3. (a) Orders the defendant and the interveners to bear their own costs;

(b) Orders the defendant to bear the costs of the applicant, apart from the costs caused by the intervention;

(c) Orders the interveners to pay the costs caused to the applicant by their respective interventions.

Donner Hammes Catalano

Riese Delvaux Rueff Rossi

Delivered in open court in Luxembourg on 22 March 1961.

H. J. Eversen
Assistant Registrar
For the Registrar

A. M. Donner
President

OPINION OF MR ADVOCATE-GENERAL LAGRANGE DELIVERED ON 24 NOVEMBER 1960[1]

Summary *Page*

1 – Translated from the French.

Mr President,
Members of the Court,

It is difficult to imagine a dispute better 'prepared' to receive its solution than this, whether in the matter of the written procedure, of the oral procedure or of the measures of inquiry. Thus my ambition would be to give to my own account a length inversely proportional to that of the proceedings: without claiming to arrive at such a result I will at least confine myself to giving my opinion on the various questions which must be resolved without seeking to discuss all the arguments put forward by each of the four parties in a systematic manner and by dispensing, at the outset, with any account of the facts.

I – Application 42/59

First of all, some explanation of Application 42/59. This, entitled 'action on grounds of an *"ultra vires"* decision', claims that the Court should annul the

> 'individual decision of 7 August 1959 of the High Authority rejecting the applicant's *claim for damages*, following express or implied decisions derogating from the equalization levy, based on an extension of the concept of ferrous scrap from own resources.'

The High Authority has not failed to point out that a claim for 'damages', based on an act or omission by the administration, can only come under Article 40 of the Treaty and cannot be the subject of an action for annulment, with which the expression used by the applicant (action on grounds of an *ultra vires* decision) is no doubt in its view synonymous.

During the oral procedure the reasons of a purely precautionary nature for which this application was introduced were explained, the applicant fearing that a limitation period might be invoked against it later if it did not dispute the High Authority's decision of rejection within the legal time-limit: it specified that in fact it did not intend at the present time to bring an action for damages before the Court and it asked only that the Court should take note that it reserves its right to bring a *'fresh* action for damages' against the High Authority—the reply says: 'an action in which the Court has unlimited jurisdiction for damages for a wrongful act or omission', thus slightly modifying the initial conclusions.

I understand the applicant's concern, but the remedy which it believes it has found is, in my opinion, invalid. Its mistake, if it did not intend immediately to commence an action for damages before the Court, was to make a claim to this effect to the High Authority. In fact, it is not necessary, as for example before the French Conseil d'État, in order to commence an action for damages for a wrongful act or omission, to show that there has been a prior express or implied decision: Article 40 of the Treaty does not speak of it and Article 40 of the Protocol on the Statute of the Court lays down only a *limitation* period, which is of five years as from the occurrence of the event giving rise to the action; thus to have brought an action for annulment based on the illegality of a given decision of the High Authority concerning the grant of derogations would not in the least have prejudiced the rights of the applicant in respect of a later action for damages for a wrongful act or omission (save for the question whether illegality alone may constitute a wrongful act or omission, which is a question of substance). But this same Article 40 of the Protocol adds:

> 'The period of limitation shall be interrupted if proceedings are instituted before the Court or if *prior to such proceedings* an application is made by the aggrieved party to the relevant institution of the Community. In the latter event [the article adds] the proceedings must be instituted within the time-limit of one month provided for in the last paragraph of Article 33; the provisions of the last paragraph of Article 35 [that is to say, the action against the implied decision consequent upon the silence of the High Authority] shall apply where appropriate'.

The intention was, in short, that the aggrieved party, instead of commencing his action before the Court, as he is entitled to do within five years, may, if he prefers, in the hope of reaching an amicable solution, apply as a preliminary to the institution, in which case moreover the period of limitation is interrupted and the action against a possible rejection is subject to the limit laid down for actions for annulment.

That is the procedure which the applicant chose by adding to its letter of 29 July 1959 a paragraph III containing a claim for damages, put provisionally at one franc, for a wrongful act or omission, the final amount to be settled by means of an expert's report. It was that claim which was rejected on 7 August 1959 by a letter from the Director of the Market Division.

The application is certainly not admissible.

First of all, the letter does not come from the High Authority. It is signed by the Director of the Market Division, who does not even state that he is acting in the name of the High Authority as a body; as he says:

> '... *the Market Division* ... sees no basis for your claim for damages for a wrongful act or omission.'

Moreover, the application was not made on the basis of Article 35.

Lastly, as we have seen, it emerges from the formal conclusions of the applicant, as specified in the reply, that the applicant intends only to bring an action for annulment. The application contains no claim concerning damages; it does not in this respect reiterate the claim addressed to the High Authority for payment of one franc by way of damages. The action is therefore not admissible under Article 40, nor is it under Article 33, since it is not a question in the present case of a dispute as to legality: that is the subject of Application 49/59.

I do not think, furthermore, that it is in the interest of the applicant for the Court to make an effort to interpret the conclusions of the application widely: the latter in fact would very likely be rejected finally for lack of sufficient justification both as to the existence of the wrongful act or omission and of the amount of the damage, and such a decision would no doubt make the success of a later action even more uncertain. Furthermore, The applicant does not appear at all to seek such an effort from the Court, since it claims to reserve the right 'to make an application within the Court's unlimited jurisdiction for damages against the High Authority for a wrongful act or omission'. It thus accepts that it has not as yet done so.

As to the conclusions claiming that 'note should be taken' that the applicant 'reaffirms that it reserves the right to make a [later] application under the Court's unlimited jurisdiction', it is not for the Court to recognize that right: the applicant means, as it says itself, to reserve that right, and it must accept full responsibility for its actions in that respect.

II – Application 49/59

A – Admissibility

Application 49/59 also raises questions of admissibility, some of which are very delicate. They have been presented to the Court in detail and I will not recapitulate them.

In order to try to find a solution to them I think that it is necessary to consider them in the rather special context of the equalization machinery, as it results, *inter alia*, from Decision No 2/57 and from the judgments already given in the matter.

There are first of all two categories of decisions on which no dicussion is possible and none has been commenced: these are, on the one hand, the regulatory decisions establishing the machinery and laying down the detailed rules for its operation, taken under Article 53 (such as Decision No 2/57), and, on on the other hand, the decisions of an executory character adopted on the basis of Article 92, against which an objection of illegality may furthermore be raised, which effectively safeguards the rights of those concerned.

However, the duty on undertakings to await a final decision taken under Article 92 appeared to constitute an excessive require-

ment, on the one hand, because of the provisional nature of the contribution accounts notified by the relevant bodies in Brussels and, on the other hand, because it involved the unpleasant necessity for an undertaking voluntarily to commit an infringement in order to obtain judgment on a dispute as to the amount of its debt.

An attempt on my part to alleviate that disadvantage, based on the procedure of Article 15 of Decision No 2/57, which allows or requires the High Authority, according to the circumstances, to resolve difficulties arising in the working of the machinery by way of decision, was rejected by the Court (Judgment in Case 20/58, *Phoenix-Rheinrohr* and Others, Judgments of 17 July 1959): it is a question here, you said, of 'directives of an internal character' which could

> 'give rise to immediate duties only on the part of the addressee organization and not of undertakings consuming ferrous scrap.'

That is why the letters of 18 December 1957 and 17 April 1958, of which the first refuses in principle to exempt group ferrous scrap and the second allows exemption in the case of local integration, were not regarded, despite their publication in the Journal Officiel, as decisions against which direct actions could be brought.

However, the Court has accepted that undertakings may dispute, as constituting decisions, *and as if such decisions came from the High Authority itself*, 'notifications' addressed to undertakings by the Imported Ferrous Scrap Equalization Fund in implementation of Article 12 of Decision No 2/57 fixing, albeit provisionally, the amount of the contributions to be paid (SNUPAT, judgment in Joined Cases 32 and 33/58, of 17 July 1959); and the Court also accepted that on the occasion of such actions undertakings might dispute the basis of *interpretations* given by the High Authority in letters of 18 December 1957 and 17 April 1958, although they had not been recognized as being in the nature of decisions.

On the other hand, in the same judgment and in the judgment in SAFE (Case 42/58) of the same day the Court decided that an undertaking could dispute a decision of the High Authority, whether express or implied (it was implied in the two cases under consideration), refusing to grant a derogation in respect of the equalization contribution. In fact, as appears from later passages of the grounds of the judgment in SNUPAT, it was not properly speaking a matter of refusing to grant a 'derogation' in the sense of an 'exemption' but of a refusal to grant a *reduction in contribution* based on an interpretation of Decision No 2/57.

Lastly, in the judgment of 17 December 1959 in Case 14/59 *(Pont-à-Mousson)*, the Court regarded as a decision against which an action could be brought a letter of the High Authority which

> 'intended to settle a point of law, and expressly affirmed the existence of a duty on the part of the applicant, which the latter had disputed.'

This was, of course, a duty involving the requirement that the undertaking should make an equalization contribution, a contribution which it had furthermore paid regularly for a certain time.

Thus the Court has refused to regard as decisions under the Treaty positions adopted by the High Authority on this or that point of law, where, even if they have been published, they have a general and impersonal character and have no direct legal effect in respect of undertakings. On the contrary, the Court accepts that an undertaking may:

1. Dispute as a decision any measure of the Fund notifying that undertaking of the amount of its own contribution;
2. At any time provoke a decision of the High Authority on a question of law, the solution of which is directly relevant to the principle or the extent of the liability *of that undertaking* to the equalization contribution. It is of little importance in either case whether the undertaking concerned has or has not paid contributions previously without complaint.

Such is the case-law of the Court, at least if I have understood it properly, which only the Court is in a position to confirm or deny.

If that is really the position, it follows first, clearly, that decisions against which actions may be brought in this matter can only be individual decisions, since in fact their object is to make a finding as to the existence, absence or extent of a duty on the undertaking making a complaint, which duty flows directly from the fixing of the amount of its contribution.

Another consequence is the complete exclusion of any system founded on the existence of a power which the High Authority might have to grant derogations or exemptions by means of decisions creating rights against which actions may be brought: the High Authority has no such power; it can only *apply* the basic regulatory decisions, by interpreting them where necessary. Any modification of these decisions requires the procedure of Article 53, that is to say a new decision of the High Authority taken with the unanimous assent of the Council. There is therefore no place here for the application of the theory concerning the withdrawal of administrative measures which have created rights. As in tax matters, the only possibility of contentious proceedings are individual proceedings, allowing the taxpayer to dispute the basis of his own contribution in relation to the law and to the regulations, neither he nor the administration itself being bound by interpretations brought to the attention of the public by way of circulars or instructions. The only difference is that in the absence, in the present case, of any procedure for dispute organized by the regulatory decisions, the Court has accepted that undertakings may dispute the basis of their levies within the liberal conditions which I have recalled.

If this reasoning is accepted it follows from it that the SNUPAT undertaking was entitled to dispute the legality of the 'derogations' granted to other undertakings, Breda and Hoogovens in this instance. No doubt it could not do so by disputing the refusal of the High Authority to 'revoke' those derogations as a 'decision' (express or implied), since they amounted in fact only to an *omission to charge* in relation to certain quantities of ferrous scrap used by the undertakings in question. It appears to me important to recall that it could not do so either by disputing the letter of 17 April 1958 granting the right to exemption for ferrous scrap in the case of local integration, since the Court has not accepted that that letter amounted to a decision in respect of which proceedings might be instituted.

But two avenues were open to it: SNUPAT could first of all have disputed the letter from the Imported Ferrous Scrap Equalization Fund of 12 May 1958, regarding it as a decision of the High Authority, not because the amount which was claimed from it in that letter by way of equalization contribution included the value of ferrous scrap used by it which originated from Renault, but because it included, as part of its share, the value of ferrous scrap on which *no levy was made* in the case of Breda and Hoogovens. At least it could have put forward that complaint as a subsidiary matter. It did not do so.

But it could also later have brought the question before the High Authority, since, on the one hand, it was a question of principle, which required interpretation by the High Authority and, on the other hand, the solution to that question had direct effect on the amount of its own contribution. Furthermore—but this is only an argument based on considerations of fair play—it was quite normal that it should do so immediately after the judgment of the Court of 17 July 1959, since, without deciding the question of the legality of the exemptions allowed on the basis of local integration, the said judgment left a substantial measure of doubt—that is the least that one may say—concerning that legality.

Is it possible to interpret the terms of the letter addressed by the applicant to the High Authority on 29 July 1959 in this way?

I think so. In fact, relying (perhaps wrongly, but it is of little importance) on the judgment of the Court, the applicant raises a *point of law*, by maintaining that all group ferrous scrap, without exception, should have been made subject to contribution; it asks, consequently, that the High Authority should

'revoke with retroactive effect . . . all express or implied decisions of derogation'

which the High Authority might have adopted or tolerated, which clearly refers to the absence of a charge on the own arisings of locally integrated undertakings. It thus disputes the interpretation given by the High Authority in its letter of 17 April 1958. On the other hand, it claims that the High Authority should 'fix the new rate of levy', which clearly means that it is asking for a new settlement *of its own contribution* in relation to the supplementary charges which must, in its view, be levied on certain undertakings.

The High Authority did not take an express decision on that request within the period of two months; the only answer, which came furthermore only from the Director of the Market Division, is confined to saying that

'the exact scope of the judgments given by the Court on 17 July, as well as their repercussions on the payment of equalization contributions by the undertakings concerned, will be considered by the departments of the High Authority,'

that information is requested for this purpose

'from yourselves as well as from a number of other undertakings',

and that,

'on the basis of the information thus gathered, the High Authority will then take the necessary decisions.'

That is not a decision, according to your case-law (judgment in SAFE, Case 42/58, of 17 July 1959).

There was therefore justification for an action for failure to act, which was properly formulated within the period laid down in Article 35.

In short, I consider that Application 49/59 is admissible.

But another question, perhaps more delicate than the first, arises: it is that of the *effects of a possible judgment of annulment.* Although that is a question unconnected with admissibility, I think I must consider it, because of its importance and also because it was canvassed at length during the course of the proceedings, although it has constantly been confused with questions of admissibility. The problem displays two aspects:

1. Should the possible annulment of the disputed decision have effects limited strictly to the applicant undertaking or must it lead at the same time to the levying of contributions from the companies wrongly exempted, Hoogovens, Breda and perhaps others, and to a corresponding reduction of the contributions from all the undertakings subject to the machinery?

2. In the latter case, must a limit be fixed to the retroactivity of the supplimentary charges to be fixed?

On the *first question,* doubt arises from the fact that this is a purely *individual* dispute (as we have seen and as is clear from the Court's case-law), which without doubt allows an undertaking to obtain judgment on questions of law which may in themselves have a general scope, but only in relation to the application of them to that undertaking. Normally, the effect of the annulment of an individual decision concerns only the person in respect of whom the decision was taken.

Nevertheless, in the present case I think that the position is different. In fact, the equalization machinery by its very nature interests all the participating undertakings together: the Fund can neither make a profit nor a loss and any reduction or increase in the contribution of one undertaking has an automatic repercussion on the amount of the contribution of all the others. On the other hand, it would be quite inequitable, and even absurd, to calculate in a purely fictitious manner the new charges consequent upon the decision of law taken by the Court and not to recover that part, necessarily small, corresponding to the reduction to which the *undertakings making the complaint* is entitled. That would cause all the other undertakings consuming ferrous scrap to make complaints and, possibly, to initiate proceedings to obtain the same advantage. It must therefore be accepted that, despite the individual nature of the decision to be annulled, a judgment of annulment would

have the legal effect of requiring the High Authority to lay down or to provide for the establishment of new criteria for calculating the charge in accordance with the judgment, which would be applicable to all the undertakings. Any other solution would disregard the principle of equality and unity which is at the basis of the equalization machinery established as between competing undertakings in their common interest. It is possible to find in the national laws analogies on this subject; I for my part know of some in French law. The Court is aware, furthermore, that the High Authority has very widely applied this principle in its Decision No 13/58 of 24 July 1958, adopted following the *Meroni* judgment which, nevertheless, only annulled an individual decision of recovery which was adopted in respect of a single undertaking.

The second question, that of retroactivity

The principle of retroactivity hardly appears disputable to me, for the reasons which I have already put before you in my opinion on the *Phoenix-Rheinrohr* case, amongst others, and to which I would ask the Court kindly to refer (pages 206-207 of the French edition of Volume V). As to the period to be envisaged, I suggested, in the absence of any regulatory provision, the application of the concept of 'a reasonable period of time' which the Court has used in another case *(Algera and Others,* 12 July 1957). That idea was reiterated and the argument was put forward especially by the interveners, who observed that a period of several years could not in their opinion be regarded as 'reasonable' and would adversely affect the legal certainty of the undertakings.

In that respect, there must be a clear understanding: although the concept of 'a reasonable period of time' may be borrowed from the *Algera* judgment, it is clear that the *assessment* of the period must be very different in the two cases. In the *Algera* case, it was a matter of the period within which the administration, in connexion with the civil service, may withdraw an illegal decision which has created an individual right in favour of an official: such a period must necessarily be relatively short, of the order of a few months (in France, for example, it is two months, that is to say equal to the period within which an action may be brought, at the expiry of which the decision becomes final). In the present case it is quite another matter: it is a question of the period during which *supplementary charges* may be settled, and therefore of the making good of omissions or inadequacies in the calculation of a contribution; taxpayers have no 'individual right' not to pay their taxes because of the mere fact that they have not been required to pay them or have been required to pay only a part. It is therefore rather a question of the *period of limitation* and, in this respect, the order of magnitude of a 'reasonable period of time' is several years, not several months.

I do not think that there is reason for the Court to come to a decision in that respect, in the event of its finding in favour of the applicant, since that would involve the execution of the judgment of annulment, which is a matter for the High Authority under Article 34. Let us take note only that because of the unified nature of the machinery, the relative brevity of its period of operation (1 April 1954 to 31 October 1958) and the provisional nature of its accounts, it might appear reasonable to accept that supplementary charges might be established for the whole period of operation of the machinery. It is, furthermore, in this way that the High Authority envisages the regularization of the equilization machinery (*Eighth General Report* No. 78, pp. 157 and 158).

B — *The substance of the case*

On the substance, the discussion may be reduced to two questions:

1. Does the so-called criterion of 'local integration', as it was defined especially by the High Authority's letter of 17 April 1958, that is to say, the existence of an 'industrial group within which own arisings circulate in the same manner as in a single undertaking', legally justify the equation of arisings recovered in such undertakings with 'own arisings' not subject to the equalization con-

tribution, since they are not 'bought scrap'?

2. Are the 'derogations' granted to Breda and Hoogovens justified?

It is self-evident that if an affirmative answer is given to the first question, an affirmative reply must also be given to the second. In fact it is neither disputable nor disputed that the two industrial complexes of Sesto San Giovanni and IJmuiden meet the criteria laid down by the High Authority.

On the other hand, if those criteria were found to be baseless, it would then be necessary to consider further whether a failure to impose the levy could be justified for other reasons.

The first question deals with the interpretation of the basic decisions, for which the case-law of the Court and especially the judgment in *SNUPAT* (Joined Cases 32 and 33/58, of 17 July 1959) provides important indications.

The second leads to an examination of the particular case of each of the two undertakings under consideration. That fact, let me say it in passing, accentuates the 'individual' nature of the proceedings, because of the fact that the applicant disputes essentially the 'derogations' granted to those two undertakings, which, for their part, energetically defend the lawfulness of the measure taken in respect of them because of their special situation.

1. The criterion of local integration

The equalization contribution is due, as the Court is aware, from the 'undertakings referred to in Article 80 of the Treaty, which are users of scrap' (Article 2 of Decision No 2/57; Article 2 of Decision No. 16/58, chronologically the latest). The basis of the contribution is the '*consumption of bought scrap*', which is calculated by determining the aggregate consumption of ferrous scrap from which are deducted 'own resources'.

Thus two questions, and two questions only, may arise:

1. What must be understood by 'bought scrap', as opposed to 'own resources', within the meaning of the basic regulatory decisions?

2. Is the wording of those decisions, once interpreted, either incompatible with the very purpose of the financial arrangements or contrary to the Treaty? The greater part of the judgment of 17 July 1959 is devoted to a consideration of questions of the second type.

But in no case, as I have already mentioned, can there be any question of accepting that the High Authority has the right to derogate, in the absence of an express provision (as, for example, that of Article 7 of Decision No 2/57), from the application of the rules adopted on the basis of and in accordance with the forms laid down in Article 53.

What did the judgment of 17 July 1959 decide?

It decided:

1. That deliveries of ferrous scrap having the legal nature of a 'purchase' had the effect of rendering such ferrous scrap subject to the equalization contribution in accordance with the wording of Decision No 2/57, even if it was a question of ferrous scrap known as 'group scrap';

2. That the charge on 'group scrap', following thus from Decision No 2/57, was itself in conformity with the purpose of the equalization machinery and in accordance with the Treaty, whilst on the contrary the exemption of such scrap would have been illegal from those two points of view;

3. That the exemption of own resources is lawful and could legally be provided for by Decision No 2/57.

The central ground of the judgment, which all the others only amplify, appears to me to be that in which the Court recalls the principle of the equalization machinery as it was established:

'The purpose of equalization is to maintain the price of ferrous scrap at an acceptable level; however, in order to achieve that objective the High Authority has established financial arrangements the principle of which is to ensure that the excess price of imported ferrous scrap is borne by all the consumers of ferrous scrap; consequently, *it is not participation in the ferrous scrap market* which gives rise to the equalization

levy but the *consumption of ferrous scrap; all consumers* are therefore automatically required to pay equalization contributions in order to finance the equalization fund.'

Thus the Court has categorically set aside the 'economic' point of view, that is to say the *market* point of view, concerning which I queried in my opinion concerning the German cases, whether it should not be taken into account at least to a certain extent.

I think that the reminder so clearly given by the judgment of the Court of the principle which is the basis of the equalization levy, that is to say, the consumption of ferrous scrap, and not participation in the market, must lead to disapproval of the criterion of local integration as it has been accepted by the High Authority.

(a) Interpretation of the basic regulatory decisions

First of all I do not think that it is possible, from this point of view, to accept exemption by the mere operation of an *interpretation* of the basic decisions, that is to say, to regard the scrap in question as not being 'bought scrap' within the meaning of those decisions.

For group scrap, such an attempt could have been envisaged (and I myself envisaged it) to the extent to which the market point of view was accepted, the expression 'bought scrap' being then extended to mean 'scrap bought on the market'. There can no longer be any question of this after the judgment of the Court.

But even for the undertakings' own 'arisings' circulating in an industrial group between undertakings which are different legal entities that does not appear to me to be possible either: if I thought I might be able to accept it that was because, here also, I thought I should take account of the market concept. I said (Rec. 1959, p. 203) that:

> 'ferrous scrap which circulates within a single industrial group is normally free from any market influence.'

If on the contrary one adheres strictly, as the Court has done, to the principle of the consumption of ferrous scrap being the basis of the levy, it is hardly possible to interpret the expression 'bought scrap' otherwise than in accordance with the purely legal criterion of 'ferrous scrap which has been bought' and, consequently, to interpret the expression 'own resources' otherwise than as resources belonging to the undertaking itself. Thus, the exemption of own arisings passed by one undertaking to another within the framework of a local integration appears to me to be contrary to the basic regulatory decisions.

(b) Legality of the basic regulatory decisions

However, and this is the second point, are not those decisions themselves contrary to the Treaty or to the fundamental principles of the equalization machinery, in which case exemption must be regarded as legal, and has having been wrongly omitted by the decisions? The objection of illegality accepted by the case-law allows and even requires a decision to be taken in that respect.

I think that from this point of view also the criterion of local integration adopted by the High Authority does not suffice to justify an exemption.

If in effect it is the *consumption of ferrous scrap* which constitutes the basis of contribution, it follows that this must apply to all scrap purchased by an undertaking to be consumed in its plant as one of the raw materials used for its own productive activity in the steel sector.

It is of little importance in this respect whether such operations are carried on in order to produce a crude product intended to be sold on the market or in order to manufacture more highly finished products in an integrated factory: it is enough that there should be a 'product' of which the name appears in Annex I to the Treaty for whoever undertakes such production to be regarded as an undertaking within the meaning of the Treaty. That is the concept which was accepted in the *Pont-à-Mousson* judgment.

If therefore the manufacture of various products is carried out by legally distinct

persons, each of them is an 'undertaking' within the meaning of the Treaty, because it is clearly 'engaged in production', and the acquisition by one of them of ferrous scrap consisting of arisings of the others necessarily gives such scrap the nature of bought scrap, which is used for production different from that engaged in by the undertaking which transfers it: it is neither the 'own arisings' nor the 'own resources' of the undertaking which acquires it.

There might, no doubt, be a temptation to accept, in support of a contrary opinion, the argument put forward in the *SNUPAT* judgment, based on the fact that the ferrous scrap thus recovered would be subject to a double charge. But in my opinion the scope of that argument, which the Court used merely to justify the principle of exemption of own resources (the question of local integration having been formally reserved), must not be over-emphasized.

In fact it is only partially true to say that if the ferrous scrap in question was not exempt, it would bear the equalization contribution twice. It is only true in fact to the extent to which the ferrous scrap has entered into the composition of the product. With much skill but with even more loyalty, the High Authority's eminent counsel, when he took up the argument on his own account, chose as his hypothesis a steelworks using only ferrous scrap. But no steel, even in an electric steelworks, is produced from 100% ferrous scrap. At Hoogovens, for example, we were given the proportions: in the open hearth furnace approximately 50% pig iron is used with 50% ferrous scrap and, in the oxygen furnace, which is also used for that part of the production intended for Breedband, that proportion is only 25% ferrous scrap. It follows, to keep to this example, that the arisings which occur at Breedband contain a proportion of ferrous scrap which is distinctly less than half; moreover, the expression which I have just employed, 'proportion of ferrous scrap', must not be taken as exact, because this is in fact a new product, both from the chemical and from the industrial points of view.

Furthermore, if one pursued this criterion further, the following two consequences would logically follow from it:

1. There would be no valid reason for making a charge on own arisings from the manufacture of products falling outside the Treaty but in which steel has been used; why, for example, should there be a charge on the own arisings of Renault which makes cars with steel for the production of which ferrous scrap has been used? Certain products falling outside the Treaty may contain more ferrous scrap than others which still appear in Annex I.
2. It would be necessary also to exempt own arisings of steel, and even crude steel, on the sale of such steel based on ferrous scrap, which would truly be paradoxical since that would lead to exempting steel ferrous scrap, that is to say the purest and the most sought after scrap.

I think therefore that there is no need to take account of the argument of an alleged double charge if the plant where the arisings occur and that where the latter is used belong to two distinct undertakings making different products within the meaning of Annex I and if the ferrous scrap recovered from one is transferred to the other.

Nor am I convinced by the argument, on which the interveners in particular put much stress, regarding the advantages of industrial integration in relation to productivity and 'Leistungswettbewerb'. In fact that argument is valid from the point of view which concerns us here only within the framework of the activity of *a single* undertaking. But if there are two distinct undertakings, one of which provides the ferrous scrap to the other to supply its needs as a consumer it is not possible to see why such delivery should escape the levy, the very basis of which is the consumption of ferrous scrap: no doubt it is more rational to have recourse to integration. But equalization is not intended to encourage industrial rationalization. If a producer of crude steel did not use the ferrous scrap from previous stages of production it would be sold on the market and the producer would have to buy from

outside and to pay the levy on the quantities thus obtained.

In fact, I think that the real reason for exempting from the levy ferrous scrap from own resources is one of good sense and fairness. It was properly considered that it would be shocking to impose a levy on the use by an undertaking of material which belongs to it—material which, as the *SNUPAT* judgment says, is one of its by-products which it returns to the production cycle: which production? That which the undertaking is engaged upon, that is to say, production of one or more of the products in Annex I, but not that upon which a neighbour is engaged (even though it may be part of the same family) for the manufacture of another product. The provisions exempting *own* resources must therefore be interpreted according to the legal meaning of the expression, that is to say, as applying to ferrous scrap of which the undertaking is the *owner* without having bought it: this criterion of civil law complements quite precisely the criterion of the same character used for the definition of bought scrap.

Finally I consider:

1. That the basic regulatory decisions (especially Decisions Nos 2/57 and 16/58) do not allow undertakings' own arisings transferred from one undertaking to another having a different legal personality to be exempted from the contribution even in the case where the two undertakings are locally integrated in an industrial complex.
2. That the same decisions are not illegal because of the fact that they did not provide for an exception in this case.

2. Examination of the situation of Breda and Hoogovens

It is now necessary to consider the two actual cases which have been put before you.

(a) Breda Siderurgica

As regards Breda Siderurgica, there can be no doubt if the conclusions to which I have just come are accepted.

Local integration at Sesto San Giovanni consists of the siting within a single enclosure of the plant of four undertakings, including Breda, which benefit from common services: use of electric energy, water distribution network, drains, social services, etc., as well as a single railway siding. But the four companies have production activities in clearly distinct fields; Breda alone is concerned with the production of steel. The ferrous scrap recovered from the consumer undertakings is transferred to Breda, and these transfers certainly have the legal nature of sales. Furthermore, only one part of the ferrous scrap is returned to Breda and, on the other hand, Breda sells a considerable part of its production to undertakings other than those at Sesto San Giovanni.

The arisings transferred to Breda by the three companies are in my opinion liable to the equalization contribution.

(b) Hoogovens

The situation is more intricate as regards Hoogovens. In fact although there are indeed two companies with distinct legal personalities, on the one hand integration is much more advanced at IJmuiden than at Sesto San Giovanni from the technical, industrial and even commercial points of view and, on the other hand from the legal point of view, it is doubtful whether there is a sale or a transfer by one company to the other. To tell the truth it is open to doubt whether there are two undertakings or a single one.

As regards the technical aspects of integration, they are well known to the Court because of the complete explanation which it received during its visit to the premises and from the memories which it has no doubt retained regarding that visit which was so interesting in every respect. Let me say only that it is difficult to conceive a more rational organization or a more advanced industrial integration. I will confine myself to recalling that there is at present a balance between the production capacity of each of the companies, so that Breedband, which has sometimes had to purchase slabs for lamination from external sources, now hardly uses anything except Hoogovens' products. Furthermore, all the arisings produced at Breedband return to

Hoogovens. Lastly, Breedband makes only ECSC products.

But, if my view is accepted none of these various circumstances, any more than all of them taken together, is of such a character as to justify the exemption of ferrous scrap coming from Breedband and used by Hoogovens. The question must be considered from the legal point of view to discover whether, despite the existence of two companies with distinct legal personalities, the transfer of ferrous scrap in question should be regarded as not having the nature of a purchase made by one undertaking from another.

The Court is aware of the argument of Hoogovens: under a contract, which is not known but the existence of which is certain, the two companies decided to pool their production capacity. Production is carried on in common from one end to the other of the manufacturing cycle; risks also are shared, the sale of products takes place by way of a common sales organization and all the results are entered in business accounts, the profits appearing in these accounts being divided between the two companies, not in relation to their capital, but according to a ratio which, although it has not been revealed to us, is related, we are told, to the size of the investments. It is true that on receipt of ferrous scrap from Breedband the latter receives a *credit note,* which is based on the market price of ferrous scrap; but it is added that this price is irrelevant, because it is used only to calculate precisely the *cost of production* in the different phases of manufacture.

That analysis of the situation is crowned by a legal edifice; the amalgamation of production, as it is carried out, is said to show the existence of a company within the meaning of Article 1655 of the Netherlands civil code, of a 'maatschap', the purpose of which is precisely the achievement of joint production. Since the company in question has no name, the result is an undivided joint ownership amongst its members which applies to all products in course of manufacture; arisings which occur at Breedband at that moment cease to be held in undivided joint ownership and become the property of Hoogovens, but, under a principle analogous to the declaratory effect of partition, they are regarded as having always belonged to the latter. There cannot therefore be any question of a transfer of property between Breedband and Hoogovens, from which it follows that the ferrous scrap in question is certainly Hoogovens' 'own resources', even within the meaning of the civil law.

It is with a feeling of modesty, which the Court will readily understand, but conscientiously, that I have tried to form an opinion on this argument. Like the applicant's learned counsel, I have first sought to reason in relation to French law, and then by comparison with Netherlands law, for two reasons: first of all, because that method is the only one which the comparative lawyer can use in order to go from the known to the unknown, and secondly because despite very considerable differences, French civil law and Netherlands civil law present in regard to their principles and legal concepts undoubted analogies owing to their common origin and even to the common written provisions which still exist in part.

The first question is whether in the present case it is possible to accept the existence of a company. In that respect the principles are common and are enshrined in the same provision, Article 1655 of the Netherlands civil code, which is identical with Article 1832 of the French and Belgian civil codes:

> 'A company is a contract whereby two or more persons agree to place something in common with a view to sharing the profit which may result therefrom.'

It seems that such is the case: Hoogovens and Breedband certainly intended to 'place something in common', that is to say their respective production capacities, and did so with a view to sharing the profits of the operation.

But what kind of company?

If it were a matter of French law, it could only be a 'société en participation' (trading partnership). In fact, on the one hand, the activity of the company is purely commer-

cial, and, on the other hand, it has no legal personality. In French law the only commercial companies without legal personality which are exempt from publicity are the 'sociétés en participation' provided for in Article 49 of the Commercial Code under the name of 'associations en participation'.

It is true that it is sometimes difficult to distinguish a void company, which is regarded as a *de facto* company, from a 'société en participation'. But in the present case it appears that the constituent elements of such a company are present.

First of all as to its object. We read in the Manuel des Sociétés, by Moliérac (1956), at No 325, that the sphere of the 'société en participation' is increasingly wide:

> 'There are even "associations en participation" between very large limited liability companies *for pooling the whole of their trading results.*'

Such is the case in the present instance, at least as regards that part of the results attributable to their common production.

Next, the fact of secrecy, which is essential. It means that the existence of the company must not be revealed to third parties.

> 'The case-law [*op. cit.*, No 328] has always emphasized that essential characteristic. As soon as it loses it, as soon as the members show themselves and act as members, it becomes a "société de fait". But the mere knowledge that third parties might in fact obtain of its existence is not sufficient to deprive it of that characteristic.'

Such is still the case: the existence of the 'maatschap' was not disclosed to third parties. The trading account, in particular, is not known and neither is the ratio according to which profits are shared. Nothing on that subject appears in the accounts of the two companies. As we were told in a reply addressed to Mr de Richemont at the time of the visit to the premises, products delivered by Breedband through the sales organization are invoiced in the name of Breedband only.

Another condition is the necessity for a contribution:

> 'It is sufficient [*op. cit.*, No 330] that a contribution should be made to the common enterprise, whether in cash or in kind, in property or in rights, in work, etc. Nevertheless, it has been considered that there was an "association en participation" when two persons decided to place in common *the result of their activities, each of them for his part exploiting his own property.*'

That appears to me to correspond exactly to the present case. The intervener tells us what was placed in common, namely, the production capacity of each of the two companies. But what is the legal result of this, still according to French law? First of all, the contribution would not cover the property in the plant necessary for manufacture; in fact, this plant remains the property of each of the companies, which is not disputed. It is not even certain that the use of it is contributed, since each company itself carries on by means of its own plant that part of the manufacture corresponding to its agreed activities: only the travelling cranes are used equally for the output of both, moving, as we saw on the spot, from one end of the works to the other.

What of the products? Here again I do not think that they become the joint property of the two companies, without an express stipulation to that effect. In fact, this is not a matter of a 'contribution', that is to say of something which is put into the company at the time of its creation, to be taken back, either in kind or in the form of the exercise of a creditor's right (if it is a question of a cash contribution) on the winding up of the company. What is contributed here is the productive capacity, that is to say, an incorporeal contribution, not the product. Furthermore, even if it were accepted that the products are 'contributed' as and when they are manufactured, it does not follow *ipso facto* that they are subject to co-ownership.

We read, in fact, in the same work, No 333:

> 'As the "association en participation" has no legal personality, goods contributed in kind remain, in principle, the property of

> the member who has contributed them ... However, it may be agreed that the contributions become the joint property of all the members; such an agreement is even presumed when the parties purchase a particular object in common, precious stones for example, with a view to reselling them.'

That example clearly shows the difference between that situation and the case with which we are now concerned. In fact, in the case considered above the very object of the company was the joint purchase of specified goods with a view to resale: those goods were certainly the subject of a contribution and it was natural to accept that they should be passed into the joint ownership of the members. In our case, the situation is quite different: each company itself undertakes the manufacturing stage assigned to it; that which is placed in common is the *result of the manufacturing process,* for the purposes of which each member has undertaken to use its own productive capacity. The raw materials used by Hoogovens (pig iron from its own blast furnaces, ferrous scrap purchased from outside, etc.) are undeniably its property. There is no reason why the materials which leave its own plant after the processing of its own raw materials should pass into joint ownership; in the same way, there is no reason why products manufactured by Breedband by means of its own plant which are sold on its own account to its customers should be in joint ownership with Hoogovens.

I think therefore that, if it were a matter of French law, it could not be accepted, in the absence of any express stipulation to the contrary, either that products in course of manufacture or finished products are the subject of a contribution, or that they pass into the joint ownership of the members.

Let us now try to discern the situation in Netherlands law.

The principal distinction as compared with French law appears to arise from the fact that in the Netherlands the existence of a company (maatschap) is not linked to the existence of legal personality or to the existence of company assets, whilst in France, as we have seen, this double requirement exists except in the case of the 'société en participation'.

Nevertheless, as C. Asser's 'Handleiding tot de beoefening van het Nederlands burgerlijk recht', 3rd edition, P. W. Kamphuisen, 1960, p. 484, says:

> 'The question is of importance only for a company which appears externally as a single unit. That is very rare. For if such a company carries on an industrial or commercial activity, it falls within the concept of a private partnership [vennootschap onder firma]'.

In fact Article 16 of the Commercial Code provides:

> 'A private partnership [vennootschap onder eene firma] is a company created in order to pursue an industrial or commercial activity under a common name.'

It follows from this that a company within the meaning of Article 1655 of the Civil Code which 'does not appear as a single unit' and which pursues a commercial activity is not void (as it would be in France, except in the case of the 'société en participation'), but does not have legal personality and cannot own property.

If that is so, the legal situation, despite appearances, closely resembles the law in France: the 'maatschap', when it pursues an industrial or commercial activity, appears to me to be very close to the 'association en participation' in French law: the only difference is that in one case (in France) a derogation is expressly provided for by the law from the rule of legal personality, whilst in the Netherlands it is simply a matter of the exercise of a freedom.

That being so, the problem which arises *(op. cit.,* p. 476) is that of

> 'knowing what is the position, from the point of view of the law of property, of assets placed at the disposal of the company ... that question is very difficult because the law says absolutely nothing concerning this aspect of the company; one is thus left with the concept of joint ownership, which is one of the most obscure questions of the law of property'.

In fact the most disputed question, it appears, is whether the *contributions* made by the members remain the property of those who made them or pass into joint ownership: in the first case it is necessary also to know whether, at the time of liquidation, account should be taken of the increase or decrease in the value of the contribution; in the second case (joint ownership), it is necessary to know whether, again at the time of liquidation, the contributor is intitled to recover the asset value of his contribution or whether the contributions are divided in proportion to the members' rights.

Nevertheless, all these difficulties appear only *in case of liquidation,* and it is on the occasion of liquidation proceedings that the judgments cited in the procedure were given: Hoge Raad, 24 January 1947, *Nederlandsche Jurisprudentie,* 1947, No. 71; Hoge Raad, 29 October 1951, *N. J.*, 1953, No 557. The second case even concerned a 'vennootschap onder firma'. The judgment of the Hoge Raad (tax chamber) of 7 December 1955, *N. J.*, 1956, No 163, holds that for there to exist a 'vennootschap onder firma' it is not necessary that there should be any assets owned by the company, which is different from our case.

In the present proceedings another question arises, that of knowing whether products manufactured within the framework of the common operation were contributed and, if so, whether the goods contributed passed into the joint ownership of the members.

I can only refer the Court to the very interesting commentary in Asser-Kamphuisen following the quotations which I made a moment ago. I have in mind especially the following passage, which seems to summarize well the context of the problem (p. 478):

> 'Nowhere does the law say that members are required to pass goods into joint ownership and that is not the case unless it follows from the company statutes. Whether such is actually the case is again a question of interpretation. We therefore arrive at the conclusion that it is not possible to deduce from the duty to contribute goods any conclusion from the point of view of the law of property: *everything depends on the intention of the parties.*'

The Hoogovens-Breedband contract has not been produced; the Court has been told the reasons. The intervener declared, at the time of the inspection of the premises, in reply to a question from the Judge-Rapporteur, that

> 'in his opinion, proof of joint ownership appeared from various clauses of the contract; that, nevertheless, there was no provision expressly concerning that question.'

Clearly the Court could have required, and could still by reopening the proceedings require, production of the contract in conditions combining both respect for commercial secrecy, to the extent to which it is legitimate, and respect for the adversary nature of the procedure. But I do not think, for my part, that this is indispensable.

In fact it is accepted that the contract does not contain an express provision on the question of joint ownership. I consider that in the absence of a formal clause to the contrary, the existence of joint ownership in respect of *products* cannot be accepted in the present case. I can in that respect only refer to what I have already said: the company, if it exists, has the purpose of placing in common the results of the productive operation, each member being required to contribute its own productive capacity towards the achievement of that object. The contribution is of an economic and financial nature, but, from the point of view of the law of property, there is no reason to assume, in the absence of any provision to the contrary, that the members intended to place in common the *property* in the various products which each manufactures by means of its own plant. Thus, accepting that the existence of a 'maatschap' is admitted, it is not established that it has the effect of placing the manufactured products into joint ownership. It seems rather that those products are *transferred* by Hoogovens to Breedband when they pass from the plant of

the former to that of the latter, and that in the same way the ferrous scrap recovered at Breedband is transferred by it to Hoogovens: the keeping of exact accounts in respect of these transfers, which are clearly itemized, and for which each company is debited or credited as the case may be, certainly appears to confirm that this is so. Furthermore, as I have said, it is *a priori* abnormal that a contribution to a company should consist of industrial *products* manufactured throughout the life of the company.

As to the fact that the risks of loss are borne in common, that does not appear to me to show the existence of joint ownership. For example, Article 1668 of the Civil Code provides that risks are shared in connexion with articles which are consumed, or which deteriorate with keeping, or which are intended to be sold, even when they are only contributed for use. The members are free, in any case, to make such provision as they wish.

If, however, contrary to my view, the existence of joint ownership is accepted as regards those products, would the result be that arisings produced at Breedband would automatically be freed from joint ownership to become the property of Hoogovens, to which they revert, Hoogovens being considered as having always been the owner?

That appears to me to be highly disputable. In French law, the declaratory effect of partition applies only at the moment of liquidation of a company and cannot apply in a case of this type. What is the Netherlands law on this point? I must say that I do not know. I know only that the intervener relies wrongly, in my view, in support of his argument, on an extract from the *Weekblad voor Privaatrecht*, 1935, No 3397, p. 62, where it is said that the members may draw off certain profits by making a partial partition, whilst maintaining the company. In fact, on the one hand, that opinion refers only to 'the members of a "société civile" or of a société sous raison sociale'; on the other hand, that is a matter of drawing off profits and not, as in the present case, of taking goods out of joint ownership. Thus in the present case it could only be a matter, it appears, of a transfer of property arranged by the joint owners for the benefit of one of them: such an operation does not of itself have retroactive effect.

Finally, I consider that the special relationship which exists between Hoogovens and Breedband is not, any more than the fact of their industrial integration, of such a character as to justify abandoning the criterion of the name of the company ('raison sociale') accepted by the case-law of the Court. These are two undertakings each engaged in production in the steel industry bearing on different products: no doubt that twofold activity could be pursued by a single undertaking, but for 'fortuitous' reasons, which the Court need not consider, it is in fact pursued by two distinct undertakings. The equalization contribution due from Hoogovens must therefore apply to its total consumption of ferrous scrap, including the ferrous scrap transferred to it by Breedband which cannot be regarded, in my opinion, as Hoogovens' 'own arisings'.

My opinion is as follows:

1. *With regard to Application 42/59:*

   It should be dismissed and the costs of the application should be borne by the applicant.

2. *With regard to Application 49/59:*

   The implied decision in dispute should be annulled.

   The case should be referred back to the High Authority so that the measure required as a result of such annulment may be taken.

   The costs should be borne by the High Authority and the interveners in a proportion which I leave to the discretion of the Court.