Costs

49 Under Article 69 (2) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs if they have been asked for in the successful party's pleading. As the applicant has failed, it must be ordered to pay the costs.

On those grounds,

THE COURT (Fourth Chamber)

hereby:

1. **Dismisses the applications;**

2. **Orders the applicant to pay the costs.**

O'Keeffe Pescatore

Bosco Koopmans Bahlmann

Delivered in open court in Luxembourg on 11 May 1983.

P. Heim
Registrar

A. O'Keeffe
President of the Fourth Chamber

OPINION OF MR ADVOCATE GENERAL REISCHL DELIVERED ON 23 FEBRUARY 1983 [1]

Mr President,
Members of the Court,

Both the cases on which I am expressing my views today are concerned, once again, with the steel quota provisions as laid down by Decision 2794/80 (Official Journal L 291 of 31 October 1980, p. 1 et seq.), which are already familiar from a series of other proceedings. The decision was in force from 1 October 1980 until 30 June 1981.

The first of the two cases at issue here concerns a decision of the Commission whereby it refused to raise, pursuant to Article 14 of Decision 2794/80, the

1 — Translated from the German.

quota assigned to the applicant for the first quarter of 1981 in relation to rolled steel products in Group I. Article 14 permitted deviations from the general quota provisions in cases where the production or delivery restrictions imposed by the decision or its implementing measures entailed exceptional difficulties for an undertaking.

The second case relates to a decision in which the Commission fined the applicant on the ground that it had exceeded its permitted production quotas in the first quarter of 1981. That was done in accordance with Article 9 of Decision 2794/80, which provides for such cases as follows:

"Firms exceeding their production quota ... shall be fined. This fine shall generally be 75 ECU per tonne of excess for ordinary steels and 150 ECU per tonne of excess for special steels.

Where the production of an undertaking exceeds the quota by 10% or more or where the undertaking has already exceeded during one of the previous quarters its quota or quotas, the fines may be up to double these amounts per tonne ... This amount shall be increased by 1% for each month of delay of payment, from the date fixed in the penalization decision. A month started shall count as a whole month."

The following may, at the outset, be said about the facts of the proceedings:

The plaintiff received from the Commission a notification, dated 19 December 1980, under Article 3 of the decision. The notice specified the reference production figures for the first quarter of 1981, stating that they had been adapted in accordance with Article 4, and the production quotas. On the latter, the remark was made that, since the products cited included some which were not subject to the quota system, they would have to be adjusted in accordance with Article 6 (2) of the decision. In a further letter from the Commission dated 1 April 1981, the quotas as adjusted under Article 6 were notified. In respect of products in Group I, the letter gave the same quota as had previously been communicated in December 1980.

As early as the first quarter of 1981, representatives of the applicant were in touch on several occasions with the Commission's Vice-President responsible for the quota provisions and with the competent departments of the Commission, concerning application of the aforementioned Article 14 of the decision, to which — the applicant alleges — an application of 4 February 1981 had referred. Even at that stage the applicant was allegedly informed that the preconditions for applying that provision in relation to Group I products were not satisfied. That was again reconfirmed to the applicant by a notification of 19 October 1981, which stated that the Commission, in comparable cases, had not recognized the presence of exceptional difficulties unless the rate of utilization of an undertaking was more than 10% below that of other producers within the Community, and unless the percentage of Group I products amounted to 30% at least of the total output of all product groups. Since the applicant's rate of utilization in the first quarter of 1981 had been only 5.4%

below that of the other producers within the Community, however, any application of Article 14 of the decision in its case was ruled out.

The notice was contested by the applicant in an application lodged at the Court of Justice on 30 November 1981, seeking a declaration that the decision of 19 October 1981 was void (Case 303/81).

In the course of an examination of the reports and the information which the applicant was obliged to supply to the Commission pursuant to Decision 2794/80, it was discovered that the applicant had exceeded its permitted production quotas for the first quarter of 1981. When the applicant learned that the Commission intended to serve notice of a fine upon it, it addressed a letter of 26 June 1981 to the Chef de Cabinet of the Vice-President responsible for the quota provisions, in which it recalled that its representatives had been promised in a telephone conversation, before the so-called Eurofer II negotiations, that the Commission would "solve the problem" of the amount by which the quota was exceeded in the first quarter — the figure quoted being roughly 25 000 tonnes — provided that the applicant took part in those negotiations. The Commission did not do so, however, and instead the applicant was formally notified in a letter of 15 July 1981 that it had exceeded its quota by 61 955 tonnes and was called upon, pursuant to Article 36 of the ECSC Treaty, to submit its comments on the matter. The applicant complied, in a letter of 22 July 1981 which emphasized that the excess production amounted to only 28 682 tonnes. The Commission wrote back on 19 August 1981, informing the applicant that, on the basis of an adjustment of the quota for Group I products, which had been accidentally overlooked in the Commission's letter of 1 April 1981, the true excess production had to be assessed at 61 955 tonnes. The same letter further pointed out that the Chef de Cabinet in question could not have promised to solve the problem of the excess production because, under Article 9 of the decision, any excess necessarily had to be sanctioned by a fine. Both on 25 August 1981 and at a hearing held on 24 September 1981, the applicant was again able to submit its comments. Subsequently, on 28 October 1981, a decision to impose a fine pursuant to Article 9 of Decision 2794/80 was issued. The decision noted that, since the quota originally notified on 1 April 1981 had, by mistake, been confirmed as the adjusted quota, it would be accepted that the excess production in Group I had amounted to 28 682 tonnes.

Accordingly, the applicant was fined 75 European currency units (ECU) per surplus tonne, giving a total of ECU 2 151 150 (= DM 5 235 727). The fine was payable within the two months following communication of the decision, and upon expiry of that period the amount would be increased by 1% for each month (or part thereof) in arrear.

In response, the applicant applied to the Court of Justice on 15 December 1981, seeking a declaration that the decision of 28 October 1981 was void, or alternatively a reduction of the fine imposed to such sum as appeared to the Court to be appropriate (Case 312/81).

My opinion on those applications, which the Commission considers unfounded, is as follows.

I — Decision based on Article 14 of Decision 2794/80 (Case 303/81)

The applicant challenges the decision with two series of arguments, alleging infringement of Article 14 of Decision 2794/80 and hence, under Article 33 of the ECSC Treaty, infringement of the Treaty or of a rule of law relating to its application. The first series concerns the criterion, which was decisive for the Commission, whereby the utilization rate of an undertaking had to be more than 10% below that of the other producers in the Community, whilst the second relates to the correct assessment of the applicant's capacity for the first quarter of 1981.

1. Principally, the applicant takes the view that it is possible to speak in terms of exceptional difficulties within the meaning of Article 14 of Decision 2794/80 not only when the rate of utilization of an undertaking is more than 10% below the Community average. That constitutes an inadmissible constriction of the test applied, which may lead to discrimination. What is called for is rather an appraisal of all the circumstances of each individual case, including economic factors and in particular the financial situation; that may readily disclose that relevant difficulties of an exceptional character exist even when the rate of utilization deviates by less than 10% below the average.

In reply, the Commission seeks to justify its administrative practice by pointing out in general terms that Article 14 represents a derogative provision which requires to be narrowly construed. In doing so, the Commission resorted not merely to *one* criterion, namely the one mentioned above. Article 14 has been applied primarily in cases in which delivery obligations could not otherwise have been met, such obligations being viewed within narrow limits, however, in accordance with the stated principle, that is to say, in so far as the existence of orders *from abroad* could be demonstrated. It was a matter of comparing utilization levels as well, inasmuch as Article 14 has been invoked whenever reference production has — owing to technical difficulties or to strikes, for example — deviated sharply from the average, a normal increase under Article 4 (3) to (5) being ruled out. In that respect, however, the Commission deemed a fixed margin to be necessary, first in order to avoid instances of discrimination and secondly so as to simplify administrative procedure, since the quotas, which have to be fixed at quarterly intervals, needed to be adapted as swiftly as possible. Moreover, the margin chosen seems a proper one. Since Article 14 speaks of exceptional difficulties, a fairly wide deviation from the average is certainly called for. Another important point is that not only is the margin selected by the Commission employed in Article 4 (3) of Decision 2794/80, but also that fluctuations of that nature are, according to experience in the steel market, quite common in normal market conditions. Not least, the Commission contends that consideration had to be given to the facts that there is some uncertainty in assessing productive capacity and that the danger of discriminating against undertakings increases if a lesser deviation from average utilization is taken into account. Moreover, in

connection with the need to give a narrow interpretation to Article 14, the Commission points out that, according to its wording, any difficulties must be *the consequence* of enforcing the production-quota system. Seen in that light, it is impossible to envisage all the possibilities, such as the debt-servicing commitments cited by the applicant, which resulted from decisions made by the undertaking prior to the introduction of the quota system, or economic circumstances such as the situation with regard to revenue, which itself was a premise for the introduction of the quota system, not a consequence thereof.

As regards the first point of this argument, it is certainly true that the application of the hardship clause in Article 14 must be subject to stringent conditions. In the interests of equality of treatment too it is possible to sympathize to some extent with the view that a *fixed* margin of deviation from the average rate of utilization was regarded as an important criterion in that connection. However, it seems to me to be equally true to say that an inflexible adherence to precisely 10% as the *sole* yardstick — besides proven delivery commitments — is bound to encounter serious misgivings. In answer to the Commission's statement that such is the usual margin of fluctuation under *normal* market conditions, it may rightly be said that under the quota system the production level has been depressed far below normal market conditions and that in such circumstances any further reduction of utilization, even if less than 10%, may give rise to exceptional difficulties. Similarly unconvincing is the Commission's reference to the difficulties in establishing capacity correctly; for if such difficulties exist — which is beyond doubt — it is quite conceivable that too low a capacity will be adopted, so that, when measured against the proper capacity, a wider deviation from the average degree of utilization results which may indeed constitute an exceptional difficulty within the meaning of Article 14.

Therefore, if in principle it may be acknowledged as sound to have chosen a 10% deviation from average utilization as a *guideline*, the Commission, in adhering rigidly to that criterion, undoubtedly did not do justice to the purpose of Article 14, which is to ensure, in a relatively crude system, that production quotas are determined as fairly as possible in each individual case. It must thus be assumed that the Commission, acting of course on proper, substantiated representations, was obliged to examine whether even a lesser deviation from the average rate of utilization did not give rise to exceptional difficulties of the kind envisaged which were not solely the responsibility of the undertaking in question. Although this is not the place for formulating a comprehensive theory, it is possible to think of relevant factors such as my colleague, Mr Advocate General VerLoren van Themaat, has suggested in his Opinion on Case 119/81 [1] in connection with the problem surrounding subsidies, namely that even where Article 14 is applied, the problem of subsidizing undertakings and the resultant difficulties for other, unsubsidized undertakings might play a role.

Since in the present case the only crucial factor in the Commission's negative

1 — Judgment of 7 July 1982 in Case 119/81 *Klöckner-Werke AG* v *Commission of the European Communities* [1982] ECR 2627.

decision was — as the Court has heard — the observation that the applicant's rate of utilization deviated from the average by less than 10% — and I shall examine shortly whether that was the fact — and since in any case no submission was made to the effect that the applicant failed, when applying under Article 14, to adduce cogent reasons of any other nature indicating the presence of exceptional difficulties, the contested decision may justifiably be declared void on the grounds that the Commission inadmissibly restricted the examination required of it by Article 14 of Decision 2794/80.

2. The applicant further maintains that the Commission was wrong to deny that the criterion which it regarded as decisive, namely a deviation of more than 10% in the rate of utilization from the Community average, was satisfied in the applicant's case. The Commission reached that conclusion, it claims, by assuming too low a capacity for the Bremen No II hot-rolled wide-strip mill. If the Commission had conceded that the output capacity was, not 355 000 tonnes per month, but (as stated in the pleadings) 459 000 tonnes per months, the applicant's utilization of capacity following the quotas as notified would have been disclosed as being no more than 39%, and hence it would indeed have been more than 10% below the Community average (56% during the first quarter of 1981). Furthermore, the applicant complains in that regard — in its pleadings, at any rate — that the Commission wrongly failed to take into consideration the capacity of the Bremen No I hot-rolled wide-strip mill. This mill was commissioned in 1958 and was temporarily closed down in April 1974 as part of the restructuring plan.

(a) As regards the first of these two points, namely the capacity of the No II rolling-mill, the applicant claims that it cannot simply be held to previous declarations on the matter; it is true that it entered on Questionnaire No 2/61 an output of 314 000 tonnes per month for the years 1977 to 1979, an output of 355 000 tonnes per month from 1 January 1980 onwards, and only from 1 January 1981 onward — once the appropriate declarations had been given during an inspection of its business in November 1980 — did it return a figure of 459 000 tonnes per month. The real issue is whether conclusive evidence was later adduced in favour of a reassessment, and the applicant maintains that in its case that must indeed be conceded. Here, the applicant refers to an expert opinion which was drawn up in May 1981 at the instigation of the Commission and of the German Federal Ministry of Economic Affairs. Although one of the experts, the Belgian Centre de Recherches Métallurgiques, speaks of an output of only 337 000 tonnes per month, that may be explained by the fact that the expert was relying on the furnace throughput as previously guaranteed by the supplier as a *minimum*, which, however, is no evidence as to the actual capacity. The other expert, the Japanese company Kawasaki, working on the basis (which the applicant regards as correct) that the output of the walking-beam furnaces is 507 tonnes per hour, reaches a completely different conclusion, namely that the capacity is 487 000 tonnes per month. By way of demonstrating that the latter figure is quite realistic the applicant makes reference to another opinion, which was prepared on the basis of capacity tests conducted in the presence of representatives of the supplier of the walking-beam furnaces. Its findings are that the walking-beam furnaces, which in effect form the bottleneck of the rolling-mill and are therefore

of prime importance to its capacity, may be assumed to have an average hourly output of 570 tonnes which is greater than that cited by the applicant. That should at least have persuaded the Commission to conduct a thorough investigation of the disputed capacity before it gave a definitive decision on the applicant's claim under Article 14 of Decision 2794/80.

On the other hand, the Commission takes the view that it was quite entitled to adopt the figures at which, following the first correction of the applicant's report, its officials had arrived in the course of an inspection of the applicant's business in 1980. Kawasaki's statements could not possibly have given rise to a further rectification, because they referred only to the abstract, technical capacity and not to the maximum possible productivity within the meaning of Questionnaire No 2/61, which concentrated on the planned specific production structure and on the specific technical conditions valid for the year in question. Furthermore, it was a question merely of forecasting possible production in the future. In addition, the Commission refers to the applicant's claim that its capacity in the period 1977 to 1980 was already of the size stated by it, which in other proceedings gave rise to a dispute concerning the appropriate margin of increase in reference production pursuant to Article 4 (3) of Decision 2794/80. However, both together — that is, the application of the above-mentioned provision on the one hand and of Article 14 on the other — is certainly not possible in the Commission's opinion. Had an increase actually been agreed under Article 4 (3) for the first quarter of 1981, in accordance with the capacity as stated by the applicant (which the applicant did not, in any case, attempt to achieve by way of an application to the Court), the resultant quotas would — as the Commission illustrates using an imaginary calculation — have been such that the applicant's utilization rate would have stood at only 6.4 % below the Community average, thereby failing yet again to satisfy the criteria considered essential by the Commission for invoking Article 14.

(b) In my view the Court cannot concur with the Commission on that point either.

(aa) If, as its last-mentioned submission appears to suggest, the Commission sees *problems of admissibility* as far as the disputed application of Article 14 with reference to assessed capacity is concerned, and regard being had to the fact that the applicant, in another case (Case 119/81 cited previously), considered an increase under Article 4 (3) in its reference production figure to be appropriate on the ground that even in the years 1977 to 1979 the capacity of the No II rolling-mill allegedly amounted to 459 000 tonnes per month, whereas it has omitted to adopt the same argument when contesting notification of quotas for the first quarter of 1981, then it would be difficult to agree with it on that point. I fail in principle to see how the tactics and submissions in a separate action can lead to the conclusion that a line of argument in the present, quite independent case is inadmissible. The fact that it was not in reliance upon Article 4 (3) of Decision 2794/80 that the quota decision governing the first quarter of 1981 was contested — and of

possible relevance here is the alleged promise, to be dealt with in Case 312/81, whereby a senior official of the Commission undertook in March 1981 to solve the applicant's problems in the first quarter of 1981, or perhaps the reflexion that it is now difficult to prove the existence of a higher capacity for the years 1977 to 1979 — may therefore lead to the supposition that the applicant's capacity during those years is thereby definitively established as being of the size assumed by the Commission. No compelling evidence may be drawn from that, however, as to the extent of the applicant's capacity by the beginning of 1981, with the result that the applicant cannot now be debarred from relying upon Article 14, which relates, not to any previous capacity but to the capacity obtaining in whichever quarterly period is at issue. It is my conviction, moreover, that application of Article 14 would not have been precluded *a priori* if, in respect of the first quarter of 1981, an increase of the extent calculated by the Commission had been allowed under Article 4 (3), precisely because the very observation that the applicant's rate of utilization would then have been only 6.4% below the Community average would undeniably have indicated exceptional difficulties.

(bb) Certainly for the purpose of deciding this issue, nothing may be deduced either from the fact that the applicants, for several years, stated a different capacity in Questionnaires No 2/61, or from the judgment in Case 119/81 (cited previously) which also contains findings as to the applicant's capacities.

It does indeed seem understandable that, at times when its plant was far from being fully utilized on account of difficulties on the steel market, the applicant did not closely investigate the output potential of that plant and may as a result — for the significance of such findings could not be perceived at the time — negligently have made false statements. If penalties are called for on *that* account, then they are those provided under Article 47 of the ECSC Treaty; on the other hand, additional sanctions in the form of an adherence as part of the quota system to declarations submitted would be — and here the applicant has demonstrated, on the basis of calculations, the extent of the associated economic disadvantages which it would suffer — excessive and unjustified. It must therefore be basically possible in such a case to return to previous declarations and, provided that sufficient evidence is available, to call for them to be rectified.

With regard to the judgment in Case 119/81 (cited previously) it is a decisive factor that those proceedings were concerned exclusively with the proper application of Article 4 (3) of Decision 2794/80, that is to say, with the applicant's maximum possible output in the period 1977 to 1979. Although in that respect the evidence adduced by the applicant was held to be insufficient, in particular on the grounds that the closing remarks of the expert opinion presented speak in terms of a possible *increase* in capacity, it is by no means certain that the same is necessarily true of the application of Article 14 of Decision 2794/80, relating as it does to demonstrable capacity at the beginning of 1981 and the utilization thereof.

(cc) There is no doubt in my mind that the reports and their supplements submitted by the applicant — to wit, the joint report of the Centre for Metallurgical Research and the Kawasaki Steel Corporation of 1 May 1981, Kawasaki's report of the same date, Professor Jeschar's expert opinion of 12 January 1982 with its appendix of 2 February 1982, and the letter from the supplier of the applicant's walking-beam furnaces of 15 February 1982, together with the attached report on an output test conducted in December 1981 — afford sufficiently cogent evidence (even if such documents are viewed, in strictly legal terms, as partisan statements) to cast doubt on the Commission's assumption as to capacity, namely 355 000 tonnes per month, and that they thereby oblige the Commission to investigate once more the question of capacity.

Above all, it is a misconception that the reports by the Centre for Metallurgical Research and Kawasaki constituted evidence merely of abstract technical capacity and thus did not allow conclusions to be drawn about the Commission's sole criterion of maximum possible output within the meaning of Questionnaire No 2/61. Thus, the said joint report explicitly states that consideration was given to the supply of semi-finished products, the demand structure for 1980 (car industry and tube manufacturers) and to the plant installed upstream or downstream of the rolling-mill; moreover, Kawasaki's special report took account of five different sets of working conditions in the applicant's undertaking and, there as well, regard was had to the production programme at that time.

According to the last-mentioned report, upon which the applicant mainly relies, it is possible for the No II rolling-mill to turn out, depending on working conditions (composition of the product and nature of the primary material), between 427 000 and 487 000 tonnes per month. The "Conclusions" in the joint report state that, assuming a furnace throughput of 506 tonnes per hour, output may be raised to 5 844 000 tonnes per annum, that is, 487 000 tonnes per month. To judge by the report as a whole the figures are to be treated, not as a mere forecast, but as an existing and present possibility. The reference to the Japanese standard is unassailable, because the applicant's rolling-mill was built to a Japanese design. The applicant further made clear during the oral procedure that the expert opinion in question shows that, proceeding on the basis of the specific production conditions in the first quarter of 1981 and allowing a suitable deduction for high-grade steels, a monthly output of 430 000 tonnes may still be regarded as realistic.

Although, on the other hand, it is indisputable that the joint report by the Centre for Metallurgical Research and Kawasaki speaks only of a maximum possible annual output of 4 050 000 tonnes (or 337 500 tonnes per month), and mentions the possibility of raising this figure, it must not be overlooked that the basic assumption was that the walking-beam furnaces, which are obviously of crucial importance to the output capacity of the rolling-mill, had an hourly output of 405 tonnes, guaranteed by the supplier of the furnaces as a *minimum* figure. Now, on the other hand, Jeschar's expert opinion, which was drafted following output tests conducted in December 1981 and January 1982 with the collaboration of the supplier and making allowance for marginal factors to which long-term

operation is subject, furnishes evidence that the walking-beam furnaces, operated under a variety of working conditions, actually yielded outputs far exceeding 500 tonnes per hour. The opinion states that it may be expected that each of the two furnaces could certainly produce 600 tonnes per hour over a lengthy period. The supplier of the furnaces also confirms in a letter of 15 February 1982 that, following trials in which the furnaces were run at normal settings and allowance was made for a variety of circumstances affecting production, outputs sometimes going beyond 600 tonnes per hour were recorded. At all events, the opinion claims, the assumption must be made that the furnaces are capable of a sustained output of 570 tonnes per hour. That undoubtedly lends permanent weight to the Kawasaki report, and the Commission cannot confront it merely with a reference, which was not made until the oral procedure and was therefore certainly out of time, to a letter from the Director of the Centre for Metallurgical Research dated October 1982, alleging that during a recent visit to Japan it had been possible to establish that Japanese undertakings using furnaces of approximately the same construction utilized them only at the rate of 300 tonnes per hour.

(c) If such considerations justify the conclusion that the notification issued by the Commission in the context of Article 14 of Decision 2794/80 is also erroneous because the Commission failed, in the face of serious evidence, to verify the capacity of the applicant's No II rolling-mill and it is therefore not certain whether the applicant's rate of utilization in the first quarter of 1981 was not, after all, more than 10% below the Community average, there is no further need to investigate the other written claim (to which the applicant moreover did not return in the oral procedure), namely that the capacity of the No I rolling-mill was ignored. If such investigation is nevertheless undertaken, no criticism is really warranted *in that regard*, because obviously any consideration of the utilization of an undertaking, even in connection with Article 14, can only deal with capacities the exploitation of which is, in normal circumstances, to be expected within a foreseeable period. That must surely rule out the applicant's No I rolling-mill, since it was expressly stated that the mill was closed down in 1974 because its functions had been taken over by the new No II mill.

3. In Case 303/81 it may thus be stated that the application formulated therein appears to be well founded, first because the Commission based its decision as to Article 14 on the applicant's rate of utilization alone, and secondly because, in spite of cogent evidence, it failed to verify the applicant's capacity, which very probably would have disclosed that its utilization rate was, owing to the quotas notified to it in the first quarter of 1981, more than 10% below the average utilization within the Community.

II — Case 312/81; concerning the Commission's decision to fine the applicant for exceeding its production quota in the first quarter of 1981

1. If my views on Application 303/81 are accepted, and if therefore it is insisted that the decision whereby the Commission refused to apply Article 14

of Decision 2794/80 to the applicant be declared void, it is clear that the Commission's fine cannot be maintained either. For the Commission will then be required to re-examine the application of Article 14 in the first quarter of 1981 and may come to the conclusion that the applicant's production quota should have been larger. That may indicate a lower margin of excess over the quota and consequently a lower fine, or even — if it seems appropriate to raise the quota to a level which corresponds to the applicant's actual output — a total cancellation of the fine, Article 9 not having been infringed.

2. The matter does not, of course, stop at that observation. Instead, I shall examine in the alternative the separate arguments submitted in connection with Case 312/81.

Those arguments are now founded exclusively on an alleged promise on the part of the Member of the Commission responsible for the steel quota provisions, transmitted by his Chef de Cabinet, to arrange for a solution of the applicant's problem arising from its having exceeded the production quota in the first quarter of 1981. Although the written pleadings have gone further and have argued the illegality of the general Decision 2794/80, there is no further need to examine either the claim itself or the complex problems regarding admissibility which are partly connected with it, as the applicant expressly stated during the oral procedure that, after considering the judgment in Case 119/81 (cited previously), it no longer maintained the objection asserting the illegality of Decision 2794/80.

3. As regards the *promise* given to the applicant, which is supposed to result in the illegality of the decision to impose a fine, the following particulars were supplied:

The applicant had been invited to participate in talks on 20 March 1981, designed to prepare legislation for the period following 30 June 1981, as part of which the larger steel undertakings were supposed to arrange voluntary restrictions on output. The applicant had in fact not intended to cooperate, because it feared that it would not receive an equitable share of the production allowance to be agreed. The Commission, which had previously announced that under Article 58 of the ECSC Treaty the quota provisions would in any case come to an end on 30 June 1981, was very anxious to obtain a voluntary arrangement thereafter, and hence to secure the applicant's participation in the planned talks mentioned above. Therefore, on 19 March 1981 the Chef de Cabinet of the Member of the Commission responsible for quota provisions, acting for and on behalf of the latter — the applicant employs the legal term "as agent" — telephoned the applicant and obtained its undertaking to participate, by means of the promise that, by way of compensation so to speak, for the disadvantages which the applicant expected from the new system, the problem resulting from the applicant's having exceeded its production quota in the first quarter of 1981 would be solved. The applicant, which in reliance upon that promise had also

refrained from submitting the quota decision concerning the first quarter of 1981 to the Court of Justice, accordingly joined in the planned talks, which even achieved a measure of agreement. In the circumstances, the applicant maintains, the Commission cannot unilaterally repudiate the arrangement concluded and impose a fine on the applicant without solving its problem.

I understood from the Commission during the oral procedure that it does not dispute that the aforementioned Chef de Cabinet spoke to the applicant about solving its problem. However, it broadly takes the view that, since Article 9 makes fines mandatory whenever production quotas are exceeded, there was absolutely no possibility of promising that no fine would be imposed when the quota had been exceeded, and the *inadmissibility* of the objection — for lack of conclusive evidence — was thereby demonstrated. In addition, the Commission points out that it is not really possible to identify what it was that had allegedly been promised, and that the hypothesis of a binding undertaking is negated by the absence of the necessary precision required by administrative law and thus by the absence of any intention to be bound. The Commission moreover denies that the Member of the Commission responsible for the quota provisions instructed his Chef de Cabinet in the manner alleged, and contends that — even supposing that the latter wished to make a binding promise — attention should at least be paid to case-law, according to which the verbal assurances of officials have to be notified by the competent authorities. Finally, proceeding on the assumption that the solution of the applicant's problem was promised in the form of higher quotas, no promise to that effect could, in any event, be regarded as valid, on the ground that it was not reduced into writing as required.

4. (a) As far as that dispute is concerned, I hesitate to speak of an objection by the applicant which, for lack of definition, is not admissible.

It is certainly right to say that when a quota is exceeded no promise may be given that no fine will be imposed, because Decision 2794/80 allows no margin of discretion in that regard; the imposition of the fine is rather the automatic and mandatory consequence of exceeding the quota. It should not be overlooked, however, that in litigation which is concerned with a penalty of that nature decisions which are alleged not to have been observed may under Article 36 of the ECSC Treaty be included, which means in the present case — as the Commission itself appears to concede — the original quota decision and supplementary measures connected therewith such as the decision as to Article 14 of Decision 2794/80. In that context promises are quite conceivable, whether they relate to an increase of reference production under Article 4 (3) in the light of fresh information affecting the assessment of the applicant's capacity, or to the application of Article 14 and an acknowledgment of the existence of exceptional difficulties caused to the applicant by the quota provisions. It is therefore sufficient to give a suitable interpretation to the applicant's submission in order to eliminate the misgivings as to its conclusiveness, because if proper investigation discloses that the decision regarding quotas is defective on the ground that, contrary to promises made it was left unchanged, it is certain that the decision imposing the fine cannot be upheld.

(b) I would, furthermore, hesitate to agree with the Commission's view that, if assessed in terms of its objective

declaratory content, the disputed statement was so ill-defined as to be incapable, in any case, of giving rise to any legal effects. At the time when it was made (shortly before the end of the first quarter), it was quite apparent that the applicant had exceeded the quota originally allocated to it, and therefore that a sanction would be imposed. That was manifestly the applicant's "problem" which needed to be solved. If, however, a solution — the avoidance of penalties — had been promised, only the two expedients outlined above are relevant: either an examination of the quota decision which, at the time, was not yet final (as initially mentioned, it was made definitive only by the notification dated 1 April 1981), regard being had to Article 4 (3) and to the disputed assessment of the applicant's capacity, or else an application of Article 14, recognition being given to the exceptional difficulties asserted by the applicant. That should definitely exclude the possibility of regarding the promise as devoid of precision and thereby of any legal force.

(c) In the final analysis however the impression gained is that the present objection cannot, on a number of scores, assist the applicant's claim.

(aa) It is doubtful whether the applicant has demonstrated conclusively enough that the promise came from a Member of the Commission who was competent to make decisions of that nature (quota amendments) by virtue of powers delegated by the Commission. The applicant's letter of 26 July 1981, which was addressed to the above-mentioned Chef de Cabinet, does indeed say: "In conversations which *you* had with us before the opening of the Eurofer II negotiations, ... *you* promised us that the Commission ... would solve the problem of ... our ... production in excess of the quota in the first quarter of 1981". It is true that it was affirmed in the written pleadings that the above statement had been made immediately following a telephone conversation between the aforementioned Chef de Cabinet and the competent Member of the Commission, and that it must be concluded that, since the former cited that telephone conversation, he had been acting as agent in transmitting a statement by the competent Member of the Commission. However, that cannot be substantiated, even by hearing evidence from those present at the meeting with the Chef de Cabinet in the offices of the applicant, since of course they would in any case be quite unable to shed light on the content of the telephone conversation between the Chef de Cabinet and the Member of the Commission — a conversation which, the Commission emphatically assures the Court, did not bear the meaning attributed to it by the applicant. What therefore seems to be relevant to the present case is indeed case-law according to which an assurance given by an official requires express ratification by the authorities responsible (Case 21/64 [1]), whereas such ratification has not been claimed and could not be proved.

(bb) It is also open to doubt whether a *binding* declaration was really intended. Although the applicant interprets the statement that its problem would be solved as meaning that, in respect of the first quarter of 1981, *compensation* was being promised for the disadvantages it expected to suffer after 30 June 1981 under an agreement on production restrictions, I really find such a "deal" — as the applicant calls it — somewhat implausible. I cannot imagine that the Commission could have given a

1 — Judgment of 31 March 1965 in Case 21/64, *Macchiorlati Dalmas e Figli* v *High Authority of the European Coal and Steel Community* [1965] ECR 175.

definite assurance without having any guarantee as to the successful outcome of the talks concerning Eurofer II, especially since the applicant could endeavour to avoid being put at a disadvantage under the voluntary system, with the result that such a disadvantage could not be accepted as an established fact.

(cc) However, on the assumption that a binding promise *was* intended, and that — to quote the judgment in Case 71/74 [1] — the impression was conveyed of a commitment on the part of the Commission, then at any rate the objection would be well founded that the statement is without legal effect because it was only an *oral* one. I have already made it clear that the only possible way of solving the applicant's problems was to revise the quota decision issued for the first quarter of 1981. That, on the other hand, calls for a decision under Article 15 of the ECSC Treaty; if such a decision is pursuant to Article 1 of Decision 22/60 of 7 September 1960 (Official Journal, English Special Edition, Second Series, VIII, p. 13) subject to the requirement that it shall be in writing, then a promise having the same effect — and the Commission has shown that this is true of national law as well — may be regarded as effective only if it is made in writing and not merely, as here, by telephone.

(d) Accordingly, it must be held in Case 312/81 that a declaration that the decision to impose the fine is void cannot be obtained by virtue of the only head of claim in these particular proceedings which has been upheld. As to the application in the alternative that the fine be *reduced*, it must further be held that, even assuming that the option is open to the Court of Justice under Article 36 of the ECSC Treaty notwithstanding the wording of Article 9 of Decision 2794/80, there is no reason for such reduction in the present case, inasmuch as the applicant has failed to put forward any special grounds whatever in that respect, and that there are no cogent arguments for the Court's arriving at such a decision of its own motion.

III — Accordingly, I propose the following decision on the two cases dealt with here:

In compliance with the applicant's claim, the Commission's decision of 19 October 1981 concerning the rejection of the request made by the applicant under Article 14 of Decision 2794/80 should be declared void. Similarly, since the determination of the applicant's production quota for the first quarter of 1981 cannot yet be considered final, the Commission's decision of 28 October 1981 whereby the applicant was fined for exceeding the production quota for the first quarter of 1981 should likewise be declared void. In view of that outcome the Commission should be ordered to pay the costs.

1 — Judgment of 15 May 1975 in Case 71/74, *Nederlandse Vereniging voor Fruit en Groentenimporthandel and Nederlandse Bond van Grossiers in Zuidvruchten en ander Geïmporteerd Fruit "Frubo"* v *Commission of the European Communities and Vereniging de Fruit Unie* [1975] ECR 563.