JUDGMENT OF THE COURT
11 March 1997 *

In Case C-357/95 P,

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

appellant,

APPEAL against the judgment of the Court of First Instance of the European Communities (Second Chamber, Extended Composition) of 15 September 1995 in Joined Cases T-458/93 and T-523/93 *ENU* v *Commission* [1995] ECR II-2459, seeking to have that judgment set aside,

the other party to the proceedings being:

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

* Language of the case: Portuguese.

THE COURT,

composed of: G. C. Rodríguez Iglesias, President, G. F. Mancini, J. L. Murray and L. Sevón (Presidents of Chambers), C. N. Kakouris, D. A. O. Edward, J.-P. Puissochet, G. Hirsch, P. Jann, H. Ragnemalm and M. Wathelet (Rapporteur), Judges,

Advocate General: N. Fennelly,
Registrar: H. A. Rühl, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 8 October 1996,

after hearing the Opinion of the Advocate General at the sitting on 5 December 1996,

gives the following

Judgment

1 By application lodged at the Registry of the Court of Justice on 16 November 1995, Empresa Nacional de Urânio SA (hereinafter 'ENU') brought an appeal pursuant to Article 50 of the EAEC Statute of the Court of Justice against the judgment of 15 September 1995 in Joined Cases T-458/93 and T-523/93 *ENU* v *Commission* [1995] ECR II-2459 (hereinafter 'the contested judgment'), in which the Court of First Instance dismissed its application for annulment of Commission Decision 93/428/Euratom of 19 July 1993 on a procedure for the application of the second paragraph of Article 53 of the EAEC Treaty (OJ 1993 L 197, p. 54, hereinafter 'the contested decision') and for a declaration that the Community was liable on the ground of breach of the provisions of Chapter 6 of the EAEC Treaty, and ordered it to pay the costs.

2 Under Article 2(d) of the EAEC Treaty, the Community is to ensure that all users in the Community receive a regular and equitable supply of ores and nuclear fuels. The implementation of that obligation is the subject of Title II, Chapter 6 (Articles 52 to 76), which establishes a common supply policy for ores, source materials and special fissile materials.

3 According to Article 52(1) of the EAEC Treaty, '[t]he supply of ores, source materials and special fissile materials shall be ensured ... by means of a common supply policy on the principle of equal access to sources of supply'. Consequently, 'all practices designed to secure a privileged position for certain users shall be prohibited' (Article 52(2)(a)).

4 To carry out that policy, Article 52(2)(b) of the EAEC Treaty provided for the establishment of a Euratom Supply Agency (hereinafter 'the Agency'), with legal personality and financial autonomy (Article 54).

5 Article 53 of the EAEC Treaty states:

'The Agency shall be under the supervision of the Commission, which shall issue directives to it, possess a right of veto over its decisions and appoint its Director-General and Deputy Director-General.

Any act, whether implied or expressed, performed by the Agency in the exercise of its right of option or of its exclusive right to conclude supply contracts, may be referred by the parties concerned to the Commission, which shall give a decision thereon within one month.'

6 To fulfil its functions relating to supplies, the Agency has the two rights provided for in Article 52(2)(b): a right of option on ores, source materials and special fissile materials produced in the territories of Member States, and an exclusive right to conclude contracts relating to the supply of ores, source materials and special fissile materials coming from inside the Community or outside.

7 With respect to the supply of source materials, as defined in Article 197 of the EAEC Treaty, from within the Community, the Agency's right of option covers the acquisition of the right of ownership (Article 57(1)(b)), which it may then transfer to users under the conditions laid down in Article 60.

8 Under Article 57(2) of the Treaty, the Agency is to exercise its right of option by concluding contracts with producers, who are in principle obliged to offer to the Agency the ores, source materials or special fissile materials which they produce within the territories of the Member States before they are used, transferred or stored.

9 The first paragraph of Article 59 of the EAEC Treaty provides:

'If the Agency does not exercise its right of option on the whole or any part of the output of a producer, the latter:

(a) may, either by using his own resources or under contract, process or cause to be processed the ores, source materials or special fissile materials, provided that he offers to the Agency the product of such processing;

(b) 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' (subject to special provisions on special fissile materials).

10 Article 60, which arranges the procedure for balancing offers and applications for the supply of ores, provides:

'Potential users shall periodically inform the Agency of the supplies they require, specifying the quantities, the physical and chemical nature, the place of origin, the intended use, delivery dates and price terms, which are to form the terms and conditions of the supply contract which they wish to conclude.

Similarly, producers shall inform the Agency of offers which they are able to make, stating all the specifications, and in particular the duration of contracts, required to enable their production programmes to be drawn up. Such contracts shall be of not more than ten years' duration save with the agreement of the Commission.

The Agency shall inform all potential users of the offers and of the volume of applications which it has received and shall call upon them to place their orders by a specified time-limit.

When the Agency has received all such orders, it shall make known the terms on which it can meet them.

If the Agency cannot meet in their entirety all the orders received, it shall, subject to the provisions of Articles 68 and 69, share out the supplies proportionately among the orders relating to each offer.

Agency rules, which shall require approval by the Commission, shall determine the manner in which demand is to be balanced against supply.'

11 The first paragraph of Article 61 of the EAEC Treaty provides:

'The Agency shall meet all orders unless prevented from so doing by legal or material obstacles.'

12 The supply of ores and source materials from outside the Community is regulated principally by Article 64 of the EAEC Treaty, which confers on the Agency 'subject to the exceptions provided for in this Treaty ... the exclusive right to enter into agreements or contracts'.

13 Under Article 65 of the Treaty, the procedure for balancing supply and demand in Article 60 is to apply to 'applications from users and to contracts between users and the Agency relating to the supply of ores ... coming from outside the Community' (first paragraph). 'The Agency may, however, 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' (second paragraph).

14 The first paragraph of Article 66 lays down a general exception to the Agency's exclusive right to conclude contracts:

'Should the Commission find, on application by the users concerned, that the Agency is not in a position to deliver within a reasonable period of time all or part of the supplies ordered, or that it can only do so at excessively high prices, the users shall have the right to conclude directly contracts relating to supplies from outside the Community, provided that such contracts meet in essential respects the requirements specified in their orders.'

15 On 5 May 1960 the Agency, pursuant to the sixth paragraph of Article 60 of the Treaty, adopted Rules determining the manner in which demand is to be balanced against the supply of ores, source materials and special fissile materials (OJ, English Special Edition 1959-1962, p. 46, hereinafter 'the Rules').

16 The Rules establish simplified procedures for balancing demand against supply of ores. Thus the first paragraph of Article 5 provides:

'If, in respect of a specific product and where in particular the Agency takes the initiative, the Commission, having heard the Advisory Committee, finds that the situation on the market shows a clear surplus of supply over demand, it may, by means of an appropriate directive, call upon the Agency to apply the simplified procedure ...'

17 Under that simplified procedure, users and producers are empowered to negotiate directly and to sign supply contracts, after the Agency has laid down the general conditions to be satisfied by those contracts. The contracts are then to be communicated to the Agency and are deemed to be concluded by it if no objection is notified by the Agency to the parties concerned within eight days from the receipt of the contracts.

18 That procedure does not apply, however, to supply contracts relating to special fissile materials (last paragraph of Article 5).

19 Article 5*bis* of the Rules, which was inserted by the Agency Regulation of 15 July 1975 (OJ 1975 L 193, p. 37), provides for a new simplified procedure which, while ensuring that the Agency has complete information on the market (indent (b)), authorizes users 'to invite tenders directly from the producers of their choice and to negotiate the supply contract freely with the latter' (indent (a)).

20 However, under Article 5*bis* (d), (f) and (g) of the Rules as amended:

'(d) the contract shall, for the purposes of its conclusion, be submitted to the Agency for signature within 10 working days;

(f) the Agency shall act, either by concluding or refusing to conclude the contract, within 10 working days from the date of receipt thereof;

(g) a refusal to conclude the contract shall be notified to the parties concerned in a reasoned decision. This decision may be referred to the Commission in accordance with the provisions of Article VIII(3) of the Statutes of the Euratom Supply Agency.'

Facts

21 According to the findings of fact made by the Court of First Instance in the contested judgment (paragraphs 1 to 17):

— ENU is a company which produces uranium concentrates in Portugal. It is a small producer at Community level, its production being of the order of 200 tonnes of uranium a year (1.5% of the Community's annual consumption of natural uranium), but it could increase its activity by exploiting a new deposit at Niza (Portugal).

— Since there are no nuclear power stations in Portugal, ENU is obliged to export all its production. For that purpose it concluded a long-term contract with Electricité de France (EDF), accounting for nearly three-quarters of its uranium production. The very low prices on the spot market, which did not even cover production costs, and EDF's decision not to conclude long-term contracts any more caused stocks of uranium to accumulate (estimated at 350 tonnes in 1990) and brought financial difficulties which seriously threatened its plans to exploit the new deposit at Niza.

— ENU, pursuant to Chapter 6 of the Treaty, requested the Agency, by letter of 8 October 1987, reiterated on 10 October 1988, to exercise the right of option provided for in Article 57 of the Treaty, with respect to the 350 tonnes of uranium concentrate. It also drew its situation to the attention of the Commission's Directorate-General for Energy.

— The Commission replied by letter of 8 November 1988, acknowledging that the problem raised by ENU was an important one and that it would receive the necessary attention. It repeated that position by letter of 14 November 1988, in response to a request from the Portuguese Secretary of State for Energy.

— After an exchange of correspondence and a meeting with the Agency, ENU, not having heard from the Agency, again requested it to act in conformity with the rules of the Treaty, and sent a copy of that letter to the Commission, stating that the survival of the undertaking depended on disposing of its stocks. By letter of 8 December 1989, Commissioner Cardoso e Cunha informed ENU that he shared the view that the Agency's supply policy should include special action to enable cases such as the present one to be resolved and that he was asking the Agency to submit proposals to that effect.

— Following that request, the Agency drew up 'outline practical solutions for the "Portuguese uranium" aspect of supply policy' ('special action') and contacted Community users to persuade them to accept that plan (which was to divide the Portuguese uranium between the electricity companies according to an allocation formula, at a price which would be the producer's cost price plus 10%, it being understood that the system would cease to apply once the market price exceeded the price indicated). The Agency's efforts were unsuccessful at that time.

— ENU formally requested the Commission, by letter of 21 December 1990, in accordance with the second paragraph of Article 53 and Article 148 of the EAEC Treaty, to order the Agency to restore the proper functioning of the machinery established by Chapter 6, and to require it to implement the 'special action'.

— When the Commission did not take a decision, ENU on 3 April 1991 brought an action for failure to act, pursuant to Article 148 of the EAEC Treaty.

— In its judgment of 16 February 1993 in Case C-107/91 *ENU* v *Commission* [1993] ECR I-599, the Court of Justice held that the Commission had failed, contrary to the second paragraph of Article 53 of the Treaty, to give a decision on ENU's request that the Commission should require the Agency to exercise its right of option in respect of the Portuguese uranium production.

— To comply with that judgment, the Commission adopted the contested decision, in which it rejected all the requests made by ENU in its complaint of 21 December 1990.

— By application of 27 September 1993, ENU asked the Court of First Instance to annul the contested decision.

— Meanwhile, on 20 October 1992, ENU also brought an action before the Court of Justice for compensation for the damage suffered as a result of the alleged breach by the Commission of the provisions of Chapter 6 of the EAEC Treaty. 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).

— Those two applications were joined by order of the Court of First Instance of 16 December 1994.

— Thanks to the efforts made by the Agency, ENU eventually sold about 250 tonnes of uranium in 1993 and 1994, at a price well below that at which it had agreed to offer its uranium under the 'special action' plan.

The judgment of the Court of First Instance

22 The contested judgment shows that ENU put forward two categories of pleas in law in support of its application for annulment.

— First, ENU argued that the Commission had unlawfully refused to require the Agency to exercise its right of option and its exclusive right to conclude supply contracts so as to ensure disposal of ENU's uranium production. ENU considered that the Treaty imposed an obligation, in the present case, to ensure disposal of its production, which was available at a reasonable price. In particular, it disputed the lawfulness of the simplified procedure for balancing supply and demand under Article 5*bis* of the Rules (see paragraphs 21 to 39 of the contested judgment).

— Second, ENU complained that the Commission had failed to order the Agency to apply the 'special action' aspect of its supply policy, relating to Portuguese uranium, even though it had been approved by Commissioner Cardoso e Cunha in his letter to ENU of 8 December 1989 (see paragraphs 75 to 79 of the contested judgment).

23 The Court's findings with respect to the first plea were substantially as follows.

— It considered that the tasks of the Agency were limited to ensuring that all Community users receive regular and equitable supplies, and that the protection of the interests of producers could be pursued only in relation with the requirements concerning the guaranteeing of supplies. It followed that the supply scheme did not guarantee preferential disposal of Community production of ores (paragraphs 59 and 60 of the contested judgment).

— The Court held that, contrary to ENU's contentions, the 'criterion of "excessively high" prices, specifically stated in Article 66 in order to define the scope of an exceptional procedure, [could] not 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' (paragraph 63).

— In the Court's view, the Agency could oppose imports of ores at prices lower than those sought by Community producers only if those imports might jeopardize the achievement of the aims of the Treaty. Outside such cases, prices were fixed by the balancing of demand against supply, in accordance with Article 60 of the Treaty or Article 5*bis* of the Rules, without any intervention by the Agency (paragraph 64).

— The Agency is therefore not obliged to give preferential treatment to the disposal of Community production, in so far as the supply scheme established by the Treaty does not guarantee Community preference for producers (paragraphs 61, 62 and 67).

— If the Agency nevertheless decided to intervene in favour of Community producers and for this purpose opposed imports, it could do so only if the price sought by those producers was equivalent to or lower than that notified to the Agency or if their offers carried advantages for the user such as to offset any price difference (paragraph 66).

— In the present case, the Court found that ENU had not referred to any particular circumstance which would constitute a legal obstacle to Community users' obtaining supplies of ores from outside the Community (paragraph 69).

— As to the lawfulness of the simplified procedure for balancing supply and demand introduced by Article 5*bis* of the Rules, the Court considered that ENU's argument that the Agency should exercise its right of option and its exclusive right to conclude supply contracts so as to ensure disposal of ENU's uranium production was irrelevant, since it was certain that the Commission's refusal to comply with ENU's request was not vitiated by any irregularity under the system governing supplies established by the Treaty (paragraphs 71 and 72). In any event, such a procedure was the result, in the Court's opinion,

of the cyclical trend towards an excess of supply over demand which rendered such centralization futile, and it did not take away the Agency's exclusive rights which must 'be exercised according to the rules of a market economy' (paragraph 73).

24 On the second plea, the Court held as follows.

— It regarded Mr Cardoso e Cunha's letter of 8 December 1989 as a 'communication of a political character' which did not constitute a directive addressed by the Commission to the Agency, and did not contain any commitment or other element capable of arousing a legitimate expectation that the 'special action' plan would be implemented with binding force (paragraph 82 of the contested judgment).

— Moreover, the Court found that the price which ENU stated that it was prepared to accept under the 'special course of action' was much higher than the prices stipulated during the same period in multi-annual contracts concluded between Community users and suppliers, communicated to the Court by the Commission on a confidential basis. Consequently, ENU could not in any case expect binding application of the 'special course of action', in the absence of particular circumstances capable of warranting a derogation from the arrangements governing supplies established by Chapter 6 of the Treaty (paragraph 84 of the judgment).

— Even if the prices proposed by ENU had proved to be at least as favourable as those obtaining on the market, the Agency had, in any event, a discretion which it did not exceed in the present case (paragraph 85).

25 In the absence of any unlawful conduct for which the Commission could be held liable, the Court dismissed ENU's claim for damages (paragraphs 89 to 91).

The rejection of the claim for annulment

26 In support of its appeal, ENU puts forward three pleas in law attacking the rejection of its claim for annulment.

27 First, ENU claims that the Court of First Instance misconstrued the subject-matter of the application.

28 Second, it complains that the Court failed to examine whether the simplified procedures established by Articles 5 and 5*bis* of the Rules were valid.

29 Third, it criticizes the Court for not holding, in paragraph 82 of its judgment, that the letter of 8 December 1989 addressed to it by Mr Cardoso e Cunha reflected a commitment by the Commission on which it could base a legitimate expectation.

The first plea in law

30 In support of its appeal, ENU argues, first, that there was an error of law in the definition of the subject-matter of the application. It submits that the Court of First Instance referred, in paragraph 54 of the contested judgment, to ENU's request for guaranteed disposal of its uranium production and, in paragraph 72, to the outcome of the proceedings depending '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'.

31 However, ENU states that it merely sought annulment of the contested decision, which rejected its requests for the Agency to be ordered, first, to restore the proper functioning of the machinery established under Chapter 6 of the Treaty and, second, to implement a 'special action' plan which would have provided an immediate solution to the problem of disposing of ENU's uranium. To decide on the claim for annulment, the Court did not therefore, in ENU's opinion, have to ascertain whether the Treaty system guaranteed the 'disposal of its uranium production' (paragraphs 54 and 71 of the contested judgment) or 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' (paragraph 72). The Court should merely have ascertained whether the Treaty provisions had in fact been applied by the Community producers and users, the Agency, the Member States and the Commission. According to ENU, the answer to that question could only be in the negative.

32 On this point, the Court of First Instance described the subject-matter of the claim for annulment as follows, in paragraph 20 of the contested judgment:

'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 ... 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 ... to order the Agency to restore the proper functioning of the machinery established by the Treaty under Chapter 6 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 ... to order the Agency to implement the "special action" part of its supply policy, concerning Portuguese uranium ...'.

33 That description of the subject-matter of the claim, repeated in part in paragraph 54 of the contested judgment, altogether corresponds to ENU's application to the Court of First Instance.

34 That application sought the annulment of the Commission's rejection of the requests made by ENU under the second paragraph of Article 53 of the Treaty. Its subject-matter must therefore be assessed by reference to those requests, to which the contested decision of the Commission was the response.

35 It is common ground that, as this Court found in its judgment in Case C-107/91 *ENU* v *Commission*, that the decision originally requested by ENU under the second paragraph of Article 53 of the Treaty was meant to provide a solution to the specific problem it had submitted to the Agency and the Commission (paragraph 16), namely the difficulties in disposing of its uranium stocks. Similarly, in so far as the Commission was formally requested *inter alia* to order the Agency to take 'special action' enabling an immediate solution to be found to the problem encountered by ENU in disposing of its uranium, ENU's letter to the Commission of 21 December 1990 had to be understood as referring to the Commission the implied act of the Agency refusing to exercise its right of option in respect of ENU's uranium production (paragraph 34 of that judgment).

36 Under those circumstances, the Court of First Instance did not misconstrue the subject-matter of the application before it by addressing specifically the question of the disposal of ENU's stocks of uranium in assessing whether Chapter 6 of the Treaty had been applied correctly by the Agency and the Commission.

37 The first plea must therefore be rejected.

The second plea in law

38 In its second plea, ENU complains that the Court of First Instance failed to hold that Articles 5 and 5*bis* of the Rules are invalid under the provisions of the Treaty and contented itself with asserting, in paragraph 73 of the contested judgment, that the simplified procedure for balancing supply against demand is the consequence of economic developments and meets the aim pursued by the centralized procedure provided for in Article 60 of the Treaty and, more generally, by the system governing supplies established by Chapter 6 of the Treaty. ENU considers that several objections may be made to that simplified procedure.

39 To begin with, in ENU's opinion, neither the Agency nor the Commission is authorized under Article 60 of the Treaty to establish a procedure distinct from that laid down in Chapter 6, in particular by authorizing users, in breach of Article 66, to negotiate directly and make contracts with any producer inside or outside the Community (see Article 5*bis* of the Rules). It is for the Council to decide, if necessary, under Article 76 of the EAEC Treaty, to adapt the supply system to changing circumstances.

40 ENU then submits that the simplified procedure deprives the production sector of all protection, by giving users the freedom to obtain supplies from outside the Community, thus damaging the disposal of Community production. Article 66 of the Treaty allows imports from non-member countries only on a case by case basis and under the strict conditions it lays down, precisely so as not to damage the disposal of Community production where that is available at a reasonable price.

41 ENU submits, finally, that by allowing price confidentiality and thus preventing traders from knowing the prices actually paid, as follows from paragraph 84 of the contested judgment, the simplified procedure interferes with the market-based system for setting prices which is the basis of the system for balancing supply and demand established by Article 60 of the Treaty in the interests of users and producers alike.

42 The Court of First Instance held, in point 71 of the contested judgment, that

'the Commission's refusal to accede to the applicant's request that the Agency exercise 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',

and that in those circumstances,

'there [was no] need to rule on the legality of the simplified procedure for balancing supply against demand introduced by Article 5*bis*' of the Rules.

43 That analysis must be accepted. As stated in paragraph 34 above, ENU's application to the Court of First Instance sought annulment of the contested decision rejecting the requests ENU made to the Commission, under the second paragraph of Article 53 of the Treaty, with a view to solving the problem of the disposal of its uranium production. Since it is certain that, in any event, the system of Chapter 6 of the Treaty did not oblige either the Agency or the Commission, in the circumstances of the case, to guarantee disposal of that production, it is unnecessary also to rule on ENU's argument as to the alleged unlawfulness of the simplified procedure introduced by Article 5*bis* of the Rules.

44 In those circumstances, whatever the method used for balancing supply and demand under the Rules, in examining the criticisms of the contested judgment raised by ENU in its second plea it must first be ascertained whether the Court of

First Instance could properly find that the system laid down in Chapter 6 of the Treaty did not oblige the Agency to guarantee disposal of ENU's uranium production and consequently did not oblige the Commission to order it to guarantee disposal of that production.

45 On this point, it must be stated, as the Court of First Instance rightly did in paragraph 57 of the contested judgment, that the Agency was established to guarantee, under the conditions laid down in Chapter 6, one of the essential aims which the Treaty assigns to the Community, in Article 2(d), namely to ensure that all users in the Community receive a regular and equitable supply of ores and nuclear fuels.

46 It must be held that, as the Advocate General has shown in point 44 et seq. of his Opinion, no provision of the supply system established by Chapter 6 in order to fulfil that aim guarantees the disposal of Community ore production. On the contrary, as the Court of First Instance rightly stated,

'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 assure that all users have regular and equitable supplies, no distinction is made according to the origin of products' (paragraph 61 of the contested judgment),

since, in accordance with the first paragraph of Article 65 of the Treaty, Article 60, on the procedure for balancing supply against demand, applies to applications from users and contracts between users and the Agency relating to the supply of ores from outside the Community.

47 Moreover, the Court of First Instance found, in paragraph 69 of its judgment, that there were no special circumstances such as to show the existence of a threat or a possible threat to the fundamental objective of a regular and equitable supply of ores and nuclear fuels.

48 In those circumstances, no provision of Chapter 6 obliged the Agency to guarantee the disposal of ENU's uranium production. On the contrary, the Court of First Instance found, in paragraph 73 of the contested judgment, that the economic trend since the establishment of the Community was typified by a surplus of supply over demand.

49 Moreover, ENU's argument that Article 66 of the Treaty permits imports from outside the Community only if Community production is insufficient or if the prices asked by Community producers are excessively high is based on a wrong reading of Article 66. As the Court of First Instance held in paragraph 63 of the contested judgment, the purpose of Article 66 is solely to provide for a derogation, under the conditions it specifies, to the Agency's exclusive right to conclude directly contracts relating to supplies from outside the Community.

50 In addition, the simplified procedure, as defined in Article 5*bis* of the Rules, applies not only to supplies from the Community but also to those imported from non-member countries in accordance with Article 65 of the Treaty, which refers to Article 60 as a whole, the sixth paragraph of which is the legal basis of the Rules. Moreover, that procedure is not contrary to Article 66 of the Treaty, since it does not infringe the Agency's exclusive right to conclude contracts directly, in view of the fact that under Article 5*bis* (d) to (g) of the Rules it is for the Agency to conclude them, which it may refuse to do. In those circumstances, there is no need to ascertain, for the purposes of the application of Article 5*bis* of the Rules, whether the two conditions specified in Article 66 must be satisfied where the supplies in question come from outside the Community.

51 In any event, it follows from the Court of First Instance's findings of fact that ENU did not show that the Agency had in fact authorized any user in the Community to conclude directly a contract for the supply of ores from outside the Community without the involvement of the Agency, in breach of Article 66 of the Treaty.

52 Consequently, the second plea must also be rejected.

The third plea in law

53 ENU considers, disagreeing with the Court of First Instance, that the letter sent to it on 8 December 1989 by Mr Cardoso e Cunha reflected an undertaking by the Commission to the Portuguese Government and the European Parliament to find a satisfactory solution to the problem of the disposal of its uranium production, and justified entertainment of a legitimate expectation on its part.

54 The Court of First Instance held, in paragraph 82 of its judgment, that the letter 'did no more than state a mere policy envisaged by the competent commissioner as part of his functions as regards the Agency'. Moreover, in paragraph 86, the Court found 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.'

55 It suffices to observe that on the basis of those findings of fact, which this Court may not reopen in appeal proceedings, the Court of First Instance could properly hold that the letter from Mr Cardoso e Cunha did not constitute an undertaking by the Commission capable of arousing a legitimate expectation on the part of its addressee.

56 The third plea must therefore be rejected.

The rejection of the claim for damages

57 Since all ENU's pleas directed against the dismissal by the Court of First Instance of the claim for annulment have been rejected, it must be held that that Court could properly conclude, in paragraph 91 of the contested judgment, that, since the conduct alleged against the Agency and the Commission's refusal to accede to the requests submitted to it by ENU were not vitiated by any irregularity, the claim for damages had to be dismissed as unfounded in any event.

58 Since none of the pleas in law are well founded, the appeal must be dismissed in its entirety.

Costs

59 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs, if they have been applied for in the successful party's pleadings. Since ENU has been unsuccessful, it must be ordered to pay the costs of the present proceedings.

On those grounds,

THE COURT

hereby:

1. Dismisses the appeal;

2. Orders the appellant to pay the costs.

Rodríguez Iglesias Mancini Murray

Sevón Kakouris Edward

Puissochet Hirsch Jann

Ragnemalm Wathelet

Delivered in open court in Luxembourg on 11 March 1997.

R. Grass G. C. Rodríguez Iglesias

Registrar President