achieved constant improvement of the supply conditions from both legal and commercial standpoints. To the argument invoked by the French Government as to the absence of prejudice resulting from the position of that government, the Comission further replies that the French decision breached the unanimity of action which the Member States sought to ensure by establishing the Community, particularly in the area of supply policy in external markets which could also place the relevant undertakings of other Member States in a position of serious inequality.

— The Commission concludes by stating that by encouraging its nationals to evade the application of Chapter VI the French Republic established a discriminatory situation to which the Commission was under an obligation to put an end.

3. In reply to the objections raised by the applicant, *the French Republic* developed its arguments relating to the inappropriateness of the common supply system and the purely formal nature of the intervention by the Agency.

(a) With regard to the first point, it alleges that there was never any common purchase of natural uranium and that while the Supply Agency always intervened in contracts concluded with the Americans for special fissile materials there had nevertheless never resulted any common contracts with several users. This was due to the conditions set out by the USAEC (Atomic Energy Commission) which, for each purchase, required the name of the user and the use for which the special fissile material was intended.

Furthermore, the methods adopted by the Agency proved unfavourable with regard to the guaranteeing of a regular supply to the Community. By systematically accepting the conclusion, by the users, of 20-25 year supply contracts, the Agency permitted the rapid exhaustion of the global quota which the USAEC had undertaken to supply under the Euratom-United States agreement. The

reply of the Commission that these contracts contain clauses for giving notice in compensation for the length of the contracts neglects to mention that this right of giving notice was provided only in favour of the users and not of the Agency itself.

The links set up by Euratom and the practices of the Agency reveal themselves to be extremely unfavourable not only for the users but also for Community producers.

Indeed in a market situation where supply exceeds demand, the Agency should have taken care to preserve the legitimate interests of the Community producers by granting to them, in the basis of an equal price, preference over their foreign competitors. This was not done by the Agency.

Finally, the provisions of Chapter VI are in no way indispensable to the efficient functioning of the safeguard laid down in Chapter VII since the provisions of this chapter are self-sufficient.

(b) With regard to the second point, the defendant re-emphasizes that the Agency had ceased to apply Chapter VI:

— For natural uranium the simplified procedure leads to a renunciation of the balancing of supply and demand provided for by Article 60 and excludes the possibility of granting on the basis of equal prices preference to marketing goods produced within the Community. Far from ensuring the transparency of the market as it was obliged to do by the Treaty, the Agency, by adopting the simplified procedure, achieved the opposite. Moreover, the defendant alleges that in practice, the Agency never exercised the diminished power of supervision remaining to it under the Regulation of 1960, particularly by the possibility of rejecting certain contracts.

Moreover, in a note of 30 November 1960, the Agency recognized that the Regulation of 5 May 1960 is concerned above all to stipulate the procedure and the conditions for avoiding in certain market situations the application of the balancing of supply and demand in transactions relating to natural uranium.

— With regard to special fissile materials, too, there was no balancing of supply and demand; thus in particular one Member State had been able to obtain from the United States the chance of acquiring uranium for stockpiling without the Agency's informing other users who might have been interested in a similar contract.

— Finally, thanks to the efforts of certain Member States in the field of prospecting, the Community was no longer reliant on third countries, thus rendering superfluous the written provisions relating to a situation of shortages and the necessity of external supply.

From this the defendant deduces that the Commission had no interest in taking proceedings since it did not itself apply provisions which had in fact become inapplicable.

D — The delay in bringing the action

1. The *French Republic* observes that the action brought in 1969 is exceptionally late since the alleged contraventions were noted in 1965. The lateness of the action is explained by the absence of any prejudice suffered by Member States by the fact that the Commission hopes to have achieved by means of an action before the Court of Justice what it was unable to obtain directly from the competent institution, the Council.

2. The *Commission* replies that the procedure under Article 141 is not subject to set time-limits and that there is a margin of discretion taking into account considerations of suitability before putting it into operation.

For a long time the Commission has thought that the procedure under the second paragraph of Article 76 would succeed. It was only in a letter of 24 April 1967 that the French Government notified its refusal to submit the annual reports provided for in Article 70.

Whilst it had the right to initiate proceedings as from this moment the Commission did not do so because of the small practical importance of this default. On the contrary, when the supervisory department in 1968 revealed the existence of transactions done without the knowledge of the Agency, this fact caused the Commission to initiate the procedure by way of a reasoned opinion.

E — Misuse of procedure

1. In the opinion of the *French Republic* the action is a misuse of procedure which may be explained by intentions contrary to the Treaty.

(a) The appropriate means of redress was an action for failure to act against the *Council* and this may not be replaced by an action against a Member State for infringement of a confirmatory decision which was not taken; such an action is inappropriate and therefore inadmissible. The Commission used the action founded on a failure to fulfil an obligation rather than the action for failure to act because the results are different. Failure to act recognized by the Court of Justice would place the Council under an obligation to act while the condemnation of the defendant in the present case would mean that Chapter VI has remained applicable although unconfirmed. The attainment of such an objective is inadmissible as it is for the Council alone to rule on the scheme to be applied.

(b) By its action the Commission is seeking to influence the decisions of the Council. The adoption of new provisions, however, in a less mandatory form than contained in the proposal made at the end of 1964 by the Commission, is desired by the defendant which has ceaselessly acted to this end.

(c) The intentions of the Commission under certain Member States are less clear in this respect and to all appearances the applicant and these States, while recognizing the unsuitability of the original provisions of Chapter VI, wish, without admitting it, to put off the end of the seven-year period set out in the Treaty. Various Member States regard it as advantageous to maintain the *status quo* which spares them the need, in the absence of a crisis, to worry about their long-term supplies or even, if a crisis occurs, to opt for the confirmation. Moreover, this situation is contrary to the spirit of Article 70 of the Treaty.

The Commission itself sees in the provisional retention of the situation an opportunity to maintain a monopoly which most of the countries of the western world have, however, renounced.

2. The *applicant* replies that the action for a declaration that a Member State has failed to fulfil its obligations certainly does not exclude the action for failure to act.

The Commission states that it is not seeking to urge the Court of Justice to substitute itself for the Council because the decision of the Court only applies on a temporary basis until the Council takes its decision. The Commission is merely concerned with ensuring the application of the Treaty.

3. The *defendant* replies that a decision of the Court that Chapter VI has remained in force 'temporarily' since 1 January 1965 and that it will remain in force without time-limit is quite different from a decision of temporary application: it is a decision which illegally encroaches upon the rights of the Council.

Grounds of judgment

[1] By an application lodged at the Registry on 11 March 1971, the Commission has brought before the Court, under Article 141 of the Euratom Treaty, an action seeking a declaration that the French Republic has failed to fulfil its

obligations under the provisions of Title II, Chapter VI, of that Treaty, by refusing to submit to the Commission the annual reports prescribed by Article 70 of the Treaty, by concluding, without knowledge of the Supply Agency, contracts relating to the importation from the Federal Republic of Germany, from Canada and from Italy, and to the supply to Italy of special fissile materials, and finally by refusing to notify to the Agency the existence of an undertaking relating to the processing of uranium imported from South Africa, and the quantities involved in the delivery in question.

Admissibility

[2] The Government of the French Republic challenges the admissibility of the action and contends that it has been commenced too late.

[3] The French Government says that since 1965 it has consistently expressed the opinion that the provisions of Chapter VI of the Treaty, which it is alleged to have infringed, have lapsed, and it has subsequently merely acted in accordance with this opinion.

[4] It says that it is not open to the Commission to bring before the Court of Justice in 1971 a situation which has lasted since 1965 and which it has known about since that time.

[5] The action for a declaration that a State has failed to fulfil an obligation provided for by Article 141 of the Treaty, does not have to be brought within a predetermined period, since, by reason of its nature and its purpose, this procedure involves a power on the part of the Commission to consider the most appropriate means and time-limits for the purposes of putting an end to any contraventions of the Treaty.

[6] The fact that the Commission only commenced its action after a lengthy period of time cannot have the effect of regularizing a continuing contravention.

[7] Moreover, according to the uncontested assertion of the Commission, the existence of the disputed transactions was only disclosed at a more recent date, in consequence of inquiries made chiefly during 1968.

[8] On 24 April 1969 the Commission notified to the French Atomic Energy Commission the facts within its knowledge, and commenced the procedure under Article 141 on 12 March 1970 by inviting the French Government to submit its observations on various contraventions which the Commission set out in a precise manner.

[9] The French Government maintains that the action is inadmissible on the further ground that it constitutes a misuse of procedure.

[10] The situation created as from January 1965 by the fact that the Council had neither confirmed the provisions of Chapter VI of the Treaty, nor adopted new provisions, ought to have given rise to an action on the ground of failure to act directed against that institution.

[11] The French Government further alleges that by substituting for this an action for a declaration of a failure to fulfil Treaty obligations directed against a Member State, the Commission is seeking to have it decided 'that Chapter VI, although not confirmed by the Council, has remained applicable', whereas it is necessary on the contrary 'to reinforce the obligation to act which the Treaty imposes on the Council'.

[12] The fact that the Council has not reached a decision on the question whether it was necessary, after 31 December 1964, to confirm the provisions of Chapter VI or to substitute for them a different supply system, cannot prevent the Commission from ensuring respect for provisions which it considers to be still in force.

[13] Therefore, in so far as the Member States were, for the period in question, bound to comply with the provisions of Chapter VI of the Treaty—on which the Court will have to decide hereafter—an action seeking to establish that a Member State has not complied with the obligations arising from the said provisions serves to ensure the application of the Treaty, and cannot constitute a misuse of procedure.

[14] Finally, the objection that the Commission is seeking to influence the future deliberations of the Council is irrelevant.

[15] The action is admissible.

The substance of the case

(*a*) *On the interpretation of Article 76 of the Euratom Treaty*

[16] The defendant contends, first of all, that by virtue of the second paragraph of Article 76 of the Treaty—and, it appears, particularly by virtue of the use in this paragraph of the word 'after'—in view of the fact that the Council did not on 31 December 1964, or within a reasonable period after that date, confirm the provisions of Chapter VI, or adopt new provisions, the said provisions have lapsed.

[17] Hence, it is said that the failure to apply them cannot amount to a failure to fulfil an obligation within the meaning of Article 141.

[18] It cannot be presumed that provisions of the Treaty have lapsed.

[19] The Member States agreed to establish a Community of unlimited duration, having permanent institutions invested with real powers, stemming from a limitation of authority or a transfer of powers from the States to that Community.

[20] Powers thus conferred could not, therefore, be withdrawn from the Community, nor could the objectives with which such powers are concerned be restored to the field of authority of the Member States alone, except by virtue of an express provision of the Treaty.

[21] This is not within the scope of Article 76.

[22] The object of this provision, which is placed at the end of Chapter VI, and which puts into effect the general obligation imposed on the Community institutions by Article 2 (d) to ensure that all users receive a regular and equitable supply of ores and nuclear fuels is precisely to enable the supply system to be adapted to changing circumstances and cannot therefore be interpreted as depriving the Community of a means of action designed to achieve one of the objectives of the Treaty.

[23] Even an abstention by the Council from exercising the powers which it holds under the second paragraph of Article 76 with a view to adapting the provisions of this Chapter in the light of experience, cannot have the effect of cutting the ties which the Member States have agreed to establish between themselves and of dissolving the obligations thereby incumbent on each of them.

[24] To admit that the whole of Chapter VI lapsed without any new provisions simultaneously coming into force would amount to accepting a break in continuity in a sphere where the Treaty, particularly by Article 2, has prescribed the pursuit of a common policy.

[25] Although the terms of Article 76 indicate that after seven years the Council and the Commission may introduce such amendments as experience may have shown to be necessary, or confirm the original provisions, they do not imply that any link whatever can be established between a failure to exercise these powers and the lapse of the old provisions, either immediately or at any subsequent date.

[26] Article 76 does not contain any express stipulation that the Community will be relieved of the tasks conferred on it by Article 2 nor that these tasks should be restored to the authority of the Member States.

[27] Nor can the objection be upheld that the maintenance in force of the provisions in question would amount to a confirmation of the said provisions in a form and following methods different from those expressly laid down by the second paragraph of Article 76, so as to render the latter superfluous.

[28] Until the decision is taken either to make the existing rules permanent, or to replace them by new rules, the provisions of Chapter VI are only maintained on a temporary basis, so that any moment there may be substituted for them a set of new provisions constituting a different supply system.

[29] The submission based on Article 76 of the Treaty must therefore be rejected.

(*b*) *On the factual basis of the alleged contraventions*

[30] The Commission complains, first of all, that since 1965 the defendant has failed to submit to the Commission the annual reports prescribed by Article 70 of the Treaty.

[31] The French Government states that the information required to be furnished under this article is published annually in the reports of the French Atomic Energy Commission, which are sent to the Commission.

[32] The applicant has then contended that these reports do not 'cover the whole of the information required', without however specifying in what respect the information contained in the reports of the French Commission is insufficient.

[33] It appears from the reports submitted to the Court that they contain, at least as regards prospecting, production and the probable development of reserves, information which may help the Commission in the performance of its duties.

[34] Moreover, the latter has not claimed that it has ever sought additional information.

[35] In these circumstances, the facts adduced by the Commission are not enough to permit the conclusion that there has been a failure to comply with Article 70.

[36] A further complaint against the defendant government is that it has effected various sales or purchases of special fissile materials in infringement of the

right of option and of the exclusive right of the Commission to conclude such supply agreements, and that it has failed to notify to the Agency a processing contract for uranium coming from South Africa.

37 Since the French Government has not disputed that the transactions alleged have been effected without the intervention of the Agency, it must be held that the prerogatives of the latter have not been respected.

(c) *On other circumstances which might exclude a declaration of a failure to fulfil an obligation*

38 The French Government then contends that, even if the provisions of Chapter VI have remained in force, they have always been applied in a purely formal manner without real effect.

39 Since the alleged defaults essentially concern the purchase or sale of special fissile materials, the defendant government objects that the quasi-monopolistic position of the principal supplier of the Community has prevented in this sphere any balancing of supply and demand, whereas it was just this balancing which justifies the Agency's right of option and its exclusive right to conclude supply contracts.

40 There is no doubt that, by reason of the structure of the market in special fissile materials, the balancing of supply and demand by the intervention of the Agency has not, in the course of the period in question, resulted in establishing a market price.

41 It does not follow, however, that the intervention of the Agency, as a Community body acting on behalf of all users, no longer makes any contribution to the attainment of the objectives of the Treaty.

42 This intervention, particularly within the framework of the cooperation agreement concluded on 8 November 1958 between Euratom and the United States of America, was such as to guarantee to the users in different Member States equal access to special fissile materials.

43 In any case, the fact that market conditions may during a given period have rendered less necessary the use of the supply mechanisms prescribed by the Treaty does not suffice to deprive the provisions relating to these mechanisms of their mandatory character.

44 Finally, the French Government contends that the lack of any decision by the Council at the end of the seven-year period prescribed by Article 76 of the

Treaty has created an equivocal legal situation, the maintenance in force of the provisions of Chapter VI having become, at least, uncertain, in view of the various possible interpretations of the second paragraph of the said Article 76.

45 Moreover, it is said that the other Member States have not been prejudiced in any way by reason of the behaviour complained of.

46 In these circumstances, according to the French Government, there can be no failure to fulfil an obligation within the meaning of Article 141.

47 It is not possible to justify a failure to fulfil an obligation by invoking the uncertainty of the legal situation in which the Member State found itself, and against which the Treaty affords it means of action.

48 On the one hand, the general obligation of cooperation imposed by Article 192 should have induced the defendant to put an end to the uncertainty on which it relies, by making use of the means offered to it by the Treaty, which puts at the disposal of each interested State, particularly by Article 148, suitable methods for remedying any lack of action on the part of the Council.

49 On the other hand, the procedure for a declaration of a failure on the part of a State to fulfil an obligation itself affords a means of determining the exact nature of the obligations of the Member States in case of differences of interpretation.

50 Finally, Article 141 does not require that other Member States should have been prejudiced as a condition for the use of the procedure for a declaration of a failure to fulfil an obligation.

51 The submission must therefore be rejected.

Costs

52 Under Article 69 (2) of the Rules of Procedure of the Court of Justice, the unsuccessful party shall be ordered to pay the costs.

53 The defendant has failed in the essential part of its submissions.

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;

Upon hearing the parties;
Upon hearing the opinion of the Advocate-General;
Having regard to the Treaty establishing the European Atomic Energy Community, especially Articles 52, 55, 57, 64, 70, 75, 76 and 141, 148 and 192;
Having regard to the Protocol on the Statute of the Court of Justice of the European Atomic Energy Community;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities,

THE COURT

hereby rules:

1. **By concluding contracts without consulting the Supply Agency relating to the import of 3 555 kg of 1.15% enriched uranium coming from the Kahl centre, quantities of plutonium coming from Canada, 116 kg of plutonium coming from the Ente Nazionale per l'Energia Elettrica, and the supply to the Comitato Nazionale per l'Energi Nucleare of about 2 000 kg of 4.7% enriched uranium and**

   by failing to notify to the Supply Agency the existence of an undertaking relating to the processing of uranium imported from South Africa and the quantities involved in the delivery in question,

   the French Republic has failed to fulfil its obligations under Title II, Chapter VI, of the Treaty establishing the European Atomic Energy Community, especially Articles 52, 55, 57, 64 and 75;

2. **The remainder of the application is dismissed;**

3. **The defendant shall pay the costs.**

Lecourt Mertens de Wilmars Kutscher

Donner Trabucchi Monaco Pescatore

Delivered in open court in Luxembourg on 14 December 1971.

A. Van Houtte
Registrar

R. Lecourt
President