# OPINION OF MR ADVOCATE-GENERAL LAGRANGE DELIVERED ON 19 JANUARY 1960[1]

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*Mr President,*
*Members of the Court,*

I am called upon to give my opinion on the applications brought on the one hand by the Government of the Federal Republic of Germany, and on the other hand by a whole series of German steel and coal undertakings, supported by interventions of the interested Länder, against two decisions published in the *Journal Officiel* of 3 March 1958 relating to special rates and conditions covered by Article 70 of the Treaty and Article 10 of the Convention on the Transitional Provisions. These decisions are the decision on the carriage by rail of mineral fuels destined for the iron and steel industry and the decision on the carriage by rail of ores. They both apply to special rates and conditions in force in Germany. They are contested in that they require the abolition of certain special rates investigated, considered as not being 'competitive rates' (which, according to the High Authority, are automatically legal), but as 'protective rates' the maintenance of which, again according to the High Authority, requires the agreement of the latter. In the various cases at issue the High Authority felt it necessary to refuse its agreement in whole or in part, while setting periods of time within which total or partial abolition was to take place.

I do not think I need set out the facts. To do so would in effect be nothing else than to produce a history of the examination of special rates in the light of the provisions of Article 70 of the Treaty and Article 10 of the Convention, a problem which is more or less tied to the problem of applying those provisions as a whole. Such a history would necessarily be either incomplete or much too long and could not in any case achieve that standard of relevance and accuracy that the reports of the technicians and the statements of the responsible politicians alone can offer on such a subject. Therefore in order to master the necessary information, which is certainly indispensable for a thorough understanding of the circumstances in which the present dispute arises, I would refer first to a group of documents expressly mentioned by the High Authority at the head of each of the two letters of 12 February 1958 and secondly to the reports of committees and discussions of the Common Assembly. I would particularly mention (a) *in the first category*: 1. the letter from the Federal Minister for Economic Affairs of 28 February 1957 with its annexes; 2. the minutes of the meeting held at Luxembourg on 11 and 12 March 1957; (b) *in the second category*: 1. the report of the Assembly's Committee on Investments presented by Mr Armengaud, Rapporteur, on a peri-

1 — Translated from the French.

patetic fact-finding inquiry carried out by the committee in January 1957 (Doc. No 33, 1956–1957); 2. the report of the Transport Committee of 10 October 1957 presented by Mr Kapteyn, Rapporteur, on the coordination of European transport, especially pages 42 to 44, and various interesting annexes, among which is to be found a summary of the history of the Interstate Commerce Commission in the United States of America, which has been so frequently mentioned during this case (Doc. No 6, 1957–1958). All these documents, except the last, are, I should add, joined as annexes to the High Authority's statement of defence in Case 19/58.

Nor shall I produce a summary of the various arguments in the case, which have been submitted to you both in writing and orally in so remarkable and so full a way. An analysis of them, even if it were detailed (and in this case tedious), could not reproduce all the subtleties of them. I shall confine myself to attempting to arrive at a correct interpretation of the provisions at issue in the light of everything that we have read and heard. In looking at those provisions I shall go back to the general context of the Treaty and take account of the objectives stated therein. Then I shall consider the question whether the contested decisions are or are not in accordance with the provisions thus interpreted.

## I – Questions of procedure and jurisdiction

However, I must first of all set out my views on a certain number of questions of procedure and jurisdiction.

First of all come two questions proper to Case 19/58 brought by the Government of the Federal Republic. This case is brought, as are the others, on the basis of Article 33 of the Treaty and it is limited to claiming that the Court should annul the contested decisions *parte in qua*. However, the applicant expressly refers, in addition, to Article 88 and to Article 37.

*As regards Article 88,* the reference is brief: 'Although they are not expressly based on Article 88 of the ECSC Treaty', says paragraph E of the application, 'the contested decisions so clearly resemble decisions covered by that article that the applicant considers it possible that the Court will consider them to have been so adopted. From that point of view, the Court would have a power to excercise its discretion in the case.'

I have already expressed my opinion on this question in examining Case 3/59. In the case of special rates relating to coal destined for the steel industry and to ore, the High Authority has not in any way considered 'that a State has failed to fulfil an obligation under this Treaty', in the words of Article 88, and therefore the possibility that it might 'record this failure in a reasoned decision' never arose. On the one hand, the High Authority has admitted that those rates which it considered to be 'competitive rates' were not contrary to the Treaty and that therefore it did not have to order their abolition (an opinion and an attitude which the Government of the Federal Republic has no interest in disputing and does not dispute), and; on the other hand, as regards the so-called 'protective' rates, it has exercised its power under the combined provisions of the fourth paragraph of Article 70 of the Treaty and of the seventh paragraph of Article 10 of the Convention, either by authorizing them, or by ordering their abolition within stated periods. Since the rates in question were in force when the High Authority was established, their retention was legal until it acted, for the provisions of the Convention expressly so provide. The Federal Government was under no obligation to abolish them until the High Authority, in exercise of its power so to do, decided to order it to abolish them. Obviously the same would be true *a fortiori* if one took the view that the rates in question, or some of them, were in accordance with the Treaty without need of an authorization. The only 'failure' recorded by the High Authority in respect of the Federal Government is, as the Court is aware, that which consists in the refusal to apply the decisions contested in the present application until such time as the Court has delivered judgment on that same application. That matter is dealt with in Case 3/59, which at the present time is still subject to deliberation.

*As regards Article 37,* the applicant declares in paragraph II of its reply that 'despite the point of view put forward by the High Authority, it is not at all certain that the contested decision does not represent, at the same time, a decision within the meaning of the third paragraph of Article 37 . . .' and 'that it is not impossible that the Court may share its point of view'.

It is possible that the Court may share such a point of view. I can only say that the Court's Advocate-General certainly does not. Article 37 applies to such a special legal situation that in my opinion there can be no question of combining the procedure for which it provides with an ordinary procedure under Article 33. A State which intends to make use of Article 37 must inform the High Authority of its request in such a manner that the latter cannot fail to understand the purpose of the request, for it must be in a position to consult the Council, as Article 37 itself requires, and to adopt its decision in the wholly exceptional context of the provision in question. Yet the Federal Government does not even claim that it addressed such a request to the High Authority, although it is claiming that the contested decisions should be considered as having dealt with such a request. At all events, it does not state which letter or document amongst the correspondence which it has exchanged with the High Authority should be regarded as having commenced the procedure under Article 37. We know, moreover, that subsequent to the lodging of the application, the applicant commenced that procedure.

As regards Applications 3 to 18/58, 25 and 26/58 submitted by the undertakings, the High Authority accepts the proposition that they are applications brought against decisions which should be regarded as individual and that those decisions concern the applicants. That opinion seems indeed to conform with your case-law. In so far as the applications contested certain provisions of the decisions at issue which did not concern them, the conclusions in those applications have been rectified and limited accordingly in the replies. Thus there is no dispute as regards the admissibility of the applications of the undertakings, and I do not think that there are any objections on that subject which the Court should raise of its own motion.

I come now to the question whether the High Authority had jurisdiction *ratione temporis* to adopt the contested decisions. The applicant *undertakings* formally raise the submission of *ultra vires* on the ground that the decisions were taken after the expiry of the transitional period. It is argued that they only became binding when they were notified to the Federal Government on 14 February 1958, whereas the transitional period expired on 9 February. Since the rates in question were in force when the Treaty was concluded, their abolition could only be ordered under the seventh paragraph of Article 10 of the Convention, and the power conferred on the High Authority by that provision could only be exercised during the transitional period. For its part, the Federal Government confines itself, in its application, to raising the question without formally making a submission as to *ultra vires.* That attitude is understandable when one learns that during previous negotiations that same government had expressed the view that the High Authority retained its power after the expiry of the transitional period. But even if the submission had not been expressly put forward in the other applications, the Court would have been obliged to examine it of its own motion.

This examination raises a whole series of questions.

First, the question to which I have just alluded: was the High Authority required to exercise its power under the seventh paragraph of Article 10 of the Convention before expiry of the transitional period?

I have no doubt that the question should be answered in the affirmative. For the High Authority had not only a right but a duty to eliminate all situations contrary to the rules established by the Treaty in existence at the moment when it entered into force, exercising the powers which the Treaty and the Convention conferred upon it for that purpose. That was what the transitional period

was for. One can even ask whether the said situations contrary to the Treaty ought not themselves to have disappeared at the expiry of the transitional period, in accordance with the provisions of the second subparagraph of Article 1 (5) of the Convention.

Does this mean, however, as the applicants, at least the undertakings, seem to think, that the High Authority had no legal means of action if it had not exercised its power under the seventh paragraph of Article 10 of the Convention before the expiry of the transitional period? Certainly not, in my opinion. It was in fact in the interest of the undertakings that the transitional period was established, so as to avoid the disturbance which could have arisen from too abrupt an integration. This is said in express terms in Article 1 (1) of the Convention. It says that the purpose of the Convention is 'to provide for the measures required in order to establish the common market and enable production to be progressively adapted to the new conditions, while helping to eliminate disequilibria arising out of the former conditions'. It would be fundamentally contrary to the Treaty to allow discriminatory situations contrary to the Treaty to continue permanently to exist during the forty-five years remaining to run after the expiry of the transitional period on the pretext that the High Authority, by omitting during that period to take the measures necessary to put an end to those situations progressively and without disturbance, has left them to subsist as such. That would create nothing less than a privilege and a source of permanent imbalance in favour of those who had the good fortune to escape from the measures of adaptation and to the detriment of those who were duly required to put an end to discriminatory situations which were to their advantage. In a word, that would be to abandon absolutely the establishment of the common market.

In my view, the legal situation is as follows: the High Authority can only take decisions on the basis of a power conferred on it by a provision of the Convention. There still remains a situation contrary to the Treaty; contrary, in the present case. *ex hypothesi,* to the first paragraph of Article 70. The possibility of agreement under the fourth paragraph of the same article should nevertheless be envisaged. In the case where a situation is judged both contrary to the first paragraph and not qualifying for agreement under the fourth paragraph, it is up to the State concerned to put an end to it pursuant to Article 86, if necessary on a recommendation from the High Authority. That is the procedure, be it noted, which the High Authority used in those of its decisions of 9 February 1958 which deal with the carriage of mineral fuels other than those destined for the iron and steel industry in which the fourth paragraph of Article 70 was not applicable.

In such a case, the interested parties would be deprived of the guarantee which the seventh paragraph of Article 10 of the Convention expressly gives them, and which requires the High Authority to allow such time as may be necessary in order to avoid any serious economic disturbance. It must be accepted, however, that such periods of time ought doubtless to be granted in accordance with the normal rules of impartiality, the basis for which can easily be found in the general principles which appear at the beginning of the Treaty, especially in the second paragraph of Article 2. Thus it may even be asked whether, by a different legal approach, the same result might be achieved, namely: 1. an obligation on the part of the High Authority to express itself on the basis of the first and fourth paragraphs of Article 70; 2. the necessity of allowing such time as may be reasonable to avoid any serious economic disturbance—which could have the result, if the Court were to find that the High Authority did indeed act in this manner in the present case, that the decisions need not be annulled on the sole ground that they were adopted out of time.

Nevertheless, whatever opinion one may have on this point, I think that the Court cannot avoid passing judgment on the question whether the time-limit was respected. For even if it is accepted, as I think it should, that the expiry of the time-limit does not release the High Authority from its duty to act, but on the contrary makes

action on its part the more necessary the greater the delay, it is certain that the High Authority commits a wrongful act in failing, throughout the transitional period, to take the measures necessary in order to put an end to situations which are *ex hypothesi* discriminatory and contrary to the Treaty in accordance with the requirements laid down in the Convention. Such a wrongful act might be considered as entailing its, or more exactly the Community's, liability.

Were the contested decisions taken before the expiry of the transitional period?

Let me go over the various dates to be borne in mind on this matter:

*9 February*: date on which the decisions were taken according to the statements appearing in the text of the decisions themselves such as they were notified and published.

*11 February*: date of the extract of the minutes of the 417th meeting of the High Authority held (according to the extract produced) at Luxembourg on 9 February 1958 at 8.30 p.m., and in which it is stated that the text of the letters appearing as an annex was adopted by the High Authority.

*12 February*: date when the letters were notified and published.

*14 February*: date when, according to the applicants, the letters reached their addressees.

*3 March*: date of the number of the *Journal Officiel* in which publication took place.

*First question*: Should a distinction be made, as regards the question whether the decision was taken within due time, between the date of the decision and the date when it was notified, or should one take the view that the decision is only 'perfect' when it is notified (an individual decision being involved; the same would be true of publication in the case of a general decision)? The parties have argued this point at length and reference has been made, in particular, to case-law both in France and in Germany. As regards the latter country, the references cited hardly appear decisive one way or the other. In France, however, there are decisions of the Conseil d'État which are perfectly clear and make a definitive distinction: notification or publication are not necessary in order to render an administrative measure perfect and are only relevant in respect of its application and of the question of limitation of actions. From this it follows that an administrative measure which may only legally be adopted within a certain period is regular even if notification or publication thereof only takes place after the expiry of the period in question.[1] From this it also follows—and this is an important consequence—that if the measure is of a legislative nature the author thereof may take individual decisions in application of it before it is published. But, of course, the latter can only become binding after the regulation has been published, and if they are enforced beforehand this can even render the measure itself void. On this point I would mention an interesting judgment concerning a member of the Comédie Française, Madame Merthe Bovy, 23 July 1943, *Recueil*, p. 203.

It would seem that it is hard to deny the principle that the conditions under which a measure is adopted are to be distinguished from those under which it becomes applicable. That distinction is very clearly made in Articles 14 and 15 of the Treaty. The real problem is whether that distinction is such as to give to those affected a sufficient guarantee regarding the date on which the conditions necessary for the adoption of the measure occurred. Confining myself to public law, it is certain that a system which attaches legal effects to the distinction can in some cases be criticized because administrative decisions are very often adopted in secret and it is almost impossible to undertake the necessary investigations. Moreover, there is something disagreeable about the suspicion that can arise in the mind of the person affected, and about the fact that

1 — See judgments: *Greuter*, 23 June 1928, *Recueil*, p. 791; *Albonico*, 23 December 1949, *Recueil*, p. 572.

in general he is unable to produce any *prima facie* evidence. But such is not the case where, as in the present case, the decisions emanate from a collegiate body acting by means of deliberations subject to precise rules as to form (quorum, majority, etc.), respect of which is evident from the minutes, and where, because of its very composition, that body is the best guarantee that those rules will be respected. I even think that the distinction is here a rule of good administration, for it is likely to discourage those tendencies which might occur with regard to matters of very small importance, whereby it would be considered enough to notify or publish decisions which had in fact been elaborated in offices, without having been duly included in the agenda of a meeting of the High Authority and entered in the minutes: these latter formalities, compliance with which can easily be verified, constitute the best guarantees for the persons concerned.

Thus I think that in fact the date to be taken into consideration is the date on which the decisions were adopted by the High Authority during a duly convened meeting, and not the date of notification.

*Second question*: What was the last day of the period during which the High Authority was empowered to adopt a decision? 'Five years after the establishment of the common market in coal', says paragraph 1 (4) of the Convention. Everyone is agreed that since the common market in coal was established on 10 February 1953, the last day of the transitional period was 9 February 1958. The Court will remember, however, that at the end of the oral procedure reference was made to the fact that 9 February 1958 was a Sunday and it was argued that the period was thus extended by a day in accordance with a rule which is generally accepted.

It is indeed possible to reason thus. But certain doubts on this point are equally possible. Can it be said that the prolongation of a period by reason of the fact that the last day falls on a Sunday is one of the 'general principles of law' which apply even without express provision? In national law, it does not seem so. In French law, there is a provision, Article 1033 of the Code of Civil Procedure, amended by a Decree Law of 31 August 1937, according to which periods which expire on *a Saturday or a public holiday* are extended until the 'first working day' which follows that Saturday or public holiday. Moreover, the provision only applies to *procedural time-limits* and it is doubtful whether it applies, in favour of the administration, in cases of periods laid down for the exercise of a power. I do not know what the situation is in the other countries of the Community.

But I do not think that it is necessary to take a position on this point, because I consider (and this is the third question) that in the light of the file and of the documents produced it must be taken as established that the contested decisions were adopted on 9 February 1958. First, the texts of the decisions themselves, as they were published in the *Journal Officiel*, says that they were adopted by the High Authority during its meeting on 9 February 1958. Furthermore, the certified extract of the 'minutes of the 417th meeting of the High Authority held at Luxembourg on 9 February 1958 at 8.30 p.m.', which I have already mentioned, shows in the clearest terms: 1. that the High Authority did indeed hold a meeting on 9 February 1958; 2. that there was a quorum (8 members were present); 3. that the question of the special rates and conditions for carriage by rail was on the agenda (it was indeed the only item); 4. that what was involved was the adoption of 'the formal decision' on that question on the basis of various drafts already discussed (which explains why the meeting was not very long despite the importance of the subject); 5. that the High Authority, after examining the various drafts, 'successively adopted, with some amendments, the texts' of the various letters. Finally, it appears from the documents produced at the request of the Court that it was indeed the letters annexed to the minutes of the meeting which were adopted during that meeting and which were, in the very wording thus adopted, notified to the governments concerned and the published in the *Journal Officiel*. The fact that the original of those letters was

only joined to the minutes on 11 February, the date when the minutes were drawn up, is only natural: minutes cannot always be drawn up and signed on the very day.

As for the insinuation that the meeting continued for a while after midnight, let me say frankly that I do not consider it worthy of attention. Without even going into certain traditions which obtain in certain countries, where the practice in cases of this kind is to 'stop the clock', I can only accept at face value the minutes which state that the 417th meeting of the High Authority took place on 9 February 1958 and not on 10 February.

To sum up, I think that the contested decisions were taken before the expiry of the transitional period, and it is for this reason that I would advise the Court to reject the submission raised by the applicants that the High authority was acting *ultra vires* because it was out of time.

## II — Interpretation of the provisions

### 1. General considerations

Let me now proceed to an analysis of the relevant provisions. In the present case they are to be found in the Treaty and in the Convention, in Article 70 of the former and Article 10 of the latter. I shall make that analysis in comparison with the general provisions of Title I, and more particularly of Article 4.

Article 4 of the Treaty solemnly declares:

'The following are recognized as incompatible with the common market for coal and steel and shall accordingly be abolished and prohibited within the Community, as provided in this Treaty:

. . . . . .

(b) measures or practices which discriminate between producers, between purchasers or between consumers, especially *in prices and delivery terms or transport and conditions*, etc.;

(c) *subsidies or aids* granted by States, or special charges imposed by States, in any form whatsoever; . . .'

The Court of Justice of the ECSC has held, in its judgment in Joined Cases 7 and 9/54 (Rec. II, p. 91), that 'the provisions of Article 4 are sufficient of themselves and are directly applicable when they are not restated in any part of the Treaty. Where, however, the provisions of Article 4 are referred to, restated or elaborated on in other parts of the Treaty, the texts relating to one and the same provision must be considered as a whole and applied simultaneously'.

Such was the Case for the rules of nondiscrimination concerning prices, as was accepted by the Court in Case 1/54 (Rec. I, p. 23), and such is also the case concerning transport rates and conditions which, as the Court has noted, are covered as well as prices in Article 4 (b). In comparison with the prohibitive rule in Article 4, Article 70 clearly fulfils a function in relation to transport rates which is analogous to that of Article 60 in relation to prices. That is easy to understand if one thinks of the importance of transport costs as a factor in the fixing of the price paid by the purchaser of ECSC products. Even the way in which each of the 'implementing' provisions (Article 60 and Article 70) is drafted strikingly shows the analogy of the two situations by the analogy of the two definitions of what constitutes discrimination: 'discriminatory practices' as regards prices are those 'involving, within the common market, the application by a seller of dissimilar conditions to comparable transactions, especially on grounds of the nationality of the buyer' (Article 60), whereas Article 70 provides that 'It is recognized that the establishment of the Common Market necessitates the application of such rates and conditions for the carriage of coal and steel as will afford comparable price conditions to comparably placed consumers', and that 'Any discrimination in rates and conditions of carriage of every kind which is based on the country of origin or destination of products shall be prohibited in traffic between Member States'. Thus in both cases we have a definition of discrimination based on the criterion of compar-

ability and emphasis is laid on national discrimination by the use of the word 'especially'.

A first conclusion from the simultaneous reading of the these provisions can already be drawn. It is that the first paragraph of Article 70 contains a rule of law which of itself produces legal effects. It is not, as has been argued, a mere 'disturbance clause' which is dependent on Article 67 for its application. For how can it be imagined that the authors of the Treaty expressly included discrimination as regards transport rates and conditions amongst the prohibitions of Article 4 without intending to consider them as being *of themselves* contrary to the Treaty and to exclude them directly? The first paragraph of Article 70 cannot have a more restricted scope than Article 4 and it is to the prohibition laid down by that article that it quite clearly refers, and not to Article 67. The latter provision only applies to distortions or disturbances affecting the functioning of the common market which may be caused by what is called 'an action by a State' in areas which have remained under national control and for which the Treaty does not lay down any particular rule and does not give to the Community any power of its own, for example in fiscal matters. In the field of transport rates, however, Article 67 was judged insufficient. Separate rules exist and there is a transfer of power: those rules must be applied and those powers exercised.

It is true, nevertheless, that the transfer is only partial and limited, even as regards the rates applicable to the carriage of Community products. Power is shared with the Member States, and in fact the High Authority only has a small number of powers of its own, such as that conferred by the fourth paragraph of Article 70. In the majority of cases, the High Authority occupies above all the role of 'motive force' and coordinator and the decision remains with the governments. But the *substantive rules* laid down by the provisions of the Treaty and the Convention on the subject are, even so, binding and directly applicable, and Articles 86 and 88 serve as a legal support in ensuring that application.

Thus, having noted the analogies with the rules on non-discrimination in relation to prices, the differences start to become apparent. The latter are to be explained firstly, of course, by the facts that the integration brought about by the ECSC is only partial, and that there is no Community transport system. They are also to be explained by the nature of the subject-matter. As regards prices, it was sufficient to establish and, in so far as possible, to define the contents of the rule against discrimination and to introduce a general means of control, the rules regarding publicity. This is what was done in Article 60 and in the regulations adopted by the High Authority in order to implement it. The problem is then only one of controlling the undertakings which are required to observe the requirements laid down in order to ensure that the rule is respected. It was possible to establish the system and to bring it into operation upon the commencement of the common market without any transitional measure.

The position is quite different as regards transport rates and conditions. The complete elimination of all discrimination as regards rates and conditions. even limited to the carriage of Community products, is a difficult task, because of the fact that the transport systems and the economies of the various Member States have not been merged, and nor has their economic policy. The purely *economic* conditions governing the 'price' of transport services vary from one country to another in relation to general economic conditions (salaries etc.) and also in relation to conditions proper to transport itself (cost of equipment, density of the traffic, existence of competing means transport, etc.). Furthermore, the *policy* followed as regards transport is very different from one State to another. Thus, for example, the Netherlands are traditionally attached to the commercial concept of transport, whereas Germany has an equally strong tradition of a tariff policy exercized in the interests of general economic policy. In France, where the concept of 'public service' has always predominated, a constant effort has been made for many years to take account to the utmost possible extent of economic and technical operating conditions.

Thus, contrary to the subject of prices, the problem which the Treaty had to resolve concerning transport rates was essentially a problem *of transition*, consisting in laying down *how* the conditions for establishing the common market were to be brought about in this field. This explains the fact that when the Treaty was being drafted, there was for a long time just one text, intended to appear in the Convention on the Transitional Provisions. The purpose of it was to fix the *programme* of measures to be taken successively in order to achieve the objectives of the Treaty. Later the text was 'split'. It was thought necessary to do this to introduce the statement of the rules of substantive law relating to non-discrimination into the Treaty. Thus the fact that the problem was one of transition also explains why traces of a draft of the 'programme' type subsist in Article 70. The dynamic of such a type should normally remain the preserve of transitional provisions. Examples are expressions such as 'the establishment of the common market' in the first paragraph, or 'for the purpose of eliminating such discrimination' in the second.

But these few imperfections of style cannot mislead the jurist. The provisions of substance laid down in Article 70 and rightly incorporated into the Treaty are permanent rules, strict observance of which is required as the stages fixed in the Convention are achieved, and which, moreover, *as regards their content, are directed to the very objectives of that achievement.* When all the stages have been achieved, that is to say when the programme outlined in Article 10 of the Convention has been completely fulfilled, the provisions of Article 70 will alone remain in force and the role of the High Authority will, as on any other matter, consist only in making sure that the discrimination arises.

We have, therefore, on the one hand, the *rules of substance,* the rules of law, which are set out in Article 70 and, on the other hand, the programme, which is fixed in Article 10. There exists a parallelism between these two provisions, which is not *prima facie* evident, but which can nevertheless discern fairly well with a little effort.

First, there is the general definition of the principle of non-discrimination in the first paragraph of Article 70. The meaning of it is, as we have seen, that for the future discriminatory measures contrary to that provision are prohibited: it was not considered necessary to restate the prohibition afresh, since it already appears in Article 4 (b). The 'parallel provision' intended to bring about the abolition of existing discrimination as to rates is mainly to be found in subparagraph (3) of the second paragraph of Article 10 concerning 'harmonization', which is the fundamental problem in this field, and which has not yet been resolved at the present time. However, it was considered possible to adopt a first measure in the field of harmonization and necessary to bring it into force without waiting for complete harmonization. It consists in establishing direct international tariffs incorporating a degressive factor taking account of total distance. This is subparagraph (2) of the second paragraph of Article 10. Here, the obligations have been fulfilled, the experts and the governments having been able, thanks to the remarkable spirit of cooperation which existed in the early days, to put those direct international tariffs into effect in record time.

But, besides the general problem of harmonization, two special cases of discrimination were dealt with in special provisions:

1. *At international level,* the case of discrimination in rates based on the country of origin or destination of the products: here the rule of substance is to be found in the second paragraph of Article 70 and the 'parallel' provision in subparagraph (1) of the second paragraph of Article 10.

2. *At national level,* the case of 'special internal rates and conditions in the interest of one or more coal- or steel-producing undertakings'. It is not stated here that such measures are necessarily discriminatory, but that they 'shall require the prior agreement of the High Authority, which shall verify that they are in accordance with the principles of this Treaty'. It is added that the High Authority 'may make its agreement temporary or conditional'. Thus certain dis-

tinctions are to be made (we shall attempt to discover them). The 'parallel provision' is to be found in the seventh paragraph of Article 10, which is concerned with the abolition of such 'special internal rates and conditions' as shall be found to be contrary to the principles of the Treaty, save that the High Authority 'shall allow such time for their modification as may be necessary to avoid any serious economic disturbance'.

Thus, in order to achieve, in the field of transport rates, the conditions for establishing the common market, that is to say the effective application of the rule set out in Article 4 and stated more particularly in the first paragraph of Article 70, the authors of the Treaty intended to proceed by stages, beginning by the measures which appeared to be the most urgent and also the most easily introduced. The analysis which I have just made shows clearly that although harmonization was considered necessary in order to arrive completely at the result sought, it was equally considered that certain partial reforms had to precede that harmonization and had to be carried out independently of it.

The autonomy of the rules relating to those partial measures results not only from the 'parallelism' which I have just observed in each case between Article 70 and Article 10, but also from the fact that special and different *periods* were set for the achieving of the various measures. Thus the abolition of discrimination contrary to the second paragraph of Article 70 (discrimination in rates based on the country of origin or destination of products) had to be achieved by the date set for the establishment of the common market in coal, that is to say 10 February 1953. Direct international tariffs which, however, already constituted a measure of harmonization, had to be brought into force by the High Authority after two and a half years even if the governments were not yet agreed in relation to harmonization as a whole. The period for the alteration of the special internal rates and conditions with which we are concerned was, as we have seen, the length of the transitional period itself. However, as for the measures of harmonization, no time-limit was laid down and the provision is drafted in such a manner that it does not impose on the governments any legal obligation to bring those measures into effect prior to the end of the transitional period. Quite clearly, such caution was based on the anticipation of the difficulty of the task.

In my opinion, this finding is essential. For it follows therefrom that until such time as the harmonization, so much desired and so long in coming, is achieved, the application of the special provisions of the fourth paragraph of Article 70 must be envisaged in relation to the *system of rates in force in each State,* in its present form. Similarly, it was in the context of the continued existence of the various national systems that it was possible to abolish discrimination in respect of the international traffic covered by the second paragraph of Article 70, and to establish direct international tariffs. Any other view would arbitrarily anticipate the results of studies intended to lead to harmonization, and would illegally encroach upon the domain left within the jurisdiction of the states by the fifth paragraph of Article 70.

2. Interpretation of the fourth paragraph of Article 70

What then, in the light of the foregoing, is the meaning of the fourth paragraph of Article 70, the correct interpretation of which remains at the centre of the dispute? The question is twofold:

(a) What is meant by '*special internal rates and conditions in the interest of one or more coal- or steel-producing undertakings*'?

(b) What is to be understood by '*in accordance with the principles of this Treaty*', a requirement which the said rates and conditions must satisfy if they are to be authorized?

The answer to the *first question* can only be found, in my opinion, in the field of transport, in the language which is proper to it, and, in particular, in terms of carriage by rail, for it is rail transport which is primarily affected by the provision at issue.

It is not necessary to be a transport expert to know that in the countries of the Community and at all events in Germany and in France (the only two countries in respect of which the High Authority took action) a distinction is normally made between 'general rates' and 'special rates'. 'General rates', however, at least as regards goods, do not only include those which apply to every form of transport, calculated per ton or *ad valorem*. First, there can be certain differentiations depending on the *technical conditions* of carriage: transport of an isolated object or by complete wagon or, as in France, by complete train. Other differences can be founded on the *nature of the products transported* (for example, in France, transport of coke and of coal, for which the rates calculated per ton differ by reason of the difference in volume of those two products). Finally, wider differences can be founded on *the origin or the destination of the product:* these are special rates, for example in Germany the Ausnahmetarife or AT for certain movements of mineral fuels or ores, which represent reductions as compared with the general rate applicable to those products. But those rates, although called 'special', can be applied very widely, as for example rate AT 6 B 1, which in principle covers the transport of fuels from the place where the coal is extracted: this latter rate is, in reality, in the nature of an internal rate having general application and it was as such that it was used as the basis for the rate ECSC – 102 rate which is, for the German sector, the direct international tariff established in application of Article 10 of the Convention. At this point, I have not yet arrived at the 'special internal rates and conditions' mentioned in the fourth paragraph of Article 70, which are 'in the interest of one or more coal- or steel-producing undertakings'.

The question does arise, however, in relation to rates AT 6 B 30 to 33 and the special rates applicable to the transport of ores, which were examined by the High Authority when the contested decisions were taken. In fact, each of these rates is confined to movements carried out either from certain mining areas to certain stations (for coal), or from certain stations or certain ports to certain stations (for ores). Here, therefore, *particular places* are involved, such that the rates in question clearly appear to *offer an advantage* to particular undertakings, which escape from the normal rate simply by reason of their location. but it does not necessarily follow from this that these rates (which are undeniably to be classified as special rates) have been established or maintained *in the interest* of undertakings which derive an advantage from them. There arises here the classic distinction between 'competitive rates' and 'protective rates'. When the 'special' nature of the rate, that is to say the reduction which it offers compared with the basic rate, is based on the real or potential existence of another means of transport, that reduction is not in the interest of the undertaking, but in the interest of the carrier who might otherwise lose traffic. From the point of view of the undertaking, it merely profits from a more favourable location, which it may even have chosen knowing this to be the case. Of course, certain conditions are necessary in order that such a rate will not be considered as discriminatory: the duly established real or potential existence of competition from another means of transport; an accurate adaptation of the rate to that of the competitor; a check that the competitor's rate is also correctly established; finally, a verification that the competitor's rate does not fall below the limit beneath which, taking into account operating conditions, it would take on the character of a subsidy. However, as to the principle, there can be no difficulty to my mind: a competitive rate, duly justified and correctly established, is not subject to the agreement of the High Authority under the fourth paragraph of Article 70. The parties, moreover, are in agreement on this point.

Does it result from the foregoing that *any other rate* which is really a special rate, that is to say applicable to particular places in such a manner that it constitutes a geographical exception to the normal rate, falls within the fourth paragraph of Article 70? I do not think so, at least not if one looks at the matter, as I think one should, from the point of view of transport.

For it is possible to envisage the case where

the abolition of the special rate would only bring about a *deflection of trade,* without necessarily jeopardizing the operation of the undertaking. The latter would simply adapt itself to other sources of supply or other outlets. This case is fairly similar to that of competitive rates. It is for the carrier to balance the respective advantages and disadvantages of the two solutions, that is to say to compare the effects of suffering loss of trade on one side with the effects of the increase to be expected on the other. He may also have to take into account the effect of the increase in traffic according to relationships involving the application of the normal rate. All sorts of elements thus come into play: first, will the consequences of the loss of traffic mean operating the line under much less favourable conditions (which is a disadvantage) or even closing it (which, on the contrary, is an advantage)? Will the new flow of trade be accompanied by profitable 'return freight', or on the contrary will return freight disappear? If, upon weighing everything up, it appears that the maintenance of the special rate is advantageous to the carrier, it cannot then be said that it is 'in the interest of the undertaking': it does not come within the fourth paragraph of Article 70.

Of course, in this case, as in the case of competition with another means of transport, the special rate must never fall below the limit beneath which the operation of the line involves a loss, for it would then take on the character of a subsidy.

In reality it seems to me that the scope of the fourth paragraph of Article 70 should be limited to the case where the real purpose of the 'special' rate is to favour the operating conditions of the undertaking or undertakings satisfying the requirements thereof as regards their geographical location. This does not mean, of course, that the person setting the rate (carrier or public authority) acts in the *private* interest of the undertaking. Usually he acts either for the furtherance of a public, social or economic interest (regional policy, industrial decentralization, etc.), or in the interest of the carrier himself (necessity to maintain traffic), and moreover the two kinds of interests can overlap. But whatever may be the *purpose,* the means consist of *assistance* granted to the undertakings concerned in the form of the special rate. Such is the case with the group of rates AT 6 B 30 to 33 and with the special rates for ores in so far as they do not have the character of correctly calculated competitive rates and, on the other hand, in so far as they are not justified by the fear of a 'deflection of trade' giving rise to the effects which I analysed a moment ago. To that extent, maintenance of such rates is subject to the agreement of the High Authority under the fourth paragraph of Article 70.

*Second question:* What is the meaning of the expression 'which shall verify that they are in accordance with the principles of this Treaty'? What principles? What are the powers of the High Authority in this regard?

The Court is aware of the defendant's argument on this point: protective rates are *of themselves* discriminatory, and are therefore contrary to the provisions of the first paragraph of Article 70. Accordingly they should, in principle, be abolished. Nevertheless, by means of a power of a discretionary nature which, during the oral procedure, was compared with the 'dispensations' of canon law, the High Authority may, it is asserted, grant derogations from the rule of prohibition when it considers them 'necessary' for the furtherance of the objectives of the Treaty.

I cannot agree with such a theory, which, I would add, is not expressed in the contested decisions (which, be it noted, do not express any theory).

The principles of non-discrimination, established as a rule in Article 4 and more particularly defined in the first paragraph of Article 70, cannot admit of any exception or give rise to derogations. On the contrary, it is one of those principles, with the prohibition on subsidies which is also set out in Article 4, adherence to which must be verified by the High Authority when it is called upon to give its agreement under the fourth paragraph of Article 70. But then, it will be said, what is the need for such agreement?

Simply because the case involved—that of special rates and conditions in the interest of one or several undertakings—is one where there exists a certain *presumption* of aid or of discrimination distorting competition within the common market: for this reason prior action by the High Authority is mandatory, being the guardian of the application of the principles of the Treaty.

Such an interpretation obviously presupposes that 'protective rates' need not necessarily be contrary to the principles of the Treaty. It is now necessary to examine whether and to what extent this affirmation is correct.

On this point, everything depends on the correct concept, as regards transport rates, of the rule of non-discrimination.

I think that the rule must be looked at *in the context of the national transport system in operation in the country under consideration.* We have seen that such was the only reasonable interpretation where, as here, what was involved was the implementation, during the transitional period, of the part of the 'plan' established by Article 10 for the abolition or modification of special internal rates *before* harmonization between the various systems of rates could be achieved. It is certain that for the authors of the Treaty the application to the carriage of coal and of steel, in each country, of a rate having general scope or, at the very least, of a rate providing for differences only in respect of the nature and conditions *of carriage,* is considered *a priori* as non-discriminatory. Conversely, so-called 'protective rates', which constitute exceptions to the normal rate, are regarded *for this reason alone* if not as necessarily discriminatory, at least as 'suspect' in relation to the rule: a close look at them is then necessary. It may be that this conception is not economically perfect, but it is relatively simple and corresponds fairly well to the general approach which is to be found in the Treaty as a whole.

In fact, one of the fundamental principles which in the minds of the authors of the Treaty govern the common market is based on the concept of equality before 'natural' conditions, and in particular on respect for what is called geographical protection. Here we meet an error, and a fundamental one I think, on the part of most of the applicants. Their reasoning presupposes that transport rates could —if not must—take the location of the undertakings into account *as a given fact* and be adjusted accordingly. This proposition was defended in a particularly brilliant way by Professor Mestmaecker on behalf of the Land of Hesse. But in my opinion it is the contrary which is true: *it is the transport which is a given fact* to which the undertakings must adapt themselves, and it is the transport itself which must be conceived in such a way that it is not discriminatory: the abolition of discrimination may involve structural alterations and the relocation of production, and all precautions must of course be taken to cushion the effects of such moves which would otherwise be too disruptive. Such is the condition judged necessary by the Treaty in order to 'progressively bring about conditions which will of themselves ensure the most rational distribution of production at the highest possible level of productivity', to use the wording of Article 2, meaning a real common market in the basic products existing on the European scale.

Attempts have been made to draw arguments to the contrary from the provisions concerning prices. Those arguments do not seem to me to be at all relevant. In fact, the principles concerning prices are the very ones which I have just noted: in particular, the 'transport' element is considered as a given fact, natural advantages resulting from geographical protection being regarded as a fundamental element of competition which must not be distorted.

What is true is that this principle suffers certain *extenuations,* such as the choice of parity points and the right of alignment (Article 60), or again the possible fixing of 'zonal prices' (Article 62). But these extenuations have their limits and their very existence merely tends to confirm the rule. I shall soon be considering whether the provisions of the fourth paragraph of Article 70 themselves constitute something of an ex-

tenuation, but for the moment I reach the following findings:

1. The concept of discrimination must be assessed in relation to the tariff system itself, and not with regard to the conditions in which the undertakings are placed as the result of their location.

2. For the purposes of applying the seventh paragraph of Article 10, and given that the harmonization of rates as between the Member States has yet to be achieved, the tariff system in its present form creates a presumption that protective rates are discriminatory.

In these circumstances, all references to the American system arising under the Interstate Commerce Act and the case-law of the Interstate Commerce Commission must be rejected. For what is involved in that case is the application of a comprehensive set of legal rules on transport, elaborated by a Federal State in full exercise of its sovereignty. Europe, even of the Six, has not yet reached that stage! Furthermore, the principles of the organization of transport in the United States are very different from those of the countries of Continental Europe and in particular of Germany. In the United states, the guiding principle is freedom of organization of transport, based on competition between the various means of transport and even, in appropriate cases, between undertakings operating the same means of transport. The purpose of the legislation is to ensure that the normal effects of competition are not distorted. In short, it is the application to transport of what may be called the American philosophy concerning freedom of trade and competition, which, it should also be said, has strongly influenced a number of sections of the ECSC Treaty.

Thus we read the following in Annex D to the report of Mr Kapteyn on the coordination of European transport, an annex to which I have already referred, and which consists of an analysis of the Interstate Commerce Act and of its application (p. 82):

'The purpose of the legislation on transport is to ensure freedom to develop and operate every means of transport by encouraging private enterprise and, to this end, to cause the public authorities to lay down the rules which have become necessary to create conditions such that each carrier pursues his activity in the public interest and, in so doing, receives. a remuneration which is fair and in proportion to his services. The essential point is the personal responsibility of transport undertakings as regards the rates and conditions which it is their duty to fix.'

It is thus by supervising the activity of the carriers, who are free as regards their organization and their prices, that the public interest must be arrived at, and not by the direct intervention of a State which lays down rates and conditions itself. The contradiction between the two systems is striking. One can even say that the proposition which I am defending here, according to which it is *from the point of view of transport* that one must look at the matter, tends more towards the American conception than does the applicant's proposition, and that the abolition, at national level, of special rates considered as discriminatory as regards transport constitutes a first step towards a harmonization of tariff systems at Community level on sound economic principles.

If it is thus accepted that conformity 'with the principles of this Treaty' and, in particular, with the principle of non-discrimination (the legal condition which, under the fourth paragraph of Article 70, requires the agreement of the High Authority where protective rates are involved) must be looked at from the point of view of transport, it will become easier to seek out the cases in which protective rates may be regarded as admitting of agreement.

We have already seen the conditions in which competitive rates are legal. It seems to me that the same perspective must be used in considering protective rates, that is to say fundamentally one must consider *the interest of the carrier* in maintaining the rate, an interest which must thus coincide with the interest of the undertaking. That im-

plies an examination of whether, in each case, the 'protection' which *ex hypothesi* is being granted to one or more given undertakings by way of a special tariff advantage is necessary for the maintenance of traffic in such circumstamces that the tariff advantage is not in the nature of a subsidy.

In this regard, the first requisite, naturally enough, is that by reason of their operating conditions, such undertakings should not be viable if the normal rate is applied, in other words the undertakings must have a real *need* of the reduced rate in order to remain competitive. That is the first condition to be fulfilled in considering whether to grant a protective rate, for without it the grant of the reduction would constitute discrimination to the detriment of the other users. This finding is again based, of course, on the idea that the 'normal' rate is the basic rate, which one must suppose to have been correctly calculated and sufficiently differentiated from the point of view of an economically sound operation of the means of transport in question. Perhaps this is not so in the present case, but the High Authority is not competent to judge that and, as I have already said, for the moment all it can do is to take note of the existing tariff system.

Supposing it be established that the undertaking really needs the special rate, one must still inquire into the reasons which may legally justify maintaining traffic by means of the protective rate.

The reasons put forward in the present disputes are based in all material respects, as the court is aware, on considerations of *economic regionalism* which have been put to the Court in generous measure. These considerations are of two kinds: those of the first kind are founded on permanent factors relating to the regional economy: the latter, it is said, requires the retention of industries as presently located, which is only possible with the help of a number of measures, of which protective rates are amongst the most essential. The other considerations relate to present political circumstances, namely, the economic effects of the creation of the zones on the operating conditions of undertakings situated near the border.

As regards the latter considerations, there can, to my mind, be no hesitation and furthermore the parties are in agreement. It is certain that the effects of the partition on the operating conditions of the undertakings (loss of their natural sources of raw materials or of their normal outlets) admit of the possible grant of protective rates. Not only do social considerations, of which the High Authority must take note, as well as human and even national considerations, which it cannot ignore, legitimately come into play here, but from the economic point of view of the interest of the carrier (to which I always return) the exceptional and supposedly temporary nature of the circumstances in question justifies the necessary sacrifices in rates in order to maintain traffic.

The first case, namely regionalism properly so-called, is a much more delicate problem. If it had to be taken fully into consideration, the Court would be led to express itself on economic problems which are amongst the most delicate and the most discussed by the experts.

Over a long period, economists tended to consider regionalism, which gives rise to more or less artificial measures of intervention, as being in *opposition* to the laws of economics and counteracting the beneficial results to be expected from the free exercise of those laws. The most that was accepted was that the State should intervene in order to *cushion* the otherwise over-harsh effects of this natural play of forces in relation to threatened regions and to temper necessary changes, particularly for social reasons.

At present, however, many economists no longer share this point of view and claim to demonstrate that there exists a regionalism which is *economically sound,* and that the creation or development of it can legitimately be encouraged by the public authorities. They thus purport to resolve the problem of the so-called 'underdeveloped' regions by means which are favourable to the country as a whole as well as to the region

in question.[1] But, of course, certain conditions must be fulfilled. In particular, there must exist in the region under consideration, if only potentially, sufficient resources and outlets to promote rational economic development: for example, sources of energy as yet not fully exploited, around which it is possible to envisage the development of consumer industries, with the aid of communications which are adequate or can be supplemented relatively easily, coupled with a sufficient supply of labour, etc. In this case, the main purpose of the assistance granted to the region is to *help it make a start,* by encouraging, for example, investment in basic industries around which new activities will arise or to which former activities will be adapted: hydro-electric power, oil refineries near a port, etc. It is above all necessary to avoid what has been called 'pointillism', that is to say the spreading of aid in an arbitrarily egalitarian manner which, by attempting to satisfy everybody, only results finally in a waste of resources. In other words, it must be accepted that, *within the context of the region also,* the laws of economics have a role to play, bringing about the necessary mergers and relocations of production. Moreover, the whole operation must be conceived as having a *temporary* character, the assistance being destined to disappear when the region has attained the natural conditions for normal economic development.

Such at least, if I have correctly understood it, is the modern economic theory on regionalism, expressed in lay parlance.

Another consideration could and no doubt even should be envisaged. It is indeed related to the first, being that of *industrial decentralization* which is one of the great problems of our Western countries. Here again, the economists have their ideas, and in particular the idea that even from the purely economic point of view there are limits to the advantages of geographical concentration, the reasoning being that there exists a certain point of *saturation* beyond which it is no longer in the interest of undertakings to establish themselves in the immediate proximity of large centres of production.

If it were necessary to pass judgment on the question whether the measures for regional protection applied by the Federal Government and the Länder are indeed orthodox in terms of the foregoing, serious doubts would be understandable. Thus in the letter from the Federal Minister for Economic Affairs of 28 February 1957 (abovementioned document, p. 20) we find the following passage: 'By reason of its unfavourable geographical situation, *the region of Sieg-Lahn-Dill is relatively unsuited to economic exploitation'.* Again, in the minutes of the meeting held at Luxembourg on 11 and 12 March 1957 (*loc. cit.,* p. 7) we read, again concerning protective rates for the Sieg-Lahn-Dill region: 'In answer to a question put by the representatives of the High Authority as to the purpose for which the various protective measures were introduced, whether they were exceptional measures of adaptation introduced as part of a general government plan for the development of that region, or whether they were *measures of a permanent nature,* the German representatives stated that the said region is not an underdeveloped region properly so-called, but that by reason of its particular economic structure it is subject to frequent economic crises. Therefore the Federal Government is at pains *to protect it against those crises by means of measures directed to that purpose.'*

However, I do not think that the High Authority should enter into these diverse considerations. In doing so it would encroach upon the jurisdiction of the Member States, which remain masters of their general (and regional) economic policy, and also of their transport policy, in so far as the needs of the harmonization of tariffs do not require otherwise. It is in any case impossible to accept the proposition that the High Author-

1 – See for example: 'Les conditions d'une politique de développement régional dans les pays du marché commun' by Joseph Lajugie, *Revue d'économie politique,* May-June 1959.

ity can undertake to judge questions of such importance upon the occasion of the exercise of a mere power of authorization, such as that conferred on it by the fourth paragraph of Article 70 in relation to special rates. At the most it is in the context of harmonization that problems of this nature may be examined, but in the meantime, as I have already said several times, it is in relation to the present situation in the field of transport—and *a fortiori* in the field of general economic policy—that the fourth paragraph of Article 70 must be applied.

This precludes all reference, even by way of analogy, to the provisions of the Treaty establishing the European Economic Community. Such a comparison, it is true, is not prohibited by Article 232 of that Treaty. On the contrary, a comparison is, in my opinion, desirable whenever the different rules of the two Treaties do not prevent it. But precisely in the present case the two Treaties do prevent it, essentially because of the difference in their objectives. the first constitutes only a partial integration, whereas the second constitutes integration which is much less thoroughgoing but is much wider and is largely based on the progressive elaboration of a common economic policy, including policy on transport. It is precisely these factors which do not exist in relation to the application of the fourth paragraph of Article 70. It should also be noted that according to Article 80 of the EEC Treaty, the prohibition on protective rates, except where authorized by the Commission, only applies as from the beginning of the second stage, that is to say at the earliest from the fourth year following the entry into force of the Treaty.

I think therefore that in applying the fourth paragraph of Article 70 the High Authority cannot undertake to judge whether the regional policy concerned is economically sound. However, it must not leave this policy out of account: *it must consider it as a factor, such as it is.* The assessment which it must then make is as follows: does the maintenance of the special rate, which is necessary *ex hypothesi* to prevent the closure of the undertaking or its redevelopment and the consequent loss of traffic, render it possible to foresee that the undertaking will be in a position to pay the normal rate within a reasonable time, on the basis of the factors on which the development of the economic activity of the region can be seen to depend, *amongst which factors may feature the effect to be expected from other measures of assistance, even those which are open to question but deemed to be permanent,* granted to the region? Thus the High Authority has remained within the field of its jurisdiction by confining itself to an examination of the question from the point of view of transport. Furthermore, from this point of view, *no discrimination or prohibited subsidy is involved.*

*There is no discrimination* as regards transport in relation to other undertakings in the common market because in the nature of the case the special rate is justified from the point of view of transport, and one can always imagine another undertaking placed in exactly the same circumstances from this point of view as the undertaking in question, to which, of course, the same rate should be granted for the same reasons. All that is involved is a *reduction in scope* of the rule of non-discrimination, which occurs every time that a measure of intervention is adopted: the Court of the ECSC conclusively so found in the ferrous scrap cases relating to Decision No 2/57.

*Nor is there a prohibited subsidy,* because the sacrifice made by the carrier is temporary, and the purpose of it is to avoid the loss of traffic considered *ex hypothesi* to be important for the carrier's business. The situation seems to me to be somewhat analogous to that of an industrialist or trader who agrees to sell below cost price for a certain time in order to keep an important customer who is temporarily in difficulties.

Thus, the 'principles' of the Treaty with which the 'special internal rates and conditions' must be 'in accordance', to take the very words used by the fourth paragraph of Article 70, are respected. We thus arrive at an interpretation which I would not be so bold as to consider as beyond all criticism—far from it—but which at least has the advantage, in my opinion, of giving

some meaning to the fourth paragraph of Article 70 and of inserting it in a context which apparently accords with the general scheme of the Treaty. In particular, this interpretation accepts the fourth paragraph of Article 70 as an *extenuating* measure in the special field of transport parallel to those laid down in other areas such as prices, and not as a *derogation,* which would be contrary to the very text of the provision in question.

This system, as the Court will understand, has the effect of emphasizing the similarity between the provisions of the fourth paragraph of Article 70 and those of the seventh paragraph of Article 10, in that both are dominated by the *temporary* character of the measures which they permit: after the end of the transitional period the time-limit which, under the fourth paragraph of Article 70, the High Authority *may* place upon its agreement to the establishment of a protective rate will not perhaps be longer—it may be shorter—than the period which it has to set for the abolition of existing rates in application of Article 10. But the essential difference is to be found in the reasons which justify the measure. In the case of the fourth paragraph of Article 70, the provisional existence of the rate is *in accordance with the principles of the common market* and is considered necessary for its correct functioning; in the case of the seventh paragraph of Article 10, on the contrary, these same principles require the *abolition* of the rate, and the delay in that case is justified mainly by social considerations. This is why in the first case the setting of a time-limit is optional whereas it is compulsory in the second, and measures to assist readaptation must be adopted in case of need.

As regards this last point, it is true, and this argument has not been overlooked, that the provisions of Article 23 are today about to cease to apply. This, however, is a problem brought about by the delay in applying the seventh paragraph of Article 10. Responsibility for this lies both with the High Authority, which waited until the last day of the transitional period to adopt its decisions, and the Federal Government which, in failing to implement them, has not yet permitted the programme of abolition for which those decisions make provision to be put into effect, and, therefore, has not yet given the undertakings which might become the victims of the operation the possibility of claiming the advantage of Article 23 in due time. However that may be, I do not see how, from the legal point of view, such a situation can create, in favour of the applicants, *a right* to the maintenance of the special rates.

## III — Application to the present case

I now come to the question whether, in the light of the interpretation which I am suggesting to you, the contested decisions are legal. I shall examine it very briefly, examining successively: 1. The rates dealt with in the 'coal' decision, excepting paragraph B relating to special rate 6 B 31, and paragraph C, 2, relating to rate 6 B 33 and to the scale of dues for navigation on the Mittellandkanal; 2. The rates dealt with in the 'ores' decision; 3. The special case of rate 6 B 31; 4. The special case of rate 6 B 33 and the dues for navigation on the Mittellandkanal.

1. *'Coal' rates.* We are here concerned with special rate 6 B 30 (No I in the scale of rates) dealt with in paragraph A of the 'coal' decision. This rate is applicable to the transport of mineral fuels *from* departure stations in the Rhine coalfield and the brown-coalfield of West Germany, the coalfield of Aix-la-Chapelle and the Ruhr coalfield *towards* certain stations in the Sieg-Lahn-Dill region.

(a) It has been argued that this is potentially a competitive rate in relation to two undertakings at Wetzlar in view of the possible continuation of the canalization of the Lahn. But the High Authority took the view that the potential competition was not established and this opinion has not been seriously disputed. Furthermore, it would not appear that any 'deflection of trade' can be envisaged because it is hard to see where the necessary coal for the factories of the region in question can come from other than the coalfields mentioned, and in particular from the Ruhr. Thus the rate in question is indeed a special rate in 'the interest of one

or several coal- or steel-producing undertakings' and falls within the fourth paragraph of Article 70.

(b) As regards the fourth paragraph of Article 70, there is no evidence that the 'structure' of the undertakings concerned is threatened and that they are unable to bear the effects of the normal rate. As the High Authority pointed out in its decision, the Federal Government has not advanced any argument other than that these factories are located in economically backward regions of the Federal Republic, and has not put forward any reasons drawn from the structure of each undertaking. Despite this, the High Authority felt that it had a duty to inquire into the situation of the various undertakings either during meetings in which representatives of those undertakings and of associations participated, or during inquiries on the spot, or by means of questionnaires sent to some of the undertakings. These various methods of investigation did not reveal sufficient justification. Although certain arguments have been put forward on this subject during the course of these proceedings, no pertinent justification results therefrom. Thus on this point the contested decision is legal and sufficient reasons are given for it.

2. *'Ores' rates.* Here again, the potential competition referred to on account of the proposed canalization of the Lahn was not considered as established and no serious counter-argument exists on this point.

For the rest, the question is more complex than for coal. For it is to be feared that certain iron mines are not in a position to bear the normal rate. The closure of those mines could bring about alterations in the operating conditions of the Federal Railways, first because of the deflections of trade which might take place and also because of the possible disappearance of any 'return freight' available until the closure. Difficulties only arise, and they are different difficulties, as regards rates 7 B 3 (Section I), 7 B 26 and 7 B 35, dealt with respectively in paragraphs 1, 2 and 3 of the decision.

(a) *Rate 7 B 3.* The essential purpose of this rate is to assist the iron mines of Siegerland in the carriage of their ore to the Ruhr.

The mines the existence of which may appear to be threatened are those belonging to the following undertakings:

Gewerkschaft Louise (Case 4/58),
Erzbergbau Siegerland (Case 7/58),
Hessische Berg- und Hüttenwerke (Case 9/58),
Stahlwerke Südwestfalen (Case 10/58),
Eisenfelderhütte (Case 13/58),
Gewerkschaft Grünebacher Hütte (Case 15/58).

*As regards these mines,* rate 7 B 3 is clearly in the nature of a protective rate. Moreover, it would not appear that this is a case where there is some chance that by developing or modernizing the means of production and even taking into account the other measures of regional aid applied by the public authorities these mines might become more competitive in the future and able, within a foreseeable period, to pay the normal rate. Thus the requisites for agreement under the fourth paragraph of Article 70, such as I have attempted to ascertain them, do not appear to be fulfilled.

It is true that what is involved here is the assessment of an economic situation and that by virtue of Article 33 such an assessment is outside the Court's jurisdiction. It is also true that the High Authority did not express itself on this subject in the contested decisions. Thus it may be asked whether reasons were lacking or inadequately stated in this connexion.

I do not think so, however. In fact, neither the Federal Government nor the applicants have ever taken this view. None of them has ever argued that the need for the special rate was only temporary. Therefore in my opinion the High Authority was not required to offer a special explanation on this point in taking the contested decisions.

Such is the situation as regards the mines. But the possible closure or the less intensive exploitation of certain mines may mean that as regards the user-undertakings some currents of trade will be rerouted, which

will have the effects on the railway to which I have alluded. Therefore it is necessary, looking at the matter, as always, from the point of view of transport, to examine the possible effects of these deflections. In particular it is necessary to take into account the fact that there exists a link between the *carriage of coal* from the Ruhr towards Siegerland at rate 6 B 30, and the *return freight* constituted by the ore sent from Siegerland to the Ruhr at rate 7 B 3.

The railway will have to 'weigh' the respective advantages and disadvantages of the operation. The *disadvantages* are: 1. The loss of ore traffic between the closed mines of Siegerland and the Ruhr; 2. The loss of the return freight constituted by this traffic.

The *advantages* are as follows: 1. The carriage of coal from the Ruhr to Siegerland henceforth taking place at the normal rate by reason of the abolition of 6 B 30; 2. The growth of *new ore traffic* (or at least increased traffic) coming either from Lorraine or more probably from Sweden towards the factories of Siegerland and also towards the Ruhr, since the factories of both areas will *ex hypothesi* be deprived of their sources of supply of ore from Siegerland.

Everything points to the view that the advantages to the carrier outweigh the disadvantages. As the defence said during the oral hearing, it appears to be established that the Federal Railways consider that there is no advantage to it in maintaining the present currents of trade. In any case, this particular question was not raised during the discussions which preceded the contested decision, and in particular the Federal Government (although accompanied by representatives of the Federal Railways) did not allege that the maintenance of the special rate was to the commercial advantage of the working of the railway. Thus the High Authority was not required to explain itself on this point.

(b) *Rate 7 B 26.* This is a special rate in favour of the Karl mine at Geislingen (Württemberg). It is undeniably in the nature of a protective rate for nothing allows of the view that to maintain it is in the interest of the railway. Furthermore, from the discussion which has taken place on this subject, it would not appear that one can consider it as established that the provisional maintenance of the special rate would within a foreseeable period render it possible to operate that mine under competitive conditions such that it could bear the application of the normal rate. This matter involves an appraisal of an economic situation which, according to Article 33, the Court may not, in principle, undertake. In any event a very long period within which to abolish the rate (until 1 July 1965) was granted by the High Authority under the seventh paragraph of Article 10.

(c) *Rate 7 B 35.* This is a special rate in favour of the so-called 'Harz mines'. It concerns three groups of mines and affects a certain number of undertakings, some of which are also affected by rate 7 B 3 relating to Siegerland. It is hardly deniable, it would appear, that the existence of these mines is more or less seriously threatened. This situation is probably to be explained partly by operating conditions and by the quality of the ore, but the High Authority accepted the fact that another reason was the proximity to the interzonal frontier. That is a reason which the High Authority itself accepts as being one which can justify the application of the fourth paragraph of Article 70. Therefore it is not clear why, in paragraph III, No 3, of the contested decision, it refuses to apply that provision to rate 7 B 35, using its standard form of words.

However, the reason becomes apparent in paragraph IV, which contains the 'operative part' of the decision. After declaring that:

'the existing reductions in rates for these mines (the Harz foothills mines) must be abolished in their present form by 31 December 1958 at the latest',

it adds this:

'Taking into account the particular economic and social difficulties encountered by these mines by reason of their location on the frontier of the Eastern zone, the High Authority proposes to examine these difficulties jointly with the Federal Govern-

ment with a view to adopting a decision before 1 January 1959 *on the form and extent of the reduction in rates necessary for those mines'*.

So the existence of a special situation such as to justify the maintenance of the protective rate is accepted, as is the necessity of that rate for the mines affected. It is only the amount of the reduction that is not yet fixed and, meanwhile, the maintenance of the present rate is authorized until a certain date. What is this then, if not an application of the fourth paragraph of Article 70 by means of an authorization which, on this occasion, is 'temporary and conditional', as expressly permitted by that provision?

In these circumstances, I think that the decision on this point is not illegal.

3. *Rate 6 B 31.* This is a protective rate for coal in favour of the Maximilianshütte and the Luitpoldhütte undertakings in the Upper Palatinate. The High Authority admitted that the operational difficulties of an economic and social nature encountered by these two undertakings by reason of the proximity of the interzonal frontier (loss of some of their former natural outlets, breaking of links with their former integrated factories situated beyond the frontier, influx of refugees etc.) resulted in the necessity for a reduction in rate. It accepted that the current reduction in respect of brown-coal briquettes was justified and could be maintained. For coal and coke, it noted the fact that the undertakings had previously enjoyed 'considerable reductions in rates', and since it intended only to take into account the new conditions arising by reason of the present political circumstances, it set the authorized reduction at 8% below the base rate, rate 6 B 1, instead of 21%, which is the present level of reduction.

The applicants argue that inadequate reasons are given in the decision concerning the setting of the reduction at 8%. They also dispute the method of calculating that reduction on legal grounds.

I will not go back over the long discussions which have taken place on this point. Let me just note that the High Authority enjoys a wide area of discretion in this matter. First, it was in fact legally entitled to disregard that part of the reduction having the character of a protective rate notwithstanding the existence of the new political circumstances. Secondly, it had to evaluate how far assistance in the form of a reduction in rate was necessary to maintain normal operating conditions having regard to those circumstances. It took the rate of 8% not so much because it is the arithmetical difference between the present rate of reduction (21%) and the old rate (13%) but because 8% corresponds more or less to the tariff assistance granted to other carriers of coal in the region. As a precautionary measure, it even decided that the final increase (4%), applicable in principle from 1 July 1960, could be postponed should there be any 'unacceptable economic and social disturbances' at that time.

All this seems to me to be evidence of an assessment made 'after considering all the relevant circumstances' as the contested decision says, and in this assessment I do not see any mistake of law, or any material mistake of fact, or any misuse of powers, or any inadequate statement of reasons.

A special argument was put forward in the reply in Case 17/58: it is based on the different treatment of brown-coal briquettes and coal in the decision. But this different treatment results from the difference between the two situations: in the first case, the reduction is maintained in its entirety because, says the decision, 'the two undertakings can only obtain supplies of brown-coal briquettes from the Rhineland', whereas previously their supplies came entirely from the East. Coal, however, has always come from the Ruhr, and here the only factor is the effect of the new political circumstances on operating conditions as a whole.

4. *Rate 6 B 33 and Article 71 (b) of the scale of dues for navigation on the Mittellandkanal.* This question concerns the undertakings Hüttenwerke Ilsede-Peine (18/58) and Hüttenwerke Salzgitter (25/58).

It was considered that rate 6 B 33 is a competitive rate in relation to the Mittellandkanal and, of course, this decision is not disputed by the applicants who benefit therefrom.

But the High Authority has ordered that Article 71 (b) of the scale of dues for navigation on the canal be abolished as being a protective rate of a discriminatory kind, not qualifying for authorization under the fourth paragraph of Article 70. Article 71 (b) provides for a reduction in favour of eastbound traffic from Minden destined for iron mines and iron- and steelworks. There can be no doubt about the special and discriminatory character of this rate.

The only question which calls for our attention is whether the High Authority has the power under Article 70 to take a decision on a navigation due, that is to say on a toll, the amount of which is set by the State and which, according to the applicants, is in the nature of a tax.

Articles 4 and 70 of the Treaty speak of 'transport *rates*'. It is certain that the expression 'rate' is normally used in relation to transport by rail or by road. However, it seems to me to be certain that the provisions of the Treaty on this subject are directed at all means of public transport, that is to say all those performed by an undertaking acting in a commercial capacity or by a public service. Navigation dues payable for use of a canal are elements in the *price* of transport and, as a result, of the production cost of the goods carried. A comparision with the rate of a competing means of transport (in this case the railways) would not fairly represent the facts if the dues were not taken into account. To my mind the fact that the toll is fixed by the High Authority in the form of a due is of little importance. The due must be regarded as the price of a service, and not as a tax.

I am of the opinion that:

Case 19/58 brought by the Government of the Federal Republic should be dismissed, and that the costs should be borne by the applicant;

Applications 3 to 18/58, 25 and 26/58 should be dismissed, and that the applicants should bear their own costs;

And that the cost incurred by the interveners should be borne by them.

## ORDER OF THE PRESIDENT OF THE COURT of 11 APRIL 1960[1]

In Cases

3/58 – BARBARA ERZBERGBAU AG,
4/58 – GEWERKSCHAFT LOUISE,
5/58 – HERZ-LAHN-ERZBERGBAU AG,
6/58 – MANNESMANN AG,
7/58 – ERZBERGBAU SIEGERLAND AG,

1 — Language of the Case: German.