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

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

4. Method of comparing the transport costs

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

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

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

I am of the opinion:

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

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

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

Index

Introduction (facts, subject matter of the proceedings, the course of the proceedings) 949

Legal consideration 951

I — Questions of admissibility 951

1. Admissibility of the amendments to the applications 951

2. Force of *res judicata* arising from judgment in Joined Cases 19 and 21/60 and 2 and 3/61 951

1 — Translated from the German.

II — The substance of the cases 952

1. Wrongful act or omission of the High Authority 952

2. Is there a casual connexion between the wrongful act or omission of the High Authority and the damage alleged? 954

(a) Objective possibilities of the purchase of scrap 955

(b) Would the applicants actually have bought imported scrap if equalization of transport costs had been refused? 956

3. Proof of damage and ascertaining its amount 957

(a) The Hennebont case 957

(b) The Saint-Jacques case 957

(c) Importance of the increase in contributions consequent upon the additional consumption of imported scrap 957

(d) Importance of the amount of the promised transport parity grants for the purpose of calculating damage 960

(e) Can the evidence adduced be regarded as sufficient? 960

(f) Summary 962

III — Opinion 962

Mr President,
Members of the Court,

On the occasion of one of the longest cases which the Court has known in recent years, I must today consider whether it is possible to find in favour of a certain number of French and Belgian undertakings which have lodged applications for reparation on the basis of alleged wrongful acts or omissions on the part of the High Authority under the ferrous scrap equalization scheme.

Concerning the history of the case I can be brief. I will refer to the judgment and to the opinion delivered in Cases 19 and 21/60 and 2 and 3/61 which were concerned with similar facts and to the report of the hearing in the present cases as well as to the opinion that my former colleague Mr Advocate-General Lagrange delivered in the present case on 12 May 1964.

We know that under the system governing the equalization of ferrous scrap Community scrap of a higher price, especially scrap from ship-breakers' yards in the Community, was placed on the same footing as imported ferrous scrap qualifying for equalization. Since for a certain number of undertakings the ship-breakers' yards were less favourably situated from the point of view of transport than the usual ports of importation, the problem arose very early whether, when they purchased shipyard scrap these undertakings could obtain a refund of the said transport costs, to the extent that the latter made the shipyard scrap more expensive than scrap imported through certain Community ports (for the sake of brevity, I will speak of a transport parity grant or of an equalization of the costs of transport). That is what the equalization authorities at Brussels

had allowed since 1954. For this reason on several occasions they made promises to this effect to the undertakings concerned (including the applicants) before the conclusion of contracts for the purchase of shipyard scrap, and in consequence they drew up the equalization accounts accordingly.

This practice continued even after the High Authority had taken over the administration of the equalization scheme in the month of August 1958. However when checking all the equalization transactions the High Authority encountered this problem, and it came to the conclusion that the practice of equalizing transport costs was not compatible with the principles of the scrap equalization scheme (see Decision No 18/60). Consequently the statements of account in respect of the undertakings concerned were altered in such a way that the latter had themselves to bear the transport parity grants which had been allowed. As we know, this gave rise to the cases brought before the Court in 1960 and 1961 (Cases 19 and 21/60, 2 and 3/61) which, it is true, ended without any examination of their substance so far as concerns the applications for annulment and those founded on a failure to act relating to the equalization of transport costs. Nevertheless the Court considered that the applications for reparation, which were made simultaneously, were well founded because of an unlawful act or omission on the part of the High Authority in the supervision of the Brussels agencies. It is only because of inadequate proof of damage that the applications were dismissed.

It is to the decisions in these cases that the applications which commenced the present proceedings refer. The same undertakings as those which were concerned in Cases 19 and 21/60, 2 and 3/61, as well as a certain number of others again accuse the High Authority of an unlawful act or omission to the extent that it did not prevent the agencies in Brussels from making illegal promises on the subject of equalization of transport costs, which led them to purchase shipyard scrap burdened with considerable transport costs. Accordingly they ask for compensation for the damage which would not have occurred if they had purchased imported scrap instead of shipyard scrap.

There is no need for us to consider now in detail the progress of the proceedings. Applications have first of all been made by 23 undertakings, requesting that the High Authority should be ordered to pay certain sums by way of damages. At the request of the applicants the cases have been joined for the purposes of procedure and of judgment. During the proceedings a large number of pleadings and notes were exchanged with the result that frequent alterations were made in the sums claimed as damages and also that certain of the original applicants discontinued their applications. The issues in the case were a year ago twice the subject of oral proceedings. My colleague, Mr Advocate-General Lagrange, at that time delivered the opinion which is before you.

Lastly the Court made an order for an expert's report to be obtained on a certain number of disputed questions bearing upon the proof of damage and on the computation of its amount. We have in our hands the conclusions reached in the version of the report dated 1 May 1965. One of the consequences of the report was that the undertaking Forges et Atèliers du Creusot also withdrew. For the rest, the applicants have declared expressly that they had no comment to make upon the expert's report whilst the High Authority has raised objections on a whole series of matters. These have been discussed in detail with the expert since the hearing on 28 September, during which the parties concluded their oral arguments.

Given this situation of fact and of law

I must now consider whether the applications for damages of the Providence, Maubeuge, Saulnes, Firminy, Pompey, Beautor, Rouen, Saint-Jacques, Châtillon, Porter-France, UCPMI, Fives-Lille-Cail, Usinor and Hennebont undertakings are well founded and, if need be, to what extent they are entitled to recover damages from the High Authority.

Legal Consideration

I — Questions of admissibility

Before considering the actual subject matter of the cases, I should make a certain number of preliminary remarks concerning admissibility, which will certainly not keep us long.

1. *Admissibility of the amendment of the applications*

If I am not mistaken, the High Authority still persists in its opinion that during the written procedure (on the basis of objections contained in the statement of defence) the applicants not only changed their original claims as to quantum of damages, but also that they altered the character of their applications and brought into the proceedings evidence which the applications did not offer. This is said to be contrary to the Rules of Procedure, in particular to Articles 38 and 42.

I share the opinion of Mr Advocate-General Lagrange that the objections of the High Authority are not justified. Since the beginning the applications made have been clearly expressed as applications concerning administrative liability, based on certain precise facts and directed towards the removal of certain injurious consequences. It is only in respect of computing the amount of the damage that the alterations were made, because in the reply (on the basis, furthermore, of criticisms made by the High Authority), the applicants no longer based themselves simply upon the amounts of the transport parity reimbursements but endeavoured to establish what had been the damages actually suffered. Similarly they also amended their offers of proof. Thus one cannot speak of an alteration in the nature of the actions. As to the new offers of proof made by the applicants, I consider that they are in conformity with the requirements of Article 42 of the Rules of Procedure (which furthermore should not be applied strictly in applications for the lodging of which there is no time-limit). As to the alteration made in the calculation of the amount of the damage, I can say that such alterations in the claims do not appear to be impossible in actions for compensation, provided that the grounds of action remain the same.

2. *Force of res judicata arising from judgment in Joined Cases 19 and 21/60, 2 and 3/61*

There is a second objection which was not raised by the High Authority but which the Court could raise of its own motion, having regard to the judgment given in Joined Cases 19 and 21/60, 2 and 3/61, to the extent in any event that the applicants are the same in the present case. We should ask ourselves whether the decision to reject their claims for damages in the earlier proceedings, a decision having the force of *res judicata,* does not now prevent the undertakings concerned from putting forward claims based on the same grounds. On closer inspection, it appears however, that such is not the case. Although the applications made in 1960 and 1961 were based on contracts for the purchase of ferrous scrap made during the course of the months of September and October 1958, we find that those contracts do not appear among any of those transactions now disputed (cf. the schedules to the various applications). At the time the applicants were concerned with promises

of the payment of transport parity grants, which were not kept, whilst in the present case what is concerned is promises which were followed by payment of the transport parity grants. In the same way, the damages differ from those asked for in 1960 and 1961. I conclude from this that the facts before us today differ from those upon which we were called to adjudicate three years ago and that consequently the claims in the present cases are not the same. But, even if one regarded all the promises of equalization of transport costs as constituting one single dispute, this would not mean that the present applications were inadmissible, because it is necessary to bear in mind that in 1960 and 1961 the applicants submitted partial claims, and this, on any reasonable view, does not prevent them from asserting new claims based upon the same facts (see Rosenberg, *Lehrbuch des deutschen Zivilprozessrechts,* 9th Edition, p. 750). Consequently neither does the force of *res judicata* which attaches to the previous judgment amount to an obstacle to considering the cases currently pending.

II — The substance of the cases

For the purpose of assessing the claims for damages, we must draw a distinction between three points:

— Was the High Authority guilty of an unlawful act or omission?

— Has the damage suffered by the applicants been proved?

— Is there a causal connexion between the wrongful act or omission established and the subsequent damage?

I will now go on to consider these points.

1. *Wrongful act or omission*

I will repeat once more what constitutes the wrongful act or omission according to the applicants: the High Authority did not exercise effective supervision over the equalization authorities at Brussels and did not prevent them from making promises concerning the making of transport parity grants—promises which had finally to be retracted because they were incompatible with the principles of the ferrous scrap equalization scheme.

Two preliminary questions give no difficulty in this connexion. The first is whether such promises were actually made to the applicants. It is necessary to reply affirmatively, in view of a series of documents produced at the same time as the applications. Even if it appears from a meticulous examination that these documents do not cover all the contracts made for the applicants by the Joint Bureau of Ferrous Scrap Consumers concerning the delivery of shipyard scrap, that circumstance is unimportant because the High Authority has not disputed that promises were made to the applicants through the Joint Bureau to the extent to which they have alleged.

The other preliminary question concerns the illegal nature of the promises. On this subject, I refer to my opinion in Joined Cases 19 and 21/60, 2 and 3/61, in which I went into all the essentials concerning the incompatibility of a special equalization of transport costs with the principles of the equalization of ferrous scrap, as they emerged from fundamental decisions on the ferrous scrap equalization scheme.

Considering next whether the complaint of a wrongful act or omission is well founded, it can come as no surprise that on this point the applicants refer above all to the findings in Joined Cases 19 and 21/60, 2 and 3/61, in which, as I have said already, it was necessary to consider similar facts. There is no need for me to cite here the relevant passages of the grounds of judgment, which are to be found particularly on pp. 590 and 591 of the 1961 Volume of the French Edition of the *Recueil de la Jurisprudence.* It is

unlikely that the Court will depart from the judgment made at the time, even if it does not have the force of *res judicata* with respect to the present case, and even if there are good reasons, as I am still convinced that there are, for taking the opposite view. On this subject I recall what I said in my opinion in Joined Cases 19 and 21/60, 2 and 3/61, and also the Court's treatment of the problem of group scrap, on which the High Authority had dwelt during the oral procedure. By referring to Joined Cases 19 and 21/60, 2 and 3/61, I am thus starting from the concept that on the subject of promises of an equalization of transport costs made to the applicants by the Brussels authorities after 1 August 1958 (the decisive date in this judgment) it cannot be denied that the High Authority was responsible for an unlawful act or omission.

The only thing which might appear doubtful is whether a different view must be taken of the promises made by the Brussels authorities before the month of August 1958, that is to say, at a time when the administration of the equalization scheme had been delegated to them and when the High Authority confined itself to exercising supervision over them. It was not promises of this type which had to be considered in Joined Cases 19 and 21/60, 2 and 3/61. On the other hand it is apparent from the documents which we have before us (see the schedules to the applications) that they clearly have a prominent part in the present case, since a few cases only (Providence, Fives-Lille-Cail, Usinor) are concerned with deliveries of scrap after 1 August 1958 (and, consequently, with promises of equalization of transport costs after that date).

In my opinion it would be quite possible to give a different answer from that of the judgment in Joined Cases 19 and 21/60, 2 and 3/61 to the question of wrongful acts or omissions concerning promises of transport parity grants made prior to 1 August 1958.

In respect of that period, it is necessary first of all to start from the premise that the wrongful acts or omissions on the part of the Brussels authorities cannot automatically be attributed to the High Authority. The fact that the delegation of powers given by the High Authority has proved to be illegal is insufficient to justify such an opinion. It could be otherwise only if this delegation had to be regarded as a clear breach of the rules of the Treaty, which is not however the case, having regard to the difficulties of interpretation of Article 53. In the same way the case-law of the Court gives no clear indications for the proposition that responsibility for the wrongful acts or omissions committed by the Brussels authorities must be automatically attributed to the High Authority. In consequence, it is appropriate to apply to the responsibility of the High Authority for the period between 1954 and July 1958 the criteria of national case-law as applied to the responsibility of an administrative authority, the rôle of which is limited to supervising the activity of other bodies. It would be necessary thus to prove that the High Authority was guilty of a wrongful act or omission of a grave nature ('faute lourde') or, if one refers to the principles applied in French law concerning the responsibility of the revenue authorities, of a wrongful act or omission of an exceptionally grave nature (de Laubadère, *Traité élémentaire du droit administratif*, No 1172, 1176). That would not be possible unless the assurances given on the subject of transport parity constituted a serious and clear infringement of legal rules and if the wrongful act or omission had involved serious consequences for those concerned, in particular serious financial consequences. Neither of these two conditions is fulfilled. As the High Authority insists with good cause, it

was quite justified in having doubts concerning the legality of the equalization of transport costs, because the wording of the basic general decisions concerning scrap were not absolutely clear on this point. And, what is important from the point of view of the responsibility of the High Authority, which confined itself to carrying out supervision, it would also be necessary to take into account the fact that the committees to which it sent a representative have clearly never discussed the legality of the equalization of transport costs. Lastly, on the basis of the amount of the damages, which are still disputed at the present time, and which must in my opinion be considered separately for each undertaking, it is hardly possible to state that the negligence of the High Authority has had serious consequences for the undertakings concerned.

Nevertheless it is hardly probable, in my opinion, that these considerations could lead the Court to deny the existence of a wrongful act or omission in the present case. As the applicants emphasize, it is indisputable that the judgment in Joined Cases 19 and 21/60, 2 and 3/61 contains severe criticisms of the High Authority concerning its inadequate supervision of the Brussels authorities. These criticisms are general and not confined to a particular period of time. It is in this way that, like Mr Advocate-General Legrange, I read certain passages in the grounds of judgment, pages 590-591, Volume VII of the French Edition of the *Recueil de la Jurisprudence*. Even if, on this point, the judgment cannot even apply to the parties then concerned in the case with the force of *res judicata* and even if, on the contrary, the grounds of judgment are to be regarded as *'obiter dicta'* as regards the facts alone, it must nevertheless be supposed that the Court will persist in the opinion which it expressed at the time and will consider the complaint of a wrongful act or omission to be well founded, because of all the promises which were made on the subject of equalization of transport costs during the operation of the equalization scheme.

That is why in the further course of my examination I shall regard as proven the first condition of fact on which a claim based on administrative liability must be founded: the existence of a wrongful act or omission.

2. *Is there a causal connexion between the wrongful act or omission of the High Authority and the damage alleged?*

Since in my opinion—here I am anticipating the result of my consideration of the evidence—it is indisputable that at least one of the applicant undertakings suffered damage, I will now apply myself to the question whether there exists a causal connexion between the event which is claimed to have caused the damage and the damage itself, and only later shall I endeavour to ascertain the amount of damage and to evaluate the evidence submitted.

The decisive question is whether, in the absence of the event giving rise to the damage (the promises made by the Brussels authorities), the damage would not have occurred; or, more exactly, whether, if the transport parity grant had been refused, the applicant undertakings would have purchased other scrap at a smaller outlay. In view of the way in which the problem presents itself, we are compelled to reconstruct a hypothetical situation of cause and effect, a course of action in which it is impossible to rely on precise information and one which therefore depends on a certain degree of probability.

During the following examination we will have to distinguish two aspects:

— it is necessary to establish whether it would have been objectively possible for the applicants to purchase scrap from another source;

— it is necessary to consider whether

it may be regarded as proven that the applicants would actually have made arrangements of this type.

(a) The objective possibilities of the purchase of scrap

In the statement of reasons for the application, the applicants base themselves on the single idea that, if they had been refused a grant to equalize transport costs, they would have purchased imported scrap. I will therefore confine myself to considering whether, during the periods in dispute, it would have been possible for them to make such arrangements.

A certain number of applications having been withdrawn from the present dispute we still have before us the cases of 14 undertakings which during the period between 1954 and 1958 purchased approximately 60 000 metric tons of shipyard scrap. If we ask ourselves whether during that period it would have been possible to make the additional purchase of a corresponding quantity of imported scrap on the world scrap market, there is little difficulty in resolving this question in favour of the applicants, having regard to the development of total imports of scrap into the Community and the development of stocks during the period in dispute. In particular, it seems mistaken to think that because of these extra quantities of scrap the American Government would have brought into play the necessary measures to freeze exports.

If we consider that under the equalization scheme the Brussels authorities had the power to fix the amount of scrap imported and of other highly-priced scrap, which was taken into account for equalization, we must again ask ourselves whether, in any efforts which they might have made to obtain imported scrap instead of shipyard scrap, the applicants would have encountered difficulties with the Brussels authorities. On looking back, it is hardly possible to answer this question either in the affirmative because of the very small quantities concerned in the case of the applicant undertakings. In particular there are insufficient precedents to show that the Brussels authorities had applied strict criteria for the admission of imported scrap to the equalization scheme. A single case only was mentioned in the course of the proceedings, that of an importation of scrap by Italian undertakings, to which the Brussels authorities refused to grant equalization. But that was a matter of imports made independently and without authority, whilst in the case of the applicants one can certainly assume that if they had not purchased shipyard scrap they would have applied to the Joint Bureau to obtain imported scrap.

On the other hand, another question which is equally important presents greater difficulties: that is whether one may consider as proven the fact that the applicants could have purchased imported scrap instead of shipyard scrap at the exact moments when they had need of it, and by making use of ports of importation which were favourably situated for them as far as concerns transport costs. This question is scarcely made any easier if one bears in mind that in general the usual state of stocks left the undertakings with a certain freedom in timing these transactions. I think nevertheless that it is possible on this point to follow the conclusions to which the expert came in his examination of the individual cases. It appears from his report that because of the quantities of scrap in fact imported by the various undertakings one cannot seriously doubt that the question put should be resolved in favour of the applicants.

One may assume also that foreign exchange difficulties such as existed in France at the time of the dispute would have made it impossible to import the said quantities of scrap. Disregarding the small quantities of foreign exchange concerned here it should not be over-

looked in the present case that if the applicants had not purchased shipyard scrap very probably consideration would have been given to exporting it to third countries, which would have had as its consequence compensation in respect of foreign exchange.

In my view the documents produced during the proceedings allow of no doubt that the necessary shipping capacity for the importation of these quantities of scrap would have existed and that the docks would have been sufficient to deal with these supplementary imports.

(b) Would the applicants actually have bought imported scrap if equalization of transport costs had been refused?

The analysis becomes particularly difficult when it becomes necessary to inquire what arrangements the applicants would have made during past years in the absence of one of the factors to which they appear to have attached importance at the time (the promise of reimbursement of transport costs).

Let us consider their actual commercial activity during the working of the equalization scheme, to the extent to which we have relevant evidence: we find that the applicants have actually purchased imported scrap in considerable quantities, but that on the other hand they have also consumed scrap from within the Community, of which the cost price was in part higher than that of shipyard scrap without the equalization of transport costs. It thus seems justified at first sight to suppose that, if they had been refused the equalization of transport costs for shipyard scrap, the applicants would also have had recourse to Community scrap, at least to a certain extent. As has become clear in the course of the proceedings, this argument must nevertheless be abandoned, because it is well established that the resources of inland scrap were far from sufficient for Community needs and that it was necessary for this reason to import considerable quantities. As a substitute product for shipyard scrap, Community scrap could thus not play an appreciable rôle.

When we consider what are, apart from actual purchases of imported scrap, the facts which further support the view that if the equalization of transport costs had been refused to them, the applicants would have decided upon imported scrap, there must be mentioned in particular the fact that they made it clear to the Joint Bureau of Ferrous Scrap Consumers that they required an assurance that transport costs would be equalized and that they made the purchase of shipyard scrap dependent upon this assurance. This is only comprehensible on the supposition that the applicants considered that the consumption of imported scrap was in itself cheaper. One cannot seriously dispute that during the periods in question the applicants were actually able to compare the cost price of imported scrap and that of shipyard scrap. At most it could be objected that, to the extent to which it is limited to the importance of transport costs, this comparison must necessarily be incomplete because it could not take into account the importance of the payment of contributions to the equalization scheme, the amount of which was dependent upon the total consumption of imported scrap and other scrap of a higher price. As we know, the undertakings were not aware of the determining facts in this case until a long time after the scrap had been consumed, for technical reasons concerned with the preparation of the accounts. Nevertheless I should be inclined to think that this argument cannot finally discredit the evidence adduced by the applicants, in view of the fact that, when they tried to evaluate the influence of the amount of contributions on the cost price, as they were obliged to do when they made their arrangements, they were right to base

themselves only on their own consumption of scrap. The supplementary quantities of ferrous scrap necessary for each undertaking could hardly justify the fear that the rate of contributions would increase to such an extent that the purchase of imported ferrous scrap would appear to be unprofitable.

On the basis of the information which we have taken in the context of reasoning on a hypothetical basis occasioned by the question of cause and effect in the present proceedings, we may thus consider as proved the fact that if the equalization of transport costs had been refused the applicants would actually have purchased imported scrap.

3. *Proof of damage and ascertaining its amount*

The problem of the proof of the damage and of its amount, that is to say, the question of the extent to which the undertakings were handicapped by the purchase of shipyard scrap, has given rise to numerous disputes. But many of the disputed points relating to it may be regarded as settled following the expert's report, so that no purpose is served by going into them. Only the questions on the expert's report raised by the High Authority merit further discussion and it is these points to which I shall devote my attention in the following examination.

(a) The case of Hennebont

In this respect the Hennebont case may quickly be disposed of. As regards this undertaking, the expert arrived at the conclusion that, if one takes into account secondary ports actually used for the import of scrap, one is compelled to conclude that if the undertaking had used imported scrap instead of shipyard scrap it would have had considerable additional transport costs, so that even in the absence of equalization of transport costs it would still have been more advantageous for it to buy shipyard scrap. The expert's report puts at approximately FF 2 000 the gain thus obtained, whilst the applicant claims damage of FF 6 000.

Since the applicants' counsel has declared expressly that he had no observations to make on the subject of the expert's report and consequently that he accepted its conclusions, it only remains for us to deduce from this that the application of Hennebont should be dismissed as unfounded for lack of evidence supporting the existence of damage.

(b) The Saint-Jacques case

I can also reply in a few words to the objections of the High Authority on the subject of the examination of the case of Saint-Jacques.

As far as concerns the situation of this undertaking, as well as that of certain others (which must be left out of account in view of the considerations with regard to them which will be dealt with later), the High Authority complains that the whole of the expert's reasoning was laconic. During the oral procedure on 28 September, additional information was given in order to make up for this deficiency. It enabled us to see that the expert had studied the Saint-Jacques case using the same methods as those in the cases of all the other undertakings. This appeared to satisfy the High Authority so that I consider it unnecessary to make other observations in this respect.

(c) Importance of the increase in contributions consequent upon the additional consumption of imported scrap

On the other hand another objection raised by the High Authority appears to be fundamental. The High Authority declares that on the assumption, which appears essential for the statement of reasons for the application, that the undertakings had consumed imported scrap instead of shipyard scrap, an increase in the amounts of contribution would have been inevitable, since im-

ported scrap was generally more expensive than shipyard scrap. Once these additional sums necessary to the equalization of scrap were divided among all the undertakings, in proportion to the consumption of scrap of each of them, the result would be that for a certain number of the applicant undertakings the consumption of imported scrap would have been more expensive than that of shipyard scrap and that consequently damage cannot be proved. As regards certain others, there results from this at least an appreciable diminution of the sums calculated by the expert by way of damages.

As to the substance of this objection, in the evidence which he gave during the oral procedure the expert did not in principle dispute its correctness. On the other hand, the representative of the applicants considers that this objection is unfounded for the following reasons. He does not indeed dispute that because of the difference in price existing between imported scrap and shipyard scrap the purchase of increased quantities of imported scrap would have meant an additional burden on the Equalization Fund, which would have had to be spread among the various individual undertakings. But in his view it is proper to consider this matter in isolation in respect of each of the undertakings. That is to say, in order to calculate the damages that undertaking X is said to have suffered one can only take into account any additional quantities of imported scrap that it consumed and ask oneself how much the amount of its contributions would be increased if these additional quantities had been incorporated into the general equalization account. If the burden were spread among all the undertakings of the Community, one would arrive at a minimal increase in the rates of contribution which could in practice be neglected for the purpose of calculating damages. The joinder of the different cases for the purpose of procedure and of judgment does not on the other hand allow a consolidated account to be drawn up in respect of all the applicant undertakings, because each application would thus lose its independence for the purposes of judgment which continues to subsist even after joinder of the cases.

On this point I think that preference must in principle be given to the view taken by the High Authority. It must not be forgotten that to ascertain the damage the essential question is how the undertakings concerned would have obtained scrap if the Brussels authorities had issued a general refusal to equalize the costs of transport and what would have been the consequences for the equalization scheme. If one can regard as well-established what *is a pure question of fact,* namely that in this situation not only each of the applicant undertakings but also other undertakings of the Community would have chosen to buy imported scrap, it is necessary to take it into account in the calculation of the damage suffered by each undertaking. It is thus not the joinder of the pending cases which leads to the examination on a wider scale of the extent of the damage but the structure of the equalization scheme which rests essentially on the idea of the common involvement of all the undertakings concerned. It appears from remarks made by the High Authority on the subject of the expert's report that there is no doubt that for a large number at least of the applicant undertakings it is possible for them to say how they would have behaved at the time if the equalization of transport costs had been refused. It thus seems justifiable to take into account their hypothetical behaviour on the market in calculating damages.

But we must go on to inquire whether there are procedural reasons which prevent the objections of the High Authority from being taken into account. According to the applicants the arguments

put forward by the High Authority cannot be taken into account because they were raised for the first time in their observations on the expert's report, that is to say, out of time, and because the conditions required by Article 42 (2) of the Rules of Procedure which permit arguments to be adduced out of time have not been fulfilled. Nevertheless I do not agree with this opinion. Article 42 (2) of the Rules of Procedure speaks of 'fresh issues', that is to say, of independent grounds of application as well as the defendant's answer thereto, but it does not prevent the parties from developing and supplementing their arguments of fact and of law during the course of the proceedings. In the present case the objections of the High Authority should be regarded as being the supplementary arguments of this kind. From the outset of the proceedings the High Authority has brought into issue the fundamental idea that in order to calculate any damage suffered by the applicants it was necessary to establish exactly all the advantages and disadvantages which would be entailed by the purchase of imported scrap instead of shipyard scrap. This idea which may be regarded as an individual issue in the sense of the Rules of Procedure was developed without raising any fresh issue in the observations on the expert's report. On any reasonable interpretation of the Rules of Procedure this point must be allowed to the High Authority. Quite apart from that it may also be said that the objections of the High Authority contain a legal argument which the Court has the obligation to raise of its own motion in proceedings for damages. There is thus no procedural reason which prevents the increase in contributions attributable to an acquisition of imported scrap from being taken into account for the purpose of calculating damages.

On this basis, for which undertakings would the consumption of imported scrap have been more expensive than that of shipyard scrap without equalization of transport costs? According to the calculations made by the High Authority these are at least Maubeuge, Le Creusot, Saulnes, Pompey, Beautor, Porter-France, UCPMI and Hennebont. However the High Authority would like to go even further and also take into account the fact that Italian and Dutch undertakings have also benefited from the equalization of transport costs. In its opinion it must be accepted that if the equalization of transport costs had been refused these Dutch and Italian undertakings would also have obtained imported scrap, which would have caused a further increase in contributions, an increase which, in view of the quantities of scrap in question, appears to make the purchase of shipyard scrap cheaper for all the applicant undertakings even without the equalization of transport costs, and consequently renders proof of any damage impossible.

However I doubt whether the present state of the proceedings allows us to go so far in the discussion. The Court must regard it as established with a certain amount of credibility that if the equalization of transport costs had been refused the undertakings which benefited from it would have obtained imported scrap. We have not at the moment any reference point on this subject concerning the Italian and Dutch undertakings. It may be thought that by meticulously studying the costs resulting from the import of scrap they would have considered that it was cheaper to buy shipyard scrap even without the equalization of transport costs. This supposition appears justified by the fact that up to the present these undertakings have not lodged applications. They must therefore be excluded from consideration concerning the calculation of the quantum of damage.

As the expert has shown in a convincing manner in the course of the oral procedure, it is the same for the Le Creusot and Hennebont undertakings.

An exact calculation of the transport costs resulting from the purchase of imported scrap has shown that these undertakings had more interest in consuming shipyard scrap even without benefiting from the equalization of transport costs, and that in consequence it was not possible to establish the existence of damage. As the expert justly claims, these undertakings would have been able to make this calculation even at the time in question in view of the fact that they made frequent imports and that in consequence they had a good idea of the costs involved. Faced with a choice, upon a refusal to equalize transport costs, between imported scrap and shipyard scrap, they thus could only have decided in favour of the latter. In consequence the quantities of shipyard scrap consumed by the Le Creusot and Hennebont undertakings must not appear in the calculation of the increase in contributions attributable to the additional imported scrap. As the expert showed, another consequence is that contrary to the High Authority's view it is necessary also to admit the existence of damage in the case of Saulnes.

In conclusion I consider that, on the basis of the objections raised by the High Authority on the subject of the increase in contributions made necessary by the purchase of imported scrap, the Providence, Saulnes, Firminy, Rouen, Saint-Jacques, Châtillon, Fives-Lille-Cail and Usinor undertakings come into consideration as having suffered damage. On the other hand in the following considerations it will be possible to leave out the Maubeuge, Pompey, Beautor, Porter-France, UCPMI and Hennebont undertakings because of the lack of proof of damage in their cases.

(d) Importance of the amount of the promised transport parity grants for the purpose of calculating damage

In its observations on the expert's report, the High Authority claims that the method used by the expert is open to criticism because he did not examine separately the individual contracts of purchase in calculating damage and that he did not take as a ceiling for damages the transport parity grants promised on the occasion of contracts for the purchase of scrap. In fact for the expert the only thing that counted was the question what would have been the actual costs if the undertakings had purchased imported scrap instead of shipyard scrap even when these costs (which is the case for one undertaking) were higher than the amount of the equalization of the costs of transport.

I agree with the High Authority that this procedure is open to dispute. The applicants complain, and this must not be forgotten, that certain promises which were made to them on the equalization of transport costs were not kept. In an action for damages which is based upon the making of such promises, they cannot reasonably require to be better placed than they would have been had the promises been kept. It is necessary on the contrary to presume that, so far as concerned the ferrous scrap equalization scheme, they intended to settle for the sums mentioned in the promises to pay transport parity grants. Any other damage is covered by the fact of their agreement. In order to calculate the damage, it is necessary therefore to take account in each case of the promises made to the applicants. However, since the amounts of damage calculated by the expert must be considerably reduced because of objections raised by the High Authority concerning the supplementary equalization contributions, it can be assumed that the amounts representing the damage are now less in each case than the ceiling of the promises given on the occasion of the contracts, which saves us the trouble of having to make new calculations.

(e) Can the evidence adduced be regarded as sufficient?

Lastly we must again ask ourselves

whether the applicants were able to give convincing proof of what would have been the costs which they would have had to bear if from 1954 to 1958 they had purchased imported scrap instead of shipyard scrap because of a refusal to equalize transport costs. To the extent to which they actually consumed imported scrap during the periods in question, the proof has to be given by means of the production of documents relating to the expenditure incurred. We know from the expert's report that the applicants have not succeeded in establishing complete proof; in other words, from one undertaking to another, there remain varying degrees of doubt on the subject of the cost prices which the applicant undertakings paid for certain quantities of imported scrap during the periods under consideration. The expert considers this uncertainty in the final result as of little importance, since we have reliable figures for a third of all the quantities of imported scrap taken into account, which suffices, according to the usual methods of economic analysis, to obtain reliable approximate figures.

I doubt however whether the Court can be satisfied with this reasoning. If for the purpose of calculating damage we keep to the actual transport of imported scrap and if we try to obtain from this average figures for certain periods, it is clear that these figures may be considerably increased when one includes in the calculations other figures, hitherto unknown. In certain cases the result may be that there is no damage at all. We must therefore endeavour in the present case to obtain figures which are as numerous and as exact as possible concerning the actual transport of imported scrap.

Among the undertakings which have not yet been excluded from our examination for other reasons, the case of the Rouen and Saint-Jacques undertakings should not give any difficulty on this point. In the case of Saint-Jacques we have complete proof, according to the expert. Rouen never purchased imported scrap. It was necessary in that case to rely upon the rail charges in force during the period in question, charges which the expert has clearly succeeded in ascertaining with certainty. On the other hand, as regards the six other undertakings (Providence, Saulnes, Firminy, Châtillon, Fives-Lille-Cail, Usinor) there are gaps in the evidence of varying seriousness as concerns transport by rail or transport by water or both. On this subject I refer for details to the table appearing in Schedules 1 and 2 to the observations of the expert, a table which the latter amended in his letter of 14 October 1965. I find it hard to see why these difficulties of proof are inevitable. When the applicants concerned explain that national law authorized them to destroy certain business documents after a period of five years they must be reminded that Joined Cases 19 and 20/60, 2 and 3/61 brought in 1960 or 1961 should have been a warning to them. From that time onwards they had to expect that the High Authority would return to the question of the compatibility of the equalization of transport costs with the provisions of the Treaty and they had every interest in still preserving documents which they had not yet destroyed. They are thus only in a position to rely on difficulties of proof for the year 1954 at the most.

Next it is surely curious that the undertakings which rely on the destruction of their business documents should be able to produce documents relating to various years since 1954 in an incomplete form. In fact it would be more in conformity with the usages of commercial life to destroy documents which have become useless as a whole instead of keeping a certain number for each particular year, without its being clear upon what basis the choice was made. On this point the list of the documents produced as proof (as from Schedule

3 to the expert's report) properly raises the question whether the applicants have actually put forward all the evidence that they were able to produce. I refer for example to Providence which has produced all the documents concerning certain cases of transport by water for the year 1954 and to certain cases of rail transport for the year 1956, whilst for the following years the documentation produced as proof is incomplete. It is the same for rail transport to Firminy, for transport by waterway to Châtillon and to Usinor-Valencienne. The case of the Fives-Lille-Cail is also significant: it has produced no documents for the year 1958, whilst it has produced incomplete documents for the previous years. In these circumstances the method used by the expert in order to obtain approximate figures upon the basis of the documents available does not appear to me to be without disadvantages. Instead of adopting this method purely and simply, it seem appropriate to record expressly the existence of certain gaps in the evidence, for which the applicants are not entirely blameless, and to take account of it in calculating the damage. This cannot indeed be done by means of an order of the Court for the production of supplementary proof or of a supplementary report by an expert. The Court should rather make use of the power which courts generally have in actions for damages and which allow to a certain freedom in evaluating the damage (see for example, paragraph 287 of the German Zivilprozeßordnung). In the case of undertakings which have undoubtedly suffered damage, the Court should therefore deduct certain percentages, the figures to be established on the basis of the present state of the case, according to the degree of seriousness of the deficiencies in the evidence adduced. However it does not appear appropriate to me to suggest precise figures to the Court on this point.

(f) Summary

Concerning the proof of damage and its amount I consider in consequence that the Providence, Saulnes, Firminy, Rouen, Saint-Jacques, Châtillon, Fives-Lille-Cail and Usinor undertakings have suffered damage. The amounts of damage must be established, taking into account the objections raised by the High Authority on the subject of the increase in contributions made necessary by the purchase of imported scrap; in accordance with the conclusions of the expert's report, it is necessary however in the present case to proceed on the basis that the Le Creusot and Hennebont undertakings did not purchase imported scrap in place of shipyard scrap. Except for the Saint-Jacques and Rouen undertakings there should be deducted from the amounts of damage thus ascertained certain percentages based upon the degree of incompleteness of the evidence adduced, which for each undertaking should be established according to the present state of the proceedings.

III — Opinion

Summing up, my opinion is as follows: the applications of the said undertakings for the High Authority to be ordered to compensate for the damage which they have suffered as a result of the illegal promises concerning equalization of transport costs, are well founded. The damages awarded should be those sums which the Court in its discretion thinks proper, on the

basis of the expert's observations, the High Authority's objections concerning the increase in equalization contributions and the deficiencies in the evidence.

On the other hand the applications of the Maubeuge, Pompey, Beautor, Porter-France, UCPMI and Hennebont undertakings must be dismissed as unfounded because of lack of any damage suffered.

As far as concerns the costs which will remain to be settled in respect of the applications which have not been withdrawn, it is necessary to take into account that the undertakings to which damages are to be awarded cannot nevertheless be regarded as having completely succeeded in their applications if one compares the original conclusions with the amounts which will finally be paid to them. The costs incurred should consequently be divided between the applicants concerned on the one hand and the High Authority on the other hand.

As to the Maubeuge, Pompey, Beautor, Porter-France, UCPMI and Hennebont applicants, who have failed entirely, the question of costs is governed by the first paragraph of Article 69 (2) of the Rules of Procedure.