OPINION OF ADVOCATE GENERAL LÉGER
delivered on 19 November 1998 *

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1. This appeal, which has been lodged by Kernkraftwerke Lippe-Ems GmbH ('KLE' or 'the appellant'), a company governed by German law, against the judgment of the Court of First Instance of 25 February 1997 in *Kernkraftwerke Lippe-Ems* v *Commission* [1] ('the judgment under appeal' or 'the judgment'), raises various questions concerning the system for supplying Community users with ores and nuclear fuels, as laid down by the Treaty setting up the European Atomic Energy Community ('the Treaty').

2. In particular, the Court is asked to give a ruling on the extent of the powers of the Euratom Supply Agency ('the Agency') where the supply contracts which it has the task of concluding relate to source materials from outside the Community.

I — Community legislation

3. According to the second paragraph of Article 1 of the Treaty, the task of the Community is 'to contribute to the raising of the standard of living in the Member States and to the development of relations with the other countries by creating the conditions necessary for the speedy establishment and growth of nuclear industries'.

4. Pursuant to Article 2(d) of the Treaty, the Community is to 'ensure that all users in the

1 — Joined Cases T-149/94 and T-181/94 [1997] ECR II-161.

Community receive a regular and equitable supply of ores and nuclear fuels'. The fulfilment of this obligation is the subject of Title II, Chapter 6 (Articles 52 to 76), which sets up a common system for the supply of ores, source materials and special fissile materials.

5. Article 52(1) of the Treaty provides that '[the] 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'. For this purpose, Article 52(2)(a) prohibits 'all practices designed to secure a privileged position for certain users'.

6. In order to implement the abovementioned policy, Article 52(2)(b) provides for the establishment of the Agency, which is to have legal personality and financial autonomy. [2]

7. 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.'

Exclusive right of the Agency to conclude supply contracts

8. To carry out its task in the matter of supply, the Agency has, in particular, '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'. [3]

9. Under Article 55 of the Treaty, the Member States are to communicate or cause to be communicated to the Agency all the information necessary to enable it to exercise its exclusive right to conclude supply contracts.

2 — Article 54.

3 — Article 52(2)(b) of the Treaty.

10. The supply of ores and source materials *from outside the Community* is governed mainly by Article 64 of the Treaty, which again states that the Agency, acting where appropriate within the framework of agreements concluded between the Community and a third State or an international organisation, 'shall, subject to the exceptions provided for in this Treaty, have the exclusive right to enter into agreements or contracts'.

Procedure for balancing demand against supply

11. The procedure for balancing demand against supply, which is laid down by Article 60 for supplies of materials from inside the Community, is applied by the first paragraph of Article 65 to supplies from outside the Community.

12. Article 60 provides as follows:

'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.'

13. The first paragraph of Article 61 of the Treaty, which appears in Section II relating to materials *from inside the Community*, states that 'the Agency shall meet all orders unless prevented from doing so by legal or material obstacles'.

14. The second paragraph of Article 65 provides that 'the Agency may 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'.

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. [4]

4 — OJ, Special Edition 1959-1962, p. 46, 'the Rules'.

16. The Rules lay down simplified procedures for balancing demand against the supply of ores.

17. Accordingly the first paragraph of Article 5 of the Rules 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 ...'

18. According to this 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 such 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 within eight days of receipt of the contracts.

19. This procedure does not apply to supply contracts relating to special fissile materials. [5]

20. Article 5 *bis* of the Rules, which was inserted by the Agency Regulation of 15 July 1975, [6] provides, in relation to ores and source materials, for a new simplified procedure which, while ensuring that the Agency has complete information on the market, [7] authorises users 'to invite tenders directly from the producers of their choice and to negotiate the supply contract freely with the latter'. [8]

21. However, Article 5 *bis* of the Rules, as amended, provides:

'(c) The supply contract shall include at least the following information:

1. designation of the contracting parties,

2. quantities of materials to be supplied,

3. annual calendar of delivery dates,

4. nature of the materials to be supplied,

5. country of origin of the materials to be supplied. If the supplier is unable to provide this information at the time of entering into the contract, he shall give the user and the Agency an undertaking that he will subsequently inform them in writing of the country of origin of each part delivery,

6. price and terms of payment,

7. duration of the contracts;

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

...

5 — Last paragraph of Article 5.
6 — OJ 1975 L 193, p. 37.
7 — Article 5 *bis* (b).
8 — Article 5 *bis* (a).

(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.'

Price

22. For supplies from inside or outside the Community, Article 67 of the Treaty provides that 'save where exceptions are provided for in this Treaty, prices shall be determined as a result of balancing supply against demand as provided in Article 60; the national regulations of the Member States shall not contravene such provisions'.

23. The first paragraph of Article 68 prohibits 'pricing practices designed to secure a privileged position for certain users, in violation of the principle of equal access ...'.

24. Under Article 69, 'the Council may fix prices, acting unanimously on a proposal from the Commission', while the Agency 'may propose to the users who have placed orders that prices be equalised'.

25. The Agreement between the European Economic Community and the European Atomic Energy Community, on the one hand, and the Union of Soviet Socialist Republics, on the other, on trade and commercial and economic cooperation, signed on 18 December 1989 and concluded on behalf of the European Atomic Energy Community by Commission Decision 90/117/Euratom of 27 February 1990, [9] applies to nuclear materials, which is clear from Article 2(1) of the Agreement. Article 14 provides that 'goods shall be traded between the Contracting Parties at market-related prices'.

26. Reference must also be made to the Council Resolution of 16 September 1986 concerning new Community energy policy objectives for 1995 and convergence of the policies of the Member States, [10] point 5 of which states that 'the energy policy of the Community must endeavour' to ensure:

9 — OJ 1990 L 68, p. 2, 'the Trade Agreement'.
10 — OJ 1986 C 241, p. 1.

'(a) more secure conditions of supply and reduced risks of sudden fluctuations in energy prices through:

— ...

— geographical diversification of the Community's external sources of supply'.

II — Facts and procedure

27. In its judgment, the Court of First Instance found as follows:

'1 The applicant [KLE] ... owns and operates a nuclear power station in Lower Saxony, Germany. It states that it follows a medium-term fuel supply policy and concludes supply contracts at regular intervals to cover its fuel requirements for up to five trading years.

2 In June 1993 it invited tenders for the supply of natural uranium in the form of uranium hexafluoride (UF_6). On 10 and 22 November 1993, it concluded a supply contract with the company which had made the most attractive offer, British Nuclear Fuels plc (hereinafter "BNFL"), established in the United Kingdom. Under that contract, 400 tonnes of natural uranium in the form of UF_6 were to be delivered by 31 March 1995 at the latest to an enrichment company established within the Community. The purchase price agreed was US $22 per kilogram, excluding VAT. The contract was silent as to the place of origin of the uranium to be supplied, but BNFL undertook to inform KLE and the Euratom Supply Agency ... of the country of origin on the occasion of each partial delivery at the latest. The contract stated that it was to take effect only with the agreement of the Agency.

3 Article 5 *bis* (d) of the Rules of the Supply Agency of 5 May 1960 ... provides that under a "simplified procedure" a supply contract is, for the purposes of its conclusion, to be submitted to the Agency for signature. Under Article 5 *bis* (f), the Agency then has ten working days within which to act, either by concluding or by refusing to conclude the contract.

4 On 29 November 1993 the Agency received for signature the contract proposed by KLE and BNFL.

5 By letter of 10 December 1993, received on 13 December 1993, the last day of the period for signature of ten working days, the Agency asked KLE and BNFL for information as to the origin of the uranium which was the subject of the contract. On 14 December 1993 BNFL informed the Agency that the uranium would come from the Commonwealth of Independent States (CIS), probably Russia.

6 By letter of 20 December 1993 the Agency informed the parties that its policy was to see to it that users in the [European Atomic Energy] Community (hereinafter "the Community") "[did] not become overdependent on any single source of supply beyond reasonable limits, and that the acquisition of nuclear materials from CIS Republics [took] place at fair prices related to those of the market (i. e. reflecting cost of production and compatible with prices of producers in market economy countries)". The Agency stated that its policy of diversification was aimed at confining the proportion of supplies from the CIS to 20 to 25% of individual Community users' needs. It considered that the contract submitted by KLE might make it too dependent on uranium from the CIS. It calculated that, taking into account total deliveries to KLE during the previous three years, KLE was entitled to acquire about 45 tonnes a year of natural uranium of CIS origin. KLE had, however, already contracted for quantities far exceeding the level of reasonable dependency for several years. Moreover, the proposed prices did not reflect normal production costs and were not comparable with prices charged in market economy countries. The Agency therefore considered that it was not appropriate to conclude the contract, but still asked the parties to submit their comments before it took a final decision.

7 On 29 December 1993 KLE referred the matter to the Commission under the second paragraph of Article 53 of the Treaty, alleging that the Agency had failed to act.

8 On 6 January 1994 it was notified of Decision No 1/94 of the Agency concerning the supply contract submitted on 29 November 1993. Pursuant to that decision, the Agency signed the contract of 10 and 22 November 1993 between KLE and BNFL with the addition of a condition that the natural uranium to be supplied could not come directly or indirectly from the CIS.

9 On 10 January 1994 the Commission informed KLE's representatives that in its opinion the Agency's decision communicated to KLE on 6 January had been taken within the time-limit laid down, so that the reference to the Commission was now devoid of purpose.

10 By letter of 20 January 1994 KLE made additional submissions in the procedure initiated on 29 December 1993, to take account of Decision No 1/94.

11 By another letter of the same date, it referred Decision No 1/94 to the Commission pursuant to the second paragraph of Article 53 of the Treaty.

12 With respect to the first procedure, concerning the Agency's alleged failure to act, the Commission adopted on 4 February 1994 Decision 94/95/Euratom relating to a procedure in application of the second paragraph of Article 53 of the Euratom Treaty (OJ 1994 L 48, p. 45). It rejected the requests made by KLE, which were based on the claim that the Agency had not taken a decision within the time-limit and asked the Commission in particular to instruct the Agency to conclude the contract of 10 and 22 November 1993. The Commission considered that the Agency had not failed to act, since it had been entitled to complete its documentation and the period of ten working days had therefore not started to run until the date when the additional information requested was received, namely 14 December 1993, and had not expired until 6 January 1994, the date on which Decision No 1/94 was actually taken.

13 With respect to the procedure concerning Decision No 1/94, the Commission adopted on 21 February 1994 Decision 94/285/Euratom relating to a procedure in application of the second paragraph of Article 53 of the Euratom Treaty (OJ 1995 L 122, p. 30). It considered that the Agency's decision was lawful on its merits and therefore rejected KLE's requests.

14 In those circumstances, KLE considered that the supply contract at issue could not be performed. BNFL and KLE did not proceed with it.

15 On 8 and 14 March 1994 KLE and BNFL concluded a new contract for the supply of 400 tonnes of uranium in the form of UF_6 at a price of US $27 per kilogram, subject to the condition that the uranium did not come directly or indirectly from the CIS. That contract was concluded by the Agency on 30 March 1994.'

28. Those were the circumstances in which KLE brought proceedings in Case T-149/94 and Case T-181/94 for annulment of Commission Decisions 94/95 and 94/285 respectively; in Case T-181/94, it also brought an order requiring the Community to pay the applicant damages of DM 3 511 279.30, with interest at 6% per annum from 7 April 1994.

III — The judgment under appeal

Case T-149/94

29. Before the Court of First Instance the appellant adduced five pleas in law, alleging infringement of Article 5 *bis* (f) of the Rules and of the provisions on supplies in Chapter 6 of the Treaty, breach of the principles of proportionality and legal certainty, breach of the rules on the division of powers, breach of the obligation to state reasons, and misuse of powers.

30. *The first and second pleas* question whether the Agency was entitled, first, to ask for supplementary information concerning, in this case, the origin of the source materials, and, second, not to take a final decision until it had completed its documentation, that is, until it had in its possession the minimum information required by Article 5 *bis* (c) of the Rules. The appellant argued that it was excessive to ask for supplementary information and that the delay in taking a decision exceeded the time needed to attain the object of completing the documentation. According to the appellant, the arbitrary delay in taking decisions concerning the conclusion of the contracts infringed the principle of legal certainty.

31. The Court of First Instance observed that it was clear from Article 5 *bis* (c) of the Rules that the geographical origin of the materials to be supplied was one of the principal elements of a supply contract which had to be communicated to the Agency under Article 5 *bis* of the Rules. The Court stated that it was essential for the Agency to know the geographical origin of the supplies in order to ensure reliability of supply, which was the aim of the supply policy pursued. [11]

32. The Court added that it was clear from Article 5 *bis* (c) of the Rules that communication of the country of origin was permissible at a later date only if the supplier was unable to provide that information at the time of entering into the contract. However, according to the Court, the appellant and its supplier had agreed, at least implicitly, that the source materials would come from the CIS. [12]

33. Therefore the Court concluded that, by not stating the origin of the uranium in the supply contract, even though it had been agreed between the parties at least implicitly, the appellant was itself the cause of the Agency's administrative difficulties in coming to a decision. In those circumstances, the Court found that the appellant was not entitled to rely on Article 5 *bis* (c) of the Rules, which provides for an expedited procedure in the form of a period of ten working days within

11 — Paragraph 35 of the judgment.
12 — Paragraphs 36 and 37.

which the Agency must act, for cases which present no problems.

34. On the other hand, the Court considered that, in this particular case, the Agency was entitled, before the expiry of the period provided for in Article 5 *bis* (f), to ask the parties to provide the missing documentation by informing it of the origin of the materials to be supplied.

35. The Court found that the time taken by the Agency to reach a decision was reasonable and did not infringe Article 5 *bis* (f) of the Rules or breach the principles of proportionality and legal certainty, so that the first and second pleas had to be dismissed as unfounded.

36. Finding that the appellant had not pursued *the third plea in law* — alleging breach of the rules on the division of powers — the Court took the view that it was unnecessary to rule on whether it was well-founded. [13]

37. The Court went on to dismiss *the fourth plea in law* — alleging that Decision 94/95 contained no reasoning — because, according to the Court, the decision clearly and unequivocally disclosed the reasoning followed. [14]

38. On *the fifth plea in law* — alleging misuse of powers by the Agency and the Commission which, according to the appellant, had no discretion, but were under an obligation to conclude the contract submitted by the appellant — the Court found that the appellant had adduced no evidence at all that the Agency and the Commission had pursued an aim other than that of implementing the supply policy. [15]

39. Consequently the Court dismissed the application in Case T-149/94.

Case T-181/94

The action for annulment

40. Before the Court of First Instance the appellant adduced five pleas in law for the

13 — Paragraphs 42 and 43.

14 — Paragraphs 48 to 50.

15 — Paragraphs 53 and 54.

annulment of Commission Decision 94/285, alleging infringement of Article 5 *bis* of the Rules and of the provisions on supplies in Chapter 6 of the Treaty, breach of the general principles of Community law, breach of the rules on the division of powers, breach of the obligation to state reasons, and misuse of powers.

41. *The first plea in law* consisted of four limbs.

42. The first and second limbs alleged respectively breach of the Agency's obligation to conclude the contract in accordance with Article 5 *bis* of the Rules and infringement — arising from the supply policy as defined and applied in the present case — of the first paragraph of Article 61, Article 60, the first paragraph of Article 65, and Articles 52(2) and 64 of the Treaty. Therefore the issue raised by the appellant was whether the operation of supply and demand could be set aside where the Agency exercised its exclusive right to conclude contracts for the supply of uranium.

43. The Court of First Instance examined the supply system established by Chapter 6 of the Treaty in the light of the aims of the Community and concluded that it was clear from the structure of the Treaty that the task of the Agency was to guarantee one of the essential aims assigned to the Community by Article 2(d) of the Treaty, namely reliability of supply, in accordance with the principle of equal access to sources of supply laid down in Article 52(1) of the Treaty. The Court considered that this was clear from Article 52(2)(b), which established that specialised body expressly for that purpose and conferred on it, in principle, exclusive rights in order to ensure that Community users received regular and equitable supplies of nuclear materials from the Community and from non-member countries. [16]

44. The Court found that, even within the framework of the simplified procedure, the Agency had a right to object to a contract which might prejudice the achievement of the objectives of the Treaty. [17]

45. Although the principle of balancing supply against demand must generally be observed when the Agency exercises its exclusive right to conclude supply contracts, the Court nevertheless considered that the Treaty provides for one specific exception because the Agency has an obligation to meet all orders 'unless prevented from doing so by legal or material obstacles'. [18]

46. The Court added that, where decisions concerning economic and commercial policy

16 — Paragraph 85.
17 — Paragraph 86.
18 — Paragraph 88.

and nuclear policy are involved, the Agency has a broad discretion when exercising its powers, so that review by the Court must in any event be confined to identifying any manifest error of assessment or misuse of powers. [19]

47. The Court considered that the Agency could lawfully bar imports of nuclear materials if those imports were liable to jeopardise the achievement of the aims of the Treaty, in particular by their effect on sources of supply. According to the Court, such a risk could be regarded as a legal obstacle, within the meaning of the first paragraph of Article 61 of the Treaty, to meeting an order. [20]

48. As the possibility could not be ruled out that, when the Commission adopted Decision 94/285, a regular and equitable supply in accordance with Article 2(d) of the Treaty could be jeopardised, the Court took the view that a first legal obstacle actually existed. [21]

49. With regard to the second obstacle, the Commission had submitted that the supply system established by the Treaty aimed at ensuring that the importation of nuclear materials into the Community was effected at market-related prices. According to the Commission, this principle had been recognised by Article 14 of the Trade Agreement as applicable in relations between the Community and the Soviet Union, or subsequently the CIS States.

50. The Court found that Article 14 of the Trade Agreement formed part of Community law and pointed out that, by virtue of Article 64 of the Treaty, the Agency had to act, where appropriate, within the framework of agreements between the Community and a third State.

51. After examining the available data on prices to determine whether Article 14 of the Trade Agreement had been applied correctly by the Agency and the Commission, the Court found that the contract did not comply with the rule that supplies must take place at market-related prices because the contract had been concluded at a price which was even lower than the average spot market price. [22]

52. Therefore a second legal obstacle within the meaning of the first paragraph of Article 61 of the Treaty was found to have been proven.

19 — Paragraph 90.
20 — Paragraph 92.
21 — Paragraphs 94 and 95.
22 — Paragraph 100.

53. With regard to the third obstacle to concluding the contract, allegedly deriving from the obligation to ensure equal access to sources of supply and to prevent one user from being given a privileged position in relation to competitors, the Court considered that, if imports were to be limited, the application of a permissible threshold of dependence — fixed, by reference to the state of the market, at a maximum percentage of individual users' consumption — was justified in order to guarantee equal access to sources of supply in accordance with Article 52(1) of the Treaty. [23]

54. Finding that the appellant had already purchased uranium from the CIS in quantities exceeding the limit fixed by the Agency within its broad discretion, the Court took the view that the Commission was justified in finding that there was a legal obstacle within the meaning of the first paragraph of Article 61 of the Treaty. [24]

55. The Court considered that the Agency did not commit an error of law or a manifest error of assessment by refusing to conclude unconditionally the supply contract in question and by adding to the contract a condition that the uranium was not to come from the CIS. [25]

56. Consequently the Court dismissed the first and second limbs of the first plea as unfounded.

57. By the third limb of the first plea, alleging infringement of the aims of Article 1 of the Treaty, the appellant claimed that the Commission and the Agency had been guided only by the interests of producers and had not taken the interests of users into account. The appellants also considered that the Agency's policy gave only feeble protection to producers within the Community, who cover only 20% of the Community's uranium requirements, and benefits producers in certain non-member countries.

58. The Court of First Instance dismissed this complaint on the grounds that the Agency was seeking to ensure reliability of supply and to guarantee continuity of supplies to Community users and that it was in the interest of the Community nuclear industry that a particular source of supply should not become too large in relation to alternative sources. The Court added that it was likewise in the interest of the Community as a whole and consistent with the aim of developing trade with other countries that imports should take place at market-related prices, as shown in particular by Article 14 of the Trade Agreement. Therefore, according to the Court, Decision 94/285 met the requirements of the supply policy and did not conflict with the task of the Community. [26]

23 — Paragraph 102.
24 — Paragraphs 104 and 105.
25 — Paragraph 107.
26 — Paragraph 113.

59. The fourth limb of the first plea alleged breach of the rules of the common market in natural uranium, particularly Articles 2(g) and 92 et seq. of the Treaty, which guarantee traders the freedom to obtain supplies from a supplier of their choice established in another Member State.

60. The Court dismissed this complaint. It took the view that the freedom of an undertaking to obtain supplies from a supplier of its choice established in another Member State had to be exercised within the limits laid down by the Treaty, in particular in such a way as to ensure that the reliability of supply was not jeopardised. In the present case, according to the Court, the appellant's contract came up against certain legal obstacles which, under the first paragraph of Article 61 of the Treaty, restrict that freedom. [27]

61. In support of its *second plea*, the appellant argued that the principle of legal certainty had been infringed in so far as the Agency's conduct lacked transparency: that the principle of equal treatment had been infringed in so far as the Agency had not taken account of the small role played by nuclear energy in electricity production in Germany; and, finally, that the principle of proportionality had been infringed in so far as the aim of diversification could have been achieved equally well on the basis of the second paragraph of Article 65 of the Treaty, or Articles 70 and 72, which relate to support for prospecting programmes and to the building-up of commercial and emergency stocks.

62. The Court found that the complaint concerning infringement of the principle of legal certainty had to be dismissed on the ground that, as there were easily accessible sources of information which a reasonably diligent trader in this very particular and clearly identified sector must be presumed to know, it could not be said that there was a lack of transparency. [28]

63. Regarding the principle of equal treatment, the Court observed that the Agency applied a threshold of permissible dependence in order to ensure equal access to sources of supply for undertakings established in the Community and that such an approach was justified on the basis of Article 52(1) of the Treaty. The Court added that the Agency and the Commission could not be required to take account of particular circumstances in different Member States. The Court also considered that the appellant had not shown that there were cases in which the Agency and the Commission had failed to object to an infringement of Article 5 *bis* of the Rules. [29]

64. With regard to the complaint concerning infringement of the principle of proportionality, the Court stated that it must be dismissed because the Agency, in view of the aims of its supply policy, had to block imports from the CIS at non-market-related prices. The Court added that the condition for approval of the contract, namely that the materials were not to come from the CIS, could not be disproportionate for the reasons

27 — Paragraph 117.

28 — Paragraph 127.

29 — Paragraph 132.

it had already given, relating to the risks which this would pose to the diversity of sources of supply. [30]

65. By the *third plea*, alleging breach of the rules on the division of powers, the appellant contended that neither the Agency nor the Advisory Committee was a Community institution within the meaning of Article 3(1) of the Treaty; that the common supply policy was a matter for the Community's political institutions, namely the Commission and the Council; and that the Agency was only responsible for the commercial aspect of supply, and had no power to fix import quotas.

66. The Court of First Instance dismissed this plea on the grounds that the Agency followed the path outlined by the Council and Commission and acted within the bounds of its broad discretion to take decisions in the field of economic and commercial policy, as well as nuclear policy. The Court added that the Commission, in exercising its power of review of the act of the Agency referred to it by the appellant under the second paragraph of Article 53 of the Treaty, had adopted the Agency's assessment as its own. [31]

67. By the *fourth plea*, the appellant alleged a breach of the obligation to state reasons in that Decision 94/285 did not reveal the structural relationship between the Agency's powers and the Treaty. In its decision the Commission did not show the reasons why the appellant would become dependent on uranium from the CIS and in what respect the purchase price agreed in the supply contract did not reflect market-economy conditions or was not related to market prices.

68. The Court of First Instance found that the reasoning of Decision 94/285 showed clearly and unequivocally the principal reasons for the refusal to conclude the contract submitted by the appellant. [32]

69. The appellant raised a *fifth plea*, alleging misuse of powers on the ground that the Agency and the Commission had no discretion but were under an obligation to conclude the contract.

70. The Court found that the appellant had not shown that the Agency and the Commission had pursued an aim other than that of implementing the Euratom supply policy. [33]

30 — Paragraph 135.
31 — Paragraph 140.
32 — Paragraph 146.
33 — Paragraph 150.

71. The Court therefore dismissed the action for annulment in its entirety.

The action for damages

72. As the Court found that the alleged conduct of the Agency and the Commission's refusal to accede to the appellant's requests were not vitiated by any irregularity, it dismissed the claim for damages as unfounded. [34]

IV — The appeal

73. In its appeal, the appellant claims that the Court should:

'1. set aside the judgment given by the Court of First Instance on 25 February in Cases T-149/94 and T-181/94;

2. annul the decision of 4 February 1994 of the Commission of the European Communities; [35]

3. annul the decision of 21 February 1994 of the Commission of the European Communities; [36]

4. order the European Atomic Energy Community to pay the appellant damages of DM 3 511 279.30, with interest at 6% per annum from 7 April 1994;

5. order the Commission of the European Communities to pay the costs, including those incurred in the preliminary procedure and the proceedings before the Court of First Instance, in so far as they are not taken into account in the claim for damages in point 4.'

34 — Paragraphs 155 and 156.

35 — C(94) 243 final.

36 — C(94) 344 final.

74. The Commission contends that the Court should:

'1. dismiss the appeal;

2. order the appellant to pay the costs.'

75. In its reply, the appellant asks the Court to order production of the Council's negotiating directives to the Commission and other documents concerning the negotiations with the Russian Federation on the partnership and cooperation agreement.

76. According to the appellant, these documents confirm that the opinion that the CIS as a whole should be regarded as a single source of supply is contrary to the Commission's practice.

77. The appellant adds that otherwise the Court should 'include in the file the procedural documents of the Agency and the defendant concerning the present proceedings'.

V — Examination of the pleas in support of the appeal

78. The Commission considers that the appeal is clearly inadmissible and asks the Court to dismiss it pursuant to Article 119 of the Rules of Procedure on the grounds that it merely reproduces the application at first instance and does not contain pleas in law which are specific and identifiable. Therefore the appeal is not in conformity with Article 52 of the EAEC Statute of the Court of Justice and Article 112(1)(c) of the Rules of Procedure of the Court.

79. The appellant maintains that, on the contrary, the conditions of Article 51 of the EC Statute of the Court of Justice [37] and Article 112(1)(c) of its Rules of Procedure are fulfilled since the appeal is based on pleas alleging irregularities in the proceedings before the Court of First Instance which jeopardise the appellant's interests, and on several breaches of Community law by that Court.

80. In the present case, the appellant submits that it is not merely requesting a re-examination; nor is it reproducing its previous pleas word for word. It states that the appeal follows faithfully, even with respect to

37 — No doubt this should read 'Article 52 of the EAEC Statute'.

headings and terminology, the judgment of the Court of First Instance, which as a whole infringes Community law.

Preliminary observations

81. The appellant's approach raises a serious question concerning the application of Article 119 of the Rules of Procedure. It is clear that the structure used by the appellant in setting out the appeal is modelled on that of the judgment of the Court of First Instance, which repeats each of the pleas put forward at first instance by the appellant itself.

82. However, Article 112(1)(c) of the Rules of Procedure states that an appeal must contain the pleas in law and legal arguments relied on. The Court of Justice has consistently held that it follows from this that an appeal must indicate precisely the contested elements of the judgment which the appellant seeks to have set aside, and also the legal arguments specifically advanced in support of the appeal. [38]

83. The Court added that this requirement is not satisfied by an appeal which merely repeats or reproduces word for word the pleas in law and arguments previously submitted to the Court of First Instance, including those based on facts expressly rejected by that court; in so far as such an appeal does not contain any arguments specifically contesting the judgment appealed against, it amounts in reality to no more than a request for re-examination of the application submitted to the Court of First Instance which, under Article 49 of the EC Statute of the Court of Justice, [39] the latter does not have jurisdiction to undertake. [40]

84. It should be observed that, contrary to what may appear from the first part of the Court's usual reasoning justifying the dismissal of pleas and arguments repeating those submitted at first instance, it is not sufficient to reword them in order to escape the objection of inadmissibility. As the second part of the reasoning clearly indicates, in order for the admissibility of a plea or argument to be sufficiently affected, it is enough if the issues already determined by the Court of First Instance, regardless of whether they are framed in identical terms, [41] are presented once again in order to obtain the judgment of the Court of Justice under the same conditions and in

38 — See the judgment in Case C-7/95 P *Deere* v *Commission* [1998] ECR I-3111, paragraphs 18 and 19.

39 — This case-law may be applied to Article 50 of the Statute known as the Statute of the Court of Justice of the European Atomic Energy Community, as the two provisions, and therefore the conditions which they set out for the admissibility of the appeals, are entirely identical.

40 — See the judgment in *Deere* v *Commission*, cited above, paragraph 20.

41 — In the judgment in Case C-355/95 P *TWD* v *Commission* [1997] ECR I-2549, paragraph 33, the Court of Justice dismissed as inadmissible a plea whereby an appellant merely repeated arguments already put by it to the Court of First Instance and which the latter had rejected, but the Court of Justice did not state that inadmissibility was subject to the condition that the arguments which were put forward a second time, but before the Court of Justice, had to reproduce word for word those submitted to the Court of First Instance.

exercise of the same jurisdiction as the Court of First Instance.

85. Accordingly, the systematic repetition at the appeal stage of pleas raised before the Court of First Instance is likely to raise serious doubts as to the true purpose of the appellant, who rather appears to be seeking a re-examination of the application.

86. However, detailed analysis of the appeal and the reply shows that the appellant's observations call into question the factual findings of the Court of First Instance and its assessment of those facts and of the evidence supporting such assessment, while at the same time raising genuine questions of law for which the Court of Justice has jurisdiction and which may therefore appear justified in certain respects. In these circumstances the reference to Article 119 does not seem appropriate.

87. In fact, this was the approach favoured by the Court, which chose to continue the proceedings.

88. As I have said, the appellant has not formally set out, as is the custom, each of the pleas raised against the judgment of the Court of First Instance. The appellant has presented them directly by placing them under the headings of the pleas which it raised at first instance and which are repeated as guidelines in its written observations to the Court of Justice.

89. This approach has somewhat affected the present opinion in so far as I have chosen to adopt in broad outline the proposed plan, so as not to call into question the logic behind the appellant's reasoning and so as to reply fully to its submissions.

A — *Case T-149/94*

1. The plea alleging misuse of the powers of the Agency as set out in Article 5 *bis* (f) of the Rules

90. The appellant contends in essence that, contrary to the finding of the Court of First Instance, Article 5 *bis* (f) does not empower the Agency to ask for supplementary information or to extend the ten-day period prescribed by that provision, which unconditionally requires the Agency to conclude or refuse to conclude the contract within that period.

91. This argument raises the issue of the exact scope of the Agency's powers when, having received a supply contract for the purpose of concluding it, it *is not aware of the source of the supplies* in question.

92. The text of Article 5 *bis* (f) envisages only one alternative because the Agency has the choice, within the legal period, of concluding or refusing to conclude the contract.

93. However, the Agency's powers must be determined in the light both of its own tasks and the objectives pursued by the Treaty and by the relevant secondary legislation.

94. The Treaty provides that the Community must 'ensure that all users in the Community receive a regular and equitable supply of ores and nuclear fuels'. [42] However, the regularity of supplies of nuclear fuels to the Community is closely linked to the diversity of sources of supply. The reason is that no authority can run the risk of maintaining commercial relations with a single supplier or a limited number of producers of products which are as necessary as energy-generating materials for the economy of a country and for the standard of living of its citizens. The lack of alternative direct sources of supply would expose the country to the serious consequences of sudden default on the part of one of its suppliers, particularly since given the limited number of suppliers, this would affect a substantial proportion of its supplies. [43] Therefore diversity of supply is a condition of a regular supply and of the resulting reliability for the Community.

95. Furthermore, the same reasons led the Council to state expressly, in the Resolution of 16 September 1986, cited above, that the energy policy of the Community and the Member States must endeavour to ensure more secure conditions of supply and reduced risks of sudden fluctuations in energy prices through geographical diversification of the Community's external sources of supply. [44]

96. It follows that it is really important for the Agency to know the geographical origin of supplies. This is itself necessary if the requirement of diversification of supplies is to be effective because it enables sources of

42 — Article 2(d).

43 — 'These supplies must therefore be "reliable, that is to say, consistent from the viewpoint of prices and quantities and must meet users' requirements so far as possible, in order not to compromise the implementation of nuclear programmes"'. A. Bette, 'Enseignements de sept années d'application du régime d'approvisionnement institué par le Traité de l'Euratom', *Annuaire français de droit international*, 1965, p. 713, cited in O. Pirotte, *Trente ans d'expérience Euratom, La naissance d'une Europe nucléaire*, 1988, p. 59.

44 — Paragraph 5(a), second indent.

supply to be ascertained not only in order to ensure a variety of sources, but also to assess the risks of a breakdown in supply caused by the political or economic situation of a particular State or group of supplier States. The need for exact information on sources of supply must therefore, it seems to me, influence the interpretation to be given to the provisions laying down the Agency's powers.

97. The provisions of the Treaty bear witness to this importance. Article 60, which applies to users of source materials from within and outside the Community, provides that they must inform the Agency periodically of the place of origin of supplies.

98. Furthermore, the Agency, which has the exclusive right to conclude agreements or contracts relating to supplies, [45] also has the power to lay down the terms on which it can meet all orders placed by users, [46] which obviously covers the conditions relating to source.

99. This power is confirmed by the second paragraph of Article 65 of the Treaty, which allows the Agency to choose 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.

100. I should add that, under Article 64, the Agency is to exercise its exclusive right 'acting where appropriate within the framework of agreements concluded between the Community and a third State or an international organisation'. In other words, if the Community is bound by international agreements which may affect its supply of nuclear source materials, the Agency must comply with those agreements, which means that it cannot conclude a supply contract without having been informed beforehand of the source of the supplies referred to in the contract. This means that, without that information, it cannot ascertain whether the contractual relationship is covered by the rules for the agreement in question and cannot ensure that they are correctly applied.

101. As we have seen, the Treaty leaves no doubt as to the importance attached to the geographical origin of supplies and the Agency's right to require full information on this point.

102. In these circumstances it is difficult to agree that Article 5 *bis* (f) of the Rules requires the Agency to reach a decision on the conclusion of the contract within the prescribed period in all cases where it is not aware of the geographical origin of the source materials.

45 — Articles 52(2)(b) and 64 of the Treaty.

46 — Ibid., fourth paragraph of Article 60.

103. If so interpreted, Article 5 *bis* (f) would lead the Agency, in the absence of particulars of the origin, to refuse to conclude a contract out of caution, simply in order to ensure the reliability of the Community's supply.

104. For the reasons just given, I can only endorse the reasoning of the Court of First Instance when it observes that 'the geographical origin of the materials to be supplied is thus one of the principal elements of a supply contract which have to be communicated to the Agency under Article 5 *bis* (f) of the Rules', because it is essential for the Agency to know the geographical origin 'in order to ensure reliability of supply — the aim of the supply policy pursued ...'. [47]

105. To my mind, taking account of this imperative and in the light of the wording of Article 5 *bis* (f) of the Rules, the Court of First Instance was not mistaken in law when it observed that the Agency was entitled to request the parties to provide the missing documentation by communicating to it the origin of the materials to be supplied. [48] The reason is that, although Article 5 *bis* (f) requires the Agency to act within the legal period of ten working days, it does not prevent the Agency from making inquiries such as that in question, provided that, as the Court of First Instance expressly indicated, the request is made within that period. [49]

106. In view of the importance of the Agency's role in relation to external supplies, it is not unreasonable to assume that it has power to make inquiries in so far as such power is justified by the aim of carrying out its task of supervision more effectively, while giving the contracting parties a last chance to complete the details of their contract with a view to concluding it.

107. However, a difficulty appears to arise where, as in this case, the information requested is given within the time-limit, but the Agency gives its decision after the deadline.

108. On this point the appellant complains that the Court of First Instance accepted the exceeding of the time-limit even though, under Article 5 *bis* (c), point 5, of the Rules, where the supplier is unable, at the time of entering into the contract, to state the country of origin of the material to be supplied, he may do so subsequently in writing.

109. The appellant adds, in essence, that the Court refused it the right to provide the information subsequently on the ground that the appellant and its supplier did not disclose that the uranium was to come from the CIS, notwithstanding the fact that the term 'country of origin' in Article 5 *bis* (c), point 5, does not cover a group of states such as the CIS.

47 — Paragraph 35.

48 — Paragraph 39.

49 — In paragraph 39 the Court stated that the Agency was entitled to make the request 'before the period provided for in Article 5 *bis* (f) of the Rules expired'.

110. It should be recalled that the Court of First Instance stated that it was clear from the actual wording of Article 5 *bis* (c), point 5, that later communication of the country of origin is permissible only if the supplier was unable to provide that information at the time of entering into the contract. [50] It then concluded that this was not the case because the appellant and its supplier had agreed, at least implicitly, that the materials would come from the CIS.

111. As the Court of First Instance found, the words 'is unable' in Article 5 *bis* (c), point 5, justify that interpretation, which I consider necessary in order to prevent fraudulent practices whereby one of the contracting parties would defer informing the Agency of the origin of the source materials, so as to obtain the conclusion by the Agency of the proposed contract, contrary to the requirement for the diversification of supplies.

112. The documents before the Court show that, although the reply from BNFL made it clear that the source was the CIS, its identification of the actual country of origin remained hypothetical. However, the fact remains that, since it is important for the Agency to know the source of the uranium, any imprecise information or, with regard to the country of origin, uncertain information concerning the source would have to be passed on, such as it was, by the contracting parties. The Court was therefore entitled to find that the geographical origin, although known to the parties, was not mentioned, even if it intended thereby to refer to the CIS, so that the judgment must be upheld on this point.

113. I should add that the pleas raised by the appellant in order to challenge the grounds of the judgment — where it is stated that the parties were aware of the origin of the source materials when the Agency was informed of the contract — do not fall within the jurisdiction of the Court of Justice and must be ruled inadmissible, in accordance with settled case-law.

114. The Court has ruled that it is clear from Article 168a of the EC Treaty and the corresponding provisions of the ECSC and EAEC Treaties that an appeal is to be limited to points of law. This limitation is set out in the first paragraph of Article 51 of the EC Statute and the corresponding provisions of the ECSC and EAEC Statutes of the Court of Justice, which specify the grounds on which an appeal may be based (lack of competence of the Court of First Instance, a breach of procedure before it which adversely affects the interests of the appellant, and the infringement of Community law by the Court of First Instance).

115. It follows from the abovementioned provisions that an appeal may be based only on grounds relating to the infringement of rules of law, to the exclusion of any appraisal of

50 — Paragraph 36.

the facts. The Court of First Instance has exclusive jurisdiction, firstly, to establish the facts except where the substantive inaccuracy of its findings is apparent from the documents submitted to it and, second, to assess those facts. When the Court of First Instance has established or assessed the facts, the Court of Justice has jurisdiction under Article 168a of the EC Treaty and the corresponding provisions of the ECSC and EAEC Treaties to review the legal characterisation of those facts at first instance and the legal conclusions it has drawn from them.

116. The Court of Justice has thus no jurisdiction to establish the facts or, in principle, to examine the evidence which the Court of First Instance accepted in support of those facts. Provided that the evidence has been properly obtained and the general principles of law and the rules of procedure in relation to the burden of proof and the taking of evidence have been observed, it is for the Court of First Instance alone to assess the value which should be attached to it. Therefore such appraisal does not constitute, save where the evidence has been fundamentally misconstrued, a point of law which is subject, as such, to review by the Court of Justice. [51]

117. In paragraph 37 of the judgment the Court of First Instance sets out the evidence which leads it to conclude that the parties to the contract had previously determined the place of origin of the uranium and were therefore in a position to state this in the contract itself.

118. In doing so, the Court made an assessment of the evidence before it which is not open to review.

119. Finally, although the appellant protests its ignorance of the origin of the supplies, it does not claim that the evidence relied upon by the Court of First Instance was distorted in any way whatever.

120. However, it is necessary to establish what the Agency was required to do on the expiry of the time-limit, knowing that the contracting parties were not allowed to inform it of the origin of the goods after the contract was concluded and that it could nevertheless obtain the information by requesting it within the legal time-limit.

121. In other words, was the Agency entitled to an additional period in which to decide on the request to conclude the contract, after receiving the information required?

51 — See the judgment in Case C-136/92 P *Commission* v *Brazzelli Lualdi* [1994] ECR I-1981, paragraphs 47 to 49 and 66; the order of 17 September 1996 in Case C-19/95 P *San Marco* v *Commission* [1996] ECR I-4435, paragraphs 36 to 40, and the judgment in *Deere* v *Commission*, cited above, paragraphs 18 to 22.

122. If it is found that the ten-day period must be observed, come what may, this would amount to allowing the supplier not to inform the Agency of the origin of the uranium, albeit at the risk of an outright refusal to conclude the contract if the Agency took the view that it could not make a decision without knowing the origin of the source materials. In the same way, strict observance of the time-limit may lead to the Agency to make a decision before obtaining details of the origin, even though they could be provided at the very last moment. Here again, the Agency would be tempted, as a precaution, to refuse to conclude the contract, which appears unreasonable where the origin of the materials does not justify that position.

123. Alternatively, it could be assumed that time cannot start to run until the Agency has all the information necessary to exercise its exclusive right to conclude contracts.

124. This interpretation, which also informs the reasoning of the Court of First Instance, seems to me more consistent with the general scheme set up by the Treaty for implementing the supply policy, in so far as the requirement that the Agency make a rapid decision is made subject to the condition that it be provided with a contract containing all the information necessary to perform its task of checking the sources of supply. Consequently, provision must be made for time to start running on the date of receipt of the complete documentation.

125. In the light of that interpretation, I believe that the Court of First Instance was justified in finding that the ten-day period began to run on 14 December 1993, the date when the Agency received the information it had requested. [52] Contrary to the appellant's argument, the length of the period in question cannot be regarded as disproportionate, as the time which had already elapsed cannot be taken into account because the documentation was not complete.

126. The appellant denies that it was itself the cause of the Agency's administrative difficulties in coming to a decision. It also claims that there is no foundation for the statement by the Court of First Instance that the accelerated procedure of Article 5 *bis* (f) of the Rules applies only to cases which present no problems.

127. I propose that the Court of Justice find these submissions inadmissible in so far as they are directed against grounds of the judgment which are given merely for the sake of completeness.

128. Challenging those grounds cannot alter the outcome of the judgment.

52 — Paragraph 40.

129. It follows that the plea in question must be rejected.

2. The plea alleging an infringement of the time-limit laid down by Article 5 *bis* (f) of the Rules

130. The appellant argues that, in any case, the legal time-limit was exceeded when the Agency took Decision 1/94 on 6 January 1994, and also disputes the method of calculating the time-limit which, it maintains, expired on 28 December 1993. It adds that, even assuming that the period expired on 6 January, the Agency's decision dated the same day is irregular because it was sent by registered letter on 7 January.

131. Under Article 5 *bis* (f) of the Rules, the Agency must act within ten working days of the date of receipt of the contract.

132. It is common ground that 'working days' do not include Saturdays, Sundays and public holidays, which therefore do not count in the computation of the time-limit.

133. The number and dates of public holidays vary from one Member State to another and, to establish which apply, it is necessary to ascertain the relevant law which, in this particular case, is governed by the staff regulations of the persons employed by the Agency.

134. As those persons are subject to the same regulations as Commission staff, the public holidays to which they are entitled are those fixed by annual communication published in the *Official Journal of the European Communities*.

135. It follows from the foregoing and from the Commission communication on public holidays for 1993 [53] that the period from Thursday 23 December to Friday 31 December 1993 was a public holiday, which means that seven days must be deducted from the number of days between 15 December 1993, the day following the Agency's receipt of the information requested, and 6 January 1994, the date of notification of Decision 1/94.

136. Furthermore, the weekends, totalling six days, [54] falling in the period in question are not taken into account when calculating the time-limit.

53 — Communication 93/C 2/07 (OJ 1993 C 2, p. 8).

54 — Saturday 18 and Sunday 19 December 1993, Saturday 25 and Sunday 26 December 1993 and Saturday 1 and Sunday 2 January 1994.

137. Consequently the total number of days accounted for by weekends and public holidays is 13, which must be deducted from the 23 days of the period in question.

138. In other words, the 10th and last day of the legal period was Thursday 6 January 1994, which no one denies is the date of Decision 1/94.

139. It is clear from the actual wording of Article 5 *bis* (f) of the Rules that the Agency must *act* within the 10-day period, and that is what it did.

140. Therefore the Court of First Instance was not mistaken in law when it stated that 'such a lapse of time [within which the Agency took its decision] was reasonable and did not infringe Article 5 *bis* (f) of the Rules'. [55]

3. The plea alleging infringement of the rules on the division of powers

141. The appellant considers that the Agency's power to conclude supply contracts is not discretionary and does not authorise it to extend the legal period within which it must act and, on this plea, the appellant refers to its application before the Court of First Instance. The Commission contends that this plea is inadmissible because it merely repeats the terms of the application, but the appellant replies that it alleges an infringement of the rules of procedure, particularly the right to be heard, which was disregarded by the Court of First Instance, which is said not to have taken account of part of the appellant's account of the facts before that Court. The appellant maintains that the judges concerned did not have personal knowledge of the whole of the file because the presentation thereof in the report for the hearing was incomplete.

142. The appellant adds that, even if the Court of First Instance were justified in finding that the appellant had made no submissions concerning infringement of the rules on the division of powers, the Court ought of its own motion to have considered whether the Agency's actions complied with those rules.

143. This plea must be declared inadmissible.

144. In paragraphs 42 and 43 of the judgment the Court of First Instance found that the appellant had not pursued its third plea in law — alleging breach of the rules on the division of powers — and concluded that there was no need to rule on whether the plea was well-founded.

55 — Paragraph 40.

145. The appellant refers initially to certain pages of its application to the Court of First Instance. Although it goes on to specify the plea in question when it says that the Court did not examine part of the report on the facts, it does not give the reasons why it considers that the Court failed to take account of some of the facts necessary for giving judgment. To be admissible, such a plea must describe the facts allegedly disregarded and compare them with the actual reasoning in order to demonstrate the inadequacy of the judgment. It must be said that such evidence has not been adduced.

146. In addition, the Court of First Instance is not required to give an express ruling on each of the circumstances relied upon by a party to support its claim if the Court's decision is well-founded in law and justified on clear, unambiguous grounds.

147. As I have already said, [56] the Court of First Instance correctly interpreted the relevant provision when it stated its finding on the application of the legal time-limit by the Agency. It also considered that the period in question was reasonable and, in particular, did not breach the principle of legal certainty. [57] There is nothing in the stated reasoning to suggest that the Court reached its decision without the judges having taken account of all the facts, pleas and submissions put forward by the parties.

56 — See paragraph 124 et seq. of this opinion.

57 — Paragraph 40 of the judgment.

148. The argument that the judges at first instance had no personal knowledge of all the facts of the case must be rejected. It is not disputed that, as required by Article 33(2) of the Rules of Procedure of the Court of First Instance, only those judges who were present at the oral proceedings may take part in the deliberations. The purpose of the oral proceedings is to enable the parties to state their case rapidly, but directly and completely, before the Court, which ensures that the members are informed directly of the pleas and arguments relied upon.

149. Above all, it is likewise common ground that the Court of First Instance had access, throughout the proceedings and, in particular, during the deliberations, to all the pleadings and documents in the file.

150. Therefore the criticism of the report for the hearing, which is only one of the documents available in the file, cannot be accepted. Although the appellant observes that it submitted observations on the report by letter of 13 September 1996 to request that it be rectified and to state certain objections concerning 'turns of phrase which may be misleading and certain assessments [which will be mentioned below], so necessary to the oral proceedings', these observations do not refer to shortcomings arising from the alleged incompleteness of the report on which, furthermore, the appellant would not have been able to comment in the course of the hearing before the Court of First Instance.

151. Finally, it must be observed that, when the Court of First Instance finds, as here, that an applicant has not pursued one of the pleas in support of its application, it cannot be required to remedy the applicant's omission by examining of its own motion the complaints which the applicant was supposed to put forward.

4. The plea alleging breach of the obligation to state reasons

152. The appellant claims that 'Article 162 of the Treaty required the Commission to state reasons for its decision [and] the same applied to the Agency, under Article 5 *bis* (g) of the Rules', with regard to its request for information.

153. In the first limb of this plea, which is directed against the Commission, the appellant contends that 'the Commission decision of 10 January 1994', informing the appellant that the Agency's Decision 1/94 had been taken within the prescribed time-limit and that therefore the action initiated against the Agency for failure to act was to no purpose, stated no grounds justifying the point when time started to run or the calculation of the further period granted to the Agency for taking a decision on the contract.

154. The appellant adds that in Decision 94/95 the Commission also disregarded its obligation to state reasons by dealing in general terms with the question of the origin of the source materials, whereas it ought to have referred to the concepts of 'country of origin' and 'sources of supply'.

155. Finally, the appellant complains that the Commission regarded the CIS as a whole as a 'particular source of supply' on which it would be dangerous for the Community to depend, which conflicts with the provisional agreement of 29 December 1994 with the Russian Federation, under which the Community undertook to regard 'Russia, in particular for the purposes of the Community's supply policy in the nuclear field, as a distinct and separate source of supply from other suppliers'. In this connection the appellant asks the Court of Justice to order, in accordance with Article 21 of the EC Statute of the Court of Justice, [58] 'production of the Council and Commission directives and other documents concerning the negotiation with Russia relating to the partnership and cooperation agreement' in order to show that the Commission's opinion is contrary to its own practice.

156. This first limb of the plea must be ruled inadmissible.

58 — No doubt this should read: 'Article 22 of the EAEC Statute'.

157. It is clear from the abovementioned provisions of the Treaty and the EAEC Statute of the Court of Justice [59] that not only is an appeal to be limited to points of law, but it may be based only on grounds bearing on the judgment of the Court of First Instance, that is to say, lack of competence of the Court of First Instance, a breach of procedure before it which adversely affects the interests of the appellant or infringement of Community law by the Court of First Instance.

158. The appellant's complaints are confined to claiming that no reasons were stated by the Commission in Decision 94/95 or in its letter of 10 January 1994, which the appellant describes as a decision, and no specific reference is made to points arising from the judgment.

159. Above all, it must be observed that, under Article 48(2) of the Rules of Procedure of the Court of First Instance, no new plea in law may be introduced in the course of proceedings unless it is based on matters of law or of fact which come to light in the course of the procedure.

160. The Court of Justice has consistently emphasised 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 mean allowing that party to bring before the Court, whose jurisdiction in appeals is limited, a wider case than that heard by the Court of First Instance; [i]n an appeal the Court's jurisdiction is thus confined to examining the assessment by the Court of First Instance of the pleas argued before it'. [60]

161. Some of these complaints were never raised by the appellant at first instance, and the Court of First Instance therefore legitimately confined the grounds of the judgment to the pleas which were raised.

162. It is clear from the judgment and from the file of the Court of First Instance that the reasoning of Decision 94/95 relating to the origin of the products and the effect of the provisional agreement of 29 December 1994 on the contract in question were not the subject of argument before the Court.

163. Likewise the allegation that no grounds were given to justify the point at which time started to run and the calculation of the extended time-limit was directed against Decision 94/95 and not, as in the present case, against the letter of 10 January 1994.

164. Finally, the request made by the appellant in its reply, and repeated in the letter

59 — Paragraph 114 of this opinion.

60 — See the judgment in *Deere* v *Commission*, cited above, paragraph 61 et seq.

lodged at the Registry of the Court of Justice on 14 September 1998, for access to Council documents cannot be granted. The request is specifically made for access to additional evidence which, as it was not examined at first instance, cannot be led before the Court of Justice on an appeal. If the Court of Justice has no jurisdiction in principle to examine evidence accepted by the Court of First Instance in support of the facts put before it, the Court of Justice quite certainly has no jurisdiction to take cognisance of evidence produced while the case was pending.

165. With regard to the second limb of the plea, the appellant complains that the Court of First Instance gave a ruling only on the plea that the Commission was in breach of its obligation to state reasons, whereas the Agency, as the Community authority responsible for the request for information and for the extension of the time-limit, was under a similar obligation in relation to any act pursuant to Article 53 of the Treaty. The appellant considers that this irregularity renders illegal the Agency's decision, which ought to have stated the reasons for the unilateral extension of the time-limit. Therefore, according to the appellant, Commission Decision 94/95 is vitiated, as is the view expressed by the Court of First Instance in paragraph 40 of the judgment.

166. The application lodged at first instance shows that the complaint concerning a breach by the Agency of the obligation to state reasons, based on Article 5 *bis* (g) of the Rules, was raised before the Court of First Instance.

167. The Court does not mention this point in the summary of the parties' arguments in paragraph 44 and therefore did not reply to it in its findings in paragraph 46 et seq. of the judgment.

168. Consequently this complaint is valid. It must therefore be found that the judgment does not state grounds in this respect and I propose that the present Court annul the judgment on this point, in so far as no ruling was given on the limb of the plea alleging that the Agency failed to state reasons.

169. Under the first paragraph of Article 55 of the EAEC Statute of the Court of Justice, the Court may, after setting aside the decision of the Court of First Instance, give final judgment in the matter where the state of the proceedings so permits. As this is the case here, I consider it would be in the interests of the proper administration of justice for the Court to give judgment on this point. [61]

170. The first sentence of Article 5 *bis* (g) of the Rules, to which the appellant refers, provides that 'a refusal to conclude the contract shall be notified to the parties concerned in a reasoned decision'.

61 — For a similar case, see the judgment in Case C-298/93 P *Klinke* v *Court of Justice* [1994] ECR I-3009, paragraphs 20, 26 and 27.

171. Clearly, therefore, the Agency must state reasons only where the decision referred to the Commission is a decision not to conclude a contract, which is not the case here as none of the Agency's acts to which the appellant refers has such refusal as its subject-matter.

172. With regard to the letter of 10 December 1993, in which the Agency asked the appellant and BNFL, within the legal time-limit, for information on the origin of the uranium, the very subject-matter of the request clearly shows that the Agency attached great importance to obtaining information on the origin of the supplies before concluding the contract, and no further explanation by the Agency on this point is necessary. There was nothing at that stage to indicate that a refusal was contemplated.

173. Regarding the Agency's letter of 20 December 1993, informing the appellant and BNFL of the requirements of its diversification policy, describing the degree of dependence already reached by the appellant and requesting the parties' observations as to the advisability of the contract, it must be observed that in that letter the Agency merely initiated a discussion with the parties on what then appeared to be only a proposal for a decision. In doing so, the Agency imparted to its letter a provisional nature inconsistent with a decision with adverse effects, which alone could be subject to the formal requirement of a statement of reasons.

174. It should be added that the implicit decision to make the starting point for the legal time-limit subject to the possession of complete documentation cannot be treated as the later decision to refuse to conclude a contract for supplies from the CIS.

175. Consequently the second limb of the plea must be held to be unfounded.

5. The plea alleging misuse of the Agency's powers

176. The appellant argues that the Agency, in requesting additional information and extending the time-limit, exceeded the scope of its powers and misused them in that it had no discretion to make a decision on the conclusion of the contract, contrary to the findings of the Court of First Instance.

177. According to the appellant, the misuse of power is shown by the fact that the Agency departed from its former practice of allowing the entire needs for uranium to be covered by supplies from the CIS. The appellant adds that, by refusing to conclude the contract in

question, the Agency was seeking to protect Western producers of uranium, thus pursuing a policy other than that for which it was given its powers.

178. The Court of First Instance began by observing that 'it has been consistently held that a decision may amount to a misuse of powers only if it appears, on the basis of objective, relevant and consistent evidence, to have been taken for purposes other than those stated' and concluded that the appellant 'has adduced no evidence at all that the Agency and the Commission pursued an aim other than that of implementing the supply policy'. [62]

179. For the reasons given above, [63] the Court of Justice has no jurisdiction to give a ruling on the value of the evidence put before the Court of First Instance, save where that evidence has been fundamentally misconstrued.

180. In the present case, the appellant has in no way shown that the Court of First Instance misconstrued the evidence in finding that the appellant's argument that the Agency and the Commission had no discretion [64] did not prove any misuse of their powers.

181. The appellant's assertion that the Agency, in exceeding the scope of its powers, misused them must be rejected. That question, which was considered in relation to the first plea examined in this Opinion, has no bearing upon the plea alleging misuse of powers which, as the Court of First Instance correctly observed, refers to cases where a Community institution exercises its powers for a purpose other than those for which its powers under the Treaty were conferred on it, not to cases where those powers are exceeded.

182. The arguments alleging a break by the Agency with its previous policy and concerning the protection of Western producers do not show that the Court of First Instance misconstrued the evidence. The appellant does not attempt to prove any such distortion because the complaints in question do not relate to the same subject-matter as the plea which the Court of First Instance addressed in its judgment.

183. This particular point shows, furthermore, that these submissions are new because, although they could have been raised at first instance, they were never set out as complaints in support of the plea in Case T-149/94 alleging a misuse of powers. Consequently they must be dismissed as inadmissible.

62 — Paragraphs 53 and 54 of the judgment.
63 — Paragraph 114 et seq. of this Opinion.
64 — Paragraph 52 of the judgment.

B — *Case T-181/94*

The action for annulment

1. The plea alleging infringement of Article 5 *bis* of the Rules and the provisions on supplies in Chapter 6 of the Treaty

184. It seems to me that two limbs can be distinguished in the appellant's complaints and arguments in support of this plea.

(a) The first limb, alleging disregard of the scope of the Agency's powers

185. The appellant states that it is not for the Agency to determine the common supply policy as this is a matter for the Community institutions. According to the appellant, the Agency does not possess the broad discretion which the Court of First Instance attributes to it in relation to the supply policy. Therefore the Court should have carried out a careful review of the Agency's exercise of the powers conferred on it.

186. The appellant adds that, although the Agency has a duty to refuse a contract where there is a legal obstacle to concluding it, it is not for the Agency to alter the terms of a contract by adding a condition relating to origin, as it did in this case.

187. Finally, the appellant maintains that none of the three obstacles found by the Court of First Instance to the performance of the contract was serious.

188. Like the Court in paragraph 88 of the judgment, the appellant and the Commission consider that the first paragraph of Article 61 of the Treaty, under which, it should be remembered, the Agency must meet all orders unless prevented from doing so by legal or material obstacles, applies to the present case.

189. I think any ambiguity on this point must be cleared up. Article 61 forms part of Section 2 of Chapter VI relating to supplies, entitled 'Ores, raw materials and special fissile materials *from the Community*'. [65] Moreover, when the legislature wished to extend the provisions of that section to the following section, entitled 'Ores, raw materials and special fissile materials *from outside the Community*', [66] it did so expressly. For example, it is

65 — Emphasis added.
66 — Emphasis added.

perfectly clear from the reference by Article 65 to Article 60 that the ambit of the latter also extends to the supply of source materials from non-member countries.

190. The same does not apply to Article 61 and its scope is therefore manifestly limited to products from the Community, so that any reference to it in relation to a dispute concerning imported products seems to me to be seeking to have Article 61 applied wrongly.

191. However, the argument as to the legal basis of the Agency's acts is largely formal in so far as its acts are subject to requirements which, from our viewpoint, are comparable with those of Article 61. The Agency must meet orders placed by users, while ensuring that certain limits are not exceeded.

192. That obligation and the associated limits, constituted by the Agency's power to oppose the conclusion of certain contracts, arise from the Treaty.

193. The Treaty's aim of a regular and equitable supply of ores and nuclear fuels for users in the Community [67] may be used to measure the Agency's discretion. The need for a regular and equitable supply means that the Agency must meet orders placed by users so far as possible, while permitting it to object to those which may affect the objective of diversification of supplies or breach the principle of non-discrimination.

194. Consequently the grounds on which the Agency may refuse to conclude a contract are the same as those which application of Article 61 would lead to being described as legal obstacles, so that the reasoning of the Court of First Instance in relation to that provision cannot be affected by the limits to its scope.

195. Before examining the three grounds on which the Agency justifies the condition relating to origin laid down in Decision 1/94, I must turn again to the complaint that the Agency has no discretion with regard to the supply policy, and then to the argument that it has no power to impose a condition of origin.

67 — See paragraph 94 of this opinion.

196. As with the other aims of the European Atomic Energy Community, the performance of its tasks in the field of the supply of ores and nuclear fuels is assured by the Community institutions within the limits of the powers conferred upon them by the Treaty. [68]

197. Article 52 of the Treaty lays down the principle of a common supply policy and establishes the Agency, which plays an essential part in implementing that policy.

198. The Agency's exclusive right under Article 52 enables it to carry out its task in relation to supplying the Community with nuclear fuels. The principle of non-discrimination between users is laid down at the same time to avoid endangering equal access to resources, which must guide the Agency in fulfilling its functions. [69]

199. As the Court of First Instance correctly observed in paragraph 86 of the judgment, 'the simplified procedure introduced by Article 5 *bis* of the Rules does not deprive the Agency of its exclusive rights ...; [e]ven within the framework of the simplified procedure, the Agency therefore has the right to object to a contract which might prejudice the achievement of the objectives of the Treaty'. With regard to the balancing of supply and demand, the way in which the Agency exercises its powers is governed by the Rules, adopted pursuant to the last paragraph of Article 60 of the Treaty, and those Rules also apply, under Article 65, to supplies from outside the Community. [70]

200. Article 5 *bis* of the Rules shows that the direct contacts authorised between users and producers in no way deprive the Agency of its exclusive right to conclude contracts.

201. Altogether the Treaty provisions concerning the Agency's powers give it a broad discretion where decisions concerning economic and commercial policy and nuclear policy are involved, as the Court of First Instance correctly observed. [71]

68 — Articles 2(d) and 3(1) of the Treaty.

69 — Article 52(2)(a) of the Treaty prohibits 'all practices designed to secure a privileged position for certain users'. The last paragraph of Article 52(2) prohibits the Agency from discriminating 'in any way between users on grounds of the use which they intend to make of the supplies requested'.

70 — In the third paragraph of point 20 of Decision 94/285 the Commission stated as follows: 'the fact that the Agency allows producers and users themselves to draw up contracts more easily and directly under a simplified procedure under the sixth paragraph of Article 60 of the Treaty, does not mean that the Agency loses these powers conferred on it by the Treaty'.

71 — Paragraph 90 of the judgment.

202. However, the breadth of that discretion must not be overestimated nor must it be forgotten that it derives its legitimacy from the relationship between the Agency and the Commission.

203. The true nature of the Agency is revealed by the other relevant articles of the Treaty, particularly Articles 53 and 54. Although, under the latter, the Agency has legal personality and financial autonomy, the first paragraph of Article 53 provides that it is to be under the supervision of the Commission. Furthermore, it is made clear that the Commission is to 'issue directives to it, possess a right of veto over its decisions and appoint its Director-General and Deputy Director-General'.

204. Therefore, with regard to the Agency, the Commission is far from being merely an appeal authority whose intervention would require the prior referral to it of the contested decision, as if it were a court with jurisdiction to rule on the decisions of an independent administrative authority. On the contrary, in view of the Commission's powers of initiative and prior objection in relation to the Agency, the latter's discretion appears entirely subject to the policy decided upon by the Commission.

205. Consequently the appellant cannot claim that the Agency has unlawfully arrogated to itself power to determine the common supply policy in breach of the rules concerning the powers conferred on Community institutions by the Treaty.

206. The institutional arrangements for the operation of the Agency do not support the idea that its decisions are taken by virtue of some kind of independent power to determine the common supply policy, because those decisions are approved afterwards by the Commission, at least implicitly, and confirmed by it in advance, and are therefore clearly the result of the policy of that institution, which is implemented by one of its administrative divisions.

207. Therefore the Commission is indeed the Community institution responsible, under Article 3(1) of the Treaty, for the supply policy in relation to Community users and, although the Agency may have a broad discretion in that area, it must be observed that it is exercised within the limits which the Commission chooses to lay down.

208. Consequently the argument that the Agency plays too large a part in determining the common supply policy must be dismissed.

209. The appellant claims that the Agency has no right to alter the contract by adding conditions to it, contrary to the findings of the Court of First Instance on this point.

210. Article 5 *bis* provides that the Agency must act either by concluding or refusing to conclude the contract. However, as I have said, I do not think it is consistent with the objectives of the Treaty to limit the Agency's decision-making power where it is unaware of the source of the supplies or where, as in the present case, it has legitimate reasons for believing that the origin of the products may imperil the reliability of supplies to the Member States of the Community. [72]

211. I must add that the condition in question cannot be treated as an alteration to the contract because, when the Agency took its decision, the contracting parties themselves were not certain as to the country of origin of the products, which shows that the condition imposed by the Agency related to a term of the contract which had not been finally decided upon. What is more, I consider that, in view of the uncertainty, the Agency adhered to the wording of Article 5 *bis* by concluding the contract on the assumption that the products would not come from the CIS, but refusing to do so otherwise. Therefore the alternative laid down by Article 5 *bis* was observed.

212. The appellant questions the existence of the obstacles referred to by the Commission and found to exist by the Court of First Instance.

213. The reasons for not meeting the order are, let me repeat, the need for diversification of external sources of supply, the level of prices stemming from the Trade Agreement, and the obligation to ensure equal access to resources.

214. The Court of First Instance found that 'where decisions concerning economic and commercial policy and nuclear policy are involved, the Agency has a broad discretion when exercising its powers'. From this, the Court concluded that its own review must be confined to identifying any manifest error of assessment or misuse of powers. [73]

72 — Paragraph 101 et seq. of this opinion.

73 — Paragraph 90 of the judgment.

215. The decisions of the Agency and the Commission in relation to the common supply policy are determined by the requirements not only of non-discrimination, but also of reliability of supply. Consequently, they depend on the present and future state of the market for nuclear materials, which necessitates an assessment of probable changes in the pattern of supply and demand, taking account of economic factors such as prices or the consequences of trends followed by non-member countries in exporting the nuclear fuels which they produce.

216. With regard to the appraisal of complex economic situations, the Agency, subject to the supervision of the Commission, has a broad discretion, which the Commission also has in the matter of common commercial policy. [74]

217. Therefore the Court of First Instance was correct in stating that judicial review of such an appraisal must be limited to verifying whether the relevant procedural rules were complied with, whether the facts on which the choice was based were accurately stated and whether there was a manifest error of appraisal or a misuse of powers. [75]

218. The appellant contends that there is no legal obstacle arising from the long-term risk of dependence on supplies from the CIS.

219. The appellant's arguments, as they appear in substance from the report for the hearing, are as follows.

220. It submits that it is for the Community institutions, not the Agency, to establish the permissible degree of dependence of the Community in relation to supplies from the CIS.

221. On this point, before dealing with the appellant's further arguments, I refer to my discussion of the powers conferred by the Treaty upon the Agency in relation to the common supply policy, and I repeat that this argument must be rejected. [76]

222. The appellant goes on to point out that the Commission referred to the existing production capacity of the CIS States, which was said to represent some 25%. However, according to the appellant, the Commission said nothing regarding long-term production

74 — See, for example, the judgments in Case 260/84 *Minebea* v *Council* [1987] ECR 1975, paragraph 28, and Case C-156/87 *Gestetner Holdings* v *Council and Commission* [1990] ECR I-781, paragraph 63.

75 — Paragraph 90.

76 — See paragraph 195 et seq. of this opinion.

capacity and the long-term dependence which would result for the Community, although it had made an estimate of these data, which were essential for assessing dependence on the CIS. Although the European Union had recognised the independence of the Russian Federation and of the other CIS States since the end of 1991, and although not all the successor States of the former USSR were members of the CIS, neither the Agency nor the Commission distinguished between the very different production capacities of those sovereign States.

223. According to the appellant, the Court of First Instance infringed Article 61 in conjunction with Articles 2(d) and the last sentence of Article 3(1), as well as Article 136 of the Treaty, when, in order to assess the risk of long-term dependence, which would constitute a legal obstacle to the conclusion of the contract, it regarded the whole of the CIS as a single source of supply, thus adopting the Commission's assumptions on this point without verification.

224. In this connection, the appellant contends that the Commission relied on production capacities only, without taking account of the fall in prices, particularly on spot markets, or of the existence of large stocks, which explained the volume of materials available from the CIS. However, according to the appellant, it could be foreseen that these stocks would be used up within a few years, regardless of the uranium deposits and production capacity of the CIS. Since, according to the Commission, the production of the CIS States accounted for approximately 25% and that figure was also the upper limit for admissible dependence in relation to supplies from the CIS, the Commission had made a manifest mistake in asserting that if an individual supply undertaking exceeded the 25% limit, this could lead in the long term to an unacceptable degree of dependence for the entire Community on supplies from the CIS. The primary cause of the fall in prices, particularly on the spot markets, had been the reduction in stocks.

225. The appellant adds that both the Agency and the Commission were also mistaken in their price forecasts. It had been clear from the beginning that prices would have stabilised by the year 2000. In fact, they had stabilised in 1996.

226. The appellant also observes that, at the beginning of the next century, production capacity would be about 90% of demand. Therefore it could not be said, as the Court of First Instance stated, that there would be a 'structural deficiency' for such a short period. In reality, Community production had a 'deficiency structure' because Community uranium deposits are very small. A policy of diversification, however skilful it might be, could not alter this because, by virtue of natural laws, the distribution of uranium deposits throughout the world was not governed by the Agency's 'supply policy'. According to the appellant, this explains why the Court of Justice dismissed ENU's

application in the case of *ENU* v *Commission*. [77]

227. The appellant complains that the Commission, in regarding the restriction of supplies on the spot market to 10% as one of the principles of the Community's supply policy, took into account the fact that the appellant covered more than 150% of its annual requirements by purchasing materials from the CIS on the spot market. According to the appellant, this opinion is not consistent with the division of powers established by the Treaty and is contrary to the freedom to contract and the freedom of enterprise guaranteed by the German Constitution and the Community legal order.

228. There is nothing in the legal system of the Treaty to justify an obligation, on the part of supply undertakings, to cover most of their needs by means of long-term contracts and not on the spot market. The period of validity of supply contracts between the parties was a matter for them alone, even though the Agency had exclusive power to conclude or refuse to conclude the contract. The opinion that the appellant's supplies on the spot market infringed the principle of equal access to resources or indicated a privileged position within the meaning of Article 52(2)(a) of the Treaty was mistaken in law. The judgment should be set aside on this ground also.

229. The appellant adds that, in free-market economies, it is inconceivable that an undertaking should be punished merely because, after assessing market trends more accurately than its competitors, it uses them as a reason for refusing to conclude long-term contracts.

230. Finally, the 'internal assessment criterion' of 25% permissible dependence of each user in relation to supplies from the CIS was exceeded by contracts previously concluded by the Agency in 1991 and 1992, without the latter seeing this as a legal obstacle. Therefore the appellant was legitimately entitled to assume that the Agency would have no objection to the contract.

231. The appellant's arguments show clearly that, in essence, it seeks to dispute the facts as found by the Court of First Instance and to question its assessment, which cannot be reviewed, of both the facts and the evidence put before it. However, the appellant is not permitted to do this. [78] Examination by the Court of Justice of each of the appellant's complaints, most of which are of a purely factual nature, would amount to accepting that the Court has jurisdiction, in the context of an appeal, to examine a complex factual situation, contrary to the provisions of the Treaty and the EAEC Statute of the Court of Justice.

77 — Case C-357/95 P [1997] ECR I-1329.

78 — See paragraph 114 et seq. of this opinion.

232. I should add that, with a very few exceptions, the appellant's submissions in no way indicate, and in any case not precisely, the contested elements of the judgment which the appellant seeks to have set aside, but the appellant has an obligation to indicate these under the Rules of Procedure of the Court of Justice, as interpreted by settled case-law. [79]

233. What is more, certain complaints are directed at the Agency or the Commission, without the slightest criticism of the judgment of the Court of First Instance or even the slightest reference to it.

234. Likewise, the appellant's arguments in support of the application for annulment are mostly non-existent or, where they exist, the legal arguments are not adduced precisely and rigorously in support of reasoning which casts doubt on the judgment in question.

235. With regard, in particular, to the complaint that the Court of First Instance deemed all the CIS States to be a single source of supply in the reasoning which led it to find that there was a legal obstacle to the conclusion of the contract, it must be observed that the references to specific provisions of the Treaty are not sufficient to justify an examination by the Court of Justice of the merits of the complaint. The appellant has produced nothing to establish a connection between the alleged irregularity and the provisions to which the appellant refers.

236. I conclude therefore that the arguments seeking to cast doubt on the existence of an obstacle relating to the policy of diversification of sources of supply are inadmissible.

237. As the appellant's complaints on this point must be rejected, the Court will not be required, in my view, to give a ruling on the other limbs of the plea disputing the provisions of the judgment relating to, first, the merits of the legal obstacle arising from Article 14 of the Trade Agreement and, second, the principle of equal access to resources.

238. It is clear from settled case-law that the Court will reject outright complaints directed against grounds given in a judgment of the Court of First Instance merely for the sake of completeness, since the latter cannot provide any basis for its annulment. [80]

239. In the present case it is sufficient if any one of the reasons given against concluding

79 — See paragraph 82 et seq. of this Opinion.

80 — See the order in Case C-137/95 P, *SPO and Others* v *Commission* [1996] ECR I-1611, paragraph 47 et seq..

the contract and found valid by the Court of First Instance cannot be called into question for Decision 94/285 to be deemed lawful in that respect. The grounds of the judgment examining the contract are sufficient to justify the dismissal of the appeal on this point.

(b) The second limb, alleging infringement of the aims of Articles 1 and 2 of the Treaty

240. The appellant contends that the Court of First Instance misconstrued the aims of Articles 1 and 2 of the Treaty in finding that it was in the interest of the Community nuclear industry that a particular source of supply, such as the CIS as a whole, should not become too important in relation to alternative sources.

241. The appellant claims that only sovereign States should be regarded as sources of supply. It also considers that the diversification of sources of supply is not one of the aims referred to in Article 2 of the Treaty, and adds that the Commission and the Agency contravened the principle of freedom of supply granted to users by the Treaty.

242. I have already said why it seems to me that the principle of a regular supply for all Community users laid down by Article 2(d) of the Treaty depends on diversification of the sources of supply. [81] Contrary to what the appellant says, such diversification must therefore be deemed an independent aim of the Treaty, because without it the principle may be rendered meaningless.

243. Moreover, the appellant does not specify the legal basis for its statement that the limits on the freedom of supply laid down by the Treaty are not justified.

244. Finally, the same observation applies to the complaint concerning the definition of sources of supply. No legal grounds are adduced in support of the argument that the term is strictly limited to States, and excludes a group of States or a particular part of the world. On the contrary, the appellant sets out a number of factual submissions on this point, thus revealing its intention of disputing the assessment by the Court of First Instance.

245. Purely for the sake of completeness, let me add that, in the absence of a precise definition by the Treaty of the geographical nature of the sources which must be taken into account to achieve the aims of reliability and

81 — See paragraph 94 et seq. of this opinion.

diversification of supply, it would be possible for several States to be considered together for assessing the risk to the Community arising from a large increase in the supply contracts concluded with them. Under these circumstances, a single limit of permissible dependence may perfectly well be applied to a group of sovereign States.

2. The plea alleging breach of the principle of legal certainty and of the principles of equal treatment and proportionality

(a) Breach of the principle of legal certainty

246. As stated in the report for the hearing, the appellant complains of a lack of transparency, consistency and foreseeability in the Agency's conduct, which is not subject to democratic control of any kind.

247. The appellant contends that Decision 1/94 does not show that the requirement of market-related prices is inferred from Article 14 of the Trade Agreement with the USSR, that is to say, an agreement with a State which has ceased to exist. The appellant considers that it cannot be bound by findings made in 1992 by a working party of experts set up in the framework of the Advisory Committee sitting in camera, whose conclusions were based entirely on Western production costs, which were not the same thing as market-related prices. Nor could it have been foreseen, according to the appellant, that the Agency would infer, from the finding in its annual report for 1992 that imports of natural uranium from the CIS represented approximately 25% of net Community needs, that the 'existing long-term production capacity' of the CIS and its share of world production were also 25%. Finally, the appellant claims that it could not have anticipated that the Agency and the Commission would not observe the international agreements with the CIS States under which each of the latter was to be deemed a particular source of supply. As the Agency had previously concluded contracts with the appellant and other users at prices which were not 'market-related', there was nothing to indicate that the Agency would evolve from an internal document a completely different 'common supply policy' which it had no power to decide on under Article 52(1).

248. The appellant adds that even the most prudent commercial undertaking could not anticipate that the Agency would consider the Community's reliability of supply to be imperilled in the medium and long-term if a single small user like itself covered in one year 150% of its annual needs by buying on the spot market, without having concluded long-term contracts.

249. The appellant's true purpose in making these submissions is to question the assessment by the Court of First Instance of the facts.

250. The Court of First Instance observed that 'the measures on which the Agency's approach is based, namely the Council Resolution, which sets out in the second indent of point 5(a) the aim of geographical diversification of the Community's external sources of supply, and the Trade Agreement, which provides in Article 14 that prices must be market-related, have both been published in the *Official Journal of the European Communities*'. [82]

251. Citing the Agency's annual report for 1992 with regard to the high level of imports of natural uranium from the CIS and the contracts concluded for future deliveries, and with regard to the price levels, 'which were unrelated to production costs in the West', and also with regard to the opinion of the Commission and the Agency that corrective measures were justified, the Court of First Instance was entitled to conclude that 'having regard to the existence of easily accessible sources of information which a reasonably diligent trader in this very particular and clearly identified sector must be taken to know, it cannot be said that there was a lack of transparency'. [83]

82 — Paragraph 125 of the judgment.

83 — Paragraphs 126 and 127.

252. The appellant merely sets out and develops these purely factual arguments without referring to a single point of law which might call into question this assessment by the Court of First Instance.

(b) Breach of the principle of equal treatment

253. The appellant claims that the Court of First Instance did not carry out a proper examination of its complaints concerning breach of the principle of equal treatment.

254. According to the appellant, the last paragraph of Article 52(2) of the Treaty requires the Agency not to discriminate between users on grounds of the use which they intend to make of the supplies requested. The application by the Agency of its internal assessment criterion causes it to allocate to large State undertakings the same quantities of uranium from the CIS as to small, legally independent, private undertakings, whereas the State undertakings are much better able to draw up their plans, and for a longer term, than small undertakings such as the appellant. This is said to be discriminatory treatment.

255. The appellant merely asserts that the Court of First Instance did not examine its

complaints relating to this part of the plea, but does not give details of the shortcomings which might affect the validity of the judgment. On the contrary, it must be said that the Court was right to approve the Agency's approach, which consists in applying a threshold of permissible dependence for each undertaking in order to ensure equal access to resources for undertakings established in the Community. [84]

256. It must be added that the fixing of a maximum percentage for the needs of each undertaking does not show discrimination based on the use of supplies or discrimination on any other basis. In any case, the conclusions of the Court of First Instance on this point do not reveal a breach of any rule of law.

(c) Breach of the principle of proportionality

257. The appellant complains that the Court of First Instance disregarded the fact that the Agency, in excess of its powers, itself decided on its supply policy and failed to examine the possibilities offered by the second paragraph of Article 65 and Articles 70 and 72 of the Treaty. The Court is also said to have omitted to find that the subsequent addition of a clause to the supply contract was likewise a serious infringement of the freedom to contract, which is protected by the Community legal order. Such infringement ought to have been specifically justified by reference to the principle of proportionality.

258. According to the appellant, under the first paragraph of Article 61 of the Treaty, Article 5 *bis* (f) of the Rules and its own regulations, the Agency has power only to conclude or to refuse the contract in its entirety, not to add a new clause to it. In only one place does the Treaty grant the Agency a right to intervene in the contractual relationship in order to give it proper form, that is to say, in the second paragraph of Article 65. However, even in that case, the Agency may decide on the geographical origin of supplies only if conditions at least as favourable as those specified in the order are thereby secured for the user. The second paragraph of Article 65 should not be applied by analogy because in the present case the conditions of delivery were altered to the disadvantage of the parties to the contract, so that only the obligation laid down by the first paragraph of Article 61 arose. As there was no legal or material obstacle to the conclusion of the contract, the Agency had an obligation to conclude it. If there really had been a legal obstacle, the Agency would have been required by the first paragraph of Article 61 to refuse to conclude the contract. By concluding it nevertheless and by adding a condition, it exceeded its powers.

259. Firstly, the appellant complains, in essence, that on the one hand the Court of First Instance did not take account of the arguments before it, and on the other that it did not state sufficient grounds for its judgment on several points.

84 — Paragraph 132 of the judgment.

260. However, the Court of First Instance gave a clear and adequate decision in finding — correctly — that application of the provisions of the Treaty referred to by the appellant would have been of no assistance in that the Agency, 'considering the aims of its supply policy, had to block imports from the CIS at non-market-related prices'. [85]

261. Above all, the Court of First Instance gave sufficient grounds for finding that the condition of origin imposed by the Agency was lawful with regard to the principle of proportionality, by referring to the other grounds of the judgment relating to the need for the Agency to be able bar uranium imports if they might jeopardise the geographical diversification of sources of supply.

262. Therefore the aim of the contested measure is expressly mentioned and the judgment shows clearly that continued imports of nuclear materials from the CIS would have been likely to jeopardise fulfilment of the requirement of regular supplies. [86]

263. Secondly, with regard to the argument that the Agency had no power to impose a condition for the conclusion of the contract and that there were no obstacles to performance of the contract, I refer to my earlier observations on these points. [87]

264. Consequently the appellant's plea must be dismissed.

3. The plea alleging breach of the rules on the division of powers

265. The appellant contends that the Court of First Instance disregarded the distribution of powers laid down by the Treaty by finding that the Agency had the right to determine the common supply policy, whereas it has only quasi-notarial functions and powers of a purely commercial nature.

266. On this point I take the liberty of referring to my foregoing observations on the roles of the Agency and the Commission in determining the Community's supply policy and the scope of the Agency's powers in that respect. It is clear from what I said that the

85 — Paragraph 135 of the judgment.

86 — Paragraphs 92 to 94 of the judgment.

87 — See paragraphs 209 et seq. and 212 et seq. of this opinion.

Treaty provisions authorise the Agency to make decisions, under the close supervision of the Commission, in relation to the common supply policy. Therefore the appellant's plea must be dismissed. [88]

4. The plea alleging breach of the obligation to state reasons

267. The appellant claims that the Court of First Instance did not fulfil its obligation to state reasons because it failed to examine the complaint that the Commission did not show a structural relationship between the Agency's powers and the Treaty and did not state why the appellant would become dependent on supplies from the CIS or in what way the purchase price agreed in the contract did not conform to market conditions.

268. The appellant adds that the Commission's reasoning is not consistent with taking the production capacity of the CIS States as a criterion, which, according to the appellant, is decisive for determining Community dependence.

269. Finally, the appellant contends that, contrary to what the Court of First Instance states in paragraph 146 of the judgment, the action does not relate to the reasons for the Agency's refusal to conclude the contract, but the reasons why the Commission did not exercise its right under the second paragraph of Article 53 of the Treaty.

270. First of all, the limb of the plea alleging irregularity in the Commission's reasoning concerning the production capacity of the CIS States must be dismissed. This part of the appellant's argument is, as the Commission rightly points out, directed against the latter's decision and does not call the judgment into question. Furthermore, the appellant brings its argument to bear on purely factual aspects of the matter and omits to put forward pleas in law.

271. Secondly, with regard to the alleged failure of the Court of First Instance to state reasons, it must be noted that the Court stated that 'the Commission made it clear in its decision that the Agency is not obliged to meet orders where there are legal or material obstacles to doing so (point 14 of Decision 94/285)', before pointing out that the Commission 'referred first to Article 64 of the Treaty, under which the Agency may act within the framework of agreements concluded between the Community and a third State ... (point 21)'. [89]

88 — See paragraphs 195 to 208 of this opinion.

89 — Paragraph 145 of the judgment.

272. This reasoning is a clear reply by the Court of First Instance to the part of the appellant's plea relating to the Agency's power under the Treaty, because the judgment refers expressly to Article 64, the main purpose of which is to give the Agency the exclusive right, within the framework of agreements with a third State or international organisation, to enter into contracts for supplies from outside the Community.

273. Furthermore, it being unnecessary to comment once again on the application of Article 61 in so far as the appellant's submissions in support of this plea relate to the alleged insufficiency of the reasons given by the Court of First Instance and not to the relevance of the legal basis established, it is sufficient to observe that the reference in the judgment to the limits on the Agency's obligation to meet orders for supplies is an implicit, but clear, reference to that Article of the Treaty, which is alleged to form the basis of the Agency's power to object to the conclusion of a contract in specific circumstances.

274. In addition, it appears from the judgment that, contrary to what the appellant says, the Court of First Instance gave a ruling on the Commission's statement of the reasons why it considered that the appellant would become dependent on supplies from the CIS.

275. The judgment shows that the Court referred to point 33 of Decision 94/285, which states that 'a further increase in the proportion of supplies coming from the CIS [at present 20-25%] would be difficult to reconcile with the Community's long-term supply interests'. [90] This is a clear, unambiguous statement of the reasons which led the Commission to take the decision in question particularly as, although the Court does not reproduce the whole of point 33, it cites it specifically, so that the appellant could have referred to it and established that the Commission pointed out that 'the Community has concluded multiannual supply agreements with a number of third countries' and that 'the common supply policy must also take account of relations with these trading partners and with other supplier countries'. [91]

276. It should be observed that the Court of First Instance did not reply expressly to the appellant's argument that the Commission did not state the reasons why the price stipulated in the contract did not accord with market-economy conditions or was not market-related.

277. The Court merely stated that the Commission's decision referred to Article 64 of the Treaty, under which the Agency may act within the framework of agreements concluded between the Community and a third State, before referring to Article 14 of the

90 — Ibid.
91 — Point 33.

Trade Agreement which, it will be recalled, made trade in goods between the Community and the USSR subject to the requirement that prices are market-related.

278. However, as I pointed out above when discussing the complaints that Decision 94/285 did not state sufficient reasons in relation to the Agency's power and the risk of dependence on the CIS, the Court of First Instance set out in full the grounds showing why the reasoning of the decision was sufficient on these two points, observing that 'Decision 94/285 discloses clearly and unequivocally *the principal reasons* for the refusal to conclude the contract submitted by KLE'. [92]

279. Having concluded that the Commission's decision was justified by the reasoning dealing with these two arguments, the Court was entitled to refrain from examining the complaint relating to price levels other than by dismissing it implicitly by a reference to the sufficiency of the principal reasons for the decision.

280. The Commission also notes, correctly, that the Court of First Instance, by summarising and repeating the principal reasons for the contested decision, espoused the Commission's reasoning and thus rejected the appellant's complaints.

281. Consequently the appellant's plea must be dismissed.

5. The plea alleging misuse of powers

282. The appellant complains that the Court of First Instance did not ascertain whether the measures taken by the Agency were within the scope of its powers, which was a necessary prerequisite for verifying the purpose actually pursued by the Agency. According to the appellant, this could not be ascertained because there was no comparable examination of the role of the Commission itself.

283. The appellant contends that the Court, by making no distinction between the Agency and the Commission when it stated that the appellant had not proved that they had both pursued an aim other than implementing the supply policy, disguised the fact that, in this plea, the appellant intended to criticise primarily the lack of reasons in the Commission's decision and only indirectly to criticise the Agency in that regard. The appellant complains that the Commission did not exercise its right of veto over decisions in excess of the Agency's powers under the Treaty, in accordance with the first paragraph of Article 53.

92 — Paragraph 146 of the judgment, emphasis added.

284. Finally, according to the appellant, the Court's reference to the Agency's letter of 20 December 1993 proves that the Agency was seeking to protect Western producers.

285. The limb of the plea alleging that the Court of First Instance failed to ascertain that the Agency acted within its powers cannot succeed.

286. It is sufficient to observe that the Court of First Instance gave an express ruling on the nature and extent of the Agency's powers and on the legality of the Commission's decision in the light of those powers.

287. After stating that 'the task of the Agency is to guarantee one of the essential aims which the Treaty assigns to the Community, in Article 2(d), namely reliability of supplies, in accordance with the principle of equal access to resources', the Court of First Instance pointed out that the Treaty 'establishes that specialised body expressly for that purpose' [93] and that 'where decisions concerning economic and commercial policy and nuclear policy are involved, the Agency has a broad discretion when exercising its powers'. [94]

288. Having determined this legal framework, the Court then ascertained that the three obstacles relied upon by the Commission to justify the condition concerning origin laid down in the contract existed. [95]

289. The appellant's argument that the Court did not distinguish between the Agency and the Commission in the part of the judgment relating to the plea alleging misuse of powers, whereas the Commission was described in the first limb as not having exercised its right of veto, must be dismissed as inadmissible.

290. The reason is that the only point of law relied upon concerns the Commission's power to object to measures taken by the Agency. It must be borne in mind that the plea before the Court of First Instance was that the Commission had misused its powers which, in the absence of arguments to prove that they were exercised for an improper purpose, disposes of the idea of inappropriate use of the right of veto.

291. Regarding the reference at first instance to the Commission's letter of 20 December 1993, it must be observed that the appellant's argument seeks to challenge the assessment of the evidence before that Court, which can be allowed only in so far as the argument in

93 — Paragraph 85 of the judgment.

94 — Ibid., paragraph 90.

95 — Ibid., paragraph 89 et seq..

question is such as to show that the evidence was misconstrued.

292. In contending that the aim was to protect Western producers, the appellant is clearly not trying to show that the evidence was misconstrued, but to adduce new evidence in support of its arguments.

293. As this submission is new and it cannot prove that the evidence put before the Court of First Instance was misconstrued, it must be ruled inadmissible. Consequently the plea must be dismissed in its entirety.

The action for damages

294. The appellant maintains that, by dismissing the claim for damages on the ground that the Agency's conduct and the Commission's refusal to accede to the appellant's requests were not vitiated by any irregularity, the Court of First Instance disregarded the fact that the applications for annulment related only to the Commission's decision. However, according to the appellant, the claim for damages related to the damage suffered by reason of the Agency's unlawful conduct, on which therefore the Court ought to have given a ruling.

295. As the Commission correctly points out, this plea cannot succeed because when the Court of First Instance, on examining the applications for annulment of the Commission's decisions, found that the conduct of the Agency and the Commission was lawful, it also made an assessment of the legality of the Agency's decisions which amounts to a reply to the plea at first instance. It must be added that the observations in the judgment concerning the Agency's conduct do not disclose any grounds which might indicate misconduct. Finally, the appellant has made no observations relating to the facts adduced at first instance on which it alleges that the Court did not give a ruling and which might indicate such misconduct.

VI — Costs

296. Under the first paragraph of Article 122 of the Rules of Procedure, where the Court itself gives final judgment in the case, it is to make a decision as to costs.

297. Article 69(3) of the Rules of Procedure, which by virtue of Article 118 applies to the procedure on appeal, provides that, where each party succeeds on some and fails on other heads, the Court may order that the parties bear their own costs.

Conclusion

298. In view of the foregoing, I propose that the Court:

(1) annul the judgment of the Court of First Instance of 25 February 1997 in Joined Cases T-149/94 and T-181/94 *Kernkraftwerke Lippe-Ems* v *Commission*, in so far as it did not reply to the plea in Case T-149/94 alleging failure by the Euratom Supply Agency to state the reasons for a unilateral extension of the time-limit laid down by Article 5 *bis* (f) of the Regulation of 15 July 1975 of the Supply Agency of the European Atomic Energy Community amending the Rules of the Supply Agency of 5 May 1960 determining the manner in which demand is to be balanced against the supply of ores, source materials and special fissile materials;

(2) ruling on the plea, declare the application unfounded;

(3) for the remainder, dismiss the appeal;

(4) order the parties to bear their own costs.