THE EUROPEAN COAL AND STEEL COMMUNITY:
A POLITICAL AND LEGAL INNOVATION

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"Great economic and social forces flow with a tidal sweep over communities that are only half-conscious of that which is befalling them. Wise statesmen are those who foresee what time is thus bringing, and endeavor to shape institutions and to mould men's thought and purpose in accordance with the change that is silently surrounding them."

JOHN MORLEY, *THE LIFE OF RICHARD COBDEN* 636 (1881)

THE Treaty¹ establishing the European Coal and Steel Community of France, the West German Federal Republic, Italy, Belgium, The Netherlands, and Luxemburg has entered the first of its expected fifty years of operation. The Community is a new type of international political² institution designed to organize and maintain a common, competitive market for coal and steel.³ Its supranational powers mark a basic departure from the conception of all previous international organizations.⁴ Its aims are explicitly stated by M. Schuman himself in his original proposal:

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1. For the English text of the Treaty, see PRESS AND INFORMATION DIVISION OF THE FRENCH EMBASSY, *TREATY CONSTITUTING THE EUROPEAN COAL AND STEEL COMMUNITY* (hereinafter cited as *TREATY*), together with *ANNEXES, PROTOCOLS* and the *CONVENTION* containing the Transitional Provisions, (hereinafter cited as *ANNEXES, PROTOCOLS*, and *CONVENTION* respectively).

Because of the shortcomings of the English translation, frequent references will be made to the original French text of the Treaty published in *LA DOCUMENTATION FRANÇAISE* NR. 1489 (June 6, 1951).

2. The political objectives of the Plan are so evident that Swiss public opinion has voiced considerable reaction against Switzerland's participation in the Plan as being contrary to her traditional policy of neutrality. *Switzerland and the Schuman Plan*, 1 *SWISS REV. OF WORLD AFFAIRS* 6 (1951).

3. Whenever the expression "coal and steel" is used, it is meant to include not only combustibles (pit-coal, briquettes of pit-coal, coke, lignite briquettes, and lignite) but also iron ore, scrap iron, manganese ore, pig iron and ferro-alloys, raw and semi-finished products of iron, ordinary and special steel, and hot-finished and finished products of iron. See *ANNEXES* 83-90.

4. The French government vigorously insisted upon the formation of the Community's supranational powers, as evidenced from the exchange of memoranda between the British

"The pooling of coal and steel production will immediately assure the establishment of a common basis for economic development, which is the first step for a European federation, and which will change the destiny of these regions which have long been devoted to the production of arms to which they themselves were the first to fall constantly victim."⁵

The following discussion of this supranational experiment is an attempt to evaluate the pertinent political and economic factors and analyze the Community's institutional structure.

EXISTING POLITICAL AND ECONOMIC CONDITIONS

The political considerations, unquestionably instrumental in formulating the Schuman Plan, were largely centered on the future position of Germany within the East-West rift. The increasing political power of the West German Federal Republic has changed the European political scene. It has raised the question of future Franco-German relations and foredoomed the further existence of the International Ruhr Authority controlling German heavy industry.⁶ The French government, realizing the consequences of this development and recognizing the necessity of re-formulating West Germany's international position, has sought Germany's closer association with a Western European scheme which would provide a safeguard against German armament potential.⁷ The Plan would also counterbalance the strength of the Soviet satellite system. The danger that West Germany, with its vital industry, would be lured into the Soviet web by promises of political unification to German nationalists, and by offers of vast and hungry markets within the Soviet orbit to German industry, only stressed the need for West Germany's inclusion within a consolidated Western Europe.

and French governments. See the British White Paper, *ANGLO-FRENCH DISCUSSION REGARDING THE FRENCH PROPOSAL FOR THE WESTERN EUROPEAN COAL, STEEL AND IRON INDUSTRIES* (Cmd. 7970—Misc. No. 9) (1950); Reuter, *La conception de pouvoir politique dans le Plan Schuman*, 1 *REVUE FRANÇAISE DE SCIENCE POLITIQUE* 258 (France 1951).

5. 22 DEP'T STATE BULL. 936-7 (1950).

6. The German political parties, especially the Social Democrats, as well as the German delegation to the Schuman Plan Conference, never failed to call attention to the necessity of ending the operation of the Ruhr Authority. See MEYER, *POLITICAL PARTIES IN WESTERN GERMANY* 22 (1951). When the Plan came into operation, the Ruhr Authority was terminated. *AGREEMENT BETWEEN THE GOVERNMENTS OF THE UNITED KINGDOM, BELGIUM, FRANCE, LUXEMBURG, THE NETHERLANDS AND THE UNITED STATES OF AMERICA, RELATING TO THE TERMINATION OF THE FUNCTIONS OF THE INTERNATIONAL AUTHORITY FOR THE RUHR AND OF THE AGREEMENT FOR THE ESTABLISHMENT OF AN INTERNATIONAL AUTHORITY FOR THE RUHR* (Cmd. 8705—Treaty Ser. No. 64) (1952). For a recent comparative study, see Kaackenbeeck, *The International Authority for the Ruhr and the Schuman Plan*, 37 *THE GROTIUS SOCIETY* 4-22 (1952).

7. The proposed Treaty constituting the European Defense Community, signed on May 27, 1952, is a further elaboration of this French foreign policy. For the full text of this Treaty and annexed Protocols, see SEN. EXEC. DOC. Q & R, 82d Cong., 2d Sess. (1952).

In addition to these political considerations, Europe's postwar economic situation played an equally significant role. As a result of the destructive effects of World War II, the pattern of international trade had undergone pronounced changes, especially in Europe.⁸ The urgent need for re-equipping its industries as well as the effects of the Iron Curtain's cutting Europe off from its former sources of raw materials and food,⁹ were bound to lead to unusually large imports from the United States.¹⁰ The net excess of imports over exports and the loss of its foreign assets only intensified Europe's long standing trade deficit with the United States and further aggravated the dollar shortage.¹¹ Europe's surpassing of pre-war production levels¹² must not, in view of its increased population and United States financial assistance, be considered a sign of healthy recovery.¹³

These difficulties of international trade, together with European efforts to maintain full employment by protecting domestic industry and labor, have resulted in a rigid pattern of intra-European trade. Bilateral trade agreements, with their inherent tendency toward autarchy, have restrained the free movement of goods, services, and capital.¹⁴ Such an economic policy protected weak domestic industry and, by limiting the size of the market, precluded efficient mass production.¹⁵ By disregarding the principle of comparative advantage,¹⁶ protectionism maintained high production costs and prices. Europe's high production costs were largely the result of international double pricing of raw materials.¹⁷ For example, against a domestic price for Lor-

8. ECONOMIC SURVEY OF EUROPE SINCE THE WAR: A REAPPRAISAL OF PROBLEMS AND PROSPECTS (Research and Planning Div., Econ. Comm. for Europe, United Nations) 10-20 (E/ECE/157, 1953) (hereinafter cited as ECONOMIC SURVEY OF EUROPE).

9. *Developments in Trade Between Eastern and Western Europe from 1950 to Mid-1952*, 4 ECON. BULL. FOR EUROPE 34-78 (1952).

10. ECONOMIC SURVEY OF EUROPE 19.

11. The dollar shortage is by no means a post-war phenomenon, as frequently assumed; the disruptive effects of war have merely intensified and further aggravated the dollar imbalance in world trade. HAWTREY, *THE BALANCE OF PAYMENTS AND THE STANDARD OF LIVING* 30 *et seq.* (1950). But see Haberler, *Dollar Shortage?* in *FOREIGN ECONOMIC POLICY FOR THE UNITED STATES* 426-45 (Harris ed. 1948).

12. ECONOMIC SURVEY OF EUROPE 7-9.

13. *E.g.*, the Special Group of Experts of the Office of European Economic Cooperation (Marshall Plan) estimates that Western Europe will be, by 1956, short of 25-35 million tons of coal, OEEC, REP.: *COAL & EUROPEAN ECON. EXPANSION* 60 (1952), a large part of which is very likely to be imported from the United States. For further details, consult UNITED NATIONS, *ECONOMIC SURVEY OF EUROPE IN 1951* pp. 143-74 (1952).

14. WILLIAMS, *ECONOMIC STABILITY IN A CHANGING WORLD* 88, 99, 137, 152 (1953).

15. *EUROPEAN STEEL TRENDS IN THE SETTING OF THE WORLD MARKET* (Econ. & Social Council, Econ. Comm. for Europe, Steel Div., United Nations) 72 (E/ECE/112, E/ECE/STEEL/42) (1949) (hereinafter cited as *EUROPEAN STEEL TRENDS*).

16. For analysis of this principle in the context of international trade, see Haberler, *Some Factors Affecting the Future of International Trade and International Policy in READINGS IN THE THEORY OF INTERNATIONAL TRADE* 530-2 (Ellis ed. 1949).

17. *EUROPEAN STEEL TRENDS* 39, 66. *E.g.*, it is estimated that the cost of raw material is responsible for up to 80% of the price of pig iron, and 75% of the price of crude steel. For

rairie ore of 585 francs per ton, France charged an export price of no less than 1,080 francs. German metallurgical coke was similarly double priced: a domestic price of \$12.60 per ton against an export price of \$17.50.¹⁸ The crippling effects of double pricing were further intensified by discriminatory railroad freight rates,¹⁹ which, in view of the bulk of raw materials needed for steel production,²⁰ considerably increased the price of steel. High steel prices may choke any stimulus for increased demand and restrict the volume of production and employment. They also handicap Europe's ability to compete successfully with American products on the world market, and further frustrate attempts to alleviate the existing dollar deficit.²¹

The nature and magnitude of post-war Europe's political and economic problems necessitated new practices and institutions.²² Hence the Schuman Plan came into existence, encompassing coal and steel, the backbones of a modern economy. These industries require some degree of control because they have difficulties in adjusting to changes in consumption, and are the first industries affected by cyclical fluctuations in an economic system.²³

OBJECTIVES OF THE SCHUMAN PLAN

Common Market: The Plan's primary and immediate aims are economic. It attempts to organize and maintain, within the European territory of the Member States,²⁴ a common, competitive market for coal and steel. To this end, the Member States of the Community are committed to abolish and prohibit:

a general discussion of the raw material problem of the West European industries, consult *L'INTÉGRATION ECONOMIQUE DE L'EUROPE* 37-74 (De Sainte-Lorette ed. 1953). See also, *ECONOMIC SURVEY OF EUROPE* 229.

18. *EUROPEAN STEEL TRENDS* 65. See also, *The Coal and Steel Industries of Western Europe*, 2 *ECON. BULL. FOR EUROPE* 17, 29-36 (2d Quarter, 1950).

19. For the problem of transportation costs, see *id.* at 39-41. See also, HIGH AUTHORITY, *REP. ON THE SITUATION OF THE COMMUNITY* 69-75 (1953) (estimating that transport charges currently represent 20-25% of the selling price of rolled steel). Discrimination in transportation rates is bound to affect the price level substantially. HIGH AUTHORITY, *THE ACTIVITIES OF THE EUROPEAN COMMUNITY* 57-63 (1953).

20. It is estimated that the production of one ton of finished steel requires an average of 2-4 tons of iron ore, about 2 tons of coal, and over 1 ton of other material such as scrap iron, fluxes, etc. *EUROPEAN STEEL TRENDS* 40.

21. *Id.* at 39.

22. Fisher, *The Future of International Economic Institutions*, 1 *YEARBOOK OF INT'L AFFAIRS* 178-201 (1947).

23. DAUGHERTY, DE CHAZEAU & STRATTO, *THE ECONOMICS OF THE IRON AND STEEL INDUSTRY* 5, 32 (1937).

24. *TREATY Art. 79*, ¶ 1 explicitly refers to European territories only. This excludes the metropolitan area of French Algeria with its rich iron ore deposits which are of particular importance to the Italian steel industry. *RAPPORT DE LA DÉLÉGATION FRANÇAISE* 75 (1951) (hereinafter cited as *RAPPORT*). However, in trade involving coal or steel in the non-European territories of a Member State, preferential treatment must be given to other Member States. *TREATY Art. 79*, ¶ 2.

"(a) import and export duties, or charges with an equivalent effect, and quantitative restrictions on the movement of coal and steel;

"(b) measures or practices discriminating among producers, among buyers or among consumers, specifically as concerns prices, delivery terms and transportation rates, as well as measures and practices which hamper the buyer in the free choice of his supplier;

"(c) subsidies or state assistance, or special charges imposed by the State, in any form whatsoever;

"(d) restrictive practices tending toward the division of markets or the exploitation of the consumer."²⁵

By creating a common productive unit and market for coal and steel,²⁶ the participating States have pooled resources representing fifteen percent of their industrial production and constituting two-thirds of the world's steel exports.²⁷ A dense railroad network, a cheap waterway transportation system, and skilled manpower, all contribute substantially to the economic efficiency of this "most powerful industrial basin in the world which history has divided."²⁸ The proximity of the main production centers to the domestic market, and to exporting harbors, rounds out the Community's favorable economic conditions.

Many benefits are expected from an enlarged, common market with no trade barriers. An expanded market is suitable for mass production techniques, which are particularly important in the steel industry²⁹ with its necessary concentration of production in large units requiring heavy capital investments.³⁰ Moreover, labor, natural resources, and capital are more productively utilized in a common market, thus reducing, through specialization, modernization, and expansion, the production costs of basic steel products.³¹ Free from discriminatory trade practices, the common market should facilitate movement of essential raw materials and result in cheaper procurement.³² The long range benefits of the common market are increased consumption and

25. *Id.* Art. 4. The common market has been in force for coal and iron ore since Feb. 10, 1953. HIGH AUTHORITY, THE ACTIVITIES OF THE EUROPEAN COMMUNITY 13; for steel since May 1, 1953, 2 JOURNAL OFFICIEL DE LA COMMUNAUTÉ EUROPÉENNE DU CHARBON ET DE L'ACIER 113 (May 4, 1953).

26. An excellent map of the European coal and steel industries is attached to EUROPEAN STEEL TRENDS. For tables on the main iron ore deposits and coal reserves, see Appendix III, *id.* at 115-116.

27. HIGH AUTHORITY, REP. ON THE SITUATION OF THE COMMUNITY 58 (1953).

28. *Ibid.*

29. EUROPEAN STEEL TRENDS 40, 61-3.

30. In 1949, the cost of building a modern integrated steel mill with an annual crude steel capacity of one million tons was estimated at about 200 to 300 million dollars; in the United States the figures quoted ran from 300 to 400 million dollars. *Id.* at 72.

31. *Id.* at 74.

32. HIGH AUTHORITY, REP. ON THE SITUATION OF THE COMMUNITY 60-93 (1953).

net consumer purchasing power, and thus an improved Community standard of living.³³

But these expected benefits depend upon the condition of the steel market. The steel industry plays a key role in the structure of any modern economy. A decrease in the steel production caused by reduced steel consumption or shortage of essential raw materials, is bound to cause unemployment not only in steel mills but in steel consuming and transportation industries as well.³⁴ Consequently, the Plan seeks to meet and forestall situations likely to endanger the steel industry. The Community assures this industry regular supplies of iron, coal, and coke,³⁵ if need be, by allocation.³⁶ Furthermore, by offering coal miners and steel workers higher wages, improved working and living conditions, and assistance against the hazard of unemployment,³⁷ the Community hopes to maintain an efficient and qualified labor force. Finally, regular surveys of market conditions³⁸ and regulation of the flow of investment³⁹ should enable the Community to utilize fully the production capacity of the steel industry.⁴⁰

The Member States' competitive positions in world trade are also expected to improve. High production and lower prices of steel and capital goods will permit increased exports either to dollar countries or to non-dollar areas able to offer in exchange their agricultural products or raw materials.⁴¹ In either instance, such increased exports will result in dollar savings, help to cure the dollar imbalance, and restore Europe's viability in world trade.

Competitive Market: The common market, established by the removal of national trade barriers and discriminatory restrictions on coal and steel movement, could not alone assure the benefits of competition. The coal and steel

33. For the complex roles of consumption and net consumer purchasing power in affecting the standard of living, see INCOME STABILIZATION FOR A DEVELOPING DEMOCRACY 111-68, 339-478 (Millikan ed. 1953).

34. EUROPEAN STEEL TRENDS 73.

35. TREATY Art. 3(a).

36. *Id.* Art. 59.

37. *Id.* Arts. 3(e), 68, 69; CONVENTION § 23. See RAPPORT 129-38; HIGH AUTHORITY, REP. ON THE SITUATION OF THE COMMUNITY 94-9 (1953); Roux, *The Position of Labour under the Schuman Plan*, 55 INT'L LAB. REV. 289-320 (1952).

38. TREATY Art. 46. Pertinent information concerning market conditions is indispensable to a rational expansion of production. See PIGOU & ROBERTSON, ECONOMIC ESSAYS AND ADDRESSES 38 (1931); EUROPEAN STEEL TRENDS 73-6.

39. TREATY Art. 54.

40. The role of public works projects in maintaining full production is also recognized in the Treaty. Under Art. 57, the community may cooperate with Member States in planning these projects.

41. ECONOMIC SURVEY OF EUROPE 135 *et seq.*

In addition to increased exports, Europe's dependence could also be eased by reducing dollar expenditures. Increased production and more economic use of coal will result in substantial dollar savings. OEEC, FOURTH REP.: EUROPE, THE WAY AHEAD 160 (1952) (estimates that expenditures for coal imports from dollar areas could be reduced 400-500 million dollars from 1951-52 expenditures).

industries could continue to fix prices, restrict production and technology, and allocate markets and raw materials.⁴² The Treaty seeks, therefore, to organize and maintain a competitive as well as common market, free from any restrictive or monopolistic practices;⁴³ to that end, it provides strong anti-cartel and deconcentration provisions designed to prevent any abuse of the competitive system. These provisions, directly enforceable within the Community, represent the first instance of supranational legislation replacing the Member State's anti-cartel and deconcentration laws in the field of coal and steel.⁴⁴

The anti-cartel provisions of Article 65 of the Treaty do not preclude non-restrictive and non-discriminatory arrangements which further specialization of production, or facilitate joint selling or buying. The Community, however, must explicitly authorize these arrangements as essential, and capable of improving production or marketing.⁴⁵ Article 65 prohibits any agreement "which would tend directly or indirectly to prevent, restrict or impede the normal operation of competition within the single market."⁴⁶ The scope of Article 65 includes unauthorized agreements among two or more coal or steel enterprises, distributors, or associations.⁴⁷ In addition, evidently following the concept of "concerted actions" in United States antitrust laws,⁴⁸ this provision seeks to eliminate all implicit understandings which are manifested by such concerted practices as price leadership, open prices, and the basing point system. Instead of employing a subjective test, such as the intent of

42. Uri, *Der Schuman Plan und gewisse Probleme der internationalen Volkswirtschaftslehre*, 13 ZEITSCHRIFT FÜR NATIONALÖKONOMIE 367 (1952).

43. For extensive treatment of the activities of monopolies and cartels, see UNITED NATIONS STUDIES, INTERNATIONAL CARTELS (1947); RESTRICTIVE BUSINESS PRACTICES (Economic and Social Council, United Nations) (E/2379, E/AC.37/2, and E/2379/Add.1, E/AC.37/2 Add. 1, April 29, 1953). Especially pertinent to the present article is HENNER, THE INTERNATIONAL STEEL CARTEL (1943).

44. For a convenient collection of European anticartel legislation, see REPORT OF THE DEP'T OF STATE TO THE SUBCOMM. ON MONOPOLY, SEN. COMM. ON SMALL BUSINESS, FOREIGN LEGISLATION CONCERNING MONOPOLY AND CARTEL PRACTICES (1952); TEXT OF NATIONAL LEGISLATION AND OTHER GOVERNMENTAL MEASURES RELATING TO RESTRICTIVE BUSINESS PRACTICES (Economic and Social Council, United Nations) (E/2379/Add.2—E/AC.37/2/Add.2 1953).

45. TREATY ART. 65(2). See KRAWIELICKY, DAS MONOPOLVERBOT IM SCHUMAN PLAN 23-6 (1952).

46. These forbidden agreements are automatically void and may not be invoked before any court or tribunal of the Member States. TREATY ART. 65(4). The anti-cartel provisions are retroactive; any agreement in force before establishment of the Community must be submitted for approval, and, if illegal, must be abandoned within a reasonable time limit fixed by the High Authority. CONVENTION § 12. See 2 JOURNAL OFFICIEL DE LA COMMUNAUTÉ EUROPÉENNE DU CHARBON ET DE L'ACIER 138-9 (1953) (2 agreements denied approval).

47. TREATY ART. 65 is applicable not only to enterprises engaged in production of coal or steel, but also to enterprises distributing these products to buyers who are not "domestic consumers." *Id.* ART. 80. See RAPPORT 94.

48. See, e.g., MACHLUP, THE POLITICAL ECONOMY OF MONOPOLY 88-91, 127-68 (1949); STOCKING & WATKINS, MONOPOLY AND FREE ENTERPRISE 132-233, 251 (1951).

the parties, the Treaty judges these restrictive practices in terms of their potential danger to, and effects upon, competition within the market, especially with regard to prices, restrictions on production or technology, division of markets and allocation of raw materials.⁴⁹

Since these anti-cartel provisions are applicable to business practices of the coal, steel, and distributing enterprises within the Community, the way is left open for export cartels.⁵⁰ This seems to be a serious shortcoming of Article 65; particularly so, if one refers to the experience with the Webb-Pomerene Act,⁵¹ designed to strengthen the export potential of United States industry. This Act became in fact a convenient vehicle for introducing through the back door the effects of cartel practices on the domestic market.⁵² It is questionable whether the Community will tolerate a similar development.⁵³ Certainly, the Community is not entirely deprived of means to prevent it. It should be noted that Article 65 makes no distinction between agreements of coal and steel enterprises tending to introduce restrictive business practices within the Community or outside of it. Article 65 only views such agreements in the light of restrictive effects likely to occur within the Community. Thus, a restrictive agreement between two or more coal or steel enterprises forming an export cartel would be void and the enterprises subject to sanctions if such an agreement would have repercussions which might "indirectly" restrict competition within the Community's market.⁵⁴

Abnormal concentrations of economic power are equally incompatible with, and potentially dangerous to, free competition. To prevent such concentration, Article 66 requires the Community's prior authorization for any transaction⁵⁵

49. TREATY Art. 65(1).

50. KRAWIELICKY, *op. cit.* *supra* note 45, at 22; Ophüls, *Das Wirtschaftsrecht des Schumanplans*, 4 NEUE JURISTISCHE WOCHENSCHRIFT 381-2 (Germany 1951).

51. 40 STAT. 516 (1918), 15 U.S.C. §§ 61 *et seq.* (1946).

52. STOCKING & WATKINS, CARTELS IN ACTION 200-02 (1946); Diamond, *The Webb-Pomerene Act and Export Trade Associations*, 44 COL. L. REV. 805, 827 (1944); Hale, *Monopoly Abroad: the Antitrust Laws and Commerce in Foreign Areas*, 31 TEXAS L. REV. 519-20, 523 (1953).

53. The possibility of forming a common export association was discussed at a recent meeting of the coal and steel industrialists of the Member States. The anxiety among the high officials of the Community caused by this discussion indicates their awareness of the dangers inherent in such an association. [1953] THE ECONOMIST 78. See also HIGH AUTHORITY, THE ESTABLISHMENT OF THE COMMON MARKET FOR STEEL—SPECIAL REPORT 19, 31 (1953) (indicating that the High Authority is examining the compatibility of such an association with the Treaty).

54. See L'INSTITUT DES RELATIONS INTERNATIONALES DE BRUXELLES, LA COMMUNAUTÉ EUROPÉENNE DU CHARBON ET DE L'ACIER 172 (1953).

55. It should be noted that the deconcentration provisions of Art. 66 are not retroactive, and do not apply to economic concentrations already in existence at the time the Community was formed. However, Art. 66 does apply to any transactions consummated between the signing of the Treaty and the date of its effectiveness, if this transaction was intended to avoid the application of the deconcentration provisions. CONVENTION § 13, ¶ 1. See RAPPORT 97.

involving at least one coal or steel enterprise, or distributors thereof, which might lead to economic concentration by merger, sales of securities or assets, loans, or "any other means of control."⁵⁶ The Community will forbid any transaction submitted for approval and declare illegal any economic concentrations already attained if they would or do "impair the maintenance of effective competition" in the coal or steel market within the Community.

The Community's control over economic concentration is broader than that over restrictive business practices. Article 66 reaches third parties outside coal and steel,⁵⁷ as, for example, a German shipyard which merges with a French steel mill, or a German chemical enterprise which gains control over Ruhr coal mines. The Community's deconcentration power is also applicable to a foreign national conducting his business from abroad, if his transaction impairs, by concentration within the Community, effective competition in coal or steel. Thus an American corporation which owns a Belgian rolling mill would be subject to possible deconcentration if it acquires from a Swiss bank a substantial control over a Luxemburg steel mill. Although the anti-cartel provisions under Article 65 cannot be invoked unless two or more coal or steel enterprises are involved, the deconcentration measures of Article 66 may apply to transactions involving two enterprises within the Community, only one of which need be in coal or steel.

Without resorting to control over other firms, a single coal or steel enterprise may expand and acquire a dominant position in the common market. In such an instance a deconcentration order would be too drastic a deterrent to economic growth;⁵⁸ therefore, the Community merely supervises this enterprise and intervenes only if it abuses its dominant position by protecting itself from effective competition in a substantial part of the market. The Community may recommend that this enterprise desist from practices incompatible with the aims of the Treaty, and, in case of noncompliance, the Community may set the modalities of sales and production which must be followed by the defaulting enterprise.⁵⁹ If the enterprise continues to disobey, pecuniary sanctions are imposed.⁶⁰

Although the anti-cartel and deconcentration provisions are directed exclusively to privately-owned enterprises, the Treaty also imposes certain limitations upon the Member States. Articles 4(d) and 5(2) oblige them "to assure the establishment, the maintenance and the observance of normal conditions of competition." By implication, compulsory cartel arrangements enacted by

56. See KRAWIELICKY, *op. cit. supra* note 45, at 57-8 (discussing the application of Art. 66).

57. See RAPPORT 93; KRAWIELICKY, *op. cit. supra* note 45, at 645. Any "physical or juridical persons who have acquired or regrouped or might acquire or regroup the rights or assets in question" must submit necessary information upon the request of the Authority. TREATY Arts. 47, 66(4).

58. RAPPORT 95.

59. TREATY Art. 66(7). See KRAWIELICKY, *op. cit. supra* note 45, at 93-100.

60. TREATY Arts. 58, 59, 64.

the Member States are prohibited.⁶¹ On the other hand, a Member State's right to nationalize its coal and steel industries appears to be unaffected by the deconcentration provisions of the Treaty. This immunity may be deduced from Article 83, which recognizes existing ownership, and from the intention of the delegations at the Schuman Plan Conference.⁶² Therefore, the French nationalized coal industry⁶³ is not subject to the deconcentration provisions. Unquestionably, nationalization is an economic concentration under public control. At this stage of the Community's political development, however, it is inconceivable that a Member State would make its contemplated nationalization of coal or steel dependent upon the Community's authorization. If the nationalization of coal or steel is carried out by establishing economically independent public corporations⁶⁴ which comply with the rules of competition as set forth by the Treaty, the Community will have no grounds for intervention. Nonetheless, the Treaty seems to impose certain limitations as to the form of nationalization. Should, for instance, the public ownership of such enterprises end their independent operation, and establish, instead, a unified State control which threatens free competition, the Community could intervene and deal with the situation in accordance with Article 66(7) of the Treaty which is applicable against an enterprise dominating certain sections of the coal or steel markets.⁶⁵

Transitory Period

By assuring the producers and consumers free and equal access to sources of raw materials and production within the Community, powerful forces of competition are released.⁶⁶ These will eliminate throughout the Community those enterprises which, because of their inefficient production methods, financial burdens, unfavorable physical conditions, and location (particularly with regard to raw materials), are least productive and thus unable to compete. Initially, however, the suddenly unleashed and unrestricted forces of competition would bring havoc to these weaker enterprises, and cause grave disturbances within the economic system. A gradual organization, offering to the weaker enterprises a breathing spell, assures a much smoother and less harm-

61. See KRAWIELICKY, *op. cit. supra* note 45, at 18-19.

62. See RAPPORT 100-102.

63. *Loi relative à la nationalisation des combustibles minéraux*, JOURNAL OFFICIEL 4272 (May 17, 1946), SIREY, LOIS ANNOTÉES 374 (1946). See Robson, *Nationalized Industries in Britain and France*, 44 AMER. POL. SCI. REV. 304 *et seq.* (1948).

64. For the various forms of nationalization, see PROBLEMS OF NATIONALIZED INDUSTRY 238-71 (Robson ed. 1952).

65. This intervention is permissible only if the enterprise abused its predominant position in order to attain objectives contrary to the aims of the Treaty. RAPPORT 102.

66. For a general discussion of some of the problems involved in establishing a common market, see MEADE, PROBLEMS OF ECONOMIC UNION (1953); FISHER, ECONOMIC PROGRESS AND SOCIAL SECURITY 49 *et seq.* (1945); VINER, THE CUSTOMS UNION ISSUE 41-81 (1950).

ful transition. To accomplish this, the Treaty provides for a five- to seven-year period of adjustment,⁶⁷ during which the Community, in cooperation with the Member States, will financially assist⁶⁸ and grant temporary protection⁶⁹ to the weaker coal and steel enterprises.⁷⁰

Financial assistance will aid beleaguered enterprises in specializing their production, modernizing their methods, or otherwise modifying their activities,⁷¹ even to the extent of creating new ones outside the coal and steel industries.⁷² The enterprises which are forced to close are given preference in establishing new industries. Before granting such financial assistance, the Community must find the proposed project economically sound and capable of providing employment for the released miners and steel workers. If these adjustments cause unemployment, the Community contributes to the employee's unemployment compensation.⁷³ The released workers will also receive financial assistance for their re-training and transfer to new industries.

In addition to this financial assistance, the Community may grant temporary protection, in the transitory period only, to coal mines whose operation costs are too high to meet the immediate impact of competition (*c.g.*, Belgian and some French mines).⁷⁴ The subsidy fund is raised by imposing a levy upon the most efficient and productive mines.⁷⁵ Temporary protection is also assured to weaker steel enterprises by restricting steel movements from one region to another, or by fixing minimum prices and production quotas.⁷⁶

To adapt the coal and steel industries to the demand of an enlarged, common, and competitive market with a minimum of economic disturbance and loss, is a formidable task requiring, above all, constant cooperation and guid-

67. CONVENTION § 1(4).

68. CONVENTION § 23. See RAPPORT 127-9.

69. Temporary protection measures for coal mines are listed in CONVENTION §§ 24, 26, 27; similar protections for the steel industries are found in *id.* §§ 29-31.

70. For discussion of the measures already taken, consult HIGH AUTHORITY, THE ACTIVITIES OF THE EUROPEAN COMMUNITY (1953); HIGH AUTHORITY, THE ESTABLISHMENT OF THE COMMON MARKET FOR STEEL—SPECIAL REPORT (1953).

71. CONVENTION § 23(1).

72. *Id.* § 23(3).

73. *Ibid.*

74. *Id.* §§ 24-8. See 2 ECON. BULL. FOR EUROPE 25 and Table 4 (2d Quarter, 1950); *Belgian Mines and the Schuman Plan*, [1951] THE ECONOMIST 1569-70; Delville, *L'Industrie charbonnière belge devant le Plan Schuman*, 61 REVUE FRANCO-BELGE 326-32 (1951).

Allotted subsidies to the Belgium collieries amount to 1,350 million Belgian francs, one-half of which is to be provided by the Belgian government, and the other half by the Community. HIGH AUTHORITY, THE ACTIVITIES OF THE EUROPEAN COMMUNITY 84 (1953).

75. The High Authority may impose a levy of up to 1.5% of the price of a ton of coal sold. CONVENTION § 25. See HIGH AUTHORITY, THE ACTIVITIES OF THE EUROPEAN COMMUNITY 52-4, 84-5 (1953) (0.55 Dm. levy imposed on German mines; 0.42 fl. levy on Dutch mines).

76. CONVENTION § 29. Section 30 permits the Italian government to maintain custom duties for the protection of its steel industry, with the understanding that these duties will be reduced annually, and completely eliminated by the end of the transition period.

ance.⁷⁷ In all probability, uncontrolled forces of competition would not only fail to establish such a market without ruinous effects, but also fail to check powerful coal and steel enterprises, seldom void of monopolistic tendencies,⁷⁸ in their quick expansion into the newly opened market. This stresses the necessity for a supranational institution with independent powers.

POWERS AND INSTITUTIONS OF THE COMMUNITY

To maintain the common, competitive market, the Community is granted extensive powers over the activities of the coal and steel enterprises. It thus replaces the Member States' sovereign powers over those industries.⁷⁹ Exceptionally, the Community may also control enterprises outside coal and steel if they are part of a forbidden economic concentration within these industries,⁸⁰ as well as those which systematically discriminate and interfere with the operation of the free coal and steel market.⁸¹ To assess properly the extent of the supranational character of the Community, it seems advisable to present first a general survey of all the Community's powers, leaving aside for the moment their distribution among its individual organs.

Power to Request Information: A permanent flow of information is necessary for efficient discharge of the Community's wide range of functions. The Community is empowered to request pertinent information from any coal or steel enterprise directly,⁸² and, if necessary, to have the information verified on the spot by Community officials.⁸³ Moreover, the Community may consult with various associations of producers, consumers, workers, and distributors in the coal and steel industries.⁸⁴

Financial and Investment Powers: The Community may tax the average value of an enterprise's products.⁸⁵ Besides paying for administrative ex-

77. Mikesell, *Economic Integration of Sovereign States: Some Fundamental Problems* in WILLIAMS, MONEY, TRADE AND ECONOMIC GROWTH 91 (1951); Robbins, *Economic Aspects of Federation* in FEDERAL UNION 186 (Channing-Pearce ed. 1940).

78. See Subcommittee on War Mobilization of Senate Committee on Military Affairs, SEN. REP. NO. 4 pursuant to S. RES. 107, 78th Cong., 2d Sess. 68-9 (1944) (international steel cartels). See also HEXNER, THE INTERNATIONAL STEEL CARTEL 65-91 (1943).

79. For a frank admission that national sovereignty will be replaced, see Foreign Minister Schuman's statement to the French National Assembly, JOURNAL OFFICIEL, DÉBATES PARLEMENTAIRES, ASSEMBLÉE NATIONALE No. 150 p. 8895 (1951).

80. TREATY Art. 66(1).

81. *Id.* Art. 63(2).

82. *Id.* Art. 47, ¶ 1.

83. *Id.* Art. 86, ¶ 4.

84. *Id.* Art. 48, ¶ 4. For restrictions on the types of producer associations with which the Authority may consult, see p. 40 *infra*.

85. TREATY Arts. 49, 50(2). For 1953, the High Authority has fixed the levy at 0.3%, to be increased 0.2% every two months with a final rate of 0.9% by the end of the year. *Décision No. 3-52*, 1 JOURNAL OFFICIEL DE LA COMMUNAUTÉ EUROPÉENNE DU CHARBON ET DE L'ACIER 4-6 (1952). The Authority estimates the income from levies at about 50 million dollars. HIGH AUTHORITY, REPORT ON THE SITUATION OF THE COMMUNITY 137 (1953).

penses, this "fiscal income" is designated for use as unemployment compensation to workers released because of the introduction of new production methods. These funds will also secure their re-employment by financing conversion of the weaker enterprises. The Community will also use the funds to finance technological improvements which will lower production costs, and to support research in production, consumption, and labor safety.⁸⁶

The amount of fiscal income may be too small to meet the capital investment needs of the coal and steel enterprises. Consequently, the Community is authorized to obtain additional funds, either by borrowing or by guaranteeing loans secured by individual enterprises.⁸⁷ In addition, the Community has the power to direct the flow of investment to its most productive use. The prevailing lack of capital investment in Europe on one hand,⁸⁸ and the large amount of financial outlay needed by the coal and steel enterprises on the other,⁸⁹ necessitate a coordination of investment policies in order to prevent waste of Europe's scarce capital on projects relatively unimportant for the economic stability of the Community.⁹⁰ To avoid such waste, any program of a coal and steel enterprise must, in accordance with the provisions of Article 54, be submitted to the Community for approval. The Community's disapproval of the investment plan bars the enterprise from access to any capital except its own funds.⁹¹ Thus the enterprises are greatly dependent upon the economic policy of the Community which, guided by the over-all market situation, regulates and directs the flow of capital, integrating the entire area into one single coal and steel unit.

Power over Prices: Financial powers alone would hardly be adequate to correct the impaired conditions of competition unless accompanied by some control over prices in the common market. To achieve price stabilization which would protect consumer, producer, and worker alike, the Community has the power to determine price limits on commercial transactions made by the coal and steel enterprises.⁹² To protect the consumer against a sudden

86. TREATY Arts. 50(1), 55(1).

87. *Id.* Arts. 49, 51(2).

88. See ECONOMIC SURVEY OF EUROPE 198, 210-3; HIGH AUTHORITY, REPORT ON THE SITUATION OF THE COMMUNITY 135-6 (1953).

89. The Authority estimates the volume of necessary annual investment, for the next four or five years, at 400-500 million dollars for the steel industry, approximately 250 million dollars for housing construction for miners, and 400-450 million dollars, for the next few years, for the coal industry. HIGH AUTHORITY, REPORT ON THE SITUATION OF THE COMMUNITY 125, 130, 132 (1953).

90. See EUROPEAN STEEL TRENDS 74; WILLIAMS, ECONOMIC STABILITY IN THE CHANGING WORLD 180 (1953).

91. The proportion of self-financing by the Community's coal and steel industries in 1952 is considerable: 44% in the coal industry, and 40% in the steel industry. Outside financial sources are banks and the capital market (coal, 31%; steel, 26%) and governmental assistance (coal, 25%; steel, 34%). HIGH AUTHORITY, REPORT ON THE SITUATION OF THE COMMUNITY 134 (1953).

92. TREATY ART. 61. See RAPPORT 154-5.

price increase caused by relative scarcity or exploitation by producers, the Community may fix maximum prices for coal and steel products. Similarly, to guard essential enterprises against economic crises which might eliminate them, the Community is authorized to set a minimum price level. By fixing minimum or maximum export prices,⁹³ the Community may regulate coal and steel exports to meet the competition of foreign sources and the demands of foreign markets.⁹⁴ The Community's control over export prices might, in view of the haziness of the anti-cartel provision on export cartels, be an appropriate and powerful weapon for combating such cartels.⁹⁵

Powers over Production, Trade, and Consumption: Production control is the greatest power the Community has at its disposal. Because of its drastic nature and far-reaching effects upon most of the industries within the Member States, this power can be invoked only in economic situations of utmost gravity which cannot be remedied by any other means.⁹⁶ Only a severe decline in demand and the reduced production resulting therefrom give the Community the power to regulate production of coal or steel enterprises.⁹⁷ To cope with the general effects of declining demand, the Community may establish production quotas and introduce quantitative import restrictions against products from abroad.⁹⁸ These restrictive measures are not introduced to maintain a price level—a motive so common to cartel practices—but rather in order to redistribute the decreased demand and temporary production setbacks throughout the Community.⁹⁹ Conversely, it may be necessary to minimize the production disturbances created by a serious shortage of products. In this situation, the Community may establish consumption priorities, allocate natural resources, and impose export restrictions in order to assure an adequate supply and distribution of raw materials and products within the Community.¹⁰⁰

Powers over Wages: The improvement of living and working conditions of the labor force in coal and steel is one of the fundamental objectives of the Community.¹⁰¹ To achieve this goal, the Community has the power to deal with an enterprise whose success is not attributable to its economic efficiency, but rather to its relatively low wage level in comparison with average wages in that region. The Community may require either the enterprise or the Member State to remedy this existing wage discrepancy.¹⁰²

93. TREATY Art. 61(c).

94. See *id.* Art. 3(a). See also RAPPORT 140.

95. RAPPORT 156.

96. TREATY Art. 57; *id.* Art. 5.

97. *Id.* Art. 58(1).

98. *Id.* Art. 58(1), (2).

99. RAPPORT 158.

100. TREATY Art. 59.

101. *Id.* Art. 3(e).

102. *Id.* Arts. 68(2), (3). The Treaty seems to authorize Community intervention if the unjust remuneration, which results in lowering the price level, affects the employer's

Sanctions: To assure the observance and enforcement of the Treaty provisions and the acts of the Community's organs, the Community may directly impose sanctions—mostly pecuniary in nature—upon the violating enterprises.¹⁰³ For violations of its anti-cartel and deconcentration provisions, the Treaty sets forth particularly strong sanctions. Restrictive agreements or decisions violating the anti-cartel provisions of Article 65 are void and the parties are subject to fines and daily payments.¹⁰⁴ Under the deconcentration provisions, the Community may, after having determined the illegality of such a concentration, order the separation of enterprises or assets illegally merged, and, if necessary, order their forced sale.¹⁰⁵ Against a Member State violating its Treaty commitments, the Community may engage in discriminatory economic practices otherwise forbidden, thus temporarily excluding such a State from the benefits of the common market.¹⁰⁶

Minimum Community intervention is the underlying principle of the Treaty.¹⁰⁷ Free competition assured, the Community, except for controlling and checking monopolistic tendencies and economic concentration, merely supervises the operation of the common market in an advisory capacity. With the appearance of an economic crisis, the Community's powers are enhanced and it intervenes to restore normal and free competition within the market. Although the Community's important powers over production and prices are reserved for abnormal economic conditions and thus appear as strictly emergency powers, it would be erroneous to consider the Community weak. Since the coal and steel industries are frequently afflicted by such conditions, the Community will have ample opportunity to exercise these powers.

regional competitors. The Treaty "neither authorizes nor provides for positive policy for the improvement of wages." Roux, *The Position of Labour under the Schuman Plan*, 55 INT'L LAB. REV. 316 (1952). When it does intervene, the Community directs its decision or recommendation to the party—enterprise or State—which fixed the wage level.

103. The Treaty imposes sanctions, for example, under Art. 47, § 3 (failure to provide information); Art. 50(3) (failure to pay tax levies); Art. 54, § 6 (unauthorized investment); Art. 64 (price discrimination); Art. 58(4) (violation of production quotas); Art. 59(7) (violation of measures taken to alleviate shortages of raw materials); Art. 65(5) (cartels); Art. 66(6) (economic concentration). It distinguishes between fines (*des amendes*) which are imposed for past violations committed by the enterprise, and daily penalty payments (*des astreintes*) which are imposed to deter future violations. See, *c.g.*, Art. 47, § 3.

One commentator has interpreted too narrowly the scope of the "sanctions" at the disposal of the Community. KRAWIELICKY, *op. cit. supra* note 45, at 42 (emphasizes pecuniary sanctions). The Community, for example, may also suspend legal rights of a violator or execute a forced sale of its assets. TREATY Art. 66(5).

104. TREATY Art. 66(5).

105. *Id.* Arts. 66(5), (6).

106. *Id.* Art. 88.

107. *Id.* Arts. 5, § 2, 57. See also Ophüls, *Das Wirtschaftsrecht des Schumanplans*, 4 NEUE JURISTISCHE WOCHENSCHRIFT 381, 382 (1951).

Institutional Structure

The institutional structure of the Community, designed to represent and protect the interests likely to be affected by the Community's operation, consists of the High Authority, the main organ of the Community; the Consultative Committee, encompassing the special interests of producers, consumers, workers and distributors; the Common Assembly, representing the peoples of the Community; the Council of Ministers, representing the Member States; and the Court of Justice.

The High Authority administers as well as legislates the policies of the common market.¹⁰⁸ It comprises nine members, who are nationals of the Member States and serve a six-year term of office.¹⁰⁹ A member of the Authority is responsible to the Community alone,¹¹⁰ enjoys immunity from any legal action based upon his official acts,¹¹¹ and is thus independent of his government.¹¹²

108. TREATY Art. 8. For details of the administrative machinery of the High Authority, see HIGH AUTHORITY, REPORT ON THE SITUATION OF THE COMMUNITY 16-18 (1953).

109. TREATY Art. 9. No more than two persons of the same nationality may be members at the same time. In order to stress the Authority's supranational character, the original proposal stipulated five members, which would have left one State unrepresented. KIELER VORTRÄGE, PROBLEME DES SCHUMAN-PLANS 15 (1951). There is a gentleman's agreement among the Member States that one member of the Authority will be a person having the confidence of the trade unions of the Community. The Member States elect this official from a list prepared jointly by the International Federation of Christian Trade Unions and The International Confederation of Free Trade Unions. Roux, *The Position of Labour Under the Schuman Plan*, 55 INT'L LAB. REV. 295 (1952). The following are the present officers of The High Authority: President, Jean Monnet, former Commissioner General of the French National Planning Commission; First Vice-President, Franz Etzel, former Christian Democratic deputy and chairman of the Commission on Economic Affairs of the German Bundestag; Second Vice-President, Albert Coppé, former Belgian Minister of Reconstruction. Members: Léon Daum, former top executive in French steel enterprises; Heinz Pothoff, former head of the German delegation to the International Ruhr Authority; Kirk Spierenburg, former director general of foreign economic relations in the Dutch Ministry of Economic Affairs; Albert Wehrer, former Minister of Luxembourg to France; Enzo Giachero, former vice-president of the Christian Democratic Party in the Italian Chamber of Deputies; Paul Finet, former secretary-general of a Belgian trade union. 6 CHRONIQUE DE POLITIQUE ÉTRANGÈRE 55 (Belgium 1953).

110. The members "shall exercise their function in *complete* independence, in the general interest of the Community. In the fulfillment of their duties, they shall neither solicit nor accept instructions from *any* Government or from *any* organization. They will abstain from all conduct incompatible with the supranational character of their functions." TREATY Art. 9, § 5 (emphasis added). They are disqualified from "any business or professional activities, paid or unpaid [and cannot] acquire or hold, directly or indirectly, any interest in any business related to coal and steel during their term of office or for a period of three years thereafter." *Id.* Art. 9, § 7.

111. PROTOCOL Art. 11.

112. The Community's Court of Justice has the exclusive power, on petition by the Council or Authority, to remove a member who no longer fulfills the necessary qualifications, or has committed a "gross fault." TREATY Art. 12, § 2.

Because of the Authority's extensive powers, the appointment of its members is of considerable importance to the Member States. For the first six-year term the States appointed eight members by unanimous agreement, leaving the ninth to be chosen by the eight.¹¹³ In future elections, however, the State control is somewhat decreased by requiring only a five-sixth's majority.¹¹⁴ But even under this majority rule, the Member State retains a right to veto the election of any member of the High Authority, whether such member was elected by all the other States or by the eight members of the High Authority.¹¹⁵ An explicit veto—and not a mere negative vote—defeats this member's election. Since an unlimited use of such a veto would enable a Member State to block the election of the High Authority's members indefinitely, the Treaty limits a State's peremptory vetoes to four candidates.¹¹⁶ Every additional veto may, upon another State's appeal, be reviewed by the Court of Justice, which is authorized to declare the veto null and void if it finds an "abusive" exercise of the veto power.¹¹⁷

The *Consultative Committee* is composed of an equal number of representatives from the associations of producers, consumers, workers, and distributors in the coal and steel industries, and secures their cooperation with the Authority.¹¹⁸ Despite the consultative function of this Committee, the Member States have retained the right to designate the eligible organizations of producers' and workers' associations, and allocate seats among them; these associations are merely entitled to prepare a list of their candidates.¹¹⁹ While the selection of representative organizations of consumers and distributors is left to those special interest groups themselves,¹²⁰ it is significant that the States have reserved the right to designate representative organizations of industry and trade unions, representing politically important groups.

The Committee assists the Authority by making available the expert knowledge and opinions of the coal and steel specialists. The Authority must, before taking action, *consult* the Committee in specific instances prescribed by the Treaty.¹²¹ Although the Committee's function is only advisory, a failure to

113. *Id.* Art. 10, ¶ 1. One commentator has apparently misinterpreted the selection process. Loewenstein, *The Union of Western Europe: Illusion and Reality—I*, 52 *COL. L. REV.* 95 (1951) (asserts that all nine members of Authority are picked by States).

114. *TREATY* Art. 10, ¶ 5.

115. *Id.* Art. 10, ¶ 10.

116. *Id.* Art. 10, ¶ 11.

117. *Ibid.*

118. The number of members on the Committee may range from 30 to 51. *Id.* Art. 18, ¶ 1. The Council of Ministers has currently fixed the number of members at 51. For a list of the current delegates, see *JOURNAL OFFICIEL DE LA COMMUNAUTÉ EUROPÉENNE DU CHARBON ET DE L'ACIER* 11-14 (1953).

119. *TREATY* Art. 18, ¶ 3.

120. *Ibid.*

121. *Id.* Art. 19, ¶ 1. The Authority is obliged to consult the Consultative Committee before taking action on: financial arrangements among enterprises, Art. 53; research, Art. 55(2); financing projects, Art. 56; production quotas, Art. 58(1), (3); measures to combat

consult would make the Authority's action faulty and subject to review by the Court of Justice on an appeal by the Council of Ministers, a Member State, or an enterprise directly affected by the action.¹²²

The Committee is also designed as a safeguard for the interests of the special groups against any arbitrary acts of the Authority. The Authority is obliged to *notify* the Committee of *contemplated* actions concerning investment regulation or enforcement of anti-cartel and deconcentration provisions;¹²³ a proposed policy is thus subject to public scrutiny. Under this procedure, the High Authority sounds out the opinion and reaction of the interest groups to be affected, and may modify its course of action in order to assure their adequate support. Although subordinate in its position, the Committee is thus indirectly associated with the policy of the Authority.¹²⁴

The Common Assembly is a representative body for the peoples of the Member States.¹²⁵ The delegates from each Member State, who are either directly elected by the people or appointed by the State's parliament from among its membership, are spokesmen of their people rather than of their governments.¹²⁶ The distribution of seats among the Member States reflects their population rather than production potential.¹²⁷ Except for the Assembly's right to approve the annual report of the High Authority and possibly effect its resignation, the Assembly serves primarily as a deliberating forum in which the Authority's policies may be examined.

*The Council of Ministers*¹²⁸ is a body of six, each representing one of the Member States. The Treaty explicitly requires that each Member State be

shortages of materials, Art. 59(1), (5), (6); price practices, Art. 60(1), (2); price levels, Art. 61, ¶ 1; subsidies, Art. 62; wage levels, Art. 68(2); and on any action not expressly provided for in the Treaty, Art. 95, ¶ 1.

The requirement that the Authority must consult with the Consultative Committee distinguishes the status of this Committee from that of the non-governmental organizations "accredited" with the Economic and Social Council of the United Nations under Art. 71 of the U.N. Charter. In this respect Krause's comparison in his *Betrachtungen über die Rechtliche Struktur der Europäischen Gemeinschaft für Kohle und Stahl* in *RECHTSPROBLEME IN STAAT UND KIRCHE* Festschrift für Rudolf Smend 191 (1952) is erroneous.

122. TREATY Art. 33.

123. *Id.* Art. 19, ¶ 2.

124. RAPPORT 53.

125. TREATY Arts. 20, 21. The original French proposal did not include an Assembly. At the beginning of the Schuman Plan Conference, the French modified their position by proposing the formation of an inter-parliamentary Assembly to which the High Authority would be responsible. N.Y. Times, June 22, 1950, p. 1, col. 1.

For a criticism of the present role of the Assembly, see *Quelques aspects institutionnels du Plan Schuman*, 67 REVUE DU DROIT PUBLIC ET DE LA SCIENCE POLITIQUE 105, 115 (France 1951).

126. TREATY Arts. 20, 21, ¶ 1. The term of office is one year. *Ibid.*

127. *Id.* Art. 21, ¶ 2, assigns 18 seats each to France, Germany, and Italy, 10 to Belgium and The Netherlands, and 4 to Luxemburg.

128. The original French proposal did not provide for a Council of Ministers. 22 DER'T STATE BULL. 936-7 (1950). The opposition of the Belgian and Dutch governments to the

represented by a member of its government in power.¹²⁹ The Council of Ministers has been established to assure a constant coordination between the acts of the High Authority and the States, and, in addition, to grant the States an instrument for protecting their interests.¹³⁰ The concurrence of the Council which is necessary for many acts of the Authority, as well as the frequent consultation between these two organs, will keep the States continuously informed of the actions contemplated by the Authority. The Member State will be able to explain to the Authority the possible injurious effects which these actions are expected to have on its general economy.

The Court of Justice is the most independent of all the Community's organs. Its seven judges are appointed by the Member States for six years.¹³¹ Although the judges and the members of the High Authority are appointed by the Member States, and both enjoy immunity from legal actions based upon their official acts,¹³² the States have reserved greater power in selecting judges, since they must be unanimously appointed. A State's veto power over judicial nominees is not limited as it is in the election of the Authority's members. On the other hand, while the Authority's members must be nationals of the Member States, nationals of other countries are eligible for judgeships.¹³³

DISTRIBUTION OF POWERS

The Community's institutional pattern reveals an intent to prevent an over-concentration of powers in one organ and assure representation and protec-

extensive powers of the proposed High Authority, and their request that the Authority's decisions be subject to approval by a Council of six Ministers of the participating States, *The Schuman Plan in Progress*, [1950] *THE ECONOMIST* 251-3, led finally to the establishment of the Council of Ministers. See COUNCIL OF EUROPE, CONSULTATIVE ASSEMBLY, OFFICIAL REPORT OF DEBATES, 3d Ord'y Sess., 192 (1951).

129. TREATY Art. 27, ¶ 1.

130. *Id.* Art. 26. See RAPPORT 28-9.

131. TREATY Art. 32.

The following jurists were appointed to the Court: Pilotti (Italy), President of the Court; Delvaux (Belgium); Hammes (Luxemburg); Riese (West German Federal Republic); Rueff (France); van Kleffens (The Netherlands); Serrarens (The Netherlands).

The Judges are not required to meet the qualifications prescribed by the Member States for local jurists. Thus economic experts may be appointed to perform the judicial function on the Court. Schlochauer, *Die Gerichtsbarkeit der Europäischen Gemeinschaft für Kohle und Stahl*, 3 ARCHIV DES VÖLKERRECHTS 385, 389 (Germany 1952).

The French working paper contemplated an Arbitration Court proposed of five members, one of which was to be appointed by the International Labor Office. Roux, *The Position of Labour under the Schuman Plan*, 55 INT'L LAB. REV. 292 (1952).

132. PROTOCOL Arts. 11, 15; CODE OF THE COURT OF JUSTICE Art. 3. The judges are barred from holding political or administrative offices, and from affiliation with any business or professional activity. *Id.* Art. 4.

133. RAPPORT 31-2. Nor does the Treaty impose any limitation on the number of judges of the same nationality. The possibility of keeping two seats on the Court open for nationals of non-Member States was discussed during the Treaty negotiations. Schlochauer, *supra* note 131, at 389.

tion of special interest groups, as well as of the public interests of the Member States. An analysis along the traditional lines of separation of powers would not convey a meaningful picture¹³⁴ of the complex power structure of the Community. The powers of the Community are partly supranational, and partly a merger of supranational and State powers wielded in a joint decision-making process in which the Authority and the Council of Ministers, representing the Community and States respectively, participate. Since no precise line can be drawn, a functional description of various bodies and their powers is preferable.

Supranational Powers

The Community's supranational powers are exercised by the High Authority.¹³⁵ A direct link exists between the coal and steel enterprises and the Authority, whose decisions or recommendations are binding upon them without any intermediary assistance of the States.¹³⁶ When the Authority addresses a Member State, the enterprises are bound indirectly through the State's commitment to implement the Authority's acts. In addition to the binding decisions and recommendations, the Treaty provides the Authority with a third course of action: the opinion. These three methods enable the Authority to deal with the wide variety of economic problems in the most effective manner.¹³⁷

*Decisions*¹³⁸ are the most far-reaching acts which the Authority has at its disposal. A decision not only determines the ends an enterprise must pursue, but also prescribes the specific means for attaining them. For example, the Authority, in order to meet a raw material shortage, may decide on specific production programs for an enterprise.¹³⁹

Recommendations, on the other hand, although binding as to objectives, leave the choice of appropriate means to the enterprise or State. Thus the Authority may recommend to a steel mill dominating a substantial part of the market that it engage in such business practices as would ensure the maintenance of free competition.¹⁴⁰ The enterprise's disregard for such a recommendation empowers the Authority to make a decision which may set prices or

134. For criticism of the "separation of powers" analysis, see McDougal, *The Comparative Study of Law for Policy Purposes: Value Clarification as an Instrument of Democratic World Order*, 61 YALE L.J. 915 (1952).

135. The Authority's powers are exercised by the vote of a majority of its members. TREATY Art. 13, ¶ 1.

136. *Id.* Art. 14. For a discussion of the binding nature of those decisions and recommendations, see Jaenicke, *Die Europäische Gemeinschaft für Kohle und Stahl*, 14 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 730-1 (1952).

137. *Quelques aspects institutionnels du Plan Schuman*, 67 REVUE DU DROIT PUBLIC ET DE LA SCIENCE POLITIQUE 105, 111 (France 1951).

138. TREATY Art. 14.

139. *Id.* Art. 59(2).

140. *Id.* Art. 66(7).

conditions of sale or establish production or delivery schedules.¹⁴¹ To abstain from dictating specific administrative or legislative actions, the Authority may address Member States in the form of a recommendation.¹⁴² Under Article 73, for example, the Authority may issue corrective recommendations to a State whose quantitative import or export controls have an unduly restrictive effect on the competition within the Community's coal and steel market.

Opinions lack any binding force, and are issued by the Authority, usually by request, for the guidance of the Member States or the coal and steel enterprises.¹⁴³

Under its supranational powers, the Authority may secure and verify necessary information,¹⁴⁴ set the Community's tax policy,¹⁴⁵ regulate investment,¹⁴⁶ and determine domestic and export price levels—maximum and minimum—for coal and steel produced within the Community.¹⁴⁷ Similarly, the Authority may regulate the wage levels which undesirably affect competition in coal and steel,¹⁴⁸ and establish conditions of sales to prevent or correct discriminatory trade practices by enterprises or buyers in coal and steel.¹⁴⁹ The Authority has exclusive power to impose sanctions for violations of the Treaty or decisions thereunder.

The imposition of sanctions without assurance of their execution would be of little practical value. The Authority, which lacks enforcement powers, must rely on the cooperation which the Member States are obliged to provide.¹⁵⁰ Financial obligations imposed by the Authority or any judgment by the Court of Justice¹⁵¹ must be enforced by the judiciary of the Member States.¹⁵² A State's judiciary cannot question a certified decision of the Authority.¹⁵³ If an enterprise appeals the validity of the Authority's decision to the Community's Court of Justice, the power to enjoin the execution of the decision, pending the appeal, rests with this Court.¹⁵⁴

141. *Ibid.*

142. RAPPORT 23.

143. TREATY Art. 14.

144. *Id.* Arts. 47, ¶ 1; 86, ¶ 4.

145. *Id.* Arts. 49, 50(2).

146. *Id.* Art. 54.

147. *Id.* Art. 61. The Authority has already availed itself of this power and has established maximum prices for coal and scrap iron. *E.g.*, High Authority Decisions, 6, 7, 9, 10, 12, 13-15, 19-24, 2 JOURNAL OFFICIEL DE LA COMMUNAUTÉ EUROPÉENNE DU CHARBON ET DE L'ACIER 63-80 (1953).

148. TREATY Arts. 68(2), (3).

149. *Id.* Arts. 60(2) (a), 63(2) (a).

150. *Id.* Art. 86, ¶ 1.

151. *Id.* Art. 44.

152. *Id.* Art. 92.

153. *Id.* Art. 41. For the opinion that this restriction on the national judiciary may conflict with the Belgian Constitution, see Van der Meersch, *Le Plan Schuman et la Constitution Belge*, 4 REVUE DE L'UNIVERSITÉ DE BRUXELLES 5, 31, 44-5 (Belgium 1951).

154. TREATY Arts. 92, ¶¶ 2, 3; RAPPORT 59.

Limited Supranational Powers

For acts other than those mentioned, particularly for emergency measures, the Authority needs the concurrence of the Council of Ministers.¹⁵⁵ The difficulty of foreseeing future emergency situations in the Treaty itself and the danger of an arbitrary recognition by one body, partly explain the requirement that both the Authority and the Council concur on the existence of a situation warranting the application of certain emergency measures.¹⁵⁶ Besides this, the Council's concurrence introduces a method of control by the Member States, the extent of which depends on the Council's voting procedure. The requirements of an absolute majority, two-thirds majority, or unanimity of the Council indicate the gradations of a single State's control. Generally, a State has greater control when considerable repercussions on, and interference with, its coal and steel industries and other sectors of its economy are expected to result from the Authority's act.

Absolute Majority. The voting procedure of the six-minister Council takes into account the coal and steel production capacities of the Member States. The required absolute majority is attained only if a Member State "which produces at least twenty percent of the total value of coal and steel produced in the Community" sides with the majority.¹⁵⁷ This qualification means that either France or Germany must concur with the majority and that against their joint stand the Authority cannot act; their negative vote in effect constitutes a veto. And, if France and Germany both approve the Authority's action, the Council's concurrence may be considered as given, even if the Council's vote was an evenly divided deadlock. If, after a second deliberation, the Authority upholds its original proposal, such proposal becomes an official act of the Community.¹⁵⁸

To meet a menacing decline of demand or a scarcity of coal and steel, the Authority may, with the Council's absolute majority, institute production quotas,¹⁵⁹ export restrictions,¹⁶⁰ and, under certain conditions, quantitative import restrictions.¹⁶¹ Even under normal conditions, the Authority needs the Council's concurrence, given by absolute majority, for such actions likely

155. The Authority is committed to consult with the Council of Ministers in specific circumstances. TREATY Arts. 50(2); 51(1); 53, ¶ 2(a); 59(6); 60(1); 61; 62; 66(1), (4); 67(2), (3); 68(5); 73, ¶ 2; and CONVENTION §§ 11, 26(1), 29(2). Since the Authority is not bound by the Council's opinion, and may act as it sees fit, this requirement to consult is not an impairment of the Authority's supranational powers.

156. TREATY Arts. 58, ¶ 1; 74(3).

157. *Id.* Art. 28, ¶ 3.

158. *Ibid.*

159. *Id.* Art. 58(1).

160. *Id.* Art. 59(5).

161. *Id.* Arts. 74(2), (3). The Authority may limit imports of coal and steel only if the low price of these products resulted from "competitive" practices which the Treaty would not condone within the Community; or when, during a period of declining demand, increased imports of coal and steel would further depress an already low production level within the Community.

to affect a State's general economy. For instance, the Council's concurrence is required if the Authority decides to finance new industrial activities outside coal and steel in order to provide employment for workers released from coal and steel industries as a result of new techniques and equipment introduced in these industries.¹⁶² An absolute majority of the Council is also needed when the Authority is dealing with such fundamental aspects of economic policy as determination of types of transactions which will be exempted from the prior authorization required by the deconcentration provisions.¹⁶³

Two-Thirds Majority. If a two-thirds majority vote is prescribed by the Treaty, the votes are not "weighted" according to production capacity, and a combined stand of France and Germany can be outvoted.¹⁶⁴ Since this concurring two-thirds majority vote of the Council is required for matters not directly related to production—*e.g.*, the imposition of sanctions against a delinquent Member State,¹⁶⁵ or the increase in tax levies beyond the usual rate of one percent¹⁶⁶—there is no reason to consider production capacity. A two-thirds majority requirement which does not grant France and Germany a privileged voting position is easier to obtain than an absolute majority with its privileged voting. On the other hand, if the Council is deadlocked, its concurrence may be easier to obtain under an absolute majority rule; if France and Germany are on the approving side, the concurrence is considered as given.¹⁶⁷ Under a two-thirds majority rule, however, the Authority's action would have been defeated. Yet, a two-thirds majority presently requires no more votes than an absolute majority, since the present number of ministers on the Council is six.

Unanimity. It is understandable that the unanimous concurrence of the Council¹⁶⁸ is reserved for any act which is bound to change not only the existing structure of the coal and steel industries, but also radically affect a

162. *Id.* Art. 56, ¶ 2(b); CONVENTION §§ 23(3), (8).

163. TREATY Art. 66(3).

164. This interpretation is based on the fact that the Treaty explicitly "weights" the votes of France and Germany on issues requiring an absolute majority, but makes no mention of a privileged voting position for these countries on issues requiring a two-thirds majority. However, some commentators hold that the votes are "weighted" in both instances, and that the Treaty's silence is a mere oversight. See Raalte, *The European Coal and Steel Community: A Dutch View*, 1 INT'L & COMP. L.Q. 80 (1952); Reuter, *La Conception du Pouvoir Politique dans le Plan Schuman*, 1 REVUE FRANÇAISE DE SCIENCE POLITIQUE 273 (France 1951); Jaenicke, *Die Europäische Kohle und Stahl Gemeinschaft*, 14 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 759 (Germany 1952).

165. TREATY Art. 88, ¶ 3.

166. *Id.* Art. 50(2); CONVENTION § 23(6).

167. TREATY Art. 28, ¶ 3.

168. "[A] unanimous decision or unanimous concurrence . . . will be adopted if supported by the votes of *all* the members of the Council." *Id.* Art. 28, ¶ 4 (emphasis added). This seems to exclude the possibility of attaining unanimity if one member is absent or abstains from voting.

State's general economy. The grant or guarantee of loans by the Authority for construction which will increase production or lower its cost, and thus affect the future development of the coal or steel industry, is an example of an act which requires the Council's unanimous concurrence.¹⁶⁹

The strong position of the Council is perhaps best illustrated by Article 95. The Treaty could not foresee and deal with all possible future situations which will require Authority action in order to effectuate the Community's aims. In all such instances for which the Treaty makes no explicit provision, the Authority will be able to act only if the Council concurs unanimously.¹⁷⁰

Unanimous Opposition of the Council. Presumably, the Authority may rescind and terminate most decisions or programs which it previously put into effect. But some measures cannot be so easily abolished. For example, the Council may block the termination of a program of production quotas either by unanimous opposition if the proposal to terminate originated with the Authority, or by simple majority if it came from a Member State.¹⁷¹ Similarly, the Authority may not abolish raw material allocation systems if the Council unanimously opposes termination.¹⁷²

State Powers Preserved: Council's Exclusive Competence

The States have reserved the exclusive power to change the fundamental institutional structure and powers of the Community, and formulate its foreign economic policy. A unanimous Council may set foreign economic policy,¹⁷³ reduce the number of members on the High Authority,¹⁷⁴ increase the number of judges on the Court,¹⁷⁵ broaden the powers of the Community,¹⁷⁶ and admit new Member States.¹⁷⁷ Of all the Community's powers of intervention, raw material allocation and consumption priorities affect the Member States' economies most vitally. For this reason, in times of serious shortage, a unanimous Council may establish coal and steel consumption priorities, allocate available raw materials among the Community's coal and steel enterprises, and regulate their exports.¹⁷⁸ The High Authority implements the Council's decision and assigns manufacturing programs to individual coal and steel enterprises.¹⁷⁹

169. *Id.* Art. 54, ¶ 2.

170. *Id.* Art. 95, ¶ 1.

171. *Id.* Art. 58(3).

172. *Id.* Art. 59(6).

173. *Id.* Art. 72.

174. *Id.* Art. 9, ¶ 2.

175. *Id.* Art. 32, ¶ 4.

176. *Id.* Art. 81.

177. *Id.* Art. 98. A new Member must be a "European State." *Ibid.* The admission of new Members is one of the few instances where the Council is obliged, before making a decision, to consult with the High Authority.

178. *Id.* Art. 59(2).

179. *Ibid.*

Failure to Act

As a rule, in matters within their exclusive jurisdiction, the Authority and the Council cannot undertake each other's functions, for such a delegation of power would change the Community's institutional pattern and distribution of power. For example, the Council can never perform any of the Authority's supranational functions such as investigating enterprises, approving investment plans, or imposing sanctions. But the Council may discharge certain functions which are within the limited supranational powers of the Authority, if the Authority has failed to act. Thus, at the proposal of a State, a unanimous Council may request the Authority to take the necessary measures to establish production quotas,¹⁸⁰ and fix minimum or maximum domestic or export prices.¹⁸¹ On the other hand, the Council may act directly to impose export restrictions¹⁸² or terminate a raw material allocation system.¹⁸³ Exceptionally, the Authority may also perform, though to a limited extent, the functions incumbent upon the Council. If the Council, when a shortage exists, fails to allocate raw materials among the Community's coal and steel enterprises, the Authority may allocate raw materials among the Member States, whose governments are responsible for their further assignment to the enterprises.¹⁸⁴

Amendment Powers of the Community

The operation of the Community will, in all probability, reveal shortcomings in the Treaty which will require amendments. For that purpose, a two-thirds majority of the Council of Ministers may convoke a Conference of all governments.¹⁸⁵ A proposed amendment must be unanimously accepted by the States and ratified by their legislatures in accordance with their constitutional processes.¹⁸⁶ Such a procedure may involve considerable delay and, furthermore, offer an opportunity for national interest groups to organize pressure against the passage of the amendment. Perhaps for this reason, the Community is granted an alternate, more flexible procedure of revising certain Treaty provisions.¹⁸⁷ It is applicable only to those provisions pertaining to the exercise of the Authority's power;¹⁸⁸ neither the objectives of the Com-

180. *Id.* Art. 58(1).

181. *Id.* Art. 61, ¶ 4.

182. *Id.* Art. 59(5).

183. *Id.* Art. 59(6).

184. *Id.* Art. 59(3). See RAPPORT 164-6.

185. TREATY Art. 96, ¶ 1. After the transition period, any Member State or the High Authority may request the Council to convoke the Conference. *Ibid.*

186. *Id.* Art. 96, ¶ 2.

187. *Id.* Art. 95, ¶¶ 3, 4.

188. "If, following the expiration of the transition period provided for by the Convention containing the transitional provisions, unforeseen difficulties which are brought out by the experience in the means of application of the present Treaty, or a profound change in the economic or technical conditions which effects the common coal and steel market directly,

munity nor its power structure may be changed by this so-called "small revision." Initiated by a joint proposal of a majority of the Authority and a two-thirds majority of the Council, the amendment is then examined by the Court which determines whether or not the substantive and procedural requirements of a "small revision" have been followed. If the Court finds the proposed amendment proper, it becomes effective when approved by a three-fourths majority of the Common Assembly.¹⁸⁹

SAFEGUARDS

The considerable powers conferred upon the Community call for effective safeguards against their abuse. Certain safeguards are inherent in the peculiar institutional structure of the Community: the prescribed cooperation between the Council and the Authority; the Authority's compulsory consultation with the Consultative Committee; and the Assembly's supervision over the Authority's general policy.¹⁹⁰ The Assembly is the weakest safeguard. Reviewing the Authority's report in its annual session the Assembly may, by its censure and two-thirds vote of no confidence, effect the resignation of all members of the High Authority.¹⁹¹ Although the Assembly may also meet in extraordinary sessions, either upon the request of a majority of its members or of the Authority,¹⁹² its right of censure is confined to its regular annual meeting.¹⁹³ As the Assembly cannot appoint members to the High Authority, there is nothing which could prevent the Member States from re-appointing the same members who were forced to resign.¹⁹⁴ At present the Assembly is primarily a sounding board—a function indicated by the right of the Assembly or any of its members to submit, at any time, questions to the Authority, and have them answered.¹⁹⁵ Since the Assembly's deliberation can, at best, only influence the future course of the Authority's actions, effective and immediate protection against specific recommendations and decisions of the Authority must be sought in the Court of Justice.

The original conception of the Court is that individuals, coal and steel enterprises and their professional associations, as well as Member States, are

should make necessary an adaptation of the rules concerning the exercise by the High Authority . . . which are conferred upon it. . . ." *Id.* Art. 95, ¶ 3.

189. *Id.* Art. 95, ¶ 4.

190. *Id.* Art. 24. The Council of Ministers, on the other hand, is not responsible to the Assembly, *Quelques aspects institutionnels du Plan Schuman*, 67 *REVUE DU DROIT PUBLIC ET DE LA SCIENCE POLITIQUE* 105, 116 (France 1951).

191. *TREATY* Art. 24, ¶ 3.

192. *Id.* Art. 22, ¶ 3.

193. *Id.* Art. 24, ¶ 2. At least a month prior to this meeting, the Authority must publish a general report, *id.* Art. 17. The Assembly will discuss, and then entertain any motion to censure this report. *Id.* Art. 24.

194. Jaenicke, *Die Europäische Kohl und Stahl Gemeinschaft*, 14 *ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT* 763-4 (Germany 1952).

195. *TREATY* Art. 23, ¶ 3.

granted access. For the first time, both the individual and the State may invoke the jurisdiction of an international court,¹⁹⁰ whose main function is to "ensure the rule of law in the interpretation and application of the present Treaty and of its implementing regulations."¹⁹⁷ Too unique to lend itself to any traditional classification, the Court's jurisdiction will be described in terms of the following functions:¹⁹⁸ (a) review and annulment of the acts of the various Community organs;¹⁹⁹ (b) review and modification of these acts on their merits, and adjudication of tort claims;²⁰⁰ (c) settlement of disputes between Member States.²⁰¹

Review and Annulment of Acts

Jurisdiction to review and annul acts of the Community's organs is the Court's most significant function.²⁰² An appeal for annulment purports to remove as promptly as possible an allegedly deficient act which is either injurious to some interests or contrary to the Treaty's objectives. A party's appeal is

196. L'Huillier, *Une conquête du droit administratif français: le contentieux de la Communauté Européenne du Charbon et de l'Acier*, 14 RECUEIL DALLOZ: CHRONIQUE 63 (France, Apr. 2, 1953).

197. TREATY Art. 31. The Court's powers and functions follow the French tribunal, *Conseil d'Etat*, which adjudicates issues under French administrative law. RAPPORT 34. In this article, therefore, the various provisions of the Treaty dealing with the function and powers of the Court will be analyzed with reference to principles of French administrative law.

198. In addition to the three functions subsequently discussed in detail, the Court has disciplinary jurisdiction over the members of the Authority: "Members who no longer fulfill the conditions necessary to the exercise of their functions or who have committed a gross fault may be removed from office by the Court on petition by the High Authority or Council." TREATY Art. 12, ¶ 2.

199. *Id.* Art. 33.

200. *Id.* Arts. 34, 36, 40, 66 (5). See RAPPORT 37-43.

201. TREATY Arts. 10, ¶ 11; 88; 89. It may be noted that the Court of Justice cannot render advisory opinions as does the International Court of Justice. STATUTE OF THE INTERNATIONAL COURT OF JUSTICE Art. 65.

202. TREATY Art. 33. In French administrative law, this appeal is called *recours en annulation*, RAPPORT 34-7.

In the 1920's, the Upper Silesia Commission and the River Commission for the Danube and the Elbe provided for appeals from decisions of these organs to an international tribunal. Gros, *Le problème du recours juridictionnel contre les décisions d'organismes internationaux*, 1 LA TECHNIQUE ET LES PRINCIPES DU DROIT PUBLIC: ETUDES EN L'HONNEUR DE G. SCELLE 267, 269 (France 1950). Also, the proposed Charter for an International Trade Organization will enable a participating State, whose interests are prejudiced by a decision of the International Trade Conference, to have the decision reviewed by the International Court of Justice. U. S. COMMERCIAL POLICY SER. No. 114, Art. 96 (Dep't State 1948). However, none of these examples of appellate jurisdiction over actions of an international governmental organization involves the broad scope of subject matter over which the Court of Justice has jurisdiction. See Guggenheim, *La Validité et la Nullité des Actes Juridiques Internationaux*, 74 HAGUE RECUEIL DES COURS 250-4 (1949).

exclusively directed against the validity of an act,²⁰³ and only the Court is competent to declare it null and void.

An appeal for review and annulment may be based on any one of four grounds of alleged deficiency: legal incompetence, substantial procedural violation, violation of the Treaty or any rule of law relating to its application, and misapplication of power.²⁰⁴ Hypothetical acts of the Authority will serve as illustrations of these four types of legal deficiencies. If the Authority, which lacks the necessary powers, determines the Community's foreign economic policy, the act would be deficient on the ground of legal incompetence. And the Authority grossly violates the procedure if it fails to consult the Consultative Committee, as prescribed, or secure the necessary Council's concurrence. It violates the Treaty itself, for example, if it imposes sanctions upon enterprises which did not engage in any illegal business practices. Finally, an appeal based on "misapplication of power" attacks an act which the Community's organ had the power to undertake but which was done in this instance for purposes other than those declared by the Treaty. For example, the Authority misapplies its granted power to regulate investment, if its motive for disallowing an investment project was to stifle competition within the Community.

Despite the common grounds, the extent of the right to appeal differs with the appellant as well as with the nature and origin of the acts challenged. The right of enterprises and associations in the coal and steel industries to appeal is limited to acts of the High Authority specifically addressed to them and affecting their interests.²⁰⁵ Although these and other private parties cannot attack the acts of the Assembly or Council,²⁰⁶ this limited appeal is an important means of checking the Authority's supranational powers which are applied against business activities. Thus a buyer may appeal an act of the Authority

203. See WALINE, *TRAITÉ ÉLÉMENTAIRE DE DROIT ADMINISTRATIF* 113 (1951) (French administrative law); Josse, *Extension et limites des compétences du Conseil d'Etat sur les actes, sur les juridictions, sur les ordres* in *LE CONSEIL D'ÉTAT, LIVRE JUBILAIRE* 161, 171 (1952) (same); UHLER, *REVIEW OF ADMINISTRATIVE ACTS* 34 (1942) (same).

204. STEINDORFF, *DIE NICHTIGKEITSKLAGE IM RECHT DER EUROPÄISCHEN GEMEINSCHAFT FÜR KOHLE UND STAHL* (1952).

The four types of legal deficiencies of the acts as set forth by the Treaty correspond to the traditional classification of the French administrative law: *l'incompétence; la violation formelle d'une règle de droit; le vice de forme; and le détournement de pouvoir*. WALINE, *op. cit. supra* note 203, at 134-45; ROHKAM & PRATT, *STUDIES IN FRENCH ADMINISTRATIVE LAW* 32-56 (1947); Josse, *supra* note 203, at 164-6.

205. TREATY Art. 33, ¶ 3. See WALINE, *op. cit. supra* note 203, at 113. Although a party's interests may be injured by a specific act of the Authority addressed to a third person, a strict interpretation of Art. 33 would preclude an appeal by the injured party since the act was not addressed to him. See STEINDORFF, *op. cit. supra* note 204, at 26 (criticizing the lack of appeal). However, these parties may challenge a *general* act which injured their interests, if the Authority was guilty of a "misapplication of power." See L'Huillier, *supra* note 196, at 65 (criticizing this right of appeal).

206. The right to appeal an act of the Assembly or Council is limited to the Authority or a Member State. TREATY Art. 38, ¶ 1.

which, because of his systematic violation of conditions of sales, deprived him of access to the Community's coal and steel market.²⁰⁷ Similarly, coal or steel enterprises and associations may contest a ruling which declares their practices illegal under the Community's anti-cartel provisions.²⁰⁸

A Member State's right of appeal is broader than that of private parties. It may not only dispute the validity of any act of the Authority which is *general* and addressed to the entire Community, whether or not the State's interests are specifically involved,²⁰⁹ but it may also challenge the acts of the Assembly or the Council on the grounds of legal incompetence or substantial procedural violation.²¹⁰ Although many acts of the Authority require the Council's concurrence, the Treaty is silent on whether or not a State may also challenge the validity of such a concurrence. Since the Treaty does not explicitly grant an appeal, it may be assumed that a State will be unable to challenge a concurrence. But the Council's concurrence is such an important institutional safeguard that a State's right of appeal should be sustained.

In addition to a right of appeal which is directed solely against the acts of the Community's organs, a State may also challenge another State's action. This appeal is available in the event that a State vetoes more than four candidates for the High Authority.²¹¹ Since the veto is not an act of a Community organ, none of the four grounds of legal deficiencies are applicable, and the appeal must be based, instead, on the ground that the exercise of the veto was "abusive."

To assure the proper administration of the Community within the framework of the Treaty, the Authority and the Council may challenge each other's acts. The Council's right of appeal is broader than that of the Authority. While the Council may appeal the Authority's acts on any of the four grounds of legal deficiency,²¹² the Authority's challenge of the Council's acts is limited to allegations of legal incompetence or substantial procedural violation.²¹³ The Council's lack of responsibility to the Community for any misapplication of power or violation of the Treaty may seem striking and dangerous. However, since the Community was created by the Member States, it may also be changed by their mutual agreement which is expressed in the Council's unanimous action.²¹⁴ On the other hand, the Authority, and not the Council, may

207. *Id.* Art. 63(2).

208. *Id.* Art. 65(4).

209. *Id.* Art. 33, ¶ 1. See RAPPORT 34. But see STEINDORFF, *op. cit. supra* note 204, at 48 (interpreting the Treaty to allow appeal only when State interests are involved); Schlochauer, *supra* note 131, at 401 (same). For the limited appeal of private parties against a *general* act of the Authority, see note 205 *supra*.

210. TREATY Art. 38, §§ 1, 3.

211. *Id.* Art. 10, ¶ 11.

212. *Id.* Art. 33, ¶ 1.

213. *Id.* Art. 38, §§ 1, 3.

214. See RAPPORT 36-7.

contest the Assembly's acts on the grounds of legal incompetence or substantial procedural violation.²¹⁵ The Assembly is the only Community institution which is denied a right of appeal.

Eligible parties may seek Court redress if their interests are injured by the *failure* of the Authority to act. To prevent damage resulting from inaction, enterprises and associations in coal and steel, as well as a State or the Council, may bring to the attention of the Authority its failure to take decisions or recommendations which are either required by the Treaty (*e.g.*, breaking up illegal economic concentration) or within the Authority's discretion (*e.g.*, establishing maximum or minimum price levels) if the failure to exercise its discretion constitutes a misapplication of power.²¹⁶ If the Authority then fails to act, such an implicit negative decision is, after two months, a ground for appeal to the Court.²¹⁷ The Court will determine whether or not the request for the Authority's action was justified; and if so, the Authority will be required to act.²¹⁸ The Treaty makes no provision in the event that the Authority disregards the Court's judgment. It may be assumed, however, that at least the coal and steel enterprises injured by such inaction, would have a claim for damages.²¹⁹

The alleged legal deficiency of an act preconditions the extent of the Court's review. To determine legal incompetence or substantial procedural violation, it suffices for the Court merely to investigate the law pertinent to the procedure followed or the powers granted, without going into the merits of the act or evaluating the facts on which the act was based.²²⁰ But this limited investigation would be inadequate when the act is challenged as a misinterpretation of the Treaty or its implementing rules, or as a misapplication of power. In such instances, the Treaty empowers the Court to examine the facts underlying the act.²²¹ And, since misapplication of power refers to "an administrative act which, though within the legal competence of the agent, is in reality done for another purpose than that which the law authorizing it had

215. TREATY Art. 38, §§ 1, 3. The lack of appeal by the Council does not constitute a restraint on the Member States, since a State may appeal an act of the Assembly. *Ibid.* The Authority's right of appeal will be particularly important when the Assembly attempts to censure the Authority's annual report, and effect the resignation of the Authority's members. See p. 26 *supra*.

216. TREATY Art. 35, §§ 1, 2.

217. *Id.*, § 3.

218. The requirement that the Authority take action after the Court's adverse judgment is an implicit conclusion from Art. 35, which states that there can be an appeal from the original failure to act. If the right of appeal is to have any meaning, it must be assumed that the organs of the Community are required to heed the decision of the appellate body.

219. See TREATY Art. 34, under which this claim could be brought.

220. ROHKAM & PRATT, *op. cit. supra* note 204, at 37.

221. TREATY Art. 33, § 1.

in mind,"²²² the Court must inquire into the organ's motive before deciding the issue of whether or not to annul the act.²²³

In practice, it will be difficult to make a sharp distinction between a Court review which is limited to the applicable law, and one which inquires into the facts as well. Even an appeal based upon legal incompetence will force the Court to examine certain pertinent facts, although it must not inquire into motives. The complexity of this problem is apparent, for instance, when the Court deals with an appeal challenging the competence of the Authority on the ground that economic conditions did not legally warrant the Authority's act. This might be the case when the Authority, on the basis of declining demand, introduces a system of production quotas.²²⁴ To determine whether or not a decline of demand actually existed will require the Court's extensive examination of the facts. It is evident that such an examination comes very close to, and perhaps is even undistinguishable from, both an evaluation of facts and a review on the merits of the Authority's act,²²⁵ a review to which the Court is theoretically entitled only in case of misapplication of power or misinterpretation of the Treaty.²²⁶

Review of Acts on the Merits and Adjudication of Tort Claims (Plenary Jurisdiction)

In addition to its jurisdiction on appeals for annulment of acts, the Court has jurisdiction to examine the economic expediency and necessity of the Authority's acts, and, if it desires, to modify these acts.²²⁷ This plenary jurisdiction permits an unlimited evaluation of the economic situation; the Court decides on the merit of the act itself, and thus controls, to a large extent, the economic policy of the Community.²²⁸ The Court's plenary jurisdiction²²⁹ is open to claims for restitution and damages against the Community, and is limited to parties: (1) directly injured by a previously annulled act of the

222. Garner, *French Administrative Law*, 33 YALE L.J. 597, 609 (1924). For a detailed discussion of the concept of misapplication of power (*détournement de pouvoir*), see WALINE, *op. cit. supra* note 203, at 142-5; ROHKAM & PRATT, *op. cit. supra* note 204, at 37-51.

223. ROHKAM & PRATT, *op. cit. supra* note 204, at 37-9; Garner, *supra* note 222, at 613.
224. TREATY Art. 58(1).

225. This has been the experience under French administrative law. See Josse, *supra* note 203, at 172.

226. TREATY Art. 33, § 1.

227. Known in French administrative law as *contentieux de pleine juridiction*. See WALINE, *op. cit. supra* note 203, at 111.

228. One commentator has failed to make the important distinction between the Court's annulment function and its unlimited plenary jurisdiction. Vernon, *The Schuman Plan*, 47 AM. J. INT'L L. 200 (1953).

229. In addition to the issues subsequently discussed in the text, the Court has plenary jurisdiction over disputes arising out of private or public contracts concluded with, or on behalf of, the Community, if the contracting parties agree to submit the controversy to the Court. TREATY Art. 42.

High Authority; (2) directly injured by the operation of the Community; or (3) penalized by the Authority's sanctions.

Damages Caused by an Official Act: The appeal for review and annulment is an immediate remedy to prevent further injurious effects of the act contested. Besides mere annulment, there is the necessity to grant a recovery for damages already inflicted before the act was invalidated. The requirements for claiming damages are more difficult to satisfy than those for annulment. The Community's limited income and the difficulties in ascertaining the extent of damages, based by and large on the speculation as to what the situation might have been had the deficient act not been undertaken, justify the limitations on the Community's liability.²³⁰

According to Article 34, only coal and steel enterprises may claim damages caused by a deficient recommendation or decision of the Authority. However, this claim seems, at least implicitly, to be available to any person or enterprise affected by a deconcentration measure ordered by the Authority.²³¹ Thus, for example, an American corporation, owning enterprises within the Community which are affected by an illegal deconcentration order, may claim damages for the injury which it suffers as a result of that order.

The necessity of establishing the illegal nature of the Authority's act indicates that the enterprise's claim must in any case be preceded or accompanied by the Court's annulment.²³² The enterprises will recover damages only if the injury was caused by an illegal official act of the Authority which implies a "fault for which the Community is liable," and which injures the enterprises *directly and particularly*.²³³ The Treaty does not define the meaning of such a "fault," leaving its definition and elaboration to the Court. It may be assumed, however, that only seriously deficient acts—*e.g.*, involving misapplication of power—will justify a claim for damages. In determining whether or not the nature of the damage resulting from such a "fault" is "direct," the Court will, in all probability, maintain that the damage must stand in a direct causal connection with the illegal act. This causal connection is evident when the loss resulted from illegally imposed fines or, in the case of a buyer, from illegal exclusion from the Community's coal market. The requirement of a "particular" damage precludes any Community liability for acts which cause general injury to many enterprises. The aggrieved enterprise must show that its losses were "unique" and not similarly suffered by others as a result of the Community's operations.

If the Court finds that the act is not only illegal, but also involves a fault and damages as indicated above, the High Authority will be obliged to give effect to the Court's annulment by granting equitable redress, primarily in

230. RAPPORT 38-9.

231. MUCH, *DIE AMTSHAFTUNG IM RECHT DER EUROPÄISCHEN GEMEINSCHAFT FÜR KOHLE UND STAHL* 93 (1952).

232. RAPPORT 39-40.

233. TREATY Art. 34.

the form of restitution,²³⁴ or if this is impossible, in the form of pecuniary indemnities.²³⁵ If the Authority fails to take satisfactory measures, the injured enterprise may return to the Court. At this time, however, the Court may only grant pecuniary indemnities.²³⁶

Injuries Resulting from the Operation of the Community: The Community is liable not only for damages caused by an illegal official act of the High Authority, but also for damages which result from a defective performance of the Community's administrative service.²³⁷ The liabilities for official acts and defective administration are mutually exclusive, precluding any double recovery on tort claims.²³⁸ The Community's liability for administrative deficiency covers injuries resulting from negligence on the part of the Community's officials. This liability covers actions which are merely coincidental to the operation of the Community and which lack any attributes of an official act. For example, violations of business secrecy²³⁹ by a Community official gives rise to a claim based on administrative deficiency. While the Community's liability for official acts usually entitles only coal or steel participants²⁴⁰ to claim damages caused by an illegal recommendation or decision of the Authority, the right to recover for injuries caused by an administrative deficiency is open to anyone who suffers them.²⁴¹ For example, the tortious operation of a car owned by the Community would give the injured pedestrian a claim based upon administrative deficiency. Since the injury was not caused by an official act, there is no occasion for a preliminary annulment procedure, and the injured party proceeds directly to the Court for an adjudication of his tort claim.²⁴²

The liability of the Community for administrative deficiency may be secondary to the personal liability of the Community official if the injury results from his personal fault while performing his official function.²⁴³ But even here, the Community is liable if the injured person fails to collect from the

234. *E.g.*, reimbursement of illegally imposed fines or subsequent approval of an investment project illegally rejected.

235. RAPPORT 37-8; Ophüls, *Gerichtsbarkheit und Rechtsprechung im Schuman Plan*, 4 NEUE JURISTISCHE WOCHENSCHRIFT 693, 695 (Germany 1951).

236. TREATY Art. 34, ¶ 2.

237. In French administrative law this liability is based on a *faute de service*, a principle and term adopted by Art. 40 of the Treaty. The English translation of the Treaty—"fault involved in an official act"—is incorrect and misleading. For a discussion of *faute de service*, and authority that it is not dependent upon the "official" nature of an act, see WALINE, *op. cit. supra* note 203, at 356-61; ROHKAM & PRATT, *op. cit. supra* note 204, at 71-92; Garner, *supra* note 222, at 620-24. For a detailed discussion of the Community's responsibility for a *faute de service* see MUCH, *op. cit. supra* note 231.

238. RAPPORT 40.

239. TREATY Art. 47, ¶¶ 2, 4.

240. For an illustration of another party who may claim damages, see p. 32 *supra*.

241. MUCH, *op. cit. supra* note 231, at 93.

242. TREATY Art. 40, ¶ 1.

243. *Id.* Art. 40, ¶ 2.

responsible official.²⁴⁴ The Treaty does not elaborate on the distinction between these two liabilities. In French administrative law,²⁴⁵ the difference between an impersonal, anonymous administrative fault and a personal fault for which the official is responsible is sometimes very subtle.²⁴⁶ The gravity of the official's personal fault appears to be a criterion for determining the nature of the liability. Thus the tortious conduct of an intoxicated driver of an official car will certainly be classified as a personal fault. On the other hand, liability would rest with the Community, if it was negligent in employing an official whose incompetence caused the injury. The dividing line between the individual responsibility of the official and that of the Community will depend considerably upon the Court's policy as to the extent of Community liability.

Sanctions: The imposition of sanctions is within the discretion of the High Authority. To minimize the danger of arbitrary actions, the Treaty provides that, before imposing sanctions upon violating enterprises or individuals involved in an illegal economic concentration, the Authority must give these parties a hearing.²⁴⁷ Furthermore, in order to afford the opportunity of an early appeal, the procedure is divided into two parts. First, the Authority determines in a preliminary decision the existence of a violation and the sanctions to be imposed should the enterprise or individual at fault continue to disobey the Treaty's provisions. Within one month after this preliminary decision, an appeal may be brought to the Court. The Court's examination of this preliminary decision is unlimited, and it may remove or reduce the sanctions imposed.²⁴⁸ However, if the aggrieved party fails in its appeal or, without attempting to appeal, disregards the Authority's preliminary decision, the Authority may then order the execution of the sanctions already imposed. Against such a decision, the party has only an appeal for annulment on any of the four grounds of legal deficiency,²⁴⁹ which theoretically precludes any consideration of the sanctions on their merits.

Anyone who will be directly affected may appeal to the Court's plenary jurisdiction against the Authority's preliminary decision declaring an economic concentration illegal and ordering deconcentration.²⁵⁰ In deciding on appeal whether or not the concentration is illegal, the Court will enter into an unlimited economic evaluation of the facts which were the basis of this order, and consider the deconcentration order on its merits.²⁵¹

244. *Ibid.*

245. For the reasons compelling an analysis of the Treaty's provisions in light of French administrative law, see, e.g., notes 197 and 204 *supra*.

246. ROHKAM & PRATT, *op. cit. supra* note 204, at 75, 80.

247. TREATY Art. 36.

248. *Id.* Art. 36, ¶ 2. See RAPPORT 41-2.

249. TREATY Art. 36, ¶ 3.

250. *Id.* Arts. 66(5), (6); PROTOCOL ON THE CODE OF THE COURT Art. 43, ¶ 2.

251. TREATY Art. 66(5), ¶ 2.

The Member State is similarly granted an appeal against the determination and imposition of sanctions.²⁵² If the Authority finds that a Member State has failed to fulfill its obligations under the Treaty, it will make its findings in a preliminary decision, and grant the State reasonable time for compliance. The State may contest the preliminary decision by appealing to the plenary jurisdiction of the Court which, evaluating all the circumstances, will examine the decision on its merits. If the State fails in its appeal, or, without seeking an appeal, continues to disregard the Authority's decision requesting the fulfillment of the State's obligations, the Authority may, with a two-thirds majority concurrence by the Council, suspend payments due to the delinquent State or resort to economic discrimination. But even against this second decision, the State has a right of appeal to the Court for a consideration on the merits. This gradual pressure put upon the State has several advantages. First, it gives the State an opportunity to recognize and correct its default, thus avoiding hasty punishment which may evoke equally hasty reactions and endanger the stability of the Community. Second, a Court confirmation of the Authority's preliminary decision may not only influence the Council to grant the concurrence required for the Authority's sanctions, but also persuade the violating State to rectify its default and comply with the Authority's decision.²⁵³

Disturbances in a Member State's Economy: The far-reaching powers of the Court are best illustrated by its unlimited jurisdiction over a Member State's appeal against any action or inaction of the Authority, which, in the State's opinion, provokes fundamental and persistent disturbances in its general economy.²⁵⁴ The State must first call the existence of such a situation to the Authority's attention. If the Authority refuses to recognize it or fails to take the necessary corrective measures, the State may appeal to the Court, which will render a complete judgment on the merits of the situation. Instead of examining the legality of the act, the Court considers the expediency of the Authority's position²⁵⁵ by evaluating this position in light of all the essential economic facts. It assumes an unusual rule of an arbiter between the interests of the complaining State and those of the entire Coal and Steel Community as represented by the Authority. The Court's judgment is final, and, if adverse to the Authority, this organ must then implement the judgment by taking corrective measures.²⁵⁶ The formulation of the Community's economic policy is thus yielded by the Authority to the Court.

252. *Id.* Art. 83.

253. If, for any reason, the sanctions imposed as a result of this lengthy procedure are ineffective, the Authority "will lay the matter before the Council." *Id.* Art. 83, ¶ 5.

254. *Id.* Art. 37.

255. RAPPORT 42-3. One commentator has failed to recognize the true extent of the Court's inquiry under its plenary jurisdiction. Loewenstein, *The Union of Western Europe: Illusion and Reality—I*, 52 COL. L. REV. 55, 96 (1952) ("[T]he Court may not pass on the validity of the High Authority's economic appraisal on which it based its decision. . .").

256. TREATY Art. 37, ¶ 4.

Settlement of Disputes between Member States

On the traditionally international level, the Court has compulsory jurisdiction over disputes among Member States concerning the application and interpretation of the Treaty.²⁵⁷ This jurisdiction would be invoked, for example, when a State abridges the privileges and immunities of another State's delegate to the Assembly.²⁵⁸ On matters *related* to the purposes of the Treaty, the Court has jurisdiction only if the States involved agree to submit to the Court's decision.²⁵⁹ Thus the Court's jurisdiction could be invoked to settle a dispute arising out of a joint agreement between two Member States to build a railroad which would serve coal and steel enterprises in both States. But, if the dispute is not related, in the Court's opinion, to the purposes of the Treaty, the Court must decline jurisdiction despite the submittal of the dispute to the Court by the States.

CONCLUSION: DANGERS AND PROSPECTS OF THE COMMUNITY

The reaction of big industrialists, trade unions, and ultra-nationalistic political parties reflects the far-reaching effects the Community may have upon the existing structure of the coal and steel industries. The vigor of these assaults cannot but caution against their acceptance at face value, and calls, therefore, for their critical analysis and confrontation with the professed aims of the Community.

The Community is frequently accused of being nothing more than an international super-cartel.²⁶⁰ The Community's institutional structure, particularly the High Authority's mandatory consultation with the Consultative Committee,²⁶¹ its public operation,²⁶² and broad judicial control²⁶³—safeguards hardly to be found in any cartel agreement, past or present—refute this charge. Even a cursory comparison of the Treaty constituting the European Coal and Steel Community with the earlier 1926 International Steel Agreement,²⁶⁴

257. *Id.* Art. 89, ¶ 1. The Member States can "not . . . avail themselves of any treaties, conventions or agreements existing among them to submit any difference arising out of the interpretation or application of the present Treaty to a method of settlement other than those provided for herein." *Id.* Art. 87. See Münch, *Die Gerichtsbarkeit im Schuman-Plan* in GEGENWARTSPROBLEME DES INTERNATIONALEN RECHTES UND DER RECHTSPHILOSOPHIE: Festschrift für Rudolf Laun 143-4 (Constantopoulos & Wehberg eds. 1953).

258. PROTOCOL ON THE PRIVILEGES AND IMMUNITIES OF THE COMMUNITY Art. 16.

259. TREATY Art. 89, ¶ 2.

260. See, e.g., Ulrich, *Réactions Allemandes*, 6 DOCUMENTS 533 (France 1951).

261. *Id.* Art. 19.

262. *Id.* Arts. 15, 17.

263. *Id.* Arts. 33-8, 40.

264. For the text of the Agreement, see SURVEY OF INTERNATIONAL AFFAIRS 1926 pp. 481-3 (Toynbee ed. 1928). For an authoritative description of the activities of the International Steel Cartel, see its publication *Memorandum on the International Steel Cartel and the International Sales Comptoirs* (Jan. 1937) which by mistake was made available to U.S. Military occupation authorities. *Hearings before the Subcommittee on Study of Monopoly Power of the House Committee on the Judiciary*, 81st Cong., 2d Sess. Pt. IV-A 357-413, Pt. IV-B 190-201 (1950).

which established a steel cartel in France, Germany, Belgium, and Luxemburg, suffices to disclose the latter's disregard for maintaining free competition and reducing steel prices, and its indifference to the problems of labor. Moreover, the 1926 Agreement did not purport to secure raw materials, exchange technical experience, or facilitate investment.²⁶⁵ On every issue, the Schuman Plan compares most favorably, showing a firm resolution to serve the entire Community instead of a limited group and its special interests. The nature of this resolution could not be better illustrated than by the statement of M. Jean Monnet, the actual framer of the Plan, asserting that "there can be no Schuman Plan that will raise the living standards if cartels are permitted."²⁶⁶

Critics have objected to the Community's economic regime as introducing a planned economy.²⁶⁷ The pooling of the Member States' sovereign powers over coal and steel, however, is necessary to create and maintain the common, competitive market. Mere elimination of trade barriers and lenient enforcement of inadequate national legislation regulating international cartels could hardly assure such an objective.²⁶⁸ Moreover, steel industries of European countries have practically never been competitive.²⁶⁹ "With the establishment of the High Authority, international power has now been substituted for the power of national governments, and public power for that of private cartels."²⁷⁰ In situations which might endanger the common market the Community intervenes to deter coal and steel enterprises from engaging in restrictive business practises which undermine free competition. The Community can be described as a liberal economic system with a modicum of mild, restrained control that is particularly essential at the initial stages of development.²⁷¹ It "represents quite an original combination of liberalism and planning. We might say that it provides for a controlled system of free competition."²⁷²

265. HEXNER, *THE INTERNATIONAL STEEL CARTEL* 236-53 (1943).

266. N.Y. Times, Jan. 19, 1951, p. 11, cols. 2, 3.

267. Flandin, *Le Plan Schuman—Aspects Politiques*, 16/17 *NOUVELLE REVUE DE L'ECONOMIE CONTEMPORAINE* 7 (1950); Bandin, *Le Plan Schuman et Socialisation*, *Id.* at 23.

268. On inefficiency of national legislation against restrictive practices of international cartels, see HEXNER, *INTERNATIONAL CARTELS* 140 (1945); *RESTRICTIVE BUSINESS PRACTICES* (Economic and Social Council, United Nations) 45 (E/2379 and E/2379/Add.1, 1953).

269. MARJOLIN, *EUROPE AND THE UNITED STATES IN THE WORLD ECONOMY* 54 (1953); *HIGH AUTHORITY, ESTABLISHMENT OF THE COMMON MARKET FOR STEEL* 29-30 (1953).

270. *ECONOMIC SURVEY OF EUROPE* 231.

271. Ophüls, *Das Wirtschaftsrecht des Schuman Plans*, 4 *NEUE JURISTISCHES WOCHENSCHRIFT* 381 (Germany 1951).

"It is not our task to direct the production of coal and steel. That is the role of industry. Our task is to establish and maintain conditions under which production will develop to the best advantage of the common interest." MONNET, *SPEECHES DELIVERED BY PRESIDENT OF THE HIGH AUTHORITY* 12 (1952).

272. MARJOLIN, *op. cit. supra* note 269, at 51.

Finally, the Plan is frequently objected to on the ground of possible German domination of the Community. German domination is a danger resulting from the dependence of the French steel industry on imports of German coke,²⁷³ and from the powerful production potential of German heavy industry. However, the quantity of raw material necessary for producing steel might be reduced by such new production methods as electric furnaces.²⁷⁴ It is difficult, therefore, to predict with certainty that French dependence on imported coke is bound to establish German predominance. Of course, the Community will fail entirely in its task if it allows German coal and steel industries to use their natural advantage to destroy the competitive market.

Dangers of the Institutional Structure

The novelty of the Plan and its possible far-reaching effects on national self-interests have prompted the Member States to reserve considerable governmental control in the Community's operation. This explains the present pattern of the Community's supranational structure—a structure still primitive in some respects.

Aside from its vote of censure, the Assembly is presently denied the right of initiative, of appeal against the Council's or High Authority's acts, or of making appointments to the Court or Authority. Even budgetary control is removed from its competence. Furthermore, the lack of supranational identification among the Community's population precludes, at present, the Assembly from playing a constructive supranational role.²⁷⁵ Eventually the Community, which is endowed with supranational powers, will also have to assume a supranational responsibility for their exercise. Once there is evidence of greater Community solidarity, it would seem that the Assembly should play a more important and responsible part in pursuing the Community's aims. If this is to be attained, the powers of the Council of Ministers, which stands free of any individual or collective responsibility to the Community, must be modified.²⁷⁶ The extensive participation of the Council in the work of the High Authority will, in the course of future development, necessitate the demand for some degree of Council responsibility to the Assembly.

Ultimately the Community is still dependent upon the willingness of States to cooperate. Even the most ingenious supranational institutional structure could not, at least in the beginning, dispense with the States' assistance. The High Authority's supranational powers are primarily applied against enterprises rather than States, and if the States abuse their extensive, and perhaps disproportionate, reserved power, the Community may fail. Whether or not

273. *The Coal and Steel Industries of Western Europe*, 2 ECON. BULL. FOR EUROPE 20, 22, Table 1 on 18-19 (2d Quarter 1950).

274. *Hearings*, *supra* note 264, Pt. IV-A at 753-68.

275. *Quelques aspects institutionnels du Plan Schuman*, 67 REVUE DU DROIT PUBLIC ET DE LA SCIENCE POLITIQUE 105, 115 (France 1951).

276. *Id.* at 116.

these powers will be abused depends on the constellation of political forces in the States.²⁷⁷ The operation of the Community would be aggravated by a considerably strengthened Social Democratic Party in Germany,²⁷⁸ and seriously jeopardized by an increased Communist following in France²⁷⁹ or Italy.²⁸⁰ Since the States are the supporting pillars for the Community's supranational structure, lack of State support or determined disruptive efforts would wreck the Community and revive the national autarchy of the coal and steel industry.

It may be assumed, however, that this danger would diminish with the increasingly successful operation of the Community, and that the advancing integration of national coal and steel industries into one single economic area would gradually strengthen the Community. The working together and reaping of common benefit might substantially relax the nationalistic tension between the French and German people, and also decrease the dangers of a State arbitrarily wrecking the Community. Once the benefits of the common market are experienced by the consumer, producer and worker alike, they will show a growing confidence in the Community, be more and more inclined to seek protection and redress with the Community, and would very likely throw their popular support behind it. A general success scored by the Community in its initial years of operation would forcibly demonstrate the advantages of a supranational institution, which in the long run stands better equipped to deal with matters common to all people.

Such a favorable development would be strengthened by the unifying impact which the Community may have on the existing political, economic, and legal systems of the Member States. Since the Court of Justice infringes upon a State's monopoly of judicial power,²⁸¹ constitutional amendments may be necessary.²⁸² Disparate tax systems of the States will be particularly affected.

277. For a convenient survey of the debates in the national legislatures of the Schuman Plan countries, see 6 *CHRONIQUE DE POLITIQUE ÉTRANGÈRE* 7-52 (1953).

278. See the antagonistic statement of Schumacher, the late leader of the German Social Democratic Party, in the special session of the German Bundestag. 6 *EUROPA-ARCHIV* 3895 (Germany 1951).

279. For the extent and danger of Communist opposition to the Plan, see 7 *NEWS FROM FRANCE* 6-11 (1952).

280. See Garosci, *The Italian Communist Party* in *COMMUNISM IN WESTERN EUROPE* 154-218 (Einaudi ed. 1951).

281. See, e.g., *TREATY ARTS.* 41, 44.

282. Limitation of a State's sovereignty in favor of international organizations has been included in most of the post-war constitutions of the Schuman Plan countries. *FRENCH CONST. Preamble*; *ITALIAN CONST. Art. 11*; *BASIC LAW OF THE FEDERAL REPUBLIC OF GERMANY Arts. 24, 25*; *DUTCH CONST. Art. 60*.

For further discussion of this question see PRÉLOT, *PRÉCIS DE DROIT CONSTITUTIONNEL* 335 (1952); Friedrich, *The Political Theory of the New Democratic Constitutions* in *CONSTITUTIONS AND CONSTITUTIONAL TRENDS SINCE WORLD WAR II* 28-9 (Zürcher ed. 1951); PALLIERI, *DIRITTO COSTITUZIONALE* 344-5 (1950); Vedovato, *I Rapporti Inter-*

If a relative equality of competition is to be established, gross disparities²⁸³ must eventually be eliminated. No less consequential, particularly for the trade unions, is the standard set forth by the Treaty for the producers associations. In discharging its functions, the Authority may not only consult the Consultative Committee, but also individual producers' associations. To qualify for such a consultative status, a producers' association must "give a satisfactory place in [its] organization to the expression of the workers' and consumers' interests."²⁸⁴ The extent of the Community's impact on a State's legal system is too complex to be dealt with here in detail. Attention may be called to the effects inherent in enforcing the deconcentration and anti-discriminatory provisions of the Treaty, which seriously affect the freedom of contract principle enunciated in the laws of the Member States.²⁸⁵ Similar impact is to be expected if the deconcentration provisions conflict with the acquisition of new economic power under a State's marital and inheritance laws.²⁸⁶

Because the Community lacks its own law, other than in the Treaty, the Court will be faced with a "conflicts" problem on the choice of the proper substantive law. It is inconceivable that in adjudicating legal disputes to which the Community is a party (*e.g.*, credit transactions and employment contracts) the Court would attempt to apply the diverse laws of the Member States. Inequality would be introduced if, for example, the amount of damages recoverable against the Community were dependent upon the situs of the tort. The need for certain unification is evident, and the Court might frequently find it necessary to formulate common principles to supplement or supersede the specific laws of the Member States.

The possibilities mentioned are, of course, hardly more than a conjecture of an anticipated unification process, whose precise trend and extent can be ascertained only by the actual implementation of the Treaty itself.²⁸⁷ Its broad principles—which serve as mere policy statements—clearly emphasize

nazionali dello Stato in CALAMANDREI & LEVI, COMMENTARIO SISTEMATICO ALLA COSTITUZIONE ITALIANA 95-7 (1950); Doemming, Fuesslein & Matz, *Entstehungsgeschichte der Artikel des Grundgesetzes*, 1 JAHRBUCH DES OEFFENTLICHEN RECHTS DER GEGENWART 222 (Germany 1951).

At present, only the Belgian Constitution poses constitutional difficulties. See Van der Meersch, *Le Plan Schuman et la Constitution Belge*, 4 REVUE DE L'UNIVERSITÉ DE BRUXELLES 5 (Belgium 1951); INTER-PARLIAMENTARY UNION, CONSTITUTIONAL AND PARLIAMENTARY INFORMATION 49 (3d Series, No. 14, April, 1953) (Belgian Council of State's statement on the European Defense Community).

283. See HIGH AUTHORITY, THE ACTIVITIES OF THE EUROPEAN COMMUNITY 90-3 (1953).

284. TREATY Art. 48; COUNCIL OF EUROPE, CONSULTATIVE ASSEMBLY DOCUMENTS, REP. ON THE EUROPEAN COAL AND STEEL COMMUNITY, 3d Ord'y Sess., Pt. I, 444, 452 (1951).

285. See sources cited note 294 *infra*.

286. See Bayer, *Das Privatrecht der Montanunion*, 17 ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 325-81 (1952).

287. For a framework of inquiry on actual practices, see LASSWELL & KAPLAN, POWER AND SOCIETY 143-73 (1950).

the significance of the choice of persons called to serve on the main bodies of the Community in general, and on the High Authority and Court in particular. Their political and economic outlook will substantially influence the Community's future policy, and the molding of its economic system.²⁸⁸ The judges on the Court will certainly perform a unique function of creating a supranational case law applicable throughout the Community.

The Coal and Steel Community in the Free World

Politically and economically, the Community is an organic part of Western Europe and the Atlantic Alliance, and its future can be properly viewed only within this broader framework. The effects of the Community's operation, transcending its political frontiers, will affect the world's coal and steel trade. Non-member states, tied up in one way or another with the States of the Community, cannot afford to stay aloof. Thus, countries that produce steel or export raw materials (*e.g.*, Sweden,²⁸⁹ Austria²⁹⁰), or merely import from the Community (*e.g.*, Norway, Denmark, Switzerland²⁹¹) have found it necessary to maintain permanent representation with the High Authority. For economic and political reasons, the permanent United States²⁹² and British²⁹³ delegations are by far the most important. Politically, their informal participation might counterbalance any attempt by one of the powerful Member States to dominate the Community. Economically, it may not only encourage the investment expected to come from the United States,²⁹⁴ but also coordinate the utilization of this investment with the programs of the British steel in-

288. For a somewhat unduly pessimistic viewpoint, see Edelman, *The Council of Europe 1950*, 27 INT'L AFFAIRS 25 (1951), concluding that "[T]he conception of 'independent' individuals who would be entirely free from party, political, and commercial prejudice is one which . . . has no reality at all; as individuals they would have their 'partial affections,' collectively they would be thoroughly undemocratic." *Id.* at 27.

289. The Swedish Delegation was accredited with the High Authority on Dec. 10, 1952. HIGH AUTHORITY, THE ACTIVITIES OF THE EUROPEAN COMMUNITY 25 (1953); the significance of the representation is well illustrated by the fact that 28% of iron ore requirements of the Community in 1952 were met mainly by imports from Sweden and North Africa. *Id.* at 39.

290. Austrian Consulate General, Information Dept., 6 AUSTRIAN INFORMATION 3 (No. 10, May 23, 1953).

291. HIGH AUTHORITY, THE ACTIVITIES OF THE EUROPEAN COMMUNITY 25 (1953).

292. 28 DEP'T STATE BULL. 352 (1953); HIGH AUTHORITY, REP. ON THE SITUATION OF THE COMMUNITY 24 (1953).

293. *Id.* at 24, 31-4. As early as 1951, the Tripartite Declaration of the Foreign Ministers of the United States, United Kingdom, and France, disclosed the intention of the British Government to establish the closest possible association with the European Coal and Steel Community at all stages in its development. 25 DEP'T STATE BULL. 485 (1951).

294. For President Eisenhower's statement, urging United States loans to the European Coal and Steel Community, see 28 DEP'T STATE BULL. 927-8 (1953). See also Mutual Security Act of 1951, 65 STAT. 373 (1951), as amended, 22 U.S.C. § 1651(b) (1952) (provides for direct appropriations to the Community).

dustry.²⁹⁵ To further economic cooperation and avoid the overlapping of functions, the Community has established liaison with the Organization for European Economic Cooperation (OEEC),²⁹⁶ the United Nations Economic Commission for Europe,²⁹⁷ the International Labour Office (ILO),²⁹⁸ and, of course, with the Council of Europe.²⁹⁹

The Schuman Plan is the pioneer in the movement to consolidate Western Europe. It may be followed by the still unratified treaty establishing the European Defence Community, and the proposed European agricultural,³⁰⁰ health,³⁰¹ and transportation authorities.³⁰² However desirable the aim, a single approach to the problem is not devoid of pitfalls. First, these proposed authorities suffer from an almost servile imitation of the Community's institutional structure, which is conditioned by the peculiarities of heavy industry.³⁰³ Second, the artificial dissection of organic economic ties into separate economic organizations under independent authorities endangers their viability. Their operation without proper coordination could conceivably result in wasted effort. This development can be curbed only by a single authority which will control the essential segments of the European economy. The establishment of this single authority is still very remote, and will partly depend upon the success of the Schuman Plan experiment. The draft of a European Political Community³⁰⁴ is a beginning in this direction.

The European Coal and Steel Community is a new and necessary experiment which seeks to foster peace and democracy. The ultimate choice is between a democratic, united Europe—created by free men through the demo-

295. *British and Luxemburg*, [1953] *THE ECONOMIST* 18-20.

296. TREATY Art. 93; Schilling, *Der Europäische Wirtschaftsrat und die Europäische Gemeinschaft für Kohle und Stahl*, 8 *EUROPA-ARCHIV* 5407-16 (Germany 1953).

297. TREATY Art. 93. See HIGH AUTHORITY, *THE ACTIVITIES OF THE EUROPEAN COMMUNITY* 28 (1953).

298. *Accord concernant la collaboration entre l'Organisation Internationale du Travail et la Communauté Européenne du Charbon et de l'Acier*, 2 *JOURNAL OFFICIEL DE LA COMMUNAUTÉ EUROPÉENNE DU CHARBON ET DE L'ACIER* 167-8 (1953).

299. See *PROTOCOL CONCERNING RELATIONS WITH THE COUNCIL OF EUROPE*; HIGH AUTHORITY, *THE ACTIVITIES OF THE EUROPEAN COMMUNITY* 26-8 (1953).

300. See AMBASSADE DE FRANCE, SERVICE DE PRESS ET D'INFORMATION, *FRENCH NOTE ON THE ORGANIZATION OF A EUROPEAN AGRICULTURAL POOL* (Doc. No. 46, June 26, 1951); Mansholt, *Toward European Integration; Beginnings in Agriculture*, 31 *FOREIGN AFFAIRS* 106-13 (1952).

301. *N.Y. Times*, Sept. 25, 1952, p. 6. col. 3.

302. COUNCIL OF EUROPE, *CONSULTATIVE ASSEMBLY DOCUMENTS, REP. ON THE ESTABLISHMENT OF A EUROPEAN TRANSPORT COUNCIL*, 4th Ord'y Sess., 853 (1952).

303. *ECONOMIC SURVEY OF EUROPE* 234-5 (1953).

304. A draft of the treaty for the European Political Community is reprinted in *INTER-PARLIAMENTARY UNION, CONSTITUTIONAL AND PARLIAMENTARY INFORMATION* 52-101 (3d Ser., No. 14, April, 1953). See COUNCIL OF EUROPE, *CONSULTATIVE ASSEMBLY, INTRODUCTORY REPORT BY THE COMMITTEE OF JURISTS ON THE PROBLEM OF A EUROPEAN POLITICAL COMMUNITY* (Doc. SG (52)2, 1952).

cratic process and dedicated to the worth and dignity of the individual—and the grave possibility of an enslaved Europe under the dictate and force of the Soviets.

“Peace depends essentially on the creation of conditions which, though they may not change the nature of men, will direct their conduct towards each other into peaceful channels. That will be one of the main consequences of the transformation of Europe with which our Community is concerned. . . . In building up Europe, the Europeans are laying the very foundations of Peace.”³⁰⁵

305. Address by M. Monnet, Ambassade de France, Service de Press et d'Information, SPEECHES AND PRESS CONFERENCES No. 11, p. 3 (May, 1953).