OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 19 APRIL 1961

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Mr President,
Members of the Court,

Introduction

I have today to deliver my opinion in Cases 9/60 and 12/60 brought by the applications made by Antoine Vloeberghs S.A. against the High Authority.

The applicant is a company incorporated under Belgian law whose registered office is in Antwerp. According to its documents of constitution it is concerned with the import and export of coal, its treatment (crushing, screening, sizing, washing) and the manufacture of briquettes. By making an application for reparation and an application for annulment it seeks to bring under review by the Court a particular aspect of the High Authority's conduct as regards the governmental regulation of the importation of coal into France. At issue is not the importation of coal in general, which was entrusted to the Association technique d'importation charbonnière (ATIC), but the importation of coal from third countries. This is an especially interesting question which arises in the ECSC market: to what extent may goods which come from third countries (in the sense of as originating there) and which fall under the provisions of the Treaty move freely between the Member States of the Community? In the interests of brevity I shall henceforth refer to this as the principle of the free movement of goods.

The two cases were joined by an order of the Court of 13 October 1960 for the purposes of the written and oral procedure, so that it is permissible for me to consider them in a single opinion.

A — The facts and the conclusions of the parties

The submissions of the parties disclose the following facts, most of which are not contested. Even before 1940 the applicant exported quite large quantities of anthracite to the north and the east of France. It imported this coal from third countries and it unloaded it in the port of Antwerp. In these areas it has traditional customers composed of importers and consumers. The applicant resumed this business after 1946 and it expanded it in 1954, especially after the construction of large preparation plants.

In 1955 and 1956 the applicant was able to export to France without great difficulties increasing quantities of American coal prepared by its treatment, with the assistance of the ATIC. Under a contract of 16 January 1957 made with the ATIC it sent 30 000 metric tons of this fuel to France. Leaving aside a small transaction in July 1958 concerning the exchange of 454 metric tons of its coal for schlamm from Blanzy, that was its last export to France. Its French customers continued to ask for American anthracite. By a letter of 13 February 1957 it offered the ATIC 75 000 metric tons of Hudson anthracite of the quality resulting from its work of preparation. The ATIC declined that offer by letter of 23 February 1957. In 1957 and 1958 the applicant's French customers renewed their offers to buy from the applicant, which can produce documentary evidence, for 1958 only it is true, that the request related to approximately 40 000 metric tons. These customers and the applicant tried hard on several occasions to obtain from the ATIC authorization to import the coal into France. The ATIC refused. The applicant alleges that because of these requests from its French customers, the offers to purchase which were made to it and the needs of its sales areas for American anthracite it imported another 73 000 metric tons in 1957. It cleared these goods lawfully through customs so that they were in free circulation in Belgium. As it had not been able to make contracts with its French customers it put this coal, which it had treated, into store. The storage took place at Antwerp and at Ghent in its own depots (approximately 23 000 metric tons), at Terneuzen (approximately 12 000 metric tons), at Strasbourg (approximately 29 000 metric tons) and at Givet (approximately 75 000 metric tons). The storage at Strasbourg and at Givet on French territory was made in the depots of its customers who

would only consent to the storage of these products in return for the express promise by the applicant that this anthracite would be reserved in priority for them as from the issue of the licences.

To put an end to the difficulties which it had encountered in 1953 and 1954 when exporting to France, the applicant had approached the High Authority. By letter of 14 March 1953 it complained of the non-recognition by the ATIC of Belgian certificates and by letter of 25 January 1954 of the refusal to allow foreign currency to the French customers.

In 1957 as it had not received an authorization for new deliveries of coal to France, the applicant made verbal representations to competent members of the High Authority and renewed them in 1958 and 1959. On 23 May 1959 the applicant submitted to the President of the High Authority a detailed written account of its difficulties in exporting to France and asked for his help. In answer to written questions from the High Authority dated 18 June 1959, 23 December 1959 and 3 February 1960, the applicant set out its point of view in its letters of 27 July 1959, 1 December 1959, 31 December 1959, 28 January 1960 and 4 April 1960. Since the negotiations with the High Authority were fruitless, the applicant made on 4 May 1960 its first application in which it asks that the High Authority be ordered to pay damages of a provisional sum of FB 64 852 973 plus 5% interest as from the date of judgment. It calculated this figure from warehousing charges, in part until 31 March 1960, and in part until 31 October 1960, from credit charges until 31 March 1960, from expenses resulting from an estimated loss in value, and loss of profit during the years 1958 and 1959.

In order to prove these facts, the applicant has produced a whole series of documents. It has offered in general terms to adduce such other evidence, especially by way of supplementary evidence, as may be necessary, and it has asked for experts to be heard.

On 3 May 1960 the applicant sent to the High Authority a further letter in which, referring to Article 35 of the Treaty, it asked the High Authority to adopt a decision requiring the French Government to allow free circulation of coal from third countries imported into Belgium.

In its reply of 16 June 1960 the High Authority stated that in its capacity as a dealer the applicant was not entitled to set in motion the procedure laid down in Article 35. Further, the French Government was not willing to examine its restrictive measures. It is the annulment of this negative decision of the High Authority which is sought in the second application of 15 July 1960.

B — Legal consideration

It is necessary first of all to clarify certain questions concerning admissibility which are of importance for both applications.

I — Is the applicant an undertaking within the meaning of the Treaty?

That question arises in the first place as regards the applicant's right to institute proceedings for annulment, but it also plays a role in the application for reparation.

1. To the extent to which the applicant manufactures *briquettes* no doubt it is possible. According to the provisions of Articles 80 and 81, together with Annex I to the Treaty, the manufacture of briquettes constitutes a production activity as regards coal. The applicant therefore carries on an undertaking within the meaning of the Treaty.

2. But it is necessary to consider also whether the *treatment* of imported coal undertaken by the applicant (crushing, washing, screening) constitutes a production activity, because it is clear that the subject-matter of the two applications does not concern the manufacture of briquettes.

The applicant considers that, according to Article 80, in order to qualify as an undertaking it is sufficient for it to carry on a part

of the activity belonging to the normal production cycle. As against this the High Authority points to the distinction drawn by Article 80 between 'production' and 'distribution'. It argues that the external processing which the applicant carries on does not result in the creation of a new product because it does not lead to any alteration in its substance.

In order to decide this contested question, it is possible to refer to the ordinary use of language, according to which it would be unusual to classify the crushing and screening of coal, processes in which any dealer may engage, as coming under production. In the same way in national customs practice it is not possible to speak of nationalization by alteration of imported products unless there has been a *substantial* alteration of their nature.[1] Article 38 (1) (2) of the Code belge des taxes assimilées au timbre (Belgian Code of Duties Equivalent to Stamp Duties) of 2 March 1927 was quoted during the course of the proceedings:

> 'The roasting of coffee, the cleaning, sorting or drying of goods as well as their crushing, grinding or milling without extraction of material shall not be regarded as industrial processing'.

Of course these remarks have only a limited persuasive effect. In the last analysis it is the examination of the system of the Treaty which must show which are the valid criteria in the present case for the purposes of distinguishing between producer and dealer.

First of all it follows from Annex I to the Treaty (definition of the expressions 'coal' and 'steel') that, even in the sphere of coal one speaks of 'production', even as regards lignite in respect of which no alteration is involved but merely the extraction of a raw material. The mere extraction of coal therefore constitutes 'production' within the meaning of the Treaty. This conclusion is confirmed by Article 62 which mentions 'the production costs of the mines'.

Annex I also reveals that the section 'fuels' in the list set out in the Treaty differentiates much less between semi-manufactured products and finished products than does the 'iron and steel' section. In particular no distinction is drawn between extracted coal and processed coal. Only the production of coke and of briquettes is given special mention. From this it may be concluded that according to the Treaty no activity, apart from extraction, may be regarded as 'production' unless the Treaty expressly states that it is.

Therefore anyone who only crushes, screens and washes the hard coal without reaching a later stage on the list in Annex I is not a producer because the original raw materials, just like the final product of his activity, must come under one and the same heading in the list.

This is the only delimitation of the concept of production which enables the Treaty to be applied in a reasonable manner.

Article 26 of the Convention on the Transitional Provisions, for example, distinguishes *inter alia* between net Belgian coal production on the one hand and total Community production on the other. That provision goes on to mention the forecast of production and of sales in Belgium as well as, in the second subparagraph of paragraph 2, the forecast for Belgian coal. The expression 'production' cannot therefore here have any meaning other than the extraction of coal in Belgium. It does not therefore include any possible preparation of imported coal.

The High Authority properly points out in addition that the application to the undertaking of the applicant of the greater part of the other provisions of the Treaty concerning producers would lead to unacceptable consequences: this would for example be the case as regards the rules on prices, on the levy, on the creation of the equalization machinery (Articles 53 and 62) or on the fixing of manufacturing programmes combined with import restrictions (Articles 58 and 74) in case of a fall in demand. But it is not possible to make a choice of the rules which might be applied to the applicant, because the Treaty constitutes a coherent system of rules.

1 – § 56 of the German Customs Law of 23 May 1952.

One arrives therefore at the following conclusion: the applicant is an undertaking within the meaning of the Treaty to the extent to which it manufactures briquettes, but not to the extent to which it prepares coal.

II – Admissibility of the application for annulment

What are the consequences of this definition of the production sphere for the admissibility of the application for annulment?

1. *Dealers' right of action*

According to Article 80, for the purposes of Articles 65 and 66 and the actions brought by virtue of them, those undertakings which are regularly engaged in distribution are also undertakings within the meaning of the Treaty. In Case 18/57 the Court had to express its view on the interpretation of Article 80 (Rec. 1957 p. 241). At that time it ruled in favour of a broad interpretation according to which dealers have a right of action not only when cartels or concentrations of distribution undertakings are at issue, but also when the 'application of these Articles affects the interests of distributors'.

In the present case, the applicant desires the High Authority to take measures in respect of a French governmental organization which has authority in respect of the importation of coal into France. As regards the interests involved and especially the effects produced by that organization, this case is no different from that in which a dealer takes proceedings to defend himself against obstacles to his activity raised by a cartel. It appears to me to be clear, however, that the facts in this case are not covered by Articles 65 and 66. The cause of the commercial restriction of which the applicant complains is neither an agreement nor a merger between undertakings governed by private law, but a sovereign act of a Member State which has created by legislative means a special administration for the import of mineral fuels and which itself directs that administration in accordance with economic policy. I will content myself here by referring you to the wording of the orders and decrees which you have before you. I do not think that there is any justification for a wide interpretation of the Treaty which would extend the right of action of commercial undertakings which is granted exceptionally in respect of cartels and mergers governed by *private law* to the sovereign measures of Member States having analogous effects.

2. *The right of action of mixed undertakings*

It is necessary also to consider to what extent the Treaty gives a right of action to mixed undertakings, that is to say, those which simultaneously engage in production and distribution. What is decisive is to know whether the production element, that is to say the manufacture of briquettes, suffices to make possible an application for annulment dealing exclusively with the elimination of restrictions on importation affecting imported coal treated by the applicant. On a similar question the Court in its judgment in Joined Cases 7 and 9/54 (Rec. 1955-1956, p. 86) held that:

> 'No provision of the Treaty requires that there be any connexion in law between the product manufactured by the producer and that which is the subject of the proceedings. The silence of the Treaty on this point may not be interpreted to the detriment of undertakings and associations. Because of this the applicant's right to bring an action before the Court cannot in the present case be disputed.'

The decision concerned the activities of the 'Office-Commercial du ravitaillement du Grand-Duché' and a compensation fund which was attached to it, and in particular the permissibility of a special charge levied for the benefit of domestic coal on industrial coal. The undertakings within the applicant group had an interest, in their capacity as steel producers, in the solution of the question in dispute, because the compensation charges had repercussions on the production

costs of steel. The applicants were therefore affected in their sphere of production.

In our case, the High Authority's failure to adopt a measure has no repercussions as regards the manufacture of briquettes. The applicant is affected exclusively in its capacity as importer and exporter, that is to say as a dealer. I consider that this important difference in the nature of the interests cannot be neglected even if the wording of the judgment covers the situation in question.

According to the Treaty, dealers do not have a direct right to make an application for annulment except in certain special cases. That means that they can claim direct legal protection only to a lesser extent than the producers. This principle would be infringed if undertakings within the meaning of the Treaty were allowed to put matters before the High Authority and to institute proceedings founded on a failure to act, notwithstanding that their interests are confined to the sphere of their commercial operations.

For this reason the application for annulment cannot be regarded as admissible in the present case. It must be dismissed without its being necessary to express a view on the other problems raised in this context.

III – Admissibility of the application for reparation

The applicant bases its application for reparation on Article 40 of the Treaty. It claims that the High Authority was guilty of a wrongful omission by failing to use against a Member State the powers which the Treaty confers upon it to enforce the principle of free movement.

The High Authority objects that the legality of its conduct both as regards its positive measures (decisions, recommendations) and its omission to take such measures can be reviewed only in the context of an application for annulment and for failure to act, and not as an incidental matter in an application for reparation. A party which, like the applicant, has no right, since it does not have the capacity of an undertaking, to make an application founded on a failure to act cannot plead in proceedings under Article 40 the High Authority's failure to act so as to make that failure the subject of an application.

In raising that objection the High Authority refers to the quite exceptional and unusual linking of the right to make an application for annulment and of the application for damages which Article 34 of the Treaty lays down for certain situations. We must ask ourselves whether the distinction which it makes between the spheres of application of Article 34 on the one hand and Article 40 on the other are justified under the system of the Treaty.

1. The first inference which the High Authority draws from Article 34 is certainly correct: after a successful application for annulment undertakings within the meaning of the Treaty cannot assert rights to damages except on the basis of Article 34 if they have suffered harm resulting from the decision.

2. On the contrary all its *other inferences* and especially the following must be examined closely:

> Article 34 always requires the prior success of an application for annulment of the decisions of the High Authority which give rise to a claim to damages;
>
> The principle of Article 34 applies also to the omissions of the High Authority which must be contested in an application for failure to act;
>
> Article 34 allows only claims for damages from undertakings and groups of undertakings within the meaning of Article 80 of the Treaty.

These conclusions can be accepted only if it necessarily follows that any other interpretation, and above all that put forward by the applicant, would lead to serious disturbances in the system of the Treaty. In such an examination it is necessary to stipulate strict requirements, because the argument of the High Authority is directed towards placing narrow limits on legal protection.

(a) In the first place it is possible to put forward arguments capable of proving that the High Authority's argument is unfounded, at least in its full extent.

(aa) The preliminary action, as a condition *sine qua non* of the application for damages based on defective decisions, is not in every case judicious. It is possible to imagine a case in which damage only became apparent after the expiry of the limitation period. One might think also of decisions which are implemented in full by a single act and in respect of which the administration cannot after their annulment take 'appropriate measures' instead of pecuniary reparation. In such cases even applicants entitled to institute annulment proceedings must be able to submit directly claims for damages.

(bb) Certain authors properly regard the fact that Article 34 restricts the categories of persons entitled to claim damages to be an unsatisfactory solution. Only undertakings and associations of undertakings are mentioned, which is far from including all the applicants who according to Article 33 are entitled to institute proceedings. Thus efforts have been made to bring about a reasonable extension. It is argued that undertakings and individuals outside the ECSC to whom the Treaty exceptionally gives the right to bring an action for annulment or an application for a sanction (purchases in accordance with the second subparagraph of Article 63 (2); participants in concentrations of undertakings outside the Community in accordance with Article 66 (5)[1] have the right to act under Article 34, or it is suggested by way of analogy that undertakings outside the Community should be allowed the right to commence an action for annulment and consequently the action founded on a wrongful act or omission under Article 34.[2]
These attempts show clearly that a narrow argument *a contrario* based on Article 34 leads to unsatisfactory results.

(cc) According to its wording Article 34 refers to cases where a defective decision or recommendation of the High Authority has caused harm. If an application for failure to act is made in case of an omission by the High Authority, the express or implied refusal of the High Authority, that is to say its decision of rejection, cannot be regarded as the cause of the harm which existed before the High Authority was informed of it.
Even supposing that the identity, accepted in principle by the Court, between the application for annulment and the application for failure to act is authority for the idea that Article 34 must apply also in principle to applications for failure to act, there exist however situations which require this principle to be made subject to exceptions.
Thus it does not appear therefore sensible to insist on proceedings for failure to act before an application for damages when, after an initial failure to act, the High Authority has taken measures the effects of which will be produced only in the future, or when it is not possible with the help of administrative measures to remedy the harm resulting from its failure to act (for example because the High Authority has no right to take retroactive decisions).

(b) As the above considerations have shown

1 – Cf. Much, *Amtshaftung*, p. 93.

2 – Cf. Steindorff, JZ 53, p. 721.

that the conclusions which the High Authority draws from Article 34 must in any case be qualified to a certain extent it is now necessary to consider whether the High Authority's argument on the right of action under Article 40 of undertakings outside the Community is correct in substance.

(aa) In accordance with the general principles of law the Treaty draws a clear distinction between actions for annulment (of which actions for failure to act form part) and actions for damages. That difference is justifiable because of the legal consequences and of the conditions under which an action may be brought. In the first case the annulment of a decision or a declaration that the High Authority is required to adopt a decision amounts to a direct intrusion upon the executive's sphere of action, whilst in the second case only pecuniary reparation for harm is in question and the legal validity of the administrative measure is not called in question. The action for annulment is based on the four well known grounds; the action for damages on the other hand assumes a 'wrong' committed by the administration. From a purely external point of view the difference in character between the two categories of action was given expression in their systematic classification in the Treaty. It is necessary to consider all questions relating to the reciprocal relationship between actions for annulment and actions for damages by starting from that elementary proposition.

It is evident that the Treaty intended to limit the number of persons and institutions entitled to bring directly an action for annulment. That intention is based on the fact that the Treaty was meant only to bring about partial integration.

On the other hand, the basic rule giving a right to damages is worded in quite general terms: '. . . to order pecuniary reparation . . . on application by the injured party . . .'. The difference which has been outlined between actions for annulment and actions for compensation, taken together with the general wording of Article 40, in my opinion thus runs counter to the argument of the High Authority which claims that all the limits on the actions for annulment apply to actions for damages when the cause of the injury is a defective decision.

The limitation of the objective of the Treaty does not exclude measures adopted by Community institutions which go beyond the integrated sphere and which affect third parties, directly or consequentially (for example, the authorization given to special transport rates).

The conferring on Community organs of sovereign powers, the exercise or non-exercise of which may result in serious injury to the interests of persons outside the Community, is unthinkable without the corollary of compensation if the institutions of the Community are guilty of wrongful conduct.

The establishment of this right to compensation requires a corresponding right of action which is set out in Article 40 by way of a general rule.

(bb) It follows from Article 40 of the Treaty that a right to compensation is available when injury has been caused by a wrongful act or omission in *implementing the Treaty* of which, according to Article 84, the provisions of its annexes and protocols and of the Convention on the Transitional Provisions form part. According to the third paragraph of Article 40

all other disputes between the Community and third parties to which the provisions *of this Treaty* or rules laid down for the implementation thereof do not apply shall be brought before national courts or tribunals.

It follows from all these provisions that the Treaty gives to every injured party, and even to undertakings outside the Community, the opportunity of having the Court examine whether the Treaty has been correctly applied. In this respect it was quite proper for the applicant to rely upon the case-law of the Court in which Article 40 was also applied when it had to be considered whether the conduct of a Community institution was in conformity with the Treaty and when the legality of a decision had to be examined. Article 40 is not therefore limited to cases where the injury has been caused by 'concrete acts of the Community' or by 'defectiveness' or 'negligence in the actual working of its departments', as the High Authority stated during the oral proceedings. But if persons outside the Community who are concerned can put in issue the correct application of the Treaty it is hard to see why that possibility should not include review of the conduct which gave rise or which should have given rise to a decision.

(cc) After these observations of principle on Articles 34 and 40 from which it clearly emerges that the High Authority's argument is untenable I must demonstrate in addition, in a few paragraphs, that, contrary to the view of the High Authority, the interpretation of the Treaty which I am advocating does not lead to insoluble contradictions in the system of the Treaty.

1. A finding in an action for damages that an administrative measure is illegal necessarily includes, according to the High Authority's argument, a requirement that that *administrative measure be annulled,* and this means that the purpose of the action for annulment is achieved. It is true that this consequence may follow in some cases. But it must not do so if, for example, the High Authority, in the interest of the Community and by compensating the injured party, believes it should adhere to its decision, or when an administrative measure has already been executed, because its effects become extinguished in a single act, or when the High Authority need no longer fear an action for annulment because of the expiration of the limitation period. This alone is enough to demonstrate an important difference as compared with the action for annulment, so that there can be no question of an unlawful extension of the right to apply for annulment.

But it should also be noted that a similar phenomenon is to be encountered within the sphere of actions for annulment. The 'objection of illegality' whose field of application the Court has extended beyond the wording of the Treaty allows indirect criticism of measures which can no longer be contested directly or which can be so only to a limited extent. Here also it is possible to speak of an indirect duty on the part of the High Authority to annul a general decision, and therefore of an extension of the right to take annulment proceedings, a right which is regarded as limited. However

that consequence is accepted in the interests of effective legal protection.

2. The High Authority also considers that the co-existence of two systems of compensation (for applicants entitled to bring an action for annulment and for those who are not) leads to unacceptable results. Here it is surely making a mistake in its premise when it maintains that in case of injury caused by administrative measures the admissibility of an application for damages by persons outside the Community depends upon the prior annulment of the illegal decision being obtained by an applicant entitled to bring an action for annulment. Article 34 is only concerned with applicants entitled to apply for annulment and with their right to damages, whereas the actions brought by other parties concerned must be dealt with exclusively in accordance with Article 40. Consecutive proceedings do not in my opinion raise any difficulty of such a nature as to exclude applications for compensation under Article 40 either where the Court's ruling on an application for annulment is given last or where the judgment awarding compensation is given last.

3. As regards the *opportunities for compensation* made available by Article 34 on the one hand and Article 40 on the other the following observations should be made: Article 40 provides only for an order for pecuniary reparation in the Court's judgment. If the injured party has no right to make an application for annulment no annulment may be decreed and the High Authority cannot therefore be required to take the measures laid down in Article 34. But that does not mean that such a possibility is not open to the High Authority. If the character of the injury does not prevent it it may always until judgment is given reduce or eliminate the injury by appropriate action.

   Further the sphere of application and the legal consequences of Article 40, an article which must be complemented by judicial decision, have not yet been marked out in a wholly clear manner. It is therefore not impossible that the right to reparation should, by way of interpretation, be made to depend upon the requirement of direct and special injury, that its extent should be defined in the same way as in Article 34 if there is a case which ought to fall under that article and in which the applicant fulfils the requisite conditions. In applying that rule of interpretation it does not appear therefore, from the point of view of the extent and the method of compensation, that there are differences between Articles 34 and 40 which are sufficiently great to bring about the exclusion of action under Article 40 in the case of defective administrative measures.

4. Lastly during the written procedure the High Authority again referred to the *limitation of the Court's right of review* (Article 33) and it stated that this could be evaded if the review of its measures were allowed in applications for compensation. In my opinion it is possible to apply here the same principle as in the case

defining the consequences of damage, that is to say that the limitation of the Court's right of supervision may also be considered by way of analogy when Article 40 is being interpreted. A person who is not entitled to make an application for annulment naturally cannot by claiming a compensation require examination of the criticized decision to an extent which is denied to someone who is entitled to make an application for annulment.

3. In summary I would state that the High Authority's view concerning the availability or otherwise of the remedy under Article 40 finds clear justification neither in the wording nor in the system of the Treaty. In view of this situation the applicant was quite right to quote the judgment of the Court in Case 6/60:

> '. . . In these circumstances it is proper to apply the principle whereby, in case of doubt, a provision establishing guarantees for the protection of rights cannot be interpreted in a restrictive manner to the detriment of the individual concerned'.

As the applicant is not entitled to bring an action for annulment within the meaning of Articles 33, 34 and 35 it can base its application for compensation on Article 40 of the Treaty, even if the cause of the alleged damage is based on an omission of the High Authority which is contrary to the Treaty.

IV — The scope of the subject-matter of the proceedings

Before going on to a consideration of the submissions based on Article 40 it is necessary to look at the extent of the period material to the facts on which the application is based.

During the written procedure the High Authority objected that in its application the applicant criticized the conduct of the High Authority only as from the time when it was seised of the matter, that is to say, at the time of the export difficulties which occurred in 1957. It was only later that in the proceedings it criticized its conduct prior to that date. That extension of the subject-matter of the dispute is, according to the High Authority, inadmissible. The Court, it says, has only to consider whether the damage could have been prevented by a measure of the High Authority taken after it had been seised of the matter.

The subject-matter of the proceedings is set out on page 2 of the application: the application claims pecuniary reparation for the injury which was caused to it by the refusal of the prolonged omission of the High Authority, despite requests from the applicant, to take measures against the French Government and to put an end to the practice of refusal adopted by the French administrative authorities in 1957, 1958 and 1959. In fact this passage by itself is not entirely clear. On the one hand the applicant speaks in general terms of the High Authority's continued inaction and of its own requests (in so doing it may also be referring to the letters in 1953 and 1954 mentioned in the application on page 3, paragraph 2). On the other hand it mentions the express *refusal* of the French authorities in the years 1957, 1958 and the following years and the failure of the High Authority to react to this refusal.

It appears to me however to follow from all the arguments, especially from the comment made on the applicant's representations in 1953 and 1954 and from the copious documentation which has been produced, that the applicant did not intend, for the purposes of its grounds of claim, to exclude from the facts which it submitted the conduct of the High Authority prior to the time when the matter was officially brought before it. Such a qualification of the subject-matter of the proceedings would be incomprehensible from the applicant's point of view. It can therefore be accepted that there has not been any extension of the facts supporting the application and that the applicant has kept its arguments within the temporal framework set out in its applica-

tion. In the same way it has not introduced into the proceedings any supplementary submissions by way of claim or defence. The admissible subject-matter of the case is therefore constituted by the conduct of the High Authority in the past without any limitation in time which might be constituted by the date on which the matter in question formally referred to it.

V — Is the application for reparation well-founded?

According to Article 40 the Court shall have jurisdiction to order pecuniary reparation from the Community, on application by the injured party, to make good any injury caused in carrying out this Treaty by a wrongful act or omission on the part of the Community in the performance of its functions.

The applicant complains that the injury which it suffered was caused because the High Authority failed to make the principle of the free movement of goods applicable in France to coal properly imported from third countries. I have therefore in the first place to consider the existence of this free movement of goods and the importance of this principle.

1. *The principle of free movement*

In the course of the proceedings the applicant produced two letters of 28 May 1955 and of 7 January 1956 in which the High Authority made it clear to the Governments of the Member States that the Treaty is based on the principle of free movement. During both the written and oral procedures we had confirmation that today the High Authority still holds firmly in principle to this concept and that on this point it is therefore in agreement with the applicant. I can therefore be brief on this question. However during the oral proceedings the High Authority put before us arguments which appreciably qualify this principle so far as its effects are concerned and which the High Authority had not raised before. It must therefore above all be ascertained whether these new objections of the High Authority can bear legal scrutiny.

The ECSC Treaty, unlike the EEC Treaty (Article 10), contains no provision expressly laying down the principle of the free movement of goods as such. It is therefore necessary to try to prove its existence with the help of logical conclusions drawn from a whole series of provisions of the Treaty which the High Authority has done in its opinions to the Governments of 28 May 1955 and 7 January 1956.

The High Authority properly emphasizes that the Treaty renounced any attempt at economic self-sufficiency and that the Community must take account of the interests of third countries. I refer to Article 3 (a) (taking into account the needs of third countries), 3 (f) (promoting the growth of international trade and ensuring that equitable limits are observed in export pricing), 3 (g) (exclusion of protection against competing industries) and Articles 46 and 59.

Article 4 (a) which prohibits import and export duties or charges having equivalent effect as well as quantitative restrictions on the movement of products is, like Article 4 (b) (free choice of supplier), drafted in such general terms that the limitation of this prohibition to goods which are produced in the Community appears defensible only if the Treaty had in view exclusively the interests of production. That this is not the case is shown by the numerous provisions of the Treaty in which trade problems are touched upon (Articles 18, 46, 52, 63, 66 and 75, Annexes I, II and III; Convention on the Transitional Provisions, Articles 1, 2, 14 and 27).

Although these provisions disclose not so much an imperative and precise conclusion but rather a tendency in the Treaty, Article 15 of the Convention is very clear on the matter. It appears from this provision which is concerned with the market in iron and steel that:

The Benelux contries shall continue to charge on products which are imported from third countries under tariff quotas and are bound for their own home markets the

duties which they are charging at the date of entry into force of the Treaty. On imports in excess of the quota which are deemed to be bound for other Community countries, they shall charge duties equal to the lowest duty being applied in the other Member States at the date of entry into force of the Treaty. The Benelux tariff quota shall be fixed by the Governments of the Benelux countries in agreement with the High Authority for a year at a time. Any imports in excess of the quota in response to unforeseen demand shall be notified forthwith to the High Authority. The latter may supervise shipments from Benelux to the other Member States and may *prohibit* imports in excess of the quota should it find a substantial increase in the shipments. Benelux importers shall be entitled to pay the lowest rate of duty only if they undertake not to re-export the products in question to other Community countries.

Lastly, the sixth paragraph states: 'If the High Authority finds, at the end of the transitional period or on the abolition of the tariff quota in advance of that date, that one or more Member States are justified in charging on imports from third countries customs duties above the rates which would be chargeable if harmonized with the least protective tariffs in the Community it shall, as provided in Article 29, authorize these States to take appropriate steps of their own to afford their indirect imports through Member States with lower tariffs the same degree of protection as that afforded by their own tariffs to their direct imports.'

Only one necessary conclusion may be drawn from these provisions: according to the Treaty the principle of free movement applies within the Community to products lawfully imported fom third countries. If the Member States were free to close their borders to such products and thus to maintain in being the measures prohibited by Article 4 (a) the special rules of Article 15 would be superfluous. And in particular the High Authority's authorization mentioned in the sixth paragraph makes sense only if the principle of freedom of movement is accepted, because an authorization means permitting a measure which in itself is prohibited.

It is also necessary to take special note of the important negotiations between the Member States within the framework of GATT: they appeared necessary to those concerned in order to harmonize the rules of the Common Market with those of the other Member States of GATT. The result of these negotiations was the subject of the GATT decision of 10 November 1952 which was published. It is possible to infer from the wording of that decision that all the Member States of the Community and the High Authority maintained the point of view that the exemption of the most favoured nation clause of GATT (Article 1), that is to say the abolition of customs duties and of quantitative restrictions within the ECSC, refers expressly to the imports of coal and of steel from a Member State and not only to products originating in these States. The decision states *inter alia*:

> 16. The Governments of the Member States will be free to eliminate customs duties and other charges imposed on or in connexion with the importation or exportation of coal and steel products from or to the territories of any other of the Member States.
>
> The Governments of the Member States will be free to refrain fron imposing any prohibitions or restrictions on the importation or exportation of coal and steel products from or to the territories of any other Member State, although instituting or maintaining such prohibitions or restrictions upon the importation or exportation of coal and steel products from or to the territories of other contracting parties . . .'

This wording is particularly noteworthy because there is a mention in Article 1 of GATT of 'any advantage, favour etc. granted by any contracting party to any product *originating* . . . in . . . any other country'. The derogating decision itself mentions expressly in another passage the 'coal and steel *originating* on the territory . . . of other Member States'. The

use of the word 'from' in that decision can therefore not be regarded as an error of drafting.

That proves beyond doubt that the High Contracting Parties, the Member States of the ECSC and the High Authority also considered that the obligation to abolish customs duties and quantitative restrictions did not apply solely to the production of the Member States, but also to all products lawfully imported from third countries into a Member State. The ECSC does therefore not constitute a free trade area in which the *origin* of a product is a decisive factor but because of its structure it approximates to a customs union such as that which is envisaged by the EEC.

Although the High Authority has hitherto itself defended this view against the Member States it has submitted in these proceedings and by referring to Article 73 new arguments which considerably weaken its initial point of view. It says this: as, according to Article 73, the administration of import licences in relation with third countries is a matter for the government in the territory of which is situated the destination point of imports, the principle of free movement cannot apply to coal which was imported into a Member State with a view to its being then forwarded to another. This is a mere transit operation with the result that the State of final destination is free to decide whether to allow the importation. It derives a weighty argument from the fact that no customs duties were levied on coal so that customs clearance gives no indication of the destination of the goods in transit.

Allow me in a few words to express my view on that argument. It is quite plain that the High Authority's argument makes the acceptance of free movement dependent upon a subjective criterion, which is the fixing of the place of destination on the occasion of the first importation into the Community. The High Authority has itself admitted the difficulties which the use of this subjective criterion might cause. The present case in which the applicant had clearly acknowledged to which markets it was sending the coal which it imported must not raise any illusions as to these difficulties. If the subjective criterion of transit were applied it is easy to imagine that in the future importers will take care not to make known their intentions with regard to their transactions.

How could the administrative authorities of a Member State decide with certainty whether goods were brought into the Community with the intention that they should be sent on to another country? How, further, can it be ascertained whether the onward shipment from one Member State to another actually sends the goods to their final destination? They might equally be sent on to a third country, at the frontier of which it would be even more difficult to determine what was the original intention at the time of import. To ask these questions is to show that the subjective criterion is inapplicable.

The applicant has also remarked that under the concept which the High Authority has adopted concerning free movement this principle would be divested of any meaning.

In international trade and especially as regards large quantities of products it is appropriate and customary that on importation into a country it is known whether a product must be re-exported and to where. It is difficult to imagine that a dealer would import large quantities of coal and store them and only thereafter consider on which markets he could sell them. These transactions are carried out above all within the framework of established trade relationships which presuppose that certain arrangements have already been made when the importation takes place. If these transactions were excluded from free movement, always supposing that the dealer openly describes his intentions, there would be practically no field of application worthy of the name for free movement, that is to say, for indirect imports from third countries. The High Authority must know that the example cited by its Agent of a 'dealer who sells stocks of coal which include both ECSC coal and coal from third countries duty cleared through customs in the country of destination' does not constitute the most frequent case in

commercial life. In addition, even in the case of these dealers, commercial arrangements are as a general rule clearly in existence at the time of the importation. In fact, according to the High Authority's argument, such a dealer would not enjoy the benefit of free movement. In fact nothing would remain of the principle of free movement.

In the sphere of the ECSC it is necessary on any reasonable view to apply the objective criteria for free movement recognized in the EEC and which may easily be checked at any time in the process of importation.

We know that Article 10 of the Treaty establishing the EEC expressly provides:

> 'Products coming from a third country shall be considered to be in free circulation in a Member State if the import formalities have been complied with and any customs duties or charges having equivalent effect which are payable have been levied in that Member State, and if they have not benefited from a total or partial drawback of such duties or charges.'

If a Member State allows the importation without reservation so that the goods may be sold in that country they are in free circulation and they may therefore circulate freely throughout the Community. It emerges from the documents produced by the applicant that the rules in force in Belgium (Royal Decree of 24 April 1953 amended by Royal Decree of 31 January 1958)[1] conforms to these principles. It is exclusively for the State which makes possible the importation into its own territory to prescribe the terms on which it will do so. The acceptance of the principle of free movement cannot therefore be made dependent on the fact that the importing State imposes customs duties. Were it desired to postulate that condition the principle of free movement would have had no significance for coal because no Member State imposed customs duties at the time when the Common Market was established.

Article 73 can refer only to the case of transit properly so-called in the customs meaning of the word, that is to say a situation in which the State of the first import only allows transit but not sale in its own territory. In this case it is for the country of destination to decide on the acceptability of the import into the Community sphere.

It is certainly not to be denied out of hand that in the absence of a common commercial policy in the Community divergences in the import practice of the various Member States may lead to difficulties. But the Treaty has taken measures to prevent the interests of the commercial policy of a Member State from being damaged by indirect imports.

The third paragraph of Article 71 has laid down in the context of the inter-dependence of all the Member States a procedure for mutual assistance in which the High Authority has the right to make proposals concerning technical methods and the right to state whether the measures envisaged are compatible with the Treaty and with international agreements. According to Article 73 it also has the duty to supervise the coordination of measures of assistance. This system of mutual assistance would lose all meaning, at least as regards quantitative restrictions on imports, if the Member States were entitled to protect themselves unilaterally against indirect imports.

In conclusion it should be said that the system of the Treaty implies the principle of free movement for products which have been properly imported into a Community country and which may circulate freely there. What is decisive is the objective criteria such as those which exist in the sphere of the EEC Treaty (Article 10). In cases where the interests of its commercial policy are damaged a Member State may only ask for mutual assistance. Unilateral measures of protection are not lawful except in the case of direct imports of which imports in transit within the customs meaning of that term form part.

2. *Following on from these conclusions an important factor for legal assessment is whether the coal imported by the applicant was in this sense in free circulation in Belgium.*

1 — *Moniteur Belge* of 27 April 1953 and of 8 February 1958.

The applicant has produced in its application a list of import and export licences and has added to that list in its reply. It appears from that list, the accuracy of which the High Authority does not dispute, that in 1957 there were Belgian import licences for the greater part of the coal in question in these proceedings. Only in the case of the coal stored at Terneuzen were the Belgian import licences not issued until 1959. The export took place with the assistance of export licences. It follows from the dates on the list that as a general rule the import licences were drawn up before the export licences. Questioned by me the applicant expressly affirmed that the issue of the import licences did not depend on the promise to re-export. As regards the licences, the applicant was allowed to make imports into Belgium without restrictions in respect of the greater part of its coal in 1957.

In 1957 Belgium did not charge customs duties on imported coal. From this point of view therefore there is nothing touching upon the problem in question.

During the course of the proceedings the High Authority also mentioned that there existed a 'transfer duty' which played an important role as regards free circulation or transit in Belgium. The provisions in question appear in the Royal Decree of 2 March 1927, Article 1 of which states:

> 'Any sale of goods, any transfer *inter vivos* against the payment of a consideration of property which is moveable in character, shall be subject to a special duty of [5 p.c.] when delivery is made in Belgium.'

Importation is treated as a sale (Article 3). As regards coal, that is to say Belgian coal as well as imported coal, there is a special provision under which only a single flat-rate duty of 5% is charged on transfer. The duty is paid by the producer at the time of sale in the case of indigenous products and at the time of the declaration of release for consumption in the case of imported coal. The sales of products intended for export are excluded in a wholly general way from the transfer duty (Article 23). This rule applies also to products imported from abroad and re-exported (with or without processing) (Articles 36 and 37).

Although the first impression might lead one to think that the transfer duty is in the nature of a customs duty because it is for the Customs administration to collect it and because the imported coal does not cease to remain under Customs supervision until release for consumption in Belgium, one decisive factor militates against this view: the transfer duty is levied in respect of sales in Belgium in the same manner as in respect of imports. And even at the time of export Belgian goods and imported goods are exempted in the same way. Thus the origin of this charge to duty is not solely to be found in the fact of the importation. Accordingly the transfer duty must be regarded as a turnover tax[1] and it may therefore be disregarded for the purposes of the question of free movement. The fact that in the absence of a Belgian consumer the right to charge this duty does not come into existence does not provide an argument, within the context of this examination, as to whether the coal was only in transit.

It is possible therefore to affirm that the coal imported by the applicant was in 1957 for the greater part in free circulation in Belgium. That concept is confirmed by the declaration of the Belgian Minister for Finance of 20 March 1961 which the applicant has produced as well as by the 'Tax Direction 1954' and the 'ECSC Direction published at the end of the tariff import duties, Edition of 1 March 1954', two documents issued by the Belgian customs administration and drafted in collaboration with the High Authority.

3. *These findings lead to the question whether the import rules in force in France were and are compatible with the principle of freedom of movement.*

It is common ground between the parties that as a result of the refusal of the ATIC the applicant was prevented from bringing into France American coal by way of Antwerp. It is also common ground that the legal control of the importation of coal into

1 – See also the Tinbergen report and the decision of the High Authority of 5 March 1953 (JO 1953, pp. 33 and 34).

France made possible the refusal of the ATIC. There is therefore no need for me to set out here in detail the functions and the organization of the ATIC. It is sufficient to state that the ATIC, which is composed of groups of coal importers and of representatives designated by the trade associations of importers, alone has the right to purchase coal abroad. The relevant text is the Decree of 24 June 1948 (No 48-125). According to Article 1 (1):

> 'The purchase abroad and the transportation of solid mineral fuels may, until they are received by those for whom they are intended, only be carried out by a group of importers subject to the provisions of the present Decree and in accordance with the import programmes mentioned in Article 6 (2) of the Law of 17 May 1946.'

This group of importers, according to the letter from the Minister for Industry and Commerce of 4 February 1948, is the ATIC. Article 4 of this Decree makes the ATIC subject to State supervision and ministerial instructions. According to Article 6 the Commissaire du gouvernement has a right of veto over the decisions of the ATIC.

The decrees issued after the foundation of the ECSC (No 53-83 of 9 February 1953; No 57-46 of 14 January 1957) as well as the 'ECSC Opinions' (Nos 1, 2, 7, 21, 22, 26) introduced an amendment only in respect of the import of Community products 'originating in and coming from Member countries' and apply only to the purchase of coal available from Community producers. In the same way the agreement made within the framework of the ATIC case (2/58) and the corresponding Decree No 61-154 of 14 February 1961 are limited to coal from this source. It is only as regards this coal that the ATIC is required to carry out the orders of the French dealers. It is the ATIC which on Ministerial instructions, according to the circumstances, decides on the purchase of coal from third countries outside the Community and in the other countries of the Community.

Thus it is clear that the legal rules which exist in France prevent the free movement within the Community of coal from third countries and do so in violation of the principles of the ECSC Treaty.

4. *Measures of mutual assistance for the benefit of France*

In connexion with what I have said concerning the existence and the limits of the principle of freedom of movement I have mentioned the measures of mutual assistance provided for in the Treaty which may lead to a complete or partial exclusion of this principle.

Before continuing the examination of the conditions for liability for a wrongful act or omission it is necessary in my opinion to ask oneself whether, in spite of the recognition of the principle of freedom of movement by France, the applicant could not have been prevented from exporting to France by reason of the system of mutual assistance, and therefore by measures which were in conformity with the Treaty. If this is so then it is clear that the fact that the High Authority did not enforce the implementation of the principle of freedom of movement was not the cause of the damage or at any event of part of the damage.

In the course of the proceedings the High Authority pointed out that in the spring of 1958 Belgium and then in September 1958 the Federal Republic of Germany and lastly in March 1959 the Netherlands asked for mutual assistance. It emphasized that France too could have taken this course in 1959 and thus close its frontiers to indirect imports from third countries.

The High Authority said nothing concerning the fact that because of its special situation France could have made use of that possibility at an earlier date, that is to say in 1957 and in 1958. During the oral proceedings the applicant stated without being contradicted what were the quantities of anthracite which were exported to France from the United States and Russia in 1957

1 — Sixth General Report, statistical appendix, Table 5.

2 — Jo 1958, p. 445; JO 1959, p. 139, 487, 1088; JO 1960, p. 667.

and in 1958. It follows from the figures published in the general reports[1] and in the Journal Officiel[2] that the import of coal from the United States to France reached a ceiling in 1957. In 1958 it was again very high. It was not until the third quarter of that year that there appeared a substantial decrease which continued in 1959.

Furthermore, reference should be made to a document produced by the applicant (memorandum of 23 July 1957), according to which the ATIC had itself endeavoured to make contracts with the applicant's suppliers, as well as well as to a note dated 27 February 1957 from the 'Syndicat central des négociants importateurs de charbon en France', on the current situation of the coal market, and which is included in Schedule I to the reply.

It emerges from these facts that at least in 1957 and in 1958 France would hardly have considered introducing import restrictions by asking for mutual assistance. In connexion with the examination of the hypothetical links of cause and effect this suffices to demonstrate that the fact that the High Authority had neglected to act cannot be left out of account as regards the source of the damage.

5. *Wrongful act or omission*

I thus come to that part of my examination devoted to the conduct of the High Authority. It is necessary to consider here whether the High Authority infringed the duties imposed upon it under the Treaty, so that it is possible to speak of a wrongful act or omission within the meaning of Article 40.

(a) It is clear that the High Authority was not in a position to act directly in order to eliminate the obstacles to exporting to France. On the other hand the complaint is that it failed to make use of the powers given to it by Article 88 in order to ensure that the Member State acted in accordance with the Treaty.

There is no reason to doubt the effectiveness of these measures. It can be accepted that a national government will take account of a request made to it by the High Authority to carry out the Treaty, perhaps, it is true, only after judicial proceedings, above all if there are complicated questions of interpretation.

(b) According to the Treaty, 'It shall be the duty of the High Authority to ensure that the objectives set out in this Treaty are attained in accordance with the provisions thereof' (Article 8). In this respect it also has an obligation towards Member States to ensure that the Treaty is properly implemented.

That duty of supervision does not require, for it to be acted upon, a request by a party concerned or even by a formal reference of the matter by way of proceedings for failure to act. The High Authority must, on the contrary, act of its own motion when it believes that there is an infringement of the Treaty.

(c) On 28 May 1955 and 7 January 1956 the High Authority sent a letter to the French Government as well as to the Governments of the other Member States, in which letter it demonstrated the existence of the principle of free movement and called upon that Government to conform to it. You know from other cases that on 22 June 1956 and 18 December 1957 the High Authority adopted decisions in respect of the French Government under Article 88 concerning the activity of the ATIC. But during the oral proceedings the High Authority said expressly that the object of these decisions was not to obtain recognition of the principle of free movement. The exact words used by the representative of the High Authority were *inter alia:*

> '... as the recitals and the provisions of the decision of 18 December 1957 show ... the High Authority did not intend to solve the question of free movement within the Common Market of coal from third countries by adopting that decision.'

This is confirmed, moreover, by the agreement of 15 February 1961 made between the High Authority and the French Government concerning the termination of the

ATIC case; the question of free movement was expressly excluded from that agreement. It is thus clear that until now the High Authority has made the principle of free movement only the subject of negotiations. However, in this sphere the Treaty does not assign to it the task of finding a solution of the problem solely by way of agreement with the Member States. Once the High Authority had accepted what were the measures which the Member States had to take by virtue of the obligations which flowed directly from the Treaty for the purposes of giving effect to the principle of free movement there could be no question even of its issuing a recommendation which, being compulsory only in its objective, could amount solely to a repetition of what the Treaty already prescribes. It had rather the duty, after a reasonable time had elapsed, and especially after fruitless negotiations, to use its powers laid down in Article 88 in order to discharge its own responsibility. It has not fulfilled that obligation with the result that in objective terms it is proved that its conduct was contrary to the Treaty.

(d) Can it be said that the omission of the High Authority amounts to a wrongful omission within the meaning of Article 40 of the Treaty?

This failure to perform the duty, in other words the illegal nature of the conduct of the High Authority, is insufficient to establish liability for the damage pleaded. It is necessary in addition to prove that this conduct amounts to a wrongful act or omission. The appraisal of this requirement is made difficult because of the fact that Article 40 is drafted in vague terms. It does not mention in detail what are the criteria which must be fulfilled in order for there to be a wrongful act or omission. It is therefore for the Court to construct a system in its case-law. For this purpose it must take account of the principles of the national laws of the Member States. It is true that it may be accepted that Article 40 in principle allows a differentiation to be made so that in many cases minor wrong will be sufficient whereas in other cases stricter requirements are needed for a finding of a 'wrongful act or omission'. According to French administrative law, in case of a failure to act, when the administration has not carried out its duty of supervision, 'serious fault' is a prerequisite of liability. It appears to me justified to stipulate this requirement also in the present case because of the special features of the procedure which the High Authority had at its disposal.

I have already intimated that in the present case proof of a wrongful act or omission depended essentially on the question when was the latest moment by which the High Authority should have used its powers under Article 88. It is certain that this provision is not intended to stipulate a purely automatic response so that the High Authority's decision had to follow immediately upon the failure to comply with the Treaty. Under the supervision procedure the High Authority has a certain discretion which must be defined in a different manner in each case, as is apparent from the requirement to accord a prior hearing to the State in question and from the power to fix a time-limit for the implementation of the provisions of the Treaty. But it is not possible to speak here of an area of political discretion which is entirely outside judicial review. The Treaty expressly fixes the limits of that review. Within this framework there is no reason to accept that there exist sovereign measures not subject to the Court and which only come within the province of political responsibility. Futhermore, the only matter to be considered is whether the High Authority unduly extended its discretion in time. In order to reply to that question what is important in the first place is to know which duties resulting from the Treaty should have been performed. Further, an objective evaluation of all the circumstances of the particular case must make it possible to decide whether a complaint alleging a fault is well founded. We must however admit that we do not know all the details of the negotiations between the High Authority and the French Government. The defendant should have made them known to the Court. As the Treaty did not fix a precise date for the establishment of freedom of movement

for imported coal it is necessary to start from the premise that this principle must be put into operation at the same time as the abolition of internal frontiers for the trade in coal, that is to say as from the creation of the Common Market in coal. (Articles 8 and 9 of the Convention). It is possible to say in favour of the High Authority that the Treaty does not expressly state this principle but that it was possible to find it indirectly by relating the objectives of the Treaty to individual provisions.

The applicant itself said in the course of the oral proceedings:

> '... I perfectly understand that, on these delicate and novel matters the High Authority at the beginning could have hesitated and even that it could have been mistaken for a time.'

But it is true that this statement immediately loses its force because of the fact that in order to excuse itself the High Authority does not rely on the difficulties of the provisions in question, but admits on the contrary that it adheres without qualification to the position which it took on 28 May 1955 on the question of free movement. That corresponds moreover to the position which it adopted, as did the other Member States, during the negotiations carried on within the framework of GATT (derogating decision of 10 November 1952). It was only during the proceedings that the High Authority expressed doubts on the scope of the principle of free movement, which led it to adopt a particular view of the concept of transit. But the High Authority has not stated that it sees in these doubts the true cause of its inactivity.

In addition it can be said in favour of the High Authority that the situation on the coal market of the Community was marked by a state of shortage from the creation of the ECSC until 1958, so that the legal recognition and the putting into practice of the principle of free movement did not appear to be of first priority. Taking account of this situation the fact that the High Authority did not solve the ATIC problem in full immediately upon the creation of the Common Market but that it began by looking for a progressive alteration by way of negotiations cannot be regarded as a fault on its part.

It is true that it is necessary to mention that in 1953 and 1954 the applicant had already had occasion to complain to the High Authority of the obstacles placed in the way of its exports to France. In a letter sent on 14 March 1953 to the Director of the Market Division of the High Authority the applicant mentioned that the ATIC was rejecting Belgian certificates of origin issued for coal from third countries and treated in Belgium and it requested that measures should be taken rapidly in order to put an end to these difficulties in exporting to France. Even during the coal shortage the problem had therefore a more than theoretical importance.

It should also be noted that at the latest by the time the letters from the High Authority were sent in 1955 and 1956 to the other Member States of the Community the principle of free movement had been recognized and put into practice in those States so that as from this time there existed a discriminatory situation within the Community. Even taking account of the interests of the French trade which could not be freed from the protection of national importing organizations until after a certain adaptation period the tolerance for years of a situation contrary to the Treaty which resulted in damaging lawful agreements made by coal dealers in the other Member States appears difficult to defend.

During the oral proceedings the High Authority described its efforts to fix in a precise manner with the Member States the details of the procedure of mutual assistance laid down in the third paragraph of Article 71 and the conditions for its exercise. The efforts are all the more welcome since it appears that after the Treaty mutual assistance was the only means for protecting the interests of the economic policy of the Member States after the recognition of the principle of free movement.

We have found that in the absence of an agreement these negotiations never arrived at the intended result. Nevertheless the system of mutual assistance could have been applied to three countries in 1958 and 1959 without giving rise to special difficulties. It should also be said that the Treaty does not make the recognition of the principle of free movement depend in any way on the preparation of precise rules concerning mutual assistance. In particular it cannot be said that in the absence of such rules the High Authority was prevented from exercising its power under the third paragraph of Article 71. Five of the Member States of the Community have accepted and applied the principle of free movement without awaiting the result of the negotiations on mutual assistance. Taking account of these matters of law and of fact it is hardly justifiable, even from the point of view mentioned, that compliance of one Member State with the principle of free movement was not enforced.

Lastly, for the purposes of assessing the conduct of the High Authority the extent of the damage to be expected from its omission and that which actually materialized constitutes an important factor. The importance of the principle of free movement for internal trade and the damage to important commercial interests due to the non-recognition of the principle are so clear that the High Authority ought to have devoted especially great efforts towards resolving this problem.

Before any conclusion can be drawn from these findings it is again necessary to consider the special nature of the possibilities for intervention which Article 88 gave to the High Authority. When it initiates the supervision procedure a certain time must be expected to pass before the desired success is achieved and this length of time, taking account of the judicial proceedings which follow as a general rule, would hardly be less than a year. In the present case that means to say that the damage caused by the obstacle to imports in 1957 could have been prevented only by action on the part of the High Authority in 1956. Later action on its part would at any event have prevented an increase in the damage. An important factor as regards the question of a wrongful act or omission is thus constituted by the fact that the High Authority should have adopted a measure at the latest by that time.

Consideration of the circumstances mentioned leads naturally to a delicate and subjective evaluation which is always open to dispute. In embarking on this now and taking account of the fact that the special character of the High Authority's powers of supervision with respect to the Member State does not allow of the complaint of wrongful act or omission unless there are serious circumstances. I would like to make the following observations: the principle of the free movement of coal imported from third countries also has its importance in the present conditions of the market, within the framework of the Community, as is shown by the fact that three Member States have claimed the benefit of mutual assistance. It is undisputed that the High Authority has as yet done nothing to obtain the recognition by one country of the principle of freedom of movement. It has put forward no declaration, no essential facts, no authoritative point of view capable of justifying its omission. Its conduct, when set against the legal situation which it recognizes itself, and taking account of all the circumstances and of the discretion conferred on it, must be regarded as a wrongful failure to exercise the important supra-national powers which have been granted to it. Although this conduct discloses a wrongful omission it cannot be said, it is true, that this wrongful omission should be considered in the same light throughout the period which extends from the establishment of the Common Market until the present day. But in considering the issues of fact and of law it is certainly justifiable to conclude that since the year 1956 when the High Authority did not continue the representations undertaken in order to give effect to the principle of the free movement of coal there has been clearly recognizable conduct which carried serious consequences and which was of such a character as to engage its financial liability.

6. *In one last chapter it still remains to inquire whether there can be found those characteristics of damage which must exist in the context of a wrongful act or omission in order that the Court may grant compensation.*

I have mentioned in the first part of my opinion that the conditions for the exercise of the right which are set out in Article 34, special damage caused directly, may be incorporated in Article 40 by way of interpretation. That concept is justified if the acts giving rise to a right which are to be assessed under Article 40 are similar to the cases of liability under Article 34. It follows from the structure of the Community which from the financial point of view is based solely on undertakings producing coal and steel. It must also be mentioned that in French administrative law the very concept of a wrongful act or omission includes in certain cases (but not all) the requirement of special damage.[1]

(a) As regards the criterion of *special damage,* the High Authority claims that:

> '... in law it is in exactly the same situation as all the other non-French dealers of the Community, as regards the French rules which do not recognize the right of free movement within the Common Market for third countries ...'

That objection is irrelevant in the sense that the important factor is not the fact of having been affected by legal rules, as is the case in applications for annulment, but the fact of *damage.* However, the High Authority has not been able to state that other coal dealers in the Community have suffered damage as regards their exports to France in the same or in a similar way as has the applicant. Furthermore Article 40 does not require proof that the applicant alone suffered damage. According to a correct interpretation it suffices that the applicant, among a well-defined small group, was the victim of an event giving rise to damage. In the present case it is not possible to take the view that this criterion has not been fulfilled.

1 – Waline, op. cit., p. 683.

(b) As regards the question whether *damage* was *caused directly,* French administrative law contains certain requirements described by Waline (page 705) as follows:

> Indirect damage is that which has not been shown to be the necessary consequence of the initial act of which the party responsible is accused.
>
> .....
>
> There is indirect damage when, between the initial act imputed to the public body and the materialization of damage for which reparation is sought, there are intervening circumstances or acts which prevent the relation of cause and effect between this initial act and the subsequent damage from being established with certainty.
>
> When this damage, in fact, is the consequence only of a series of acts which took place between the initial act and the final damage, it is necessary immediately to make a series of value-judgments on the role and the importance of each of these intermediate acts in causing the damage, and an error of assessment of the influence of any of these facts may falsify the whole reasoning.'

The fact that conduct contrary to the Treaty on the part of a Member State is at the commencement of a chain of cause and effect does not prevent the subsequent omission of the High Authority from being regarded as the direct cause of the damage. If the High Authority has failed to exercise its functions of supervision with regard to a Member State it is liable for the damage which follows from the original behaviour of a Member State contrary to the Treaty.

(c) In this connexion it is necessary to consider also the applicant's *own conduct* which in German law is seen from the point of view of contributory fault. The applicant imported the coal and stored it knowing that at any moment the French rules on imports could cause a barrier to be set up. Because of this fact it is necessary to attribute to the applicant's own conduct the expenses resulting from the importation in fact made into another country (warehousing, loss of

quality, transport costs) and must not only the loss of profit be regarded as damage caused directly by the High Authority? I hesitate to put forward that solution. The applicant has set out in a very detailed manner the history of the imports in question. It is undeniable that it was able in 1955 and 1956 to sell in France the coal which it had imported. It has accepted that the demand from its French customers, with whom it was in constant contact, continued. For the year 1958 it has proved such interest; for 1957 it has produced *prima facie* evidence that there was a demand and further it has offered to prove that there was. One important factor which led it to this view was the fact that the representatives of the ATIC entered into negotiations with the applicant's suppliers to the Member States, the Hudson Coal Company, during the second quarter of 1956 concerning the direct supply of 200 000 metric tons and were referred by the selling agency of this American producer to the applicant. The business which it carried on with the Hudson Coal Company enabled it later, in January 1957, to make a contract for 30 000 metric tons with the ATIC.

It is necessary therefore to consider whether the applicant knowing the market situation, the needs of its customers, their desire to buy from it and the previous import practice of the ATIC should have made other arrangements. I consider that because of these developments it is not possible to speak of a wrongful act on the part of the applicant, which would have the consequence that it would itself have to bear the full amount of the damage caused by the imports actually made. It is true that the evidence which will have to be called for will show to what extent it would rely on the demand from its customers as the basis of its arrangements and to what extent this business was frustrated solely by the refusal of the ATIC.

During the oral proceedings there was also raised the question why the applicant did not try to sell the coal in question elsewhere, that is to say to dispose of the stocks the maintenance of which had caused it a part of the damage which it alleges. It is clear that the damage would have been less if it had acted in this way. It appears from the documents produced that the applicant continually offered its French customers deliveries from these supplies. In that respect it must also be mentioned that the owners of the depots at Strasbourg and at Givet were assured of a right of priority over this coal in case an import licence should be delivered. It is necessary therefore to consider as from what time, on the basis of reasonable commercial forecasts, the applicant should have taken the view that the opportunity of selling its coal in France was less than the current risk of depreciation in value and of costs of storage. For such an assessment it is necessary to consider as decisive factors in the calculation, the cost of disposing of the supplies, the costs of transport and shipment as well as the prospects of sale elsewhere. In that respect the facts available are insufficient to allow a full assessment to be made, even accepting, within the framework of judicial discretion, a date when the applicant should have been persuaded that the authorizations for imports into France would no longer be granted. It is therefore indispensable to have further measures of inquiry on this point.

However, notwithstanding questions which still remain open on this point, it may be stated that it is not possible completely to exclude the liability of the Community.

(d) Lastly, as regards *the precise quantifying of the damage,* the applicant has done this itself only in a provisional manner. During the proceedings the applicant produced documents from which it appears that in respect of certain quantities of coal at certain times French dealers would have bought the coal which it offered. It has thus produced a certain amount of evidence which prevents the dismissal of its application for lack of proof of damage. But it is also necessary to consider in detail what were the possibilities of sale in France (periods and quantities), what were the amounts of storage costs and of transport and to how much the damage caused by loss of quality and by loss of profit amounted. In

order to ascertain the extent of the damage, to which the considerations which I put forward in the context of the apportionment of liability are relevant, it is open to the Court in accordance with its Rules of Procedure to order measures of inquiry which would be undertaken by the Chamber or the Judge-Rapporteur.

But it seems to me that the Court would not be going beyond the Rules of Procedure and exceeding its powers if it first of all were to give a preliminary judgment on the substance of the claim and if it were to give the parties the opportunity of coming to an amicable settlement on the amount of the damages. Such a method is justified especially in cases of proceedings in which the Court has unlimited jurisdiction and which give the Court a wide discretion and extensive opportunities for action. If the parties cannot agree on the amount of the damage, the procedure for ascertaining the extent of the damage could be resumed on request.

C–Summary and Conclusion

My summary at the end of this long and complex study is as follows:

The application in Case 12/60 which seeks to compel the High Authority to take a decision is inadmissible because by reason of the subject-matter of the action the applicant cannot be regarded as an undertaking within the meaning of the Treaty.

The application for compensation in Case 9/60 is admissible. It is properly based on the general rule in Article 40. An examination of the various conditions laid down by that provision has shown us that a State which is a member of the Community has not applied the principle of freedom of movement for coal which is to be inferred from the Treaty. The High Authority has failed to make an effective attempt to put an end to that infringement of the Treaty and to make use of its powers of intervention under Article 88 of the Treaty. It has itself thus infringed the Treaty. Its conduct in breach of its obligations amounts at the same time to a wrongful act or omission within the meaning of Article 40. This wrongful act or omission constitutes the cause of the damage suffered by the applicant who because of the High Authority's failure to act was prevented from exporting its coal freely to a Member State. We have seen that the present case discloses a direct cause of injury and special damage. At the present stage of the proceedings it may therefore be stated that the applicant's right to pecuniary reparation is well founded.

I advise the Court:

1. in Case 12/60 to dismiss the application as inadmissible;
2. in Case 9/60 either to order measures of inquiry into the extent of the damage caused or to hold in a first judgment that the applicant's claim for damages is well founded in law and to reserve the decision on the amount of the claim for the final judgment;
3. to order the applicant to pay the costs in Case 12/60; the decision on costs in Case 9/60 will depend on the outcome of the application in that case.