JUDGMENT OF THE COURT OF FIRST INSTANCE
(Second Chamber, Extended Composition)
15 September 1995 *

In Joined Cases T-458/93 and T-523/93,

Empresa Nacional de Urânio SA (ENU), a company incorporated under Portuguese law, established at Urgeiriça, commune of Nelas (Portugal), represented by João Luís dos Reis Mota de Campos, of the Lisbon Bar, with an address for service in Luxembourg at the Office of Joaquin Calvo Basáran, 34 Boulevard Ernest Feltgen,

applicant,

v

Commission of the European Communities, represented by António Caeiro, Legal Adviser, and Jürgen Grunwald, of its Legal Service, both acting as Agents, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, Wagner Centre, Kirchberg,

defendant,

APPLICATION for annulment of the Commission's decision of 19 July 1993, on a procedure for the application of the second paragraph of Article 53 of the EAEC

* Language of the case: Portuguese

Treaty, rejecting requests which the applicant had submitted to the Commission in a letter of 21 December 1990 in order to resolve the problem of the disposal of its uranium production, and for a declaration that the European Atomic Energy Community is liable for the damage which the applicant is alleged to have incurred as a result of an alleged breach of the rules of the Treaty,

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES
(Second Chamber, Extended Composition),

composed of: B. Vesterdorf, President, D. P. M. Barrington, A. Saggio, H. Kirschner and A. Kalogeropoulos, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 5 April 1995,

gives the following

Judgment

Facts and procedure

1 Empresa Nacional de Urânio SA (hereafter 'ENU') is a company engaged in mining, producing mainly natural uranium concentrates (U_3O_8) in Portugal.

According to the documents before the Court, that production is in the order of 200 tonnes a year, obtained from its mine in Urgeiriça. For ENU, which has no resources other than those stemming from the sale of its uranium output, disposal of its uranium stock is essential for maintaining its industrial activity. The uranium concentrates are used in industrial nuclear reactors. Since there are no nuclear power stations in Portugal, there are no possibilities for ENU's uranium concentrates to be used in that country, so that ENU is obliged to export all its production.

2 The parties agree that ENU's production represents approximately 1.5% of the Community's consumption of natural uranium, which is about 14 000 tonnes a year (1987 Annual Report of the Euratom Supply Agency, page 15), compared to Community uranium production in the order of 3 500 to 4 000 tonnes a year. In 1987, 72.5% of the supplies of Community users therefore came from outside the Community (ibid. page 19). This proportion did not change substantially during the following years. It reached 81% in 1992 (1992 Annual Report of the Euratom Supply Agency, page 33) whilst consumption remained relatively stable in the Community throughout that period.

3 Until 1990, ENU sold 136 tonnes of uranium concentrates a year, accounting for nearly three-quarters of its production, at the price of US $27 a pound, to Electricité de France (EDF) with which it had concluded a long-term contract before Portugal joined Euratom. However, since for some years the prices obtainable under spot market contracts did not cover its production costs, ENU began to accumulate stocks, which seriously jeopardized its plans to exploit a new deposit located at Niza (Portugal), which was richer and involved lower production costs. Furthermore, when the contract it had concluded with EDF expired on 31 December 1990, this deprived ENU of its only guaranteed sales on what it terms 'minimum profitability conditions'.

4 Against that background and following the accession of the Portuguese Republic to the European Communities, ENU, by letter of 8 October 1987, offered for sale to the Euratom Supply Agency (hereafter 'the Agency') 350 tonnes of uranium concentrates (U_3O_8) for delivery between 1987 and 1991 so that the Agency could exercise its right of option. The Agency forwarded this offer to Community users, by letters of 3 November 1987. It informed ENU, by letter of 9 November 1987, that the offer had been sent to all the electricity companies and to other potential buyers in the Community. It also indicated in that letter that it would pass on the offer to intermediaries in case no interested party came forward in the period indicated, as had been agreed by telephone with ENU. Following transmission of the offer to intermediaries, direct negotiations between ENU and a number of companies began. They continued in 1988 but did not result in conclusion of contracts for the sale of uranium since the prices asked by ENU were higher than those sought by potential buyers.

5 By letter of 10 October 1988, ENU formally reiterated the request which it had submitted on 8 October 1987 regarding the Agency's exercise of its right of option on the stock of 350 tonnes of uranium which it expected it would have by 1990. On 8 November 1988, the Commission formally acknowledged receipt of that letter, emphasizing the importance of the problem raised by ENU and assuring it that it considered that its satisfactory resolution was a priority. Once again, requested by the Portuguese Secretary of State for Energy to examine this problem, the Commission replied, by letter of 14 November 1988, that it would study the problem in detail in order to find a positive solution.

6 In a letter sent to the Agency on 2 August 1989, ENU stated that no solution had yet been found to the question of the disposal of its uranium stocks. By letter of 21 September 1989, the Agency suggested that at the next meeting with ENU the question of the basic price of ECU 25.80 per pound of U_3O_8, which, in its view, was 'at present too high, even for a multi-annual contract, given the situation on the market as known to the Agency', should be rediscussed. At that meeting, held on 24 October 1989, the Agency proposed finding a pragmatic solution, with the agreement of users, that is to say using persuasion and not compulsion. By a letter of 25 October 1989, a copy of which was sent to the Commission, ENU again requested the Agency to act in conformity with the rules of the Treaty.

7 In response to the letter of 25 October 1989, Mr Cardoso e Cunha, the Commissioner responsible for energy matters and the Euratom Supply Agency, informed ENU, by letter of 8 December 1989, that 'he shared the view that the Agency's supply policy should in future include "special action" to enable a problem such as this to be resolved' and he asked the Agency 'to move on to take specific steps to implement the proposals for action which it had submitted to that effect'. Moreover, in reply to a written question put to it, the Commission stated to the European Parliament during the April 1990 session that it had undertaken under the EAEC Treaty to find a solution to the problem of disposing of Portuguese uranium production (Question 190/90).

8 It was during the meeting held on 12 December 1989 that the Agency presented to ENU, as is agreed by both parties, its 'outline practical solutions for the "Portuguese uranium" aspect of supply policy' to which Commissioner Cardoso e Cunha, with the words 'special action', referred to in his letter of 8 December 1989. That 'outline' provided as follows:

(a) The solution proposed would consist in dividing the Portuguese uranium between the electricity companies according to the following principles:

— the Agency's policy on preference for Community uranium production would be complementary in relation to national policies;

— it would apply without discrimination to all producers making a request to the Agency;

— it would apply only to existing mines (production capacity on 1 January 1990);

— the aim would be to maintain those mines in production during periods of market depression;

— the Community uranium available would be shared on the basis of the most objective formula possible;

— producers benefiting under the system would have to show a cost price lower than the annual average price paid by Community users under multi-annual contracts ('multi-annual average price' of the Agency) for the current year;

(b) The allocation arrangements and principles for determining the prices paid to producers could be as follows:

— the uranium would be shared out in proportion to the generating power of nuclear power stations in industrial or commercial service;

— the price paid to the producer (free-at-Community conversion plant of choice) would be the producer's cost price plus 10%, indexed (the cost price to be certified by a firm of accountants and reviewed every three years),

— once the market price was higher than the producer's costs price plus 10%, the system would cease to apply.

9 ENU agreed that the Agency should take the 'special action' as outlined at the meeting held on 12 December 1989 in order to resolve the problem of disposing of its uranium production. However, both during that meeting and in its letters of 31 January and 9 April 1990, it informed it of its doubts about the effectiveness of the plan, set out in the preceding paragraph, in that it did not require Community

users, pursuant to the provisions of Chapter VI of the Treaty, to adopt the action it envisaged.

10 The solution proposed for the 'Portuguese uranium' aspect of supply policy was discussed by the Agency and the users, bilaterally with the CEGB (United Kingdom), Synatom (Belgium) and RWE (Germany) initially, then at a multilateral meeting which was held on 24 April 1990. The Agency had previously informed its Advisory Committee, by a memorandum of 20 March 1990, of the question of Portuguese uranium and the holding of that meeting. In that memorandum, it stated that, after having made inquiries amongst all Community users, the responses ranged between:

— we are prepared to support the Agency's interventionist action (quantities and prices by the Agency), provided that such action applies to everyone without discrimination;

— our needs are met, the price sought is too high, the best guarantee for secure supplies would be to leave the uranium in the ground.

11 In the letter which it sent to ENU on 2 May 1990, following the meeting held on 24 April 1990, the Agency stated that the electricity companies were not prepared to take uranium at a price higher than the upper limit of the long-term market price, which they then estimated to be US $20 a pound. It also stated that the companies, relying on the second paragraph of Article 65 of the Treaty, challenged the Agency's right to require them to buy Portuguese uranium at a higher price.

12 After various talks and a voluminous exchange of letters with the Agency and the Commission, ENU, in its letter of 21 December 1990, requested the Commission

'in accordance with the second paragraph of Article 53 of the Treaty and Article 148 of the EAEC Treaty:

(a) to order the Agency, pursuant to Article 53 of the Treaty ... to restore the proper functioning of the machinery established by the Treaty under Chapter VI, requiring compliance with the provisions concerning the common supply policy;

...

(b) to carry out an immediate enquiry — and thereafter take action accordingly, — to determine how it was possible that, without any checks by the Commission under Article 66 of the Treaty, Community users freely obtained supplies of uranium on foreign markets, despite the availability of all ENU's production at a reasonable price ... and to warn the offending undertakings, either directly or through the Agency, that it will take action against them if they carry out further imports whilst ENU production remains on sale;

(c) ... to discuss ... with ENU the amount of fair compensation to be paid to ENU for the damage caused to it by the Commission's and the Supply Agency's unlawful failure to exercise their Community powers;

(d) require compliance with its decision — which the Supply Agency did not comply with — to direct the Agency to take "special action" affording an immediate solution to the problem of the disposal of uranium by ENU and to assist it in its implementation;

...

(e) ... therefore ... to order the Agency to implement the decision addressed to it by implementing a satisfactory solution to the problem affecting ENU — without prejudice to the application of the Treaty provisions in such a way as to palliate future difficulties'.

13 When the Commission did not take a decision, ENU brought an action for failure to act against the Commission, on 3 April 1991, pursuant to Article 148 of the Treaty. In its judgment of 16 February 1993 in Case C-107/91 *Empresa Nacional de Urânio* v *Commission* [1993] ECR I-599, paragraphs 32 to 34, the Court of Justice held that the Commission had failed, contrary to the second paragraph of Article 53 of the EAEC Treaty, to give a decision on ENU's request referring to it the implied act of the Agency refusing to exercise its right of option in respect of Portuguese uranium and to apply the 'special action' part of its supply policy.

14 By application lodged at the Registry of the Court on 20 October 1992 in Case T-458/93, ENU also applied, under the second paragraph of Article 188 of the Treaty, for an order that the European Atomic Energy Community should compensate the damage suffered as a result of the alleged breach, by the Commission, of the provisions of the EAEC Treaty. By order of 27 September 1993, the Court of Justice referred the case to the Court of First Instance pursuant to Council Decision 93/350/Euratom, ECSC, EEC of 8 June 1993 amending Council Decision 88/591/ECSC, EEC, Euratom establishing a Court of First Instance of the European Communities (OJ 1993 L 144, p. 21). The written procedure followed the normal course before the Court of Justice and then before the Court of First Instance.

15 It appears from the observations of the Commission, confirmed by the applicant, that, as a result of the efforts made by the Agency, ENU signed a contract with a Community user in June 1993 for the sale of 50 tonnes of uranium in the form of concentrates. Subsequently, another sale contract, for the supply of 100 to 200 tonnes of uranium in 1993 and 1994, was concluded by ENU in October 1993. Those particular sales were made at a price well below the price for which ENU had agreed to offer its uranium under the 'special action' plan (see paragraph 8 above).

16 In order to comply with the judgment of the Court of Justice of 16 February 1993, the Commission adopted, on 19 July 1993, Decision 93/428/Euratom on a procedure for the application of the second paragraph of Article 53 of the EAEC Treaty (OJ 1993 L 197, p. 54, hereafter 'the decision'). That decision rejected all the requests submitted by ENU in its letter of 21 December 1990 (see paragraph 12 above).

17 Those were the circumstances in which, by application lodged at the Registry of this Court on 27 September 1993 (Case T-583/93), ENU sought annulment of the decision. By order of 16 December 1994, the Court (Second Chamber, Extended Composition) joined that case to Case T-458/93 for the purposes of the oral procedure and the judgment. On hearing the report of the Judge-Rapporteur, the Court decided to open the oral procedure without any preparatory inquiry. The parties produced documents and replied in writing, before the date set for the hearing, to questions put to them by the Court as measures of organization of procedure provided for by Article 64 of its Rules of Procedure. The hearing took place on 5 April 1995.

Forms of order sought by the parties

18 The applicant claims that the Court should:

— declare the Commission's decision of 19 July 1993 void;

— declare that the breach of the provisions of Chapter VI and VII of the EAEC Treaty, to the detriment of achieving the objectives of the Community set out in Article 2(c), (d) and (g) of the Treaty, has caused it damage which is impossible to quantify accurately at the present time;

— order the Community to compensate that damage on a basis to be agreed between the parties or, failing agreement within 60 days from delivery of the judgment, on a basis to be defined by the Court;

— order the Commission to pay the costs.

19 The defendant contends that the Court should:

— dismiss the action for annulment as unfounded;

— declare the application for damages to be inadmissible;

— alternatively, declare that application unfounded;

— order the applicant to pay the costs.

The claim for annulment

20 The applicant seeks annulment of the decision in so far as it rejects the requests which had been made in its letter of 21 December 1990 (paragraph 12 above) on the basis of the second paragraph of Article 53 of the Treaty for the purpose of resolving the question of the disposal of its uranium production. For the purposes of these proceedings, those requests may be grouped as follows. In order to have the Agency exercise its right of option on its production and its exclusive right to conclude contracts for the supply of ores, in accordance with the provisions of the Treaty, ENU was in effect asking the Commission (A) to order the Agency to

restore the proper functioning of the machinery established by the Treaty under Chapter VI and, secondly, pursuant to those same provisions, to stop Community users from freely obtaining supplies outside the Community when ENU production was available at a reasonable price. In addition, in order to resolve the urgent problem of disposing of its uranium stocks, the applicant was requesting the Commission (B) to order the Agency to implement the 'special action' part of its supply policy, concerning Portuguese uranium (see paragraph 8).

A — *The request for application of the machinery established by Chapter VI of the Treaty so as to ensure disposal of the uranium offered by ENU*

Summary of the parties' arguments

21 The applicant maintains that the Commission's refusal to accede to its request that the Agency should exercise its right of option and exclusive right to conclude supply contracts, so as to enable it to dispose of its uranium production, is in breach of the machinery established by Chapter VI of the EAEC Treaty. First of all, it contests that the proper functioning of that machinery is guaranteed, as the Commission maintains in the contested decision, by the rules of the Euratom Supply Agency determining the manner in which demand is to be balanced against the supply of ores, source materials and special fissile materials, adopted on 5 May 1960 under the sixth paragraph of Article 60 of the EAEC Treaty and amended by the regulation of the Supply Agency of 15 July 1975 (JO No 32 of 11 May 1960, pages 776 and 777 and OJ 1975 L 193, p. 37, hereafter 'the Regulation').

22 The applicant first points out here that the rules of Chapter VI of the Treaty have never been revised and therefore remain in full force, as the Court of Justice held in its judgment in Case 7/71 *Commission* v *France* [1971] ECR 1003, paragraphs 10 to 28). It therefore considers that the simplified procedures for balancing demand against the supply of ores and source materials established by Articles 5 and 5*bis* of the Regulation are irregular in that they derogate from the system of balancing

demand against supply which had been provided for in Article 60 of the EAEC Treaty.

23 As regards more particularly Article 5*bis*, the applicant claims, first of all, that the Agency's regulation of 15 July 1975, mentioned above, by which that article was inserted in the Regulation, is vitiated by breach of an essential procedural requirement: it was not approved by the Commission, as Article 60 of the Treaty requires, and, in any event, it does not mention, in its citations, any such approval decision.

24 On the issues of substance, the applicant maintains that, in so far as it provides that 'users shall be authorized to invite tenders directly from the producers of their choice and to negotiate the supply contract freely with the latter', Article 5*bis* is contrary to Article 60 of the Treaty, which, it states, empowers the Agency alone to determine, in its Regulation, the manner in which demand is to be balanced against supply offers which producers and users are obliged to communicate to it in order that it may exercise its right of option and its exclusive right to conclude supply contracts.

25 In so providing Article 5*bis* infringes the second subparagraph of Article 57(2), Article 58 and the second paragraph of Article 60 of the EAEC Treaty, which without any reservation require producers to offer their products to the Agency. It is also contrary to the first paragraph of Article 60 which requires users to 'periodically inform the Agency of the supplies they require'. Finally, according to the applicant, it infringes Article 52(1) of the EAEC Treaty, laying down the 'principle of equal access to resources', in that it authorizes national producers to negotiate directly with respective national users, sometimes on government orders, as that has been the case for 30 years.

26 Furthermore, Article 5*bis* represents, according to the applicant, a fundamental breach of the Agency's exercise of its right of option and its exclusive right to conclude supply contracts under the system of centralizing demand and supply

established by the EAEC Treaty and laid down in Article 52(2)(b) and Articles 53, 55, 57, 60, 61 and 62. The intervention by the Agency, provided for in Article 60, means that it first exercises its right of option by concluding a purchase contract (Article 57(1)(b) and (2)) and then, by a new contract, resells the ore in which it has acquired ownership to users (Article 52(2)(b), Article 55 and the fifth paragraph of Article 60). In other words, Article 5*bis* infringes the 'constitutional principle according to which no direct contractual relationship is to be created between producers and Community ore users'. In this regard, the applicant contends that, even where the Agency does not exercise its right of option, a producer is only authorized, under the first subparagraph of Article 59(b), to dispose of his available production 'outside the Community'. He is never therefore authorized to negotiate with a user in the Community.

27 Furthermore, the applicant denounces the total lack of distinction between the Community market, on which the Regulation is applicable and the scarcity of supply of ores (produced in the Community) is enormous, and the external market, on which supply at present exceeds demand. The Treaty made a clear distinction between those two markets, by laying down the principle of Community preference. Thus, Community ore production is reserved to Community users and may be exported only if those users have no need of it, in accordance with Articles 58 and 59(b) of the Treaty. Similarly, under Article 66 of the EAEC Treaty, Community users may not obtain supplies on external markets unless the Commission finds that Community production is insufficient or its prices excessively high.

28 The applicant contends that Community preference for producers is confirmed by the fact that, as part of section II of Chapter VI, relating to ores and combustible nuclear fuels coming from within the Community, and in view of those for whom it was intended, namely traders, Article 60 of the Treaty is only concerned with the balancing of demand for and supply of products 'coming from within the Community'. Article 60 lays down the detailed arrangements for the conclusion of exclusive contracts between the Agency on the one hand, and Community producers and consumers, on the other hand, in accordance with Article 52(2)(b) and

Articles 55, 57 and 58, which expressly only concern products coming from within the Community. Similarly, the fact that Article 61, which requires the Agency to 'meet all orders', in section II of Chapter VI of the Treaty confirms that uranium imports are authorized by the Treaty only in order to deal with insufficient Community supply. Ores or nuclear fuels may be obtained from outside the Community only upon the conditions laid down in Article 64, laying down the Agency's exclusive right to conclude contracts for the supply of ores, Article 66, laying down the conditions under which users are entitled to enter directly into contracts for the supply of materials from outside the Community, and Article 73 of the EAEC Treaty, relating to the situation where an agreement or contract 'provides *inter alia* for delivery of products which come within the province of the Agency'.

29 The applicant also contends that the guarantee of supplies in Article 2(d) of the EAEC Treaty presupposes that the uranium production industry will be protected in order to ensure Community self-sufficiency. Article 2(g) also confers on the Community the objective of ensuring 'wide commercial outlets'. Furthermore Article 2(c) requires the Community to 'facilitate investment and ensure, particularly by encouraging ventures on the part of undertakings, the establishment of the basic installations necessary for the development of nuclear energy in the Community'. That is why the EAEC Treaty contains provisions, notably in Article 70, to promote production.

30 The applicant therefore considers that, in not showing due regard for the exclusive rights of the Agency and the principle of Community preference, the simplified procedure established by Article 5*bis* of the Regulation stops the price-formation machinery established by the Treaty from functioning properly. It points out in this regard that, according to Article 67, prices are to be determined 'as a result of balancing supply against demand as provided in Article 60'.

31 The applicant states that the Commission has accepted that the simplified procedure for balancing supply against demand established by Article 5*bis* of the Regulation is irregular by recognizing that 'it is certain that the Agency does not at present follow the balancing procedure provided for by Article 60 of the Treaty [because] with the market now in surplus [...], the Article 60 procedure would serve no purpose'. It also relies on the minutes of various meetings held by the Advisory Committee of the Agency, drawn up by a member of that committee, Mr Bettencourt, who is a director of ENU, in order to show that the Agency has also recognized, in statements made by its Director-General and its Deputy Director-General that the monopoly enjoyed by the Agency and the system of balancing demand against the supply of ore was not observed.

32 After having set out the legal background to these proceedings, the applicant submits, secondly, that in the present case the system established by the Treaty requires it to be ensured that its natural uranium production, available at a reasonable price, is disposed of.

33 The applicant contends that users could not refuse to take their uranium from the Agency and obtain supplies from outside the Community unless the Commission found, upon their application, that the price which it asked for was excessively high. In order for Community production to benefit from a preference system, Article 66 of the Treaty does not require that the price asked for by a Community producer should be competitive, only that it should not be excessively high, that is to say that it must reflect 'a fair relationship with the cost price'. In any event, the Commission has not disputed that neither the Agency nor any user ever claimed that the price sought by ENU was excessively high.

34 ENU observes in any event that the price which it sought was quite competitive, contrary to the contentions made in the decision. That price was equal to, if not lower than, the price at which other Community producers sold their output to users in their respective countries. Furthermore, the price sought by ENU in multi-annual supply contracts which it proposed to the Agency (offers to supply uranium of 8 October 1987, 2 August 1989, 10 December 1990 and 4 January 1991), were

even lower than the average price observed by Community users under similar contracts and published in the Agency's annual report, in the light of which ENU's competiveness had to be assessed.

35 In this regard, the applicant contests the Commission's arguments that such a comparison, between its own prices and those published by the Agency, do not show that its offers were competitive, in that the latter were fixed in contracts concluded in the past for a period of many years and were therefore 'historic' and excessive in relation to contemporary offers on the market. It contends that, if those prices were excessive, users could easily renegotiate or even cancel the contracts, on the basis of Article 64 and 66 of the Treaty. Those prices had in fact been systematically reduced from ECU 28.25 a pound in 1988 to ECU 21.05 in 1991, which represents a reduction of 25% in four years. Such a reduction in the average prices was not to be seen in the new multi-annual contracts, which were very few between 1987 and 1991, which related to a proportion of annual Community consumption that was insufficient to affect appreciably the average price of uranium.

36 After arguing that the prices which it proposed, in its offers for multi-annual contracts, did not exceed those charged on the European market in similar contracts, the applicant complains that the Commission compared its prices with prices applied in particular contracts providing for only one delivery or a number of deliveries spread over a period of no more than twelve months. In its view, such prices should not be taken into consideration because they relate to occasional offers which do not guarantee supplies for the Community nuclear industry.

37 Moreover, those prices, it claims, represent dumping prices. In many cases, the uranium has been obtained from the decommissioning of nuclear warheads. The cost price of such uranium is neither known nor even determinable. More generally, ENU contends that, both under multi-annual contracts and on the 'spot' market, ore is sold at a dumping price, bearing no relation to actual production costs, in

non-member countries in which there is either no national outlets or production largely exceeds existing needs. That is the case not only with uranium exported from the CIS republics but also with uranium coming from the People's Republic of China and certain African countries.

38 Finally, the applicant points out that the abovementioned imports of uranium from, in particular, the CIS republics are, as the Agency accepts in its annual reports, carried out 'through intermediaries', in breach of the provisions of the Treaty and the Regulation, which authorized only direct negotiation between producers and users.

39 In those circumstances, the Commission's contentions concerning the price of the uranium offered by the ENU are even more groundless in view of the fact that ENU agreed, as part of the 'special course of action', to sell its uranium at a price equal to 'the producer's cost price plus 10%, indexed-linked'. The applicant states that this price was 'lower by about one-third than the total cost price of the undertaking and much lower [...] than the price at which Community users were importing uranium under multi-annual contracts'. It concludes from this that the Agency is in a position to resell Portuguese uranium at a profit and not at a loss. In any event, it rejects the Commission's argument that the Agency had no financial resources to purchase Portuguese uranium. It points out that in conferring upon it its right of option the Treaty authorizes the Agency to obtain the necessary resources, on the conditions laid down in Article VII of its Statutes, in order to exercise this power.

40 The Commission rejects all the applicant's arguments. It rejects the applicant's interpretation of the scheme established by Chapter VI of the Treaty for providing supplies. It points out first of all that the system established by the Treaty is based on the monopoly of the Agency which, according to Article 52, has a right of option on materials produced in the Community and an exclusive right to conclude contracts for the supply of ores and nuclear fuels. However, the Agency is not under any obligation to exercise its right of option. This is shown in particular by

the first paragraph of Article 59 of the Treaty which provides for the case in which the Agency does not exercise its right of option.

41 The procedure laid down by Article 60 for balancing demand against supply is arranged as follows. Users periodically inform the Agency of the ore and nuclear fuels they require, specifying in particular the place of origin and the price terms on which they wish to contract. Producers periodically inform the Agency of offers which they are able to make. The Agency then informs users of the offers and of the volume of applications which it has received and calls upon them to place their orders. If the Agency cannot meet all the orders received, it shares out the supplies proportionately among the orders. In this balancing procedure, the Agency concludes two contracts: first, with the producer, when exercising its right of option, and second, with the user, exercising its exclusive right to conclude contracts.

42 The first paragraph of Article 65 of the Treaty provides that the procedure laid down in Article 60 for balancing demand against supply is also to apply, as far as applications from users and contracts between users and the Agency are concerned, to supplies of materials coming from outside the Community.

43 This is confirmed by the fact that, in the first paragraph of Article 60, 'place of origin' is mentioned before intended use, delivery dates and price terms in the list of specifications required by users when they periodically inform the Agency of their needs. That arrangement is explained by the fact that many users control mining undertakings in which they sometimes have holdings which may reach 100% and therefore show preference for 'their' places of origin, whether these are inside or outside the Community. It is only 'where applications cannot be satisfied because

the places of origin present "legal or material obstacles" preventing the meeting of orders (Article 61 of the Treaty) that the Agency can, on the conditions laid down in the second paragraph of Article 65 "decide on the geographical origin of supplies provided that conditions which are at least as favourable as those specified in the order are thereby secured for the user"'.

44 In this context, the Commission rejects the applicant's objections to the simplified procedure introduced by Article 5*bis* of the Regulation of the Agency. It states that this article was properly inserted in the Regulation of the Agency by its regulation of 15 July 1975 which, contrary to the applicant's allegations, was approved by the Commission.

45 On the issues of substance, the Commission contends that the manner in which demand is to be balanced against supply, which is to be determined by Agency rules pursuant to the sixth paragraph of Article 60 of the Treaty, depends on the market conditions. In the present saturated state of the market, which is very different from the conditions prevailing in 1957, the procedure for balancing demand against supply provided for in the first five paragraphs of Article 60 serves hardly any purpose since all user orders may be largely met. This is why the Agency does not follow the procedure for balancing demand against supply laid down in Article 60. The main difference between that procedure and the simplified procedure introduced by Article 5*bis* of the Regulation resides in the fact that the two contracts envisaged in Article 60 between the producer and the Agency and, between the Agency and the user are merged, in the simplified procedure, into a single trilateral contract between the producer, the Agency and the user. In co-signing the contract with the producer and the user, the Agency is exercising its right of option and exclusive right to conclude contracts. The Commission points out that if the Agency declines to sign a contract, the contract is void.

46 Finally, the Commission states that it has never acknowledged that the provisions of the Regulation are unlawful. It denies that its officials or Agency officials have made statements calling in question the validity of the Regulation. In any event, such statements are not binding upon it.

47 The Commission therefore considers that, in rejecting ENU's request that it should stop users from obtaining supplies from outside the Community when ENU's production was available, it was acting in conformity with the Treaty, which, in its view, does not impose Community preference in favour of Community producers.

48 In particular, the Commission rejects all of the applicant's arguments on the question of prices. It states first of all that the prices set out in the Agency's annual report, with which the applicant compares its own prices, correspond in reality to the average price of supplies made during the reference year covered by the report, pursuant to multi-annual contracts concluded many years previously, and not to the prices fixed in multi-annual contracts concluded that year, which are appreciably less, owing to market conditions.

49 In this regard, it maintains that the prices sought by ENU were very much higher than the prices fixed, according to confidential information provided by the Agency and submitted to the Court, in the sixteen multi-annual contracts concluded in 1987, 1988 and 1991 and to the average annual price stipulated in current contracts of that type.

50 As regards the allegations of dumping practices, the Commission points out that, if such a practice were shown to exist, it would constitute a legal obstacle, within the meaning of Article 61 of the Treaty, and it would oblige the Agency to 'meet all orders unless prevented from so doing by legal or material obstacles'. The Agency could oppose conclusion of those contracts, in accordance with the combined provisions of Article 61 and Articles 60 and 65 of the EAEC Treaty. However, within the limits laid down by Article 61, the Agency must also ensure that Community users may take advantage of favourable market conditions.

51 The Commission points out that, as regards more particularly the prices charged by east European countries, Article 14 of the Agreement between the EEC, the EAEC and the USSR on trade and commercial and economic cooperation, approved by Commission Decision 90/117/Euratom of 27 February 1990 (OJ 1990 L 68, p. 2), provides, in the part relating to nuclear energy, that goods are to be treated between the contracting parties at market-related prices. Consequently, the Agency opposed the conclusion of certain contracts for the supply of natural uranium from the CIS which stipulated prices lower than market prices (see, in particular, Commission Decisions 94/95/Euratom and 94/285/Euratom of 4 February 1994 and 21 February 1994 relating to a proceeding in application of the second paragraph of Article 53 of the Euratom Treaty in the *KLE* case, OJ 1994 L 48, p. 45, and L 122, p. 30).

52 The Commission also points out that, until this action was brought, neither the applicant nor any Community uranium producer had lodged a complaint with the Agency or the Commission against any dumping practices.

53 The Commission accordingly considers that, given the lack of competivity of its prices, ENU's demands would mean making the Agency and the Community purse 'subsidise it, by an amount equal to the difference between the price which it is asking for and the market price'.

Findings of the Court

54 The Court must assess the lawfulness of the Commission's refusal to accede to ENU's request, based on the second paragraph of Article 53 of the Treaty, for guaranteed disposal of its uranium production pursuant to the provisions of the Treaty. In practical terms, the applicant was essentially asking the Agency to exercise its right of option on its production and if necessary to require Community users to

purchase it, exercising its exclusive right to conclude contracts for the supply of ores, which it has under Article 52 of the Treaty.

55 For that purpose, it is first necessary to examine the guarantees which Community producers of ores or nuclear fuels enjoy under the supply arrangements established by Chapter VI of the EAEC Treaty.

56 Regardless of the arrangements for balancing demand against supply introduced by the Regulation of the Agency, the lawfulness of the Commission's refusal to accede to ENU's request must be assessed by having regard to the supply system established by the provisions of the Treaty on which the applicant in fact relies. This approach is in accordance with the case-law of the Court of Justice, which, in its judgment in Case 7/71 *Commission* v *France,* cited above, (paragraph 43), held that '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 those mechanisms of their mandatory character'. Moreover, in its ruling given on 14 November 1978 pursuant to Article 103 of the EAEC Treaty, the Court of Justice, referring to the prerogatives conferred on the Community by the provisions of Chapter VI, emphasized 'the care taken in the Treaty to define in a precise and binding manner the exclusive right exercised by the Community in the field of nuclear supply in both internal and external relations' (ruling 1/78 [1978] ECR 2151, paragraph 14).

57 It is important, therefore, to consider first of all the supply system established by Chapter VI of the Treaty in the light of the objectives assigned to the Community. In this regard, it is clear from the scheme of the Treaty that the task of the Agency is to guarantee one of the essential aims which the Treaty assigns to the Community, in Article 2(d), namely to ensure supplies, in accordance with the principle of equal access to resources laid down in Article 52(1) of the Treaty. This is clear from Article 52(2)(b) of the Treaty which establishes this specialized body expressly for this purpose and confers upon it in principle exclusive rights in order to ensure that

Community users receive regular and equitable supplies of ores and nuclear fuels coming from both the Community and non-member countries. Under that provision, the system for ensuring supplies must be run by the Agency, which, in order to perform its task, has a right of option on ores, source materials and special fissile materials produced in the Member States and an exclusive right to conclude contracts for the supply of those products coming from inside the Community or from outside.

58 As regards the common supply policy, which is provided for in Article 52(1) and in respect of which certain provisions are laid down in Section V (Articles 70 to 72) of Chapter VI dealing with supplies, it essentially concerns market surveys and its implementation is conferred directly on the Commission or the Council. Pursuant to this section, the role conferred on the Agency is limited to a commercial area. Under the first paragraph of Article 72 the Agency may only, 'from material available inside or outside the Community, build up the necessary commercial stocks to facilitate supplies to or normal deliveries by the Community'. It is further provided in the second paragraph of Article 72 that the Commission 'may, where necessary, decide to build up emergency stocks'.

59 It is thus quite clear that the tasks of the Agency are limited to implementing the system for ensuring supplies established by Chapter VI of the Treaty. It is therefore for the precise aim of enabling it to ensure supplies of ores, source materials and special fissile materials under the conditions for which it provides that Chapter VI confers on it the exclusive rights mentioned above. It is nevertheless true that in performing its task of ensuring that all Community users receive regular and equitable supplies, the Agency may sometimes find it necessary to take into account the interests of producers, in accordance with all of the aims of the Treaty, and in particular those concerned with establishing the basic installations necessary for the development of nuclear energy in the Community and with ensuring wide commercial outlets, laid down in Article 2(c) and (g) of the Treaty, relied on by the applicant, the specific attainment of which is more particularly provided for in

Chapters IV and V concerning investment and joint undertakings and, Chapter IX, devoted to the nuclear common market. However, in the implementation of the supply system established by Chapter VI of the Treaty, the protection of the interests of Community producers may be pursued only in relation with the requirements concerning the guaranteeing of supplies.

60 It must be noted in this regard that the system for regulating supplies only lays down the principle of preference for Community users, in accordance with Article 2(d) of the Treaty, and does not guarantee the disposal of Community production of ores. Observance of the principle of preference for Community users is assured by the Agency's right of option, provided for in Article 52(2)(b) to acquire the right of ownership in uranium produced in the Community. By virtue of Article 57 of the Treaty, that right of option is in principle exercised through the conclusion of contracts with producers. As a general rule, every producer must, under the terms of that article, offer to the Agency the ores or nuclear fuels which it produces within the territories of Member States. It is only where 'the Agency does not exercise its right of option on the whole or any part of the output of a producer' that the producer 'shall be authorized by a decision of the Commission to dispose of his available production outside the Community, provided that the terms he offers are not more favourable than those previously offered to the Agency', as Article 59(b) of the Treaty provides.

61 The Treaty does not, however, contain any provision guaranteeing, expressly or implicitly, preferential disposal of production coming from the Community. On the contrary, under the system by which offers from Community producers and applications from Community users are centralized with the Agency so as to enable it to ensure that all users have regular and equitable supplies, no distinction is made according to the origin of products. The first paragraph of Article 65 of the Treaty states in fact that Article 60, which relates to the procedure for balancing demand against supply, 'shall apply to applications from users and to contracts between users and the Agency relating to the supply of ores, source materials or special fissile materials coming from outside the Community'.

62 Contrary to the applicant's contentions, the obligation imposed on Community users, by the first paragraph of Article 60 of the Treaty, to inform the Agency of the supplies which they require, specifying in particular, amongst the stipulations of the planned supply contracts, the place of origin, therefore also applies with regard to products not coming from inside the Community, which must therefore be subject, as a general rule, to the same procedures for balancing demand against supply as Community products. In particular, according to the second paragraph of Article 65 of the Treaty, the Agency may decide on the geographical origin of supplies only providing that conditions which are at least as favourable as those specified in the order are thereby secured for the user. Furthermore, the first paragraph of Article 61 requires the Agency to meet all orders unless prevented from doing so by legal or material obstacles so that it has no power, where there are no such obstacles, to oppose the importation of ores at a more competitive price in order for Community production to be disposed of at a higher price, even if that price is not excessively high within the meaning of Article 66. That is the context in which it is necessary to interpret Article 59 of the EAEC Treaty, which expressly makes provision for the case in which the Agency does not exercise its right of option on the whole or any part of Community output, thus confirming that the Agency is not bound to guarantee the disposal of ores and nuclear fuels coming from within the Community, offers of which are notified to the Agency pursuant to the second paragraph of Article 60.

63 In this regard, ENU's argument that the Treaty guarantees the disposal of Community products at a 'fair' price in that it only authorizes users to obtain supplies outside the Community under the conditions laid down in Article 66 of the Treaty, that is to say where Community production is insufficient or the prices asked by Community producers are 'excessively high', cannot be accepted. Article 66 defines the cases in which it is in fact permitted to derogate from the procedure ordinarily applicable, laid down in Article 60 of the Treaty, which provides for demand to be balanced against supply, which is meant to enable the Agency to exercise its exclusive rights in order to guarantee supplies. Article 66 excludes any intervention by the Agency. It provides, in substance, that, if the Commission finds that the Agency is not in a position to supply users within a reasonable period, or can do so only at excessively high prices, users are to have the right to conclude directly contracts relating to supplies from outside the Community for a period of one year, which may be extended. It follows that, in the scheme of Chapter VI, the criterion of

'excessively high' prices, specifically stated in Article 66 in order to define the scope of an exceptional procedure, cannot be interpreted, in the scheme of the Treaty, as if it were also intended to ensure preference for Community output, under the same ordinary procedure established by Article 60. Furthermore, the applicant's arguments that imports of ore or other nuclear fuels are governed by the procedure established by Article 66, which excludes any power on the part of the Agency, is incompatible with the combined provisions of Articles 52(2)(b), 60, 61, 64 and 65, which were considered in the paragraph above and which in principle laid down the Agency's exclusive right to conclude such contracts and define the Agency's powers when exercising that exclusive power.

64 Moreover, it is the balancing of demand against supply, referred to without distinction in Article 60 in relation to the supply of ores and other nuclear fuels whatever their origin (see paragraph 61 and 62 above) which generally leads to the fixing of prices, following the law of supply and demand, without any Agency intervention on the level of prices. Article 67 of the Treaty provides in fact that: 'Save where exceptions are provided for in this Treaty, prices shall be determined as a result of balancing supply against demand as provided in Article 60: the national regulations of the Member States shall not contravene such provisions.' In this regard, the Agency only has, under the second paragraph of Article 69 of the EAEC Treaty, the power to propose to users, and not impose on them, that prices be equalized. In this context, the Agency could therefore only oppose imports of ores or other nuclear fuels at prices lower than those sought by Community producers if those imports might jeopardize the achievement of the aims of the Treaty, in particular by their effect on sources of supply. Such a risk could be regarded as a legal obstacle to the meeting of an order, within the meaning of the first paragraph of Article 61 of the Treaty. It would release the Agency from its obligation to meet all orders or conclude all contracts submitted to it, in practice, under the simplified procedure introduced by Article 5*bis* of the Regulation, whatever the origin of the products, where they are offered at a more favourable price. The price-fixing mechanisms established by the Treaty under the system governing supplies thus confirms that that system does not allow preferential treatment to be given to ores and other

nuclear fuels coming from within the Community when they are offered at prices higher than those prevailing on the world market, in the absence of specific circumstances which would impede attainment of the aims of the Treaty pursued by Chapter VI, without Council intervention under Article 69 of the Treaty.

65 Moreover, the interpretation of the abovementioned provisions of the Treaty contended for by the applicant, which would mean giving priority to disposing systematically of all Community output at prices reflecting 'a fair relationship to cost price' before allowing in imports of nuclear fuels at better prices for users, would penalize the Community industries using nuclear products and would slow down their development, contrary to the task assigned to the Community in Article 1 of the Treaty. For all those reasons, showing systematic Community preference for producers of nuclear ores would run counter to the objectives of the Treaty.

66 It follows from all the considerations set out above that, in the scheme of the Treaty, offers from Community producers are generally in competition with those from outside the Community. It follows that, contrary to the applicant's contentions, the Agency has no power, in the absence of exceptional circumstances which might jeopardize attainment of the aims of the Treaty, to exercise its right of option when the price sought by the Community producer is too high to secure outlets on the market. In any case, 'save where exceptions are provided for in [the] Treaty', the price-fixing system established by Chapter VI of the Treaty does not in principle require users to purchase ores coming from the Community at a price higher than the market price, resulting from the balancing of demand and supply. Specifically, it follows that the Agency could not, in such cases, in the absence of legal obstacles preventing an order from being met in application of the first paragraph of Article 61 of the Treaty, apply Community preference such to Community producers and for this purpose oppose imports, unless the price sought by those producers was equivalent to or lower than that specified either in the order notified to the Agency by the user in accordance with the procedure laid down in the first five paragraphs of Article 60 of the Treaty or in practice, in the contract previously submitted to the Agency for signature for the purposes of its

conclusion pursuant to Article 5*bis* of the Regulation, or their offers included advantages for the user such as to offset any price difference.

67 It must also be pointed out that, even in that case where the Agency has the power to exercise its right of option on ores produced in the Community — if these are offered on price terms which are just as favourable for users as those proposed by competitors, in particular for ores coming from outside the Community — it is not, however, obliged to favour the disposal of Community output, since the system governing supplies established by the Treaty does not lay down any principle of Community preference for producers, as has already been shown (see paragraphs 61 and 62 above). In particular, the Agency may exercise its exclusive rights so as to dispose of natural uranium offered by a Community producer and thus ensure that it continues to remain in business on Community territory only where this is combined with the pursuit of the objectives laid down by the Treaty. Where decisions concerning economic and commercial policy and nuclear policy are concerned, the Agency has a broad discretion when exercising its powers. In those circumstances, the Court's review must, in any event, be confined to identifying any manifestly wrong assessment or misuse of power (see, in particular, the judgment of the Court of Justice in Case C-280/93 *Germany* v *Council* [1994] ECR I-4973, paragraphs 51 and 89 to 91).

68 Similarly, the provisions of Chapter VI which, if the occasion arises, allow derogations to be made from the commercial mechanism for balancing supply against demand established by the Treaty (see paragraphs 62 to 64 above) give this power only to the Agency and to the Commission or to the Council. Thus, in order to ensure in particular geographical diversification of outside sources of supply, the Agency has a discretion to bar — using its exclusive right to conclude contracts for the supply of ores and other nuclear fuels so as to ensure reliability of supplies according to the principle of equal access to resources, in accordance with the task conferred upon it by the Treaty — certain imports of uranium which would reduce such diversification. The same is true of the power which the Commission has in implementing the second paragraph of Article 72 of the Treaty, which authorizes that institution to decide to build up emergency stocks, for which the method of financing must be approved by the Council. Finally, the Council has the power to

fix prices, under Article 69 of the Treaty, by derogation from Article 67 establishing a trade mechanism for determining prices based on balancing supply against demand as provided for in Article 60.

69 Given the legal framework set out above, it must be stated that, in the present case, the applicant has not referred to any particular circumstance which would constitute a legal obstacle to Community users' obtaining supplies of ores from outside the Community and which would require the Agency to exercise its right of option on the applicant's production, having regard to the objectives pursued by the Treaty. In that regard, in considering that the threats, mentioned by ENU, to the pursuit of exploitation of its natural uranium mines, whose output represents approximately 1.5% of Community consumption, did not jeopardize regular and equitable supplies to Community users, the Agency and the Commission did not exceed the limits of their discretion.

70 As regards more particularly the applicant's argument that certain offers, from outside the Community, are akin to dumping practices, it must be noted that the EAEC Treaty contains no specific provision relating to the linking of the system governing supplies set up in Chapter VI of the EAEC Treaty and measures for combatting dumping practices in the area of nuclear resources. In those circumstances, nothing excludes *a priori* the application, to the nuclear energy sector, of the antidumping provisions laid down by the EC Treaty. As the Court of Justice held in its ruling of 14 November 1978 pursuant to Article 103 of the EAEC Treaty (Ruling 1/78 [1978] ECR 2151, paragraph 15), the provisions of the EAEC Treaty 'reinserted in the context of the Treaty establishing the European Economic Community ... appear to be nothing other than the application, in a highly specialized field, of the legal conceptions which form the basis of the structure of the general common market ... Like the EEC Treaty the EAEC Treaty seeks to set up, with regard to matters covered by it, a homogenous economic area'. The applicant has not, however, lodged any complaint with the Commission against the alleged dumping practices and it has not supplied, in the present case, any precise evidence

or factor in support of its complaints. In any event, such complaints would, moreover, go beyond the ambit of this action, which seeks only annulment of a Commission decision under Article 53 of the Treaty and does not relate to a procedure for examining a complaint of dumping.

71 In those circumstances, without there being any need to rule on the legality of the simplified procedure for balancing supply against demand introduced by Article 5*bis* of the Regulation, the Court must find that the Commission's refusal to accede to the applicant's request that the Agency exercises its right of option and exclusive right to conclude contracts for the supply of ores so as to ensure disposal of its uranium output was not vitiated by any irregularity under the system governing supplies established by the Treaty.

72 In view of the reasoning set out above, the applicant's argument relating to the alleged illegality of the simplified procedure introduced by Article 5*bis* of the Regulation is irrelevant in that the outcome of these proceedings depends only on the question whether the provisions of the Treaty may be interpreted as requiring the Agency or the Commission, or both, to guarantee disposal of the natural uranium tendered by ENU. In this regard, it is clear from the reasoning above, that the Agency and the Commission were neither obliged nor entitled to guarantee disposal of that output at a price higher than the market price for similar contracts, in the absence of special circumstances which would justify a derogation from the system governing supplies set up by the Treaty. In any event, even if ENU had been disposed for a brief period to offer its output at a price at least as favourable as the price offered by some of its competitors, which has not been established, the Agency and the Commission would not have exceeded the limits of their discretion in not guaranteeing it outlets, as the Court has found (see paragraph 69 above).

73 In any event, even supposing that the applicant's argument relating to Article 5 and, more particularly, Article 5*bis* of the Regulation was relevant, the Court's review of the regularity of the simplified procedures for balancing supply against demand

introduced by those articles would not lead to any different outcome for the applicant's claims. Those simplified procedures meet the aim pursued by the provisions of Article 60 of the Treaty and, more generally, by the system governing supplies established by Chapter VI, which is intended to ensure that Community users can obtain supplies of nuclear products at prices set by market forces. In particular, the introduction of a simplified procedure distinct from the centralized procedure for balancing supply against demand provided for in the first five paragraphs of Article 60 was due to the cyclical trend towards an excess of supply over demand, rendering such centralization futile. The procedure takes those market trends into account, in accordance with the aims of the system governing supplies which the Treaty gives the Agency the task of implementing (see, to this effect, the Opinion delivered by Advocate General Roemer in Case 7/71 *Commission* v *France* [1971] ECR 1023, at page 1032).

Moreover, as regards more particularly the simplified procedure introduced by Article 5*bis*, that procedure, which allows users to negotiate supply contracts directly with producers of their choice, still does not take away the Agency's exclusive rights which, under the scheme of the Treaty, must in any event be exercised according to the rules of a market economy. That article provides that a contract freely negotiated between traders 'shall, for the purposes of its conclusion, be submitted to the Agency for signature within 10 working days' and that the Agency 'shall act, either by concluding or refusing to conclude the contract, within 10 working days from the date of receipt thereof'. In order to enable the Agency effectively to exercise its prerogatives, that article requires that all supply contracts submitted to the Agency must include a minimum amount of information. It follows that the simplified procedure established by Article 5*bis* of the Regulation is in conformity with the system governing supplies established by the Treaty.

74 It follows from all the foregoing considerations that this action must be dismissed as unfounded in so far as it seeks annulment of the Commission's refusal to accede to the applicant's request that the disposal of its uranium production be guaranteed on the basis of the machinery established by Chapter VI of the Treaty.

B — *The request for the 'special action' plan to be implemented*

Summary of the parties' arguments

75 The applicant also seeks annulment of the decision in so far as it rejects its request for implementation of the 'special course of action'. It points out first of all that the latter reminds users that both the Treaty and the Regulation empower the Agency to oblige them to acquire ENU's uranium at the price which the latter had accepted as part of that 'special course of action' Article 5*bis*(f) and (g) of the Regulation authorize the Agency to refuse to conclude contracts in a reasoned decision. It would be sufficient in this regard for the Agency to invoke Article 66 of the Treaty, which precludes importation of uranium by users when the Agency has such ores at its disposal at a price not excessively high, which was the case with ENU's output. Being thus prevented from obtaining supplies from outside the Community, from where approximately 70% of Community consumption comes, users could not refuse to purchase the uranium offered by ENU.

76 The applicant also contends that the Agency was obliged to take the 'special course of action' since the Commission had addressed to it a directive to this effect, pursuant to the second paragraph of Article 53 of the Treaty. It relies on the letter which was sent to it on 8 December 1989 by Mr Cardoso e Cunha, the Commissioner responsible for energy matters in the Community, which indicated that 'the Agency's supply policy should in future include a "special course of action" enabling cases such as [ENU's] to be resolved' and that he had asked the Agency 'to move on to take concrete steps to implement the proposals for action which it had submitted to this effect' (Annex 11 to the application).

77 In this regard, the applicant rejects first of all the Commission statement that the letter from Commissioner Cardoso e Cunha expressed an 'individual opinion' and not a decision of the Commission itself, taken through the competent commissioner. It points out that that commissioner exercises, in the energy sector, the powers delegated to him under the allocation of powers and duties made by the Commission in accordance with Article 27 of its Rules of Procedure.

78 The applicant goes on to dismiss the Commission's contention that the 'special course of action' imposed on the Agency only an obligation to 'use the most appropriate mechanisms for attempting to resolve the problem by persuasion and the use of its good offices'. It contends that the 'special course of action' entails precise machinery, compulsory for ENU and for Community users. This 'special course of action', approved by the Commission, therefore constitutes a binding measure not only as regards the results to be achieved but also as regards the means to be used.

79 The applicant maintains, secondly, that in rejecting, in the contested decision, its request for binding application of the 'special course of action', the Commission infringed the principles of good faith and the protection of legitimate expectations since the Agency had given an assurance to ENU that it would give priority to finding a satisfactory solution to its problem (Annex 6 to the application). Similarly, the Commission had undertaken in its letter of 14 November 1988, to 'study in detail the problem raised by ENU [...] in order to find a positive [...] solution' (Annex 7 to the application). Furthermore, it had informed ENU, by letter of 8 December 1989, that it 'shared the opinion that the Agency's supply policy should in future include "a special course of action" enabling cases such as [ENU's] to be resolved' (Annex 11 to the application). Finally, the applicant points out that, in reply to a written question, the Commission had stated to the European Parliament during the session held in April 1990 that it had undertaken under the Euratom Treaty to find a solution to the problem of disposing of Portuguese uranium (Question 190/90).

80 The Commission observes for its part that the 'special course of action' could, pursuant to the provisions of Chapter VI of the Treaty, consist only in a series of serious and continuous efforts by the Agency to encourage Community users to take supplies from ENU. The letter from Commissioner Cardoso e Cunha, mentioning the 'special course of action', cannot be interpreted as a directive since the power to address such measures to the Agency belongs to the Commission as a collegiate body, in accordance with Article 53(1) of the Treaty. For all those reasons, the Commission considers that the 'special course of action' only requires it to fulfil 'an obligation to use certain means [...] to use the most suitable mechanisms to attempt to resolve the problem by persuasion and by use of its good offices'.

81 Finally, the Commission denies that it failed to observe the principles of good faith and protection of legitimate expectations. It maintains that, by the intermediary of the competent commissioner, it followed the efforts made by the Agency to help ENU to dispose of its uranium stock on the market. Neither the Commission nor the Agency had formally undertaken to resolve the problems submitted by ENU.

Findings of the Court

82 The applicant's argument that the 'special course of action' was binding cannot be accepted. First of all, the letter of 8 December 1989 sent by Commissioner Cardoso e Cunha cannot in any way be interpreted as referring to a directive addressed to the Agency. Formally, it did no more that state a mere policy envisaged by the competent commissioner as part of his functions as regards the Agency. It was therefore a communication of a political character meant to open negotiations which could eventually lead to companies' entering into undertakings. Consequently, that letter does not refer to a directive previously adopted by the Commission, in its collegiate capacity, on the basis of the first paragraph of Article 53 of the Treaty. Furthermore, the actual terms of the request thus addressed to the Agency cannot confer any binding character on the 'special course of action'. In merely stating that the commissioner had 'requested the Agency to move on to take concrete steps to implement the proposals for action which it had submitted to that effect', it gives no indication as to whether or not the solutions proposed are binding. That interpretation is confirmed by the actual wording of the 'special action' plan, which takes the form of a set of non-binding proposals, as is attested in particular by the use of the conditional tense (see paragraph 8 above). In acting as he did, the competent commissioner did not therefore intend to confer any binding force on the solutions proposed as part of the 'special course of action'.

83 In any event, the solutions envisaged as part of the 'special course of action', to be adopted under the simplified procedure introduced by Article 5*bis* of the Regulation could be applied by the Agency only in conformity with the delimitation of its own powers and those of the Commission, under the system governing supplies

established by the Treaty. The question whether or not the 'special course of action' was binding must therefore be assessed with reference to the relevant rules of the Treaty.

84 In this regard, it has already been held that the Agency was not entitled to oppose the importation of uranium by Community users at a price appreciably less than that sought by ENU on the sole ground that ENU's output was available at a price which was not excessively high (see paragraph 66 above). The price which ENU stated that it was prepared to accept under the 'special course of action', which was notified to it on 12 December 1989, was, according to the observations of the interested party which are not contested by the Commission, ECU 19 a pound and was therefore much higher, according to confidential information which has been provided by the Agency and produced by the Commission in these proceedings, and which has not been contested by the applicant, than the prices stipulated in multi-annual contracts concluded between Community users and suppliers other than ENU during the same period. The price terms which the applicant was prepared to accept had to be compared, in the balancing of demand against supply provided for by the Treaty, with the price terms proposed by its competitors at that time, and not — as the interested party contends — at the average price for supplies carried out in the course of one year under multi-annual contracts in force, that is to say pursuant to older multi-annual contracts in the course of being performed, published by the Agency in its annual report. The confidential information referred to above, provided by the Agency, reveals that no multi-annual contract was concluded in 1990 and that the eight multi-annual contracts concluded in 1991 by Community users with suppliers other than ENU, in force until the year 2000, set prices considerably lower than the price asked for by ENU under the 'special action' plan. It follows that the applicant could not in any case expect binding application of the 'special course of action', in the absence of special circumstances capable of warranting, in order to ensure achievement of the objectives defined by the Treaty, such a derogation from the arrangements governing supplies established by Chapter VI of the Treaty.

85 Furthermore, even if the prices proposed by ENU had been at least as favourable as those stipulated at the same time in some similar contracts made between

Community users and suppliers other than ENU, the Agency had, in any event, a discretion when exercising its exclusive rights, in order to ensure, in appropriate conditions, the preferential disposal of ores produced in the Community. It has already been found in this regard that the Agency and the Commission did not exceed the limits of their discretion in refusing to require Community users to take supplies from ENU (see paragraph 67 to 69 above).

86 Finally, the applicant's arguments based on the principle of protection of legitimate expectation cannot be accepted either. Suffice it to state that the documents relied on by ENU, originating from the Agency, the Commission or the competent commissioner, contained no undertaking relating to binding implementation of the 'special action' plan or even any evidence which could reasonably give ENU such an expectation. On the contrary, it is clear from the documents before the Court, and in particular from the applicant's observations, that the applicant was in no doubt that the 'special action' plan was purely exhortatory (see paragraph 9 above).

87 It follows that the application must be dismissed as unfounded in that it seeks annulment of the Commission's refusal to accede to the request to implement the 'special action' plan.

The claim for damages

88 The applicant claims in substance that the Community should be ordered, on the basis of the second paragraph of Article 188 of the EAEC Treaty, to compensate the damage which the Supply Agency allegedly caused it in failing to exercise its right of option and its exclusive right to conclude supply contracts so as to guarantee disposal of its natural uranium output and which the Commission allegedly caused it in failing to fulfil its obligations under the Treaty.

89 The Commission, which has submitted observations on the substance, submits that the claim for damages is inadmissible.

90 Under the second paragraph of Article 188 of the EAEC Treaty, in order for the Community to incur non-contractual liability, a set of conditions must be fulfilled, relating to the unlawfulness of the conduct alleged against the Community institutions, actual damage and existence of a causal link between the conduct and the alleged damage (see, for example, the judgment of the Court of Justice in Case C-308/87 *Grifoni* v *Commission* [1990] ECR I-1203, paragraph 6).

91 It follows that, in the present case, since the conduct alleged against the Agency and the Commission's refusal to accede to the requests submitted to it by the applicant are not vitiated by any irregularity, as held above, the claim for damages must be dismissed as unfounded in any event, without its being necessary to consider its admissibility.

Costs

92 Under Article 87(2) of the Rules of Procedure of the Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for. Since the applicant has been unsuccessful in its submissions, it must he ordered to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE
(Second Chamber, Extended Composition)

hereby:

1. Dismisses the applications;

2. Orders the applicant to pay the costs.

Vesterdorf Barrington Saggio

Kirschner Kalogeropoulos

Delivered in open court in Luxembourg on 15 September 1995.

H. Jung B. Vesterdorf

Registrar President