OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN DELIVERED ON 27 MARCH 1984

My Lords,

The Finanzgericht, Düsseldorf, has referred to the Court, pursuant to Article 41 of the ECSC Treaty the question whether certain recommendations of the High Authority of 28 January 1959 and 30 October 1962 are compatible with Article 4 (a) of the Treaty and are capable of justifying national measures introducing a differential duty on hard coal which is imported from the open market in a Member State but which originated in a non-member country, "and if so for how long are such measures justified?".

The question has arisen in proceedings brought by Mabanaft GmbH, Hamburg, to annul a decision of the German customs authorities that the company was liable to pay a total of 1 382 829 Deutschmark in respect of custom duties on various consignments of coal. The coal was purchased during 1977 and 1978 by another company, since dissolved, and to whose business Mabanaft succeeded, from a Netherlands company, and imported into the Federal Republic. It was described and purchased as "EEC products of Netherlands origin, dump stocks and storage stocks". The supplier of the coal provided certificates of origin purportedly issued by the Netherlands state mines on the basis of which the coal was allowed in free of duty.

There is no suggestion that Mabanaft's predecessor in title was aware that it was not as described, but in fact it has subsequently been established that these certificates were forgeries and that the coal had been originally imported into the Netherlands (it seems quite lawfully) from non-member States. Accordingly in 1981 the German customs authorities assessed it to duty under the appropriate customs law and the Revenue Code.

The Finanzgericht came to the conclusion that once the coal had been cleared for the open market in another Member State it was in free circulation in the Community and that the Federal Republic could not levy a differential customs duty on it. The recommendations of the High Authority which were relied on were no longer effective to permit the duty to be levied in 1977 and 1978.

The Court has been told that, following a surplus of coal production in the Community in 1958, the Federal Republic, amongst others, wished to impose restrictions on importations of coal from third countries. The High Authority, after consultation with the German Government and on the basis of Article 74 (3) of the ECSC Treaty, made a recommendation dated 28 January 1959 that that government charge, on a temporary basis, customs duties on coal, originating in third countries and with the Federal Republic as its destination. Such duties were not to exceed DM 20 per tonne and were only to be levied after a quantity being not less than 5 million tonnes had been allowed in free of duty. Other Member States were

required to take the steps necessary for the implementation of the recommendation to the Federal Republic, particularly in so far as concerned controls as to the origin of coal destined for the Federal Republic and going there from Member States.

This recommendation authorized steps taken earlier in the month to the same effect by the Federal Republic. By a further recommendation of 3 November 1959 the minimum duty-free quantity of 5 million tonnes was fixed for 1960, and subsequently for 1961, 1962 and 1963 the figure was set at 6 million tonnes, that for 1963 being fixed by a recommendation of 30 October 1962, the second of those mentioned in the question referred. Laws of the Federal Republic gave effect to these recommendations and extended the 6 million tonne limit for 1964 so that for that year no recommendation was issued by the High Authority. Indeed, no further recommendations were issued by the High Authority prior to the events in question. Laws of the Federal Republic, however, maintained in force the limit at 6 million tonnes until it was increased to 7 million tonnes for 1971 and reduced to 5 million tonnes by the Federal Republic for 1976, to take account of the fact that coal from the United Kingdom, formerly covered by the quota, was by then coal originating in the Community.

It seems that even though no further recommendation was made to the Federal Republic, the Commission kept under surveillance the coal stock position in the Community, and the possible effects of third country imports, and also that the Commission was aware of the limitations imposed by the Federal Republic on such imports which it was said had favoured the coal industry in the Community. By a recommendation of 15 April 1977 (77/328/CECA; OJ 114, 5. 5. 1977, p. 4) the Commission recognized the problem facing the industry because of increasing stocks, and in particular those existing in the Federal Republic, and recommended joint consultation and information as to third country imports. Member States were not to take national measures without implementing such procedure. Such Community surveillance was established by a decision of the Governments of the Member States in Council in November 1977 (OJ L 292, p. 11).

The Finanzgericht considered whether it had jurisdiction to make the reference under Article 41 of the ECSC Treaty. It concluded that it had.

The Commission has also raised the question as to whether this reference is admissible and has submitted that, in one way or another, it is. The Federal Republic and Mabanaft do not suggest that the Court should reject the reference as inadmissible.

Article 41 gives the Court of Justice "sole jurisdiction" to give preliminary rulings on "the validity of acts of the High Authority" where such validity is in issue in proceedings brought before a national court. In this context a distinction is drawn between this provision and the terms of Article 177 of the EEC Treaty which expressly empowers preliminary rulings on the interpretation of the Treaty and as to the validity and interpretation of acts of the institutions of the Community.

In Case 23/68 *Klomp* v *Inspektie Der Belastingen* [1969] ECR 43 at p. 49 paras 3-5, the Court held that the preliminary ruling procedure was "available only in respect of questions relating to the validity of the acts of certain institutions of the Community but not in respect of questions relating to the interpretation of the provisions of that Treaty", albeit in that case the Court found jurisdiction elsewhere. It is, however, to be observed that Mr Advocate General Lagrange has taken a much broader view. In the light of the structure of the ECSC Treaty, and in particular Article 31 (which requires the Court to ensure that "in the interpretation and application of this Treaty and the rules laid down for the implementation thereof the law is observed"), he considered that the Court must be able, indeed may be obliged, to answer questions relating to the interpretation of the Treaty which arise in proceedings before national courts. (Case 101/63 *Wagner* v *Fohrmann* [1964] ECR 195 at p. 205 and Revue du Droit Public 1958, p. 841 at p. 855.)

There may be much to be said, from a practical point of view, in favour of the opinion that a power to refer questions as to the interpretation of the Treaty is to be implied into Article 41, not least in view of the benefit to the development of Community law of the answers to questions on interpretation given by the Court pursuant in favour of references under Article 177 of the EEC Treaty, perhaps even to applying what has been called the extension theory so as to add on to Article 41 the power to deal with questions of interpretation contained in Article 177 of the EEC Treaty.

It does not, however, seem to me necessary to resolve this question in this case. It is, in may opinion, clear that, if the validity of an act is in question, the first task almost inevitably is to ask what is the nature of the act in question. That involves, where the act is in a document, interpreting the words used. If the compatibility of an act of the High Authority with provisions of the Treaty is in question, that inexorably involves the Court in directing itself as to the proper meaning of the Treaty. That process, as I see it, was followed in Case 15/81 *Gaston Schul* [1982] ECR 1409 and in Case 292/82 *Merck* (judgment of 17 November 1983 and see also the opinion of the Advocate General in the same case (6 October 1983) at p. 8 where such a course was considered to be valid).

In the present case it seems to me clear that the two Recommendations of the High Authority ("recommendations" being specifically included in Article 14 of the ECSC Treaty) are "acts" for the purposes of Article 41. In the French text of Article 41 "déliberations" appears, not acts, but in my view "recommendations" in Article 14 (French text) are included in "déliberations" in Article 41.

The validity of those recommendations in the sense of their compatibility with Article 4 of the Treaty is specifically questioned; for this purpose it is permissible to construe both the acts and the Treaty to rule on the validity of the acts. The question as to how long such measures are justified under the Treaty can, in one sense, be said to be a question of interpretation. In my view, however, the question of substance is whether those acts of 1959 and 1962 can

provide a valid basis for what is done in 1977 and 1978. That involves a question as to their validity at the relevant time, as well as a question of interpretation. Moreover, if the Court finds it necessary, as part of the process of ruling on the validity of the acts, to interpret other Articles of the Treaty, that also seems to me possible under a reference as to the validity of specific acts.

I consider accordingly that the present reference is admissible.

The first part of the question asks whether the Recommendations of 1959 and 1962 are compatible with Article 4 and are capable of justifying a national differential duty on coal imported from the open market in a Member State but which originated in a non-member country; the second part asks for how long national measures are justified (i.e. on the basis of those recommendations). The point of the question as I read the reference is essentially to ask (i) were the recommendations valid when they were made (so that national measures could lawfully be based on them), or were they incompatible with Article 4 (a) of the Treaty (ii) were they, if initially valid, still valid in 1977 and 1978 so as to authorize national measures based on them in respect of those years?

The 1959 recommendation refers to Articles 3, 57, 58 and 74 of the Treaty; it recites the serious difficulties arising from large stocks in the Community and particularly in Germany where third country imports threaten seriously to prejudice coal production in the Community and to put employment at risk. The recommendation is, on a temporary basis, to impose duties on imports from third countries for delivery in Germany, over a prescribed duty-free figure, the maximum duty and the minimum prescribed figure being established only for 1959 subject to the High Authority recommending a modification to the minimum figure, if changing circumstances required it. The recommendation of 30 October 1962 recites Articles 3, 57 and 74 of the Treaty and the recommendation made in respect of 1962 and states further that the reasons justifying the institution of customs protection in the Federal Republic continue to exist, and that the position in 1963 will probably be no better than in 1962. Having fixed for 1963 the same minimum figure as had been fixed by specific recommendation for 1961, the recommendation provides in Article 2 that it becomes binding when notified to the Federal Republic and that it will be published in the Official Journal. It also specifically records the meeting of the High Authority at which the recommendation was adopted.

It was at that stage clearly the view of the Commission that a recommendation was needed for 1963, even though the level adopted for 1961 was to be repeated, and had ben repeated in 1962 in a specific recommendation.

The form of both recommendations was equally clearly intended to comply with Article 15 of the ECSC Treaty which requires reasons to be given and provides for the way in which a recommendation is to become binding.

By Article 3 of the ECSC Treaty the institutions of the Community were charged, within the limits of their respective powers, in the common

interest, with a number of tasks including those of ensuring an orderly supply to the common market, taking into account the needs of third countries, protecting consumers and workers and promoting trade and production. So far as concerns production, the High Authority was by Article 57 required to give preference to indirect means of action such as cooperation with governments and in intervention in regard to prices and commercial policy as provided for in the Treaty. In the event of a decline in demand, if the High Authority considered that the Community was confronted with a period of manifest crisis, and that Article 57 provided inadequate machinery, it might under Article 58 fix production quotas "accompanied to the necessary extent by the measures provided for in Article 74".

Despite the reference to these articles in the recitals, it is clear that these recommendations purported to be made under Article 74. In three cases the High Authority is empowered by that Article to do one of two separate things. It may take any measure "which is in accordance with this Treaty", and in particular with the objectives set out in Article 3. That clearly does not allow any derogation from the Treaty. It may also make a recommendation which is in accordance with the second paragraph of Article 71. That seems to confer a wider power on the High Authority than is contained in the first part, so long as the recommendation does not in matters of commercial policy towards third countries exceed what Member States could do under international agreements to which they are parties. In other words exemptions from Treaty obligations in limited cases can be granted by way of recommendation of the High Authority.

The relevant case is to be found in paragraph (3). In the light of the circumstances recited in the recommendations (the factual basis of which in relation to the time at which the recommendations were made is not challenged) it seems clear that coal was imported into the territory of one or more Member States "in relatively increased quantities and under such conditions that these imports cause or threaten to cause serious injury to production within the comon market of like or directly competing products".

The final paragraph of Article 74 clearly accepts that quantitative restrictions may be imposed so long as the conditions laid down in Article 58 (here paragraph 1) are satisfied. If quantitative restrictions can be imposed, it seems to me that other restrictions can be imposed such as the imposition of customs duties in respect of excess importations over a minimum limit.

If this is the correct interpretation of the second part of the first paragraph of Article 74, in my view the recommendations of 1959 and 1962 were validly made in respect of the years to which they refer in respect of imports of coal originating in third countries, even those which had already been lawfully imported and cleared through customs in another Member State. National measures for those years could be based on them, whether or not they would otherwise violate Article 4 (a) of the Treaty. They were made under powers of derogation provided for in an emergency situation.

It does not follow automatically that they were still valid in 1977 so as to

justify the imposition of customs duties at that time. Exemption or safeguard provisions must be limited to what is necessary having regard to the legitimate object in view. They can only be valid if they are limited to take effect during the circumstances which justify their existence. It may be permissible to provide for measures to be taken during a period of time, if the circumstances indicate that conditions justifying them will continue during that period, but they must be limited to that period. (See e.g. Case 337/82 *St. Nikolaus Brennerei* v *Hauptzollamt Krefeld,* judgment of 21 February 1984, para. 15). They cannot be automatically renewed without a consideration of the circumstances existing at their first expiring, and under Article 15 of the ECSC Treaty the reasons justifying the extension must be stated.

The 1959 recommendation and the 1962 recommendation recite the circumstances justifying their making at the time of making and it is specifically recited in the 1962 recommendation that in 1963 the situation was not expected to improve. The 1959 recommendation authorized customs duties on imports over the prescribed limits on a temporary basis. The minimum quantity in both recommendations is fixed for a specified year. If the specific provisions are ignored (which in my view they cannot be since Article A must be read as a whole) there remain merely the opening words of Article A of the 1959 recommendation, which provides for a tariff free minimum without specifying what it is, and there is no way under Community law of identifying it. After 1963 there was accordingly no minimum fixed by the High Authority. Such a minimum and the maximum rate of duty could only validly be fixed by the High Authority in the light of circumstances obtaining from time to time. It is no answer to say, as the Commission argues, that it was not necessary for the High Authority to fix a limit because the Federal Republic legislation fixed it. The latter could only do so within the terms of the recommendations which covered at the latest 1963.

Accordingly as a matter of their proper interpretation, it seems to me that these recommendations expired at the end of 1963 and they were not valid to authorize national measures in respect of the years 1977 and 1978.

If the recommendations could not be made under the second part of the first sentence of Article 74 but only under the first part, wider questions arise, in some respects the same as those which have been raised in the extensive arguments addressed to the Court as to whether the Federal Republic was entitled to take the national measures which it took regardless of whether the Commission authorized it to do so or not.

The latter question is not directly raised in the reference — and is somewhat curious since, from what the Court has been told, it seems that both the High Authority and the Federal Republic thought in 1959 and in 1962 that duties could only be imposed if they were auth-

orized by a recommendation of the High Authority. None the less it seems necessary to deal with it in this opinion.

These questions turn on the interrelation between Article 4 and Chapter X Commercial Policy, and on the question whether goods originating in a third country which have been imported into and cleared through customs in one Member State, and which are then exported to another Member State, are assimilated to goods originating in the Community for the purposes of the ECSC Treaty. Many arguments have been advanced as to the relationship between the EEC and the ECSC Treaties, and as to the issue as to whether the Coal and Steel Community is a free trade area, a customs union or a *tertium quid.* It is argued that there cannot be a system for the free circulation of goods which originated in a third country unless there is a common customs tariff and a common commercial policy, neither of which is created by the ECSC Treaty.

Although the ECSC Treaty lacks many of the provisions of the EEC Treaty (such as Articles 9 and 10) and does not create a customs union within the definition of Article XXV (8) (a) of GATT and may be nearer to the definition of a free-trade area in paragraph 8 (b), there are features of the ECSC Treaty which, even without reliance on the EEC Treaty, seem to put it into a separate category. That Treaty does not deal with "substantially all the trade" between the constituent territories, and it sets up a "community founded upon a common market, common objectives and common institutions" (see Case 15/81 *Gaston Schul* [1982] ECR 1409 at p. 1431 as to the concept of a common market in the EEC Treaty). It does not, however, seem to me necessary to resolve this debate and it is any event in my opinion wrong to start, as the able argument of counsel for the Federal Republic at times seemed to start, from the *a priori* assumption that the Coal and Steel Community must be either a free-trade area or a customs union.

The starting point rather is Article 4 (a) which recognizes as incompatible with the common market, prohibits and abolishes import duties and quantitative restrictions on the movement of products. That says nothing in terms about goods originating in third countries which are put in free circulation in a Member State. In Cases 9 and 12/60 *Vloeberghs* v *High Authority* [1961] ECR 197 at pp. 216 and 217, the Court accepted that the principle of the free movement of products enshrined in Article 4 (a) does apply to goods originating in third countries and imported into a Member State; which it is sought to export from that Member State into another Member State. The principle was, however, adopted not for the protection of third country producers but "in order to prevent the free movement of Community products being itself diminished or impaired by the establishment of obstacles to the free movement of the said products."

Articles 71 to 75 of the Treaty provide for a degree of coordination in the Community by the High Authority and by the Member States amongst themselves, and, as has been seen, confer powers on the High Authority.

It is expressly provided that the powers of Governments of the Member States in matters of commercial policy should not be affected by the Treaty "save as otherwise provided therein" (Article 71).

Further, as the Commission points out, Article 71 (3) would not be necessary if Member States could, contrary to the principle of the free movement of goods, themselves adopt autonomous measures concerning the movement of goods from third countries in circulation in the Community.

On the basis tha the principle of free movement can apply to goods originating in a third country and lawfully imported into and cleared through customs in one Member State, is there any provision which allows Member States to restrict that free movement?

I do not think that any assistance is derived from Article 72 which empowers the Council to fix minimum and maximum rates for customs duties on coal and steel "as against third countries" and leaves it to the governments, subject to considering the opinion of the High Authority, to fix their tariffs within this bracket. This Article is dealing with goods on first importation into the Community from a third country.

Paragraph 3 of Article 71 provides that Member States are required to afford each other such mutual assistance as is necessary to implement measures recognized by the High Authority as being in accordance with the Treaty and the High Authority is empowered to propose to the Member States concerned the methods by which this mutual assistance can be provided.

Article 73 provides that the Member States in which the place of destination for imports is situated shall administer import licences, subject to control by the Commission by way of recommendation.

Contrary to what appears to be suggested, this does not seem to me to be a provision which would justify measures by a Member State to deal with the sort of problems which arose here by way of a derogation from other Treaty obligations. On the contrary the assistance which can be sought from other Member States (not self-administered as provided in Article A of the recommendation) is only such as the High Authority recognizes as being in accordance with the Treaty. This article is thus not an exception clause covering the same grounds as Article 74 (3), as appears to be suggested, not least since the limitations contained in the latter do not appear in the former.

Subject to the judgment of the Court I would have come to the same conclusion as Mr Advocate General Roemer in the *Vloeberghs* case that the Member State of destination for the purpose of Article 73 is the State to which the goods are first sent, and into which they are lawfully admitted and cleared through customs. That is a fact which can objectively and clearly be ascertained, whereas, as Mr Advocate General Roemer pointed out, the criterion of "ultimate destination" may be impossible to apply with certainty. To take only one example, a trader in a third country selling goods to another in one Member State may have no knowledge that his purchaser has

already agreed to re-export them to another Member State.

The Court, however, found that the coal in question was imported by a company in Antwerp from the United States of America with a view to resale into France. It was admitted into Belgium "without difficulties or charges of any kind", subjected to certain processes and then sent on to France. In these circumstances, when the French authorities refused to grant import licences the Belgian importer claimed compensation against the High Authority for failure, by not applying the procedure laid down in Article 88 of the Treaty, to ensure respect for the free movement of goods.

The application failed because the Court found that it was never intended to import the coal into Belgium or anywhere in the Community other than France. Accordingly since there was "an attempt at direct importation into France having the mere semblance of an import into Belgium" France was treated as the country of destination, and it was entitled to refuse to admit the coal.

If this judgment rules that the country of final destination is always enabled under Article 73 to restrict the import of goods originating in third countries, even if they have been lawfully imported into and cleared through customs in another Member State, then that article provides an exception to the principle of free movement.

It seems to me that the better view is that the Court was not laying down such an absolute principle, but was dealing with the special facts of a case in which compensation was being claimed for breach of duty. France was not so much the final as the real destination. To have laid down an absolute rule that the country of ultimate destination can always control the admission of goods of third country origin, in free circulation in another Member State from which it is desired to export them, would undermine the very principle of free movement which the Court accepted, and, as I see it, would also curtail the effect of Article 86 (2) of the ECSC Treaty under which Member States undertake to refrain from any measures incompatible with the common market referred to in Articles 1 and 4. It would also open up the practical difficulties adverted to by Mr Advocate General Roemer.

Accordingly I am of the opinion that the power of control conferred by Article 73 is vested in the Member State in which the third country goods are first in free circulation upon import into the Community. When they are first in free circulation for this purpose depends in my view not on a definition adopted by each Member State, as Mr Advocate General Roemer thought, but on a Community definition on the lines of Article 10 of the EEC Treaty, which must be applied to the facts found by the authorities of the Member State. Thus goods merely in transit in one Member State or, admitted to one Member State subject to a specific customs procedure such as storage in a customs warehouse,

would not be in their country of destination.

On the other hand if the goods are *bona fide* in free circulation in one Member State, they are not thereafter subject to further control by another Member State under Article 73. They are, for the purposes of Article 4 (a), to be treated on the same basis as goods of Community origin; they benefit from the principle of free movement which is not excluded by the mere fact that they are sold on.

This conclusion seems to me to be consistent with Article 74 (3) which is dealing with goods "imported" into the territory of a Member State. That country, as I read it, is the country in which the goods are first put into free circulation, and should, in the ordinary case, be the same as the Member State of destination for the purposes of Article 73. It is also consistent with Article 15 (6) of the Convention on the Transition Provisions which forms an integral part of the ECSC Treaty (Article 84). As Mr Advocate General Roemer put it:

"Only one necessary conclusion may be drawn from these provisions: according to the Treaty the principle of free movement applies within the Community to products lawfully imported from third countries. If the Member States were free to close their borders to such products and thus maintain in being the measures prohibited by Article 4 (a) the special rules of Article 15 would be superfluous. And in particular the High Authority's authorization mentioned in the sixth paragraph makes sense only if the principle of freedom of movement is accepted, because an authorization means permitting a measure which is in itself prohibited."

That general principle applies equally to coal as to steel.

I would not in any event apply Article 73 "by analogy" to goods originating in a third country which are imported into the Community as counsel for the Federal Republic contends.

Accordingly, as the High Authority itself accepted in its letter of 28 May 1955, set out in the *Vloeberghs* judgment pp. 15 and 16, the principle of free movement in the Community applies also to "coal and steel products of third countries, on conditions that they have been imported properly into any country of the Community".

In my view, accordingly, Article 4 (a) is not to be read restricively so as to confine it to goods of Community origin, as the Federal Republic argues, is not deprived of effect by Article 73 and the principle derived from Article 4 (a) is not displaced by measures which can be taken by a Member State alone under Article 71 (3) or under Article 74 (3). Articles 71 (3) and 74 (3) seem in any event to be provisions which would be unnecessary if the Community were simply a free trade area.

If the judgment in the *Vloeberghs* case does lay down a wider exclusion than that which has been set out above then it seems to me that on the basis of the issues arising in the present case it is open to the Court to reconsider it in the light of the opinion of Mr Advocate General Roemer.

It also follows that if recommendations could only be made under the first part of the first sentence of Article 74 they could not validly be made in so far as they authorize customs duties in the Federal Republic on coal already lawfully admitted and cleared through customs in another Member State. Such a measure which breached the principle of free movement in Article 4 (a) would not be a measure "which is in accordance with this Treaty".

However I take the view, on the basis of the first grounds set out in this opinion, that the question posed should be answered on the lines that:

The recommendations of the High Authority of 28 January 1959 and 30 October 1962 were not valid in respect of any period subsequent to the end of 1963 and were not capable of justifying national measures introducing a differential duty on hard coal imported into the Federal Republic of Germany in 1977 and 1978 where such coal, which had originated in a non-member country, was already in free circulation in another Member State.

The costs of Mabanaft fall to be dealt with in the proceedings before the national court. No order should be made as to the costs of the Commission or of the Federal Republic of Germany.