OPINION OF MR ADVOCATE GENERAL ROEMER[1]

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Mr President,
Members of the Court,

In the case of the Royal Dutch Government against the High Authority the language of the procedure is Dutch. I regret that my knowledge of that language is not adequate. I shall therefore deliver my opinion in my mother tongue, German, which, however will simultaneously be interpreted into the other official languages of the Community.

It is my duty 'acting with complete impartiality and independence, to make' in open court 'reasoned submissions' on the case brought before the Court. May I make some general preliminary remarks before presenting a statement of the facts which constitute the subject of the present proceedings.

In the course of the oral proceedings the applicant frequently referred to international law, the law of nations, in accordance with the principles of which the Treaty establishing the European Coal and Steel Community is to be interpreted. In my view it has put forward *exceptions* under the law of nations in which individual persons—not only the classic subjects of the law of nations, the States—possess rights and obligations under the law of nations; similarly, with regard to the Treaty it referred to *exceptions* of a more international nature such as cases where the unanimous consent of the Council of Ministers is necessary. I do not believe that it is necessary for me to examine this in any greater detail. On the one hand I do not think that it is relevant to the judgment in the present case. Secondly in its defence the High Authority clarified matters properly. Perhaps it is necessary to point in addition to the position of this Court which does not have *ad hoc* judges, takes no account of nationality, has no dissenting opinions but only judges of a European Community whose judgments are directly enforceable without any reexamination of the merits and which thus ensures compliance with Community law. Finally, the applicant itself refers to 'droit communautaire' (Community law) and in its submissions as to the term 'détournement de pouvoir' (misuse of powers) made references to the law of the individual Member States which is of decisive importance in the interpretation of our Community law.

The question to be decided here concerns without any doubt the application of the economic law laid down in the Treaty.

1 — Translated from the German.

Legislating on economic factors is a difficult task in which it is not possible to dispense with the use of terms which entail a value judgment and whose definition presupposes knowledge and appreciation of the economic situation. The Treaty went a very long way in legislating on economic factors; in particular it laid down legal preconditions for general decisions of the High Authority which in part are comparable to the statutory instruments of national law. The possibility of legal control which is thereby given is not as a rule intended to have the result that the Court of Justice substitutes its own economic value judgment for the assessment of the High Authority. Consequently in the application and interpretation of the Treaty it would be dangerous only to rely on the text of the Treaty. In order to recognize the economic objectives of individual provisions the general aims and principles of the Treaty must be taken into consideration. The Court has already stressed the importance of the general objectives in its first judgments. My learned colleague Mr Lagrange emphasized in his opinions that in the exercise of an individual power the High Authority must bear in mind *all* the objectives of the Treaty, that in achieving the aim envisaged by an individual provision it must not act in conflict with any superior general objective and that the same principles must apply to interpretation by the Court.

These general objectives only acquire real meaning when they are set against the factual situation. Every decision in general matters and also in economic matters is based ultimately on the fact that an existing situation must be altered or influenced in the most appropriate way to achieve a future objective. Without giving a comprehensive examination here I therefore believe it is necessary as a starting point to refer to certain important factors about the coal market which may be of relevance in the present case. They must be considered against the background of the objectives of the Treaty; subsequently it will be necessary to examine briefly how the High Authority, faced with the situation as it then was, tried, by means of its decisions at the time of the opening of the Common Market, to act in accordance with those objectives and finally how, because of the changed position at the beginning of the second coal marketing year it altered its price system for the coal market and in particular adopted the decisions which have been contested and which are at issue in the present proceedings. Only when the decisions at issue have been set within the system of dynamic development, when they are considered on this basis and in that context can an appropriate legal evaluation and examination of their compatibility with the Treaty be undertaken.

A — Facts

I thus come to a statement of the facts which are well known to the Court and which I may therefore outline briefly. The national markets in coal were more or less strictly organized. For decades prices had been regulated by the authorities. In so far as competition was possible it did not exist between individual mines but between groupings of them organized by the respective coalfields for joint selling. Finally the costs of production in the coal producing countries of the Community were very varied.

Account had to be taken of this situation existing at the time when the Common Market was established; the Convention on the Transitional Provisions emphasized that fact on a number of occasions and stated that the principal task of the High Authority for the preparatory period was the collecting of information in order to acquire actual knowledge of the general position and the particular circumstances within the Community. A transitional period of five years, one year of which had elapsed at the time of the adoption of the contested decisions, was provided for the establishment of the Common Market and normal competitive conditions.

The decisions of the High Authority at the beginning of the transitional period must be seen in this light. An equalization levy was imposed to benefit the Belgian and Italian coalfields. The alignment provided for in the Treaty with the prices of competitors within the Community (Article 60 (2)

(b)) was not at first permitted (Decision No 3/53, Journal Officiel, p. 21); instead for certain coalfields zone prices were permitted. The level of prices then existing was maintained by fixing maximum prices for coalfields in general with an initial relaxation: only the most important fields were included and undertakings were allowed a certain freedom of action with regard to the price structure in that not all grades were restricted and for grades which were not directly tied only two limits had to be complied with: the absolute maximum limit for the whole category of coal and a maximum limit for the average of all grades of one type.

At the beginning of the second coal marketing year the measures 'for the progressive integration of the Belgian coal mines into the Common Market' as the High Authority stated in its general report were continued: measures were also continued 'which were to enable the mines in Sulcis to meet competition from the Common Market after the expiry of two years'. The decision prohibiting price alignment was extended without a time-limit. The system of area prices was altered in that, according to the position of the selling market, alignment with the delivered price for comparable combustible fuels from the Ruhr coalfield or from the coalfield of the Nord and Pas-de-Calais was generally permitted while previously only in respect of sales from the Saar and Lorraine to the Federal Republic of Germany had reference been made to the prices in the Ruhr, but for the rest prices were determined independently. Finally, fixed prices were laid down for Belgium.

It was in this context that the contested decisions were adopted. They maintained maximum prices but with the omission of one of the three previous limits, namely the average maximum price for all grades of one type and were solely applicable to the two largest fields in the Community, the Ruhr coalfield and the coalfield of the Nord and Pas-de-Calais. In respect of the Ruhr coalfield the price limit for one type, for the coalfield of northern France the price limit for four types was omitted. On the other hand the price limits for certain grades were altered and in part extended. It is however true that the restrictions for three or two grades have been omitted but three or four grades which earlier had been unrestricted are now restricted.

For the fixing of the maximum prices at the time of the opening of the Common Market Decision No 6/53 laying down the principle stated that 'in order to avoid disturbances in the economy of the Member States' they had to be based on the level resulting from the maximum prices fixed in all the Member States; the fixing of particular maximum prices for certain grades of coal was justified on the grounds of supply difficulties.

In general terms the High Authority referred to the fact 'that in accordance with the general objectives of the Treaty maximum prices in the Community may only be fixed when and in so far as the maintenance of the present level of prices is not ensured by competition between coalfields and that the fixing of maximum prices must be carried out by a method which permits progressive development of the free play of forces in the Common Market'.

At the beginning of the second coal marketing year the High Authority was of the opinion 'that in view of the development of the Common Market for coal a further continuation of maximum prices for undertakings in *all* the coalfields of the Community is no longer necessary; however, in view of the present structure of the Common Market if maximum prices are not fixed by the High Authority the prices for coal will be determined by the selling agency of the Ruhr coalfield and by the Houillères du Nord et du Pas-de-Calais and it is therefore necessary in order to achieve the objectives set out in Article 3 to maintain for the time being the maximum prices for undertakings in both these coalfields'.

That is the development which led to the contested decisions, to the detailed contents of which I shall return, in my examination now of the grounds of action relied on by the applicant.

B — Legal assessment

May I first make a number of observations with regard to the procedure:

Decisions Nos 19 and 20/54

The action seeks the annulment of three decisions. In its judgments in Cases 1 and 2/54 the Court of Justice has already ruled that that is admissible if there is evident factual connexion. Such a connexion exists in the present instance: Decision No 18/54 extends the validity of the basic decision, No 6/53, with the above-mentioned amendments for a further year and on the basis of that decision Decisions Nos 19/54 and 20/54 fix the price-limits for the undertakings of both coalfields.

Decisions Nos 19 and 20/54 are not separately challenged by the applicant. It is true that the applicant states that the new maximum prices are not substantially lower than the previous maximum prices; this argument, however merely serves to support its view that Decision No 18/54 could not have had as its object a reduction in price. In other words the applicant denies altogether the admissibility of the fixing of maximum prices but if they are admissible it does not apply for an examination of the level of prices thereby established.

In those circumstances Decisions Nos 19/54 and 20/54 can only be annulled as a result of the annulment of Decision No 18/54.

The examination of the grounds of action relied on by the applicant may therefore be restricted to Decision No 18/54.

Decision No 18/54

The applicant bases its action on infringement of the Treaty, manifest failure to observe the provisions of the Treaty, misuse of powers and the infringement of essential procedural requirements.

Both parties rightly assume that the manifest failure to observeTreaty rules is not an individual ground of action.

Rather it is *the degree* of infringement of the Treaty which can only be determined in the course of an evaluation of the situation within the meaning of the second sentence of the first paragraph of Article 33. In such an evaluation of the situation the review by the Court in respect of infringement of the Treaty only extends to determining whether it constitutes a manifest failure to observe provisions of the Treaty. The examination of manifest failure to observe the Treaty consists in the examination of infringement of the Treaty as restricted by the second sentence of the first paragraph of Article 33 to the instances set out in that provision and it must therefore be carried out in that context. It is not possible to accept the view of the High Authority that the proof of manifest failure to observe the Treaty is a pre-condition for the Court's undertaking an examination of the overall evaluation of the situation. As the applicant correctly pointed out if such proof were given the decision would have to be annulled without the necessity for further examination. The phrase 'save where the High Authority is alleged ...' merely means that the manifest failure to observe the Treaty—as every other ground of action—must be invoked by the applicant and must state the reasons on which it is based. There then follows the thus *limited*—and always limited— further examination.

Accordingly, three grounds of action have been relied on which will now be examined in turn.

I. Infringement of the Treaty

The applicant alleges an infringement of Article 61 (a) of the Treaty and puts forward the view that in the given circumstances the fixing of maximum prices was not admissible and that the prices should have been completely freed.

Article 61 requires that, on the basis of studies and after consulting the Consultative Committee and the Council of Ministers, the High Authority should find that maximum prices are necessary to attain the objectives set out in Article 3 and particularly in paragraph (c) thereof; then it may fix maximum prices within the Common Market for one or more of the products within its jurisdiction. The factual situation justifying that legal consequence is therefore so to speak composed of two stages: studies must be made as to the existing economic facts and circumstances on the basis of which the High Authority makes an overall evaluation of the situation, that is, a value judgment.

Accordingly the arguments of the applicant can be distinguished as to whether they relate to the finding of the underlying economic facts and circumstances or the formation of the value judgment made on the basis of those facts.

(1) *Establishment of the facts*

With regard to the first point the parties are only in disagreement in one respect. The High Authority alleges that if prices had been freed they would not have fallen substantially while in the view of the applicant prices would have fallen after some time even without intervention by the authorities.
There are two reports of the Market Division of the High Authority of 3 February 1954 (No 728) and of 15 February 1954 (No 6523) with regard to this question and we must accept them as evidence. According to those reports there were no prospects of a reduction in prices from the German and French coalfields. The representative of the Charbonnages de France stated that the market would not allow of higher prices than those existing at present from which it may rather be deduced that the undertakings were seeking an increase in price. The representatives of the Ruhr coalfield at first stated that a certain rebate could be granted but later they requested an examination of their costs of production and withdrew their previous proposals.
Against this the view of the applicant is supported by no facts and, as the High Authority correctly pointed out solely constitutes a forecast based on economic theory. In addition the applicant itself did not maintain that an immediate reduction in price would have occurred. In the course of the oral proceedings it merely stated that the prices would have fallen of their own accord *after a certain time if* the economy had further weakened and the import of cheaper coals from third countries had continued. As the Court is aware the position has changed in both respects and at the present moment a price increase is already being discussed. The clarification sought as to how the undertakings reacted to the extent of the reduction finally fixed by the High Authority was given in the course of the oral proceedings by the High Authority which stated that a reduction of 0.50 DM had been proposed for coke.
Therefore there exists no incorrect finding of fact such as to reveal infringement of the Treaty.

(2) *Formation of the value judgment as to the necessity of fixing maximum prices*

The applicant contests the formation of the value judgment of the High Authority as to the necessity of fixing maximum prices from two points of view.

(a) First the applicant regards it as an infringement of Article 61 in conjunction with Article 5 of the Treaty that the High Authority accepted the *possibility* that *one* of the objectives of Article 3 would not be achieved instead of setting out in detail what effects would have been produced by freeing prices and what objectives would not thereby have been achieved. However, the High Authority specified those effects in the second recital in the preamble to Decision No 18/54 in saying that in the absence of the fixing of maximum prices by the High Authority the prices for coal would be determined by the selling agencies of the Ruhr coalfield and the Houillères du Nord et du Pas-de-Calais. That can only be interpreted to the effect that in such a case prices would have been artificially maintained at a high level or even increased out of line with the market situation. The High Authority therefore based its decision directly on the effects on prices, contrary to Article 3 (c). It shares the view of the applicant in so far as it too does not regard as sufficient an equivocal and dubious possibility that detrimental effects might occur. However, in view of what has been said it cannot further be deduced from the fact that the preamble to the decision uses a more prudent and broader formulation in the fourth recital that the High Authority regards the mere possibility as sufficient.

(b) The second argument raised in this respect is to the effect that in its assessment of the necessity for maximum prices the the High Authority took account of and

thereby recognized a market structure which is contrary to the Treaty. That was not permissible because the Treaty provided measures for such a situation in Articles 65 and 66; the failure to apply such measures cannot constitute the grounds for the exercise of a power which is directly intended for other purposes and which applies for a market situation which is not distorted by unauthorized cartels and concentrations.

The applicant considers that as regards the *Ruhr coalfield* the market structure contrary to the Treaty consists in the existence of the Gemeinschaftsorganisation Ruhrkohle and its six sales companies which, in the opinion of the applicant, infringe Article 65 of the Treaty.

In this respect it may be stated that it is still by no means certain whether and to what extent those organizations infringe Article 65 of the Treaty and that at any event at the present moment the prohibition contained in Article 65 is not yet applicable to those organizations. This arises unequivocally from the second paragraph of Article 12 of the Convention on the Transitional Provisions and Decision No 37/53 of 11 July 1953 based on that convention. Under Article 1 of the Convention on the Transitional Provisions the implementation of the Treaty is to be effected in two stages, a preparatory period and a transitional period. During the transitional period which is running at present— it expires on 9 February 1958— the Treaty is only to apply subject to the derogations arising from the Convention on the Transitional Provisions. Article 12 of that Convention constitutes such a derogation for the application of Article 65. It provides that where the High Authority does not grant the authorization provided for in Article 65 (2) which under that provision may be applied for by existing cartels, reasonable time-limits shall be set after which the prohibitions contained in Article 65 shall apply. By Decision No 37/53 the High Authority provided that in principle the prohibitions laid down in Article 65 of the Treaty would enter into force on 31 August 1953 (Article 2). Under Article 3 of the decision however that did not apply for agreements in respect of which a written reasoned application for authorization had been submitted before that date. In such cases only when the procedure for authorization is concluded without authorization being granted will the time at which the prohibition under Article 65 takes effect be fixed in the decision refusing the authorization. The Gemeinschaftsorganisation Ruhrkohle and its six sales companies lodged such an application within the time-limits and the procedure for authorization has not yet been concluded. The position is set out in the *Report of November 1974, No 75, on the situation of the Community.* Although it was stated in the course of the oral proceedings that the handling of this question of vital importance for a country of the Community with consequences of both economic and social nature without true parallel in the Community has wrongly been delayed it is in my opinion not a serious charge giving rise to legal consequences.

It cannot reasonably be assumed that the applicant also wishes to challenge Decision No 37/53 by indirect means. It must certainly be admitted that the fixing of prices by the Gemeinschaftsorganisation Ruhrkohle—the sole activity of several of these organizations in issue—cannot be authorized. Is it necessary to dissolve the whole organization for that reason? The applicant itself states that in the event of a winding-up the liquidators would have to determine prices on instructions from the High Authority and that this state of liquidation could last for years. What did the High Authority do in the present instance? It fixed prices, that is exactly what would have had to happen in the view of the applicant even in the event of a winding-up. Winding-up concerns 'prohibited' organizations; subject to a decision by the Court of Justice the High Authority is exclusively competent to issue the prohibition.

The applicant is therefore anticipating the decision of the High Authority against which an appeal could be lodged at the Court and it appears to me this anticipation is inadmissible. At the present stage and in the present proceedings it appears to me incorrect to refer to an illegitimate or unlawful existence of these institutions which regulate the market.

In the present context the circumstances in which the Gemeinschaftsorganisation Ruhrkohle was created may be recalled as the facts may perhaps facilitate understanding of this substantial problem. The syndicates which regulated the entire sales for coal or lignite in wide areas such as for example Upper Silesia or the Rhine-Ruhr including the Ruhr, the Lower Rhine, Aachen and the Saar were followed after the summer of 1945 by selling agencies of the Allied occupation and administrative authorities. By virtue of a decision of the Allies in the Control Commission in Berlin they were replaced in 1947 by the 'Deutscher Kohlenverkauf' a subdivision of the 'Deutsche Kohlenbergbauleitung'. There subsequently followed a de-cartelization of this body by the institution established by the Allies; as with the creation of the six sales companies it is based on an express measure of the Allied High Commission which, by Law No 27, ordered the dissolution of the previously existing Deutscher Kohlenverkauf and which in Durchführungsverordnung (implementing regulation) No 17/20 regulated in detail the formation of the organizations replacing it, the Gemeinschaftsorganisation Ruhrkohle and the six sales companies. That implementing regulation made provision for the jurisdiction of the High Authority which was intended to step into the shoes of the Allied authorities as soon as it had commenced activities and opened the Common Market in coal. The attendant problems played a considerable rôle in the negotiations concerning a Treaty creating the European Community and were the direct reason for the insertion of the fifth paragraph of the oft-mentioned Article 12 of the Convention on the Transitional Provisions. Although in principle the second paragraph of Article 1 (5) of the Convention on the Transitional Provisions provides that the rules for the transitional period shall cease to apply on its expiry, in this instance, in particular as regards the selling agencies of the Ruhr coalfield, provision was made for the transformation and for the creation of *permanent* organizations with the words 'recourse to these ... bodies need not be confined to the transitional period'. Therefore the provisional existence of these organizations must be regarded as a factual circumstance which the High Authority not only could but had to take into account in its decision on coal prices. That by no means entails recognition that the facts accord with the Treaty. On the contrary the High Authority has clearly stated that fixing of prices by these organizations could not be tolerated and for this reason in particular it fixed maximum prices itself.

In the coalfield of the Nord and Pas-de-Calais the structure contrary to the Treaty is constituted according to the applicant by the fact that that coalfield exercises a determining influence on the French market which for its part is not yet fully exposed to the competition of the Common Market because the present marketing arrangements for trade in coal between the countries of the Community and the international transport tariffs which are still provisionally in force prevent effective competition. The studies and work of the High Authority in this field are well known; there exist obstacles to the Common Market, provision for the dismantling of which during the transitional period was made by Article 10 of the Convention on the Transitional Provisions. So long as such a position exists it must like all other factual circumstances be taken into account by the High Authority.

Thus it is understandable that Article 61 solely subjects the fixing of maximum prices to the pre-condition that they must be necessary to attain the objectives set out in Article 3 and particularly in paragraph (c) thereof without insisting on a particular state of the market or of competition. On the establishment of the Common Market the fixing of maximum prices was justified on the grounds that 'to avoid disturbances in the economies of the Member States the level of coal prices in the Community must be equated to the level resulting from the maximum prices at present fixed in all the Member States'. Equally account can and must be taken of every other factual situation even if it does not yet comply with the requirement of an ideal common market. No infringement of the Treaty can be found to exist so long as the conditions laid down in Article 61 have been satisfied and

the general objectives of the Treaty have been complied with. The fact that account was taken of the existing situation with regard to competition and distribution does not prove the contrary; it was rather an obligation.

(3) *Manifest failure to observe the Treaty*

In the arguments which were examined and refuted above the applicant contested the *formation* of the judgment of the High Authority as to the necessity of fixing maximum prices; it objected that the High Authority took into account considerations which were *legally* inadmissible and which therfore infringed the Treaty. Examination of that point was unrestricted. However, the applicant also contests the *correctness* of the decision itself by formulating *factual* considerations which differ from those of the High Authority. The applicant alleges that it was incorrect to fix maximum prices when the market situation did not give reason to expect increases in prices; to do so was in fact detrimental because it served to freeze the level of prices. In other words the applicant argues that where there exists a surplus of supplies and large pit-head stocks it is *manifestly unnecessary* and is even detrimental to fix a *maximum* and not a minimum limit for prices. The High Authority takes the contrary view and replies that in spite of the fact that no increase in the prices applicable was threatened the fixing of maximum prices was necessary in order to impose on undertakings an appropriate price reduction which they would not have introduced on their own account.

In the examination of the necessity of price fixing a large number of economic facts and circumstances must be taken into consideration and the resultant situation must be evaluated in its entirety. It is evident from the words 'if it finds' in Article 61 that this evaluation of the situation is in principle reserved to the High Authority. In the oral proceedings *contradictory conclusions* were drawn from the words 'si elle reconnaît': the High Authority claims on that basis a discretionary power while the applicant contests the subjective nature and demands objective correspondence of the facts and the judgment. This contradiction of views is however merely apparent. If it must be determined whether reality and the judgment correspond a *second* judgment as to the reality must be taken, as is done by the applicant which with its own judgment opposes that of the High Authority. That judgment is nothing more than the conclusion, the result of an evaluation and assessment of all factors which are necessarily subjectively coloured which includes a certain discretion, a margin of freedom of assessment—it is not merely a finding of fact which must only be taken into account and in respect of which there exist no differing views. Whether an economic measure is necessary is very largely a question which can be answered neither by mere observations nor by logical conclusion. Accordingly the word 'finds' describes the result of an assessment of numerous circumstances, factors and tendencies.

Under the second sentence of the first paragraph of Article 33 the Court can not just examine such an evaluation of the situation with regard to infringement of the Treaty; it can only do so on the ground of manifest failure to observe the provisions of the Treaty. If the evaluation of the situation by the High Authority constitutes such a manifest failure the Court must annul the decision of the High Authority based on that evaluation. If such a manifest failure to observe the Treaty is not found to exist the Court must regard the evaluation of the situation by the High Authority as proper without more ado and subject to investigation for misuse of powers.

The concept of manifest failure to observe the Treaty must first be clarified in so far as it is necessary for deciding the question whether the arguments adduced by the applicant reveal such a manifest failure.

(a) In interpreting this concept the reasons for restricting judicial control must be of importance.

The statement of reasons by the German Government[1] says in this regard:

1 — *Translator's note:* This is the statement of reasons for the draft law authorizing the ratification of the Treaty.

'In respect of the extent of administrative judicial control the problem was raised as to the extent of the powers of the Court to include in its judicial evaluation the numerous economic factors in the provisions of the Treaty. The principle of the separation of powers prevailing in the provisions of the Treaty relating to institutions required that the judicial control by the Court should not make it the supreme body representing the will of the Community in economic questions in place of the High Authority. Therefore in general terms the Court can only extend its examination to the situation arising out of the economic facts or circumstances when the High Authority is charged with misuse of powers or where it has manifestly failed to observe the provisions of the Treaty; on the other hand examination of economic facts or circumstances is admissible without restriction'.

Reference may also be made to the report of the French delegation:

'... it was considered that most decisions of the High Authority were by the very provisions of the Treaty made subject to the realization of factual conditions or the existence of situations of an economic nature and examination by the Court of the 'legality' of decisions taken by the High Authority would have had the effect in reality of letting the Court judge whether those decisions were well founded. Consequently the actions of the High Authority could be paralysed by the total control of the Court which would have produced complete confusion of powers'.

There then follows the text of the second sentence of the first paragraph of Article 33 which is described in that report as the result of a fundamental examination of the problem and is appraised with the following words:

'Thus it has been possible to achieve the indispensable reconciliation of the concern to maintain within legal limits the action of the High Authority and the necessity which is no less great of not obstructing that action in a field where economic, political or social considerations require a continuous appraisal of the factual circumstances which normally fall outside the jurisdiction of a judge'.

In my opinion the Court should examine the statement of reasons laid before the parliaments of the other countries. In my view they would not reveal any divergent views.

These reasons have also been recognized by legal writers. For example Ule in his article 'Verwaltungsgerichte überstaatlicher und internationaler Organisationen' (Deutsches Verwaltungsblatt 1953, pages 491-497) admits despite some doubts that no other solution is conceivable; economic policy must be adapted to changing circumstances and cannot therefore be subject to a long-term fixed legal ruling and a judge cannot be allowed to determine economic policy.

From the *ratio legis* it may be deduced in respect of the concept of manifest failure to observe the Treaty that the judge must be in a position to find it without substituting his own economic policy for that pursued by the High Authority; it was intended that this should be avoided by the restrictions on the Court's powers of review.

Under the Treaty a control is provided for the economic policy of the High Authority; it is contained in Article 24 of the Treaty which obliges the High Authority to submit a general report to the Assembly each year on its activities. If a motion of censure is adopted with the requisite majority against this general report—that is a motion which disapproves of the general economic policy of the High Authority—the High Authority must resign as a body. This control of a political nature which cannot be implemented by juridical means was in my opinion deliberately denied to the Court.

The restriction of judicial control is particularly relevant in respect of the question of the necessity and appropriateness of a measure which, as Steindorff, who has often been cited in the course of the proceedings, stated in his report on an action for annulment, in general can not be answered by means of a logical conclusion. Although Steindorff thought that the French word

'patent' must have a weaker meaning than the French word 'manifeste', a word which had at first been chosen for the text of the second sentence of the first paragraph of Article 33, and although that article in general does not require undeniable and obvious unlawfulness but regards a *serious* deviation of the administrative decision from the view of the Court as 'méconnaissance patente' Steindorff believes that for the question whether a measure was necessary or appropriate, the term must only be accepted subject to strict conditions and that in this respect the view of the Court must differ very widely from that of the High Authority.
In my view it is superfluous to seek an exhaustive definition beyond these points of reference. The progressive development and clarification must be left to subsequent practice; the application to the present instance will reveal whether it is necessary to define the limits more closely.

(b) The question whether the fixing of maximum prices with a weakening economy is detrimental if it results in a freezing of the price structure is a question of abstract economic theory. The applicant supports its view with psychological considerations and itself admits that it can never be proved. It ignores the fact that the prices fixed could be adapted to an economy which is weakening further if the undertakings do not do so themselves in which case the *maximum* prices will certainly not stand in their way. The whole system of prices established by the High Authority in March 1954 has been again further relaxed in comparison with earlier provisions so that the general tendency is by no means towards a freezing of the price structure. Finally, actual developments contradict the arguments of the applicant: to a certain extent the Ruhr coalfield has given considerable rebates and the coalfield of the Nord and Pas-de-Calais has also made price reductions.
By their very nature economic decisions such as those contested here, adopted for a limited period in the future must be justifiable not only at the time of their adoption but also in the context of economic developments after their adoption and having regard to the objectives of the Treaty. Thus the adoption of a decision entails the evaluation of anticipated factors. The decision, seen in retrospect from the time when the evaluation of the situation existing at its adoption is being judicially examined, can be said to have proved satisfactory, having regard to the aims of the Treaty, in particular in ensuring the lowest prices and continued employment. In brief, as is well known to the Court, pit-head stocks have fallen, supply difficulties are said to exist for certain grades of coal and, because of *inter alia* the increase in sea freight charges, imported coal has become more expensive; these are all market factors pointing away from reduced or unchanged prices for coal. After decades of the fixing of prices by administrative action it must not be overlooked that by means of the second decision of the High Authority after only the first year of the five year transitional period the freeing of prices has to a large extent already been achieved. In so far as the Common Market is achieved and normal competitive conditions are established complete freeing of prices may become the general rule and the fixing of price limits restricted to exceptional cases. In my opinion these considerations are sufficient to support the conclusion that the arguments of the applicant certainly do not suffice to prove the existence of manifest failure to observe the general objectives of the Treaty and the requirements of Article 61 in particular.

(c) There remains for consideration the view of the applicant that where there is an over-supply prices cannot be expected to increase and that for that reason maximum prices were not necessary.
The first conclusion is shared by the High Authority which also did not expect price increases for those grades of coal in plentiful supply. However, it was of the opinion that in view of the market situation that was not sufficient and that a reduction in prices was required. It concluded from inquiries made of the undertakings that they were not prepared to introduce a reduction in prices themselves. I have already stated that this factual basis has not been contradicted by the the applicant (*supra*, p. 122).

The applicant also appears to admit that in this respect maximum prices may be necessary—it only contested this on the grounds that the fall in prices would occur of its own accord after a certain time. However, the applicant does not believe that the High Authority fixed maximum prices for that purpose; it reaches this conclusion from the fact that the maximum prices are not substantially lower than the prices which were actually applied previously. In other words *the applicant believes that maximum prices are not necessary in so far as they were fixed at the level of the prices applied previously in spite of the plentiful supplies available.* If this is in fact the position then it calls for an examination whether the High Authority manifestly failed to observe the requirement of 'necessity'. It is therefore necessary to undertake first of all a factual comparison of prices. In this comparison of prices it must be borne in mind that the maximum prices for types of coal merely constitute absolute limits below which the prices for grades of coal must lie. Consequently the specific limits for grades are important. As has already been stated limits have been fixed for grades which were previously subject to no maximum prices and therefore in general terms only the list prices can be compared. In the answer given by the High Authority to the second question put to it by the Court it was rightly stated that the level of prices of a coalfield as a whole must be considered. A further point was mentioned which up till then had been neglected, namely production costs.

Article 3 (c) does not merely prescribe the lowest prices but imposes two conditions: the prices fixed must not be so low that they 'result in higher prices charged by the same undertakings in other transactions or in a higher general price level at another time'; furthermore the prices fixed must allow 'necessary amortization and normal return on invested capital'. In this connexion reference may also be made to Article 3 (d) which requires 'the maintenance of conditions which will encourage undertakings to expand and improve their production potential'.

(d) In respect of the Ruhr coalfield the comparison reveals that the list prices of all five grades for which price limits were fixed have fallen by DM 2. That is a reduction of around 4% or for blast furnace coke a reduction of around 3%. Taking account of the production costs which in the view of the undertakings only reveal a reduction of DM 0.50 this amount can certainly not be regarded as insignificant. In the course of the oral proceedings the High Authority stated that the intended stimulus for the steel industry has occurred as a result of this reduction and this statement was not disputed.

As against this, in the case of the grades which were restricted until 31 March 1954 and have since been freed the list price is unaltered for two grades while for one grade it has increased by DM 2.

This development appears to confirm the expectation of the High Authority that without its intervention prices would not have fallen and to confirm also its intention to effect a reduction in prices. In any event it may not be deduced from this that maximum prices were clearly unnecessary for the Ruhr coalfield.

(e) In respect of the coalfield of the Nord and Pas-de-Calais the comparison reveals the following situation:

The list price of three grades has fallen by between 2 and 4%. The price of three other grades has remained unchanged and the price of one grade has risen by about 2%. On the contrary, in the case of the two grades which have been freed the price of one has remained unchanged and that of the other has increased by 220 French francs.

In respect of the coalfield of the Nord and Pas-de-Calais it may therefore be asked whether the fixing of a maximum price was necessary for the three grades the prices of which have remained unchanged. If one first examines the fourth grade, the price of which has even increased—it is the 'Braisettes 10/20' of the 'demi-gras' type—it is found that the *maximum* price was *reduced* from 6 540 French francs to 6 000 French francs. While use was made of the maximum price of 6 540 French francs only to the extent of 5 880 French francs the list price of 6 000 French francs has

now been increased to the upper limit. From this it may be concluded that there was for this grade a tendency to increase in price and this tendency had to be checked; in this respect also then the fixing of a maximum price was necessary.
The example equally shows that the price trends of individual grades may be contrary to the general trend. The same applies to availability: even if there are large overall stocks there may be shortages of certain grades. These factors must be taken into account for the remaining three grades. Further the above-mentioned observations as to production costs should be borne in mind as should also the necessity to prevent undertakings from compensating for a prescribed reduction by increases for other grades by means of fixing the existing level of prices.
In respect of one grade, 'fines brutes' no price limit had previously been set. It may therefore be assumed that the price level attained at the time had to be maintained and that it was necessary to prevent the increase which might be expected so that here too the fixing of maximum prices was justified in spite of the identical list prices.
May I refer again to the above-mentioned report of Charbonnages de France to the effect that the market would allow of no higher prices than the current ones and also to the *Second General Report of the High Authority* (p. 75, No 54) to the effect that in the opinion of the High Authority a *reduction* in prices for Ruhr coal and the *maintenance* of the level of prices for the coalfield of the Nord and Pas-de-Calais was in closest accord with the market situation and was therefore taken as the basis for the contested decisions.

(f) I may therefore summarize this part of my examination as follows:
Even if the concept of manifest failure to observe the Treaty is widely interpreted it cannot be held that in the present case the High Authority has fixed maximum prices which were manifestly not necessary. Otherwise it would be hardly possible to see why three members of the Council of Ministers and, having regard to the still incomplete functioning of the Common Market and especially of competition, 15 members of the Consultative Committee should have seen the necessity for further maintenance of maximum prices for a limited period. Accordingly the High Authority is by no means alone in its judgment as to the necessity of the decision but it is backed by eminent experts who share its opinion.
In these circumstances I do not believe that there exists manifest failure to observe provisions of the Treaty.

(4) *Method of fixing maximum prices*

In the context of my examination with regard to the infringement of the Treaty I should like to examine the legal scope of Article 61 whereby the High Authority may fix maximum prices for one or more of the products subject to its jurisdiction within the Common Market.
In this connexion the applicant did not allege an infringement of the Treaty in the course of the written procedure but in the oral proceedings raised the question whether it was admissible to fix prices solely for *individual* undertakings. As Counsel for the applicant pointed out the question must be examined of the Court's own motion as in certain circumstances there could exist an infringement of Article 61 (a).
Article 61 provides for the fixing of prices for one or more of the products subject to the jurisdiction of the High Authority within the Common Market. From this it could be concluded that the fixing must be comprehensive, that it must be a general decision which has the aim of determining the level of prices for the whole of the Common Market. Accordingly the Treaty prescribes prior studies made jointly with undertakings and associations of undertakings and consultation of the Consultative Committee and the Council in which *all* Member States and all the principal producer and labour organizations of the Community are represented. That article may be contrasted with provisions such as Article 66 (7) which provides for fixing of prices for an individual undertaking. Under the latter article recommendations are sent directly to the undertaking; if they are not implemented the High Authority can

determine *inter alia* the prices and conditions of sale to be applied by the undertaking in question in which respect consultation with the government concerned is the sole requirement.

The question is thus raised whether, by means of the contested decision, the High Authority in fact undertook a general fixing of maximum prices and determined the level of prices of the common market for coal.

Such fixing of the level of prices in the Common Market does not need to include all undertakings down to the smallest producers in the same way as it does not need to include all products. This is clear from the principle of Article 5 which prescribes *limited* measures of intervention and expressly restricts measures of intervention on the market with the requirement that the circumstances must require such measures. Thus in its preamble to Decision No 6/53 which I have already mentioned at the beginning of my opinion the High Authority correctly stated 'that in accordance with the general objectives of the Treaty maximum prices in the Community may only be fixed if and in so far as the maintenance of the present level of prices'—and there should here be added the establishment of a level of prices in accordance with the market—'is not ensured by competition between coalfields; the fixing of maximum prices must be achieved by a method which allows the progressive development of the free play of forces on the Common Market'.

In an examination of the methods whereby the prices were fixed in the present instance the actual circumstances and the whole situation must be taken into account. I can here give a brief resumé of the situation: the Belgian and Italian coal undertakings are not yet fully subjected to the competition of the Common Market; special fixed prices are laid down for the Belgian undertakings. There remain the German coalfields of the Ruhr, Aachen and Lower Saxony, the French coalfields of the Nord and Pas-de-Calais, Lorraine and Centre-Midi, the coalfield of the Saar and the Dutch coalfield in Limburg. Even at the beginning of the transitional period no maximum prices were fixed for the Lower Saxony and Centre-Midi coalfields. For the Aachen (9/54) and Lower Saxony (7/54) coalfields and for sales to the Federal Republic of Germany from the Saar (11/54) and Lorraine (10/54) there exist zone prices which allow alignment with the prices for comparable fuels from the Ruhr. In respect of sales from the coalfields of the Saar (13/54) and Lorraine (12/54) to certain areas of France alignment is prescribed with the corresponding prices of the Nord and Pas-de-Calais coalfield. In practice those coalfields *have to* apply the zone prices in order to find a market for their products.

From this the following conclusion may be drawn: in so far as the High Authority regarded a maximum price limit for certain types and grades of coal within the Common Market as necessary it implemented it, having regard to competition and marketing, in the simplest manner and the one which entailed the least interference by setting upper limits for the prices concerned for both the largest coalfields of the Community. Those two coalfields together provide approximately 60% of the coal production of the Community; Belgium, for which prices are fixed, produces a further 13%. Therefore in conjunction with the zone prices a general measure was taken which has the result of controlling the level of prices throughout the Common Market to the necessary extent.

In view of the circumstances existing at the time of adoption of the contested decisions therefore Decision No 18/54 does not infringe Article 61 of the Treaty by the manner in which it fixed maximum prices. In any event the High Authority will have to examine whether in view of changing circumstances and the progressive development of the Common Market it will not have to change to another method when it undertakes any fixing of prices which may be necessary.

II. Misuse of powers

It only remains for me to examine whether and to what extent misuse of powers can be established. The arguments brought by the applicant in support of this second ground of action, in particular in the learned

speeches of the professors and counsel for the applicant in the course of the oral proceedings, may be summarized as follows:
The High Authority was able to and was under an obligation to proceed against the selling organizations of the Ruhr coalfield and the Houillères du Nord et du Pas-de-Calais under Articles 65 and 66 of the Treaty.
In order to be able to avoid that procedure the High Authority applied Article 61. It negotiated with the cartels and capitulated to them; it countered the detrimental effects of its failure to act, which constituted a breach of its duty, by fixing maximum prices under Article 61 which was not intended for that purpose. In this respect I may quote in French a passage from the submissions of Professor Verzijl taken from the French text which has been given to us:

'La Haute Autorité s'est avisée de faire intervenir les cartels interdits par le Traité comme conseillers pour les "études (à faire) en liaison avec les entreprises et les associations d'entreprises" visées au début de l'art. 61, et elle est même entrée en négociations avec eux sur le niveau de leurs prix...'

(The High Authority decided to admit the participation of cartels prohibited by the Treaty as advisers in the 'studies made jointly with undertakings and associations of undertakings' referred to at the commencement of Article 61 and it even opened negotiations with them on the level of their prices...)

The applicant further stated that there is evidence that the ostensible intention of effecting a reduction in prices was not the true reason for the decision. This may be concluded from the fact that the maximum prices which were fixed were only in part and only to an insignificant extent below the list prices which had previously been applied.
In view of the preceding examination it is barely necessary in my opinion to state that this allegation is without foundation.

(1) *The Ruhr coalfield*

In respect of the Ruhr coalfield it has already been stated that the prohibition contained in Article 65 is not yet applicable to the selling agencies of the Ruhr. The question whether the High Authority could have concluded the authorization procedure before March 1954—the date of the adoption of the contested decisions—is not the issue in the present proceedings. In this instance it is only possible to examine whether the High Authority exercised the powers granted to it by Article 61 (a) of the Treaty in pursuit of an aim for which those powers were not authorized so that its decision, the results of which is not open to objection, is based on extraneous and unlawful considerations. It has already been stated that the taking into account of the existing market structure does not constitute such a wrongful consideration and was moreover required of the High Authority. From the end of the first trading year for coal and the expiry of the decisions relating to prices which were limited to that period the High Authority was under a duty to form a fresh judgment as to the necessity for maximum prices. To ensure a correct judgment the participation and consultation of various bodies was prescribed in which, as is evident from the documents submitted, opinions on this question were divided. The fact that the High Authority answers the question in the affirmative but has relaxed and substantially limited the system of maximum prices in comparison with the former system reveals clearly the ground on which the decision was based: that so far as possible account must be taken of all the considerations raised.
As regards the objective pursued by the decision it has already been stated that in conjunction with the remaining decisions as to prices, in particular the zone prices, which have been adapted to the new method of price fixing, the decision set an upper limit for the level of Common Market prices to the extent deemed necessary; however that was the purpose laid down by the Treaty of the powers of the High Authority under Article 61 (a). Finally, comparison of the maximum prices fixed with the list prices which had been applied up

till that time reveals that the latter are generally 3% to 4% lower. So from that no indication of any other intention can be derived.

In its first two judgments the Court has already ruled that the inclusion of a reason for a measure which in itself is open to objection does not constitute misuse of powers if the decision is primarily based on lawful reasons and does not abandon the essential object. In the present instance it cannot even be said that the additional reason of gaining time for a fundamental examination of the question of cartels was open to objection. In the view of the applicant the High Authority should have prohibited the cartel completely and should have had prices fixed by the liquidators, certainly one of the most far-reaching measures of intervention for which the Treaty makes provision. By applying the less far-reaching Article 61 the High Authority in fact achieved the same result and it avoided the dropping, without replacement, of activities of those organizations which could be authorized. Reference may be made to the regulations which established those organizations, the purposes of the organizations as defined there and their obligations. The applicant, which frequently and quite correctly emphasized the liberal nature of the Community, demands here, on the contrary, a drastic action without compromise. I may say that its arguments lack concern for the economic consequences and the other objectives of Article 3 of the Treaty. Responsibility therefore is however borne by the High Authority which must justify its economic policy to the Assembly. I believe that as provided in Articles 46 and 48 of the Treaty undertakings may form associations and negotiate with the High Authority. It can be established from the documents submitted by the applicant that it was with the association of undertakings of the Ruhr that the High Authority negotiated, as was also said by Professor Verijn Stuart in his submissions in the French text before me:

'...Ainsi qu'il est permis de le conclure des pièces du procès, elle s'est davantage livrée à des négotiations avec *les producteurs* de la Ruhr...'

(...it may be concluded from the documents submitted that it (the High Authority) also entered into negotiations with *the producers* of the Ruhr ...)

I therefore believe that it is erroneous to speak of capitulating to the cartels.

(2) *The Nord and Pas-de-Calais coalfield*

I may now turn to the coalfield of the Nord and Pas-de-Calais. The same reference points apply but certain special features must be borne in mind.

If it is assumed as was done by the parties that this coalfield constitutes an undertaking with a dominant position in the Common Market within the meaning of Article 66 (7) because the coalfield is not yet fully exposed to competition by reason of the sales system which still exists between the countries of the Community, the particular the international transport tariffs, it must be recognized first of all, in agreement with the applicant, that this factual situation for which the undertaking is not to blame does not exclude application of Article 66 (7). That provision could rather have been applied in the case of an abuse of the dominant position on the market for example by demanding unjustifiably high prices. The fact that the High Authority did not wait for such abuse does not signify that the decision taken was a misuse of powers. The considerations on which it is based and the objective which is thereby pursued have already been specified. The fact that the High Authority included that coalfield in its general fixing of maximum prices because it deemed such action necessary in view of the still insufficient competition constitutes an admissible reason for such a decision. The alterations in prices in that coalfield are not uniform. It has, however, already been stated that the maximum prices which were fixed at the previous level, and in one case above the previous level, can be justified so no indication of misuse of powers can thus be deduced.

The allegation of misuse of powers is therefore without foundation.

III — Infringement of essential procedural requirements

1. The last allegation concerning the breach of essential procedural requirements is justified by the applicant on the grounds that the High Authority did not specify the true reasons for its decision with the result that the decision does not state the reasons on which it is based or at least does so insufficiently. It challenges the fourth recital in the preamble where it is stated that by virtue of the market structure 'there could result within the Community effects contrary to the objectives laid down for the High Authority by Article 3 of the Treaty either with regard to prices or production or the employment of labour'. In agreement with the applicant it must be admitted that this formulation is imprecise. In Decision No 6/53 the High Authority particularly specified Article 3 (c) and similarly it expressly based that decision on the first paragraph under letter (a) of Article 61 while Decision No 18/54 simply states its basis to be Article 61. It should, however, be borne in mind that the part of the preamble which has been reproduced concerns the reference to the abstract circumstance set out in the Treaty which can be interpreted in the light of the concrete factual situation. From the fact that in its second recital the High Authority states that in the absence of the fixing of maximum prices, the prices of coal would in fact be determined by the selling agency of the Ruhr coalfield, and by the Houillères du Nord et du Pas-de-Calais it is clear, as has already been pointed out in the course of the examination of the allegation of infringement of the Treaty, that the High Authority regarded the formation or maintenance of unjustifiably high prices as imminent and wished to prevent this by means of its decision. The fact that the High Authority now states these reasons in its written submissions is to be regarded as providing further details to the formal statement of reasons contained in its decision which could have been deduced by interpreting that statement of reasons and therefore it does not constitute a belated and inadmissible act. It is also evident from the facts in the present case that the High Authority was not satisfied with an uncertain possibility of effects which had to be countered—a hypothesis in which the High Authority would have relied on legally incorrect considerations.
There cannot be found to exist an infringement of essential procedural requirements in this respect.

2. However, it is necessary for the Court of its own motion to examine this ground of action from another aspect. Under Article 61 the High Authority must make the finding that maximum prices are *necessary;* in this question of suitability and economic policy it possesses a wide discretion in its appraisal which can only to a limited extent be re-examined by the Court. To counter-balance that the High Authority has a particularly extensive duty of examination and consultation which is intended to ensure the formation of a proper judgment in this respect. For that reason correspondingly strict requirements apply to compliance with this obligation.
There is a need for such an examination because at the meeting of the Council of Ministers of 13 March 1954 one member put forward the view that the negotiations which had taken place had merely been a repetition of the exchange of views of 27 February 1954 and did not constitute formal consultation as the High Authority had made no concrete suggestions; consequently the maximum prices could not lawfully be maintained in force (Document 347/5 of the Council of Ministers, pp. 37 and 38 and p. 55). It is correct that at the meeting on 13 March 1954 the High Authority did not expressly indicate the position it would adopt on the questions raised. However, in the present instance it did not need to take a new decision in order to free prices as the time-limit for the existing decisions was set at 31 March 1954 and on that date they automatically became inoperative. Therefore the consultations requested pointed to the possibility of maintaining the system of maximum prices. The grounds which the High Authority intended to rely on for such a decision may

be deduced from the individual questions which the High Authority submitted both to the Council of Ministers and the Consultative Committee. As my learned colleague indicated in his opinion in Case 2/54 in respect of the Consultative Committee, that committee is not a body that must give its opinion on a text but consists of experts who are concerned in the matter and who can give the High Authority information and advice on economic problems so that it has to hand all the elements of the problem facing it. In its judgment in that case the Court of Justice ruled that the High Authority together with the Consultative Committee could rightly consider as an opinion the minutes of a meeting reflecting a collection of opinions. This consideration is applicable by analogy to the Council of Ministers whose main task according to the Treaty, is 'to harmonize the action of the High Authority and that of the governments, which are responsible for the general economic policies of their countries'. Although in general it is necessary or at least appropriate that the High Authority produces for consultation an opinion with the statement of reasons, in the present case it appears that the Council was so well informed as to all questions and all possibilities of this complex problem that there was sufficient consultation. The Council of Ministers itself, with one member dissenting, expressed that view. As regards the question of the level of prices, which moreover was not challenged in the application, the Council expressly restricted itself to a general opinion and refused to enter into specific problems such as the prices of various grades as this was a matter for the High Authority. As to the question of the suitability of continued fixing of maximum prices the consultation could not have been more extensive if the High Authority had unequivocally stated that it intended to maintain the system of maximum prices for the reasons which were evident from its individual questions. From this point of view as well there cannot be said to be an infringement of essential procedural requirements.

C – Summary and conclusions

I may summarize my views as follows:

(1) Decision No 18/54 does not infringe the Treaty. The High Authority did not base its decision either on incorrect facts or considerations which were legally inadmissible. In its judgment as to the necessity of fixing maximum prices there cannot be found to exist manifest failure to observe the provisions of the Treaty. Finally, in the circumstances existing at the time of adoption of the decision and taking account of the price system as a whole, the method of fixing maximum prices is not open to objection.

(2) In exercising the powers conferred on it by Article 61 the High Authority was not guided by extraneous and unlawful considerations nor was an objective, the pursuit of which was not authorized by Article 61 a decisive factor.

(3) Furthermore, no essential procedural requirements have been infringed as the statement of reasons for the decision and the degree of prior consultation were sufficient.

For those reasons I conclude:

that the application should be dismissed and the decision on costs made pursuant to Article 60 (1) of the Rules of Procedure.