Delivered in open court in Luxembourg on 15 July 1960.

A. Van Houtte
Registrar

A. M. Donner
President

OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 1 APRIL 1960[1]

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1 — Translated from the German.

Mr President,
Members of the Court,

A — Introduction

In December last year the Court heard during the oral procedure which covered several days the submissions of various applicants and interveners on the question whether the decisions of the High Authority to abolish or modify a special German railway tariff are lawful. One of the decisions challenged at that time concerns the special tariff for the carriage of mineral fuels for the iron and steel industry. This particular decision is, *inter alia,* the subject-matter of the proceedings in which I have to give my opinion today. However, although it is the objective of the German undertakings and interveners to have the decision of the High Authority declared void in so far as it makes arrangements for the abolition of the German special tariffs, the applicants in the present proceedings—French undertakings and associations of undertakings—seek the annulment of the decision on the ground that the objections of the High Authority to the special tariff do not go far enough. I believe that nothing can show more clearly how difficult the tasks of the High Authority are in the field of transport and also how difficult it will be for the Court to find the right way in this dispute to interpret and apply the Treaty correctly.

The applicants in these proceedings do not aim only at the annulment of the said decision. They have in addition brought an action for failure to act in which, with the support of the French Government, they seek to oblige the High Authority to advise the Federal Government to arrange for the obligatory introduction of a general tariff to be applied to the carriage of mineral fuels for the iron and steel industry.

B — Are the applications admissible?

During the examination of the admissibility of the applications and of individual claims in the applications some questions have arisen which must first be considered.

I — *Case 24/58*

In Case 24/58 the applicants, as has already been indicated, seek the annulment of the High Authority's decision of 12 February 1958:

(1) In that it states that the application of Tariffs 6 B 30 II and 6 B 33 for reasons of competition is justified in whole or in part;

(2) In that it retains certain charges in the German system of tariffs, although the system as a whole discriminates on the basis of nationality;

(3) In that time-limits are prescribed for the abolition of Tariffs 6 B 30 I, 6 B 31 and 6 B 33 which expire after the transitional period.

1 — Scope of the conclusions

So far as points 1 and 3 of this application are concerned its scope is clear. Point 2 on the other hand gives rise to questions. In the disputed decision the High Authority does not object to Tariffs 6 B 30 II and 6 B 33, which the applicants challenge with special submissions, or to Special Tariff 6 B 32 or to parts of 6 B 31. (The tariffs in question are for the carriage of coal and coke to Lübeck—Dänischburg—6 B 32—and also the special tariffs for the benefit of the Luitpoldhütte and Maximilianshütte factories in East Bavaria.) The application does not contain any particular submissions against the last-mentioned tariffs. To some extent special arguments are put forward in connexion with Tariff 6 B 31 in later pleadings and I will have something to say about their admissibility in another part of my opinion. However, according to the substance of the application it can be assumed that the two tariffs which are not expressly disputed are also covered by the applicants' criticisms in so far as they form part of the tariff arrangements of the Federal Railways for the benefit of the German iron and steel industry, which, in the opinion of the applicants, are discriminatory.

2 — Is a 'decision' of the High Authority challenged?

When considering the admissibility of the applications the question can be asked whether those parts of the contested decision in which the High Authority states that it does not object to Special Tariffs 6 B 30 II and 6 B 32 can be said to constitute a decision. It must be remembered that the seventh paragraph of Article 10 of the Convention on the Transitional Provisions, upon which the High Authority relies, does not provide that existing tariffs which comply with the principles of the Treaty require to be *authorized* by the High Authority. If, when it examines special tariffs, the High Authority comes to the conclusion that the principles of the Treaty have not been infringed, those tariffs remain unaffected without any specific measure of the High Authority, for example the granting of consent – as in the case of existing subsidies – or a binding confirmation being necessary. The undertakings concerned could only therefore challenge the result of such an examination revealed by the High Authority simply abstaining from any action by bringing an action for failure to act. In this case the High Authority has not merely left the tariffs which in its view are unobjectionable as they are, but, within the framework of a decision, has made a specific finding that objections are not called for. In my opinion, this formal statement in a decision concerning tariffs constitutes a legally binding confirmation, which the High Authority could not itself modify without taking further steps, and that for this reason it is a decision against which proceedings can be instituted under Article 33.

3 – The legal interest of the applicants

All the interested parties are agreed that the contested decision is of an individual character. Further observations on this aspect of the matter are unnecessary. However, it may be asked whether the applicants have a legal interest in challenging a decision which has been sent to another addressee and is concerned with tariffs fixed for other undertakings. This question must not be confused with the High Authority's plea relating to the admissibility of some of the applicants' complaints. I have some observations to make on this point.

In order to justify an application for annulment, the Treaty stipulates that the contested decision must concern the applicant and be individual in character. It is therefore necessary to consider the effect of the contested decision on the legal position of the applicants and the effects which its annulment has on the applicants. The decision does not place upon the applicants the burden for example of a duty imposed upon them but allows advantages for the benefit of other undertakings to remain in being which are not available to the applicants. If the decision is annulled, the High Authority is under a duty to declare that the tariffs, to which exception has not hitherto been taken, infringe the Treaty and to require them to be annulled. This advantage will then be withdrawn from undertakings which enjoyed the benefit of special tariffs, although the High Authority is not under a duty to grant the applicants an equivalent advantage.

It is true that this finding does not mean that the applicants have no right of action for annulment if it is clear that the advantage enjoyed by the favoured undertakings corresponds to a disadvantage suffered by the applicant undertakings. This is the case if the undertakings are in competition with each other and the competitive position is affected by unilateral tariff measures. I have not considered this question in detail with due regard to the facts, although it is possible that not every applicant undertaking is an actual or potential competitor of the German undertakings enjoying the benefit of the various special tariffs. If this factual condition precedent does not exist, then the legal position of the applicant undertakings is not affected by the contested decision. The undertakings' right of action for annulment then ceases to exist, since undertakings not specially connected with the facts as set out in the decision are not intended and entitled to require objective compliance with the rules of the Treaty. I shall, however, assume for the purpose of my further examination that there is in fact an interest giving rise to a right of action for annulment.

Moreover, it can also be assumed that the

French undertakings which have lodged applications have a more special and greater degree of interest in the annulment of the decision than the other iron and steel undertakings of the Community, since they not only compete when they sell their products with the German undertakings, which are favoured—as has to be assumed in this case—but also obtain their fuels from the same source and over approximately the same long distances, although on the basis of different tariffs.

4 — Admissibility of individual complaints

In its defence the High Authority has denied that the applicants have a right of action for annulment, in so far as they rely on the complaint that Special Tariffs 6 B 30 and 6 B 33 are wrongly regarded as competitive tariffs and that excessive periods of time were allowed for abolishing the tariffs to which exception is taken, although it considers the complaint that the German special tariffs as a whole amount to discrimination on the basis of nationality as admissible. The High Authority justifies this distinction on the ground that the applicants do not have a special interest in the abolition of the German special tariffs which is different from the interest of all undertakings of the Community, whereas a narrower class of undertakings, namely the Luxembourg, Belgian and French undertakings, are affected by discrimination on a national basis.

In my view, this plea relating to the admissibility of individual complaints cannot succeed. Under the Treaty the condition precedent to bringing an application for annulment is that the *decision* concerning the applicant is individual in character. If this question, which must be considered in the light of the legal effects of the *decision,* is answered in the affirmative, then the applicant can avail itself of all the causes of action set out in Article 33. In particular, the applicant can plead that the decision is in every respect illegal without having to put forward any special substantiation of individual claims so far as the question of the applicant's special legal interest in them is concerned.

The legal interest which must be assumed to exist for annulment of the whole of the decision cannot therefore be denied when a specific part of the decision is concerned, because this particular part is challenged both with general arguments (discrimination on ground of nationality) and also with particular complaints (illegal acceptance of competitive tariffs). The applicants are therefore entitled to complain of an infringement of the Treaty not only with reference to the second paragraph of Article 70 but also with reference to the remaining provisions of Article 70 (competitive tariffs).

5 — Conclusion

As far as Case 24/58 is concerned I have no hesitation in acknowledging the applicants' legal interest in the annulment of the decision. Since the proceedings have been brought within the prescribed period, as is shown by referring to the relevant dates (the decision was published in JO of 3.3.1958 and the applications were lodged on 1 April 1959), a further discussion of this part of the proceedings from the point of view of the admissibility of the applications is unnecessary.

II — *Case 34/58*

However, specific problems in the field of admissibility arise also in Case 34/58.

The applicants—the same undertakings and associations of undertakings as in Case 24/58—seek, and they are supported by the French Government, the annulment of a decision of the High Authority of 7 June 1958. In spite of the wording of the application this is in fact an action for failure to act originating from a letter of 26 March 1958 which the High Authority answered in its letter of 7 June 1958 which is at issue.

The purpose of the applicants' letter of 26 March 1958 was to induce the High Authority to send a recommendation to the Federal Government to the effect that for the benefit of new German undertakings a system of tariffs be introduced similar to the one which applies to German undertakings.

The High Authority's answer to this request, in which the applicants expressly referred to Article 35 of the Treaty, was that since the High Authority's decision of 12 February 1958 the whole of the German system of tariffs is no longer valid because the High Authority ordered certain tariffs to be discontinued. The request therefore has no purpose and a specific recommendation to the Federal Government is unnecessary.

1 — Preliminary proceedings and period within which proceedings must be brought

According to Article 35, in order to determine whether an action for failure to act is admissible it is important first of all to ascertain whether all the applicants took part in the preliminary administrative procedure, and in 'raising the matter' with the High Authority. The annexes to the High Authority's statement of defence show clearly that this took place.

Furthermore, specific time-limits apply to an action for failure to act. If at the end of two months the High Authority has not taken a decision on a matter which has been raised, proceedings must be instituted before the Court within a further month. In this case it is not only necessary for the purpose of this question to consider the period which elapsed between the delivery of the High Authority's reply and the institution of proceedings, because the High Authority's answer obviously was only received by the applicants after the expiration of the said period of two months. However, the necessary periods of time appear to have been granted even if the actual reply of the High Authority is disregarded. If the calculation begins with the date when the application was lodged, after allowing for a period of grace of three days based on considerations of distance from France, which, even though it is not expressly mentioned in Article 85 (2) of the former Rules of Procedure, must apply to actions for failure to act, it transpires that the time-limit of two months cannot begin to run before 1 April 1958. Since the applicants' letter is dated 26 March, it may be assumed that the High Authority did not receive it before 31 March. Consequently, complaints concerning the periods within which proceedings must be brought appear to be unjustified.

2 — Is the legal objective of an action for failure to act different from that of an application for annulment?

However, there is another reason why the admissibility of an action for failure to act can be called in question. The issue between the parties is whether the action for failure to act has a *separate objective* compared with the application for annulment in Case 24/58, because the admissibility of such an action brought in addition to the application for annulment can only be justified if it has. It may therefore be asked whether the aim of the action for failure to act is to cause the High Authority to take a step which it is under a duty to take even after the annulment of the contested decision. The effect of a successful action for failure to act is not only that the contested decision is annulled. Under Article 34 of the Treaty the High Authority is also under a duty to take the necessary steps to comply with the judgment declaring a decision or recommendation void.

(a) The legal effects of a successful application for annulment

If the applicants are successful in their application for annulment the High Authority will have to call upon the Federal Government to abolish all special tariffs to which exception is not taken in the decision with the result that Tariff 6 B 1, which is regarded by the High Authority as a general tariff, will be applied in place of those tariffs or another general tariff will be introduced which will then apply to all German undertakings and will also have to serve as a basis for the through international tariff. Following a successful application for annulment the same tariffs applicable to French undertakings would therefore have to be applied to German undertakings. This is what the applicants request the High Authority to do in their letter to it of 26 March, if the application for 'the introduction of similar tariff arrangements for non-German undertakings' is to be understood as having this

meaning. If this is the interpretation of the applications, then there is no special legal interest to protect in the second application. This is the only issue in the action for failure to act, not the surrounding circumstances referred to by the applicants (difference between the persons to whom the contested decision was addressed).

(b) Discrimination on the ground of nationality not taken into account —The tariff situation of the Federal Railways after the decision of the High Authority

The applicants, on the other hand, submit that they have an interest in the second proceedings which is justified by the fact that the German tariff situation has not changed since the contested decision was adopted, first, because the periods of time allowed for the abolition of the tariffs were long and secondly, because the Federal Government has not implemented the High Authority's decision. In addition, when the High Authority examined the special tariffs, it failed to consider them from the point of view of discrimination on the ground of nationality. In this connexion it must be said that the complaint concerning the periods within which the tariffs must be abolished and the complaint of discrimination on the ground of nationality are according to the applicants' application to be considered in the proceedings for annulment. So far as the non-compliance by the German Government with the decision of the High Authority is concerned, the applicants overlook the fact that in their action for failure to act they blame the *High Authority* and not the *German Government* for failing to act. After adopting its decision, the High Authority can be blamed for not going far enough in its criticisms, which is what the application for annulment has done. The High Authority could also be forced in proceedings under Article 88 to confirm that its decision has not in fact been implemented (although the applicants have however no intention of doing so). However, there is no place for an action for failure to act having the objectives mentioned here, in addition to the application for annulment.

(c) Introduction for the benefit of the applicants of a tariff corresponding to the German special tariffs

The applicants' request of 26 March 1958 and their application in Case 34/58 can have another meaning. Their request can be understood to mean that they claim for themselves the right to introduce a tariff corresponding to the special tariffs which are criticized.

If this meaning is accepted, Case 24/58 would be inconsistent with Case 34/58. In the application for annulment the applicants' aim is the abolition of all German special tariffs and then—from the point of view of the High Authority there is no other possibility in this case—the application of Tariff 6 B 1 as a general tariff, whereas in Case 34/58 their objective would be to introduce a tariff for French undertakings corresponding to the system of special tariffs which, according to Case 24/58, must be abolished, that is, to discriminate in favour of French undertakings.

(d) Introduction of a general tariff for complete trainloads

If this interpretation of the claims made in the application leads therefore to a denial of admissibility, there still remains a final possible argument which the applicants stressed during the oral procedure. Irrespective of the question whether the special tariffs challenged in Case 24/58 are abolished or remain in being the Federal Government is to be recommended to introduce a general tariff for the carriage of coal by trainloads to undertakings of the iron and steel industry. The general transformation of the German tariff arrangements including the special tariffs and Tariff 6 B 1 is an objective pursued in legal proceedings which cannot itself be attained by means only of the application for annulment, because, even if it succeeds, this does not mean that a general tariff has to be applied to complete trainloads. Viewed in this way Case 34/58 has its own specific objective which is a good ground for declaring it to be admissible.

The question could perhaps be asked whether such an action for failure to act

could and should have been brought earlier. If the action is considered in the light of the applicants' interest, its only aim is to complain of the application of Tariff 6 B 1 in through international traffic, in which field it serves as a basis for ECSC Tariff No 102, and to have this tariff replaced by another one. It is common knowledge that in 1955 the governments entered into an agreement for the introduction of through international tariffs (cf. JO 1955, 701) which entered into force on 1 May 1955. It was accepted at that time that Tariff 6 B 1, an internal tariff of general application, formed the basis of the through international tariff (cf. the tables showing the limits of the decreasing scale in the Annex to the Treaty). The agreement contains an arbitration clause which reads as follows:

'The Court of Justice of the European Coal and Steel Community shall, in accordance with the conditions prescribed by Article 89 of the Treaty, have jurisdiction to settle disputes between Member States concerning the interpretation and application of this agreement.'

On the basis of this arbitration clause the French Government—the intervener in this case—could have complained of what in its view is an improper application of the agreement by the German Government.

It had also been established at that time—the applicants have mentioned this on various occasions during the proceedings—that the High Authority recognized Tariff 6 B 1 as the German general tariff for the carriage of coal, whereas Tariffs 6 B 30 to 33 were classified as special tariffs, which should be examined in the light of the fourth paragraph of Article 70. It was therefore clear that the incompatibility of these tariffs with the fourth paragraph of Article 70 would not lead to the introduction of another general tariff (even for international traffic).

Following this decision, French undertakings, which as far back as 1956 had complained in several letters about discrimination on grounds of nationality, as is shown in the schedules to the statement of defence, could have raised the matter with the High Authority in accordance with Article 35.

It is true that there is no procedural period of time within which the matter has to be raised with the High Authority.

However, the question arises whether a matter connected with a specific measure which it is desired to modify must be raised with the High Authority within a reasonable time after the occurrence which appears to give rise to criticism. An application lodged in 1958 relating in fact to events occurring in 1954 or 1955, viewed in this way, could be dismissed as inadmissible, even if very broad criteria are applied.

Nevertheless I do not go so far as to recommend this solution to the Court. I am content to draw attention to this problem and I will also consider the merits of the action for failure to act.

C – Are the applications well founded?

I – *Application for annulment*

The first point to consider is whether the application for annulment of the decision of the High Authority of 12 February 1958 is well founded.

The applicants attack this decision in so far as it fails to criticize the special tariffs of the Federal Railways in whole or in part and in so far as it grants time-limits for the abolition of the tariffs to which exception is taken.

1 – Examination of individual tariffs

Just as the applicants criticize in the first place certain tariffs which are dealt with in the decision I will begin my examination by considering individual tariffs and only then ask myself whether these tariffs as a whole are objectionable from the point of view of discrimination on the ground of nationality. If the High Authority is in fact found to have wrongly acknowledged that a particular tariff is a competitive tariff it is unneces-

sary to consider whether there is any discrimination on ground of nationality.

Among the tariffs mentioned in the decision which in the view of the High Authority are competitive, the applicants complain in particular of Special Tariffs 6 B 30 II and 6 B 33 whereas they only challenge Special Tariff 6 B 32 in a general way and together with all other special tariffs from the standpoint of discrimination on the ground of nationality.

(a) General observations on the concept of 'competitive tariffs'

This examination begins with Article 70 of the Treaty, which lays down the powers of the Community in the field of transport. The fifth paragraph of Article 70 refers to *competitive tariffs* in so far as it provides that measures relating to competition between different needs of transport shall continue to be governed by the laws of the individual Member States. It is undoubtedly legitimate to ask—starting with the wording of this provision—what it means, because there is no doubt that, in the absence of an express power vested in the Community to fix tariffs, the other tariffs (for example the special rates and conditions within the meaning of the fourth paragraph) are governed by the laws of the Member States. It appears to be reasonable to assume that—in so far as it refers to competitive tariffs—the importance of the fifth paragraph of Article 70 lies in the fact that it refers to the special features of such tariffs and to emphasize that they are to be dealt with in accordance with their own rules. What are the special features of competitive tariffs? This question was frequently broached in the proceedings and—if I have a correct understanding of the position—in principle was answered in the same way by both parties. It can be understood without going into far-reaching discussions on economics or transport.

Competitive tariffs are specific, that is to say, special, tariffs, which a carrier applies on a particular route, with the object of taking away transportation business from another carrier or protecting its own transportation business from the competition of another carrier (tariffs designed to retain its business). The particular circumstances in which they are applied do not make it possible for them to be compared with other tariffs. To this extent they do not come within the prohibition against discrimination. It is unnecessary to mention that they are caught by the prohibition of discrimination if they are not applied in a similar way to comparable consumers.

Their special treatment is justified by the principles of the Treaty, because undertakings enjoying the benefit of such tariffs have a natural and not an artificial advantage due to the conditions in their locality. They are able to choose between several carriers one of whom rationalizes his work in such a way that he can offer lower charges without forgoing a profit. If another carrier, who does not enjoy the same favourable conditions, competes with these tariffs in order to obtain for himself a specific share of the traffic, there can be no objection against such a tariff arrangement which is in the economic interest of the carrier himself, because it offers nothing which the favoured undertakings did not already have without the competitive measure. The parties not only appear to agree on this elementary evaluation of competitive tariffs, they also agree on the conditions to which such a tariff must be subject in order to be recognized as a competitive tariff:

There must be no doubt that the carrier upon whose rates and conditions a competitor aligns his own charges is not himself applying an illegal special tariff.

There must be actual competition in the sense that a carrier endeavours to entice away the customers of another carrier or to protect his own customers from the competition of another carrier.

If no such competition in fact exists, it is sufficient that there is a serious danger of a competing transport facility being provided, if the rates and conditions of the existing method of transport are raised above a certain level; in these circumstances it is extremely difficult to record a definite find-

ing of 'potential competition', because for this subjective factors (the plans and intentions of the undertakings) are involved which are dependent upon a large number of factors which are not capable of evaluation.

Finally, parity between the competing tariffs must be maintained.

(b) The individual competing tariffs

The issue between the parties in this case is whether the tariffs which are regarded as competitive by the High Authority comply with the factual and legal requirements which have been mentioned. Even in 1953 the members of the Committee of Experts considering this question could not agree. I will concentrate first on the examination of these issues.

The parties have produced a host of facts concerning Tariffs 6 B 30 II and 6 B 33 which differ from each other on a large number of important points and this has caused the Court to obtain an experts' report. It cannot in this case be my responsibility to give full particulars of this report and to attempt a detailed explanation of all the questions arising out of it. I will merely select those points which are of special importance and carry out a critical evaluation of the report in the light of the observations of the parties and also the supplementary observations of the expert with a view to suggesting to the Court after I have done this which of the report's findings it should adopt in its judgment. For the purpose of this evaluation it is necessary for me to describe separately the fields in which the individual tariffs are applied.

(i) Tariff 6 B 30 II

Tariff 6 B 30 II applies to the carriage of solid fuels from the Ruhr to Osnabrück and Georgsmarienhütte.

Let me first consider the carriage of mineral fuels to *Osnabrück:*

The first point to notice is that coal deliveries to the Osnabrück factory are extremely small (1957: 8300 metric tons, 1958: 5700; metric tons); that they continue to decline and will cease in the future. The applicants have not disputed this fact and have conceded that in this case the carriage of fuels to Osnabrück is of little importance. For this reason it is necessary to ask whether there are any grounds for assuming that the applicants have an interest in the abolition of Special Tariff 6 B 30 II in so far as the deliveries to Osnabrück are concerned. The applicants can scarcely be said to suffer any serious disadvantage by reason of the negligible advantage which enures in this way to the Osnabrück factory. Therefore a declaration that this part of the application is inadmissible, because there is no legal interest which the applicants can protect, could be envisaged.

Apart from this fact the following observations remain to be made: carriage by inland waterway is practicable in the case of the Osnabrück factory, because Osnabrück has its own port. No special technical arrangements have to be made in order to use this mode of transport. However no carriage by inland waterway has so far taken place. Further, in the case of Osnabrück there are no deliveries of coke so that it is unnecessary to make any observations on their special features.

When the expert checked the respective costs of carriage he came to the conclusion that the carriage of coal by rail costs DM 11.01 per metric ton whereas the cost by inland waterway was DM 11.39 per metric ton. He concluded that the railway tariff is not correctly aligned on the tariff of the competing carrier and that it could on the contrary be raised by about DM 1 without there being any risk of a switch to the inland waterway.

Although this particular example has little importance, I have some observations to make on the expert's calculations. The expert has taken the railway tariff in force on 1 August 1959 as the basis of his calculations. But for the Court it is the situation at the date when the High Authority adopted the decision which is relevant, since the question which has to be considered is whether the decision was defective when it was adopted. This means that for carriage

by rail from Unna-Königsborn DM 8.80 per metric ton and from Viktor-Ickern DM 9.50 metric ton must be substituted for DM 10 per metric ton. Further, the expert has put in his report the same figure for unloading costs for carriage by rail as he has for combined rail and inland waterway transport (namely DM 0.30 per metric ton). He proceeds on the basis that in the long run special wagons would be used not only for deliveries from port to factory but also for direct deliveries by rail from mine to factory, which would enable unloading to be carried out more efficiently. This assumption does not appear to be justified because the factory is thinking of using its *own* special wagons for deliveries from port to factory, whereas the railways in the foreseeable future for reasons of profitability (absence of any return freight) will not use special wagons for the traffic bound for Osnabrück. In calculating the transport costs by inland waterway the figure for delivery by the railway at the port is not DM 0.48 per metric ton (the rate for 1959) but DM 0.41 per metric ton (the rate for 1958). Finally, if it is borne in mind that carriage by rail from the Viktor-Ickern mines to Osnabrück is dearer than carriage by rail from Unna-Königsborn to Osnabrück, whereas the reverse applies in the case of carriage by inland waterway and that nothing stands in the way of the factory obtaining its supplies of coal in future from its own factories, the following comparison of the rates can be made:

carriage by rail Viktor-Ickern—Osnabrück DM 11 per metric ton
carriage by inland waterway Viktor-Ickern–Osnabrück DM 11.32 per metric ton.

Even if account is taken of the corrections to the expert's calculation, these figures make it clear that, when the decision was adopted, the railways in fact enjoyed an advantage in rates of DM 0.31 per metric ton, which proves that the competing tariff of the Federal Railways has not been correctly aligned in this particular case.

The case of the Georgsmarienhütte factory, which enjoys the benefit of the same tariff, is more difficult. In order to be able to use the inland waterways the undertaking had to create a link between the factory and the Dortmund-Ems canal. We are therefore faced with potential competition between water and rail and the examination of this question has given rise to a great many controversial issues. In his report the expert came to the conclusion that the carriage of coal by inland waterway to Georgsmarienhütte would cost DM 9.90 per metric ton, whereas the railway rate is DM 9.67 per metric ton (place of despatch Königsborn) and DM 9.07 per metric ton (place of despatch the mine in Westphalia). Further, in the case of the carriage of coke by inland waterway a surcharge of DM 0.80 to DM 1 per metric ton would be justified. From this he concluded that an increase in the railway rate of from DM 1 to DM 1.20 per metric ton, would not cause the Klöckner-Werke AG, to which the Georgsmarienhütte factory belongs, to establish a link with the inland waterways which had not existed before, in other words that parity has not been maintained for the railway rate under Tariff 6 B 30 II.

The applicants criticize various parts of the opinion which relate to this case. The principal argument which they put forward is that the Klöckner-Werke would not invest a large amount of money in constructing a new railway line which it claims would not be written off for 13 years. As against this is the fact that there is no evidence that the expert has made a mistake in his technical and economic assessments and in his extremely cautious conclusions relating to the Georgsmarienhütte case. It must not be forgotten that, in the event of an increase in the railway rate, the risks of investing large sums of money in the construction of a railway link with the port appears to Georgsmarienhütte, after a certain point, to be more acceptable than the cost of through carriage by rail. Where that point lies can only be ascertained after difficult forecasts and deliberations which the expert, from the general impression of his report, has undertaken in a manner which is too cautious rather than too liberal.

In calculating the profitability of the rail connexion to the Dortmund-Ems canal the expert assumed that after these plans had been realized, the ore for Georgsmarien-

hütte would also be delivered by inland waterway. In a comprehensive list of questions and observations the applicants have endeavoured to show that in the case of ore deliveries the expert was wrong to assume that an inland waterway could compete with the railways. The Georgsmarienhütte factory itself calculated that the carriage of ore by inland waterway from Emden to Dörenthe would be more than DM 2 per metric ton cheaper than carriage by rail according to the tariff in force. The expert did not adopt this calculation but he did however point out after a very thorough examination that, even if very careful calculations are made and every conceivable disadvantage is taken into account, the carriage by inland waterway of ore supplies would not be dearer than carriage thereof by rail to date and this fact is sufficient for the purpose of taking these modes of carriage into account when calculating the profitability of the new railway line.

In order to undermine the expert's conclusions the applicants finally submitted that the Georgsmarienhütte factory was not free to switch from carriage by rail to carriage by inland waterway because in these circumstances the Federal Railways would withdraw from the Klöckner-Werke AG, which owns the Georgsmarienhütte, the considerably more important special tariff for the carriage of ore to the industrial consortium Hagen-Haspe. The High Authority rebutted this objection during the oral procedure. The tariffs for Hagen-Haspe are competitive tariffs which the Federal Railways has introduced in its own interest.

Some other points in the opinion however call for comment irrespective of the view taken by the applicants. When the expert calculated the capital outlay required for the construction of the rail connexion to the port of Dörenthe he increased the entire costs as calculated by the factory by about 10% to 15%, without giving any special reasons for this increase. One could be tempted to make a corresponding deduction from his final figures (transport costs Dörenthe—factory DM 1.65 per metric ton) but the fact is that it has scarcely any effect on the result.

Another factor is of greater significance for the final result: just as he did in the case of Osnabrück the expert proceeded in the case of Georgsmarienhütte on the assumption that the cost of unloading goods at the factory delivered direct by rail will in the foreseeable future be as high as unloading goods transported to the factory from Dörenthe. In this connexion the High Authority has also pointed out that the lower unloading costs at the factory when goods are carried both by inland waterway and by rail were due to the use of its own special wagons which had not hitherto been considered for direct carriage by rail from the mine and would also not in all probability be used in future, because the use of such special wagons on the railways without a return freight (ore) does not pay. These explanations of the High Authority appear to be convincing and must be reckoned with in the calculation with the result that the computation of the railway rates increases by DM 0.45 per metric ton.

Furthermore the High Authority has justifiably drawn attention to the fact that, as far as both the quality of coal and the production plans of the mines are concerned, there is nothing to prevent Georgsmarienhütte meeting its requirements from its own mines at Viktor-Ickern and this entails an increase of railway rates and a decrease of the rates for carriage by inland waterway. It can be shown by means of statistics that deliveries from Viktor-Ickern were increased at the expense of the other mines.

Having regard to these factors the following comparison can be made between railway rates and rates for carriage by inland waterway:

Railway rate from Viktor to Ickern DM 10.82 per metric ton
Inland waterway rate from Viktor to Ickern DM 9.42 per metric ton
Railway rate from Unna to Königsborn DM 10.12 per metric ton
Inland waterway rate from Unna to Königsborn DM 9.90 per metric ton.

The expert held that a surcharge of DM 0.80 to DM 1 per metric ton (for loss of quantity, increased costs for transhipment of mer-

dise etc.) was permissible. Some of the determining factors for this charge do not apply to Georgsmarienhütte, because the undertaking is able to produce its own coke and because it has special installations for the consumption of small sized coke, which 'arises' primarily during carriage by inland waterways being too small to be used, and is generally regarded as one of the disadvantages of inland waterways. These facts are sufficient justification for reducing by a small amount this surcharge which has a bearing on the calculation of the parity.

Finally the report contains particulars of an allowance which, when comparing the respective tariffs, must be set against carriage by inland waterway for the typical disadvantages of inland waterways (slow moving traffic, large amounts to be transported, changes in the water level, fog, lock repairs etc.). The High Authority has pointed out that these disadvantages do not apply to Georgsmarienhütte, because the factory's storage capacity and the fact that it owns its own mines permit a satisfactory amount of supplies to be obtained by water. By the same token, Georgsmarienhütte even derives a benefit from the length of time required for carriage by inland waterway, because part of the storage charges are thereby avoided. Moreover canal traffic suffers to a considerably less extent from those occurrences which adversely affect transport by river (ice, fog, changes in the water level etc.) and to which the Franco-German Commission set up to study the canalization of the Moselle attached considerable importance when it calculated the freight allowance mentioned above. Carriage by inland waterway as opposed to carriage by rail is especially advantageous for Georgsmarienhütte, because it is an important factor in the sale of the undertaking's products. I believe that there is no reason why the Court should leave these facts out of account when it evaluates the conditions of competition between the railways and the inland waterways. Consequently the extra charge, which in general is usually added to the tariff for carriage by water when railway and inland waterway rates are compared, must in the case of Georgsmarienhütte be put at a lower figure.

In the light of these corrective observations the question arises whether, by applying strict criteria to Georgsmarienhütte, there cannot be said to be serious potential competition between railway and inland waterway and the view cannot be advocated that the special tariffs of the Federal Railways are correctly aligned on the tariff which would apply on the inland waterways. At the beginning of my opinion I have already drawn attention to the fact that the determination of these questions gives rise to difficulties. During the proceedings the applicants and the defendant have stressed that in this case several imponderables and factors dependent upon subjective evaluation rule out the possibility of any reliable findings and each has laid the burden of proof on the other. It seems to me to be doubtful whether such rules of evidence apply to a case of this kind. However the question can remain open because the facts are clear and because conclusions can be drawn from the given facts with some degree of certainty. The determinative question in this case is: was the High Authority right to hold that the Federal Railways' apprehensions that even a small tariff increase might cause the Klöckner-Werke to set up a competitive mode of transport were justified and consequently not to modify Special Tariff 6 B 30 II? In my opinion, which differs from the expert's, having regard to the corrections which have to be made to his report in the case of Georgsmarienhütte, this question can be answered in the affirmative.

However, all this establishes that when the High Authority reviewed this tariff, in so far as Georgsmarienhütte is concerned, its evaluation of the facts and the conclusions to be drawn from them was not wrong in law.

At this point in my opinion I should like to refer once again to the observations relating to Osnabrück which—so far as the parity of the railway tariff is concerned—were indeed negative. Should the Court not accept my conclusions on the questions of admissibility, which are based on the fact that deliveries of coal to Osnabrück represent for the purposes of this case a 'quantité néglige-

able' ('a negligible quantity') in the ordinary meaning of this word, then it would have to embark upon a different deliberation. It is known that the Osnabrück and Georgsmarienhütte undertakings, to which the same tariff applies, are owned by the Klöckner-Werke AG. This company is an important user of other lines of the Federal Railways. However, the possibility cannot be ruled out that the Federal Railways take account for its own benefit of the interests of this important user even in the case of small deliveries to Osnabrück and, notwithstanding certain doubts as to the parity, also applies Special Tariff 6 B 30 II, which it has validly offered Georgsmarienhütte for reasons of competition, to deliveries to Osnabrück. Having regard to the impending losses of the Federal Railways in the case of Georgsmarienhütte it cannot be denied that there is some justification for these considerations. Even if it is confirmed that the applicants have a legal interest in the complaint relating to the tariffs applicable to Osnabrück the conclusion would accordingly be reached that the High Authority was right not to object to these tariffs. The recognition of Special Tariff 6 B 30 II as a competitive tariff in all its fields of application is not therefore an infringement of the Treaty.

(ii) Tariff 6 B 33

Special Tariff 6 B 33 which the applicants have criticized in detail is applied to the carriage of solid fuel from the Ruhr to Peine and Salzgitter. In the case of each of these destinations there is competition from the inland waterways since both the places of despatch and the consignee undertakings are linked to the inland waterways. The figures produced by the High Authority, which are not disputed, also show that up to now by far the greatest part of the transportation has been by inland waterways, and, in the case of *Peine* the same applies to coke.

I will first examine the *Peine* case in greater detail. In his opinion the expert came to the conclusion that the railway rate to Peine is DM 12.17 per metric ton and the inland waterway rate DM 12.75 per metric ton. In his calculation – and this must on no account be overlooked – he has already taken account of the discontinuance of the reduction of canal dues ordered by the High Authority. Had it not been for this discontinuance transport by inland waterway would be DM 1.27 lower. I have already emphasized in this case that it is the Court's task to review the legality of the High Authority's decisions and not to look into the present tariff situation in the Federal Republic of Germany. However, the High Authority in its decision also ordered that the parity of Special Tariff 6 B 33 must be correspondingly adjusted after the reduction of the canal dues. A correct calculation of the parity must therefore take into account either the reduction of the canal dues or the abolition of this reduction for *both* calculations. By doing this the following figures are arrived at:

Railway rate DM 12.17 per metric ton
Inland waterway rate DM 11.45 per metric ton

or (after the reduction had been abolished):

Railway rate DM 13.44 per metric ton
Inland waterway rate DM 12.72 per metric ton

In this connexion the applicants submit – and these observations also apply to Salzgitter – that the rate for carriage by inland waterway is itself partly subsidized and not only to the extent to which it provides for the reduction of canal dues which is criticized. This is shown by a comparison with the freight rates applicable to Lahde, which are almost as high, although Peine is further from the Ruhr. However the expert convincingly accounted for this fact by mentioning the technical obstacles (locks, changing the tug), which on the journey to Lahde cause a corresponding loss of time in spite of the distance being smaller. Transportation to Lahde has another role in the applicants' reasoning. They point out that no Special Federal Railway tariff applies to Lahde. They regard this as evidence to support their argument that the railway tariffs applicable to Peine and Salzgitter are not competitive tariffs but special support ta-

riffs for the benefit of the iron and steel works located there. The High Authority countered this with the argument that the power station at Lahde will continue to use the inland waterway if a favourable railway tariff is introduced, because it has its own fleet for the carriage of coal. In my view this accounts for the situation at Lahde without it being necessary to accept the conclusions which the applicants draw from it.

The proceedings have not confirmed the applicants' argument that in fact the railway tariff has not been aligned on the inland waterway tariff but that conversely the inland waterway tariff has been aligned on the railway tariff. The High Authority has shown that it is precisely along the routes to Peine and Salzgitter that there is particularly keen competition between the inland waterways and the railways which is explained by the large reduction in the volume of transport brought about by the demarcation of the zones. Both carriers therefore are making very intensive efforts to keep the remaining trade to Peine and Salzgitter—which accounts for the low freight rates—without either of them ceasing to operate profitably.

At this point in my opinion I refer to the expert's findings that, apart from the reduction of canal dues, there is no element of subsidy in the rate for carriage by inland waterway. The references to the way in which tariffs for carriage by inland waterways are fixed in genral and also the comparison with the freight rates applied on other inland waterway routes in respect of which any suspicion that they are kept artificially low is out of the question (e.g. the traffic on the Rhine) deserve very special emphasis. At this stage let me recall the High Authority's observations, which are not disputed, on competitive tariffs for coal deliveries *outside the European Coal and Steel Community* (in particular to cement works and power stations in South Germany and Berlin), which show that competitive tariffs for large deliveries of coal are by no means reserved for German iron and steel works, as the applicants assume.

Finally in connexion with this point the Wetzler report (The charges other than operating expenses and the obligations to the public of the German Federal Railways (DB). Report of a Committee of Experts. Volume 9 of Publications of the Federal Ministry of Transport) on the charges other than operating expenses of the German Federal Railways and the conclusions to be drawn from them concerning the real nature of the disputed competitive tariffs must be mentioned. This report was produced upon the instructions of the Federal Railways and the Federal Ministry of Transport. It was intended to induce the Federal Government to approve subsidies for the Federal Railways. The views of the experts summarized in this report are in part contradictory and have not been accepted except in so far as they were aimed at the financial objectives mentioned above. It appeared that the designation of special tariffs in the Wetzler report as support tariffs is misleading in so far as all Federal Railway tariffs which make a loss are treated as support tariffs. A searching examination of the calculations in the tables annexed to this report shows that, if General Tariff 6 B 1 is not applied, there is a loss of revenue, but that, on the other hand, the withdrawal of the competitive tariffs would cause the Federal Railways to lose traffic which would wipe out any profit from the application of the competitive tariffs. The tables and explanations of the report on the other hand do not admit in any circumstances of the conclusion that when the Federal Railways apply support tariffs they operate below prime costs and that by replacing the competitive tariffs with the general tariff the Federal Railways, in spite of the switching of traffic to the inland waterways, would achieve a more favourable economic result with the remaining traffic on the lines in question than they would if they applied the special tariffs.

If, after these general observations on the nature of competitive tariffs and the fixing of rates and conditions for the inland waterways, I turn my attention again to the particular case of the Ilsede-Peine factory, it only remains for me to state that not only the calculations of the expert but more importantly the description of transport practice demonstrate convincingly that in the

ship between carriage by inland waterway and rail showing that water transport is clearly predominant makes it unnecessary to submit any special observations on any allowance which has to be made between carriage by inland waterways and rail and on possible additional charges for the carriage of coke. On this point as well the High Authority's decision does not therefore contain any mistake.

Finally I must reconsider the position at *Salzgitter* which in every way, particularly as far as the amount of coal carried by inland waterway is concerned, is very similar to the situation at Peine. When the expert considered the rates he came to the conclusion that the carriage of coal costs by land on average DM 11.61 per metric ton and by water DM 12.47 per metric ton. In this connexion it must also be borne in mind that the reduction of canal dues were not included in the calculation of the inland waterway rate. Furthermore the rate for carriage by inland waterway was DM 0.21 per metric ton higher at the relevant time (adoption of the decision by the High Authority). These data produce the following corrected figures:

Average railway rate DM 11.61 per metric ton
Average inland waterway rate DM 11.21 per metric ton

or (if, as the High Authority insists, account is taken of the withdrawal of the reduction of canal dues in the case of both modes of transport):

Average railway rate DM 13.08 per metric ton
Average inland waterway rate DM 12.68 per metric ton.

My observations on the question whether the railway rate is aligned on the inland waterway rate or vice-versa are also valid here. The special situation which distinguishes the traffic in the Peine and Salzgitter region (increased competition after the cessation of the transport of goods for Central Germany and Berlin) makes it impossible to determine with any degree of certainty which carrier has aligned itself on the other. Having regard to this special situation the High Authority cannot be blamed for having wrongly acknowledged Special Tariff 6 B 33 to be a competitive tariff. The best evidence that this conclusion is correct apart from the figures produced by the High Authority and the expert is the heavy traffic on the inland waterway which, moreover, tends to expand at the expense of rail traffic.

As far as the special additional charges to be included in the calculation of the parity in the case of coke deliveries by inland waterway are concerned, they may only be taken into account to a very limited extent for Salzgitter and this represents a departure from the general rule. The Mittellandkanal in its present state of development scarcely permits boats carrying coal to be used to capacity, owing to its shallowness, with the result that it is difficult to justify any difference with regard to coke deliveries. Moreover the further consideration of loss of quality does not apply, because Salzgitter has a port, which makes unnecessary the additional transhipment to railway wagons, which is the actual cause of loss of quality. If, finally, account is taken of the fact that only very small amounts of coke are dispatched to Salzgitter, the conclusion is reached that Special Tariff 6 B 33 is not to be criticized on the ground that it applies the same parity for the carriage of both coke and coal.

(iii) Summary of the observations on Tariffs 6 B 30 II and 6 B 33

The separate examination of Tariffs 6 B 30 II and 6 B 33 in the light of the specific complaints made by the applicants, on the basis of the expert's report together with the findings, some supplementary, others corrective, leads to the conclusion that the High Authority cannot be blamed for recognizing the tariffs to be competitive tariffs. In all four cases where these tariffs were applied it can be assumed that the competition of the inland waterways at rates containing no element of subsidy since the modifications ordered by the High Authority came into force, is determinative for the fixing of the railway tariff and that the calculation of the parity was carried out correctly.

(iv) Tariff 6 B 32

Further *Tariff 6 B 32* which has a certain, albeit minor, effect on the carriage of goods to Lübeck-Dänischburg is declared in the disputed decision to be a lawful competitive tariff. The applicants did not make any special submissions concerning this tariff in their application, subsequent pleadings or during the oral procedure. It is only challenged as part of German tariff arrangements which, viewed as a whole, are thought to discriminate on grounds of nationality. Tariff 6 B 32 together with all other special tariffs has therefore only to be considered from this point of view.

(c) Tariff 6 B 31

However, I have some observations to make on *Special Tariff 6 B 31* which applies to Bavarian undertakings in the territory adjoining the borders between East and West Germany. In its contested decision the High Authority has acknowledged in principle the legality of this tariff but at the same time determined that in relation to Tariff 6 B 1 its reduction is to be restricted by progressive stages to 8%. The application does not contain a specific argument challenging this tariff either. It is only in the subsequent pleadings that the applicants dispute with detailed arguments the justification of this measure supporting the works in East Bavaria. The question is whether these arguments concerning facts, for which the application provides no sort of evidence at all, are admissible. The rules of procedure of the Court—in this case the former rules apply—prescribe in Article 29 (3) that the application must be well founded in law and in fact. Even if this article does not require an *exhaustive* statement of the facts and the law relating to the subject-matter of the case, it can only mean, however, that the applicants are under a duty to indicate the subject-matter of the proceedings and the various lines of attack. Giving this provision a wide interpretation I will, however, assume that in this case the individual arguments put forward subsequently by the applicants are admissible for the purpose of buttressing their case and that Special Tariff 6 B 31 is not justified because the undertakings which benefit from it are in a special situation but is part of tariff arrangements which viewed as a whole are discriminatory.

The applicants take the view that the ECSC Treaty, unlike the EEC Treaty, does not permit account to be taken of the special situation of undertakings in the territory adjoining the boundary between East and West Germany. This is their opinion on the interpretation of the fourth paragraph of Article 70 and it was in the light of the main principles referred to in this paragraph that the High Authority determined whether the tariff was lawful. The fourth paragraph of Article 70 refers to special rates and conditions in the interest of one or more undertakings. Article 70 does not exhaustively enumerate the special rates and conditions which are lawful; it merely provides that subsidizing measures must be in accordance with the principles of the Treaty and with that in mind refers to the general principles required for its interpretation. It can therefore be asserted that in general there must be a special situation for special rates and conditions to be lawful (which does not mean that the special situation of an undertaking is in itself sufficient justification in each case). The Treaty does not in principle exclude special kinds of situations (for example those which originate in politics) from the field of application of Article 70. Since the circumstances in which Article 70 applies are defined in general terms it allows special circumstances arising out of the separation of the zones to be taken into account.

In my opinion in the case dealing with the French special rates and conditions I had occasion to make some basic observations on the interpretation of the fourth paragraph of Article 70. I would at this point like to refer to my submissions in that case, recalling only their general purport. The principles of the Treaty do not permit the granting of regular subsidies to undertakings which cannot by their own efforts compete in the Common Market. If the fourth paragraph of Article 70 is to have any meaning at all it must at least allow aid to be granted to such undertakings which do not

need *regular* support but which, owing to unusual and grave circumstances beyond their control, are for the time being in difficulties, provided that it can be assumed that such undertakings after a certain time can compete again without any measures being adopted to support them.

The applicants do not dispute that the undertakings which benefit from Tariff 6 B 31 have to operate in conditions made difficult by the demarcation of the boundary between the two zones. They have not taken the view that these undertakings would in normal circumstances hardly be in a position to withstand competition in the Common Market and furthermore they have not called in question the fact that these particular difficulties have a political origin and are assumed to be of a temporary nature. With reference to what has just been said it is in my view however clear that if the fourth paragraph of Article 70 is strictly construed it can be applied to the undertakings.

However the applicants are of the opinion that a special tariff is no longer justified, because the undertakings have succeeded in replacing the markets lost in the East with outlets in the West. They also refer to these undertakings' rate of expansion. It is true that the applicants overlook the fact that the present situation is also due to the effect of the special tariffs. They have not asserted that the undertakings' operations would have expanded in the same way even if no measures to support them had been adopted. Particular attention must be drawn to the difficulties with which the undertakings are confronted when marketing their goods in Southern Germany in the face of competition from France. Before the war the undertakings could to a great extent make good by sale in the East the disadvantages of their geographical position by means of the advantage offered by the conditions of carriage from Oberhausen or Dillingen to the Saar. Moreover the High Authority has shown that the undertakings have not only suffered a loss of markets in the East but also a loss of business in Central Germany. If the relevant figures relating to the undertakings are compared with the average expansion figures applicable to the Community, it cannot be maintained that all the disadvantages suffered by these undertakings have in the meantime been made good.

The compensation fund mentioned by the applicants for steel sales in South Germany must be disregarded in this connexion, because in general it serves the purpose of reducing the price of steel supplied from a great distance. It does not therefore amount to any special preferential treatment of the Bavarian works.

To sum up I conclude that even if the fourth paragraph of Article 70 is construed strictly the High Authority cannot be blamed for having been wrong to acknowledge that Tariff 6 B 31 complied with the principles of the Treaty. In the present context it suffices to determine that special measures to subsidize undertakings in Bavaria at the time of the adoption of the decision were justified. In this case I do not have to consider whether the authorized rate of the special tariff is appropriate, that is to say, whether it should be higher or lower.

2 — Do the entire tariff arrangements dealt with by the decision contain discrimination based on nationality?

After a separate examination of the tariffs mentioned in the contested decision in the light of the fourth and fifth paragraphs of Article 70, which failed to disclose any mistake on the part of the High Authority, I must now turn my attention to the question whether the *whole of* the German tariff arrangements for the carriage of coal to the iron and steel industry when compared with the tariff applied to the French applicants justify any reference to 'discrimination based on the country of origin or destination' — in short to discrimination on the ground of nationality.

Under the second paragraph of Article 70 this type of discrimination in the words of this article 'in rates and conditions of carriage of every kind' shall be prohibited in traffic between Member States. 'For the purpose of eliminating such discrimination it shall in particular be obligatory to apply to the carriage of coal and steel to or from another country of the Community the scales,

rates and all other tariff rules of every kind which are applicable to the internal carriage of the same goods on the same route'.

The wording of this provision indicates that it contains prohibitions and mandatory instructions to take action for the attention of the governments of the Member States. An act of the High Authority is not necessary for the application of these prohibitions and instructions. However this does not mean that the High Authority has no powers in this field. It is not only obliged under Article 88 in the event of non-compliance with the fourth paragraph of Article 70 to adopt a formal decision recording the infringement of the Treaty; it is also under a duty when examining special tariffs which have to be brought to its notice under the fourth paragraph of Article 70 or notified to it under the seventh paragraph of Article 10 of the Convention on the Transitional Provisions not to lose sight of the question of discrimination on the ground of nationality.

During the oral procedure the high Authority expressed the view that the complaint that it did not consider the whole of the German tariff arrangements for the carriage of coal from the point of view of discrimination on the ground of nationality falls *sui generis* within the scope of the action for failure to act and not of the action for annulment, because it is based on the non-feasance of the High Authority. I cannot accept this view. Not only the wrong application of a provision in the Treaty but also culpable non-compliance with a provision in the Treaty when adopting a decision are good grounds for claiming in an application for annulment that there has been an infringement of the Treaty. There is no justification for bringing proceedings to compel the High Authority to take action, if it has done so but is alleged to have disregarded when making its decision a relevant factor, which might affect the content of the decision.

In connexion with their principal complaint of discrimination on the ground of nationality the applicants lay stress on the second paragraph of Article 70 which provides that 'the scales, rates and all other tariff rules of every kind which are applicable to the internal carriage of the same goods on the same routes' apply to the carriage of coal between Member States of the Community. They infer from this that they have the right to enjoy the benefit of tariffs similar to those which in general enure to the German steelworks which are located at a corresponding distance from the Ruhr. In their view it is not sufficient for them to be granted a tariff, which having regard to its formal designation and the abstract description of the conditions for its application may be considered to be a general tariff but in reality is not generally applicable.

There is a theory in international law that it is impossible to talk about discrimination in international relations if foreigners do not receive worse treatment than the worst-placed nationals. According to this theory the complaint of discrimination on the ground of nationality is ruled out if any coal or steel undertaking pays over longer distances freight rates based on Tariff 6 B 1, which applies to deliveries to the applicants.

In my view, although this theory may have its place in international law, it does not however apply to ECSC law, that is to say, to a Community whose interrelations differ basically from the usual relations governed by international law. This clearly emerges from the second paragraph of Article 70. There is an additional requirement under the Treaty; it provides that there must be equality of treatment of national and foreign undertakings in so far as they are in a comparable position.

The applicants, on the strength of this requirement, make a complaint relating to the method adopted to examine the German rates and conditions and the order in which they were considered: The High Authority should first of all have considered the German tariff arrangements; when doing so they ought to have found that the average level of the German special tariff is lower than the level of Tariff 6 B 1 which applies to the French undertakings and first of all ordered this discrimination on the ground of nationality to be abolished. However there seeems to me, indeed, to be no doubt that when the High Authority examines tariffs in the field of transport it ought not

to be guided by outward appearances, for instance by the designation of the tariffs (special rates and conditions on the one hand and general rates and conditions on the other) and by the limitation of their field of application to a specific route. It is quite clear that the way a tariff is described can distort the general view of the tariff situation. I do not, however, believe that if the High Authority had acted in the way the applicants consider appropriate, there would have been no objections. Comparisons can only be made in so far as comparability exists, that is to say, in so far as the tariffs apply to comparable situations. Those tariffs which have been introduced for special situations, in particular competitive tariffs, must be excluded from the comparison. An undertaking which can make use of two competing kinds of transport is, in the world of transport, not comparable to those undertakings which are exclusively dependent on rail transport. Nor are undertakings, the economic situation of which has been seriously affected by unusual political events, to be compared to undertakings which are unaffected by such exceptional circumstances. When the High Authority endeavoured in this way to determine the extent of this comparability before making comparisons and drawing the corresponding conclusions, there is no evidence that it adopted the wrong method.

The thorough examination by the expert has shown that Tariff 6 B 33 is to be treated as a competitive tariff. After making some necessary corrections to the expert's report, Tariff 6 B 30 II is to be treated in the same way. These two tariffs and the undertakings which benefit from them cannot accordingly be compared with the applicants. Tariff 6 B 32 (the competitive tariff for 'Lübeck-Dänischberg') also cannot be compared for the same reason with the tariff which applies to the applicants.

The examination of the special tariffs for the part of Bavaria adjoining the boundary between East and West Germany has shown that the special position of the undertakings enjoying the benefit thereof justifies in principle their being treated as special cases, which goes to prove that they too cannot be compared to the applicants, because their special position does not have its counterpart in France. In the final analysis the only undertakings remaining which can be compared with the applicants are those in the Sieg-Lahn–Dill area and the tariffs applicable to them. However, with regard to the tariffs applicable to these undertakings the High Authority's decision is negative, that is to say, the High Authority calls for the withdrawal of the applicable special tariff and the gradual introduction of Tariff 6 B 1.

At this stage in my opinion an observation which I have already made in these cases must be emphasized: the object of the proceedings is to review the conduct and decisions of the High Authority and not to examine the tariff situation in Germany, part of which is not at present compatible with the High Authority's decisions. Therefore the question whether the High Authority's *decision* is lawful and its underlying point of view is in accordance with the Treaty must continually be asked. It has become apparent that according to the decision of the High Authority to withdraw Special Tariff 6 B 30 I (the Special Tariff 6 B 30 I for Siegerland) equal treatment of the French applicants and the German undertakings, which within the framework of the decision above are alone to be regarded as comparable, has been guaranteed. Accordingly there is no ground for the complaint that the contested decision discriminates on the ground of nationality.

This finding leads to another. Tariff 6 B 1, upon which the calculations of the rates in the case of the applicants are based, does not since the decision of the High Authority, which primarily applies, in any case play an entirely subordinate part in the German tariff arrangements for the carriage of goods to steelworks outside the Ruhr. It is not only of importance for Annahütte in Bavaria, which according to the particulars supplied by the High Authority takes delivery of about 19 000 metric tons of coal and 15 00 metric tons of coke each year but also in connexion with deliveries to the Sieg-Lahn-Dill area, which according to the High Authority amounted to 873 000 metric tons. Even if the unusually large amounts carried to the Ruhr on the basis of

Tariff 6 B 1 are disregarded, there can be no doubt that, after the High Authority's decision, Tariff 6 B 1 is to be treated as of general application. This view of the matter receives further confirmation if account is taken of the quantities delivered to Luitpoldhütte and Maximilianshütte, in respect of which according to the High Authority's decision a reduction of only 8% compared with general Tariff 6 B 1 is authorized. Accordingly this case, for which special treatment is in principle justified, also approximates to the general rules.

These observations on the field of application of Tariff 6 B 1 as it has to be delimited following the High Authority's decision dispose of many of the complaints which the applicants have made concerning it. The complaints were also relevant within the context of the proceedings for annulment of a decision which did not make a binding statement relating to Tariff 6 B 1, in so far as the applicants make use of the reference to the unfavourable structure of 6 B 1 to substantiate their complaint of discrimination on the ground of nationality. At this point I draw attention again to the observations on the proportion of fixed costs in Tariff 6 B 1 and on the fact that it does not provide for any reduction for complete trainloads. These disadvantages also affect German undertakings, to the deliveries of which Tariff 6 B 1 applies. They cannot therefore be evaluated from the point of view of discrimination on the ground of nationality. I have consequently come to the conclusion that the applicants cannot either ask for the decision of 12 February also to be annulled under the heading of discrimination on the ground of nationality.

II — *Action for failure to act*

Apart from the complaint relating to the period of time for withdrawing the tariffs upon which I shall express my views at the end of my opinion the action for failure to act has still to be examined.

In this action which is concerned with the introduction of a general tariff for complete trainloads for the benefit of the steel industry or—alternatively—with the introduction of a tariff for the French applicants corresponding to the current tariff arrangements for the benefit of the German steel industry, the criticism of Tariff 6 B 1 is of primary importance.

The formal basis of the applicants' application is Article 35 of the Treaty which *inter alia* reads 'Wherever the High Authority is required by this Treaty, or by rules laid down for the implementation thereof, to take a decision or make a recommendation and fails to fulfil this obligation it shall be for . . . undertakings or associations . . . to raise the matter with the High Authority'. Therefore the question to be considered is whether under the Treaty the High Authority is under an obligation or has a power—sufficient for the purposes of the second paragraph of Article 35—to order a Member State to introduce a specific tariff. It is known and has frequently been stressed in these proceedings that the Treaty conceives the fixing of tariffs to be a matter for the Member States (cf. the fifth paragraph of Article 70). Provision is made for the cooperation of the High Authority when a special tariff is introduced. However, in this field its powers are restricted to rejecting a tariff or granting permission, which is temporary or unlimited in time (conditional or unconditional). Moreover, the Treaty contains obligations which have to be complied with by the *States* when they fix their tariffs and this is borne out by the second and fifth paragraphs of Article 70. Failure to fulfil these obligaions may cause the High Authority to introduce the procedure provided for in Article 88, in which it shall record this failure and may indicate how the obligations are to be fulfilled. When tariffs have to be fixed the High Authority can only act within the framework of these narrowly defined alternatives.

1 — Introduction for the benefit of the applicants of a tariff corresponding to the special German tariffs

In this case it must not be overlooked that the object of the applicants' application is not to institute proceedings under Article 88. It can, if necessary, be interpreted in this way. The question to be examined therefore is whether the fact that Tariff 6 B 1 was retained and a tariff requested by the appli-

cants was not introduced amounts to an infringement of the Treaty. The applicants refer in this connexion to the fact that the undertakings in Lorraine were granted special rates and conditions by the railways for the carriage of Ruhr coal and coke during periods in the past when the undertakings in this area were directly served on all transport routes by German railway administrations. They also submit that the Federal Railways are not introducing any competitive tariffs for the carriage of goods to Lorraine, although after the work of canalizing the Moselle has been completed the competition from this inland waterway will represent a threat. These two arguments refer to the introduction of special rates and conditions for the benefit of the applicant undertakings corresponding to those in the German system of tariffs. In this connexion I have the following observation: it is my view that when Member States introduce special tariffs they must also abide by the principle of equality of treatment. When they resolve to introduce special tariffs they are under a duty to grant the benefit of them in all those circumstances where the same conditions hold good. Of the special tariffs, within the proper meaning of that word, of the German Federal Railways the only one which was left after the review by the High Authority was for the benefit of undertakings in East Bavaria and this was only retained because it was subjected to restrictions. I do not know whether the applicants can produce figures capable of proof relating to their undertakings which can go to show that some of them are in a comparable situation to that of German undertakings which benefit from a special Federal Railways tariff. The applicants have not at any stage of the proceedings, so far as I can see, asserted that their situation is comparable to the circumstances of the undertakings in East Bavaria, the applicable railway tariff of which they have in particular criticized, except in so far as the same geographical distance has been a matter which can be compared. In these circumstances it cannot be accepted that there is a comparable situation and that the Federal Railways are under a duty to ensure equality of treatment in transport services. The occasional fixing in the past of tariffs for German railway undertakings for the benefit of the applicants cannot justify any inferences applicable to the harmonization of tariffs in the Common Market pursuant to the Treaty establishing the European Coal and Steel Community, which at the present time is necessary and lawful.

The international treaty for the canalization of the Moselle, in the making of which the contracting parties were actuated by considerations and aims other than the opening of a traffic route, reveals that the interests and aspirations of the management of the German Federal Railways could not be such as to influence the setting up of this transport route which was expected to be competitive. This task of European integration, which from many points of view is exceptionally important, does not offer a suitable basis for comparison before the navigable route from East France to the Rhine is completed. The possibility of a tariff calculation appears at the present time to be ruled out, as is shown by the discussions of transport experts during the past few years.

So far as the competitive tariffs are concerned the German Federal Railways, as the High Authority has rightly stressed, are entirely free to decide whether to compete with the waterway or not. Having regard to this situation it may appear to the railways to be advisable only to compete when the waterway can be used and its competition can be felt. If therefore the Government of the Federal Republic of Germany is held not to be under a duty to introduce for the benefit of the applicants a tariff similar to the German special tariff, the High Authority cannot either be blamed for having wrongly failed to send the Government of the Federal Republic of Germany a corresponding recommendation.

2 — Introduction of a general tariff for complete trainloads

What is the position with regard to the applicants' request that the High Authority should ask the German Federal Government to introduce a general tariff for coal carried in complete trainloads? The reasons for this request are that the charges covered by Tariff 6 B 1 are unfavourable (a small

proportion of fixed costs, high transport costs) and that under 6 B 1 there is no reduction for complete trainloads, whereas the German Federal Railways can require complete trainloads to be assembled in the case of the special rates and conditions which the High Authority has declared are legal.

As far as the latter observation is concerned the applicants overlook the fact that it is not the assembling of complete trains which justifies reductions of the general tariff. It is more correct to say that the Federal German Railways, either because they face *competition* or because an undertaking has to be *supported,* are forced to offer low tariffs in a particular case. In order to secure the profitability of this form of railway transport they have to impose the condition that large amounts are carried. But this does not mean that the economic situation of the German Federal Railways permits them to apply lower tariffs every time large loads are carried and to forgo part of their profits.

To lower the general tariff and to make a general reduction for complete trainloads are measures for the fixing of tariffs which a carrier *may* take, if it appears to him to be expedient to do so for reasons connected with the profitability of his undertaking, but which he is *under no obligation* to adopt. In this connexion it must be remembered that special tariffs for complete trainloads are by no means the normal practice in the Member States of the Community. This also indicates to which part of the Community's operations in the field of transport measures designed to further the attainment of the various objectives pursued by the applicants belong. They are dealt with in detail in connexion with endeavours to harmonize tariffs and conditions of carriage. All those questions relating to the relationship between the rates for particular goods (ore—coal, coal—coke), to the proportion of fixed costs in transport tariffs, decreasing scale of rates, introducing special tariff brackets for specific sectors of the economy, for example for the steel industry etc., form part of this harmonization. For a long time these problems have given rise to difficult discussions upon which the Committee of Experts has already reported. They have to be solved with the agreement of all the Member States. On the other hand the Member States are not under a duty to adopt specific measures straightaway any more than the High Authority has the power to adopt decisions to this effect in this direction. However, having regard to what has been mentioned, the condition precedent of the applicants' request has not been fulfilled and the action for failure to act proves in this respect to be unfounded.

III — *Examination of the periods allowed for the modification of the tariffs to which exception is taken*

After these arguments there still remains a final point which must be looked into, that is the applicants' criticism relating to the periods allowed by the High Authority for the *withdrawal of the tariffs which are criticized.* There are two aspects of the criticism of these time-limits: first because discrimination on the ground of nationality —which in the view of the applicants has occurred—had to be eliminated under the fifth paragraph of Article 10 on the date of the establishment of the Common Market in coal and steel at the latest; secondly because periods of time allowed for the withdrawal of special tariffs—even if discrimination on the ground of nationality is ruled out—must in no circumstances run beyond the end of the transitional period (cf. Article 1 (5) of the Convention on the transitional Provisions).

I can deal shortly with the first complaint. The examination of the contested decision has shown that the High Authority has considered the tariffs with which it found fault in the light of the fourth paragraph of Article 70 (unlawful special rates and conditions) and did not order that they should be withdrawn under the second paragraph of Article 70 (discrimination on the ground of nationality). The only chance of the fifth paragraph of Article 10 applying would have arisen if it had been established that the modification of the German system of tariffs had to be effected by means of discrimination based on nationality.

We have seen that there could be no question of discrimination on the ground of nationality since Tariff 6 B 1 was also

regarded before the High Authority adopted the decision as a tariff of general application and 6 B 30 I, which is the only special tariff to be criticized, was not introduced for reasons based on nationality but partly as a competitive tariff and partly as a support tariff.

As far as the second argument is concermed, it is correct that Article 1 (5) of the Convention on the Transitional Provisions provides that 'measures taken to implement them' (i.e. to implement the provisions of the Convention on the Transitional Provisions) 'shall cease to have effect, at the end of the transitional period'. Since allowing time for modifying special rates and conditions which are not in accordance with the principles of the Treaty is based on the seventh paragraph of Article 10 of the Convention on the Transitional Provisions, the applicants argue that these periods of time cannot run beyond the end of the transitional period. The first question to ask is whether decisions which have permanent effect, for example safeguards within the meaning of Article 29 of the Convention on the Transitional Provisions, but not measures which, like the decision relating to the withdrawal of special tariffs, are single operations which when performed cease to have effect, are included among the measures mentioned in article 1 and within the meaning of this provision. I leave this question open because the view can be held that granting periods of time amounts to a provisional authorization of tariffs, that is to say, a measure having permanent effect. In my view there is another reason why the applicants' complaint is not valid. The first paragraph of Article 1 (5) states that the derogations to which it refers shall cease to apply, save where the Convention expressly provides otherwise. This exception, having regard to its meaning, also includes the seventh paragraph of Article 10 to the extent to which this provision provides one criterion only for limiting the periods of time allowed, namely the avoidance of very serious economic disturbance. It is the general view that this provision serves to obviate the effects of an abrupt withdrawal of special tariffs and therefore can only be given a reasonable meaning if any temporary limitation of the transitional period is disregarded, because when the Treaty was concluded it was impossible to foresee at what date the review of the special tariffs would be completed. Accordingly, specific exceptions within the meaning of Article 1 (5) would be all those exceptions which can be conclusively inferred from a reasonable interpretation of the Convention on the Transitional Provisions. Finally I would also like at this point in my opinion to repeat the view which I expressed in the proceedings relating to the French special tariffs. It is not only the Convention but also the actual provision of the Treaty – Article 2(2) – which permits the granting of periods of time in order to avoid serious economic disturbances. The conditions of Article 2 may be stricter and time-limits which can be granted under this provision have to be shorter. This question can, however, remain open because the applicants have not complained of the actual fixing of the time-limits but simply denied that they can be granted. In any case the Court cannot, on the basis of the subject-matter of this case, review the question whether the time-limits which have been granted are in each case appropriate even if Article 2 was applied.

Accordingly this complaint of the applicants is also unfounded.

D – Final conclusion

Having regard to all these considerations I submit that the Court should dismiss as unfounded:

Application 24/58 for annulment, and
Application 34/58 for failure to act

and order the applicants to bear the costs.

In so far as costs have been incurred by reason of the intervention they must be borne by the intervener.