

OPINION OF ADVOCATE GENERAL FENNELLY

delivered on 5 December 1996 *

1. The judgment under appeal touches on a number of important questions of principle, and in particular whether the Commission can be required by a uranium producer to order the Euratom Supply Agency to apply certain provisions of the Euratom Treaty¹ which are alleged to have fallen into desuetude, and be held liable for refusing to issue such an order. For reasons which will appear shortly, I do not consider that it is necessary for the Court to reach these issues in the present proceedings.

with the other countries by creating the conditions necessary for the speedy establishment and growth of nuclear industries' (Article 1). To this end, in accordance with Article 2(d) and (g), 'the Community shall, as provided in this Treaty, ... ensure that all users in the Community receive a regular and equitable supply of ores and nuclear fuels' and 'ensure wide commercial outlets and access to the best technical facilities by the creation of a common market in specialized materials and equipment, by the free movement of capital for investment in the field of nuclear energy and by freedom of employment for specialists within the Community'.

I — Legal framework

2. The Treaty is based on the idea that 'nuclear energy represents an essential resource for the development and invigoration of industry and will permit the advancement of the cause of peace' (preamble, first recital).² The task of the Community is defined as being 'to contribute to the raising of the standard of living in the Member States and to the development of relations

3. Chapter VI of Title II of the Treaty (hereinafter 'Chapter VI') establishes more specific provisions concerning supplies. Article 52(1) provides that '[the] supply of ores, source materials and special fissile materials³ shall be ensured ... by means of a common supply policy on the principle of equal access' to sources of supply. Article 52(2)(a) prohibits 'all practices designed to secure a privileged position for certain users'. Article 52(2)(b) establishes a supply Agency (hereinafter 'the Agency') and confers on it a 'right of option on ores,

* Original language: English.

1 — References to 'the Treaty' in this Opinion are to the EAEC Treaty, unless the contrary is stipulated.

2 — See, however, the views expressed in European Parliament written question E-3468/95 by Martina Gredler and Elly Plooi-j-van Gorsel to the Council, OJ 1996 C 305, p. 3.

3 — These terms are defined in Article 197 of the Treaty; as the present proceedings do not concern special fissile materials, to which special rules apply, the term "nuclear materials" will be used generally throughout the present Opinion to designate ores and source materials.

source materials and special fissile materials produced in the territories of Member States and an exclusive right to conclude contracts relating to the supply of ores, source materials and special fissile materials coming from inside the Community or from outside'.

4. Article 53 of the Treaty provides as follows:

'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.'

5. Sections 2 and 3 of Chapter VI lay down provisions concerning nuclear materials coming, respectively, from inside and from outside the Community. For nuclear materials coming from within the Community, Article 57(1) defines the Agency's right of option as being 'the acquisition of the right

of ownership'; pursuant to Article 57(2), '[the] Agency shall exercise its right of option by concluding contracts with producers of ores, source materials and special fissile materials', while obliging producers to offer to the Agency the nuclear materials they produce on the Community territory. Article 59 defines the conditions under which a producer may process or export nuclear materials over which the Agency does not exercise its right of option.

6. Article 60, which plays a central role in the present proceedings, merits being cited in full:

'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

10 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.'

7. The Agency is obliged under Article 61 to 'meet all orders unless prevented from so doing by legal or material obstacles'.

8. Article 64 provides in essence that '[the] Agency ... shall ... have the exclusive right to enter into agreements or contracts whose principal aim is the supply of ores, source materials or special fissile materials coming from outside the Community'. The first paragraph of Article 65 applies Article 60 to 'applications from users and to contracts between users and the Agency' relating to such supplies, while the second paragraph allows the Agency to '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'.

9. The first paragraph of Article 66 provides as follows:

'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.'

4 — The word 'to' before 'applications' is missing in the English version of the Treaty issued by the Office of Official Publications, *European Union — Selected instruments taken from the Treaties*, Book I, Volume II, Luxembourg, 1995, ISBN 92-824-1180-X, page 357.

The right to import nuclear materials is granted for a period of one year, though this may be extended; such importations are under the direct supervision of the Commission.

10. Section 4 of Chapter VI concerns prices. Article 67 provides that 'prices shall be determined as a result of balancing supply against demand as provided in Article 60', while Articles 68 and 69 allow, respectively, the Commission, in specified circumstances, and the Council, on a proposal of the Commission, to fix prices. Article 68 also prohibits '[pricing] practices designed to secure a privileged position for certain users'.

11. The rules determining the manner in which demand is to be balanced against the supply of nuclear materials, referred to in the sixth paragraph of Article 60 of the Treaty, were adopted by the Agency on 5 May 1960 and approved on the same day by the Commission.⁵ Certain amendments to these rules were adopted on 16 July 1975;⁶ Article 5*bis* of the amended rules allows users of nuclear materials 'to invite tenders directly from the producers of their choice and to negotiate the supply contract freely with the latter', though reserving to the Agency a right to conclude, or refuse to conclude, each contract negotiated.

II — Factual and procedural background

12. The Empresa Nacional de Urânio SA (hereinafter 'ENU') is a small-scale uranium producer in Portugal; as there are no industrial nuclear reactors in this Member State, it is obliged to export its entire production. On two occasions in 1987 and 1988, ENU requested the Agency to exercise its right of option under Article 57 of the Treaty in respect of stocks of 350 tonnes of uranium concentrate it had accumulated.

13. The events leading up to the first legal proceedings by ENU against the Commission are described thus in paragraphs 6 to 9 of the judgment under appeal:⁷

'6. ... At [a] meeting, held on 24 October 1989, the Agency proposed finding a pragmatic solution [to the problem of the disposal of ENU's uranium stocks], 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.

5 — OJ, Special English Edition 1959-1962, pp. 46 and 45 respectively.

6 — OJ 1975 L 193, p. 37.

7 — Joined Cases T-458/93 and T-523/93 *ENU v Commission* [1995] ECR II-2459.

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).

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);

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:

- 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;

(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

- 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 satisfied by a firm of accountants and reviewed every three years),
- once the market price was higher than the producer's cost 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.⁸

14. On 2 May 1990, the Agency informed ENU that the users were not prepared to adopt the outline solution it had proposed. Following 'various talks and a voluminous exchange of letters with the Agency and the Commission', ENU wrote to the Commission on 21 December 1990,⁸ 'in accordance with the second paragraph of Article 53 and Article 148 of the EAEC Treaty', requesting that it:

- '(a) ... 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, etc.;
- (b) ... immediately undertake an investigation and thereafter take action accordingly — to determine how it was possible that, without any check by [the Commission] under Article 66 of the Treaty, the Community users freely obtain supplies of uranium on foreign markets, despite the availability at a

⁸ — The version of the text quoted is that published in section I(3) of the contested Decision, OJ 1993 L 197, p. 54; only the Portuguese version is authentic.

reasonable price of the entire output of the ENU ... and ... either directly or through the Agency, warn the offending undertakings that it will take action against them if they effect further imports whilst the ENU output remains on sale;

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

(d) ... require compliance with the Commission's decision, which was not complied with by the Supply Agency, and to direct that the Agency urgently adopt a "special course of action" so as to achieve an immediate resolution of the problem regarding the disposal of the ENU's uranium and to support it in that regard;

(e) ... therefore direct the Agency to implement the Decision which it addressed to it, by finding a satisfactory solution to the problem of the ENU, without prejudice to the application of the provisions of the Treaty, in a manner which will make it possible to lessen the effects of any future difficulties.'

15. In the absence of any reply from the Commission, ENU initiated proceedings under Article 148 of the Treaty on 3 April 1991 for a declaration that the Commission had failed to adopt and address to it the decision it had requested pursuant to Article 53 of the Treaty.⁹ In paragraph 29 of its judgment of 16 February 1993, the Court noted *in limine* that '[it] is ... necessary to determine whether, as the applicant claims, it referred to the Commission by that letter an implied act of the Agency'. The judgment continues:

'30. The Court finds, first, that the applicant requested the Agency to exercise its right of option on the applicant's uranium production, pursuant to Article 57 of the Treaty and that, although the Agency had announced its intention to seek a favourable solution to the applicant's problem, the Agency's attitude over several years amounted to an implied rejection of that request.

31. Second, it must be held that it was in reply to that same request, which was also addressed to the Commission, that the latter informed the applicant, by letter of 8 December 1989, that it shared the view that the Agency's supply policy should include "special action" enabling cases such as that of ENU to be resolved and that it requested the Agency to move on to take concrete

9 — Case C-107/91 *ENU v Commission* [1993] ECR I-599.

steps to implement the proposals for action which the Agency had submitted to that effect.

32. It is against that background that the letter sent by the applicant to the Commission on 21 December 1990 must be treated, having regard to the second paragraph of Article 53 of the Treaty.

33. The various requests regarding the policy which the Agency ought to be pursuing and the request relating to the discussion of the amount of damages to be paid to the applicant do not come within the scope of the second paragraph of Article 53 of the Treaty.

34. On the other hand, in so far as the Commission is formally requested, "in accordance with the second paragraph of Article 53 ... of the EAEC Treaty", in particular to order the Agency to take "special action" enabling an immediate solution to be found for the problem encountered by ENU in disposing of its uranium, the letter at issue must be understood as referring to the Commission the implied act of the Agency refusing to exercise its right of option in respect of the applicant's uranium production.'

16. In the operative part of the judgment, the Court held that 'contrary to the second paragraph of Article 53 of the EAEC Treaty, the Commission [had] failed to take a decision on the request submitted to it by the applicant pursuant to that provision'.

17. In order to comply with the Court's judgment, the Commission adopted 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 (hereinafter 'the [contested] Decision').¹⁰ Under the heading 'Legal Assessment', the Decision rejects each of the five points in ENU's letter of 21 December 1990. The essence of the Commission's answers may be presented as follows:

- (a) '...[the rules of the Agency provide] a mechanism for balancing supply and demand. These rules take account of the prevailing conditions of supply and provide for the Agency to exercise its rights to conclude contracts and its right of option by signing contracts negotiated directly between users and producers. ... [the] proper functioning of the machinery established by Chapter VI of the EAEC Treaty is ensured by the above-mentioned rules of the Euratom Supply Agency';

¹⁰ — Cited in footnote 8 above.

(b) 'Article 5a of the rules of the Euratom Supply Agency of 5 May 1960 authorizes Community users to negotiate with the producers of their choice, both within the Community and outside, without the EAEC Treaty or the above-mentioned rules laying down a "Community preference". Article 66 of the EAEC Treaty does not apply in the present case . [...] No action should therefore be taken against Community users who obtain supplies from outside the Community ...';

(c) 'A claim for damages is the subject of an action for compensation ... which is pending' [before the Court of First Instance];

(d) and (e) '... The "special course of action" which, according to the letter of 8 December 1989 from the Member of the Commission responsible for the Supply Agency, should be included in the common supply policy for nuclear fuels[,] should form part of the framework of the EAEC Treaty and the applicable rules. As stated above, the applicable rules authorize Community users to negotiate with the producers of their choice. Neither the EAEC Treaty nor the secondary legislation provide for "Community preference", and the Agency is therefore not required to order Community users to obtain supplies from Community producers before they can conclude supply contracts with non-Community suppliers.

Against this background, the "special course of action" can only consist of serious and sustained efforts on the part of the Supply Agency to encourage Community users to obtain supplies from the ENU. The Agency has undeniably been doing this since 1987.'

18. The operative part of the Decision states in Article 1 that '[the] requests submitted by the Empresa Nacional de Urânio in its letter of 21 December 1990 are rejected', while Article 2 indicates the addressee of the Decision.

19. By application lodged at the Registry of the Court of First Instance on 27 September 1993, ENU sought the annulment of Commission Decision 93/428/Euratom (Case T-523/93). This was joined to proceedings ENU had previously initiated against the Commission for compensation for damage in accordance with the second paragraph of Article 188 of the Treaty (Case T-458/93).

20. The Court of First Instance gave judgment in the two cases on 15 September 1995.¹¹ For the purposes of the present appeal, its conclusions on the annulment of the Decision as regards 'the lawfulness of the Commission's refusal to accede to ENU's

11 — Cited in footnote 7 above.

request ... for guaranteed disposal of its uranium production' ¹² were as follows:

'61. The Treaty does not ... 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

¹² — Paragraph 54 of the judgment.

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.

origin (see paragraphs 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 ... 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.

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

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.

preventing an order from being met in application of the first paragraph of Article 61 of the Treaty, apply Community preference [as] 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.

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

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.

... (omissis)

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.'

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 (...). 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".'

21. The Court of First Instance also rejected ENU's request that the Decision should be annulled in so far as it rejects the request for the implementation of the 'special course of action'. The Court's principal conclusions in this regard were as follows:

22. In the light of these conclusions, the Court rejected the claim for compensation for damage in the following terms:

'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 than 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

'... 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.' ¹³

13 — Paragraph 91 of the judgment.

III — Opinion

of ENU's uranium production, or obliged the Agency and/or the Commission to guarantee the disposal of this production.

(a) — *The appeal against rejection of the annulment action*

(i) Commission refusal to order the Agency to 'restore the mechanism of Chapter VI of the Treaty'

23. In its appeal, ENU contends that the Court of First Instance has failed to distinguish between the different objects of its two actions against the Commission; it argues that, as a result, the Court of First Instance rejected the annulment action on grounds which are relevant only with respect to its action in damages. ENU states that the object of the former action is the annulment of the Decision of the Commission to reject its request that the Commission order the Agency 'to restore the proper functioning of the machinery of ... Chapter VI' of the Treaty, and to 'direct the Agency to take a "special course of action" affording an immediate solution to the problem of the disposal of uranium by ENU'. In its view, as an economic operator in the common market in nuclear materials, it was entitled to request that the Agency and the Commission ensure that the Treaty rules are applied. It was therefore unnecessary, in its view, for the Court of First Instance to examine either whether the Treaty guaranteed the disposal

24. ENU then identifies those matters it considers the Court of First Instance should have examined and explains how Chapter VI of the Treaty has not been applied by Community producers (excepting ENU) and users, the Member States, the Agency and the Commission. Furthermore, it contends, as it had done before the Court of First Instance, that the Agency Rules of 1960, as amended in 1975, fail to respect Chapter VI of the Treaty, and that the Commission's refusal to require the Agency to apply the 'special course of action' breached ENU's legitimate expectations and good faith, as well as the obligation incumbent on both the Commission and the Agency to ensure wide commercial outlets for the Community's uranium production.

25. The approach of the Court of First Instance to which ENU takes exception is set out in paragraph 20 of the judgment as follows:

"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 [ENU's] 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 ...'

26. The Court of First Instance therefore proceeded on the assumption that all of the requests contained in ENU's letter of 21 December 1990 had been properly submitted on the basis of the second paragraph of Article 53 of the Treaty, and that the single decision rejecting them should be treated, in effect, as a series of discrete decisions, regrouped for the purposes of deciding the annulment proceedings before the Court. It appears from the text of the contested Decision that each of the requests was examined separately in a section headed 'Legal Assessment', prefaced by the observation that 'the Commission is required to take the necessary measures to comply with the judgment of the Court' in accordance with Article 149 of the Treaty. While the operative part of the contested Decision rejected the requests without distinguishing between them, it does not necessarily follow in my

view that the Commission's rejection of each of the requests should be treated as if they comprised several separate decisions, each of which is amenable to judicial review in annulment proceedings. Some aspects of the Decision may relate to matters properly submitted to the Commission under the second paragraph of Article 53, and some may not.

27. Prior to any consideration of this preliminary question as to the scope of the contested Decision, however, it is necessary for me to examine the jurisdiction of this Court to raise on appeal the partial inadmissibility of the original application which had not been raised before the Court of First Instance; the question arises here as regards ENU's request that the Commission order the Agency to 'restore the functioning of Chapter VI'. In accordance with Article 52 of the EAEC Statute of the Court, an appeal will only lie 'on the grounds of lack of competence of the Court of First Instance, a breach of procedure before it which adversely affects the interests of the appellant as well as the infringement of Community law by the Court of First Instance', while Article 113(2) of the Court's Rules of Procedure provides that '[the] subject-matter of the proceedings before the Court of First Instance may not be changed in the appeal'. In its judgment in *Brazzelli Lualdi and Others*, the Court held that '[to] allow a party to put forward for the first time before the Court of Justice a plea in law which it has not raised before the Court of First Instance would be to allow it to bring to the Court, whose jurisdiction in appeals is limited, a case of wider ambit than that which came

before the Court of First Instance. In an appeal the Court's jurisdiction is thus confined to review of the findings of law on the pleas argued before the Court of First Instance'.¹⁴

28. An exception to the general principle thus laid down in *Brazzelli Lualdi* should in my view be allowed where the jurisdiction of the Court is at issue; as noted above, lack of competence of the Court of First Instance is the first ground on which an appeal may lie to this Court. While the Commission is disbarred by Article 113(2) of the Court's Rules of Procedure from questioning on appeal the admissibility of this ground of the original application in the present proceeding, this rule does not affect the competence of the Court to raise such an issue of its own motion in accordance with Article 92(2) of its Rules of Procedure.

29. In *Amylum*, the Court examined a submission that the Council had no competence to adopt the regulation in question, notwithstanding the fact that this submission was out of time: 'since the submission relates to the powers of the author of the contested measure, the Court considers that it should state the reasons why the Council was competent' to adopt it.¹⁵ In the present case the 'contested measure' is the judgment of the Court of First Instance. In my Opinion in *Commission v France*, I expressed the view

that 'matters going to the jurisdiction of the Court are matters of public policy, and *must* be so raised'.¹⁶ It seems to me that the same principle applies to the question of the Court's jurisdiction on appeal; the fact that the Court of First Instance decided an issue, *in casu* the validity of the Commission's refusal to direct the Agency to 'restore the proper functioning of the machinery established by the Treaty under Chapter VI' which should have been rejected as inadmissible, cannot have the effect of bestowing jurisdiction on this Court to decide that issue on appeal. Thus in *Rendo and Others v Commission*, the Court raised of its own motion the objection that the appellant no longer had any interest in bringing or maintaining the appeal, in that a subsequent event might have removed the prejudicial effect of the original judgment as regards the appellant.¹⁷ It is true that no issue of the admissibility of the grounds relied upon before the Court of First Instance was raised in *Rendo*; however, this case does illustrate that this Court can, and should, examine of its own motion questions concerning its own jurisdiction on appeal.

30. In the context of annulment proceedings, the Court has long held that 'a decision by the Commission which amounts to a rejection must be appraised in the light of the nature of the request to which it consti-

14 — Case C-136/92 P *Commission v Brazzelli Lualdi and Others* [1994] ECR I-1981, paragraph 59 of the judgment.

15 — Case 108/81 *Amylum v Council* [1982] ECR 3107, paragraph 28 of the judgment.

16 — Case C-334/94 [1996] ECR I-1307, paragraph 12 of the Opinion, and the case-law referred to in footnote 15.

17 — Case C-19/93 P [1995] ECR I-3319, paragraph 13 of the judgment.

tuted a reply'.¹⁸ The first paragraph of Article 53 of the Treaty describes the broad extent of the supervisory powers of the Commission over the activities of the Agency. The second paragraph of this article is more limited; it allows economic operators in the nuclear materials market to refer to the Commission a certain category of acts of the Agency, those performed 'in the exercise of its right of option or of its exclusive right to conclude supply contracts'. It follows that only the exercise of these rights by the Agency, or the refusal to exercise them, properly come within the scope of this provision. Where the Commission upholds the complaint of the operator, it will address an appropriate directive to the Agency pursuant to the first paragraph of this article; where it rejects the complaint, the Commission will address a decision to this effect to the operator. Such a negative decision could, at the material time, be challenged before the Court in accordance with the conditions laid down in the second paragraph of Article 146 of the Treaty, which was identical to the second paragraph of Article 173 of the EEC Treaty.¹⁹

31. The Commission, in its decision on such a refusal, might take a position both as regards the legality of the Agency's exercise of the right of option and the right to conclude supply contracts, and on more general policy matters. In rejecting a complaint submitted under the second paragraph of Article 53, the decision of the Commission may thus contain elements, which, in prin-

ciple, do not affect the legal situation of the complainant. A Commission decision under this provision may not, in my view, be challenged on grounds based on such elements in annulment proceedings under the Treaty; to hold otherwise would in effect grant economic operators a wider right of judicial review than that which is provided by Article 146 of the Treaty.

32. This is the approach which, in my view, informed the Opinion of the Advocate General and the judgment of the Court of Justice in Case C-107/91 between the same parties. That case had arisen because the Commission had not given any decision on the very letter of 21 December 1990 which is at issue in the present case. Having defined the subject-matter of those proceedings in the same terms as have been relied upon by ENU in the present appeal, to wit, the Commission's failure to order the Agency to comply with Chapter VI of the Treaty and to implement the 'special course of action', Advocate General Gulmann took the view that:

'it follows from the wording of [the second paragraph of Article 53] that parties concerned may refer to the Commission only specific acts of the Agency, and only those

18 — Joined Cases C-15/91 and C-108/91 *Buckl and Others v Commission* [1992] ECR I-6061, paragraph 22 of the judgment; see also Case 42/71 *Nordgetreide v Commission* [1972] ECR 105, paragraph 5.

19 — The relevant provisions are now the fourth paragraph of Article 146 of the Treaty and the fourth paragraph of Article 173 of the EC Treaty.

specific acts which relate to the right of option or the exclusive right to conclude contracts conferred by the Treaty.

...

The Agency's overall supply policy is not, in my view, a specific act capable of being referred to the Commission under the second paragraph of Article 53. It is perfectly clear that ENU wishes the Agency to amend its supply policy in such a way that it will at some point exercise its right of option to purchase ENU's uranium; however, ENU precisely does not submit that the Agency breached a specific duty to exercise its right of option.²⁰

33. The Court was similarly at pains to identify the parameters of the request which could properly be made by ENU in accordance with the second paragraph of Article 53. In examining the Commission's contention that ENU lacked *locus standi* under Article 148 of the Treaty, the Court found that 'the decision requested by ENU was meant to provide a solution for the specific problem which it had submitted to the Agency and the Commission ... even if it had been addressed to the Agency, [the Commission decision], *would have been of direct and*

individual concern to the applicant'.²¹ The Court also held that it was only 'in so far as the Commission is formally requested ... in particular to order the Agency to take "special action" enabling an immediate solution to be found for the problem encountered by ENU in disposing of its uranium' that the request came within the scope of the second paragraph of Article 53 of the Treaty.²² It followed that ENU's complaint concerning the Commission's failure to act was admissible only as regards 'the implied act of the Agency refusing to exercise its right of option in respect of the applicant's uranium production'.²³

34. On the other hand, the 'various requests regarding the policy which the Agency ought to be pursuing', including that relating to the application of Chapter VI of the Treaty, 'and the request relating to ... the amount of damages' were expressly held 'not [to] come within the scope of the second paragraph of Article 53'.²⁴ While not determinative, it is worthy of note that paragraph 38 and the operative part of the judgment in the languages in which the judgment is available²⁵ refer to the Commission's failure to take a decision on a single *request*, though ENU's letter of 21 December 1990 indubitably contained a number of different requests.

21 — Paragraphs 16 and 17 of the judgment, emphasis added.

22 — Paragraph 34 of the judgment.

23 — Loc. cit.

24 — Paragraph 33 of the judgment.

25 — With the exception of the Greek version, which uses the word 'αποφασισμός' in paragraph 38 and 'αποφασίζω' in the operative part.

20 — Case C-107/91, paragraph 12 of the Opinion.

35. In so holding, the Court implicitly rejected the contention made by ENU in the framework of the present appeal, that its capacity as an economic operator in the nuclear market gives it sufficient standing to challenge the alleged non-application by the Agency and the Commission of Chapter VI, regardless of whether the Commission's rejection of its request on these matters affected its legal situation. Underlying the Court's refusal to interpret the second paragraph of Article 53 of the Treaty more widely is the familiar notion that 'only measures producing binding legal effects of such a kind as to affect the applicant's interests by clearly altering his legal position constitute acts or decisions open to challenge by an application for annulment'.²⁶

36. The contested decision in the present case expressly cites the second paragraph of Article 53 of the Treaty as its legal basis, and the Commission could, in order to comply with the Court's judgment in Case C-107/91, only have responded to that part of ENU's letter of 21 December 1990 which concerned the Agency's refusal to exercise its right of option in respect of ENU's uranium production. That the Commission chose to respond to each of ENU's requests is perhaps understandable in the circumstances, given the breadth of the arguments raised and the expressed willingness of both the Commission and the Agency to provide ENU with some assistance in disposing of its unsold uranium concentrates. It is for this

reason that Article 1 of the operative part of the contested decision, unlike the judgment of the Court in Case C-107/91, refers to a plurality of requests rather than a single request.²⁷

37. Notwithstanding the wording of Article 1 of the operative part of the Decision, I am of the view that the 'Legal Assessment' of the contested Decision should be treated as a statement of reasons, not all of which is an integral and reviewable part of the decision taken by the Commission under the second paragraph of Article 53 of the Treaty. I agree in this regard with the conclusion drawn from *IBM v Commission* by the Court of First Instance in *Nederlandse Bankiersvereniging*, to the effect that 'whatever the grounds on which ... an act is based, only its operative part is capable of producing legal effects and, as a consequence, of adversely affecting [the] interests [of the applicant] ...'. The legality [of the statement of reasons] might be open to review by the Community judicature only to the extent to which, as grounds of an act adversely affecting a person's interests, they constituted the necessary support for its operative part'.²⁸

38. In the light of the foregoing, I take the view that the operative part of the contested Decision should be interpreted as being restricted to the Commission's refusal to

²⁶ — Case C-50/90 *Sunzest v Commission* [1991] ECR I-2917, paragraph 12 of the order, citing Case 60/81 *IBM v Commission* [1981] ECR 2639.

²⁷ — The operative part of the Portuguese text of the Decision uses the words 'os pedidos'.

²⁸ — Case T-138/89 *NBV and NVB v Commission* [1992] ECR II-2181, paragraph 31 of the judgment.

order the Agency to implement the 'special course of action', for the reason given by the Court in Case C-107/91, namely its connection with the exercise by the Agency of its right of option. ENU's plea regarding the Commission's refusal to direct the Agency to implement the 'special course of action' is examined below (see (ii)).

39. I therefore recommend that the Court reject as inadmissible that part of the appeal which relates to the dismissal by the Court of First Instance of ENU's action for the annulment of the contested Decision as regards the Commission's refusal to order the Agency to apply Chapter VI of the Treaty, including the alleged illegality of the Agency rules. Although my recommendation is based on a different ground from that upon which the Court of First Instance based its decision,²⁹ the interpretation of the scope of the second paragraph of Article 53 of the Treaty adopted by this Court in Case C-107/91 was clear and clearly relevant to the present case and should, in my view, be followed.

40. Should the Court decide not to follow this recommendation, it may be useful to examine the merits of ENU's appeal on the Commission's rejection of its request concerning Chapter VI of the Treaty. The bulk of its pleadings in this regard seek to prove

that the rules laid down in Chapter VI are not being respected, and that the 1960 rules of the Agency, as amended in 1975, are incompatible with the Treaty. In concluding its arguments in this regard, ENU identifies as 'a fundamental point for the resolution of the dispute' the alleged systematic breach of Article 66 of the Treaty. According to this view, it is not the fact that producers and users enter into contracts directly which adversely affects ENU's interests, as this would not prevent it from selling its production on the Community market, in which only 25% of the demand is met by uranium produced in the Community. It is instead the fact that nuclear materials are imported freely from outside the Community, in supposed breach of Article 66, which adversely affects ENU's interests by preventing the disposal of its production. This approach was confirmed at the oral hearing, where ENU's agent accepted that it was only if Article 60 were applied in combination with Article 66 and a consequential effective prohibition on importing uranium, where Community production is available, that ENU would achieve the disposal of its production.

41. ENU argues that Article 60 is only applicable to *orders* by Community users in respect of nuclear materials coming from outside the Community, but not to *supplies* of such materials. In its view, Article 60 only applies to offers and orders from Community producers and users, and it is only these offers and orders which are balanced in accordance with this provision. Article 60 obviously could not apply to offers from third country producers in the framework of Chapter VI, which is only binding on Com-

²⁹ — See, in this regard, Case C-480/93 P *Zunis Holding and Others v Commission* [1996] ECR I-1, paragraph 15 of the judgment.

munity operators. Where Community production is insufficient to meet the demand from Community users, and after a *pro rata* distribution of the available (Community) production, the Agency may, and indeed, pursuant to Article 61, must, resort to the importation of nuclear materials in accordance with Article 64, but these imported materials would not be in competition with Community production. Article 65 should therefore be interpreted as applying to imported uranium only those provisions of Article 60 which concern orders from users and the supply of materials, to wit, the first, fourth and fifth paragraphs. The remaining paragraphs, which regulate the offers of Community producers and the balancing of offers and requests, could not be applied to nuclear materials originating outside the Community.

42. It follows, under this view, that while Article 60 does not distinguish between orders by users for Community and imported production, it does distinguish between offers of Community and imported production, as only Community production could be taken into account in the balancing exercise. It further follows that Article 66 establishes a prohibition on the direct importation by users of nuclear materials originating outside the Community, other than in the exceptional circumstances in which such importation may be authorized for a limited period by the Commission. It has not been

argued in the present appeal that the Agency must exercise its right of option in all circumstances, but only in a situation of a deficit in Community production compared to consumption (which undoubtedly does exist).

43. I agree with the statement that this point is fundamental; indeed, it is clear both from ENU's pleadings in the present appeal and the contested judgment that its entire case depends upon the existence of the alleged Community preference, and the consequent prohibition on the importation of non-Community uranium whenever Community supplies are available at a price which is not 'excessively high'.

44. I do not find ENU's line of argument convincing. In the first place, while it is obvious beyond peradventure that third country producers cannot be *obliged* to offer all of their production to the Agency as Community producers are, it does not follow that Article 60 does not apply to offers of nuclear material which such producers may wish to make to Community users. In principle, Article 65 applies *all* of Article 60, and not merely selected paragraphs which happen to suit ENU's thesis, to applications from users for supplies from outside the Community and to contracts between users and the Agency relating to such supplies. The right of option and exclusive right to contract in respect of Community production, and the exclusive right to conclude con-

tracts for the importation of nuclear materials, are merely means to achieve the same end, viz. to enable the Agency to supervise *all* the production of nuclear materials in the Community, and the use of *all* nuclear materials for civil purposes within the Community territory, whether indigenous or imported. ENU has not put forward any reason why any provision of Article 60 which can apply to users' applications and the relevant contracts should not apply; furthermore, the reference to 'contracts' in the first paragraph of Article 65 would in effect be superfluous if Article 60 did not mean that Community demand was to be balanced with imported supplies.

45. I agree in this regard with the analysis of Advocate General Roemer in *Commission v France* that 'the system of Article 60 ... mainly regulates the balancing of supply against demand for ores, source materials, etc. by the Supply Agency'.³⁰ If this is so, then Article 65 would lose much of its useful effect if it were interpreted as requiring the Agency to balance all of the demand from Community users with only part of the supply to which they can have access through the Agency. Furthermore, the fact that Article 60 obliges users to specify the 'place of origin' in the requirements they communicate to the Agency, in turn allows the

Agency to exercise the power it enjoys by virtue of the second paragraph of Article 65 to determine the geographical origin of supplies; the circumstances leading to the proceedings in *Kernkraftwerke Lippe-Ems* demonstrate that the Agency considers this a necessary element in the management of the Community's supply policy.³¹

46. I might add that ENU's selective application of Article 60 to imported supplies would, even on a literal reading of the provisions in question, lead to certain anomalies. Thus the fourth paragraph of Article 60, which, according to ENU, applies to imported supplies, would require the Agency to make known the terms on which it can meet the orders it has received; as ENU would exclude the third paragraph, however, the Agency would not have received any orders for imported materials. Moreover, under ENU's interpretation, potential users would not have been informed of 'the offers and the volume of applications' the Agency has received in respect of imported supplies, which seems to me to be essential in order to ensure respect for the principle of equal access.

47. ENU further argues on the basis of Article 66 that Community users can only reject Community production, thereby justifying the Agency's importing supplies from

30 — Case 7/71 [1971] ECR 1003, paragraph 4 of the Opinion, page 1031.

31 — Joined Cases T-149/94 and T-181/94 *Kernkraftwerke Lippe-Ems v Commission*, pending.

outside the Community, where the price at which Community production is offered is 'excessively high'. However, it appears that Article 66 is only concerned with the situation where the Agency, even after having had recourse if need be to the importation of nuclear materials under Article 64, is unable to supply the materials the particular users require; this provision is therefore in no way relevant to the distribution of supplies according to Article 60. In any case, ENU has not demonstrated that the Agency has in fact permitted any Community user 'to conclude directly contracts relating to supplies from outside the Community' without any intervention of the Agency, in breach of Articles 64 and 66.

expressly granted to the Agency under the first paragraph of Article 72 to use either Community or imported materials 'to build up the necessary commercial stocks to facilitate supplies to or normal deliveries by the Community'.

49. I might add that the French Government had complained, in its rejoinder in *Commission v France*,³² that the Agency had not adopted a Community preference to protect Community producers on the basis of equal prices with external suppliers in a situation of market surplus, and had allowed users to purchase third-country nuclear materials rather than the available French supplies. In its judgment the Court did not expressly comment on this argument, merely noting the Agency's contribution to the attainment of the objectives of the Treaty.³³

48. No trace of the preference for Community production of nuclear materials over imported materials upon which ENU relies so heavily is to be found in the other relevant Treaty provisions. Thus, for example, Article 67, which is not in section 2 of Title II and hence presumptively applies to both Community and imported materials, establishes that 'prices shall be determined as a result of balancing supply against demand as provided in Article 60'. There is no evidence that the Treaty intended a two-tier price structure such as would arise if Community production were automatically to be given preference as ENU has maintained and which would in effect lead to the subsidization, directly or indirectly, of ENU's production. Community preference would also be inconsistent in principle with the facility

50. It is also difficult to avoid the impression that, given the state of the market in nuclear materials in 1957, if the Treaty authors had intended to discriminate against non-Community production, as ENU has argued, they would have included specific provisions to this effect. The nuclear industry was in its infancy in the Member States,

32 — Case 7/71 *Commission v France*, cited in footnote 30 above, page 1014.

33 — *Ibid.*, paragraph 41 of the judgment.

with the possible exception of France, and the extent of available supplies of ores and source materials within the Community territory was largely unknown. It is, in my view, highly unlikely that the Treaty was intended to establish the preference for Community production that ENU has sought to rely on; indeed, its application to enriched uranium would have been somewhat presumptuous or premature, given that the Community was entirely dependent at the time on supplies from the United States.³⁴ As late as 1984, one commentator was able to affirm without qualification that 'France is the only significant producer within the Community of uranium ore and even she cannot meet more than a fraction of her requirements from her mines'.³⁵ I do not consider it plausible that the Member States would have agreed in 1957 to set up a supply system which favoured those in a single Member State who produced the basic material without which the Community could not function.

51. ENU has also sought to rely on Community preference as a general principle of Community law, supposedly established by the Court in *Beus*.³⁶ In the first place, the Treaty does not contain any provision estab-

lishing this as a principle in favour of Community uranium production, equivalent to Article 44(2) of the EC Treaty for agricultural production. Secondly, this principle is normally given effect by charges on imports and export subsidies which seek to compensate for the difference between Community prices and those on the world market;³⁷ rather than favouring Community production by imposing compensatory charges on imported supplies, the common customs tariff for nuclear products which came into effect on 1 January 1959 set the duty on fertile and fissionable materials and radioactive isotopes at nil.³⁸

52. It should also be remembered that nuclear materials are highly sensitive products, of strategic importance to the economy, and in some cases the defence arrangements, of the Member States, whose production cannot readily be compared with that of other products, such as agricultural or industrial products. They are the raw materials for the entire nuclear cycle and the various forms of activity associated with it: conversion, enrichment, fuel fabrication and reprocessing. I do not consider that the Treaty can be interpreted as imposing a competitive disadvantage in all these fields on the Commu-

34 — See Case 7/71 *Commission v France*, cited in footnote 30 above, paragraphs 39 to 43 of the judgment.

35 — Cusack 'External Relations of the European Atomic Energy Community in the Fields of Supply and Safeguards; Background and Developments in 1982 and 1983' 3 *Yearbook of European Law* (1984) p. 347, at p. 349. France is reported to have produced almost three times as much natural uranium in 1995 as the remaining Member States put together (Commission, *Draft Illustrative Nuclear Programme*, 31 July 1996, Annex 1.2 (not yet published)).

36 — Case 5/67 *Beus v Hauptzollamt München* [1968] ECR 83.

37 — See, for example, Case 58/86 *Coopérative Agricole d'Approvisionnement des Avirons v Receveur des Domaines* [1987] ECR 1525, paragraph 9 of the judgment.

38 — Euratom, *Third General Report on the activity of the Community*, Office of Official Publications, Luxembourg, 1960, p. 59.

nity nuclear industry, because of the higher prices which could be demanded, under ENU's view, by Community producers.

53. At one point, ENU admits that the Agency can import in order to meet orders, but argues that, as a true European public service with general responsibility for the normal operation of the common market, it should not resort to needless importation when Community production is available. In its view, this would run counter to its duty to ensure wide outlets, in accordance with Article 2(g) of the Treaty. Even if uranium concentrates could be considered 'specialized materials' for which the Community should seek to ensure wide commercial outlets, this obligation can only be carried out 'as provided for in this Treaty', and there is in my view no provision which would require a Community preference. Furthermore, the imposition of a restriction on the importation of the basic materials would render the production of the other specialized materials less competitive, and hence run counter to the objective of ensuring wide commercial outlets for these materials. Finally, I do not see how this general objective, which is concerned with the establishment within the Community of a common market in nuclear materials (Chapter IX), rather than supply policy from both within and outside the Community (Chapter VI), could be interpreted as modifying the duties which arise for the Agency under the specific provisions of the latter Chapter.

54. ENU has argued that the Treaty would be profoundly unjust and unbalanced if it obliged Community producers to make their entire output available to Community users, without establishing a Community preference as a *quid pro quo*. The Community was set up with a view to encouraging first and foremost the production of 'nuclear energy [which] represents an essential resource for the development and invigoration of industry and will permit the advancement of the cause of peace' as noted in the first recital in the preamble; its objective is to promote the Community economy in general, and the Treaty restrictions on the disposal of nuclear materials produced in the Community reflect the strategic character of the product, rather than any intention to favour users over producers. Indeed, in a world market where uranium supplies exceed demand, this restriction is in fact of no particular benefit to users, while in the converse situation of a world market where demand exceeds supply, the disposal of Community production would in practice be guaranteed in any case.

55. ENU has also invoked the necessity to protect Community production *per se* as a Treaty objective. For the reasons given in paragraph 69 thereof, the judgment under appeal cannot, in my view, be impugned on this ground. It is also clear that the Community's duties in this regard are limited, and that a Member State is at most obliged to carry out prospecting and mining activities where 'the prospects for extraction appear *economically justified on a long-term basis*' (fourth paragraph of Article 70 of the Treaty,

emphasis added), on pain of being deemed to have waived its right of equal access. ENU has not demonstrated how the general interest of the Community is better served by extracting all the available uranium in the Community territory than by availing of the low-cost supplies on the world market.

56. It follows that the balancing of supply and demand provided for in Article 60 applies equally to Community and imported production, and there is no Community preference which would guarantee preferential disposal of Community production. It is therefore unnecessary to consider the question of whether the judgment of the Court of First Instance should be annulled because it upheld the Commission's refusal to order the Agency to 'restore the mechanism of Chapter VI' of the Treaty, as by ENU's own admission, such an order would only affect its legal situation if the Treaty imposed such a Community preference.

57. I therefore recommend that, should the Court decide to examine the merits of this ground, the appeal be rejected.

(ii) Commission refusal to order the Agency to adopt the 'special course of action'

58. ENU contests the finding of the Court of First Instance that the 'special course of action' was not binding on the Agency, and

argues that the Commission should therefore have ordered the Agency to implement it as ENU had requested. Noting that the Commissioner responsible had approved the plan, and that the Commission had given undertakings to both the Portuguese Government and the European Parliament to find a satisfactory solution to the problem of the disposal of ENU's uranium, ENU argues that the contested Decision violates Article 2(g) and Chapter VI of the Treaty and its legitimate expectations and good faith.

59. In seeking to establish the obligatory character of the Agency's implementation of the 'special course of action', ENU relies on Article 2(g) of the Treaty and the alleged Community preference for uranium produced in the Community. I have already examined the latter at some length above.³⁹ ENU does not, however, establish how a general obligation to create a common market in specialized materials could impose a specific obligation on the Commission to order the Agency to implement a special course of action in its favour, or on the Agency to exercise its right of option in the circumstances of the present case. The terms of the Commissioner's letter of 8 December 1989, supporting the view that the Agency's supply policy should include 'uma vertente especial' for the solution of cases such as ENU's, which seems to me in the circumstances to be no more than 'special consideration' for Portuguese uranium, could not in my opinion be interpreted as constituting a directive to the Agency to exercise its right of option. Indeed, in its judgment in Case

39 — Paragraphs 44 to 56 of the present Opinion.

C-107/91, this Court expressly recognized that the Commissioner's letter of 8 December 1989 did not constitute 'a definitive position on the applicant's request'.⁴⁰ Furthermore, the Court of First Instance has found as a fact, which this Court will not review on appeal, that ENU itself recognized that the Agency's proposal 'did not require Community users ... to adopt the action it envisaged'.⁴¹

60. Nor are ENU's arguments in relation to its legitimate expectations and its good faith any more substantial. While it is true that the principle of legitimate expectations has been recognized as 'form[ing] part of the Community legal order with the result that any failure to comply with it is an "infringement of this Treaty or of any rule of law relating to its application"',⁴² there is no evidence before the Court that ENU had ever been led to believe the plan was binding. Furthermore, ENU has not shown how the refusal of the Commission to require the Agency to implement the plan could impugn its good faith, in so far as it might be considered relevant in the present proceedings.⁴³

61. ENU has not produced any argument capable of disturbing the conclusions of the Court of First Instance regarding the essentially non-binding and political character of the 'special course of action'. I fully agree with that court's analysis as expressed at paragraph 82 of its judgment, and therefore recommend that this ground of the appeal be rejected as unfounded.

(b) — Appeal against the rejection of the action in damages

62. The Commission has challenged the admissibility of ENU's action in damages on two grounds. In the first place, it contends that the action is an abuse of procedure, in that the annulment action, if successful, would constitute an adequate means of redress for ENU, whose principal interest in the proceedings is the disposal of its uranium. It further contends that, as the Agency has legal personality, the action should have been directed against it rather than the Commission, in so far as any alleged damage could be attributed to the Agency, and that the action should therefore be declared inadmissible. The Court of First Instance dismissed the action in damages as unfounded, without discussing the question of admissibility.

63. If the Court were to follow my recommendation to reject ENU's appeal concerning the action on annulment, it would not be

⁴⁰ — Case C-107/91, cited in footnote 9 above.

⁴¹ — Paragraph 9 of the judgment under appeal.

⁴² — Case 112/77 *Töpfer v Commission* [1978] ECR 1019, paragraph 19 of the judgment.

⁴³ — For a recent application, see the Opinion of Advocate General Jacobs of 12 November 1996 in Case C-24/95 *Land Rheinland-Pfalz v Alcan Deutschland GmbH*, [1997] ECR I-1591, I-1594, paragraphs 23 and 33.

necessary to decide whether annulment would in fact constitute an adequate remedy. In any case, it is not possible in the present state of the file to determine this issue, given that ENU has not specified the extent of the damage it claims to have sustained as a result of the behaviour of the Agency and the Commission. The Commission's second ground of inadmissibility was only raised before the Court of First Instance in its rejoinder and would therefore, presumably, have been inadmissible in accordance with Article 48(2) of the Rules of Procedure of the Court of First Instance. I propose to follow the Court of First Instance in considering the merits of the claim in damages first.

64. In its appeal, ENU relies essentially on the existence of a duty on the Agency to exercise its right of option in the factual situ-

ation which gave rise to the dispute, which in turn depends on the existence of a Community preference which would benefit ENU's production.

65. I have already examined and rejected at paragraphs 44 to 57 of the present Opinion ENU's arguments based on the alleged existence of a Community preference for Community uranium production. In the absence of any illegal act or behaviour by the Agency or the Commission capable of affecting ENU's legal situation, I have no difficulty in agreeing with the conclusions of the Court of First Instance in this regard, as set out in paragraph 91 of the judgment under appeal. I therefore recommend that the appeal on the action in damages in Case T-458/93 be rejected as unfounded.

IV — Conclusion

66. In the light of the foregoing, I recommend to the Court that it:

- (1) reject the appeal against the judgment of the Court of First Instance in Case T-523/93 as inadmissible, as regards the appellant's request concerning the application of Chapter VI of the Treaty, and unfounded for the remainder;
- (2) reject the appeal against the judgment of the Court of First Instance in Case T-458/93 as unfounded; and
- (3) order the appellant to bear the costs.