9. The principle of free movement which prohibits the Member States from refusing entry into their territory of products originating in third countries and which have been lawfully imported into another Member State does not apply to an attempt at direct importation into a Member country having the mere semblance of an import into another Member country, since Article 73 of the Treaty reserves to the Government in whose territory is situated the place of destination of imports the administration of licences relating to them.

Even if it is accepted that the Member States may defend themselves against such proceedings by the application of the mutual assistance provided for in Article 71, the duty to have recourse to the said mutual assistance is not intended to safeguard the interest of any third parties but only the interests of the Community. Consequently these third parties by making an application under Article 40 of the Treaty cannot rely upon the failure to apply mutual assistance in the defence and legal protection of practices which mutual assistance has precisely the object of preventing.

In Joined Cases 9/60 and 12/60

SOCIÉTÉ COMMERCIALE ANTOINE VLOEBERGHS,

Société Anonyme governed by Belgian law, having its registered office in Antwerp, represented by its President and managing director, Mr Antoine Vloeberghs, assisted by J. Mertens de Wilmars, Advocate at the Antwerp Bar, with an address for service in Luxembourg at the Chambers of Ernest Arendt, Advocate at the Cour d'Appel, 27 avenue Guillaume,

applicant,

v

HIGH AUTHORITY OF THE EUROPEAN COAL & STEEL COMMUNITY, represented by its Legal Adviser, Gérard Olivier, with an address for service in Luxembourg at its offices at 2 place de Metz,

defendant,

Application for

Pecuniary reparation from the Community for damage claimed to have been caused by a wrongful act or omission of the High Authority; the annulment of the decision of the High Authority contained in its letter, sent on 16 June 1960 by its President to the applicant.

THE COURT

composed of: A. M. Donner, President, Ch. L. Hammes and N. Catalano (Judge-Rapporteur), Presidents of Chambers, O. Riese, L. Delvaux, J. Rueff and R. Rossi, Judges,

Advocate-General: K. Roemer
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of Fact and of Law

I – Facts

The facts of the case may be summarized as follows:

1. The applicant is established in Antwerp as an importer of solid and liquid fuels. It also runs a factory in the port of Antwerp containing plant similar to the pit-head plant at a mine, especially a modern dense-liquid washing plant, enabling it to treat imported solid fuels (crushing, sizing, screening and washing). It has in addition a factory for the manufacture of compressed fuels.

By letters of 14 March 1953 and 25 January 1954, the applicant drew the attention of the High Authority to the difficulties and restrictions placed by the French authorities on the free movement of anthracite imported by it from third countries and treated in its factories, and asked it to take the necessary measures.

In January 1957, the ATIC (Association Technique de l'Importation Charbonnière) agreed to the delivery of 30 000 metric tons of American anthracite. Subsequently, during 1957, the applicant imported 73 000 metric tons of American anthracite and treated it in its factories with the view to selling it in France, but it did not succeed in obtaining the necessary authorization despite its applications and those of its traditional customers in France. In 1958, certain of the latter renewed their offers to make contracts for a total of 41 000 metric tons but the applicant again encountered a new refusal by the ATIC.

During the years 1957, 1958 and 1959 the applicant persisted in its approaches to the High Authority. In particular, it repeated its claims by letters of 23 May 1959, 27 July 1959, 1 December 1959 and 20 January 1960, in respect of which the High Authority took no action.

In the meantime, at the request of the Governments of Belgium (February 1958), Germany (September 1958) and The Netherlands (March 1959), the High Authority took the view that the conditions for the application of the third paragraph of Article 71 of the Treaty were satisfied and that the Governments concerned were therefore entitled to suspend the free entry of coal from third countries across the internal frontiers of the Community.

The company Antoine Vloeberghs, considering itself to have suffered damage through the behaviour of the High Authority, made an application on 4 May 1960 for compensation against the Community (Case 9/60).

2. On 3 May 1960, that company sent to the High Authority a letter in which, basing itself on Article 35 of the Treaty, it asked it

'to take a decision in respect of the French Government requiring the latter to authorize French importers and/or dealers to buy freely' the anthracite which it imported from third countries and treated in its plant provided that this anthracite was put into free circulation in Belgium. Further, it asked that emergency measures should be taken in respect especially of certain stocks frozen since 1957.

By an answer of 16 June 1960, the High Authority denied that the Vloeberghs company had the capacity to set in motion the procedure under Article 35, and maintained that it was not an undertaking within the meaning of the Treaty and raised an objection of inadmissibility against the application. The High Authority further informed the applicant that it had made contact with the French Government on the subject of the question concerning it, and that it appeared from this discussion that the French Government was not inclined, in the present situation of the market, to alter its position in respect of the applicant.

On 15 July 1960 the Vloeberghs company brought an action for annulment against the decision of refusal contained in that letter (Case 12/60).

II — Conclusions of the parties

In *Case 9/60* the *applicant* claims that the Court should:

'hold the application to be admissible and well-founded;

consequently award the applicant provisional damages of FB 64 852 973;

hold that such damages are to bear interest at 5.5% on the principal, from the date of judgment until the date of payment. Before adjudicating upon the remainder of the application to appoint one or more experts for the purposes of assessing the damage suffered by the applicant between 1957 and the date of the expert's report, following the refusal of the ATIC to authorize the importation of stocks of American anthracite stored in Strasbourg, Givet and Terneuzen, Ghent and Antwerp, especially the costs of storage and warehousing paid by the applicant, the cost of financing the goods in stock, its loss in value and the commercial loss suffered by the applicant; give their reasoned opinion on all other points which the Court considers proper as well as replying to all the questions of the parties in that respect;

make an appropriate order as to costs.'

The *defendant* contends in the first place that the Court should:

'dismiss the application made by the company Antoine Vloeberghs on 3 May 1960 with all consequences in law, as regards costs;'

In the second place the defendant

'reserves its position fully on the assessment of the damage which may according to the circumstances require the services of qualified experts.'

In *Case 12/60*, the *applicant* claims that the Court should:

'annul the decision contained in the letter dated 16 June 1960 sent by the High Authority to the applicant in so far as by that letter the High Authority refused to adopt a decision requiring the said French Government to authorize the free circulation in France of anthracite imported by the applicant from third countries and allowed into free circulation in Belgium, as the applicant had invited it to do by its letter of 30 April 1960, and more especially of stocks of anthracite put into store by the applicant at Strasbourg (30 000 metric tons), at Givet (7 500 metric tons), at Antwerp and Terneuzen (13 000 metric tons), and at Antwerp and Ghent (23 391 metric tons);

hold that the High Authority is required to take the measures involved in the execution of the annulling judgment and es-

pecially to take measures appropriate to ensure equitable reparation of the damage directly consequent upon the annulled decision.'

The *defendant* contends that the Court should:

'dismiss the application made by the company Antoine Vloeberghs with all consequences in law, especially as regards costs'.

III — Submissions and arguments of the parties

The submissions and arguments of the parties may be summarized as follows;

1. *Admissibility*

A — The application in Case 9/60

The *defendant* challenges the admissibility of the application maintaining that the assessment of any liability consequent upon the non-conformity with the Treaty of an act or omission of the High Authority necessarily calls for a review of legality and that in the present case, because the application puts in issue the liability of the Community on account of a failure to act by the High Authority, Article 40, which is relied upon by the applicant, does not apply. The case can be decided only, first by the procedure of an action founded on a failure to act, followed by putting in issue the financial liability of the High Authority in the circumstances laid down in Article 34 of the Treaty.

In support of its contention the defendant puts forward the following arguments:

(a) After having emphasized the various objective conditions to which Article 34 subjects the financial liability of the High Authority, it deduces from them that the authors of the Treaty clearly had here a particularly restrictive intention. From that consideration and from the reference made by Article 40 to the application of Article 34, it deduces that where a decision of the High Authority is annulled persons not mentioned in Article 34 cannot put in issue by means of Article 40 the financial liability of the High Authority for a wrongful act or omission following from the irregularity of the annulled decision.

(b) If the possibility of applying Article 40 when there has not been a prior application for annulment is accepted, it is necessary to accept the co-existence of two different systems of liability dependent upon whether there has or has not been a prior application for annulment.

(c) If the financial liability following from non-compliance with the Treaty of the acts or failures to act of the High Authority could be put in issue by means of Article 40 of the Treaty, those concerned would have a means of setting in motion the judicial review of legality. The High Authority, once found liable under Article 40, cannot of course refuse to draw the consequences from the findings of the Court on the non-conformity with the Treaty of its act or failure to act. Thus the limit imposed by the Treaty as regards those entitled to call for a judicial review of legality would in fact lose all practical significance.

Article 40 must therefore be interpreted as directed towards governing cases quite different from those mentioned in Article 34 such as, for example, liability for the concrete acts of Community institutions and those which may result from defects or negligence in the actual functioning of the departments.

Against this view, the *applicant* puts forward two types of argument:

(a) In the first place it denies that the legality of an act or omission of the High Authority can be reviewed only through proceedings for annulment. This contention finds no support in the positive law of the Member States and it is contradicted by the Treaty itself which provides, in addition to proceedings for annulment (Articles 33

to 35), for other forms of action, including those mentioned in Article 40.

(b) In the second place, the applicant disputes the meaning attributed to Article 34 by the defendant which considers that this provision is applicable where an application for damages calls in issue the legality not only of a decision but, more widely, 'of any act or omission of the High Authority'. Article 34 on the contrary refers only to an action based on liability derived from a wrongful decision or recommendation of the High Authority. The applicant denies that Article 34 would be applicable in case of an implied decision capable of giving rise to an application for failure to act since, on the one hand, the cause of the damage is not to be found exclusively in such refusal, but also and mainly in an omission which may, at the time of the implied decision of refusal, already have lasted for a long time.

On the basis of that consideration and remarking that it is the conduct of the High Authority taken as a whole over several years which it has put in issue by its application, the applicant goes on to challenge the defendant's statement that for the purposes of the present proceedings it is a matter of assessing not the conduct of the High Authority, taken as a whole, concerning the problem of free movement, but only the question how the High Authority by refraining from using Article 88 against the French Government as soon as it received the complaint of Mr Vloeberghs (May 1959), was guilty of a wrongful act or omission which caused damage to the applicant.

Lastly, the applicant states it has the capacity to make an application under Article 34, but since the defendant disputes its capacity as a Community undertaking it observes that in these circumstances the High Authority cannot, except at the risk of denial of justice, deny it the right to bring an action under Article 40.

The *defendant* replies that the Treaty has not established a complete system of legal protection for private persons.

It would, furthermore, deprive of all meaning the reservation made by the first paragraph of Article 40, concerning the application of Article 34, to accept that in case of the annulment of a decision of the High Authority persons not referred to in Article 34 may put in issue, by means of Article 40, the financial liability of the High Authority for an unlawful act or omission stemming from the irregularity of the annulled decision.

Contesting the argument which the applicant had based on Article 34, the defendant observes that it is difficult to understand why in the case of an application on the ground of a failure to act the authors of the Treaty paid no attention to regulating the consequences of a judgment of annulment, when they had just done so in respect of Article 33. In fact since the proceedings mentioned in Article 35 must be regarded as a special case of the action for annulment provided for in Article 33, the absence from the wording of that article of details concerning the character and the grounds of the action as well as the consequences of the judgment can be interpreted only as a reference to the general rules laid down by Articles 33 and 34 of the Treaty.

The defendant also contests the solution following from the argument of the applicant relating to Article 35, according to which only the provisions of Article 40, to the exclusion of those of Article 34, allow the financial liability consequent upon an omission to act to be put in issue. The defendant considers, on the contrary, that the provisions of Article 34 and only those, apply in every case where the liability of the High Authority is put in issue on the ground of the non-conformity of an omission with the provisions of the Treaty and that the liability of the High Authority for the non-conformity with the Treaty of an omission is linked to the use of the action established by Article 34 of the Treaty. The Treaty has tightly bound financial liability for non-conformity with its provisions to the institution of proceedings for annulment. The consequence is that undertakings not entitled to institute proceedings pursuant to Article 35

have neither directly nor indirectly the opportunity of having an act or omission of the High Authority reviewed.

The defendant further disputes that Article 31 gives the Court the power to exercise in all kinds of action the judicial review of legality by considering the conformity of the conduct of the High Authority with the Treaty.

As regards Article 36 the defendant observes that this provision has no relationship to the argument submitted in the statement in defence, which relies exclusively on the meaning of Articles 34 and 40 respectively of the Treaty. Furthermore Article 36 shows only that the unlimited jurisdiction which it establishes allows the Court greater scope than in the action for annulment established by Articles 33 and 35. This is therefore a concept which is the opposite of that espoused by the applicant.

Lastly as regards Article 40, the defendant disputes that by using the expression 'injury caused in carrying out this Treaty by a wrongful act or omission' the authors of the Treaty wished to restrict the jurisdiction of the Court to cases where the liability of the institutions of the Community is put in question on the ground of the non-conformity of their conduct with the provisions of the Treaty; because, starting from this criterion, it is not possible to explain the Court's jurisdiction, laid down in the second paragraph of Article 40 in case of damage caused by a servant in the performance of his duties.

B – The application in Case 12/60

Referring to the reasons given by the defendant in its letter of 16 June 1960 concerning the refusal of the applicant's request, the *applicant* states in its application that the treatment which the crude imported coal undergoes in its plant constitutes an activity which the High Authority itself regards as production activity when it is carried out directly by mining undertakings. It cannot therefore be regarded as distribution when it is the work of an undertaking which does not itself extract the coal from the mine, but confines itself to treating it in order to make a product capable of being distributed.

In its statement in defence, the *defendant* emphasizes first that the application in Case 12/60 brings a new factor into the presentation of the problem raised by the applicant in its application in Case 9/60. The latter is arguing in fact that it carries on a production activity within the meaning of the ECSC Treaty, whereas in its application in Case 9/60 it described itself as an importer-reseller of coal from third countries. That alteration affects the very basis of the action, because if the party concerned could be regarded as a Community producer of coal the coal thus produced by it would therefore be a product originating in the Community.

The defendant observes further that the applicant has thus presented in parallel two arguments which are quite different and even contradictory: one based on a claimed status as a Community producer; the other based on the status of importer-reseller of coal from third countries.

On this subject the defendant maintains:

(a) That the operations of processing coal carried out by the Vloeberghs firm comes within the normal activity of a dealer and cannot confer upon it the status of an undertaking within the meaning of Article 80 of the Treaty.

According to the defendant, the authors of the Treaty, when speaking of production activities as opposed to distribution activities, intended to limit the normal sphere of jurisdiction of the High Authority by referring to the manufacture properly so-called of a product and not merely to simple operations intended to improve the presentation of a product already manufactured, as is so in the case of Vloeberghs.

In cases where the activity in question is carried on immediately upon extraction by the mining undertaking itself, it is regarded, it is true, as a production activity as concerns for example the application of Article 54, but that is so only to the extent to which it constitutes an activity accessory to and connected with the principal activity of the mine.

Although it can be accepted that the accessory follows the principal, the converse cannot be accepted.

The defendant goes on to emphasize that outside the present application Mr Vloeberghs never considered himself as a producer within the meaning of the ECSC Treaty. In fact he sends, pursuant to Article 60, to the High Authority the price lists only for his sales of compressed fuels, and not for sales of anthracite such as those in question in the present case. Further, Mr Vloeberghs has never made investment declarations to the High Authority in accordance with Article 54 of the Treaty.

(b) Furthermore the applicant based its action on its status as a dealer, relying on the right to free movement within the Community for coal from third countries which has been properly cleared through customs in one of the countries of the Community, which shows that the rejection already given to the notice submitted by Vloeberghs under Article 35 is well founded. According to the case-law of the Court in Cases 7/54 and 9/54 on the one hand and 18/57 on the other, undertakings carrying out distribution activities have not the capacity to make an application on the basis of Article 35.

To these arguments the *applicant* replies that, both in its application for damages and in its application for annulment, it put itself forward 'in its sole and real capacity as an importer of coal from third countries in order to sell it in the Common Market after having subjected it to an industrial process'. It disputes that the fact that an undertaking is regarded as carrying on a production activity in the sphere of coal within the territory of a Member State necessarily has the consequence that the coal which is the subject of such activity becomes, through this, a product originating in the Community. In order that an undertaking which treats coal coming from outside the Common Market may be regarded as an undertaking within the meaning of the Treaty it is not necessary, according to the applicant, that its activity should be of such a character as to 'naturalize' the produce subject to industrial treatment by the undertaking.

As regards the character of the activity which it carries on in its plants, the applicant reiterates that the fact that the various operations of crushing, washing and screening and, in another division of its undertaking, the manufacture of compressed fuel, result directly in transforming a raw material into a finished product suffices to bring its activities within the production cycle.

The applicant states also that the argument that the processing of coal on the surface of a mine has the nature of a production activity within the meaning of the Treaty only because it is accessory to extraction is not supported by any argument and is irreconcilable with the wording of Article 80 of the Treaty.

Lastly the applicant states that the observation of the defendant that, outside the present application, it never occurred to it to regard itself as a producer, is irrelevant, since it is precisely in respect of the present application that the question arises and must be resolved. The applicant states that it is ready to accept the legal consequences which may follow for it from the recognition of its status as a producer.

The *defendant* disputes that the operations of crushing, washing and screening of anthracite carried on by Vloeberghs alter the substance of the product thus treated to the point of transforming a raw material into a finished product. As regards in particular the manufacture of compressed fuel, the defendant states that this is an activity which is quite distinct from the one in question in the present case, for the coal which Mr Vloeberghs has not been able to bring into France is anthracite and not compressed fuel. The defendant also finds in the applicant's argument a contradiction of the view held by the applicant that the product coming from his factory must not be regarded as originating in the Community (that argument is furthermore irreconcilable with the very wording of Annex I to the

Treaty). It observes that the problem thus raised is posed in analogous terms in the spheres of ferrous scrap and of steel.

The defendant goes on to state that the number of traders carrying on an activity in Belgium similar to that of the applicant company is seven and not two or three as the latter states and that this comparison with the Belgian traders taken as a whole has no significance for the purposes of deciding an argument which concerns only the activity of the largest among the wholesale traders.

The defendant also observes that, even if the rules laid down by the Treaty in the spheres of prices and production were regarded as applying to the applicant company, it would be necessary to limit the opportunities for bringing actions conferred on it in its capacity as a producer only to cases where its production activity properly so-called is brought into question. It would be necessary therefore in the present proceedings in any case to deny to Mr Vloeberghs the capacity to bring an action for annulment in order to claim a right to free movement which in his own opinion has nothing to do with the treatment to which he subjects the coal which he imports.

Furthermore, the applicant's argument that there are, in respect of the Treaty, different classes of production undertakings subject to different rules, is in contradiction with the very letter of the Treaty where the word 'undertakings' was used in referring to a general definition given once and for all in Article 80 and drawing a distinction only between production and distribution. Further, that argument also runs counter to the very concept of the Treaty by which freedom of movement, escaping the restrictions which may apply to products from third countries, finds its counterpart *inter alia* in subjecting production undertakings to a body of closely interlocking rules.

2. *On the substance of the case*

A - As regards the application in Case 9/60

The High Authority's failure to act

The *applicant* first and foremost emphasizes that the principle of free movement within the Community of coal imported from third countries which had been allowed into free circulation in the territory of one of the Member States is based upon Articles 3 (a) and (f), 4 (b) and (d), the third sentence of the second paragraph of Article 5, Articles 46 and 60 *in fine* of the Treaty and paragraphs 15 and 19 of the Convention on the Transitional Provisions. This principle is not, moreover, contested by the High Authority which recalled its existence to the Governments of the Member States on various occasions and especially on 28 May 1955 and 7 January 1956.

Articles 71 to 75 of the Treaty, far from contradicting the principle of free movement, conferred on the High Authority and on the Council of Ministers the power necessary both to ensure this free movement and to prevent the disadvantages which might follow from it and thus confirm that this principle is one of the rules of the Common Market.

Since it is not disputed that the American coal treated by the applicant had been imported in lawful circumstances which prevent the High Authority and the Council from using in respect of it the powers set out in Articles 71 to 75 of the Treaty, it follows, according to the applicant, that this coal must be able to circulate freely within the Community in the same way as coal originating in the territory of the Community, and that the French Government, by prohibiting its nationals from purchasing this coal because of its origin, has therefore infringed the rule of free movement.

In these circumstances the High Authority had the duty, in accordance with Articles 8, 14 and 88 of the Treaty, to take action to ensure respect for the rules of the Treaty, but although its attention had on numerous occasions been drawn to this fact, it deliberately failed to take the necessary measures.

The applicant sees in this failure to act an *unlawful act or omission* in the execution of the Treaty giving rise to reparation of the damage which it suffered as a result.

The *defendant* maintains that the correspondence produced by the applicant

shows that until May 1959 Mr Vloeberghs, far from basing his claims on the principle of free movement for coal from third countries within the Community, based his conduct on the concept that the operations he carried out were related rather to the commercial policy of the French Government in respect of third countries. It was not until May 1959 that Mr Vloeberghs began to rely on the rules of the ECSC Treaty regarding freedom of movement. But in the meanwhile, faced with the crisis on the market in coal, the High Authority had accepted that the Belgian, German and Netherlands Governments, which had made an appropriate request, were entitled to suspend the free movement of coal from third countries across the internal frontiers of the Community. The French Government, states the defendant, would certainly also have obtained the benefit of mutual assistance if, after having recognized the principle of free movement of coal from third countries, it has asked for such assistance.

The *applicant* disputes that interpretation of the facts and especially that it did not rely on the rule of free movement until 1959. It refers, *inter alia*, to its letter of 14 March 1953 in which it complained to the Market Division of the High Authority of the restraints placed by the ATIC on free movement. The departments of the High Authority replied to the letter claiming that this question did not concern the High Authority, but was within the exclusive competence of the national governments. The applicant reaffirms further that it was its reliance on the application of the Treaty which made it decide in 1954 to add to its crushing and re-screening installations a large modern dense-liquid washing plant. After the difficulties encountered because of the ATIC in 1957, the departments of the High Authority caused it to hope that within the framework of an arrangement with France in respect of the ATIC, a solution to its problems would be arrived at, which explains its great patience before asserting its rights at law.

The applicant goes on to state that the High Authority did not at any time dispute the correctness in law of its argument on the subject of free movement within the Common Market of coal imported from third countries and admitted to free circulation in one of the Member States and that further the High Authority does not in fact dispute that the French Government refuses to conform to that rule.

That explains why the defendant confines its defence to a purely formal plane and carefully avoids the substance of the problem. Furthermore the High Authority itself, as appears from its letter of 16 June 1960 to the applicant company, had on its own initiative made contact with the French Government on the subject of the importation into France of anthracite treated by Vloeberghs, thus impliedly recognizing its duty to intervene.

In its rejoinder the *defendant* indicates its disagreement on the subject-matter of the action as it appears from the reply. The defendant considers that this subject-matter was set out on page 2 of the application and it concludes from this passage that the applicant has not put the liability of the High Authority in issue except to the extent to which the latter abstained from acceding to its requests. To wish now to put in issue the whole of the High Authority's conduct over several years, even before it had been approached by Mr Vloeberghs, as the applicant does in its reply, amounts to altering the subject-matter of its application.

The defendant contests furthermore that the question of the right of free movement within the Community for coal from third countries was raised before 23 May 1959 by Mr Vloeberghs. In his letter of 14 March 1953 Mr Vloeberghs proceeded on the basis that coal treated by him became Belgian coal and had, because of this, the right to free movement like coal originating within the Community. The letter of 25 January 1954 raised only a problem of obtaining foreign currency.

Concerning the installation in 1954 of a large modern washing plant by the Vloeberghs firm, the High Authority replies that the Vloeberghs company had carried

out this installation at its own risk. In fact it was only in 1955 that it finally settled its position concerning the free movement of goods from third countries in respect of the six governments. Furthermore, the Treaty does not in the least guarantee, according to the defendant, free movement for the said products in all circumstances.

The defendant does not dispute the verbal approaches which the applicant made on numerous occasions in 1957 and 1958 to one of the two directors of the Market Division of the High Authority, but it considers that it was a matter of contacts which were not capable of binding the parties and which cannot be placed on the same level as the letter of 23 May 1959.

According to the defendant the fact that the High Authority does not dispute the principle of the freedom of movement within the Community of coal from third countries does not entitle the applicant to conclude that this principle must necessarily lead to the admission to French territory of American coal which Vloeberghs had imported from the United States into Belgium for this purpose. Relying upon the first paragraph of Article 71 of the Treaty, the defendant maintains that 'the choice of a permanent policy of directing imports from third countries (which in the present case finds expression in the ATIC monopoly) comes within the competence of the Governments of the Member Countries and cannot in itself be regarded as contrary to the Treaty' and that 'supposing even that the principle of freedom of movement within the Community for coal from third countries is accepted by the Government concerned, it still remains to decide whether the Treaty offers in practice a way to reconcile its application with the conduct of a permanent policy of direction of imports'. The defendant specifies that 'by adopting (on 18 December 1957) the decision which was the subject of Application No 2/58 by the French Government the High Authority did not intend to decide the question of freedom of movement within the Community for coal from third countries. Neither the recitals nor the operative part of that decision include an express reference to this problem. The High Authority does not therefore claim that by adopting the decision of 18 December 1957 in respect of the French Government, it took the actions necessary to require that Government to accept the principle of free movement within the Community of coal from third countries'. It accepts nevertheless the existence of an indirect link between the problem of free movement raised by the present application and the questions raised in Case 2/58, for that decision of the High Authority showed the incompatibility with the provisions of the Treaty of the prohibition placed on French purchasers on obtaining supplies from non-French dealers in the Community (among whom are persons capable of selling coal from third countries). The existence of Application No 2/58, states the defendant, 'constitutes one of the factors which might have caused the High Authority to refrain until now from initiating the procedure laid down in Article 88 of the Treaty to require the French Government to recognize the principle of free movement within the Community of coal from third countries'.

During the oral procedure the defendant furthermore maintained for the first time that since coal imported from America by the applicant was intended from the beginning for France and not for Belgium it was in Belgium as coal in transit and that in these circumstances, according to Article 73, the administration of import licences came within the competence of the French Government. The question raised by the application has therefore no relationship with that of free movement within the Community of coal originating in third countries properly imported into a Member State.

The applicant contests that argument by asserting that the 73 000 metric tons which the Vloeberghs firm had purchased in the United States and which was intended for the French State had not been in transit through Belgium either legally or economically. This 73 000 metric tons had in fact been released into free circulation in Belgium and left Belgium with export licences.

The defendant opposed the concept supported by the applicant that the duty on the High Authority to take action under Article 88 existed prior to any notice being given and that consequently the financial liability of the High Authority comes into existence at the time when a Government has introduced regulations or taken measures amounting to a failure to comply with the obligations it has under the Treaty.

The defendant maintained that in the case provided for in Article 88, the Treaty left to the High Authority, to the extent to which the procedure laid down in Article 35 is not set in train, the choice of the time to take action. Furthermore, it is not for private persons to open before the Court a discussion on the diligence shown by the High Authority in putting Article 88 into practice.

The obligation to act and the commencement of financial liability do not coincide. This fact is furthermore confirmed by Article 88 which lays down a procedure making it possible to annul with retroactive effect Government regulations which are contrary to the Treaty but which gives the High Authority the means of requiring Member States to put an end to legal situations which are contrary to the Treaty. The defendant expressed doubts on the question whether an individual is entitled to behave as if a Government regulation, regarded by him as contrary to the Treaty but not contested by the High Authority under Article 88, could not be used against him.

The damage

The *applicant* states that it had envisaged deliveries of the order of 70 000 metric tons as from the second quarter of 1957. The impossibility of selling this tonnage in 1957, which was caused as a result of the opposition of the ATIC, caused it damage which it estimates in total and provisionally as a sum between a minimum of FB 69 962 979 and a maximum of FB 99 162 973.

The applicant offers to prove by all legal means the facts and circumstances which it has set out in support of its application, to the extent to which they are disputed. It mentions especially a series of facts which appear to it to be particularly relevant.

The *defendant* denies that the damage suffered by the applicant is due to the behaviour of the High Authority. It maintains that the illegality of its behaviour does not necessarily amount to an unlawful act or omission bringing financial liability with it. In order to prove this act or omission it does not suffice to show that the High Authority abstained, following complaints from Mr Vloeberghs, from applying Article 88 to the French Government but 'it is necessary also, by referring to all the facts and circumstances at the time, to point to special factors which justify the conclusion that there is a wrongful act or omission on the part of the High Authority'.

The defendant further denies the existence of a causal nexus between the criticized behaviour of the High Authority and the damage suffered by the applicant until May 1959, because, even if the High Authority, following the complaints of Mr Vloeberghs as from May 1959, had set in train the procedure laid down in Article 88 in respect of the French Government, his action could not have resulted in compensation for the wrong caused to the applicant, because that procedure has no retroactive scope and merely gives the High Authority the means of requiring the Member States to put an end to situations of law contrary to the Treaty. Further, since the High Authority was not in any case in a position immediately to ensure the application by the French Government of the principle of free movement within the Community of coal from third countries, it would be very difficult to assess the link between the criticized conduct of the High Authority and the impossibility which Mr Vloeberghs always encountered since May 1959 of sending third countries' coal coming from another Community State into France and the more so since at that time the coal market was such as to justify, on the part of the Member States, measures restricting imports from third countries.

In its reply, the *applicant* although accepting the distinction between illegality

and wrong, maintains that for a public administration to commit an illegality is in principle a wrong, except where the illegality is purely formal in the sense that it applies only to matters external to the decision and does not affect in any way the contents of the decision. On the other hand, it is always a wrong 'when it renders illusory the legal certainty to which the party subject to the administration is entitled, or when it shows that the public service is not operating in the conditions of efficiency and legal certainty which one is normally entitled to expect of it'.

According to the applicant the prolonged failure to act of the High Authority which has not required one of the Governments to adhere to such an essential rule as that of free movement is evidence of wrongful conduct.

With regard to the existence of a causal nexus between the damage and the conduct of the High Authority, the applicant mentions that the requirement imposed on the High Authority to ensure respect for the Treaty is not subject to the condition of a prior complaint from the applicant. Consequently that obligation was already in existence in 1957 and 1958.

B – As regards Case 12/60

Infringement of the Treaty

In the application in Case 12/60, the *applicant*, basing itself on arguments similar to those which it set out in the application in Case 9/60, complains that the High Authority has infringed Articles 3, 4, 5, 71 and 75 of the Treaty and the rule of law concerning the free movement of goods imported from third countries.

The applicant maintains further that the High Authority infringed Articles 14 and 88 of the Treaty by refusing to use, after the failure of its approach to the French Government, the powers which those articles confer on it, to require recalcitrant States to conform to the Treaty.

The *defendant* opposes this submission by raising an objection of inadmissibility which it founds on the argument that the contested decision is general in nature.

Referring to the judgments in Joined Cases 7 and 9/54, it maintains that the decision which the High Authority would have to adopt under Article 88 in respect of the French Government in case of annulment of its refusal to act could not be regarded, if account is taken of the contents of the duty which that Government is said to have neglected, as an individual decision; for the real subject-matter of the proceedings is the general rules adopted by the French Government at the opening of the Common Market (Decree of 9 February 1953) which limited free movement of products from other Member States to products originating in the Community.

In its reply the *applicant* puts forward two arguments against the proposition that the contested decision is a general decision.

It states that on the one hand what it requested from the High Authority was not to lay down a rule, but merely to require a particular party, in this instance the French Government, 'to comply with and to apply a pre-existing rule in one or more individual cases' and that on the other hand the contested measure is the High Authority's *refusal* of the applicant's request that it should take action. It is therefore a matter of an individual decision.

The *defendant* disputes the first argument and states that the applicant has in this connexion failed to take account of the scope of Article 88 of the Treaty by seeing that provision only as a method of execution, enabling a rule of law which is no longer in dispute to be enforced in this or that individual case, whereas the dispute between the High Authority and the French Government within the framework of Article 88 turns on the very existence of the rule of law in question and the intervention of the High Authority is directed towards having the general rules in force in France concerning the movement in its territory of coal from other Member Countries of the ECSC modified. On the other hand according to the defendant the second argument would ultimately amount to maintaining that

every decision adopted by the High Authority under Article 35 of the Treaty must necessarily be of an individual nature.

Misuse of powers

The *applicant* further complains that the High Authority has been guilty of a misuse of powers.

Referring to the assertions of the High Authority contained in the statement in defence in Case 9/60, it observes that the defendant shows itself conscious of the fact that if the French Government had no need to call for mutual assistance, as have the Belgian, German and Netherlands Governments, it is because it had already infringed the principle of free movement with impunity. The High Authority therefore knowingly accepts discrimination between the Governments which conform to the Treaty and the Governments which do not conform to it and, consequently, discrimination between the nationals of the various Member States in contravention of Articles 3, 4 and 5 of the Treaty. It has therefore made use of its powers in a manner contrary to the purpose for which these powers were conferred upon it.

The *defendant* replies that this submission is based on the false concept that the High Authority must with the assistance of Article 88 only give effect to a situation defined before the procedure under that article is set in motion. On the contrary, only the reasoned decision taken under Article 88 has, as to the extent of the disputed duty, the character of a declaration which, subject to a right to bring the matter before the Court, is binding upon those to whom it is addressed.

Contesting the complaint of deliberate infringement of Articles 14 and 88 of the Treaty, the defendant denies that in dealing with the French Government concerning the problem raised by Mr Vloeberghs it accepted through this the validity of the latter's position. On the other hand the High Authority cannot in any way be regarded as legally bound by a declaration made outside the procedure laid down in Article 88 of the Treaty.

IV – Procedure

The procedure followed the normal course. At the request of the applicant and with the consent of the defendant the Court joined the two cases on 12 October 1960.

Following replies from the applicant to the questions put by the Advocate-General and observations lodged in respect of these by the defendant the Court, by order of 17 March 1961, decided to hear the parties again.

The parties were heard again on 22 March 1961.

Grounds of judgment

A – The admissibility of the application for failure to act

(Case 12/60)

The defendant maintains that the applicant company cannot be regarded as an undertaking within the meaning of Article 80 of the Treaty.

As is plain from Article 35 an application for failure to act is admissible only if the applicant has the nature of an undertaking within the meaning of Article 80.

The applicant maintains it has the character of an undertaking producing coal by reason of the activities which it pursues by way of crushing, screening and washing of the imported anthracite.

These operations cannot be regarded as production activities as described by Article 80 of the Treaty. In addition to extraction, the Treaty regards as production activities only those which it expressly recognizes as such. To decide whether a particular activity constitutes a 'production' activity it is necessary to refer to the nomenclature of Annex I to the Treaty. If the activity involves a certain degree of processing of the raw material, the decisive criterion is in particular whether after the processing operation the product in question falls within the said nomenclature under a heading different from that under which it appeared previously.

However this is not so in the present case for the original product and the product obtained after crushing etc., come under the heading 'Hard coal' (heading 3100 of the nomenclature).

The activities of crushing, screening and washing consist, as the applicant itself stated during the oral proceedings, in sorting operations enabling pieces of different size, quality and specific weight to be separated, these operations covering neither the processing of a particular product nor the manufacture of a new product. The fact that operations similar to those carried on by the applicant company may be carried on by mining undertakings and that in that case they are considered as forming part of the production of coal, cannot be taken into account because in that context it is an ancillary activity which is concerned and which cannot in any case in itself constitute a coal-producing activity.

Although it is true that the applicant carries on production activities as a manufacturer of briquettes, that capacity has not been taken into account in the present case in which the applicant has instituted proceedings in its capacity as an importer and exporter of, and therefore as a dealer in, coal originating in third countries, whilst its capacity as manufacturer of briquettes plays no role either directly or indirectly in relation to the subject-matter of the dispute.

It follows from the foregoing considerations that the application for failure to act is inadmissible and it is not necessary to consider the other objections raised on this subject by the defendant.

B — The admissibility of the application for compensation

(Case 9/60)

The defendant maintains that where adjudication on the question of liability is linked to the review of legality, Article 40 is not applicable, and that in such a case the proceedings can be decided only by means of an application for annulment followed, after annulment of the disputed measure, by putting in issue the financial

liability of the High Authority under the conditions laid down in Article 34 of the Treaty. Otherwise those concerned would be able to obtain a judicial review of legality even in a case where the time-limit for commencing annulment proceedings is past.

1. The meaning of the first paragraph of Article 40

The first paragraph of Article 40 deals with disputes concerning the liability of the Community for wrongful acts or omissions.

The action for reparation referred to in Article 40 differs from an application for annulment both in its subject-matter and in the nature of the grounds which may be pleaded. As regards its subject-matter, an action for reparation is directed not to the abolition of a particular measure but only to reparation of damage caused by an act or failure to act amounting to a wrongful act or omission. As regards the grounds on which an action for reparation may be based only the existence of a wrongful act or omission can lead to a finding against the High Authority whereas an application for annulment enables the four grounds mentioned in Article 33 to be pleaded.

Article 40 consequently confers on the Court a jurisdiction which is clearly different from that which it exercises in disputes concerning legality.

In the present case the Court is not asked to rule on the question whether it may be pleaded that the alleged illegality of a measure which has not been annulled constitutes in itself a wrong capable of giving rise to a right to reparation under Article 40.

On the other hand in the present case there was no decision of the High Authority creating rights or having legal effects. In these circumstances the infringement of the Treaty of which the High Authority is accused, on the ground that this is inherent in its inaction, may unquestionably be pleaded in support of an action based on Article 40 and there is no need, in considering the present case, to rule upon the question of the admissibility of an action for reparation based on the illegality of a positive act the annulment of which has not been sought.

The difference which exists between the jurisdiction conferred on the Court by Articles 33 and 35, and that which is conferred on it by Article 40, is confirmed by the reservation contained in the first paragraph of the latter article: 'without prejudice to the first paragraph of Article 34'. That phrase excludes any possibility of a reference to Article 34 and refers on the contrary to situations where Article 34 is not applicable, as in the present case.

2. The capacity to bring an action under Article 40

Since, as has already been shown, the applicant does not have the status of an undertaking within the meaning of Article 80 of the Treaty, it is necessary to consider whether it has the capacity to institute proceedings for reparation under the first paragraph of Article 40.

Article 40 does not contain the limits laid down by Articles 33 and 35 as regards the capacity of applicants. Because of the distinction between actions for annulment and actions concerning liability, that difference in wording must be regarded in itself as a factor sufficient to exclude the possibility that the authors of the Treaty intended to lay down, as regards the right to take proceedings for reparation, limits similar to those which they had laid down as regards actions for annulment.

That literal interpretation is confirmed by the following considerations.

An application for annulment makes possible a direct review of the activities of the High Authority leading, where appropriate, to the annulment of illegal acts, whereas an application for reparation can give rise only to an order directed to the High Authority to make good the injury caused by its conduct. An application for annulment has a much more marked impact on the High Authority's field of activity whilst an application for reparation can deal only with the consequences of that activity.

On the other hand the problem arises in a different manner in the case of an action for reparation,

on the one hand because the subject-matter of the application for repaaration is much more limited than that of an application for annulment, and because the basis of the action is subject to proof of the existence of a wrongful act or omission;

on the other hand because no reason can justify the refusal of any legal protection to natural or legal persons who are not subject to the jurisdiction of the Community, when such damage is caused by a wrongful act or omission committed in the implementation of the Treaty, a matter in which the Court has exclusive jurisdiction, whilst any natural or legal person may by application to the competent national courts obtain reparation for damage caused by Community institutions outside the application of the Treaty (third paragraph of Article 40).

For the reasons set out above, the objection of inadmissibility raised by the defendant must be dismissed.

3. Subject-matter of the application

The defendant further maintained that the applicant confined itself in its application to complaining of the High Authority's conduct as from 1957 and that it extended its claim in the reply, in which it belatedly criticized the previous conduct of the High Authority.

It is in the context of the examination of the substance of the case that a decision may be called for on whether a failure to act by the High Authority may constitute a wrongful omission independently of any request from those concerned. Within the context of admissibility it is enough to say that the subject-matter of the claim was set out in the application with sufficient clarity in the arguments relied upon by the applicant, which complains that the High Authority never acted, as it was its duty to do, in order to ensure respect by the French Government for the rule of free movement of products imported from third countries. On the other hand, there must be no confusion between the subject-matter of the application, which is reparation for damage caused as from a particular time, with the legal arguments relied on to show the existence of a wrongful act or omission, since these arguments may be supplemented and expounded in greater detail during the course of the proceedings.

This second objection must therefore also be dismissed.

C— On the substance of the case

(a) The applicant maintains that when the Treaty prescribes the free movement of products of the Member States, this implies also the free movement of products originating in third countries, which are lawfully granted by one of the Member States the right of entry into its own territory.

The defendant does not contest this view, which was adopted officially by the High Authority as from 1955 and formulated by it in its letter sent on 28 May 1955 to the Governments of the Member States in the following terms:

> 'The Community is based, in its own sphere, on the principle of unity, that is to say on that of the Common Market which assumes unrestricted movement of all coal and steel products coming within the jurisdiction of the Community. This principle of the free movement of products laid down in Article 4 (a) of the Treaty applies not only to products originating from a Community country but

also to coal and steel products of third countries, on condition however that they have been imported properly into any country of the Community' (Document No 12 annexed to the application in Case 9/60).

The Court accepts the principle (which is not disputed by the parties) of the free movement of products from third countries and considers that it is not necessary in the present case to examine it in greater detail.

(b) The applicant maintains that the High Authority was guilty of a wrongful omission by abstaining from ensuring respect, by applying the procedure laid down in Article 88, for the abovementioned rule of free movement, and that because of this wrongful omission the applicant was not in a position to make regular sales in France of the coal which it had imported into Belgium, and that consequently the High Authority is obliged to compensate it for the damage caused to it by this infringement of its rights.

The Court, before considering whether the abstention of the High Authority must be regarded as wrongful omission, proposes first of all to to examine whether such abstention (even assuming that it amounted to a wrongful omission) damaged the interests of the applicant in such a way that a right to reparation accrued to it.

Article 4 (a) must be interpreted in the light of Articles 2 and 3 (b), and especially of their respective objectives, that is to say 'progressively bring about conditions which will of themselves ensure the most rational distribution of production' and 'ensure that all . . . consumers in the Common Market have equal access to the sources of production'. The principle of the free movement of goods implied by Article 4 (a) was established especially in the interests of Community production. The extension of that rule to products coming from third countries and properly imported was not adopted for the protection of those products or their producers, but in order to prevent the free movement of Community products being itself diminished or impaired by the establishment of obstacles to the free movement of the said products.

Consequently if the High Authority, which is required to have Article 4 (a) respected by the Member States and Community undertakings, does not carry out that duty, those who are subject to it are entitled to consider themselves to have suffered damage to their legitimate expectations or to their rights and to ask for reparation of the damage which has thus been done to them. It is otherwise when products originating in third countries are concerned because although in certain circumstances these products are allowed to benefit from the application of Article 4 (a) that advantage is only a reflection of the guarantee which the Treaty intended to grant to Community products, so that producers in third countries and traders dealing in their products are therefore not entitled to put forward claims for repara-

tion on the basis of the infringement of some alleged personal right vested in them if it should happen that the above rule is not applied and they suffer damage as a result.

Article 73 assigns the administration of import licences for trade with third countries to the Government in whose territory the place of destination for imports is situated. It emerges from the allegations of the applicant itself, and especially from the document annexed to the application in Case 9/60, that the coal in question was never intended for movement within Belgium or the Community in general, but only for France. The fact of having subjected the coal to washing, screening and crushing in Belgium in no way changes this first and final destination of the coal. The admission of this coal to free circulation in Belgium could be effected without difficulties or charges of any kind. In these circumstances the applicant cannot rely on a possible breach of duty by the High Authority in order to claim compensation for the damage thereby said to be caused to it.

Although the principle of free movement, accepted by the Court, prohibits the Member States from refusing entry into their territory of products originating in third countries and lawfully imported into another Member State, Article 73 of the Treaty on the other hand assigns the administration of import licences for trade with third countries to the Government in whose territory the place of destination for imports is situated. In the present case, as has been said already, what is at issue is an attempt at direct importation into France having the mere semblance of an import into Belgium.

Even if it is accepted that the Member States may defend themselves against such practices by the application of the mutual assistance provided for in Article 71, the duty to have recourse to the said mutual assistance is not intended to safeguard the interests of any third parties, but only the interests of the Community. In making an application under Article 40 of the Treaty, these third parties cannot rely on the failure of mutual assistance for the defence and legal protection of practices which mutual assistance has precisely the object of preventing. In these circumstances the applicant cannot rely on a possible breach of duty by the High Authority in order to claim compensation for the damage thereby caused to it.

Because of these considerations and without its being necessary to consider the applicant's other arguments the application must be dismissed.

D — Costs

Under Article 67 (2) of the Rules of Procedure of the Court of Justice of the European Communities, the unsuccessful party shall be ordered to pay the costs.

In the present case the applicant has been unsuccessful in all its submissions.

It must therefore bear the costs of the proceedings.

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the parties;
Upon hearing the opinion of the Advocate-General;
Having regard to Articles 2, 3, 4, 33, 35, 40, 71 and 73 of the Treaty establishing the European Coal and Steel Community;
Having regard to the Protocol on the Statute of the Court of Justice of the European Coal and Steel Community;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities;

THE COURT

hereby:

1. **Dismisses the application in Case 9/60 as unfounded;**

2. **Dismisses the application in Case 12/60 as inadmissible;**

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

Donner Hammes Catalano

Riese Delvaux Rueff Rossi

Delivered in open court in Luxembourg on 14 July 1961.

A. Van Houtte
Registrar

A. M. Donner
President