2. Article 83 of the EAEC Treaty confers on the Commission wide powers to penalize infringements of the rules concerning safeguards committed by undertakings in order to enable it to carry out the tasks of the EAEC described in Article 2(e) of the Treaty, namely to make certain that nuclear materials are not diverted to purposes other than those for which they are intended. Accordingly, sanctions may be imposed even where an infringement has ceased.

3. The provisions designed to ensure that nuclear materials are not diverted to purposes other than those declared by their users are fundamental to the accomplishment of the EAEC's tasks, as described in Articles 1 and 2 of the Treaty. In that context, compliance with the rules laid down for that purpose, under the supervision of the Commission, is essential. It follows that any infringement of those rules by a nuclear undertaking constitutes a serious infringement justifying a severe sanction. For that purpose it may be decided to place the undertaking under administration, a course which may, in certain cases, be necessary in order to avoid the repetition of similar offences since it is only by that means that precise instructions can be given to the undertaking and, if necessary, enforced against its will.

REPORT FOR THE HEARING
in Case C-308/90 *

I — Facts

A — *Legal framework*

1. Article 83 of Chapter VII, entitled 'Safeguards', of Title Two of the Euratom Treaty provides that:

'1. In the event of an infringement on the part of persons or undertakings of the obligations imposed on them by this Chapter, the Commission may impose sanctions on such persons or undertakings.

These sanctions shall be in order of severity:

(a) a warning;

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

* Language of the case: German.

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

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

2. Decisions taken by the Commission in implementation of paragraph 1 and requiring the surrender of materials shall be enforceable. They may be enforced in the territories of Member States in accordance with Article 164.

By way of derogation from Article 157, appeals brought before the Court of Justice against decisions of the Commission which impose any of the sanctions provided for in paragraph 1 shall have suspensory effect. The Court of Justice may, however, on application by the Commission or by any Member State concerned, order that the decision be enforced forthwith.

There shall be an appropriate legal procedure to ensure the protection of interests that have been prejudiced.

3. The Commission may make any recommendations to Member States concerning laws or regulations which are designed to ensure compliance in their territories with the obligations arising under this Chapter.

4. Member States shall ensure that sanctions are enforced and, where necessary, that the infringements are remedied by those committing them.'

2. Under Article 77 of Chapter VII of the Euratom Treaty the Commission must satisfy itself that, in the territories of Member States,

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

(b) ...'.

3. Article 79 of the Euratom Treaty provides that:

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

Those subject to such requirements shall notify the authorities of the Member State concerned of any communications they make to the Commission pursuant to Article 78 and to the first paragraph of this Article.

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

4. Those requirements were defined by Commission Regulation (Euratom) No 3227/76 of 19 October 1976 concerning the application of the provisions on Euratom safeguards (OJ 1976 L 363, p. 1), as amended by Commission Regulation (Euratom) No 220/90 of 26 January 1990 (OJ 1990 L 22, p. 56). By Euratom Decision of 5 June 1985, the Commission adopted special operational rules for the company Advanced Nuclear Fuels (hereinafter 'ANF-Lingen'), having its head office in Lingen, Federal Republic of Germany.

Articles 10 and 11 of Regulation No 3227/76 are worded as follows:

'Article 10

The accounting records shall show in respect of each material balance area:

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

(b) all measurement and counting results that are used for determination of the physical inventory;

(c) all corrections that have been made in respect of inventory changes, book inventories and physical inventories.

For all inventory changes and physical inventories the accounting records shall show, in respect of each batch of nuclear material, material identification, batch data and source data. These records shall account separately for uranium, thorium and plutonium in each batch of nuclear material. Moreover for each inventory change, the date of the inventory change and, when appropriate, the dispatching material balance area and the receiving material balance area or the recipient, shall be indicated.'

'Article 11

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

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

(b) the data obtained from the calibration of tanks and instruments and from sampling and analysis, the procedures to control the quality of measurements and the derived estimates of random and systematic error;

(c) a description of the sequence of actions taken in preparing for, and in taking, a physical inventory in order to ensure that it is correct and complete;

(d) a description of the actions taken in order to ascertain the cause and magnitude of any accidental or unmeasured loss that might have occurred.'

Under Article 24 of that regulation, all exports of source or special fissile materials to a non-member State must be notified in advance to the Commission eight working days before the materials are prepared for export. Article 24(c) of the regulation provides that:

'(c) Such notification shall be given in accordance with the form set out in Annex V to this Regulation and shall state, *inter alia*,

— the identification and, if possible, the expected quantity and composition of the material to be transferred, and the material balance area from which it will come,

— the State to which the nuclear material is to be sent,

— the dates on and locations at which the nuclear material will be prepared for shipment,

— the approximate dates of dispatch and arrival of the nuclear material,

— the use which the persons or undertakings concerned had made of the nuclear material.'

5. Code 1.3.2. of the Commission decision of 5 June 1985 adopting special operating provisions for ANF-Lingen is worded as follows:

'If the undertaking regularly exports or imports a large total quantity of materials to or from the same State, even if the individual operations do not exceed one effective kilogramme, advance notification to the Commission as provided in Articles 24 and 25 of Commission Regulation No 3227/76, shall be necessary'

6. Article 81 of the Euratom Treaty provides that the Commission 'may send inspectors into the territories of Member States'. The second paragraph of that article is worded as follows:

'On presentation of a document establishing their authority, inspectors shall at all times have access to all places and data and to all persons who, by reason of their occupation, deal with materials, equipment or installations subject to the safeguards provided for in this Chapter, to the extent necessary in order to apply such safeguards to ores, source materials and special fissile materials and to ensure compliance with the provisions of Article 77. Should the State concerned so request, inspectors appointed by the Commission shall be accompanied by representatives of the authorities of that State; however, the inspectors shall not thereby be delayed or otherwise impeded in the performance of their duties.'

B — *The facts*

7. The undertaking ANF-Lingen operates a manufacturing plant which regularly receives nuclear materials from the undertaking Advanced Nuclear Fuels, based in Richland in the United States of America (hereinafter 'ANF-Richland').

By Decision 90/413/Euratom of 1 August 1990 relating to a procedure in application of Article 83 of the Euratom Treaty (OJ 1990 L 209, p. 27), the Commission placed ANF-Lingen under administration by a board for a period of four months, and only as regards aspects connected with the safeguards mentioned in Chapter VII, Title Two, of the Euratom Treaty. By its Decision 90/465/Euratom of 20 August 1990, relating to the appointment of the persons responsible for implementing Decision 90/413 (OJ 1990 L 241, p. 14), the Commission appointed the members of the board responsible for the administration of ANF-Lingen.

8. The Commission adopted the aforesaid decisions after being informed by ANF-Lingen on 16 May 1990 that during the month of May 1990 the company had exported nuclear materials from the Federal Republic of Germany to ANF-Richland without previously declaring that exportation.

9. The exportation occurred owing to a combination of circumstances which are not contested and which are described in the preamble to Decision 90/413 as follows:

'— On 8 May 1990, a loading pallet with two containers, each containing two boxes, was moved from the storage area to the material entry lock at the plant for the purpose of removing the boy containing uranium pellets enriched to 3.3%.

Once this operation had been completed the pallet, together with its two containers, was mistakenly placed outside, close to the storage area for empty containers, and forgotten about. The two containers on the pallet now only contained three boxes: one with 49.84 kilogrammes of uranium oxide (UO2) enriched to 2.7% and the two others weighing 49.86 kilogrammes and 47.29 kilogrammes respectively, with uranium enriched to 3.95%.

— On the morning of 11 May 1990, during preparation of a shipment of 72 empty containers for ANF-Richland, the pallet in question was loaded by mistake by another employee on to a lorry belonging to a normal goods transport company.

The employee in charge of the operation observed that the containers on the pallet were marked with the labels stipulated by national law indicating the presence of radioactive materials. Since the containers were standing in this area, he believed them to be empty and destined for shipment, and removed the labels, replacing them with ones indicating that the containers were empty. On the same day, at 7 p. m., the lorry was unloaded at Luxembourg-Findel airport and the consignment packed for transport by air.

— On 12 May 1990, the containers were transported by cargo plane to Seattle (USA), where they arrived at 9.10 p. m. local time.

— On 14 May 1990, the containers were transported by road to ANF-Richland, arriving on 15 May 1990.

ANF-Lingen was informed that same day by ANF-Richland that, after carrying out a routine dosimetric check, they had established the presence of nuclear material in the two containers which were supposed to be empty. An examination of the seals carried out immediately thereafter revealed that no material could have been removed from the three boxes concerned.

— On 16 May 1990, ANF-Lingen notified the Safeguards Directorate at the Commission of the occurrence.

— On 17 May 1990, ANF-Lingen also notified the Euratom Supply Agency of the occurrence.'

10. When, on 15 May 1990, the shipment of enriched uranium to ANF-Richland was discovered, ANF-Lingen immediately recorded the inventory change in its books, in accordance with the requirements of Articles 10 and 11 of Regulation No 3227/76.

11. In accordance with the German Law governing activities involving nuclear materials, ANF-Lingen also informed the Ministry of Environment of Lower Saxony of the incident. On 23 May 1990 that Ministry undertook an investigation at the premises of ANF-Lingen and ordered it to augment the internal operation practices which governed the ANF-Lingen plant. The undertaking immediately complied with those directions and on its own initiative also ordered further changes in addition to those practices.

12. The German authorities found that at no time was there any radioactive risk for the plant staff or for the environment.

13. On 31 May and 1 June 1990 Commission inspectors inspected the plant of ANF-Lingen. On the basis of their report the Commission, in a letter dated 29 June 1990, considered in particular that:

'... in view of the inspectors' report, the Commission is not in a position to satisfy itself, as regards the declared transport of combustible nuclear materials with a routine shipment of empty containers, that, on the territory of the Community, the special fissile materials in question were not diverted from the uses for which their users stated they were intended.'

14. On 4 and 6 July 1990, the Commission carried out a fresh inspection at the ANF-Lingen plant in order to make an inventory of all the stock. The purpose of that inventory was:

— to check the operating records and note the book inventories;

— to check the physical inventory carried out on 4 July 1990 by identification, counting of consignments, weighing, non-destructive measurement and the taking of samples for analysis;

— to fix, remove or replace the seals confining the solutions and the samples for analysis;

— to ensure that the particular monitoring obligations to which the Community has subscribed under agreements concluded with non-member countries had been observed.

By letter of 1 August the Commission informed ANF-Lingen 'that it appears from the report of the Commission inspectors that the controls carried out do not give rise to any particular remarks on the part of the Euratom Safeguards Directorate'.

15. On the same day the Commission adopted Decision 90/413. Articles 1, 2 and 3 of that decision provide as follows:

'Article 1

Advanced Nuclear Fuels GmbH has infringed Article 79 of the Euratom Treaty as defined in Articles 10, 11 and 24 of Regulation (Euratom) No 3227/76 of 19 October 1976 and in code 3.1.2 of the Commission Decision of 5 June 1985 on particular safeguards provisions, through:

(a) its failure to give advance notification of an export;

(b) its breach of the regulations on recording inventory changes;

(c) its breach of the regulations on operating records regarding:

— changes in quantities,

and

— changes in the composition of nuclear material.

Article 2

1. Advanced Nuclear Fuels GmbH shall be placed under administration for a period of four months, and only as regards aspects connected with the safeguards mentioned in Chapter VII, Title Two, of the Treaty.

2. The placing under administration shall in no way affect the responsibility of the undertaking under national or international law.

Article 3

The task of administration set out in Article 2 shall consist of:

— checking and, if necessary, amending the internal regulations in the field of safeguards,

— supervising their implementation and monitoring their application.

2. In order to perform this administrative task, the person(s) appointed:

— shall have access to all documents and offices,

— shall have the power to give any instructions whatsoever to the management or staff of the undertaking,

— shall have the right to solicit or request any help from outside sources which may be required for the satisfactory performance of the above task.

3. An assessment report shall be presented to the Commission within eight days of the completion of the task.'

16. In the preamble to the decision, the Commission considers, in particular, that:

'Given that the determining criterion for application of this Article is the seriousness of the infringement committed, it is first necessary to carry out both an objective and a subjective analysis of the nature of the offences.

From an objective point of view, it appears that the provisions breached are essential elements of Community legislation in the field of safeguards, and that observance of them is essential if the aim set out in Article 77 of the Treaty is to be attained.

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

It should be noted here that the Commission attaches particular importance to the control of exports to nuclear materials.

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

From a subjective point of view, it seems, however, that there was no intention behind the actions and that these should not be seen as a form of diversion. This is, moreover, reflected in the fact that the report on the full annual check of the inventory of materials held only showed minimal differences between the physical inventory and the book inventory, corresponding to approximately 0.1% of the total stock or to 0.023% of the sum of the stock and its variations between 4 August 1989 and 4 July 1990.

They nevertheless constitute a serious infringement, stemming from a series of instances of negligence, both at the operational and the organizational level, which were made possible primarily by the absence of back-up verification measures.

Given the nature of the mistakes made, the Commission regards it essential that all necessary action be taken to ensure that mistakes of this nature cannot recur in the future, all the more so since ANF-Lingen carries out such container transfer operations on a regular basis, and intends to continue doing so.

In order to guarantee that mistakes of this type, which have their origin in the routine nature of the activities concerned, do not recur, the Commission intends to make sure that appropriate measures are clearly drawn up regarding working practices and their implementation.

With this purpose in mind and in view of the serious nature of the mistakes made, the Commission feels that the most effective sanction to impose is that laid down in Article 83(1)(c) of the Treaty.

Only by placing the undertaking under administration can the Commission be sure that the undertaking will meet all its obligations regarding safeguards, since any recourse to the issue of a warning, as provided for in Paragraph 1(a) of that Article, is ruled out by the serious nature of the infringements committed.

Even though ANF-Lingen has notified the appropriate Euratom safeguards authority that it intends to enforce the new internal regulations covering the management and handling of materials which it has undertaken to communicate, the Commission feels that the length of time during which the undertaking is under administration must be four months from the date of notification of the name(s) of the person(s) appointed to carry out this task. At the end of this period, an assessment report will be drawn up.'

On 20 August 1990 the Commission appointed the persons responsible for carrying out that task of administration.

17. After completing its task, the board of administration submitted its assessment report to the Commission which published the communication on the implementation of Decision 90/413/Euratom (OJ 1991 C 46, p. 3).

18. At no time did ANF-Lingen resist any measures of investigation, stock-taking or administration. ANF-Lingen provided continuous cooperation at all levels.

C — *Procedure*

19. ANF-Lingen's application was lodged at the Court Registry on 6 October 1990.

20. By order of 7 December 1990 the Court granted the Commission's application of 7 and 15 November seeking an order for the immediate enforcement of the contested decisions.

21. By order of 20 March 1991 the Court dismissed ANF-Lingen's application for disclosure to it of the assessment report of the persons responsible for its administration and decided to consider together with the

merits of the case the application for the disclosure of that report to the Court.

22. Appended to the reply, ANF-Lingen submitted to the Court the assessment report of the persons responsible for its administration.

23. Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.

24. By Decision of 3 June 1992, the Court, in accordance with Article 95(1) and (2) of the Rules of Procedure, assigned the case to the Sixth Chamber.

II — Forms of order sought by the parties

25. *ANF-Lingen* claims that the Court should:

(1) declare that the defendant's decisions of 1 August 1990 (90/413/Euratom) and 20 August 1990 are null and void;

(2) *in the alternative:*

amend the defendant's decisions of 1 August 1990 (90/413/Euratom) and 20 August 1990 by replacing the sanction imposed on the applicant with a warning as provided for by Article 83(1)(a).

26. The Commission contends that the Court should:

(1) order the immediate enforcement of the Commission's Decisions of 1 August 1990 (90/413/Euratom) and 20 August 1990 (C(90) 1707), in accordance with Article 83(2) of the Euratom Treaty;

(2) dismiss the application as unfounded;

(3) order the applicant to pay the costs.

III — Summary of the pleas in law and arguments of the parties

27. *ANF-Lingen* relies essentially on three grounds in challenging Decisions 90/413 and 90/465. It considers that the two decisions are above all void, first of all because the sanctions provided for by Article 83 of the Euratom Treaty may be imposed only in order to stop infringements which continue to be committed and, secondly, because no infringement of the obligations imposed by the Community rules on safeguards is attributable to it. In the alternative, ANF-Lingen considers that the sanction imposed is disproportionate and excessive.

The main claims

28. According to ANF-Lingen, the legal nature of the 'sanctions' provided for by Article 83 has still not been determined by

the Court. The question is whether those sanctions have a retaliatory and preventive function or the function of bringing to an end an infringement which continues to exist and which must be brought to an end by restoring a legal situation. ANF-Lingen considers that the sanctions provided for by Article 83 of the EAEC Treaty may be regarded only as measures of administrative constraint for bringing to an end infringements which continue to exist.

The fact that the generic term 'sanction' is used in Article 83 of the Treaty does not justify the conclusion that all four sanctions provided for by that provision have a retaliatory or preventive function. In primary Community law, that generic concept covers various instruments fulfilling various functions and it is therefore necessary to examine in each particular case whether the 'sanction' in question has a retaliatory and preventive character (fine function) or a coercive character (penalty payment function). The judgments of the Court of Justice in Case 41/69 *Chemiefarma* [1970] ECR 661, Case 44/69 *Bucher* [1970] ECR 733, and Case 45/69 *Boehringer Mannheim* [1970] ECR 769 concerned exclusively the sanction of a fine within the meaning of Article 15 of Council Regulation No 17, the first regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87) and say nothing about the nature of other sanctions, such as those provided for in Article 83 of the Treaty. According to the Court of Justice, a fine is a penalty for preventing breaches of obligations and punishing infringements which have occurred. A fine may be imposed even if the infringement has ceased whereas a penalty payment is intended to bring a continuing infringement to an end. Of the four sanctions provided for in Article 83 of the Treaty, the warning, the withdrawal of special benefits and the withdrawal of source materials or special fissile materials have a retaliatory and preventive function.

The placing under administration provided for in Article 83(1)(c) of the Treaty does not have that function. Placing under administration, like bankruptcy procedure, is directed towards the future in order to safeguard a regular situation. Its function is that of the penalty payment. Placing under administration is justified if the undertaking concerned does not guarantee observance of the obligations imposed upon it, if the directors were unworthy or incapable of acting, or if it was feared that infringements would occur without its being necessary, however, to shut down the undertaking.

The Commission imposed on ANF-Lingen the sanction of being placed under administration owing to its character of penalty and retaliation. However, such an approach is contrary to the law because there are several arguments to support the view that placing under administration, as provided for by Article 83(1)(c), functions as a periodic penalty payment and does not have a function of retaliation.

29. First of all, there is the wording of the first subparagraph of Article 83(1) of the EAEC Treaty. That provision is based on the principle that the infringement exists at the time when sanctions are imposed.

Academic literature also attributes a similar nature to the sanction provided for by Article 83(c).

The second phrase of the second subparagraph of Article 83(2) should also be mentioned. That provision, which provides for the possibility for the Court to order the immediate enforcement of the Commission's decision against which an appeal has been lodged, is based on the principle that the sanctions provided for in paragraph 1 of that article are designed to ensure that situations are in compliance with the Treaty and to bring to an end any infringements which persist. As a reaction *ex post facto* to an infringement which has already taken place, a penalty does not need to be immediately enforced.

Furthermore, it is necessary to take into account paragraph 4 of Article 83 of the EAEC Treaty. There would be no need for the Treaty to provide that the Member States must ensure that sanctions are enforced and, where necessary, that the infringements are remedied by those committing them if it was not based on the principle that a continuing infringement is necessary as a condition for the imposition of such a sanction.

Finally, if the EAEC Treaty had been intended to confer on the Commission, by means of Article 83, the power to impose a penalty *ex post facto*, this would have been clearly provided for in the Treaty itself. Only by way of exception does Community law lay down provisions of a penal nature. Thus, Articles 36 and 65 of the ECSC Treaty distinguish a fine from a periodic penalty payment. The same is true of Articles 15 and 16 of Regulation No 17 of the Council. A fine has the character of a penalty whereas a period penalty payment is intended to move a person to satisfy a specific obligation which is not fulfilled. The fact that the EAEC Treaty does not provide, in the catalogue of sanctions provided for in Article 83, for the fixing of a fine is a factor which supports the view that the measures to be adopted must be designed to ensure that a situation is in accordance with the Treaty, through the cessation of a continuing infringement.

30. ANF-Lingen then states that on 1 August 1990, the date of the adoption of Decision 90/413, there was no infringement, even one committed by negligence, of the obligations incumbent on it pursuant to Article 79 of the EAEC Treaty, Articles 10, 11, 24 and 32 of Regulation No 3227/76 and code 3.1.2 of the Commission's decision of 5 June 1985 adopting special safeguard provisions relating to that undertaking. Therefore, the sanction imposed is unlawful because it could not have had in view the restoration of a regular situation, since the infringement did not continue until that time.

31. In this regard, ANF-Lingen states that none of its employees committed a fault in relation to the observance of obligations arising under Article 79 of the EAEC Treaty and as defined by Articles 10, 11 and 24 of Regulation No 3227/76 and under the Commission's decision of 5 June 1985. On this matter ANF-Lingen points out that:

— the exportation to the United States of America was not notified in advance since an exportation was not even planned; the materials accompanied a shipment in a way which was not intended and in consequence there is no infringement of Article 24 of Regulation No 3227/76;

— until the inadvertent shipment was discovered, on 16 May 1990, the materials in question appeared in the book inventories; consequently, no change in the

inventory could be indicated and there was accordingly no infringement of Article 10 or Article 11 of Regulation No 3227/76 either;

— according to the records, the nuclear materials in question were in the material balance area; consequently, after the inadvertent shipment was discovered, the operating records could be changed and for that reason also there was no infringement of Article 11 of Regulation No 3227/76;

— the change in inventory was recorded in the accounting records immediately after the discovery of the inadvertent shipment so that, for that reason too, there was no infringement of code 3.1.2 of the decision of 5 June 1985.

The only true fact is that the inventory registered by the employees of ANF-Lingen in the records kept under Articles 10, 11 and 24 of Regulation No 3227/76 contained for a number of days — from 12 May to 15 May 1990 — a surplus of 150 kg.

32. ANF-Lingen adds that the inadvertence was connected with the handling of the transport containers. However, the provisions relating to such handling of containers do not form part of the safeguard rules of Chapter VII of Title Two of the Euratom Treaty but of 'handling rules ANFG 10.105 transport of uranium dioxide of 14 October 1987' whose observance is monitored by the nuclear supervisory authority. Under those internal operating practices the UO2 containers arriving at ANF-Lingen must be stored exclusively in the storage area for combustible nuclear materials.

Those internal operating practices were disregarded in the present case. However, the inadvertent exportation cannot automatically be regarded, as the Commission contends, as both an infringement of those internal operating practices and a serious infringement of the principal obligations existing under the EAEC Treaty and Regulation No 3227/76. An infringement of the obligations referred to in the first subparagraph of Article 83(1) of the EAEC Treaty could be upheld only if the action or omission of the persons or undertakings concerned is directly connected with the performance of obligations mentioned in the provisions of the EAEC Treaty and Regulation No 3227/76. In the absence of such a direct link, where the action or omission of the person or undertaking concerned relates to another area, that would necessarily lead indirectly to temporary, but immediately rectifiable, faults in the records. Such secondary effects of a breach of obligations in another area cannot be regarded as an infringement of the obligations referred to in the first subparagraph of Article 83(1) of the EAEC Treaty.

In order for ANF-Lingen to be accused of a negligent infringement of the obligations arising under the Treaty and the instruments adopted in application thereof it would not only be necessary for there to be a simple causal link but it would also be necessary for the matter to be imputable to ANF-Lingen as a fault. However, that is not the case in this instance.

ANF-Lingen adds that no-one would imagine that the destruction, in particular, by an accidental fire, of the uranium records would constitute an infringement of Community law; or that entries in the records which do not correspond to the actual state of affairs because of the discovery *ex post facto* of the disappearance of radioactive materials owing to theft would constitute non-observance of the obligations laid down by the Treaty subject to the sanctions laid down by Article 83 of the Treaty.

33. Finally, ANF-Lingen denies that it was impossible for the Commission to carry out the task which it has under the EAEC Treaty: the whereabouts of the combustible nuclear materials which were inadvertently transported could have been determined for certain; those materials remained under the control of ANF-Lingen and ANF-Richland; and the Commission was informed immediately of the incident in question.

The purpose of the inspections ordered could therefore only have been to determine whether the internal operating practices of ANF-Lingen prevented an incident of this type from occurring again or whether other supplementary practices were necessary. The Commission could have decided this matter on the basis of the inspection reports of 31 May and 1 June 1990 and of 4, 5 and 6 July 1990 alone. Once it was established that the shipment was inadvertent and that it inevitably affected the various records, which were rectified once the incident was discovered, the Commission was in a position to carry out its safeguards task and to satisfy itself that, in the territory of the Community, special fissile materials were not diverted from their intended uses as declared by the users. Even by 2 June 1990, the inspectors had already formed definite views on all essential points and had informed the Commission which did not dispute them. After that date, the ability of the Commission to carry out its supervisory task was not impaired. Therefore, there was no infringement and consequently the sanction imposed is unlawful.

34. The *Commission* states first of all that, no matter how reassuring the findings about the absence of any radioactive danger from the incident which occurred in May 1990, that circumstance does not change the fact that substantiated and uncontested breaches of obligations were found.

The Commission then describes the means of investigation and the procedures which are available to it in order for it to fulfil its task under Article 77 of the EAEC Treaty which consists in comparing the nuclear materials recorded in the books with the materials which are physically present in plants. That monitoring system is based on a general obligation imposed on operators to keep and submit operating records the observance of which is monitored by Commission inspectors and, secondly, by on-site inspection of ores, source materials and special fissile materials carried out by the Commission's inspectors.

It follows that the operator's notifications are not sufficient in themselves to enable the Commission to satisfy itself of the matters referred to in Article 77 of the Treaty. On-site inspections are always necessary in order to ensure that accounting records are in order by checking the physical presence of the nuclear materials.

In view of the information provided by ANF-Lingen on the day of the discovery of the May 1990 incident, the Commission considers that it had an obligation to establish the facts by means of a plant inspection which took place on 31 May and 1 June 1990. That inspection confirmed the facts and consequently the infringements of Regulation No 3227/76 and the Commission's decision of 5 June 1985. Owing to the fact that ANF-Lingen's book inventories and physical inventory did not correspond, the Commission was unable to satisfy itself that 'in the territories of Member States, ... special fissile materials [were] not diverted from their intended uses as declared by the users'.

Moreover, the irregularity committed by ANF-Lingen prompted the Commission to investigate whether the case was an isolated incident or whether other cases of the same type had occurred without being discovered. Consequently, the Commission decided to take an inventory of all the materials held by ANF-Lingen. That inventory was taken on 4, 5 and 6 July 1990 and showed that the May 1990 incident which had been notified was an isolated case.

35. In the Commission's view, Article 83 of the Treaty enables it not only to impose the sanction of placing under administration if the infringement persists; that article forms part of the rules of primary law providing for coercive measures and, by virtue of its purpose, comes under Chapter VII, Title Two, of the Treaty of which it ensures the effectiveness.

A number of provisions of primary law enables sanctions to be imposed; they are divided into fines and periodic penalty payments; a fine penalizes an infringement of a legal rule (dissuasive function) and must prevent it from re-occurring whilst a periodic penalty payment is meant to induce compliance with an obligation which has been imposed. Although Article 83 of the EAEC Treaty uses the generic term 'sanction', it also enables fines and periodic penalty payments to be applied in practice. Thus, the concept of a sanction within the meaning of Article 83 of the EAEC Treaty also covers measures designed to punish an infringement of legal rules and to prevent other infringements as well as measures designed to induce observance of an obligation which has been imposed (effect equivalent to periodic penalty payment).

The Commission then refers to the judgments in Cases 41/69, 44/69 and 45/69, cited above, according to which the Commission's power to impose sanctions is not affected by the fact that the conduct constituting the infringement and its potential to produce harmful effects have ceased to exist.

In order to accomplish its task under Article 2(e) of the EAEC Treaty, the Treaty conferred upon it wide powers which go as far as allowing it to impose severe sanctions (not involving pecuniary sanctions). This reveals the firm intention underlying the Treaty to enforce its provisions, which is all too comprehensible in view of the dangers which uncontrolled use of nuclear energy presents. It is therefore absurd to suggest that the draughtsmen of the Treaty intended to penalize only continuing unlawful actions and not infringements which have ceased. If the reasoning of ANF-Lingen were followed, the Commission would also have to accept and leave unpunished undeclared deliveries of plutonium if it was subse-

quently informed of them and the relevant accounting records were corrected as a result.

36. The Commission considers that the May 1990 incident in question represents negligent breaches of Articles 10, 11 and 24 of Regulation No 3227/76.

There was an actual breach of Article 24 because the exportation of nuclear materials had not been notified in advance to the Commission by ANF-Lingen. The undeclared shipment of nuclear materials took place without being recorded in the accounting and operating records.

Because the book inventory could not be determined for a period lasting a number of days and could not therefore be determined 'at any time', ANF-Lingen was in breach of Regulation No 3227/76.

There was also a failure to observe Article 11(a) of that regulation.

Moreover, since ANF-Lingen is an undertaking within the meaning of Article 196(b) of the EAEC Treaty, it committed a fault and that was sufficient to enable it to be found that the undertaking had not complied with its obligations. As the owner responsible, the applicant must admit that a fault was committed by its employees in the course of its operations.

Questions as to causality arise only if third parties, not coming within the applicant's sphere of responsibility, could have brought about the events in question. That was not the case here.

The alternative claim

37. *ANF-Lingen* considers that Decision 90/413 is vitiated on account of its being in excess of conferred powers. First of all, the sanction imposed is disproportionate having regard to its conduct and the fact that the infringement was not particularly serious; secondly, it was neither appropriate nor necessary for the attainment of the objectives put forward by the Commission in order to justify the placing of ANF-Lingen under administration.

38. ANF-Lingen explains that from the date of its establishment until the day of the incident in question its conduct had been free of any criticism. Commission officials had repeatedly praised ANF-Lingen.

It also points out that when the incident of May 1990 occurred it immediately adopted, on its own initiative, measures for ensuring that such an incident could not happen again. At the time of the adoption, on 1 August 1990, of Decision 90/413, ANF-Lingen had already notified its new internal operating practices to the Commission. At that date only the introduction of the computerized

monitoring system remained to be completed. By 1 August, there was no longer any uncertainty about the additional preventive measures already adopted by ANF-Lingen.

The two inspections carried out by the Commission's officials on 31 May and 1 June and 4, 5 and 6 July 1990 confirmed, moreover, that the incident of May 1990 was an isolated and unusual case.

In view of its attitude, ANF-Lingen considers that the Commission could have opted for a less serious sanction than placing under administration.

39. ANF-Lingen goes on to state that the incident of May 1990 did not represent a serious infringement of the safety obligations incumbent upon it. In this regard, it again draws attention to the fact that the incident in question represented only a breach of internal operating practices — and not of safety monitoring obligations — and had the unavoidable result that for a few days the uranium dioxide inventory was misrecorded in the books and in other documents and that the exportation was not notified. The list of failures set out in particular in Article 1 of Decision 90/413 gives the impression that faults were committed at various points in the ANF-Lingen undertaking. This could give the false impression that the secondary consequences concerning the operating documents, the notifications of shipments abroad and the keeping of the uranium inventory could have been avoided by the persons responsible if they had shown sufficient attention.

However, ANF-Lingen considers it important to point out that the failures listed in Decision 90/413 are but the unavoidable consequences of an error in the handling of the containers in question and as such cannot constitute grave infringements justifying its being placed under administration.

That course of action cannot be justified by the Commission's statement that it was unable to carry out its task of monitoring safety. That task was always possible since the whereabouts of the combustible material could be determined. It continued to remain under the control of ANF-Lingen and ANF-Richland.

Nor can the placing of ANF-Lingen under administration be justified by an alleged risk that the combustible material might have been stolen. If a third party wished to appropriate uranium dioxide unlawfully by theft during its transport, such a party would try to appropriate a full transport container on the journal from Richland to Lingen. The theft of an empty transport container on the return journey would be pointless. Neither

the applicant as dispatcher nor the transport undertaking knew that two of the containers contained combustible nuclear material.

The significance of the incident is no greater because significant weighable quantities of enriched uranium were involved, which, according to the Commission, were capable of being enriched more easily into strategic value grades. Firstly, there was no real risk of third parties appropriating empty marked containers. Secondly, the statement that that uranium could easily be enriched to strategic value grades is wrong. Enrichment to 'strategic value grades' (higher than 90%) is not 'more easily' done but requires major conversion and enrichment plant. The unlawful possession of 150 kg of weakly enriched uranium would neither facilitate nor accelerate in particular the carrying out of a supposed intention to produce nuclear weapons.

The seriousness of the sanction imposed is not attenuated by the restriction of the administration under which ANF-Lingen was placed only to the aspects connected with the safeguards mentioned in Chapter VII, Title Two, of the EAEC Treaty. Under Article 83, the sanction may be imposed only for the breaches of the obligations laid down by Chapter VII. Consequently, the Commission imposed only the placing of an undertaking under administration permitted by Article 83 of the Treaty. That placing under administration is restricted to the aspects governed by Chapter VII.

40. ANF-Lingen then states that the placing of its undertaking under administration was not necessary because the Commission has, under Article 81 of the EAEC Treaty, wide supervisory powers enabling it to send in inspectors charged with carrying out investigations. Placing the undertaking under administration is not justified by the need to have, in addition to the powers provided for in Article 81, the possibility to give instructions. That possibility was not necessary in view of ANF-Lingen's readiness to cooperate with the Community and the national authorities and in view of ANF-Lingen's own initiatives to change its internal operating practices. On 1 August 1990, there was not the slightest evidence to suggest that ANF-Lingen had not carried out the improvements to its organization which the defendant's inspectors may have suggested or that it was not prepared to carry them out, or that the applicant was opposed to the verification inspections ordered by the Commission under Article 81 of the EAEC Treaty.

Furthermore, no administration actually took place. ANF-Lingen explains that the course of the placing under administration was as follows:

— On 29 August 1990, the board of administration visited ANF-Lingen for a first preparatory meeting;

— On 20 and 21 September 1990, the board of administration held meetings and conducted investigations at the premises of ANF-Lingen;

— On 29 and 30 October 1990, the board of administration held further meetings and

carried out other investigations at the premises of ANF-Lingen. On this occasion, the applicant presented in particular its computerized monitoring system, which was practically ready. That system was discussed with the board;

— On 13 and 14 December 1990 the final meeting with the board of administration took place at the premises of ANF-Lingen. On that occasion, the documentation relating to the programme for the computerized monitoring system was presented. On the same occasion a final revision of the internal operating practices was made.

The administrators did not give 'instructions'. They only made recommendations, which were immediately complied with by ANF-Lingen. This is proved by the assessment report submitted to the Commission by the administrators which, moreover, confirmed the effective collaboration between ANF-Lingen and the board of administrators. All this demonstrates that the means made available to the Commission by Article 81 of the Treaty were perfectly sufficient in order to permit the investigations, monitoring and participation of the Commission in the ensuring of safeguards within the meaning of Chapter VII of the EAEC Treaty. It was not necessary and was disproportionate to place under administration, pursuant to Article 83(1)(c) of the Treaty, an establishment such as that of ANF-Lingen, whose management is good and which was quite disposed to providing its cooperation. The reason why this measure was nevertheless taken could only be an intention to punish the applicant and to make it an example.

41. In conclusion, ANF-Lingen considers that the sanction of placing it under administration, which is too severe and disproportionate, infringes the principle of subsidiarity. Placing under administration can only be a 'last resort' when an undertaking is not cooperating and not complying with instructions. Finally ANF-Lingen proposes that the Court should amend the sanction imposed by replacing it with a warning.

42. The *Commission* considers that it has not imposed a disproportionate sanction on ANF-Lingen. Referring to the preamble to Decision 90/413, the Commission considers that it took account of the objective and subjective conduct of ANF-Lingen and of the legal provisions applicable. As regards the four-month duration of the administration, the Commission states that ANF-Lingen had considered such a period to be necessary in order to implement the necessary measures.

There was no certainty that a mere warning would have enabled the objective of removing the shortcomings in the operation of ANF-Lingen in a reliable and verifiable way to be achieved. A warning, which is a unilateral measure, would not have enabled the Commission to take part in the internal examination of the conduct of operations at ANF-Lingen or to participate in the elaboration of better operating methods or in verifying their application. The aim was mainly to give the Commission a view into the inside of the undertaking and influence over it. A warning would have provided no 'feedback' and would not have given the Commission sufficient guarantees or possibilities for intervention.

The Commission goes on to state that a warning should be used only for mild infringements and the total or partial withdrawal of source materials or special fissile materials only for serious infringements of the obligations imposed by the Treaty, which are committed intentionally and/or are likely to reoccur in the immediate future. Infringements of the obligations imposed, which do not correspond to either of those two categories, are best dealt with by the measures provided for in Article 83(c) since only those measures are capable of having an 'instructive' effect on the undertaking and of imposing changes in internal management practices.

In the present case, the assessment report produced by the persons responsible for the administration shows that none of the important improvement measures had been completed before August 1990. Indeed, the structures and organization of the applicant were improved only after that date. This is clear not only from the assessment report of the persons responsible for the administration but also from the opinion on the operational and supervisory procedures in connection with the entry and departure of radioactive materials from ANF-Lingen's combustible elements plant, given by the Technische Überwachungs-Verein Hannover e. E. That institution, which is neutral in this matter, found on 31 August 1990 — that is to say one month after the adoption of the contested decision — that the main weaknesses in the operating structures and organization of the applicant had still not been remedied. The statement that the main improvements had been introduced in the operational functioning before 1 August 1990 is therefore untenable.

Finally, the Commission states that, in the case of U235 enriched to 3%, approximately half the separation work for obtaining strongly enriched (to approximately 93%) uranium has already been done. Another significant possibility for unlawful use would be to use weakly enriched uranium as a 'booster' in reactors using natural uranium, which allows the production of plutonium to be facilitated or accelerated.

43. According to the Commission, the placing of ANF-Lingen under administration was appropriate and effective.

In the Commission's view, these proceedings concern the question whether the placing of the undertaking under administration was ordered in compliance with the law and not the way in which that administration was carried out. Furthermore, the Commission ordered the most limited form of administration having regard to all the factors, including those favourable to the applicant.

Finally, the Commission considers that the statement that the measure which it adopted is unlawful because the applicant was quite prepared to comply with all directions given to it is the same as arguing that to impose a fine would be unlawful since the applicant was prepared to pay it.

G. F. Mancini
Judge-Rapporteur