On those grounds,

THE COURT

hereby:

1. **Declares that there is no need to give a decision on the application;**

2. **Orders the parties to bear their own costs.**

Mertens de Wilmars Bosco Touffait
Due Pescatore Mackenzie Stuart O'Keeffe
Koopmans Everling Chloros Grévisse

Delivered in open court in Luxembourg on 10 February 1982.

P. Heim
Registrar

J. Mertens de Wilmars
President

OPINION OF MR ADVOCATE GENERAL REISCHL DELIVERED ON 24 NOVEMBER 1981 [1]

Mr President,
Members of the Court,

The system of steel production quotas has already been before the Court in a series of cases. In the course of preparation of the quota system it was found that the demand for certain tubes was increasing. This was the reason why certain materials intended for the production of tubes were exempted from the rules laid down in Decision 2794/80/ECSC (Official Journal 1980, L 291, p. 1 et seq.). Article 6 of that decision provided that undertakings must be exempt from production quotas in respect of the following products intended for production within the common market:

1 — Translated from the German.

"(b) reversing mill plate for the production of welded tubes;

(c) hot-rolled wide and narrow strip for the production of welded tubes;

(d) hot-rolled wide strip for the production of tinplate;

(e) ingots, rounds and squares for seamless tubes".

The steel producers were, however, still obliged by virtue of Article 11 of Decision 2974/80/ECSC to supply information to the Commission in respect of those products.

Material for tube can be used for other products. It therefore appeared necessary to the Commission, in the interests of the proper functioning of the quota system to ensure that only the products mentioned in Article 6 were exempted from the quota system. To that end the Commission, having regard to the ECSC Treaty and in particular to Article 95 thereof, adopted on 13 February 1981 Decision 385/81/ECSC concerning certain obligations to be fulfilled by Community producers of steel tube (Official Journal 1981, L 42, p. 17).

Article 1 of the decision provided as follows:

"Tube producers shall be required to furnish to the Commission, on a monthly basis, as from February 1981, not later than the sixth day of the following month, information about the production of tube and the origin of the material for such tube. . . ."

Article 2 of the decision provides that:

"The Commission, in the exercise of the powers conferred on it by Article 47 of the Treaty, shall verify the accuracy of the information provided by tube producers. Tube producers must allow such verification work to be carried out, and no individual decision shall be required for this purpose. The instruction given to the verifying official must refer to this provision and state what information provided by tube producers he has been asked to verify. In the event of non-compliance, the sanctions provided for in Article 47 of the Treaty shall apply. . . ."

That decision entered into force, pursuant to Article 3 thereof, on the day of its publication in the Official Journal, that is to say, on 14 February 1981 and, pursuant to the same provision, ceased to apply with effect from 30 June 1981.

The applicants in these proceedings, who are among the tube producers covered by Decision 385/81/ECSC, are of the opinion that the Commission has unlawfully imposed obligations on them, since they do not come within the jurisdiction of the Treaty establishing the European Coal and Steel Community and are not associated with undertakings engaged in production in the coal or the steel industry. Unlike other undertakings in a similar position they did not, therefore, furnish the reports which became due as from March 1981. The Commission reacted by sending letters of reminder in June 1981. However no sanctions were imposed and there were not even any proceedings for the imposition of sanctions; similarly, no checks were carried out among the applicants.

On 6 April 1981 the applicants applied to the Court claiming that Decision 385/81/ECSC should be declared void as regards themselves.

My views on these proceedings are as follows:

1. As I have already stated, the contested decision ceased to apply as

from 30 June 1981. Since that date the quota system has been maintained by Decision 1831/81/ECSC to a certain extent. (Official Journal 1981, L 180, p. 1). That decision also exempted material intended for the production in the Community of tubes (Article 4). It also provided for the possibility of adjusting the production quotas with regard to products used for the production of welded tubes (Article 10). There was however no reintroduction of rules corresponding to those contained in Decision 385/81/ECSC. The explanation given for this was that from experience gained in applying Decision 385/81/ECSC, involving a comparison of the reports of steel producers with the information furnished by the tube producers and the carrying out of a number of checks, it had been shown that the exemption provisions had not given rise to complaints. Furthermore, it was to be noted that the system laid down in Decision 1831/81/ECSC contained an important new feature in respect of the matters relevant to these proceedings. Under that system, as a precondition for exemption and an adjustment of the quota under Article 10 *proof* must be submitted, apparently by the steel producers themselves, that the products have in fact been used in the prescribed manner.

The first question is therefore whether the action to have Decision 385/81/ECSC declared void has lost its purpose. This is the case where the subject-matter ceases to exist, leaving no legal consequences outstanding, and there is no interest in obtaining a declaration of the illegality of the measure which it was originally sought to have declared void.

In my view the facts in the present case disclose just such a situation. In support of that view, it should be noted that, after the expiry of its validity, Decision 385/81/ECSC may no longer, contrary to the applicants' fears, constitute the legal basis for any measures, such as the imposition of fines or the carrying out of checks, and certainly not for measures in relation to the conduct of undertakings before 30 June 1981. That was stated clearly, and in my opinion convincingly, by the Commission's representative at the hearing. In futher support of that view I would refer also to the scheme of the decision. First, no sanctions were provided for in the event of non-compliance with the duty to furnish information pursuant to Article 1. Secondly, Article 2 merely provided for verification of the information actually furnished and it was only in the event of a refusal to allow verification that sanctions might be applied.

Furthermore, it is impossible to establish an interest in the clarification of the questions arising out of Decision 385/81/ECSC on the ground that it is possible that equivalent rules may be reintroduced since the system of quotas has been continued and exemptions have once again been granted to tube producers. Such considerations ("the danger of recurrence") may, in my view, at most come into account where there is a certain degree of probability and not merely a vague possibility, that those provisions will be reintroduced. However, in view of the statements made by the Commission's representative on the experience gained with Decision

385/81/ECSC in the context of the first system of quotas, there can be no question of this. Again, the considerable difference in the formulation of the relevant provision of Decision 1831/81/ECSC establishing the new system of quotas also militates against such a viewpoint and also deprives of any significance the statement made in the preamble to Decision 385/81/ECSC that it is necessary to extend the application of the provisions of Article 47 of the Treaty to tube producers during the period in which the system of production quotas is in operation. In effect, it should no longer be necessary to require information from tube producers and to carry out checks on them since the exemptions from the system of quotas is linked to the proof to be supplied by the producers of the materials for the manufacture of tubes that those materials have in fact been put to the stipulated use within the Community.

Thus, it may clearly be seen that the action has lost its purpose and that, by virtue of Article 69 (5) of the Rules of Procedure of the Court, since the matter will not proceed to judgment, the costs are in the discretion of the Court.

2. I do not, however, wish to confine myself to these observations but would like to make some remarks on the highly interesting and certainly important questions of law raised by the case. This is not only because the Court might not wish to follow the view which I have expressed but also, even if the proceedings have lost their purpose, an examination of the prospects of the application's suceeding seems appropriate, in any event in regard to the decision on costs.

(a) In the context of such an examination, which perforce will be only summary, the first question to be answered is whether undertakings, *that is to say tube producers, may be considered as having a right to bring an action under the ECSC Treaty.*

According to the system of the Treaty and in view of the fact that in principle only those undertakings which, according to Articles 80 and 81 and of Annex I to the Treaty, may be defined as being engaged in production (thus excluding processing companies such as the applicants), are subject to the provisions of the Treaty and to measures adopted thereunder, of the private natural and legal persons who may be affected by such provisions and measures only undertakings engaged in production and their associations may obtain judicial review of measures adopted by the Coal and Steel Community in the exercise of its sovereign powers (second paragraph of Article 33 of the ECSC Treaty). For the purposes of Articles 65 and 66 and of the information required for their application, undertakings and agencies regularly engaged in distribution other than sale to domestic consumers or small craft industries are by virtue of Article 80 placed on the same footing as regards such measures.

Furthermore, the possibility of instituting proceedings exists only in a number of special cases. Thus, under Article 63 of the Treaty, a *purchaser* of coal and steel products may bring an action before the Court if the Commission, having found that the purchaser has infringed certain obligations contained in the conditions of sale of undertakings relating to price maintenance, restricts dealings with that purchaser by Community undertakings. In addition, mention should be made of the field covered by Article 66 which governs cases of concentration between undertakings, at least one of which is covered by Article 80. The others

therefore need not be undertakings subject to the Treaty. Article 66 (4) gives the Commission the power to obtain information even from the latter undertakings. By virtue of Article 66 (6), in the event of non-compliance fines may be imposed, subject to a right of appeal under Article 36. Under Article 66 (5) the Commission may order the separation of undertakings which are unlawfully concentrated. Any person directly concerned, including undertakings not subject to the Treaty, may appeal against such an order. If the order for separation has not been carried out within the specified period Article 66 (5) gives the Commission the power to impose fines against which appeals may be brought under Article 36 of the Treaty in conjunction with Article 43 (2) of the Protocol on the Statute of the Court of Justice of the European Coal and Steel Community. Again, Article 66 (6) provides for the imposition of fines on all natural and legal persons who have evaded the obligations laid down in paragraph (1) of that Article, or who have obtained or attempted to obtain authorization under paragraph (2) by means of false or misleading information. Article 36 also confers a right of appeal in such cases.

Since it is plain, on the facts of the case, that tube producers do not fall within any of those categories, it is indeed arguable that no right to institute proceedings before the Court is available to them.

None the less I have very serious reservations about accepting that argument. The applicants have rightly pointed out that there is no power in the Treaty by which the Commission may, as it were, create a legal vacuum by addressing to undertakings, which are not covered by the Treaty, measures which may not be made subject to judicial review. It certainly cannot be inferred from Article 33 of the Treaty that the Treaty covers undertakings or persons who are deprived of any legal protection. I have no doubt that such a proposition would be repugnant to constitutional principles and legal traditions common to all the Member States, which have given rise to something akin to a body of *general principles* of Community law. It is thus possible to infer from the above-mentioned provisions a general principle governing the system of the ECSC Treaty, a principle, moreover, which the Commission has not denied, to the effect that, whenever measures adopted on the basis of the Treaty produce effects on undertakings which are not subject to its provisions and to which certain measures are expressly addressed, such undertakings too, may obtain judicial review of those measures, even where, as in the present case, no such right is granted *expressis verbis* in the allegedly *ultra vires* measure. That being so, the applicants' alternative argument to the effect that, in the absence of any legal protection for tube producers and in the light of the general scheme of the Treaty, the measures laid down in Decision 385/81/ECSC cannot in law apply to them, also becomes irrelevant.

(b) Decision 385/81/ECSC is a legislative measure, that is to say a *general* decision within the meaning of the Treaty. Thus, in applying to the Court, the applicants have founded their action on the second paragraph of Article 33 of the Treaty which provides that "undertakings or the associations referred to in Article 48 may, under the same conditions, [those laid down by the first paragraph] institute proceedings against decisions or recommendations concerning them which are individual in

character or against general decisions or recommendations which they consider to involve a misuse of powers affecting them". In their view, it is possible, in the present case too, to mount in this way a direct challenge to the measure complained of, subject only to the precondition that a *prima facie* case for misuse of powers affecting the applicants is made out.

The Commission, however, considers that argument to be untenable. In its view, there can be no question of an application by analogy of the provision cited above, which is designed for coal and steel undertakings within the meaning of the Treaty, and by virtue of which the contesting of general measures is to be considered exceptional, to undertakings which are not subject to the Treaty. This, according to the Commission may be demonstrated by reference to the general scheme of the Treaty which, as we have seen, grants to undertakings, which are not subject to the Treaty, special rights of appeal which, in the Commission's view, would otherwise be meaningless. If, however, — so runs the Commission's argument — those special provisions are taken as a basis and it asked which specially regulated case is most closely comparable to the present case, it is difficult to avoid the conclusion that it is only following a decision to impose a penalty that judicial review may be applied for. In the context of that review the general decision on which the individual decision is based also becomes subject to scrutiny by way of Article 36 of the Treaty.

In my opinion there is, in any event, something to be said for the Commission's view. An examination of the provisions I have mentioned conferring rights of action on undertakings not covered by the Treaty shows that in no case is there a right to institute proceedings against general decisions. It *appears*, therefore, that the most appropriate solution in the present case would be to grant a right of action analogous to the one provided for by Article 66 (6).

Article 63, which enables coal and steel undertakings to be made subject to obligations which mainly affect their purchasers, had to give a right of action to the purchasers who themselves are in no way addressees of decisions. The decisions in question are however always *individual* in nature, as is clear from the general system of the Treaty and some of the provisions of Article 63 as well as from the fact that Article 43 of the Protocol on the Statute of the Court of Justice provides that such decisions must be notified to the purchasers concerned. Thus, even if an application by analogy of that provision were to be considered (and the different nature of the facts in the present case militates against this), there would certainly not be any justification for a right of action against a general decision.

Similarly, Article 66 (5) which confers a right of action on any person directly concerned never speaks of general but only of individual decisions, whether it be a case of a finding that a concentration is unlawful or of contesting orders for separation and interim measures of protection in connection therewith, or the consequential impostion of penalty payments and fines.

Article 66 (4), dealing with concentrations which may involve undertakings not subject to the Treaty, empowers the Commission to request information from those undertakings. Pursuant to that article Decision 26/54 of 6 May 1954 was issued (Official Journal, English Special Edition, October 1972, p. 17). Article 2 of that decision provides that natural and legal persons are to notify certain acquisitions of rights in an undertaking and Article 7 provides that the High Authority may,

by special request, obtain from the persons mentioned in Article 1, all information necessary for the implementation of Article 66 of the Treaty. In the event of non-compliance fines may be imposed under Article 66 (6) subject to a right of appeal under Article 36 of the Treaty. This can only be understood as meaning that, in this situation, too, persons not subject to the Treaty have a right of action only against individual decisions imposing penalties on them. For if it were otherwise, that is to say if one were to accept the applicants' argument to the effect that no provision had been made for legal protection of persons not subject to the Treaty in connection with requests for information and that therefore, in regard to Article 66 (4), general principles of legal protection must be applied, then the reference which is made in Article 66 (6) to Article 36 of the Treaty, and which can only relate to undertakings not subject to the Treaty, would be deprived of any real meaning. It must also be acknowledged that, of all the special provisions conferring rights of action on undertakings not subject to the Treaty, the right of action contained in Article 66 (6) must be considered as coming closest to the present case. Even if it cannot be denied that the facts of the case are somewhat different since Decision 385/81/ECSC also confers the right to carry out *checks* and since, in the case of a concentration involving a number of undertakings not covered by the provisions of the Treaty, those undertakings voluntarily bring themselves within the field of jurisdiction of the ECSC Treaty, there are still strong grounds for supposing that, in the case of a general decision, the possibility of legal protection is only afforded, by analogy with Article 66 (6), to the extent of permitting appeals against individual decisions adopted in implementation of Decision 385/81/ECSC, but not to the extent of allowing that general decision to be contested directly. Since, in this respect, objections founded on rules of constitutional law are difficult to sustain (after all, it is clear that Community law makes no provision for a general right of action, and even coal and steel undertakings may bring an action against general decisions only in exceptional cases), the present action could have had no hope of succeeding simply because an action brought by tube producers against a *general* decision could not have been considered admissible.

(c) If that line of reasoning is rejected and it is instead considered appropriate to *apply by analogy the second paragraph of Article 33* to the present case, on the ground that otherwise there would be no reasonable or adequate legal protection, that still does not establish the admissibility of the action. Since the decision at issue is clearly general in nature, it is necessary, according to the case-law of the Court, that the applicants should make out a *prima facie* case of a misuse of powers affecting them (judgment of 9 June 1964 in Joined Cases 55, 59 and 61 to 63/63 *Modena* v *High Authority* [1964] ECR 211).

The applicant's submissions in that respect principally allege a misuse of procedure which constitutes, according to the applicants, a misuse of powers. There is a misuse of powers if a procedural measure is used to implement measures for which the procedure resorted to is not designed, in particular where recourse is had to a simple procedure so as to avoid a more complicated one. In the applicants' view it is important, in considering the problems raised by the present case, to remember that the legislatures of the Member States had defined the class of persons who come within the jurisdiction of the Coal and Steel Community. Tube producers clearly do not come within the field of application of the ECSC Treaty. The provisions of the Treaty could therefore only have been extended to

them by way of an amendment — requiring ratification — to the Treaty under Article 96 and certainly not by using, as was the case, the procedure laid down by Article 95. It was absolutely inadmissible to adopt the decision under the procedure laid down in the *first paragraph* of Article 95, as evidently happened. A "minor amendment" of the Treaty which, under paragraphs (3) and (4) of Article 95, is subject to stricter and wider ranging preconditions is limited inasmuch as there may only be an amendment of *existing* powers and there can be *no* question of creating completely *new* powers. Nor may such amendment entail any alteration in the general scheme of the Treaty or in the relationship between the powers of the Community and those of the Member States. However, if those conditions must be observed in the case of a "minor amendment" of the Treaty, there can be no doubt that they apply equally to the procedure laid down in Article 95 (1) which is both simpler and leaves less scope for discretion. In this case, too, there can be no question of extending the class of persons coming within the field of application of the ECSC Treaty or of creating completely new powers, as was the intention of the contested decision.

In addition, the applicants also find that there is a misuse of powers in the failure to have regard to the objectives of Articles 2, 3 and 4 as well as in the extension, for the wrong purposes, of the power to obtain information and to carry out checks. They point out that the reference in the decision to those articles is not significant in itself because those articles are mentioned in any event in Article 95. Thus the unlawful extension of the class of persons to whom the ECSC Treaty applies also constitutes an infringement of the above-mentioned objectives of the Treaty since the realization of those objectives is confined to the market in coal and steel within the framework laid down in Article 3.

Lastly, there can be no doubt, in the applicants' view, that there was a misuse of powers affecting them and that they have been the subject or at any rate the victim of a misuse of powers, a necessary requirement laid down by case-law of the Court (judgment of 16 July 1956 in Case 8/55 *Fédération Charbonnière de Belgique* v *High Authority* [1956] ECR 227). They have been manifestly prejudiced by the imposition of a duty to furnish information and by the obligation to permit checks to be carried out. They contend that they are particularly affected because they are bound to their suppliers by long-term contracts which preclude any other use being made of the material supplied and therefore the suppliers are able to carry out checks which make it unnecessary to subject the applicants to any further direct checks.

I have, however, serious doubts, as does the Commission, whether the applicants' contention is sufficient for the purposes of the second paragraph of Article 33 of the ECSC Treaty.

(aa) This is particularly so in the case of the requirement that they should make out a *prima facie* case of a misuse of powers affecting *them.*

What this means is not sufficiently covered by the statement in Case 8/55, *Fédération Charbonnière de Belgique* v *High Authority,* that an undertaking must show itself to have been the subject or at any rate the victim of the alleged misuse of powers. Further clarification is to be found in the same judgment where it is stated that in such a case it is still the

individual factor which prevails. A further refinement was added by the judgment of the Court in *Modena* v *High Authority*. In that judgment it was held that the applicant must show that the contested decision is directly prejudicial to its interests and that it directly damages its individual interests. In any event it is not sufficient that the disputed measure affects all the applicants to the same degree.

In my view the applicants have not clearly shown that it is precisely *they* who are the victims of the contested provisions and that they are required to make a *special* sacrifice which singles them out from the general class of tube producers. The reference to the existence of long-term contracts with the steel producers is hardly sufficient, since, whilst it may just be doubted whether it is *necessary* to provide for special checks in respect of the applicants, it cannot be shown, on the other hand, that *special sacrifices* are required of the applicants. Nor should it be forgotten that it is not clear from the applicants' arguments, and this is an absolutely essential point, whether the existence of long-term contracts for the supply of tube in fact do render additional checks unnecessary, for example with regard to supplies outside the terms of the contracts or from other suppliers, quite apart from the fact that such special relations with steel producers are probably not confined to the applicants but may well be widespread amongst tube producers.

(bb) Furthermore, however, it may properly be doubted whether a *prima facie* case of a misuse of powers has been made out.

In so far as the applicants are pleading a misuse of procedure I should like to recall that Mr Advocate General Roemer in his opinion of 1 June 1965 in Joined Cases 3 and 4/64 *(Sidérurgie Française* v *High Authority* [1965] ECR 441) expressed doubts "whether the plea of misuse of procedure which is generally described as misuse of powers, has any place in the particular category of 'misuse of powers affecting them' ". There does indeed appear to be room for such doubts particularly where, as in the present case, a general and not a special procedure is applied to a particular group of persons. It may also be said that a misuse of powers constituted by a misuse of procedure may only be shown if, within the limits of the powers conferred on the competent authority, one procedure was applied *instead of another.* That follows in any event from the judgments of the Court of 13 June 1958 in Case 2/57 *Hauts Fourneaux de Chasse* v *High Authority* [1958] ECR 199 and in Case 8/57 of 21 June 1958, *Groupement du Hauts Fourneaux et Aciéries Belges* v *High Authority* [1957 and 1958] ECR 245 in which it was claimed that instead of Article 59, and in order to evade the specific procedure prescribed in that article, Article 53 was applied. In the present case, however, the main allegation of the applicants is to the effect that the Commission *possesses no sovereign powers whatever* in regard to them, these having been reserved by the Member States in regard to undertakings engaged in processing. Even if it has to be admitted that the applicants have not accordingly pleaded any infringement of rules governing jurisdiction, as was confirmed by the applicants in the oral procedure in relation to the problem of the division of sovereign powers between

States and communities of States, it is nevertheless undeniable that such arguments raise the issues of *ultra vires* action or infringement of the Treaty rather than that of a misuse of powers. Thus, in a case turning on similar facts, the Court pointed out that the applicants' complaint of a misuse of powers, in that the Commission had taken powers affecting commercial undertakings which were not covered by the Treaty, was one which in fact came within the field of the doctrine of *ultra vires,* thus following the Advocate General who made that point quite clear in his opinion (judgment of 8 July 1965 in Joined Cases 3 and 4/64, *Sidérurgie Française* v *High Authority* [1965] ECR 441). On the other hand, although the Court, in its judgment of 15 July 1960 in Case 20/59 *Italy* v *High Authority* [1960] ECR 325, to which the applicants have attached such great weight and in which the problem of the High Authority's lack of legislative powers in regard to Article 70 was at issue, spoke of a misuse of the enforcement procedure governed by Article 88 which does not permit legislative measures to be adopted in spheres where Member States have not renounced their sovereign powers, it should not be overlooked that that case was concerned with an action brought by a *Member State.* Accordingly there was no need for the Court to express an opinion as to whether a misuse of procedure in the form described could constitute a misuse of powers within the meaning of the second paragraph of Article 33.

Inasmuch as the applicants also plead a misuse of powers in the form of a *failure to comply with substantive rules* (namely the objectives set out in Articles 2, 3 and 4 of the Treaty) it is clear however that this plea too cannot lead to a different conclusion. On closer examination it is apparent in this respect as well that the contention amounts to nothing more than an allegation of an unlawful extension to tube producers of the field governed by the ECSC Treaty. However, as I have already said, that argument can scarcely be classified as one relating to a "misuse of powers". The complaint is much more akin to an allegation of an infringement of the Treaty or of *ultra vires* action.

(cc) Therefore, even if the second paragraph of Article 33 were to be applied by analogy the application still cannot be considered admissible. Moreover, there is no likelihood of the application's succeeding, if only because the applicants have not made out a *prima facie* case that the contested rules constitute a misuse of powers *affecting them in particular.*

(d) Accordingly, there is no need for me to examine further the substance of the case. I would nevertheless like very briefly to give my thoughts on this matter.

(aa) If one confines oneself to the complaint of misuse of powers and to the classic definition relating to that concept contained in the case-law of the Court and according to which the necessary review extends to the aim pursued by and the objective of a measure (judgment of the Court of 21 June 1958 in Case 8/57 *Groupement des Hauts Fourneaux et Aciéries Belges* v *High Authority* [1957 and 1958] ECR 245), it can scarcely be said that the contested decision owes its existence to a misuse of powers.

The decision was taken in the context of steel production quotas with the objective of securing the proper functioning of the system by ensuring, by means of appropriate checks, that the exemption rules which had to be provided for in accordance with the principle of proportionality were confined to products which were in fact used in the manufacture of tubes. It was only for that purpose that the Commission considered it essential, in respect of the processing industry, to take certain measures for which the Treaty, and in particular Article 58, did not provide any basis in law. It has been suggested that the Commission was pursuing other more far-reaching objectives, such as the extension of the field covered by the ECSC Treaty to the whole of the processing industry. I cannot find anything to suggest that this was the case. Thus it can scarcely be said that the Commission availed itself of powers which it believed the Treaty conferred upon it, for the purposes other than those expressly stated.

(bb) I do not consider it permissible in this case to undertake a more wide-ranging review covering, for example, the question of a failure to observe the limits of Article 95. If the applicants' view were correct that the Court may, on its own initiative, the right of action conferred on private persons would in fact come very close to the right of action provided for the Member States. That would be incompatible with the system of legal protection laid down by the ECSC Treaty since under the second paragraph of Article 33 of the Treaty actions may be brought by private persons against general decisions only within narrowly defined limits. Nor may any support be derived for such a view from those decisions of the Court in which the Court has considered certain points on its own initiative.

(cc) If the applicants were however correct on this point it would be difficult not to entertain serious reservations regarding the legality of Decision 385/81/ECSC. I do not wish to say anything further about this but to confine myself in principle to this general observation. I would merely refer to what emerged, in the course of the proceedings, concerning the question whether Decision 385/81/ECSC was necessary; to the views expressed on Article 95 (1) and on its inherent limits; to the case-law cited by the applicants concerning a "minor amendment" of the Treaty under Article 95 (3) and (4), and to the statements contained in the case-law regarding the requirement that there may be no alteration in the relationship between the powers of the Community and of the Member States (Opinion No 1/60 [1960] ECR 39), which of course are also valid in regard to Article 95 (l).

3. It merely remains for me to say a word on the *decision as to costs* which, in a case such as this, are, as I have said, in the discretion of the Court, by virtue of Article 69 (5) of the Rules of Procedure. If my assessment of the chances of success of the action is adopted, the decision could simply provide that the applicants are to pay the costs. It might however be thought fit to have recourse to the decisions of the Court relating to Article 69 (3) of the Rules of Procedure. According to those decisions, where the circumstances are exceptional it is not necessary to adhere to the rules. This is particularly true where difficult and complex questions of law are at issue or where there is considerable uncertainty surrounding the legal position (judgment

of 13 July 1961 in Joined Cases 2 and 3/60 *Niederrheinsche Bergwerke AG* v *High Authority* [1961] ECR 133; judgment of 23 April 1956 in Joined Cases 7 and 9/54 *Industries Sidérurgigues Luxembourgeoises* v *High Authority* [1956] ECR 175; judgment of 14 December 1962 in Joined Cases 46 and 47/59 *Meroni* v *High Authority* [1962] ECR 411; judgment of 2 July 1974 in Case 175/73 *Union Syndicale, Massa and Kortner* v *Council* [1974] ECR 917). I have no doubt that this is such a case, for which, if I am right, there are no precedents and which the Commission itself, in the oral procedure, described as "a case involving exceptional legal difficulties". I think therefore it appropriate to make an order that the parties should bear their own costs.

4. In conclusion, therefore, I propose that the Court should declare that the action has lost its purpose and that the parties should bear their own costs.