OPINION OF MR ADVOCATE-GENERAL LAGRANGE DELIVERED ON 12 MAY 1964[1]

Mr President,
Members of the Court,

In these cases, more than in any others which have come before the Court until now, the oral procedure took the form more of a sequel to and development of the written procedure than of a mere amplification of the submissions and arguments of the parties. There is indeed nothing surprising about this since it is a dispute which is mainly about the proof of damage resulting from a wrongful act or omission the existence of which it is hard to deny by reason of a preceding judgment, or rather to be more precise a previous judgment creating a precedent, namely the judgment in the case of Fives-Lille-Cail and others of 15 December 1961. Now this proof, the absence of which was the only reason for dismissing the first cases, has been difficult to establish and the efforts of the applicants to do so have gone on unceasingly up to and including the last hearing. The continuation of what is in reality a technical discussion, more likely to lend itself to exchanges of pleadings and written documents than to the making of speeches, into and throughout the oral procedure, has proved to be very useful since it has made it possible to define and to limit the points to be discussed, and has indeed done so in such a way that in my opinion the Court is now in a position to give judgment without having to call for an expert's report, although this seemed difficult to avoid during the first stages of the procedure.

However, while making every effort right up to the end to dispute the probative value and the relevance of the evidence put forward by the applicant undertakings, the High Authority has not abandoned the positions of principle which it took up from the very beginning of the written procedure in its defence. It has even said that it stands by them entirely. Therefore the latest stage in the dispute should not make us forget the submissions of a general nature which the defendant puts forward in its defence, and I must start by an explanation of these.

I

1. First of all, as regards the wrongful act or omission, the High Authority, while declaring that it accepts the judgment of 15 December 1961, and while not disputing that it has the force of *res judicata* in regard to the present disputes, 'denies that it has committed any wrongful acts or omissions upon which a right to reparation may be founded' (last sentence of p. 8 of the statement of defence), but says that there are certain differences between the issues dealt with in that judgment and those which are now submitted to you. In particular the defendant stresses that part of the judgment in which the Court held that 'the High Authority's failure to exercise adequate supervision is further aggravated as regards the present disputes' because 'in these cases the assurances with regard to the transport parities . . . were given to the applicants at a time when the High Authority no longer limited its activities to mere supervision of the equalization scheme, but had, by Decision No 13/58, taken over the administration of it' (Rec. 1961, p. 591). The High Authority then stresses that the present disputes call in question, at least in part, assurances given by the authorities running the equalization scheme prior to Decision No 13/58.

1 — Translated from the French.

The applicants have not found it difficult to refute this argument: it has been enough for them to reproduce a certain number of passages from your judgment. It is clearly apparent from these that the Court's ruling was that a wrongful act or omission already existed because the supervision which the High Authority was required to exercise over the equalization scheme had not been sufficient before it took over the administration itself, and the said wrongful act or omission was only 'aggravated' by the persistence of the High Authority's attitude after it had taken the scheme into its own hands. It is admittedly true that the last reason given in this part of the grounds of judgment (Rec. 1961, p. 592, first paragraph) formally bases the responsibility of the High Authority only on the wrongful act or omission which consisted in permitting the 'continuance of past practices' after Decision No 13/58 (in those cases the facts were that 'promises with regard to the transport parity grant' had continued to be made in October 1958). Nevertheless the clarity and the rigour of the grounds of judgment relating to the period prior to Decision No 13/58 makes it hard to conceive that the Court can have felt that a distinction was to be made, as regards the existence of an actionable wrongful act or omission, between promises made before and promises made after that decision came into force. In these circumstances, I do not think that it is necessary for me to give my opinion on this point.

2. The High Authority 'claims to establish the fact that in any event the recognition of a right to reparation is frustrated by an insurmountable legal difficulty'. It is argued that this difficulty consists in its being impossible to conceive—without arriving at what the defendant calls a 'paradoxical, not to say absurd result'—that the High Authority could be ordered to pay damages precisely equal in amount to the payments improperly made to the applicants by way of the transport parity grant, which are payments that the High Authority is in duty bound to require them to return.

It is easy to reply that such a result is not paradoxical at all, and still less is it absurd. This is because it is only the consequence of the distinction between two essentially different claims, the one based on restitution of overpayments and the other on responsibility for a wrongful act or omission. We are dealing with a situation which for example often occurs in France in the administrative courts. This is because in a large number of cases the same court has jurisdiction to adjudicate upon the two claims and this can often lead to a settlement by way of a set-off, in whole or in part.

Moreover in the present case the amount of such damage as may be established is not, as you know, the same as the amount of the sums improperly paid by way of the transport parity. This is precisely because of the grounds given in the last part of your judgment in the Fives-Lille-Cail case.

3. Before going into the questions relating to the various factors used to calculate the damage, I must still examine a number of aspects of a more general nature.

(a) First, and as a matter of general principle, what are the conditions which must be fulfilled in order that justice may require the payment of damages, once responsibility has been established? The eminent representative of the High Authority told us in the oral proceedings that the damage must be 'proved, certain and quantifiable'.

'Proved' is an obvious requirement: the onus of proof lies with the injured party. However the defendant must not remain inactive. It is incumbent on him to produce to the court all the evidence which can be used to dispute the relevance of the evidence put forward by the party opposing him. Even when the

defendant is an administrative body it must, at least within certain limits, produce the documents or the information which it alone possesses in its capacity as a public authority. Briefly, therefore, although the parties oppose each other, they are required, and indeed precisely because they are opponents, to collaborate with a view to enabling the court to decide, with all the facts at its disposal, whether the damage is sufficiently proved, a matter which is in the last resort one for the court alone: I am not here considering a situation in which clear evidence is available in advance.

'Certain and quantifiable damage'—I willingly concede that the damage must be certain. On the other hand I have some reservations as regards 'quantifiable'. Doubtless it must be admitted that the assessment of the damage cannot be arbitrary, but the difficulties in calculating it must not stop the court: this is the case with non-material damage, but even with material damage the fact that certain elements cannot be calculated with a complete guarantee of accuracy is not a sufficient reason for refusing any reparation. For it must not be forgotten that the starting point is a wrongful act or omission, and that it is precisely this which can make it difficult to calculate the amount of the damage exactly. It is surely not for the injured party to suffer from this state of affairs. This is particularly so when, as here, it is necessary to reconstitute fictitiously the situation which would have arisen if the wrongful act or omission had not been committed. When reconstituting a situation in this way, the court may call for the most detailed evidence which can reasonably be produced, having regard to the circumstances of the case. However it cannot ask for more than this, and where necessary it must accept realistic estimates, such as averages prepared on a comparative basis, as satisfactory proof. Experts are always preparing estimates of this sort.

Finally, it is often said that one of the conditions which must be fulfilled in order that damage may be actionable is that the damage must be 'direct', which means that there must be an 'immediate' (and not an 'indirect') link of cause and effect as between the wrongful act or omission and the damage. In the written procedure, the High Authority denies in several passages the existence of such a link in this case.

(b) Turning now to the specific matters in dispute it still remains to consider a series of objections of a general nature raised by the High Authority. These objections are to the effect that nothing proves that even in the absence of the transport parity grant the applicant undertakings would have obtained greater supplies of imported ferrous scrap and lesser supplies of shipyard scrap. Three reasons are given in support of this argument:

1. The Equalization Fund had the power to determine the amounts of ferrous scrap qualifying for equalization payments. In particular they had the power to favour shipyard scrap in this respect. It follows that the undertakings did not have a free choice between shipyard scrap and imported scrap, and that therefore it is definitely not right to say that they would certainly have obtained the latter in place of the former.
2. Shipyard scrap has always been considered of better quality than imported scrap. It is therefore to be supposed that the applicant undertakings would in reality have obtained the same supplies of shipyard scrap as they in fact did even if they had not been given the transport parity grant.
3. The undertakings did not know what the final cost of each transaction was going to be. This prevented them from exercising a choice in placing their orders, influenced only by the promise of the transport parity grant,

as they claim, nor even mainly by it. The said promise could not be the factor determining their choice.

These arguments must be rejected. The first is refuted in cogent and apparently unanswerable terms by the reply, and I take the liberty of referring to it (pages 16 and 17), because the High Authority has refrained from returning to the question subsequently. As to the second, the applicants answer that the quality of shipyard scrap is comparable with the quality of imported scrap, or at least of scrap originating in America, and this point is no longer disputed. The third, which is developed mainly in the rejoinder (pages 37 to 41) is apparently the most forceful.

In fact the uncertain factors pointed out by the High Authority are undeniable, particularly as regards the equalization price which was not known until after the making of the contract. Furthermore the uncertainty experienced by the undertakings with regard to the final cost of a transaction is confirmed by the fact that, having worked out the comparative calculations in the course of the proceedings, certain undertakings have been led to claim a loss greater than the amount of the transport parity reimbursement. This proves, says the High Authority (rejoinder, p. 41), that this repayment 'did not make up for the loss which those undertakings suffered by reason of the fact that they chose shipyard scrap in preference to imported scrap'.

Nevertheless it does seem that in a general way the making of the transport parity grant to the works which were further away from the ship-breakers' yards than from the ports of importation was a factor determining their choice. The example of Pompey mentioned at the last hearing in the oral procedure seems to show that the undertakings attached a decisive importance to it. It may well be that they sometimes made mistakes in their estimates: at the moment when a commercial bargain is struck, the true advantage of it cannot be calculated with the same precision as it can after a detailed investigation carried out several years later, when the financial and commercial documents are looked at together. In reality the damage results from the fact that the freedom of choice of the undertakings was impaired by the promises of the transport parity grant which had been improperly made to them. Therefore the damage exists if (even after the event) it is 'established that the purchase of shipyard scrap without the benefit of the transport parity grant was more expensive for the applicants than an outright purchase of imported ferrous scrap': this is precisely what you held in your judgment of 15 December 1961.

II

It now remains for me to examine whether the applicants have indeed furnished the proof which it is incumbent on them to provide in the circumstances which the Court has defined.

I must first of all state what the factors for comparison are, and it is indeed easy to do so: on the one hand, for the shipyard scrap actually received we have the amount of the charges for loading the scrap at the shipbreaker's yard, plus the transport charges from yard to works. On the other hand, for the same tonnage of imported ferrous scrap notionally received we have the amount of the transhipment charges at the port, plus the transport charges from port to works. The calculation of the first limb of the comparison, which is a matter of fact, does not involve any difficulty. It is otherwise as regards the second, which is necessarily based on matters of conjecture, and it is here that differences between the parties are found. I shall only examine those which remain at issue after the lodging of the documents annexed to the reply. The criticisms of the High Authority are set out in its written observations of 18

March 1964, supplemented by further written observations dated 30 April 1964, and counsel for the applicants has replied to both sets of observations in his oral arguments delivered at the last hearing, on 21 April 1964.

1. Choice of ports

(a) *Mediterranean ports* (pp. 1 and 2 of the observations of 18 March). Relying mainly on the example of Le Creusot, the High Authority criticizes the applicants for omitting from their calculation the ferrous scrap received through Mediterranean ports.

The reply of the applicants on this point (BF 1/2 and 1/3 of the transcript of the oral arguments) seems to me to be convincing. They state, and this is not disputed, that the shipyard scrap could only have been replaced by American scrap, which alone was of comparable quality, and not by scrap originating in Africa, which comes in through the Mediterranean ports. The fact that some African scrap was also imported through Atlantic ports does not really matter because the American scrap is always imported through the Atlantic ports. Thus the omission of the Mediterranean ports seems to be justified.

(b) *Secondary ports* (observations of 18 March, pp. 2 and 3; oral arguments, p. BF 1/3). The High Authority calls attention to the fact that the handling charges are in general much higher in the secondary ports of importation. It argues that the effect of including them is to raise the average costs as calculated by the applicants by 12% and thus to reduce *pro tanto* the amount of the alleged damage.

The applicants reply by saying that the ports omitted from the calculations were only used for minimal proportions of their supplies, and that the tonnage of shipyard scrap at issue, for which imported scrap is conjecturally substituted, itself only represents a very small percentage of the total amount of ferrous scrap imported by each of the applicants. They argue that the effects of the omission on the calculation of the damage are therefore insignificant, and further that it is only natural to take into consideration the ports which they generally use for their imports of ferrous scrap.

I find these explanations convincing.

2. Transhipment costs at the ports

In their original calculations, upon which the conclusions in their applications were based, the applicant companies confined themselves, as regards assessing the transhipment costs, to taking into account the increase of the equalization price by 2 dollars per metric ton laid down by Decision No 18/60 of 20 July 1960 (Official Journal of 24 August 1960, p. 1145) in several of its provisions. It was indeed reasonable to suppose that the point of this increase was to take the port handling charges into account on a flat-rate basis. However the High Authority disputed this method, asserting that the increase of 2 dollars only covered a part of the real costs in question. So the applicants yielded the point and endeavoured to calculate the real handling charges—and this, by the way, gives added importance to the choice of port.

Far from acknowledging the efforts thus made by the applicants to arrive as closely as possible at the actual situation, the High Authority uses them in support of an argument that in acting thus the applicants have altered the legal basis of their applications. This is not my opinion. The legal basis of the applications remains the same: no change has taken place in the kind of wrongful act or omission alleged. As for the damage for which reparation is demanded, this is still the damage re-

sulting from the fact that, according to the applicants, the purchase of the shipyard scrap, without the benefit of the transport parity grant, was more expensive than the purchase of an equivalent tonnage of imported ferrous scrap. All that has changed is that a new method has been used for calculating one of the factors to be taken into consideration for the assessment of the damage.

As to the facts, the applicants have corrected their calculations to take into account certain criticisms which the High Authority made in the rejoinder (pp. 27 to 30). These corrections include: taking weighted averages into account, and no longer arithmetical ones; taking into account that part of the 'dispatch money' which it is customary to give to the forwarding agent; and correcting errors as to parity exchange rates. It seems that there is no longer any room for disputes as to what the port handling charges really were.

3. Transport costs from port to works

(a) *Transport by rail* (observations of 18 March, pp. 3 and 4). In his first address to the Court at the hearing on 12 March 1964, learned counsel for the applicants said (BF 4/2):

'As regards transport by rail, the greatest possible use has been made of the extensive data set out in the High Authority's rejoinder. These data are themselves based on wagon consignment bills sent by the applicants to the High Authority when the equalization accounts were periodically settled up. For the rest, reliance has been placed, in so far as necessary, on the rates charged by the Belgian and French railways, taking full account of corrections justified by cross-checking with the wagon consignment bills.'

In its observations of 18 March the High Authority says that this procedure is not acceptable because it consisted in taking certain data furnished by the defendant itself as the basis for the calculations, although the originals of the documents in which the data is found are still held by the applicants, and the High Authority is only by chance in possession of copies of them.

The reply (oral arguments of 21 April, p. BF 1/4) is that

'The average of the figures set out in the rejoinder for a given journey and a given year has not been the only information used for calculating the total amount of damage. For my clients were also in possession of a large amount of other information, in particular tables compiled by the GIPS which have been lodged with the Court, sent to the High Authority and annexed to the reply. They are documents Nos 45 to 64 (a), A to K. This very extensive documentary material has been used concurrently with the data in the rejoinder for drawing up tables both for rail transport and for transport by waterway. Finally, although many of the applicants have destroyed their accounting documents more than five years old as is permissible under French law, others have forwarded their accounting documents to us. Thus these documents have furnished information which supplements the data in the rejoinder and the tables compiled by the GIPS. This explanation should be enough to dispose of the reservations on the part of the High Authority expressed in its observations.'

Here we have one of the points on which some doubts might still be entertained, more because the problem is such a technical one (and only an expert's report could elucidate it more or less completely) than because of the absence of any documents, since these have been put before you.

(b) *Transport by waterway*. The two points which have given rise to criticism (first demurrage and the costs

incidental thereto, secondly the effect of the tonnages actually carried on the unit cost of transport; p. 4 et seq. of the observations of 18 March) have been settled, as appears from the oral arguments of 21 April (p. 1).

However the High Authority raises yet another objection in its observations of 20 April: it says that the data used in the new tables only relate to 20% of the total tonnage imported by the applicants. The question therefore emerges whether these figures, which apply to deliveries carried out between 1954 and 1958, are sufficiently representative, as the applicants assert. I think it can be accepted that they are.

4. Method of comparing the transport costs

The criticisms made by the High Authority about this seem to me to be directly refuted by the last set of oral arguments addressed to the Court (p. BF 1/6-2/1).

In conclusion I think that the applicants have furnished sufficient evidence to show how much it would normally have cost to import the same tonnage of ferrous scrap as the tonnage of shipyard scrap which in fact they did receive, and on which the transport parity grant had been improperly allowed.

If any doubts were still to remain in your minds on any given point, your right course would be to order measures of inquiry, and indeed the applicants have said that they are ready to accept this. But, given the state of the evidence put forward, it seems to me impossible to dismiss the applications purely and simply, as you did on 15 December 1961, for lack of proof or any offer of proof.

I am of the opinion:

— that the Court should find in favour of the applicants on the basis of their conclusions in the form in which they were finally submitted on 11 April 1964;

— and that the costs should be borne by the High Authority.

OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 19 OCTOBER 1965[1]

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1 — Translated from the German.