OPINION OF MR ADVOCATE-GENERAL LAGRANGE DELIVERED ON 5 NOVEMBER 1959

Mr President,
Members of the Court,

As if by way of a preface or introduction to the long series of cases brought before the Court concerning transport, the Government of the Federal Republic invites you, in the present case, to pass judgment on certain questions of principle. These questions concern certain fundamental rules of the Treaty, but they do not in any way prejudge the solution to the other cases, in particular Case 19/58, brought by the same Government.

While the questions which arise in the present case are important, it seeems to me that the solution to them is simple.

I

Let us first look at the provisions at issue. Essentially, these are article 70 of the Treaty and Article 10 of the Convention on the Transitional Provisions.

Article 70 (definitive system) sets out the rule of non-discrimination, already contained in Article 4, in relation to rates and conditions for the carriage of coal and steel. Article 10 establishes a procedure intended to 'attain the objectives set out in Article 70 of the Treaty', within certain time-limits.

The conditions of carriage, and in particular the setting of rates, remain under national control, and it is usually through the States that application of the Treaty and of the Convention is to be achieved. Since the permanent rules set out in Article 70 must be respected, it is in the first place the State which has to observe them and ensure compliance with them, in particular by the exercise of the powers which it possesses over transport undertakings and by obtaining, if need be, any necessary additional powers by legislative or other means.

Inter-governmental agreements prepared by a committeee of experts have been necessary in order to reach the stages set out in Article 10 of the Convention. the High Authority has done no more than encourage the studies and take the initiative in negotiations.

However, provision is made for direct action by the High Authority in a particular case, namely that involving 'The application of special internal rates and conditions in the interest of one or more coal-or steel-producing undertakings'. The fourth paragraph of Article 70 provides that such application 'shall require *the prior agreement* of the High Authority, which shall verify that they (the said rates and conditions) are in accordance with the principles of this Treaty; it may make its agreement temporary or conditional'.

As regards those rates and conditions which were 'in force when the High Authority (was) set up', the seventh paragraph of Article 10 of the Convention provides that they 'shall be notified to the High Authority, which shall allow such time for their modification as may be necessary to avoid any serious economic disturbance'.

The Court will observe that this system is very close to that concerned with cartels: prohibition as a matter of principle except where prior authorization granted, but as regards situations existing when the Treaty came into force, or to be more precise 'when the High Authority (was) set up' (for transport), or on the establishment of the common market (for cartels, at least according to the Court's case-law), a transitional rule is introduced which allows the situation to continue until the High Authority has been able to rule on its compatibility with the Treaty.

Although the text of the seventh paragraph of Article 10 of the Convention is not very comprehensive, it can be seen that it permits three possibilities:

1. If the special rate or condition is compat-

ible with the rules set out in the first two paragraphs of Article 70, it is wholly in conformity with the treaty and it may be said (at all events the High Authority accepts this) that in such a case there is no need for it to give its approval pursuant to the fourth paragraph;

2. If the rate or condition is not in conformity with the said rules, but is nevertheless considered to accord with the 'principles' of the Treaty, it may be said (the High authority also accepts this) that approval of it, which may be 'temporary or conditonal' if necessary , may be given under the fourth paragraph of Article 70;

3. Finally, if it is considered that the rate or condition is not in conformity with the rules of Article 70 and is not a case where authorization may be granted, the High Authority shall allow such time for its 'modification' (which means its replacement by a legal rate or condition) 'as may be necessary to avoid any serious economic disturbance'.

I do not wish for the moment to give my opinion on the interpretation of this fourth paragraph of Article 70, which the court will have to consider when it comes to examining the substance of the cases concerning transport. Nor do I wish to interpret the other provisions of that article, in conjunction with Article 4 and the principles of the first Title. All I would note here, from the procedural point of view, and it seems to me to be undeniable, is that the 'special internal rates and conditions in the interests of one or more coal-or steel-producing undertakings', mentioned in the fourth paragraph of Article 70, which were in force when the High Authority was set up, *remain legally in force* until such time as the High Authority has given a ruling on them in application of the seventh paragraph of Article 10 of the Convention. The only duty on the Governments was to notify them to the High Authority and this, for its part, the Federal Government did.

II

What, then, is the position in the present dispute?

It was only, as you know, on 9 February 1958, the penultimate day of the transitional period, that the High Authority took all its decisions in application of the provisions which I have just brought to your attention. These decisions were discussed in a series of letters dated 12 February, published in the Journal Officiel of 3 March.

Three of those decisions concern the Federal Government: they relate to special rates and conditions applicable to the carriage by rail of mineral fuels for the iron and steel industry, of mineral fuels other than those for the iron and steel industry and of ores, respectively, only the first and the third being relevant in the present case.

Applying the distinction which I mentioned a moment ago, the High Authority took the view that certain rates and conditions were compatible with Article 70 as a whole and did not give rise to any objection on its part; others it authorized under the fourth paragraph, taking into account the particular situation of certain undertakings benefiting therefrom; for others, finally, it held that no such authorization was warranted and, as regards these, time-limits were set for eliminating or modifying them step by step.

The Federal Government has initiated proceedings by Application 19/58 against this latter part of the decisions, and has itself described its action as an action for annulment. However, the Federal Government has based that action not only on Article 33, but also on Article 88 and on Article 37. As the Court is aware, those provisions set up special procedures, the first for cases where a State has failed to fulfil an obligation, and the second for cases where action or failure to act on the part of the High Authority is of such a nature as to provoke fundamental and persistent disturbances in the general economy of the Member States.

Since then, the applicant has set in motion the special procedure under Article 37, and it has not been mentioned again in case 19/58. As regards Article 88, the applicant has simply mentioned that provision, but has not laid emphasis on it : the whole dis-

cussion has taken place on the basis of an an action for annulment brought under Article 33.

The first of the periods set by the decisions of 9 February expired on 1 July 1958 without the modifications in rates required by that date having being made. Therefore the High Authority asked the Federal Government for its explanation. The latter replied that it did not consider itself bound to implement the decisions prior to a judgment of the Court on the application which it had lodged against the said decisions.

The High Authority then commenced the procedure under Article 88: after giving the Federal Government the opportunity to submit its comments (letter of 8 October 1958, to which a reply was made on 30 October), it took a decision based on the first paragraph of the said article on 1 December 1958. That decision states that by failing to carry out the decisions relating to rates and conditions, despite the fact that no suspension of execution had been granted by the Court, the Federal Government has failed to fulfil an obligation under the Treaty, and sets it a time-limit of 31 January 1959 for the fulfilment of its obligation.

Such is the decision which the Federal Government has contested before the Court in an action in which the Court has unlimited jurisdiction based on the second paragraph of Article 88 and which you must now examine.

III

The whole argument of this action is directed at showing that the decisions of February 1958 did not impose on the applicant Government an *obligation which it was required to discharge* to modify the rates and conditions as laid down in those decisions.

The Court is acquainted with this line of argument and I shall not analyse it again in detail. It seems—in so far as it is possible to summarize it in a few words—that it is based on alternative lines of reasoning.

In the first line of reasoning, it is argued that the question of substance on which the parties are divided—namely, whether the rates and conditions in question are compatible with the Treaty—can be discussed in the context of an action brought against the decision of the High Authority taken under Article 88, *that is to say, against the decision contested in the present case,* and, in this connexion, the applicant cites by way of analogy the case-law of the Court on the objection of illegality. It is also argued that the decisions of 9 February 1958 may only be regarded as conditions to which an authorization granted under the fourth paragraph of Article 70 has been made subject: the High Authority, it is said, was not entitled to impose a prohibition having binding force on established provisions prescribing rates and conditions. Therefore, a finding that the rates and conditions are illegal, which would give rise to the obligation to modify them, *can only result* from the setting in motion of the procedure under Article 88.

In the second line of reasoning there again appears the idea that it is only the procedure under Article 88 that can have binding force in relation to a State. But it is considered that the decisions of 9 February 1958 must be considered as having themselves been adopted under the first paragraph of Article 88. From this viewpoint, Application 19/58 brought against the said decisions is an action in which the Court has unlimited jurisdiction under the second paragraph of Article 88. The third paragraph of the said article provides that such an application has suspensory effect, and the High Authority is not entitled to take other measures before judgment is delivered upon it. Therefore, it is argued, the contested decision is illegal in so far as it sets a period, expiring on 31 January 1959, within the applicant is required to fulfil its obligation.

In my opinion, the applicant's argument is incompatible with the rules established by the Treaty.

It proceeds, in my opinion, from confusion between the *binding nature* of decisions of the High Authority and the *methods of enforcing* those same decisions. 'Decisions

'shall be binding in their entirety', according to the terms of Article 14 of the Treaty. The obligation arises by the mere fact of the notification or of the publication of the decision, as the case may be (Article 15), and, save where otherwise provided (as for example by the second subparagraph of Article 66 (5)), an action does not have suspensory effect, unless a suspension of application has been granted by the Court or its President as an interim measure. *All these rules are valid both as regards the States and as regards undertakings.*

The question of enforcement, that is to say 'compulsory enforcement', is a quite different matter. Here, as is natural, the rules differ depending on whether enforcement is sought against an undertaking, a private person, or a State. As well as fines, periodic penalty payments, the binding effect of which is undoubted, can be imposed on undertakings. Furthermore, an enforcement procedure by way of national procedures exists in order to ensure that decisions of the High Authority involving pecuniary obligations are enforced. As regards States, the special procedure under Article 88, which I need not go over again, has been created.

However, it should be noted that in both situations the failure to comply with decisions of the High Authority, which justifies setting in motion the methods of enforcement, only constitutes a particular case of infringement of the Treaty. It may well be, indeed, that the infringement results *directly* from a failure (be it on the part of a State or of an undertaking) to fulfil an obligation, either to act or to refrain from action, laid down by the Treaty or by an implementing regulation: such is the position, for example, in the case of a State, where a special charge is created or a subsidy is granted contrary to Article 4. A State which commits such an act automatically infringes the Treaty without any decision on the part of the High Authority being taken. In the case of an undertaking, the same is true, for example, of a discriminatory practice prohibited by Article 60. This is why pecuniary sanctions applicable to undertakings are laid down both for direct infringement of the Treaty and for failure to comply with the decisions of the High Authority (for example: Article 64 on prices). This is also why Article 88 covers, in a general way, a failure by a State 'to fulfil an obligation under this Treaty'.

Thus (now speaking only of States), Article 88 applies both to the creation by a State of a situation contrary to the Treaty and to a refusal to comply or want of compliance on its part with a decision of the High Authority. For it goes without saying that to refuse to comply or refrain from compliance with a binding decision of the High Authority constitutes a failure by a State 'to fulfil an obligation under the Treaty', to follow the wording of Article 88. This is clear not only from the principle set out in Article 14, which I have mentioned, but also the very wording of Article 86 and from the undertaking given by the States in accepting that provision.

Having said that, it is quite obvious that the *nature of the failure to fulfil an obligation* will be very different depending on whether it falls into the first or second of the categories which I have just distinguished. If it falls into the first category, it is the High Authority which must take the initiative in discerning in the action of a State what it considers to be an infringement of the Treaty. If the State maintains its attitude it is because for its part it takes the view that it is not infringing the Treaty. The dispute arising from this difference of opinion will, unless settled by agreement, come before the Court under the procedure of Article 88, and it will be by way of an action brought under the second paragraph of that article that the Court will be called upon to judge the substance of the matter, namely the question whether the action of the State is or is not compatible with the Treaty. Quite clearly, it was with a view to cases of that kind that the authors of the Treaty were at pains to establish a procedure giving the fullest guarantee to the States, and in particular enabling them to bring an action in which the Court has unlimited jurisdiction.

If, on the contrary, it falls into the second category, the procedure under Article 88

has not complied with a decision of the High Authority which, in the nature of the case is binding. In this situation it is evident that an action under Article 88 cannot deal with the substance because this would involve throwing doubt on the legality of the decision, non-compliance with which constitutes the whole and exclusive basis of the failure. An action in which the Court has unlimited jurisdiction can only deal with the *circumstances* appertaining to compliance or non-compliance, and this can very easily give rise to certain difficulties. But the legality of the decision can only be contested by the means made available by the Treaty for so doing, which is an action for annulment under Article 33. Here, it was not considered necessary to make specially available to the State an action in which the Court has unlimited jurisdiction. The reason for this is that in such cases a decision of the High Authority accompanied by the usual formalities has been adopted. The general rules of the Treaty apply, and the Court knows how numerous those formalities were in the present case: there was a committee of experts which sat for several years, there were consultations with governments, visits of inquiry and so on. The Court also knows how far, on the basis of Article 33, it may exercise its power of review of 'legality', and is aware of the guarantees contained in that article, particularly for the States, which are not restricted, as undertakings are, with regard to their rights of action.

The applicant is also mistaken in relying on the case-law of the Court relating to the objection of illegality. In fact, this objection can only be raised against legislative decisions, regulations adopted in application of the Treaty, non-compliance with which may be treated as a failure to comply with the provisions of the Treaty itself, and in respect of which it is possible that the interest in asserting that they are illegal may only arise at the moment when they are applied. In the present case we are faced with an individual decision which concerns a particular Government and which applies rules laid down by the Treaty to a certain number of concrete cases. It is a refusal to grant an authorization and is not in the least of a legislative nature. All your case-law points this way.

Therefore the legal situation in the present dispute appears to me to be perfectly clear.

By its decisions of 9 February 1958, the High Authority gave a ruling on all the 'special rates and conditions' which had been submitted to it. One must, of course, leave out of account the rates and conditions examined which were found to be compatible with the first and second paragraphs of Article 70 and which did not, in the High Authority's view, require to be authorized by the High Authority under the fourth paragraph. There can be no question of any failure to fulfil an obligation as regards those rates and conditions, which are not in dispute. One must also exclude those rates and conditions which, in the High Authority's view, did require authorization by the High Authority under the fourth paragraph, but which it did authorize. Here again, there cannot have been any 'failure to fulfil an obligation' on the part of the State by reason of not having modified them.

There remain the rates and conditions in dispute. In its decisions of 9 February 1958, the High Authority took the view that these were 'special internal rates and conditions in the interests of one or more coal- or steel-producing undertakings', according to the wording of the fourth paragraph of Article 70, and it took the view, first, that those rates and conditions were contrary to the provisions of the first two paragraphs of Article 70, and, secondly, that they did not qualify for authorization under the fourth paragraph. Accordingly, it applied the seventh paragraph of Article 10 of the convention and set time-limits for their modification.

It is possible that the High Authority made a mistake. It is possible that the rates and conditions in question qualify for authorization under the fourth paragraph. It is equally possible that some of them or even all of them are in conformity with the Treaty, without an authorization from the High Authority even being necessary. All these questions relate to Case 19/58 and will be dealt with in those proceedings. But what is

certain is that the maintaining in force of those rates and conditions until the decision of the High Authority was perfectly legal by virtue of the transitional provisions of the Convention and that, therefore, no failure to fulfil an obligation could be or indeed was established by the decisions of 9 February 1958.

Furthermore—and this is a second point, even more obvious than the first—on 9 February 1958 the High Authority did indeed take *decisions* within the meaning of Article 14 of the Treaty. These decisions were notified to the Federal Government by a number of letters dated 12 February. They were based, as I have just explained, on the combined effect of Article 70 of the Treaty and of the fourth paragraph of Article 10 of the Convention, and in them the High Authority set the said Government time-limits for the abolition of the special rates and condition in question by successive stages. These decisions are 'binding in their entirety' and are enforceable notwithstanding the application for annulment brought against them under Article 33, since no suspension has been granted (nor, as the court, is aware, has it been asked for in this case).

In these circumstances the fact that the Federal Government refrained from taking the necessary measures at national level in accordance with Article 86 so as to bring about the modifications to the rates and conditions as required by the High Authority and within the time-limits set by it in its decisions of 9 February 1958 constitutes of itself alone a failure on the part of the State which that Government represents to fulfil one of the obligations, and not the least, which that State undertook to fulfil by accepting the Treaty, namely the undertaking to enforce the decisions of the High Authority and cause them to be enforced.

There is one last complaint in the application which I still have to answer: it is said that the contested decision could not set a *shorter* period within which the applicant had to fulfil its obligation than the period within which it may bring an action under the second paragraph of Article 88, for to do so would be contrary to the *suspensory effect* of that action. In fact, the time-limit fixed by the High Authority in its decision was 31 January 1959, and yet the period within which proceedings must be initiated, which is two months in this case, only expired on 11 February 1959.

Here again, we are faced with confusion between the binding nature of decisions of the High Authority and enforcement of those decisions. An action under the second paragraph of Article 88 does not have suspensory effect: all that is suspended is the High Authority's right, so long as judgment has not been passed in that action (that is, judgment whereby the application is dismissed), to take the punitive measures set out in the third paragraph, with the assent of the Council acting by qualified majority.

At the beginning of its reply, the applicant strongly defends itself against an accusation which, rightly or wrongly, it believes it has found in the High Authority's statement of defence, namely that the applicant 'attempted to avoid provisional enforcement of the decisions of 9 February 1958 by invoking abusively and without serious intent legal processes laid down by the Treaty'. Having asserted that its only intention was to use the legal process set out in Article 88, a legal process which constitutes a guarantee in respect of the Member States, the applicant declares that 'the effect of this procedure is not to *delay* but on the contrary to accelerate the review by the court which it seeks and to which it has an undoubted right'.

For my part, I do not accept the existence of this right. Furthermore, doubts as to the intentions of the Federal Republic have never entered my mind, and I am entirely convinced that if the Court's judgment accords with my opinion the said Government will feel itself bound at once to enforce the decisions of 9 February 1958.

I am of the opinion that:

The application should be dismissed;
The costs should be borne by the applicant.