of which they form part, considered as a whole, are lawful.

6. As far as the duration of the period, which the High Authority has to allow for the modification of special internal rates and conditions contravening the Treaty, is concerned, the principle set out in the second paragraph of Article 1 (5) of the Convention on the Transitional Provisions does not apply to the seventh paragraph of Article 10 of the Convention. The High Authority is therefore not only entitled but forced to grant periods of time which exceed the expiration of the transitional period if it considers this to be necessary in order to avoid any serious economic disturbance (Cf. Judgment of the Court in Joined Cases 27 to 29/58, Summary No 5).

7. Under Article 35 of the Treaty an action against the High Authority for failure to act can only be brought if the matter has previously been raised with it. Such an action can only be directed against the refusal of the High Authority to take the decision which it was called upon to adopt (Cf. Judgment of the Court in Case 17/57, Summary No 1; Judgment of the Court in Cases 7/54 and 9/54, Rec. 1955/1956, Vol. II, p. 89-90)

In Joined Cases 24/58 and 34/58

1. CHAMBRE SYNDICALE DE LA SIDÉRURGIE DE L'EST DE LA FRANCE,
2. CHAMBRE SYNDICALE DE LA SIDÉRURGIE DE MOSELLE,
3. SOCIÉTÉ ANONYME LORRAINE ESCAUT,
4. SOCIÉTÉ ANONYME FORGES ET ACIÉRIES DE NORD ET LORRAINE,
5. SOCIÉTÉ ANONYME UNION SIDÉRURGIQUE LORRAINE (SIDÉLOR),
6. SOCIÉTÉ ANONYME SOCIÉTÉ LORRAINE DE LAMINAGE CONTINU (SOLLAC),
7. SOCIÉTÉ ANONYME UNION DE CONSOMMATEURS DE PRODUITS MÉTALLURGIQUES & INDUSTRIELS (UCPMI),
8. SOCIÉTÉ DE WENDEL & CIE., SA,

all of which have an address for service in Luxembourg at the office of La Chambre Syndicale de la Sidérurgie Française, 49 boulevard Joseph-I,

applicants,

represented and assisted by André Garnault, Advocate at the Cour d'Appel, Paris,

v

HIGH AUTHORITY OF THE EUROPEAN COAL AND STEEL COMMUNITY, with an address for service in Luxembourg at its offices, 2 place de Metz,

defendant,

represented by its Legal Adviser, Raymond Baeyens, acting as Agent, and assisted by Georges van Hecke, Professor at the University of Louvain, Advocate at the Cour d'Appel, Brussels,

Application for the annulment of the decision of the High Authority of 9 February 1958, notified by letter of 12 February 1958 to the Federal German Government relating to rates and conditions applicable to the carriage by rail of mineral fuels for the iron and steel industry and published in the Journal Officiel of the ECSC of 3 March 1958,

and 34/58 brought by the same applicants as those in Case 24/58,

applicants,

represented and assisted as above,

HIGH AUTHORITY OF THE EUROPEAN COAL AND STEEL COMMUNITY,

defendant,

represented and assisted as above,

Application for failure to act asking for the annulment of the letter of 7 June 1958 of the High Authority sent to the applicants,

Intervener:

GOVERNMENT OF THE FRENCH REPUBLIC, represented by Paul Reuter, Professor at the University of Paris, acting as Agent, with an address for service in Luxembourg at the French Embassy, 19-21 rue Notre-Dame,

THE COURT

composed of A. M. Donner, President, L. Delvaux, President of Chamber, R. Rossi, President of Chamber (Rapporteur), O. Riese and Ch. L. Hammes, Judges,

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

gives the following

JUDGMENT

Issues of fact and of law

First part: Case 24/58

I — Conclusions of the parties

1. The applicants claim that the Court should:

'admit the applications by la Chambre Syndicale de la Sidérurgie de l'Est de la France, la Chambre Syndicale de la Sidérurgie de Moselle, la Société Anonyme Lorraine Escaut, la Société Anonyme Forges et Aciéries de Nord et Lorraine, la Société Anonyme Sidélor, la Société Anonyme Sollac, la Société Anonyme UCPMI and la Société de Wendel et Cie., SA for the annulment of the decision of the High Authority notified by a

letter of 12 February 1958 to the Government of the Federal Republic of Germany relating to special rates and conditions applicable to the carriage by rail of mineral fuels for the iron and steel industry and published in the Journal Officiel of the ECSC of 3 March 1958;

consequently annul the said decision:

1. On the ground that it wrongly states that the application of some or all of Tariffs AT 6 B 30 (scale of rates and conditions II) and AT 6 B 33 is justified on grounds of competition;

2. In particular it nullifies the provisions of the first and second paragraphs of Article 70 of the Treaty by keeping in force some of the German rates and conditions applicable to the carriage by rail of mineral fuels, even though these rates and conditions viewed as a whole discriminate against the applicants, who are French nationals, because they are based on a criterion of nationality which should have been abolished at the very latest when the common market in coal was established;

3. While acknowledging that Tariffs AT 6 B 30 (scale of rates and conditions I), AT 6 B 31 and AT 6 B 33 discriminate unlawfully, in that these tariffs nullify the provisions of the second paragraph of Article 2 and of Article 4 (b) of the Treaty, the High Authority, by granting extensions of time, unlawfully authorized their retention after the expiration of the transitional period, as a result of misapplying the seventh paragraph of Article 10 of the Convention and disregarding Article 1 (5) thereof;

and order the High Authority of the European Coal and Steel Community, 2 place de Metz, Luxembourg, to bear the entire costs of the proceedings.'

2. The defendant contends that the Court should:

'dismiss the application of the applicant undertakings and associations lodged on 1 April 1958 with all the attendant legal consequences, in particular in so far as the settlement of fees, costs and any other disbursements are concerned.'

II — Facts

The facts of these joined cases may be summarized as follows:

The coal basins of the Ruhr and Aix-la-Chapelle supply with mineral fuels all the German iron and steel factories as well as the French iron and steel undertakings of Lorraine, which include *inter alia* the six applicant companies.

As far as consignments of mineral fuels to German iron and steel factories are concerned, the applicable rates and conditions on the German Federal Railways are almost all calculated on the basis of rates and conditions which under the terminology in use in Germany are called 'special tariffs', namely Tariffs AT 6 B 1 and AT 6 B 33. Tariff AT 6 B 1 is regarded as a special tariff compared with the generally applicable tariff called Class FK. Since, however, this tariff has no practical significance, Tariff AT 6 B 1 is defined by the German Government as also being a 'general' tariff.

Tariffs AT 6 B 30 to AT 6 B 33 are regarded as being special tariffs compared with Tariff AT 6 B 1 mentioned above; they form the subject-matter of this case.

As far as the consignments of mineral fuels to the French iron and steel undertakings of Lorraine and *inter alia* to the applicants are concerned, the applicable rates and conditions for the carriage of goods by rail is the through ECSC Tariff No 1301 which includes the application on the German sector of 'the international ECSC tariff, Scale 102'. The latter tariff is calculated on the basis of the internal German Tariff AT 6 B 1.

As soon as the High Authority took up its duties it decided, pursuant to Article 10 of the Convention on the Transitional Provisions, to examine the internal rates and

conditions applied by each Member State with a view to determining whether they were compatible or not with the principles laid down in the Treaty.

To this end it forthwith convened the Committee of Experts provided for by the first paragraph of Article 10 of the Convention and entrusted it with the task of making the preparatory classification necessary for the purpose of determining which rates and conditions were to be examined in the light of the provisions of the fourth paragraph of Article 70.

From the very beginning of this work the classification of German internal Tariffs AT 6 B 1, AT 6 B 30, AT 6 B 31, AT 6 B 32 and AT 6 B 33, which are the subject-matter of these proceedings, produced a number of disagreements between the French and German delegations. The French delegation maintained in particular that this series of special rates and conditions in fact formed a complete tariff offering reduced preferential rates to all German iron and steel undertakings located far from coal mines and for this reason amounted to discrimination based on the criterion of nationality. It maintained that it was advisable to examine them in the light of the first and second paragraphs of Article 10 of the Convention and of the first and second paragraphs of Article 70 of the Treaty (discriminatory internal rates and conditions) and not with reference to the fourth paragraph of Article 70 of the Treaty (special internal rates and conditions).

The Commission however expressed the opinion that, before deciding whether the tariffs in question, viewed as a whole, were discriminatory it was advisable first of all to classify them, taking into account the particular characteristics of each of them.

On the basis of this classification, recorded in a memorandum of 8 March 1954 on which the French experts noted down their reservations, the High Authority at its meeting on 9 February 1958 examined separately each of these tariffs and:

(a) Acknowledged that Tariffs AT 6 B 30 (II), AT 6 B 32 and AT 6 B 33 (I) comply with the principles of the Treaty; with reference to the last tariff, however, account must be taken of the abolition of Article 71 (b) of the scale of inland waterway charges on the Mittellandkanal by the High Authority as from 1 January 1959;

(b) Decided on the gradual modification of Tariffs AT 6 B 30 (I) and AT 6 B 31;

(c) 'Reminded' the Government of the Federal Republic of Germany that it was in its interest to create a tariff of general application to the carriage of mineral fuels by complete trainloads.

This decision is the subject-matter of Application 24/58 which was lodged on 1 April 1958.

III — Submissions and arguments of the parties

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

Admissibility

The *defendant* takes the view that when the applicants attack a complete tariff allegedly discriminating against French iron and steel undertakings (second complaint) and when they take exception to specific rates and conditions which affect a limited number of German undertakings (first and third complaints) their legal interests are not the same because, in the case of those rates and conditions it is in the interest of all the undertakings of the Community, and not merely of the applicants, to see the special rates and conditions which are discriminatory support measures brought to an end as quickly as possible. Viewed in this way the disputed decision, even though it is an 'individual' decision, does not concern the applicants.

The *applicants,* however, call attention to the fact that the defendant's argument appears in itself to be contradictory. In order to demonstrate that the complete discriminatory tariff referred to in the second

complaint exists it seems to them to be relevant to demonstrate what the first complaint endeavours to prove, namely the non-competitive nature of all authorized rates and conditions. It appears to the applicants inconceivable that, whereas they can establish an interest considered adequate for the purpose of criticizing the retention of a complete system which is discriminatory, they cannot establish a similar interest for the purpose of criticizing the retention of the rates and conditions which are the constituent elements thereof.

The substance

On the submission that Tariffs AT 3 B 30 (II) and AT 6 B 33 (I) are illegal

The *applicants* in their first complaint dispute the legality of each of these two tariffs considered separately. They maintain that Tariff AT 6 B 30 (II) is not justified on the ground that there are other competing modes of water transportation by inland waterway and that Tariff AT 6 B 33 (I) is not correctly aligned on the actual cost of transportation by inland waterway either in the case of the carriage of coal or of coke.

The *defendant* replies to each of these points with arguments of a technical nature.

For the purpose of determining the accuracy of the facts put forward by the applicants in the first complaint of Application 24/58, which the defendant challenges, the Second Chamber of the Court decided on 26 June 1959 to obtain an expert's report on the facts upon which this complaint is based.

After having compared the charges for the carriage of coal by inland waterway in force on 1 August 1959 with the disputed tariffs for carrying coal by rail the expert concludes that

(a) On the question whether inland waterways are in competition with the railway in the case of Tariff AT 6 B 30 (II) there is competition from inland waterways for consignments to the Osnabrück factory; there is potential competition from inland waterways in the case of consignments to the Georgsmarienhütte factory.

(b) As far as traffic to the Osnabrück factory is concerned Tariff AT 6 B 30 (II)—after taking into account the fact that it was increased on 1 October 1959—is not correctly aligned on the charges for carrying coal by inland waterway. However the expert goes on to say that this finding has ceased to have very much significance since the traffic in question is relatively unimportant and still decreasing.

(c) As far as traffic to the Georgsmarienhütte factory is concerned Tariff AT 6 B 30 (II) is not correctly aligned on the charges for carrying coal by inland waterway. While the expert states that it is difficult to set a precise limit to the alignment which might be held to be correct, he concludes nevertheless that the safety margin which this tariff contains seems to be rather exaggerated.

(d) As far as traffic to the Ilsede-Peine and Salzgitter factories are concerned Tariff AT 6 B 33 (I)—considered in relation to the level of charges for carriage by inland waterway before the abolition of Article 71 (b) of the scale of inland waterway charges on the Mittellandkanal which it was decided should take effect as from 1 January 1959—is correctly aligned on the charges for carrying coal by inland waterway.

(e) With a view to determining the correct parity of the charges considered above in the case also of consignments of coke, the expert concludes that it is advisable to reckon, for consignments of coke by inland water, with an additional charge of DM 0.80 to DM 1.00 per compared with the cost of carrying coal by the same route.

The defendant in its final written conclusions takes the view that it can on the whole adopt the expert's conclusions. At the same time it states that when the Court determines whether the disputed measure is illegal it will have to take into account the fact that the expert's calculations do not in general refer to the date when the disputed decision was adopted but to a later date.

On the other hand the applicants in their final written conclusions state that they cannot accept the expert's reasoning concerning Tariff AT 6 B 33 (I) and reserve the right to criticize during the oral procedure the calculations for consignments to the Georgsmarienhütte factory under Tariff AT 6 B 30 (II). In addition they re-emphasize what they consider to be the artificial nature of tariff AT 6 B 1 as an internal Tariff of general application thus repeating the argument advanced and expanded in their pleadings.

The submission that the fifth paragraph of Article 10 of the Convention relating to the Transitional Provisions and Articles 3 (b), 4 (b) and (c) and the first and second paragraphs of Article 70 of the Treaty have been infringed

The applicants blame the High Authority for having examined each of the tariffs to which exception is taken separately instead of finding that in the aggregate they constitute discrimination based on nationality. They attribute this failure by the High Authority simply to the effect of the presumption that Tariff AT 6 B 1 is to be considered as being in fact an 'internal tariff of general application'. Proceeding on the basis of this presumption the High Authority in fact concluded that:

(a) The disputed Tariffs AT 6 B 30 to AT 6 B 33 which secure reductions compared with a system regarded as normal 'in all probability belong to the category of special internal rates and conditions referred to in the fourth paragraph of Article 70 of the Treaty', and consequently, instead of being examined together, they had to be examined separately as provided for by that provision.

(b) In accordance with the agreement of 21 March 1955 hereinafter mentioned, Tariff AT 6 B 1 had to be taken as the basis for the calculation of the through international tariff applicable to the iron and steel factories in Lorraine and in particular to the applicants whose works are also more than 40 km from the Ruhr mines.

In the view of the applicants this premise is completely wrong, because under the terms of the agreement of 21 March 1955 entered into by the Member States of the Community Tariff AT 6 B 1 can only be treated as an internal tariff of general application, that is to say 'the tariff which is applicable to all users belonging to the same category in one of the territories referred to in the first paragraph of Article 79 of the Treaty'. The applicants argue that Tariff AT 6 B 1 is not in fact applied generally to the carriage of coal, most of which is not intended for iron and steel undertakings, or to consignments of coal to German iron and steel factories located less than 40 km from the Ruhr coal mines.

Moreover, since the applicants are in the same position as the German iron and steel factories and since those factories are in fact more than 40 km from the Ruhr coal mines it follows that Tariff AT 6 B 1 is never applied to consignments to these groups of users and consequently should not have been considered as an internal tariff of 'general application'.

The applicants, on the other hand, are of the opinion that the fact that this was how the tariff was regarded amounts to discrimination based upon nationality and nullifies the provisions of Articles 3 (b), 4 (b) and the first, second and fourth paragraphs of Article 70 of the Treaty.

The *defendant* states first of all that by examining separately the various elements which make up the German tariff arrangements, it complied in every way with the provisions of the Treaty. The preliminary examination, which it carried out with the help of the Committee of Experts provided for in paragraph one of Article 10 of the Convention, instead of disclosing a connexion between these different tariffs showed that both the date when they were introduced or were restructured and their price level and their justification differed.

The defendant, on the basis of these findings, regarded these tariffs as special internal rates and conditions referred to in the fourth paragraph of Article 70 of the Treaty and in the seventh paragraph of Article 10

of the Convention and it proceeded to examine each of the tariffs separately in accordance with these provisions.

In the second place the defendant challenges the argument that Tariff AT 6 B 1 is not a tariff of general application. The fact that the fuels for the German iron and steel factories are only carried at the rates of the tariff over short distances not exceeding 40 km from the Ruhr mines does not mean that this tariff is not an internal tariff of general application to fuels, because, under the system of charges adopted by the German railways, it also applies to the carriage of fuels which are not intended for the iron and steel industry. Tariff AT 6 B 1 applies to consignments from all coal mines to all stations and frontier crossing points and for all users whether they are iron and steel factories or not.

Furthermore the defendant goes on to say that the argument that Tariff AT 6 B 1 is only applied outside the Ruhr to consignments to iron and steel factories on non-German territory does not correspond to the actual situation created by the contested decision of 9 February 1958 which abolishes Tariff AT 6 B 30 (I), orders the progressive alignment of that tariff on Tariff AT 6 B 1, and provides for Tariff AT 6 B 31 to be aligned within a margin of 8% on Tariff AT 6 B 1.

As Tariff AT 6 B 1 is thus an 'internal tariff of general application', the fact that it was used as the basis of the calculation of the ECSC through international tariff, which applies to the applicants, cannot be regarded as discrimination.

The submission that the time allowed for the alteration of Tariffs AT 6 B 30 (I) and AT 6 B 31 as well as Article 71 (b) of the scale of inland waterway charges on the Mittellandkanal are illegal

The *applicants* state that, although the High Authority acknowledges that special internal rates and conditions AT 6 B 30 (I) and AT 6 B 31 and also Article 71 (b) of the scale of inland waterway charges on the Mittellandkanal are discriminatory within the meaning of the second paragraph of Article 70 of the Treaty, the fact that it has nevertheless, by granting extensions of time, authorized their retention after the expiration of the transitional period, amounts to an infringement of the Treaty and of the Convention on the Transitional Provisions.

(a) Infringement of the second paragraph of Article 70 of the Treaty and of the fifth paragraph of Article 10 of the Convention.

The *applicants* maintain that the retention of the above-mentioned discriminatory tariffs prohibited by the second paragraph of Article 70 beyond the transitional period is illegal having regard to the provisions of the fifth paragraph of Article 10 of the Convention. This provision provides that 'measures to eliminate discriminatory practices contrary to the second paragraph of Article 70 shall enter into force on the date of the establishment of the common market in coal at the latest'.

The *defendant* points out that there is no question in these cases of being guided by the second paragraph of Article 70 of the Treaty and of the fifth paragraph of Article 10 of the Convention. These two provisions only apply if the Committee of Experts examines the measures intended to eliminate the discrimination contravening the second paragraph of Article 70, whereas in these cases the High Authority thought it had to examine the tariffs in question as 'special internal rates and conditions' under the fourth paragraph of Article 70.

(b) Infringement of the fourth paragraph of Article 70 of the Treaty and of the fifth paragraph of Article 10 of the Convention

The *applicants* maintain that even if reliance is placed on the seventh paragraph of Article 10 of the Convention the timelimits granted by the High Authority cannot be held to be lawful. They explain that this paragraph contains a provision which, because it derogates from the principles of the Treaty, falls within the fifth paragraph of Article 1 of the Convention which reads 'Save where this Convention expressly provides otherwise, these derogations and sup-

plementary provisions shall cease to apply, and measures taken to implement them shall cease to have effect, at the end of the transitional period'.

Now, since the wording of the seventh paragraph of Article 10 of the Convention does not expressly state that it is to apply after the expiration of the transitional period, the conclusion must be drawn that the seventh paragraph of Article 10 of the Convention does not derogate from the general principle laid down by the fifth paragraph of Article 1 of the Convention.

The *defendant* replies that it appears to it to be very doubtful whether the Treaty intended the application of the seventh paragraph of Article 10 of the Convention to be subject to the conditions laid down by the fifth paragraph of Article 1 of the same document. It argues that the granting of extensions of time for the abolition or modification of the three tariffs in question can be assimilated to a 'temporary or conditional authorization' which expires at the same date as these time-limits. Since the applicants concede that the High Authority could, in application of the fourth paragraph of Article 70 of the Treaty, have agreed to a 'temporary or conditional extension' in respect of similar support tariffs introduced after it was set up, particularly having regard to the need to avoid disturbances in the economy of the Member State concerned, within the meaning of the second paragraph of Article 2 of the Treaty, it must also be admitted that the High Authority could also grant a similar extension in the case of support tariffs in force at the date on which it was set up, which moreover is what it in fact did on 9 February 1958 before the expiration of the transitional period. Furthermore, the defendant goes on, the effect of the requirement, based on an abstract and purely literal interpretation of the fifth paragraph of Article 1 of the Convention without reference to the other provisions of the Treaty, that these extensions of time expire at the end of the transitional period would have been to deprive the provisions of the seventh paragraph of Article 10 of the Convention of their full force and effect and to prevent any reasonable application of these provisions. It was in fact impossible, because of the large amount of preparatory work, to anticipate at the time the Treaty was drawn up when the High Authority would in fact have been in a position to notify the governments of the modifications to be made in the rates and conditions referred to in the seventh paragraph of Article 10 of the Convention; on the other hand there was no way of anticipating at that time what period would have been necessary to ensure that any economic disturbance was definitely avoided.

The *applicants'* objection to this latter argument is that it consists of practical considerations which seem to call into question the very principle of limiting the transitional period to five years.

Second part: Case 34/58

I — Conclusions of the parties

1. The *applicants* in Case 34/58 claim that the Court should:

   'admit their application for the annulment of the decision of refusal taken by the High Authority on 7 June 1958;

   consequently annul the said decision;

   declare that this application is brought by the applicants without prejudice to the application now pending before the Court in which they ask for the annulment of the decisions of the High Authority notified in its letter of 12 February 1958 to the Government of the Federal Republic of Germany.'

2. The *defendant* in Case 34/58 contends that the Court should:

   'deal with this application and Application 24/58 jointly;

   declare that this application is inadmissible since it has no purpose or in any event is unfounded and consequently dismiss it and order the applicants to bear the costs of the proceedings.'

II — Facts

The main facts of this case may be summarized as follows:

By letter of 26 March 1958 the *applicants* drew the attention of the High Authority to the fact that:

on the one hand, an examination of special Tariffs AT 6 B 30 to AT 6 B 33 discloses that tariff arrangements exist, which viewed as a whole produce discrimination based on the country of origin or the destination of the products;

on the other hand, the High Authority did not adopt appropriate measures to bring the whole of this discriminatory system to an end but merely imposed in its decision of 9 February 1958 a partial prohibition on certain tariffs and simply reminded the Federal German Government that 'it was in its interest to introduce a tariff of general application' for the carriage of mineral fuels to the iron and steel industry.

The applicants, after they had stressed the inadequacy of this suggestion, invited the High Authority to take the initiative in recommending expressly to the German Federal Government either to introduce such a tariff of general application or to establish for the benefit of non-German iron and steel factories of the Community, tariff arrangements for the carriage of fuels similar to those which benefit German iron and steel factories.

The High Authority replied by letter of 7 June 1958 in which it pointed out that by its decision of 9 February 1958 it had discontinued within the time-limits laid down by the seventh paragraph of Article 10 of the Convention those tariffs numbered AT 6 B 30 to AT 6 B 33 which it regarded as being incompatible with the Treaty with the result that the tariffs which were authorized to be retained cannot be held to be discriminatory. This letter is the subject-matter of Application 34/58 lodged on 2 July 1958.

III — Submissions and arguments of the parties

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

Admissibility

The *defendant*, after calling attention to the fact that the complaint of failure to act has already been brought before the Court, since it has been formulated in the second complaint of Application 24/58, submits that this application is inadmissible. In its view the letter of 7 June 1958, which is the subject-matter of the application, is not a decision and does not disclose a new attitude compared with the decision of 9 February 1958.

The *applicants* do not dispute *this* but take note of the fact that between the two dates mentioned above the High Authority did did not change its attitude to the iron and steel industry in Lorraine. This conduct therefore provides the most convincing proof of a failure to act by the High Authority.

The substance

In the first place the *applicants* blame the High Authority for having examined each of the special German Tariffs AT 7 B 30 to AT 6 B 33 separately and also for having deliberately failed to state that when considered together, they are found to consist as a whole of rates and conditions fixed in such a way that they constitute a discrimination based on the country of destination of the products.

The *defendant* points out that, since the tariffs in question have been defined by the German Federal Government as 'a tariff fixed to meet competition' or 'a support tariff' or as 'a support tariff fixed to meet competition', it was forced to find out first of all whether the tariffs defined in this way should be so defined. Thus, so far from avoiding the application of the first paragraph of Article 10 of the Convention, it asked the Committee of Experts provided for in that paragraph to deal with the matter

and took account of the information supplied by the said Committee.

The *applicants* nevertheless challenge the merits of this procedure. They maintain that the High Authority has separate obligations which are independent of the proceedings of the Committee of Experts. Thus, even if the Committee of Experts has nowhere near completed its task, the High Authority is still under a peremptory *duty* to eliminate discrimination on grounds of nationality.

Having made this point the applicants challenge the assertion that, although the High Authority is under a duty to eliminate discrimination on grounds of nationality, it could not disregard the reasons put forward by the Federal German Government to 'justify' each of these tariffs.

The applicants also endeavour to prove that the 'separate' examination of the tariffs in question merely stems from a mistaken presumption which has caused the High Authority to regard them as 'special' tariffs compared with 'general' Tariff AT 6 B 1.

Since the substance of this complaint is exactly the same on this point as that of the second complaint in Case 24/58 the arguments developed by the applicants and the defendant are identical in both cases.

In the second place the applicants submit that, since the whole of the disputed rates and conditions are discriminatory, the High Authority should have invited the Federal German Government either to introduce a general tariff for the carriage by complete trainloads of fuels for the iron and steel industry, or a special tariff for the export of fuels to the iron and steel factories of the Community, or again to work out some other way of meeting that government's requirements, provided only that the solution adopted should ensure observance of the principle of non-discrimination.

The fact that the High Authority merely made some simple suggestions in this connexion is evidence of its failure to act.

The *defendant* replies that, after it had abolished the special tariffs which were found to be discriminatory, it could not go further and require the German Government to deal with the difficult situation in certain regions by introducing a general tariff for the carriage by complete trainloads of mineral fuels. Such a requirement would have infringed the fifth paragraph of Article 70 of the Treaty under which transport policy continues to be within the jurisdiction of Member States, whereas the High Authority is only empowered to discontinue the special internal rates and conditions which are regarded as incompatible with the principles of the Treaty.

IV — Application to intervene

The Government of the French Republic made an application to intervene on 2 January 1959 for the purpose of supporting the submissions of the applicants in Case 34/58.

By order of 3 March 1959 the Court allowed the intervention of the Government of the French Republic.

The intervener in its written observations on the substance of the case fully endorses the argumentation developed by the applicants in the main action and produces documentary evidence in order to prove that their arguments are well founded.

V — Procedure

The procedure followed the normal course.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate-General the Second Chamber on 26 June 1959 ordered an expert's report to be obtained on the facts upon which the first complaint in Case 24/58 is based; since the parties were agreed upon the person to be appointed as the expert by the Chamber, it entrusted Mr Joseph Haenni, Directeur de l'Office Central des Transports Internationaux par Chemin de Fer à Berne (Director of the Central Office for International Railway Transport, Berne) with the task of preparing this report.

On 24 November 1959 the expert's report was lodged at the Court Registry.

At the hearing on 17 December 1959 the Second Chamber granted the parties a period of time within which to put questions in writing to the expert; it granted the same period to the Advocate-General for putting questions both to the expert and to the High Authority; the replies of the High Authority to the questions put by the Advocate-General were lodged at the Court Registry on 21 January 1960; the answers of the expert to the questions put by the Advocate-General, the High Authority and the applicants were lodged on 15 January and 2 February 1960 respectively.

After deciding in accordance with Article 45 (1) of the Rules of Procedure of the Court of Justice of 4 March 1953 that the preparatory inquiries were closed the Second Chamber granted the parties a period of time within which to lodge their written observations.

After these written observations had been lodged on 12 February 1960 by the defendant and on 22 February 1960 by the applicants, the Second Chamber, in accordance with Article 45 (2) of the above-mentioned Rules of Procedure, sent the file of Joined Cases 24/58 and 34/58 to the Advocate-General and then to the President of the Court who fixed 8 March 1960 as the date for the opening of the oral procedure.

VI — Grounds of Judgment

The order of 30 January 1959 that Cases 24/58 and 34/58 shall be dealt with jointly does not preclude separate consideration of them in this judgment.

Case 24/58

Admissibility

The defendant submits that the first and third complaints of the application are inadmissible as the applicants have no legal interest in them.

It is in the interests of all undertakings in the Community to bring to an end as expeditiously as possible special internal rates and conditions which are discriminatory, but the applicants have not shown that their individual situation differs from that of the majority of iron and steel undertakings of the Community.

The applicants and the German undertakings benefiting from the contested tariff rates are in competition with each other, since they carry on the same productive activity in the Common Market, sell the same products and obtain their supplies of mineral fuels from the same mines.

Consequently, the contested decision, which permits the retention of reduced tariff rates which might affect this competition is of concern to the applicant undertakings within the meaning of the second paragraph of Article 33 of the Treaty.

Therefore the first and third complaints of the application are admissible.

On the substance of the case

The submission that Tariffs AT 6 B 30 (II) and AT 6 B 33 (I) are illegal

1. The applicants maintain that Tariff AT 6 B 30 (II) is not justified by competition from another mode of transport. Tariff AT 6 B 33 (I) is not aligned on the competing rates for the carriage by inland waterway of either coal or coke.

On the basis of the findings of the expert's report which it adopts and accepts as its own, the Court finds that the inland waterways are in genuine competition with the railway for consignments to the Osnabrück factory and offer potential competition for consignments to the Georgsmarienhütte factory.

Since the two tariffs are thus justified in general on the ground of competition, it is sufficient in this case to ascertain whether the parity of the rates between the two competing modes of transport has been correctly calculated, that is to say, whether the rates upon which the disputed tariffs are based are correctly aligned on the competing inland waterway rates.

As the expert has convincingly shown this alignment can only be considered to be correct if the railway rate exceeds the inland waterways rate by DM 0.60 to DM 0.70 per metric ton and provided that the rate for carrying coke by inland waterways is increased by an extra charge of DM 0.80 to DM 1.00 per metric ton compared with the rate for carrying coal by the same means.

It emerges from the expert's report that, so far as this traffic from the Königsborn mines to the Osnabrück factory is concerned, Tariff AT 6 B 30 (II) is in no way aligned on the inland waterways rate.

Further, so far as traffic from the mines of Westphalia and Königsborn is concerned, Tariff AT 6 B 30 (II) is not correctly aligned on the inland waterways rate for coal.

Even if certain corrections are taken into account, namely that unloading charges should in the case of the railways be put at a higher figure than the one calculated by the expert, the Court finds that the tariff in question, in the case of traffic starting from the mines of Westphalia, is based on a rate which is lower than the inland waterways rate, or in the case of traffic starting from the Königsborn mines, on a rate which exceeds the inland waterways rate by such a small amount that it cannot be regarded as a tariff which is correctly aligned and competitive.

On the other hand this tariff is correctly aligned on the inland waterways rate so far as traffic from the Viktor-Ickern mines is concerned.

The defendant submits that the determination of the legality of the tariffs in question must be based on the rate applicable to traffic from the Viktor-Ickern mines, because, taking into account the quality of the coal from and the production targets fixed by the mines, the Georgsmarienhütte factory would have no difficulty in obtaining its supplies from its own mines at Viktor-Ickern rather than from those in Westphalia and Königsborn.

The possibility of supplying this factory from the Viktor-Ickern mines cannot justify retention of Tariff AT 6 B 30 (II) for consignments from the mines of Westphalia and Königsborn, since, in the case of these consignments, it is not correctly aligned on the competing inland waterways rates.

The abovementioned findings apply *a fortiori* to the carriage of coke, since the railway rate has in this case to take account of the surcharge by which the inland wa-

terways rate for the carriage of coke has to be increased compared with the carriage of coal by the same route.

Consequently, in so far as Tariff AT 6 B 30 (II) is a special internal rate and condition applied to consignments from the mines of Königsborn and Westphalia it consists partial of an aid or a subsidy and for this reason does not comply with the principles of the Treaty as laid down in the fourth paragraph of Article 70 to the extent to which it is not correctly aligned.

2. On the other hand, according to the findings of the expert's report which the Court adopts, Tariff AT 6 B 33 (I), which is applied to the carriage of coal, is correctly aligned on the competing inland waterways rate.

Consequently this tariff fulfils the conditions peculiar to tariffs fixed to meet competition in that it enables the carrier to maintain his own tariff when faced with competition from another mode of transportation.

Therefore this tariff is a special internal rate and condition which complies with the principles of the Treaty and for this reason cannot be prohibited.

Nevertheless, taking into account the surcharge of DM 0.80 to DM 1.00 per metric ton which has to be added to the inland waterways rate for coal, as has been mentioned above, so that this rate may be taken as the basis of calculating the railway rate for coke, the Court finds that Tariff AT 6 B 33 (I) is not correctly aligned on the inland waterways rate for coke, since it is lower.

For this reason, although the scheduled charge in question is correctly aligned as far as the carriage of coal is concerned, part of it consists, on the other hand, of an aid or subsidy so far as the carriage of coke is concerned.

Therefore in so far as Tariff AT 6 B 33 (I) is a special internal rate and condition applicable to the carriage of coke, it cannot be regarded as complying with the principles of the Treaty as laid down by the fourth paragraph of Article 70 to the extent to which it is not correctly aligned.

3. For all these reasons the first complaint of the application is well founded in so far as it is directed against that part of the contested decision which acknowledges that

(a) Tariff AT 6 B 30 (II) applied to the carriage of coal and coke coming from the mines of Königsborn to the Osnabrück factory and from the mines of Königsborn and Westphalia to the Georgsmarienhütte , and

(b) Tariff AT 6 B 33 (I) applied to the carriage of coke

comply with the principles of the Treaty.

The submission that the fifth paragraph of Article 10 of the Convention on the Transitional Provisions and Article 3 (b), Article 4 (b) and (c) and the first and second paragraphs of Article 70 of the Treaty have been infringed

The applicants submit in the first place that the High Authority was wrong to acknowledge Special Tariffs AT 6 B 30 to AT 6 B 33 as being special internal rates

and conditions and therefore believed that it had to compare them with the seventh paragraph of Article 10 of the Convention.

Tariff AT 6 B 1, compared with which the disputed tariffs have been regarded as special internal rates and conditions, is never applied to the carriage of mineral fuels in bulk to the German iron and steel industry which is in a situation similar to that of the applicant undertakings.

Therefore the tariffs at issue, far from being rates and conditions applicable to certain transport links in which the German iron and steel industry is interested, constitute, as a whole, tariff arrangements which apply to the entire carriage of mineral fuels in bulk to that part of the German iron and steel industry which is in a similar situation to that of the applicant undertakings.

The applicants also argue that the ECSC through international tariff applies to them and that, since it is calculated on the basis of Tariff AT 6 B (I), it includes rates which are higher than those of Special Tariffs AT 6 B 30 to AT 6 B 33.

In such circumstances German iron and steel undertakings would enjoy the benefit of tariff arrangements at reduced rates compared with those applicant undertakings which are in a similar situation; in this way rates and conditions would be offered to users in a similar situation which were so different that they could not guarantee for the applicants equal access to sources of production.

Consequently the High Authority, instead of considering in accordance with the seventh paragraph of Article 10 of the Convention whether Tariffs AT 6 B 30 to AT 6 B 33 comply with the principles of the Treaty should have found that the said tariffs as a whole establish, to the detriment of the applicants, discrimination based on a criterion of nationality.

Therefore in so far as the contested decision keeps in force some of the rates and conditions of these tariff arrangements it infringes the fifth paragraph of Article 10 of the Convention and Articles 3 (b), 4 (b) and (c) and the first and second paragraphs of the Treaty.

This argument is based on a false appraisal of the facts and fails to appreciate the limits imposed upon the powers which the High Authority can exercise in transport matters.

When the court considered first of all whether Tariff AT 6 B 1 is in fact an internal tariff of general application, it adopted, for the purpose of determining the limits of this concept, the definition in Article 1 of the Agreement of 21 March 1955 entered into by the Member States of the Community, which treats internal tariffs applicable equally to all users of a particular category in one of the territories referred to in the first paragraph of the Treaty as internal tariffs of general application.

Tariff AT 6 B 1 applies to the carriage of mineral fuels for the iron and steel industry to all stations and frontier-crossing points.

This tariff is in fact applied to transport, to which Special Tariff AT 6 B 30 (I) was applied before the contested decision entered into force.

In the cases of transport covered by special tariffs which were found to comply with the principles of the Treaty the application of Special Tariff AT 6 B 1 is ruled out either by the competition offered to the railways by the waterways or by the existence of special difficulties which do not originate in economics and to which the undertakings benefiting from these special tariffs are exposed; if this competition or these difficulties ceased to exist, Tariff AT 6 B 1 would apply to the users, who actually enjoy the benefit of reduced special tariffs.

There is no doubt that Tariff AT 6 B 1 is an internal tariff of 'general application' within the meaning of Article 1 of the aforementioned Agreement of 21 March.

The Government of the Federal Republic of Germany used this particular tariff as the basis for the calculation of the ECSC international tariff applicable to the carriage of mineral fuels in bulk to the applicant undertakings; this circumstance has never been challenged in the manner prescribed by Article 16 of the said agreement.

Even though before 1958 Tariffs AT 6 B 30 to AT 6 B 33 as a whole covered a large part of the long-distance internal carriage of coal in the Federal Republic the position has, however, changed since the entry into force of the decision of the High Authority of 9 February 1958 which abolished a large number of these special tariffs; the appeal of the German Government against this decision and the applications for annulment brought by a large number of German undertakings were dismissed by the judgments of the Court of 10 May 1960 (Cases 19/58, 3 to 18, 25 and 26/58). Consequently, for all these reasons Tariff AT 6 B 1 is both in form and in substance an internal tariff of general application.

This finding is also confirmed by the fact that Tariff AT 6 B 1 has also been applied to transport to the Saar ever since it became part of the territory of the Federal Republic.

Under the fourth paragraph of Article 70 of the Treaty and the seventh paragraph of Article 10 of the Convention the High Authority has to authorize the retention of special internal rates and conditions which comply with the provisions of the Treaty.

It is common ground that Tariffs AT 6 B 30 to AT 6 B 33, considered separately, are special internal rates and conditions.

Accordingly, the High Authority examined these special tariffs separately and, after doing so, decided upon the total or partial abolition of some of these tariffs, as has been stated above.

As indicated earlier some of the rates and conditions which have been held to be lawful by the High Authority comply with the principles of the Treaty; if these rates and conditions, considered separately, are lawful, their application complies with the Treaty so that they cannot amount to prohibited discrimination within the meaning of Article 4 of the Treaty; what is true of the tariffs considered separately must also hold good for the disputed tariff arrangement as a whole.

Further, Tariff AT 6 B 1 is in fact of general application; it is therefore correct to

define the disputed tariffs when they are compared with Tariff AT 6 B 1 as 'special internal rates and conditions'; the disputed tariffs do not include any reduction of rates which would be discriminatory compared with the rates of the through international ECSC tariff which applies to the applicants, since this latter tariff is correctly calculated on the basis of an internal tariff which is in fact of general application.

It is true that the effects of the intervention of the High Authority, taking into account what has been stated above in connexion with the first complaint, do not correspond to the wishes, which are moreover understandable, of the applicants but it must be noted that these effects are caused, on the one hand, by the fact that the Treaty establishing a Community restricted to coal and steel only covered transport indirectly and to a limited extent and, on the other hand, by the fact that the network of waterways competing with the railways was in the past developed much more within the various countries than for traffic with countries abroad.

For these reasons this complaint is unfounded.

The submission that the time allowed for the modification of Tariffs AT 6 B 30 (I) and AT 6 B 31 and Article 71 (b) of the scale of inland waterway charges on the Mittellandkanal are illegal

1. The applicants submit in the first place that when the High Authority granted time-limits exceeding the transitional period for the modification of Tariffs AT 6 B 30 (I) and AT 6 B 31 and also of Article 71 (b) of the scale of inland waterway charges on the Mittellandkanal it infringed the second paragraph of Article 70 of the Treaty and the fifth paragraph of Article 10 of the Convention on the Transitional Provisions under which measures to eliminate discriminatory practices contravening the aforementioned second paragraph of Article 70 must enter into force on the date of the establishment of the common market in coal at the latest.

Even if the question whether any national discrimination within the meaning of the second paragraph of Article 70 may be determined by comparing internal tariffs and tariffs applied between Member States is disregarded, it is common ground that the tariffs at issue are not 'based on the country of origin or destination of the products' but were introduced or retained for reasons based, although wrongly, on the special situation of those undertakings which benefited from them.

Therefore the tariffs at issue do not come within the second but the fourth paragraph of the said Article and also within the seventh paragraph of Article 10 of the Convention.

2. The applicants also submit that the seventh paragraph of Article 10 of the Convention does not derogate from the rules laid down in the second part of the fifth paragraph of Article 1 of the Convention which reads 'Save where this Convention expressly provides otherwise, these derogations and supplementary provisions shall cease to apply, and measures taken to implement them shall cease to have effect, at the end of the transitional period'.

Therefore the time allowed by the High Authority for the modification of the tariffs at issue should not have exceeded the transitional period and should have ended at the expiration of that period.

This argument must be rejected.

The two prerogatives of the High Authority in this connexion must be distinguished. On the one hand, it is under a duty, for the purpose of permitting special internal rates and conditions to be modified, to allow such time as may be necessary to avoid any serious economic disturbance and, on the other hand, it has the right to fix the duration of the time allowed.

Although this duty must be carried out subject to a strict time-limit prescribed by the Treaty, the duration of the periods in question allowed cannot, on the other hand, be in general restricted to a fixed period such as the transitional period.

In fact, since the special internal rates and conditions may even, for justifiable reasons, be examined just before the expiration of the transitional period, the High Authority could not perform its duty to allow the time provided for by the seventh paragraph of Article 10 of the Convention if the periods of time granted were in no circumstances to exceed the expiration of the transitional period.

There is no doubt that the seventh paragraph of Article 10 of the Convention, as far as the duration of the time which the High Authority has to allow for the modification of special internal rates and conditions contravening the Treaty is concerned, is not subject to the rule laid down in the second part of the fifth paragraph of Article 1 of the Convention; therefore the High Authority is not only entitled but forced to grant periods of time which exceed the expiration of the transitional period, if it considers this to be necessary in order to avoid any serious economic disturbance.

The applicants could only challenge the legality of the time allowed by the High Authority by arguing that its duration is not in this case justified by the need to avoid such serious economic disturbances.

However the applicants did not advance this argument.

Therefore the second complaint of the application is unfounded.

Costs

Under Article 60 (2) of the Rules of Procedure of the Court of Justice of the ECSC the Court may order that the parties bear their own costs in whole or in part when each party succeeds on some and fails on other heads.

Under Article 4 of these Rules concerning legal costs, fees and other sums payable to experts are regarded as recoverable costs.

The defendant in this case has partially failed on the first head of the submissions of the application; the expert's report called for by the Order of the Second Chamber of 26 June 1959 covered the facts referred to under this head.

It is appropriate to order that the applicants and the defendant each pay one half of the costs of the expert's report and that, as far as the remainder of the costs are concerned, each party bears its own costs.

Case 34/58

Admissibility

The applicants maintain that, in order to remove the discrimination based on a criterion of nationality arising out of the disputed tariff arrangements as a whole, the High Authority was under a duty to recommend the Government of the Federal Republic of Germany either to fix a general tariff for the carriage of mineral fuels by trainloads or to adopt for the benefit of non-German iron and steel factories of the Community tariff arrangements for the carriage of mineral fuels similar to those which apply to German iron and steel factories.

The alleged duty of the High Authority to submit the first of these two recommendations mentioned above to the Government of the Federal Republic of Germany is not mentioned in the letter of 26 March 1958 in which the applicants raised with the High Authority the question of its failure to act.

Under Article 35 of the Treaty proceedings against the High Authority for failure to act can only be brought if the matter has been raised previously with the High Authority and the grounds upon which such proceedings are based can only be the refusal of the High Authority to take the decision which it was called upon to adopt.

Since the High Authority has not been formally required to take such a decision in accordance with the first paragraph of Article 35 of the Treaty, it cannot be said to have taken an implied decision of refusal according to the third paragraph of the said article.

For this reason, as far as this point is concerned, the application is inadmissible since it has no purpose.

On the substance of the case

1. The applicants submit that an examination of Special Tariffs AT 6 B 30 to AT 6 B 33 applicable to the carriage of mineral fuels for the German iron and steel industry which is in a similar situation to that of the applicant undertakings makes it quite clear that there are tariff arrangements which establish discrimination based on a criterion of nationality.

The refusal of the High Authority in its letter of 7 June 1958 to confirm the existence of such discrimination infringes the first and second paragraphs of Article 70 of the Treaty.

This argument is the same as the one used in support of the second complaint of Application 24/58 which the Court rejected when hearing that application.

It is therefore unnecessary for the Court to consider this argument again.

2. The applicants also submit that the High Authority is under a specific duty to recommend the Government of the Federal Republic of Germany to adopt for the benefit of non-German iron and steel factories of the Community tariff arrangements for the carriage of mineral fuels similar to those applying to German iron and steel factories.

The refusal by the High Authority in its letter of 7 June 1958 to acknowledge that it is under such a duty contravenes the first and second paragraphs of Article 40 of the Treaty.

Therefore this argument is not well founded.

The High Authority only has power under Article 4 (b) and the first, second and third paragraphs of Article 70 of the Treaty to bring to an end tariff measures which entail discrimination based on a criterion of nationality or which do not comply with the principles of the Treaty.

Except in the cases covered by this prohibition the fifth paragraph of Article 70 of the Treaty provides that all other transport measures fall within the jurisdiction of the Member State concerned, with the result that in this field the High Authority can merely make suggestions.

It is only possible to imagine the High Authority being under a duty to recommend the adoption for the benefit of non-German iron and steel factories of the Community of tariff arrangements similar to those applying to German iron and steel factories, if the German and non-German iron and steel undertakings are in comparable situations.

The applicants have neither submitted nor proved that they are in such a comparable situation, because they have a mode of transport competing with the railways or because they are exposed to special difficulties similar to those to which the German undertakings in question are laid open.

As was found in Case 24/58, the disputed tariff arrangements, even if they are considered as a whole, do not include any discrimination based on a criterion of nationality and therefore comply with the principles of the Treaty.

In these circumstances the application to the applicants of the tariff arrangements applicable to German iron and steel factories would infringe Articles 4 (b) and 70 of the Treaty.

The application is unfounded.

Costs

Under Article 60 (1) of the Rules of Procedure of the Court of Justice of the ECSC the unsuccessful party must be ordered to pay the costs.

In this case the applicants and the intervener have failed on all the heads in their applications.

The applicants must therefore bear the costs of the proceedings, the costs of the intervention to be borne by the intervener.

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the parties and the intervener;
Upon hearing the opinion of the Advocate-General;
Having regard to Articles 3, 4, 33, 35, 70 and 80 of the Treaty and Articles 1 and 10 of the Convention on the Transitional Provisions;
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 Coal and Steel Community, especially Articles 35 to 45, 60 (1) and 71,

THE COURT

hereby:

I — Case 24/58

(a) Annuls the disputed decision to the extent to which it acknowledges that Tariff AT 6 B 33 (I), only in so far as it applies to the carriage of coke, and Tariff AT 6 B 30 (II), in so far as it applies to the carriage of coal and coke coming from the mines of Königsborn and Westphalia, comply with the principles of the Treaty.

(b) The other conclusions in the application are rejected as unfounded.

The applicants and the defendant shall each bear one half of the costs of and incidental to the expert's report.

So far as the remainder of the costs are concerned each party shall bear its own costs.

II — Case 34/58

(a) Dismisses the application as inadmissible in so far as it is directed against the refusal of the High Authority to recommend the Government of the Federal Republic of Germany to introduce a tariff of general application to the carriage of mineral fuels by trainloads.

(b) Dismisses the application as unfounded is so far as it is directed against the implied decision of refusal of the High Authority to recommend the Government of the Federal Republic of Germany to adopt for the benefit of non-German iron and steel factories of the Community tariff arrangements for the carriage of mineral fuels similar to those applying to German iron and steel factories.

The applicants are ordered to pay the costs of the proceedings.

The costs of the intervention shall be borne by the intervener.

Donner Delvaux Rossi

Riese Hammes

Delivered in open court in Luxembourg on 15 July 1960.

A. Van Houtte
Registrar

A. M. Donner
President

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

Summary

1 — Translated from the German.