Chapter VII

New Legal Remedies of Enterprises: A Survey

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The Community system is conceived of as "a government of laws" rather than "a government of men." The Community Court of Justice is directed "to ensure observance of law and justice . . . in the interpretation and application" of the Treaty. Any other system would run counter to the basic principles underlying the democratic institutions of the six Member States and would be incompatible with their constitutions. A necessary component of this system is an adequate armory of legal remedies available to persons whose rights are unlawfully abridged by authorities administering the system.

Economic rights and interests of persons—individuals and enterprises—engaged in economic activities in the Community may be affected in varying degrees by the acts of the Community institutions as well as by the acts of national authorities acting pursuant to the Treaty or to a Community act. This applies to economic rights and interests of natural persons whether or not they are nationals of a Member State, as well as to legal persons whether or not they are organized under the laws of a Member State or of a non-member country if such persons are partly or wholly engaged in economic activities within the Community. Thus, for example, an American citizen doing business in the Community, a branch of an American company or a subsidiary of an American parent may be affected by these acts.¹ The principal purpose of this chapter is


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¹ Art. 196 of the Euratom Treaty defines the term "person" as used in that Treaty as "any natural person wholly or partly engaged in the territories of Member States in activities" falling within the scope of the Treaty and the term "enterprise" as "any enterprise or institution wholly or partly engaged in activities under the same conditions, whatever may be its public or private legal status." Art. 80 of the Coal-Steel Treaty provides that the term "enterprise" as used in that Treaty "refers to any enterprise engaged in production in the field of coal and steel" within the Community territory; "and in addition, with regard to Articles 65 and 66 as well as information required for their application and appeals based upon them, to any enterprise or
to outline the legal remedies available to enterprises against these acts in the Community Court of Justice. Only brief reference is made to remedies available in national courts. A study of national remedies would entail an analysis of the procedural systems in the six Member States, a task which is entirely beyond the scope of this volume. Brief attention is given to legal remedies in suits based on contracts to which the Community is a party and on tortious acts imputed to the Community, as well as to the related conflict of laws problems. Finally, the salient features of the procedure before the Community Court and the Court’s sources of law will be considered.2

I. ADMINISTRATIVE ACTS OF THE COMMUNITY

A. FORM OF ADMINISTRATIVE ACTS

In the areas of their responsibility, the Council of Ministers and the Commission adopt measures3 which will be referred to here, for want of a better term, as administrative acts. This term must not obscure the fact that in form, content, and effect some of these acts may resemble national legislation more than national administrative measures. The effect of the administrative acts depends on whether they take the form of regulations, directives, decisions, recommendations, or opinions. Of these, regulations resemble American federal statutes in that they establish general rules applicable directly and without national implementing legislation in the Member States. Directives, on the other hand, are binding orders which may be addressed only to Member States; they bind the Member States as to the prescribed result but leave to each Member State the choice of the means and legal form of implementation of the order.4 Decisions are individual rather than general acts and differ from directives in that they may be addressed to an enterprise, as well as to a Member State, and are binding in all respects.5

3 Art. 189.
4 E.g., art. 69 provides for the implementation, by directives issued by the Council, of the provisions of art. 67 concerning the abolition of restrictions on the free movement of capital.
5 E.g., art. 79(4) empowers the Commission to issue decisions to remove discrimination practiced by carriers.
mendations and opinions, finally, do not bind their addressees but constitute advice to Member States or enterprises in those instances in which the institutions have no power or do not choose to act with a binding effect. Recommendations and opinions are, nevertheless, of importance because of the expertise of the Community institutions and of the possible measures which may be taken if a recommendation or an opinion is disregarded.

B. ENFORCEMENT OF ADMINISTRATIVE ACTS AGAINST ENTERPRISES

I. IMPOSITION OF PENALTIES

Failure to abide by a binding administrative act (regulation or decision) subjects an enterprise to the enforcement procedure. Normally, such an administrative act will be enforced by fining the delinquent enterprise. The E.E.C. Treaty does not expressly authorize enforcement by other means.

The Coal-Steel Community Treaty under which a number of fines have been imposed specifically authorizes the High Authority to impose penalties upon enterprises in a considerable number of instances; it envisages either a single fine or a series of daily fines for each day of continuing violation. The E.E.C. Treaty expressly requires penalties in one instance only: the Council must institute fines to ensure observance of the antitrust provisions. In addition,
however, the Treaty contains a general provision to the effect that the regulations adopted by the Council “may confer” on the Community Court “full jurisdiction in respect of penalties” provided for in such regulations. Consequently, it would seem that the Council in any regulation may provide for penalties against enterprises and determine the respective roles of the Commission and of the Community Court in the imposition of penalties. Three patterns seem possible.

1) The Treaty requires the Commission to “exercise the competence conferred on it by the Council for the implementation of the rules laid down by the latter.” Thus the Council may authorize the Commission to impose penalties on enterprises violating a Council regulation. In accordance with the general procedure discussed below, the enterprise concerned may appeal the Commission decision to the Community Court which may either sustain or annul the penalty.

2) The Council may provide in its regulation that in hearing an appeal from a Commission decision imposing a penalty the Court exercises “full jurisdiction.” In that case the power of the Court will be substantially broader than its general power of review on appeal against administrative acts: the Court will act as a trial court and consider such factors as the seriousness of the violation, recidivism, and the economic circumstances of the defendant. Moreover the Court will not be limited to confirming or annuling the penalty but will also be able to modify it.

14 “Zwangsmassnahmen,” “sanctions.” It should be noted that these terms are not limited to fines.

15 Art. 172. Whether the Council may establish penalties and give the Court “full jurisdiction” with regard to them for violation of the antitrust provisions only (cf. art. 87, 2a) or whether it may establish penalties for all its regulations and give the Court “full jurisdiction” with respect thereto, depends on how art. 172 is interpreted. The language of art. 172 admits of an extensive interpretation which appears preferable in order to render the Council’s regulations effective. The meaning of “full jurisdiction” will be discussed later.

16 Art. 155.

17 Art. 173. See Part II, Section A, Subsections 3-4, infra.

18 Art. 172.

3) The Council may determine that the penalties for infraction of its regulation should be imposed by the Court itself exercising "full jurisdiction" within the meaning described above. If this alternative is adopted, the Commission presumably would act as prosecutor before the Court. 20

A further question arises, whether the Commission has an independent power to institute penalties for the violation of its own regulations or of Council regulations, without being authorized to do so by the Council. 21 The Treaty contains no express provision granting the Commission such power; it does accord the Commission a power "to ensure the application of the provisions of the Treaty and of the provisions enacted by the institutions of the Community in pursuance thereof" as well as "a power of decision of its own" but only "under the conditions laid down in this Treaty." 22 The Commission, composed of appointed and independent administrators, is conceived of predominantly as an "executive" and not a "law-making" institution. It is, therefore, doubtful whether the Treaty could and should be interpreted so extensively as to accord the "executive" an implied independent power to prescribe penalties.

The Council and, in case of disagreement, the Community Court will provide authoritative answers to these problems of Treaty interpretation. But it may be safely concluded that the Council has the power to prescribe penalties for violation of any of its regulations and to authorize either the Commission or the Court to impose such penalties.

It has been suggested that in the antitrust field at any rate the Community Court exercising "full jurisdiction," rather than the Commission, should have the original authority to impose penalties because the Court's procedures more effectively safeguard rights of the affected enterprises. 23 Under certain circumstances an enterprise

20 Daig, Arch. d. ö. R. 185.
21 The conferral of such broad discretionary law-making powers, which are ordinarily within the competence of the legislator, on the executive may also create difficulties with regard to the constitutionality of such acts under the constitutions of the Member States. This question has already been raised with regard to a regulation issued by the Commission of the European Atomic Energy Community. See Everling, Die ersten Rechtsetzungsakte der Organe der Europäischen Gemeinschaften, 14 Betriebs-Berater 52 (1959) No. 2, and Meibom, Die Rechtsetzung durch die Organe der Europäischen Gemeinschaften, 14 Betriebs-Berater 127 (1959) No. 4.
22 The E.E.C. Council Regulations Nos. 3 and 4 concerning the social security of migrant workers, [1958] Journal Officiel 561, 597, have been said to raise questions of constitutionality in France.
may prefer, however, to "accept" a penalty imposed by the Commission rather than to face the publicity of a public proceeding before the Court, particularly since the Commission may be more indulgent than the Court.

2. COLLECTION OF MONETARY OBLIGATIONS

Only those administrative acts which create monetary obligations are enforceable against an enterprise in the territories of the Member States under an express provision of the E.E.C. Treaty. These acts include Council or Commission decisions creating monetary obligations or imposing fines for the violation of administrative acts. These decisions as well as money judgments of the Community Court are enforceable in the Member States. Domestic authorities in the Member State where execution takes place are authorized by the Treaty only to require verification of the authenticity of the document containing the decision or judgment. Once the document is verified they must grant execution in accordance with their own rules of civil procedure. Thus, the enforcement of judgments of the Community Court is quite different and substantially easier than the enforcement of foreign judgments. National courts cannot examine whether the Community Court had jurisdiction, whether, on the merits, the Community law was correctly applied, or whether the enforcement would be contrary to the "public policy" of the forum. A collateral attack on Community acts or judgments therefore is not possible in the course of the enforcement procedure. Only the Community Court may suspend execution.

24 Under the E.C.S.C. Treaty pecuniary obligations other than fines were imposed upon enterprises for instance by decisions setting forth the contributions to be made by enterprises to the compensation scheme for scrap. See E.C.S.C., SEVENTH GENERAL REPORT ON THE ACTIVITIES OF THE COMMUNITY 88–94 (1959).

25 Arts. 192 and 187.

26 For a discussion of the applicable national law, see OSTERHELD, DIE VOLLSTRECKUNG VON ENTSCHEIDUNGEN DER E.G.K.S. IN DER BUNDESREPUBLIK DEUTSCHLAND 70–84 (1954).

27 This procedure can be explained by the fact that the Community Court is not regarded as a "foreign court" in the Member States. See MATHIJSEN, LE DROIT DE LA COMMUNAUTÉ EUROPÉENNE DU CHARBON ET DE L'ACIER 97 (1958). The requirement of verification of the authenticity can thus not even be assimilated to an exequatur proceeding. See Dumon and Rigaux, La Cour de Justice des Communautés Européennes et les juridictions des États membres, 19 Annales de Droit et de Sciences politiques 7, at 21 (1959). For the competence of German courts to go behind an ordinary foreign judgment, see Zivilprozessordnung (ZPO) § 328; it might also be said that German courts would not be able to go behind a Community judgment even absent the express provision of art. 192 of the Treaty, on the ground that the Community Court is not a "foreign" court but a supranational court for purposes of ZPO § 328. Cf. in a different context, OSTERHELD, op. cit. supra note 26, at 73, n. 258.
II. LEGAL REDRESS OF ENTERPRISES AGAINST ADMINISTRATIVE ACTS

A. SUIT FOR ANNULMENT IN THE COMMUNITY COURT OF JUSTICE

The composition of the Court and its diversified jurisdiction have been described in general terms in the chapter dealing with the institutions of the Community. The experience with the Coal-Steel Community Treaty has shown that from the viewpoint of an enterprise the most important aspect of the jurisdiction of the Court is its power to review and annul administrative acts rendered by the institutions. This will no doubt also be the case under the E.E.C. Treaty; one must keep in mind, however, that since the E.E.C. Treaty contains fewer rules directly applicable to enterprises, there will be fewer occasions for enterprises to appeal to the Court in the earlier stages of the Community at any rate and pending the issuance of regulations by the Community institutions.

I. THE ENTERPRISE AS PARTY BEFORE THE COMMUNITY COURT

The question of who may bring an appeal before the Court has been of importance in the Coal-Steel Community, since there the right to appeal is limited to coal and steel producers, while certain distributors and buyers of coal and steel are able to sue in special circumstances only.28 A much disputed question was the extent to which "outsiders," such as industrial users of coal and steel or labor groups, would have access to the Court. In one case the Court refused to consider an appeal from an association of coal consumers.29 This problem does not exist under the E.E.C. Treaty. The right to appeal under the E.E.C. Treaty is granted under specified cir-

cumstances to "any natural or legal person," 30 obviously because the Community may affect almost any person or any type of enterprise within its jurisdiction. 31 This right does not depend on any specific legal status, nationality, or type of activity of the plaintiff enterprise. Thus the Court will be open to American citizens or companies organized in the United States or to foreign companies controlled by American capital if the rights or interests of such citizens or companies are affected in a manner specified in the Treaty.

There is reason to assume that the Court will interpret liberally the provisions governing access to the Court. This expectation is supported by the clause of the Treaty, referred to above in the introduction to this chapter, which is called the "Magna Carta" of the Court; it charges the Court with the duty of ensuring "observance of law and justice in the interpretation and application of" the Treaty. 32 This expectation is also encouraged by the constitutional requirement of broad access to legal remedies inherent in any democratic system of government under law. 33

2. ADMINISTRATIVE ACTS SUBJECT TO APPEAL

Since the object of legal redress is the protection of rights, an enterprise may appeal against regulations and decisions but not against recommendations or opinions which are not binding and therefore in law cannot affect rights. 34

3. GROUNDS OF APPEAL AGAINST ADMINISTRATIVE ACTS

If, for example, an enterprise applies for exemption from the antitrust provisions and the application is denied, on what grounds can an appeal be taken to Court? 35 The Treaty provides four grounds of appeal. 36

1) The first ground is "incompetence" which consists of an ac-

30 Art. 173.
32 Art. 164; Daig, ARCH. D. Ö. R. supra note 19, at 150-154.
33 The concept of "Rechtsstaatlichkeit." E.g., German Grundgesetz art. 19; cf. also in a different context Everling, supra note 21, at 55, 58 and Meibom, id. at 131.
35 It is assumed here that in regulations to be issued under art. 87 the Council will charge the Commission with the task to pass upon such application in the first instance.
36 Art. 173.
tion by a Community institution ‘outside the defined limits of [its] legal power’ and may perhaps be analogized to the concept of *ultra vires*.

2) The second ground for appeal is the violation of a substantial procedural requirement, such as the failure to adopt the administrative act by the requisite number of votes, the failure to comply with requirements of publication or consultation with other bodies (such as the Economic and Social Committee), or the failure to give sufficient reasons for the act. These requirements are based on express provisions of the Treaty. However, this ground of appeal may possibly be available not only in case of a violation of a procedural requirement set forth in the Treaty (i.e., ‘statutory requirement’), but also in case of a violation of a procedural requirement to which the administrative act is ‘inherently [subject] from its nature,’ a concept which has its American analogy in the notions of ‘due process’ and ‘fair play.’ It may well be that should the competent institution refuse an application for exemption from the antitrust provisions without according an opportunity to the applicant enterprise to present evidence, the decision will be subject to annulment because of a defect in form even though the Treaty and all applicable regulations are silent on the point.

3) The third ground, violation of the Treaty, serves to contest the administrative act because of an incorrect interpretation of the Treaty or ‘of any legal provision relating to its application,’ such

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38 For instance the plaintiff argued the High Authority’s incompetence in the E.C.S.C. case 8-55, Sammlung, Vol. II, 197, at 228, 307-314, but the Court rejected this alleged ground.
39 In E.C.S.C. case 6-54 plaintiff charged that the High Authority’s decision was not based on sufficient reasons as required by arts. 5 and 15 of the E.C.S.C. Treaty. The Court held that the reasons given were sufficient. Sammlung, Vol. I, 213, at 232-233; a similar allegation in E.C.S.C. case 2-56 was rejected by the Court on the ground that the High Authority was not bound to meet all possible arguments in its reasons, but needed only state the factual and legal considerations on which it bases its decision. Sammlung, Vol. III, 9, at 37-38. Finally, in the more recent E.C.S.C. case 9-56 the Court held that the recital of reasons in two short paragraphs did not constitute compliance with the requirement to give reasons; having found, *inter alia*, that the lack of sufficient reasons constituted a major violation of procedure, the Court annulled the High Authority’s decision. Sammlung, Vol. IV, 9, at 28-31. The requirement to give reasons for regulations, directives and decisions is contained in E.E.C. Treaty art. 190.
40 VALENTINE, op. cit. supra note 37, at 72.
as a regulation, or because of a complete absence of facts to support
the act. Violation of the Treaty has been argued extensively in
many cases involving the Coal-Steel Treaty and the Court has
developed a sizable body of law.

4) Finally an administrative act may be attacked for détournement de pouvoir, best translated as "misapplication of power,"
which results whenever an organ has exercised its power to achieve
an end not envisioned in the grant of power. Although alleged in
several Coal-Steel cases, thus far the Court has not relied on it as
a basis for annulment.

These grounds for appeal are modeled on those of French admin­
istrative law in which they are known collectively as appeals for
excès de pouvoir, that is, appeals to prevent governmental agencies
from exceeding their powers. They show considerable similarity to
the administrative law of the other Member States and even of
England and the United States. Belgian and Luxembourgian admin­
istrative laws in this area are almost exactly like the French. The

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43 Cf. the excellent analysis by Steindorff, op. cit. supra note 29, at 130-131, with
regard to the E.C.S.C. as well as his comparative analysis of French law, id. at 55-76.
See also case 6-54, Sammlung, Vol. I, at 235-236.
44 In case 2-56, Sammlung, Vol. III, 9, at 38 the Court had to decide whether the
High Authority's reference to the general principles of E.C.S.C. Treaty art. 4 in
applying and interpreting the anti-cartel provisions of the Treaty constituted a viola­
tion of the Treaty. The Court held that the High Authority did not violate the Treaty
by interpreting the specific prohibition against discrimination of art. 65 in conformity
with the general principles of art. 4. Id. at 44, 45. Any other interpretation
would have led the Court to the untenable proposition that some parts of the Treaty are
contrary to other parts of the Treaty. Daig, Die Rechtsprechung des Gerichtshofes der
Europäischen Gemeinschaft für Kohle und Stahl in den Jahren 1956 und 1957, 13
JURISTENZEITUNG 238 at 239. On the other hand, the Court annulled the High Author­
ity's decision concerning price publication because it was based on an incorrect inter­
pretation of E.C.S.C. Treaty art. 60 (case 1-54, Sammlung, Vol. I, at 23-33); the
Court also annulled the decision involved in case 9-56, Sammlung, Vol. IV, 9, at
32-33, inter alia, because the High Authority had violated arts. 5 and 47 of the
E.C.S.C. Treaty by not publishing certain information and data as it was required
to publish. For a discussion of cases 1-54 and 2-56 see Stein, The Court of Justice of
the European Coal and Steel Community: 1954-1957, 51 AM. J. INT'L L. 821, at 821­
824 and 828-829 (1957) and Stein, The European Coal and Steel Community: The
45 E.g., cases r-54, 6-54, 8-55, 9-55. See Stein, articles cited in note 44 supra.
46 See text at notes 54-56 infra for discussion of case 9-56 and 10-56, Sammlung,
Vol. IV, 9, at 34-47 and 51, at 73-85 where plaintiff charging détournement de pouvoir
prevailed.
47 STEINDORFF, op. cit. supra note 29, at 53-83 and literature cited there.
48 With regard to the E.E.C. Treaty see Erläuterungen der Bundesregierung zum
Vertrag zur Gründung der Europäischen Wirtschaftsgemeinschaft, HANDBUCH FUR
EUROPAISCH WIRTSCHAFT I/Teil A/30 at 77, where it is said that the grounds of
appeal of art. 173 are the same as in German constitutional and administrative law.
49 WIGNY, DROIT ADMINISTRATIF 371-375 (1953). Lievens, The Conseil d'Etat in
Italian law provides for similar grounds of appeal with the difference that détournement or sviamento di potere, is not an independent ground for appeal but may be asserted only in support of one of the other grounds of appeal—for example, violation of law—which are collectively known as eccèso di potere.\textsuperscript{50} Détournement is an independent ground for appeal under Dutch law together with the other three grounds included in the E.E.C. Treaty.\textsuperscript{51} German law, finally, recognizes as grounds for appeal the administrator's incompetence to act, the violation of statutory procedural requirements, and violation of law,\textsuperscript{52} as well as misapplication of power which is understood in very much the same way as the French détournement de pouvoir.\textsuperscript{53} In those cases under the Coal-Steel Treaty where the ground of détournement was pressed the Court tended to employ the French definition of the term. In one case the plaintiff attacked a decision of the High Authority establishing a subsidiary organ on the ground of détournement de pouvoir. The Court upheld the plaintiff and annulled the decision primarily because of an unlawful delegation of power.\textsuperscript{54} The Court intimated that the Treaty had been violated since "the guarantee of the balance of power" among the institutions had been upset by the unlawful delegation of power by the Authority to the new organ.\textsuperscript{55} The Court did not inquire whether or not there was a détournement but having found an irregularity proceeded to decree the annulment.\textsuperscript{56}

Détournement de pouvoir has also served the Court as a basis for broadening the right of appeal of enterprises under the Coal-Steel Community Treaty.

Grounds for appeal similar to those of the E.E.C. Treaty are found in common law countries. Although review of administrative
acts in England is now usually provided for in the statutes establishing administrative agencies—and in terms which often differ substantially from one statute to the next—some general observations can perhaps be made. English law of judicial review revolves around the question of whether the administrative agency has "exceeded its jurisdiction." 57 Exceeding jurisdiction includes exceeding its powers (ultra vires), procedural defects, that is, failure to observe mandatory procedural requirements or rules of "natural justice" (due process), and "error of law on the face of the record," that is, violation of law. 58 "Abuse of discretion," finally, includes the increasingly important element of "improper purpose" which seems to be similar to détournement de pouvoir in Community law. As is true of Community administrative law, English law grants no right of appeal when the agency can show that it pursued in good faith a proper as well as an improper purpose. 59 In the United States where judicial review of federal administrative acts is treated as are appeals from lower courts, 60 judicial review of administrative acts may be obtained on the grounds of ultra vires, violation of law, disregard of the requirements of procedural due process, and abuse of discretion. 61 "Improper purpose" does not seem to offer a ground for review. However, because of the relatively broad scope of review asserted by American courts, adoption of an act for an "improper purpose" perhaps might be challenged as an abuse of discretion. 62

4. SCOPE OF THE RIGHT OF APPEAL OF ENTERPRISES

a. Direct Appeal Against Binding Acts

An enterprise may appeal against a decision addressed to it. In addition, it may appeal against a decision which, although in the form of a general regulation or a decision addressed "to another person," is "of direct and specific concern" to it. 63 Thus if an in-

57 Griffith and Street, Principles of Administrative Law 212-229 (2d ed. 1957).
58 Id. at 212, 215, 218.
61 Id. at 113; cf. also Steindorff, op. cit. supra note 29, at 90 and 95-96. Administrative Procedure Act § 9(e), 5 U.S.C. § 1009 (1958).
62 The "Hoover Commission" recommended that the scope of review should be broadened to permit the courts to reverse for "unwarranted exercise" of discretion. This was intended to permit review where it was alleged that agency action was taken for an improper purpose. Report on Legal Services and Procedures of U.S. Commission on Organization of the Executive Branch of the Government (1953-1955) 215-217.
63 Art. 173, para. 2. Cf. the French text: "... les décisions qui, bien que prises sous l'apparence d'un règlement ou d'une décision adressée à une autre personne,
stitution issues what purports to be a regulation, but which in fact affects a single enterprise only, an appeal would lie. Again, an enterprise should be able to appeal a decision addressed to its competitors authorizing a cartel agreement among them if a similar authorization has previously been denied to it, but there may be some question whether the language of the Treaty permits such appeal. If such appeal does not lie, the only recourse remaining to the enterprise would be to re-submit its application for an authorization to the Commission with a view to appealing a second denial to the Court. Thus defined the right of appeal is narrower than that granted under the Coal-Steel Community Treaty.64

The language of the E.E.C. Treaty seems to exclude an appeal against regulations except where they affect a single enterprise. Nor does it allow an appeal against a decision or a directive addressed to a Member State which will cause the latter to take administrative or legislative action against an enterprise. If an enterprise has no way in national courts to restrain its national government from complying with an illegal Community directive and if it is barred from an appeal to the Community Court, it will be without any remedy. As is true of American courts which refuse to review administrative action where the plaintiff is "anyone who asserts no more than his interest as a member of the public" 65 (absent a "case or controversy"), the Treaty understandably seeks to exclude appeals based on insubstantial and remote interests. A problem might arise, however, of reconciling the requirement contained, for instance, in the German constitution that legal redress must be available against every administrative act 66 with the necessity of avoiding abuse of the judicial process. The Court may in due course define "direct and specific concern" of enterprises claiming the right of appeal. It is difficult to foresee whether the Court will be able to elevate the concept of "direct and specific concern" to a general test by which it would measure the right of appeal in those cases where

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64 E.C.S.C. Treaty art. 33 grants enterprises a right of appeal not only against decisions addressed to them and against "general decisions" (i.e., decisions purporting to contain general rules roughly comparable to regulations under the E.E.C. Treaty) which are "concealed decisions" but also against "recommendations" (comparable to directives under the E.E.C. Treaty) and "general decisions" in which a détournement de pouvoir was committed against the enterprise.


66 German Grundgesetz art. 19(4).
such right is claimed by an enterprise but is not expressly accorded in the Treaty. From the viewpoint of an enterprise it would certainly be more desirable to permit it to appeal whenever its interests were directly affected than to limit arbitrarily the right of appeal to appeals against specified administrative acts.67

b. Collateral Attack Against Regulations

An appeal must be brought within two months from the date of the publication of the regulation in the official journal of the Communities or from communication of the directive or decision to the addressee or, absent such communication, from the day the addressee obtained knowledge of the act. Since regulations are in the nature of general laws, it may be impossible to determine within two months whether an enterprise is “affected” in the sense that permits it to appeal. For this reason the Treaty provides that whenever a regulation becomes the subject of a dispute in any legal proceeding, any party may question its validity on any ground on which the regulation could have been attacked directly, regardless of the lapse of time since its publication.68 It may well be that this broad right of “indirect appeal” will be used as a substitute for direct appeals against regulations which enterprises may not be permitted to bring. Despite the specific Treaty language an effort might also be made to make “indirect appeals” available not only against regulations but against other acts as well in order to create legal protection against acts which cannot be attacked directly.69

The Court is not given the power to annul an indirectly contested

67 An attempt to arrive at a general test of “interest” was made under the E.C.S.C. Treaty for the purpose of resolving the difficult question of whether a given administrative act was “individual” or “general” in character and thus did or did not entitle enterprises to appeal. Such a test has been urged repeatedly by writers, (Rivero, supra note 56, No. 14 at 302; Steindorf, Die Europäischen Gemeinschaften in der Rechtsprechung, 8 Archiv des Völkerrechts 50, at 66 (1959); Court Advocate Römer in cases 7-54 and 9-54, Sammlung, Vol. II, 105, at 111 and 120-127. Court Advocate Lagrange in case 8-55, id., 231, at 248 and in case 15-57, id., Vol. IV, 205, at 211), and in at least one case the E.C.S.C. Court seemed to have accepted this test (case 7-54 and 9-54, Sammlung, Vol. II, 53, at 84). Cf. also Belgium, Conseil d'État, 8 juin 1952, 5-6 Recueil de Jurisprudence du Droit Administratif 281; Lievens, AM. Comp. L. supra note 49, at 585; Laubadère, Traité élémentaire de droit administratif Nos. 635-643, 623, 526 and 629; Forsthoff, op. cit. supra note 52, at 501.


69 Daig (ARCH. D. Ó. R. supra note 19, at 177) seems to favor extending availability of the indirect appeal beyond the language of art. 184, which limits it to regulations, to all other acts of the Community organs, where the time limitation for the bringing of a direct appeal has run. He argues that the indirect appeal is designed to broaden the available legal protection rather than merely provide for special situations.
regulation. It is merely authorized to hold it “inapplicable.” It has been argued, however, that the result will be essentially the same because Community institutions as well as national courts are bound to comply with the legal interpretations rendered by the Court.\(^7^0\)

c. *Appeal Against Decisions “Disguised” as Recommendations or Opinions*

A recommendation or opinion, although not binding and not appealable, may in effect reflect a policy which the Community institution has adopted and will enforce by means of binding administrative acts, for example, if the recommendation or opinion is not heeded. For purposes of legal certainty and commercial security, an enterprise may therefore desire a determination of the legality of the position taken by the institution in the recommendation or opinion.

Several situations of this kind seem possible. For example, the Commission might address a recommendation to an enterprise to desist from what it considers dumping practices. The enterprise knows that if it disobeys the Commission may authorize “the Member State injured” to take “protective measures” defined by the Commission.\(^7^1\) Or, the Community institution for reasons of its own might choose to recommend action in the antitrust field which it has the authority to make obligatory by a binding appealable decision.

In several cases arising under the Coal-Steel Community Treaty it was argued that the Court could not consider an appeal because the contested act of the Community institution was not binding. The Court has held, however, that acts will be considered binding and thus appealable (“disguised decisions”) if they contain provisions which can be applied. In other words, where the High Authority had made abundantly clear in administrative acts what position it would take, should stated conditions later obtain, those acts were considered appealable. In several cases the Court, following this reasoning, has found acts appealable. On the other hand it refused to entertain an appeal against an “opinion” in which the High Authority took a negative view of certain investment plans of a steel

\(^{70}\) It is argued further that the Court may also adjudicate which *parts* of the regulation are to remain in force, a competence which the Treaty confers on the Court expressly only in the case of annulment of regulations on direct appeal. *Ibid.*

\(^{71}\) Art. 91(1). It could possibly be argued on the basis of the general Treaty framework that the Commission may address a recommendation to a Member State only rather than to an enterprise.
producer. The Court did so despite the fact that the "opinion" had grave economic consequences for the enterprise concerned and was thought by some to contain a clearly implied threat of sanctions. In this case the Court stressed the fact that the "opinion" did not impose any legal obligations on the enterprise.\(^2\) It is interesting to compare this latter approach with the recent judgment of a U.S. District Court. It held a "report" by the Interstate Commerce Commission reviewable because of its "immediate and practical impact" on the enterprise concerned.\(^7\)

The E.E.C. Treaty provides expressly that only "acts other than recommendations or opinions" are subject to judicial review.\(^7\) However, this provision was hardly intended to exclude appeals against such recommendations and opinions which are in fact "disguised decisions," since decisions remain decisions regardless of the form in which they are issued.\(^7\)

A different situation may arise where the Commission renders an unfavorable opinion with regard to a project which forms the basis for an application by an enterprise for a loan from the European Investment Bank. In such event the Board of Directors may grant a loan by a unanimous vote only which means that the opinion may prejudice the applicant in a very real sense.\(^7\) This case may be distinguished on the ground that a grant of a loan is a privilege rather than a right or legally protected interest. Thus an enterprise would not have a legal remedy against an unfavorable opinion of the Commission even if in fact the opinion was the cause of the denial of the application by the Board of Directors of the Bank. Nor would the enterprise have recourse to the Court against the negative decision of the Board of Directors.\(^7\)

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\(^7\) See note 72 supra, particularly cases 8-55 and 9-55.

\(^7\) The conclusions of the Board of Directors may only be contested by Member States or the Commission and only on the ground of infringement of specified procedural requirements. Art. 180(c).
d. "Unclassified" Acts

Closely connected with the last problem is the question of the appealability of Community acts "other than recommendations or opinions" which do not fit the categories of "regulation," "directive," or "decision." Although in many cases it may be possible to draw analogies to these categories, it may be difficult to do so in some. In numerous cases the Treaty provides that the Council or Commission is to "authorize," "approve," "decide," "provide," "lay down rules" or "adopt measures" without specifying the form of the administrative act. Again, the Treaty authorizes the Council to conclude international agreements on behalf of the Community without specifying the form of the act by which the Council gives final approval to such agreements.

The problem is twofold: Is the Community free to choose any form where the Treaty does not specify the type of act and, secondly, how does this affect an enterprise's right of appeal? The choice of the form of an act was discussed earlier in the chapter on "The New Institutions." With respect to the enterprise's right to appeal against such "unclassified acts," it will be recalled that the right is given in general terms with regard to "acts other than recommendations or opinions." The use of such a broad term without a defined meaning should be a sufficient basis to allow appeals against those acts of the Council or the Commission which do not fit the above categories but require judicial control because of their legal impact on the enterprise.

5. THE SUIT FOR INACTION

Since the Treaty requires the Community to exercise certain powers, a provision had to be included whereby the Council and the Commission may be compelled to act when they fail to exercise their powers. This type of suit is familiar to the common lawyer in the form of a mandamus proceeding whereby an official may be compelled to perform a statutory duty or to exercise a discretionary

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Footnotes:

28 Everling, Betriebs-Berater supra note 21, at 52, footnotes 18, 19. Art. 51 provides that the Council shall "adopt ... measures" in the field of social security for migrant workers. The Council enacted two regulations on the basis of this article: Regulations Nos. 3 and 4, [1958] Journal Officiel 561, 597.

29 Art. 228 and art. 238. Daig, ARCH. D. 6. R. supra note 19, at 167, recognizes the possibility of an appeal against such acts of approval under art. 173 but doubts whether this was intended. It seems that appealability of such acts of approval merely depends on whether they can be assimilated to other binding Community acts and appealed on the same conditions.
power but not to exercise such power in any particular manner.\(^80\) In
the E.E.C. the legal means for compelling such action is the suit for
inaction. Its scope is wider than that of a similar suit under the
Coal-Steel Community Treaty.\(^81\)

In order to institute such an action the enterprise must allege
that the Community institution has failed *to address a decision to
it* ("an act other than a recommendation or an opinion") and that
the inaction is *in violation of the Treaty*. Thus after the Council
has issued the regulations implementing the antitrust provisions as
envisioned in the Treaty, an enterprise, relying on the regulations,
would be able to sue if the Commission should fail to act on its ap­
plication for exemption from the antitrust provisions.\(^82\) Two ob­
servations must be made in this context. First, the language of the
Treaty is specific enough to exclude a suit by the enterprise for a
failure of the institution to address a decision to another enterprise
or to a Member State, or to issue a directive or a regulation. Such
a suit is reserved to the Member States only. Secondly, of the four
grounds enumerated above on which appeal can be taken against an
administrative act, "violation of the Treaty" seems to be the only
ground on which a suit for inaction may be instituted.

Yet there are cases where choice by the Commission of a recom­
mendation (or opinion) rather than a decision would not of itself
constitute a violation of the Treaty. In making this choice, the Com­
mmission may nevertheless be guided by improper motives. Thus,
while an enterprise may not be able to sue for annulment of the
opinion (since it is a non-binding act), it is arguable that it should
be able to bring what would amount to a suit for inaction (for fail-

and in Corrigan v. Jansen, 173 N.Y.S. 2d. 894 (1958), the applications for mandamus
were dismissed because the defendants had neither failed to act in violation of a duty
imposed by law nor had made an "arbitrary, unreasonable or capricious" use of their
discretionary power. Corrigan case at 897.

\(^81\) Art. 175. The E.C.S.C. Treaty regards the suit for inaction merely as a particular
aspect of the suit for annulment. It is likened to an appeal for the annulment of an
"implied negative decision." E.C.S.C. Treaty art. 35. Daig, *Juristenzeitung supra*
note 34, 204 at 206-207. The E.E.C. Treaty provides for two separate actions. As a
result, the scope of the suit for inaction under that Treaty cannot be determined by
analogies to the suit for annulment. Daig, *Arch. d. ö. R. supra* note 19, at 178. See also
the appeal lodged recently by the Chambre Syndicale de la Sidérurgie Française in

\(^82\) It is assumed for the purpose of this illustration that in the regulations which the
Council is required to issue under art. 87 the Commission will be charged with the task
of passing upon such applications.
ure to issue a decision) by urging that the choice of the opinion constituted a détourment de pouvoir. Such a right could be justified on the ground that only incomplete legal protection would be afforded if the Community institutions could refuse to issue appealable acts for demonstrably improper motives with immunity from judicial control. 83

No remedy is available to an enterprise in the Community Court against a Member State which has failed to act in violation of its Treaty obligation. Only other Member States and the Commission are given the right to sue before the Community Court for a determination that a Member State has failed to fulfill its obligation under the Treaty; the enterprise concerned would therefore have to induce a government or the Commission to institute action on its behalf. 84 Nor, as shown above, can the enterprise bring suit for inaction in the Community Court against the Commission for failing to sue the Member State. To the extent that a remedy exists at all, it would have to be sought through national procedures.

6. RELIEF IN A SUIT FOR INACTION AND APPEAL FOR ANNULMENT

The purpose of the suit for inaction is to establish the duty of the institution to act. The Court therefore may determine the existence and timing of the duty to act but the contents of the required act must be left to the institution itself. Thus, in the example used earlier, the Court may find that the institutions must act on the application for authorization of a cartel agreement; the institution is left free, however, to grant or deny the application.

The same principle applies in appeals for annulment. The Court may only annul the contested Community act, but it may not substitute its own judgment as to the kind of act required; the institution concerned has the duty to substitute an appropriate act for the annulled one.

In practice, of course, the judgment of the Court in a suit for inaction or on appeal will frequently indicate at least by implication the elements of the act which the defendant institution will be required to issue "for the implementation of the judgment." 85

83 See Daig, Arch. d. 6. R. supra note 19, at 179. The Court will have to rule on the scope of the suit for inaction in joint cases 24-58 and 34-58 now pending before it. 84 Arts. 170 and 169. Judgments rendered against Member States are not enforceable. These types of suits are known as Feststellungsklagen in German law since they do not carry any sanction. 85 Arts. 176 para. 1, 174, 175 para. 1.
Claims for damages against the Community arising from the act annulled by the Court are not affected by the judgment of annulment but may be pressed against the Community in a separate action.\textsuperscript{86}

7. THE SCOPE OF REVIEW BY THE COURT

The Coal-Steel Community Treaty provides that the Court may not review "the High Authority's evaluation of the situation, based on economic facts and circumstances," which led to the administrative act, unless détournement de pouvoir or clear misinterpretation of the Treaty law is alleged. Only in such circumstances was the Court authorized to examine, for instance, whether the decision of the High Authority to fix maximum coal prices was warranted economically.\textsuperscript{87} An express limitation of this type was not included in the E.E.C. Treaty which is, indeed, wholly silent on the point.

The question thus arises whether the Court—for instance in reviewing a decision denying an application for exemption from the cartel provisions—is free to inquire whether the institution has evaluated correctly the economic circumstances and conditions, or whether it must accept the economic conclusions of the institution and is limited to a review of the legality of the decision. The lack of an express authorization such as was included in the Coal-Steel Treaty might be interpreted as barring the Court from any review of the economic conclusions; or, at the least, it might be taken to indicate that the power of the Court to review conclusions is limited. On the other hand, it appears fairly clear that the absence of an express provision should not be interpreted as depriving the Court of any and all power to review economic conclusions. The Court must be free—as it is under the Coal-Steel Community Treaty—to review such conclusions where the subjective motivation of the administrator is an issue determinative of the legality of this act, that is, when the administrative act is attacked by an allegation of détournement de pouvoir. At least in that case the Court must be able to inquire into the conclusions if it is to determine whether the administrator has applied his power to an improper end.\textsuperscript{88} In those

\textsuperscript{86} Arts. 176 para. 2 and 215.


\textsuperscript{88} See Daig, ARCH. D. ß. R. supra note 19, at 175. Contra Bebr, The Development of a Community Law by the Court of the European Coal and Steel Community, 42 MINN. L. REV. 845, at 858, n. 80 (1958), who regards art. 172 as the only instance where the Court may be given an unlimited right of review. It has been suggested that the Court should be given "full jurisdiction" to review the facts in cases where an application for exemption from antitrust provisions was denied. Nebolsine, 8 AM. J. COMP. L. 433 supra note 23, at 461.
instances, of course, where the Court exercises "full jurisdiction," its right with respect to the review of facts and economic conclusions is in no way limited.

In this context, English and American parallels are of interest. In English courts, as in the Community Court, the scope of review extends merely to testing the legality of administrative acts. As a result, an administrative decision unsupported by any facts whatsoever may not be quashed on that ground; however, a total lack of facts may provide sufficient basis for quashing on other grounds such as "error of law on the face of the record," "bad faith," or "unreasonableness." In the same situation the Community Court could annul an administrative act for violation of the Treaty or perhaps also for détournement de pouvoir.

The scope of judicial review in the United States is substantially wider than in England or in the Community. On the basis of the Administrative Procedure Act the United States Supreme Court has held in several recent cases that while the findings of an administrative agency are entitled to respect, "they must nevertheless be set aside when the record before a Court of Appeals clearly precludes the . . . [agency’s] decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both." A review of this breadth could be undertaken by the Community Court apparently only upon a showing of détournement de pouvoir.

B. Redress in National Courts

I. Jurisdictional Limitation on National Courts

An enterprise may not seek the annulment of a Community act in national courts. The Treaty vests exclusive jurisdiction in the Community Court to review the validity of and strike down the administrative acts of the Community institutions. It bars any assertion of similar jurisdiction by national courts. On the other hand, national courts are not deprived of their jurisdiction over cases

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90 Schwartz, op. cit. supra note 60, at 109.

which may involve the application of the Treaty or of a Community act. But under Article 177 the Community Court has exclusive jurisdiction to render a final and binding interpretation of the Treaty and the acts of the Community institutions.

Thus, if any question concerning the interpretation of the Treaty or of an act of the Community institution or of the validity of such act arises in national judicial proceedings, the national court may, "if it considers that its judgment depends on a preliminary decision on this question, request the Court of Justice to give a ruling thereon." But when such question arises before a national court from whose judgment there is no further appeal, such court is bound to refer it to the Community Court which renders a binding decision on the point. Any move by an enterprise to attack a Community act collaterally in the course of a proceeding before a national court would therefore be ultimately determined under the Community law by the Community Court. This pivotal arrangement is designed to preserve the integrity of the Community system in relation to Member States. It is designed to assure the uniform interpretation of the Treaty and of the Community acts which is necessary for the development of a uniform "quasi-federal" law. It recalls the American concept of federal jurisdiction over "federal questions" arising in state courts.

Two factors may limit the efficacy of this provision. Article 177 leaves to the national court the decision whether the lawsuit before it can or cannot be adjudicated without reference to the Treaty or to a Community act. The Article does not provide for a procedure akin to the American writ of certiorari whereby a party to the proceeding could seek a determination by the Community Court. Consequently, while paying lip-service to the principle of Article 177, a German court of last resort was able to determine that the Treaty's antitrust article did not apply to the case before it and that it was therefore not bound to refer the case to the Community Court.

[Notes and references]

92 Art. 177.
94 In its judgment of October 21, 1958, the Court of Appeals (Oberlandesgericht) Düsseldorf held that the issue of the Treaty interpretation was only incidental to the main question and would not influence the decision in any way. It therefore refused to submit the question to the Community Court. Docket No. 2 W 47/58, reported in 1958 Europäische Wirtschaftsgemeinschaft 493 (No. 24), and 13 Betriebs-Berater 1110 (No. 37, Nov. 10, 1958); Steindorff, Archiv des Völkerrechts, supra note 67, at 50 n. 3. Cf. also the decision of the Court of Zutphen (Netherlands) reported and commented on (by Steindorff) in 13 Betriebs-Berater 931-933 (No. 26, Sept. 20, 1958).
While a national court has undoubtedly the power to dispose of a case exclusively on what U.S. federal law would call "state law grounds," its freedom to decide the case without reference to the Community Court ends when it begins to interpret the Treaty law. In the instant case, the German court interpreted the Treaty in order to hold it inapplicable and thus failed to give effect to the mandate of Article 177. It is arguable that a procedure of *certiorari* must be introduced in order to avoid such incorrect decisions. Although the parties do not possess the right to have the "Community law question" reviewed, the Commission could sue the Member State of the national court for violation of the Treaty thus helping the Court preserve its power over the uniform development of Community law.

Again, the Community Court passing upon the conformity of a national law with the Treaty very likely will consider itself bound by the interpretation of that law as laid down by the national courts concerned—another factor limiting the scope of review of the Community Court somewhat as compared with a right of review of a court of last resort in a unitary state. It will be recalled that the United States Supreme Court, in passing upon the conformity of a state law with federal law or the federal Constitution, insists as a rule on affording the state court concerned an opportunity to interpret the state law.

2. SUIT FOR UNCONSTITUTIONALITY OF COMMUNITY ACTS OR OF NATIONAL ACTS ISSUED PURSUANT TO THE TREATY

The question to be considered here is whether an enterprise has, as an alternative to a suit for annulment in the Community Court, the choice of attacking the Community act in national courts on the ground that the act (or for that matter the Treaty itself) is contrary to the national constitution. A somewhat different, but analogous, problem is whether an enterprise may attack as unconstitutional

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87 Article 177 speaks of questions of "interpretation of Treaty." Article 219 dealing with disputes settlement refers to disputes concerning "interpretations and application" of the Treaty. Could it be argued that where the Treaty rule is so clear as not to require any interpretation reference to the Community Court is not required when such rule is applied in a national proceeding? *But cf.* 177(b) which deals with "The validity and interpretation" (emphasis added).

in national courts an act issued pursuant to the Treaty by a national authority.

The question is of little interest in France, where treaties have constitutional dignity and cannot be reviewed by the courts, in the Netherlands and Luxembourg, where the question was resolved by constitutional amendments and where courts are also precluded from a review for unconstitutionality, or in Belgium, where the Constitution is little more than an aggregate of "maxims of political morality" which impose no restrictions on parliamentary authority. In Germany and Italy, however, constitutionality may be raised by an individual or an enterprise by means of a special judicial procedure.

An act issued by German authorities pursuant to the E.E.C. Treaty could be subject to an attack before the Federal Constitutional Court by reference from a German court on the ground that the German federal statute ratifying the Treaty is contrary to the Federal Constitution, but it is unlikely that such an attack would succeed. A successful recourse to the Constitutional Court is even

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98 Bebr, The Relation of the European Coal and Steel Community Law to the Law of the Member States: A Peculiar Legal Symbiosis, 53 Col. L.R. 767, at 778 (1958). FRANCE, CONSTITUTION OF 1958, art. 55. Title VII of the Constitution of 1958 provides for a Constitutional Council which may be asked to pass on the constitutionality of laws before their enactment. The same applies to statutes ratifying treaties. CONSTITUTION art. 54. The Council must pass on the constitutionality in cases of special measures taken during national emergencies (art. 16), certain decree laws (art. 37), and certain organic laws (art. 46). See also, Ambassade de France, Service de Presse et d'Information, French Affairs, No. 82, March 1959. In no case is a control a posteriori by the Constitutional Council envisioned. The existing system, noted in the main text, whereby questions of treaty interpretation and constitutionality are not passed upon by ordinary courts, but for reasons of "ordre public" are referred to the executive branch, does not seem to have been disturbed by the new Constitution.

99 For the Netherlands and Luxembourg: Bebr, id., at 776-777, n. 49-54.

100 Lievens, AM. J. Comp. L. supra note 49, at 572.

101 An act issued by German authorities pursuant to the E.E.C. Treaty could conceivably be attacked on the basis of Art. 100 Bonner Grundgesetz (Basic Law). This article provides: "If a court considers unconstitutional a law, the validity of which is relevant to its decision, the proceedings shall be stayed, and a decision shall be obtained from the Federal Constitutional Court if the matter concerns a violation of the Basic Law." (Translation of the Basic Law by the Legal Staff of the Allied High Commission, Bonn, 1955). According to this provision, only a court before which a proceeding is pending, may refer the question of constitutionality of a Statute (not of an administrative act or order) to the Federal Constitutional Court. But in a pending case it could be argued that the basis of the attacked act, a statute, is invalid. Referring to Articles 20, 24(1), 59(3) and 79(3) of the Grundgesetz an enterprise could claim that the statute ratifying the E.E.C. Treaty in effect amended the Grundgesetz (because of the far-reaching impact of the Treaty) and thus should have been (but was not) adopted by the larger majority required for constitutional amendments. In the alternative, the enterprise could argue that the changes in the structure of the Federal Republic brought about by the Treaty are absolutely precluded by Art. 20 of the Basic Law and could not be effected even by a constitutional amendment (e.g., transfer of power to bodies which are not subject to adequate parliamentary control).
less likely if the attack on the ground of unconstitutionality is directed against a Community act. In the first place, decisions of the Constitutional Court indicate that acts emanating from “German public authority” only are within its jurisdiction and Community acts are not likely to be considered as emanating from such a source. In the second place, even if the Constitutional Court should take jurisdiction, the complainant would have to show that one of its basic rights (for instance freedom of expression, free choice of profession, property right) has not only been restricted but destroyed “in essence” by the Community act. Thirdly, appeals based on unconstitutionality can be brought before the Constitutional Court only after all other remedies have been exhausted. This would seem to require the complainant to seek annulment of the Community act in the Community Court on Treaty grounds (at least where a plausible argument may be made that any such ground exists) before he may contest the act for unconstitutionality in the German court. The Community Court will, of course, not consider any allegation of unconstitutionality based on German law. If the Community Court refuses annulment and the plaintiff does finally appeal to the Constitutional Court, Article 177 of the Treaty, which requires the national court to refer to the Community Court any question concerning the validity of a Community act, might conceivably be held to come into play. Thus the Com-

102 The complaint would be in the form of a Verfassungsbeschwerde.
103 Entscheidungen des Bundesverfassungsgerichts 10 No. 7: “... Öffentliche Gewalt im Sinne des § 90 Abs. 1 Bundesverfassungsgerichtsgesetz ist nur deutsche öffentliche Gewalt. Besatzungsrecht und Massnahmen, die deutsche Behörden auf Anweisung der Besatzungsmächte treffen, unterliegen der Verfassungsbeschwerde ebensowenig wie Massnahmen ausländischer öffentlicher Gewalt.” LECHNER, Bun desverfassungsgerichtsgesetz 258 (1954); GEIGER, Gesetz über das Bundesver fassungsgericht 277 (1952).
104 The Federal Republic transferred its public functions (Hohheitsfunktionen) to the Community as a “supranational” organization. Mosler, Die Wendung zum supranationalen Gedanken im Schumanplan, 3 RECHT, STAAT, WIRTSCHAFT 245-259 at 256 (1951); Schlochauer, Der überweltliche Charakter der Europäischen Gemeinschaft für Kohle und Stahl, 6 Juristenzeitung 289-290 at 290 (1951).
105 Art. 19(2) Bonner Grundgesetz (Basic Law).
106 Bundesverfassungsgerichtsgesetz § 90.
107 Case 1-58 as yet unpublished. It would seem that the Community Court, as a practical matter, would, under the circumstances of the case suggested in the main text, attempt a Treaty interpretation which would be compatible with the national constitution. However, in one case Court Advocate Römer argued that art. 19 of the German Constitution was not controlling for the Community Court. Case 18-57, Sammlung, Vol. III, 247 at 266. In this context the interesting question arises to what extent the Court’s competence under art. 177, par. 1, (a) and (b), to “interpret” the Treaty and to pass on the “validity and interpretation of acts of the institutions,” when such questions are referred to it by national courts, encompasses the authority to render a restrictive interpretation for the purpose of avoiding unconstitutionality under national law.
Community Court might have two chances to give the Community act an interpretation compatible with the national constitution before the case could be decided by the German court. At any rate, the likelihood of success of an appeal against a Community act to the Constitutional Court is minimal.

Requirements of a constitutional test in the new Italian Constitutional Court are less stringent. Review of any law or any act having the force of law—for instance, a statute ratifying an international agreement—may be sought in the Constitutional Court upon certification of the question from any court (autorità giurisdizionale). While the constitutional question may not be raised in a recours populaire but only within an actual adversary proceeding, there is no requirement that all other remedies be exhausted before the Constitutional Court may consider the question. The Community Court would consider the question if it is referred to it perhaps by the Italian Constitutional Court itself as the national court of last resort.

III. REDRESS UNDER NATIONAL LAW FOR VIOLATION OF THE TREATY OR OF A COMMUNITY ACT BY GOVERNMENTS OR OTHER ENTERPRISES

A. Redress for Violation by National Governments

If a Member State fails to enact a measure required by the Treaty or by a Community act or issues a measure contrary to the


110 As indicated initially in this section, the French Constitution of 1958 accords to treaties a position superior to statutes. Any treaty as domestic law cannot be changed by subsequent legislation but enjoys a position similar to the Constitution itself. In turn, the E.E.C. Treaty (which enjoys such constitutional standing in France) provides for regulations to be issued by Community institutions. These regulations—because of the position of the Treaty upon which they are based—partake of the position of the Treaty, i.e., cannot be modified by French legislation. It has therefore been said that the French Constitution consists of the Constitution of 1958 and the E.E.C. Treaty. In contrast, acts of the Community institutions enjoy a position of superiority only over previous national legislation in those Member States where the Treaty's position is the same as that of an ordinary statute. Thus, regulations issued by the institutions in the proper exercise of their Treaty powers would supersede a previous national law. Reuter, Cours de Droit International Public 171 (1958-1959).
Treaty or a Community act, does an enterprise which suffers damage from such violation have a remedy in a national court or before an administrative agency against the government? For instance, if during the transitional period a French exporter to Germany can show that he had to pay higher customs duties to German authorities because the German Government had failed to reduce its tariff as required by the Treaty, does he have a remedy in Germany?

The Treaty became national law of the Member States by virtue of ratifying acts of their national parliaments. The existence of a national remedy depends in the first place on whether the relevant Treaty provision imposes an obligation which is completely and clearly enough defined to be directly enforceable; and, secondly, on whether or not the provision was designed to give rights to individuals and enterprises which are enforceable by an appeal to national remedies. This is a matter of Treaty interpretation. Beyond that national law will determine the nature of the remedy. An analysis of this latter question would require a detailed inquiry into national laws not contemplated here.

An attempt may be made to classify the Treaty provisions, dividing them into those which were and those which were not intended to modify national law directly upon ratification. The former require no implementing action subsequent to ratification whereas the latter do.

Some provisions merely embody declarations of economic and social policy and are not intended to create independent legal obligations. Other provisions, imposing broad obligations on Member States or even obligations defined in fairly specific terms, require implementing action by the Member States, in the form of national legislative or administrative acts, or by the Community institutions; and these provisions cannot be interpreted as modifying national laws directly. The obligation to reduce internal tariffs by stages during the transitional period, falls into this category since it requires periodic implementing action by Member States. This is apparent not only from the language of the Treaty, but

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113 E.g., art. 18 in which Member States “declare their willingness” to contribute to the development of international commerce. Similarly: arts. 50, 117 and 120.
114 Cf. arts. 5, 220.
115 Art. 14.
116 Arts. 14 and 11.
also from the entire scheme which was designed to establish the Common Market by progressive steps to be taken by the Members and from the flexibility of action left to Members. Consequently if a French exporter to Germany is forced to pay higher customs duties because the German government failed to reduce its tariff in accordance with its Treaty obligation, the French exporter would have no legal remedy in Germany against the German government. A similar conclusion would apply to other Treaty obligations imposed on Members with a view to the progressive abolition of restrictions within the Community. 117

Some Treaty provisions may be construed as becoming directly applicable at the end of the transitional period. Thus, to change the above example, if the German Government continues to collect customs upon imports from France after the expiration of the transitional period without an authorization from the Community institutions, the French exporter may be in a position to appeal through German administrative procedure for annulment of the national administrative act imposing the customs charges on the theory that the Treaty prohibition of internal tariffs became absolute and directly applicable at the end of the transitional period. 118

Again, certain Treaty articles prohibiting the imposition by a Member State of new restrictions which did not exist when the Treaty came into force, may be interpreted as directly applicable from the effective date of the Treaty. Thus it might be argued that a French exporter to Germany has a right of appeal before German authorities if the German government, contrary to the prohibition of Article 12, has introduced and sought to collect from him “new customs duties” which did not exist at the time the Treaty came into effect. 119 In this case the result would be different (and a national remedy would not lie) in those Member States where any treaty (including the E.E.C. Treaty) is considered of no more effect than an ordinary statute so that a subsequent national law contrary to the Treaty would supersede the Treaty provision as domestic law. 120

117 E.g., arts. 33, 48, 49, 52, 54, 59, 63, etc.
118 Arts. 8(7), 13(1). Perhaps a clearer example of a “self-executing” provision at the end of the transitional period is the provision relating to quotas, Art. 30: “Quantitative restrictions on importation and all measures with equivalent effect shall, without prejudice to the following provisions, hereby be prohibited between Member States.” Cf. also arts. 48 and 49.
119 Article 12 provides that “Member States, shall refrain from introducing, as between themselves, any new customs duties....” For other “prohibitions” see e.g., arts. 31, 53, 62, 76, 106(3). On the German constitutional law question see v. MAN-GOLDT-KLEIN, DAS BONNER GRUNDESETZ, I, 676 (2nd ed., 1957) and references therein.
120 In this case, the Member State would have violated its international obligation, but the enterprise would have no remedy under national law.
NEW LEGAL REMEDIES OF ENTERPRISES

Whether or not there may be a remedy in national law, in practice a violation of a Treaty prohibition against new restrictions may be taken up by the Commission with the delinquent Member State and, if necessary, brought before the Community Court by the Commission or any other Member.

One provision—Article 221—seems designed to become directly applicable three years after the effective date of the Treaty unless the Member States issue implementing measures earlier. The Article provides for national treatment of nationals of Member States as regards financial participation in the capital of companies. Again, where the Treaty contains new conflict of laws rules, such rules appear directly and immediately applicable.\(^{120a}\)

Certain other provisions impose obligations upon Member States which not only are fairly clearly defined and capable of direct application, but appear designed to benefit a class or group of individuals.\(^{121}\) Thus, under Article 119 “[e]ach Member State shall in the course of the first stage ensure and subsequently maintain the application of the principle” of equal pay for women workers with men. Where a Member State fails to enact the necessary legislation, could a woman worker, who as a result suffers discrimination, claim a remedy, after the expiration of the first stage, which would bring about the application of the Treaty provision with respect to her? In order to establish such right she would have to show that the obligation involved was imposed upon the Member State for the benefit of persons or a class of persons to which she belongs and with a view to conferring rights directly on them. A rule of international law recognized by German\(^{122}\) and French courts\(^{123}\) holds that the conferral of rights on individuals must be clearly expressed in international agreements to overcome a presumption to the contrary. Unless the intention to benefit individuals is clear from the Treaty, the obligation of a Member State runs only to other Member States but does not give individuals an enforceable right. The language of Article 119 and the fact that it appears ancillary to the general provisions dealing with social matters would indicate that the woman would not be entitled to a remedy against her government.\(^{124}\)

\(^{120a}\) E.g., art. 215.

\(^{121}\) Arts. 76, 106(1), 119.

\(^{122}\) Entscheidungen des Reichsgerichts in Zivilsachen 280; 143 id. 57.


\(^{124}\) By like token, it may be said that art. 76 is ancillary to art. 75 and art. 106 to arts. 63–65. Cf. Katzenstein, Der Arbeitnehmer in der europäischen Wirtschaftsgemeinschaft, 13 Betriebs-Berater 1081 (No. 21, Nov. 10, 1951).
Article 7 of the Treaty deserves particular attention in this context. It provides that "[w]ithin the field of application of this Treaty and without prejudice to the special provisions mentioned therein, any discrimination on the grounds of nationality is prohibited.\(^ {125} \) The Council may . . . lay down rules in regard to the prohibition of any such discrimination." It could be argued that this provision was intended by the parties to the Treaty to modify national laws directly and bind individuals and enterprises in the Community as well as the Member States with an immediate effect in those fields where the Treaty does not contain special provisions for a gradual removal of discrimination based on nationality; the fact that the Council may (but is not required) to issue implementing rules does not impair this conclusion.\(^ {126} \) On the other hand, others contend that this Article included in the part on "Principles" contains only a policy declaration or at most an obligation imposed exclusively upon Member States, to be implemented by subsequent measures. Those supporting this position point to the limiting language in Article 7 quoted above and to the Council's authority to issue implementing rules.\(^ {127} \) It would seem that at least some immediate and direct effect of this Article was intended by the Member States in those areas within the scope of the Treaty where neither the Treaty itself nor Council rules provide otherwise.\(^ {128} \)

The extent to which the antitrust provisions ("Rules applying to enterprises" in the Chapter on "Rules governing competition") may be considered as affording a national remedy is explored elsewhere in this book.\(^ {129} \)

\(^ {125} \) The English translation reads: "... shall hereby be prohibited." The German and French originals read: "... ist ... verboten"; "... est interdite ..." If read literally, Article 7 would prohibit discrimination against nationals of third states as well as of Member States. (Text published in Brussels; see note 199 infra.)

\(^ {126} \) Everling, \textit{Die Regelung der selbständigen beruflichen Tätigkeit im Gemeinsamen Markt}, 13 \textit{Betriebs-Berater} 817 (No. 23, Aug. 20, 1958); von Boeckh in \textit{Handbuch der Europäischen Wirtschaft, Kommentar}, Art. 7 Anm. 5, 1A41, 21 (1958). Note also art. 90(r) of the Treaty prohibiting certain measures which are "contrary to the . . . rules provided for in article 7 . . . ."


\(^ {128} \) But see Kahn-Freund, "Labor Law and Social Security," Chapter VI supra.

\(^ {129} \) Riesenfeld, "Protection of Competition," Chapter X, infra. The provisions in question are arts. 85–90. See also the decision of the Court of Düsseldorf, supra, note 94; the decision of the Court of Zutphen (Netherlands) reported and commented on (by Steindorff) in 13 \textit{Betriebs-Berater} 931–933 (No. 26, Sept. 20, 1958); Koch, \textit{Das Verhältnis der Kartellvorschriften des EWG-Vertrages zum Gesetz gegen Wettbewerbsbeschränkungen}, 14(1) \textit{Betriebs-Berater} 241–248 (No. 7, March 10, 1959), particularly n. 3.
Thus one may conclude that only the few Treaty provisions, some of which were mentioned above, which are capable of direct application and confer rights upon individuals, enable an enterprise to contest through national remedies a national administrative act based on a previous—and probably, as in France, on a subsequent—national law contrary to these provisions. Such an appeal can probably also be brought if national authorities issue administrative acts which are at variance not with the Treaty itself but with administrative acts of the Community institutions provided that the Community acts are directly applicable in the Member States (as in the case of regulations) and are intended to benefit the appellant enterprise.

Professor Reuter suggests another national remedy which may be open to an enterprise if, for instance, the government of Belgium, in violation of the Treaty, enacts a measure favoring Belgian enterprises and discriminating against French enterprises on the ground of nationality. In this situation a French enterprise might be able to institute an action for unfair competition against a Belgian enterprise before a French court with a view to obtaining compensation for the damages caused by the defendant’s activity based on the illegal Belgian measure. The plaintiff could obtain execution of the judgment on defendant’s property in France.

It should be observed that where the remedies considered here involve an interpretation of the Treaty or a Community administrative act, the national court of last resort will have to refer this issue to the Community Court.

B. Redress for Violation by an Individual or Enterprise

If an enterprise acts in violation of the Treaty or of a Community act to the prejudice of another, does the injured party have a national remedy? Obviously, the question would arise only under those provisions of the Treaty or under those Community acts which are held to be capable of direct application and to confer rights and impose obligations directly upon individuals and enterprises. The first phase of this inquiry would thus parallel that pursued in the preceding section. The second phase would require an analysis of national laws of the Member States with a view to determining whether a remedy would be available to the injured party in a na-
tional court or administrative agency. Such remedy could, for instance, take the form of an action for restitution where a contract contrary to a Treaty provision is held void or of an action in damages caused by a Treaty violation. Actions of this type based on the Coal-Steel Treaty and German law have already lead to decisions in German courts. Because the cases concern rules of competition they are more appropriately discussed in the chapter on Protection of Competition in the European Economic Community. The conclusion reached there is that a violation of at least one Coal-Steel Treaty provision—the prohibition of restrictive agreements—may constitute tortious conduct involving liability for damages under German law. A similar conclusion with respect to the corresponding provision of the E.E.C. Treaty is suggested in a very tentative manner only.

IV. LEGAL REMEDIES IN CONTRACT AND TORT CASES TO WHICH THE COMMUNITY IS A PARTY

A. SUITS IN THE COMMUNITY COURT

In addition to its exclusive jurisdiction to annul administrative acts, the Community Court also has exclusive jurisdiction in tort actions (actions for “non-contractual liability”) brought against the Community. The rules for these actions are much less detailed than those governing the complaints for annulment. Thus an enterprise may sue the Community in the Community Court if it suffers damages from an act of a Community employee in the performance of his duty (negligent driving of a Community truck, disclosure of a trade secret by an official, etc.) as well as from an act of a Community institution. The latter category includes damages arising from administrative acts which are annulled by the Community Court and damages arising from the Community’s unlawful inaction. The Treaty specifically provides that a judgment of annulment or a judgment finding that the Community failed to act in violation of the Treaty shall not prejudice any claims for damages. A suit for

132 Riesenfeld, Chapter X infra.
133 Arts. 178 and 183. Daig, ARCH. d. ö. R. supra note 19, at 159.
annulment is not a prerequisite to a suit for damages. Whether or not the Community is liable will be determined on the basis of "the general principles common to the laws of Member States." 135

Similarly, the Community Court has jurisdiction in cases involving contracts concluded under public or private law by the Community or on its behalf, but only if that Court's jurisdiction is stipulated by the parties in an "arbitration clause" 136 contained in the contract. The Community institution entering into a contract with an enterprise has the opportunity to insist on a stipulation of Community Court jurisdiction if the institution believes that the national court which would otherwise be competent might favor its own nationals. 137 Other motivations might be considerations of convenience and the desire to develop uniform jurisprudence in the field of contracts involving the Community. One author, subject to dark forebodings, foresees that the Community might insist on such a stipulation in order to complete its control over all transactions in which its institutions are involved, with the consequent overcrowding of the Community Court's docket. 138 The identical provision in the Euratom Treaty may have a greater impact because of the more extensive operational responsibilities of Euratom, envisaging the conclusion of contracts of purchase and sale particularly by its Supply Agency.

The Coal-Steel Treaty contains a similar provision allowing stipulation of the Community Court jurisdiction, and the Court adjudicated several cases arising from employment contracts between the Community institutions and their employees on the basis of such stipulation. 139 It is interesting to note that the bonds and notes issued by the High Authority in the United States are governed by a stipulation extending the jurisdiction of the Community Court to disputes between the holders of these obligations and the High Authority; the High Authority, however, has also waived any claim of immu-

135 Art. 215.
137 LA COMMUNAUTÉ EUROPÉENNE DU CHARBON ET DE L’ACIER, PAR UN GROUPE D’ÉTUDE DE L’INSTITUT DES relations INTERNATIONALES, 223 (Bruxelles, 1953).
nity to suit in a state or federal court. The practice of the High Authority, in this respect, has varied in its various financial operations.

As confirmed by the cases under the Coal-Steel Treaty the proceeding before the Community Court arising under a contractual stipulation of jurisdiction does not differ from that instituted under the jurisdictional provisions of the Treaty. In this respect the Treaty terminology describing the stipulation as an "arbitration clause" is misleading.

B. SUITS IN COURTS OF MEMBER STATES

From the foregoing it is clear that the Treaty limits the jurisdiction of national courts in the Member States in cases to which the Community is a party. National courts have no jurisdiction over the Community in tort; they do, however, have jurisdiction in contract unless the contract stipulates the jurisdiction of the Community Court. Even where the national courts have jurisdiction over the Community for purposes of the suit, they have no jurisdiction over Community assets for purposes of execution. In this respect the Community enjoys immunity. A judgment of a national court must be submitted to the Community Court which has exclusive authority to allow execution against the Community.

In the obvious interest of enhancing its credit standing, the European Investment Bank of the Community has been made subject to action in national courts as any legal person, and its assets have been made liable to execution by order of such courts. As a general practice, when a Bank extends a loan for the financing of a project within the European territory of a Member State, the loan contract stipulates that the courts of that Member State shall have exclusive jurisdiction over suits arising out of the contract and that the contract shall be governed by the law of that Member State. This practice is not necessarily followed in the guarantee or security agreements supporting the loan contract. The Bank has not, as yet,


141 Cf. art. 183.

142 Protocol on Privileges and Immunities of the European Economic Community art. 1.

143 Protocol on the Statute of the European Investment Bank art. 29.
developed a practice with respect to loan contracts concerning projects located outside the European territory of Member States.

C. SUITS IN COURTS OF NON-MEMBER STATES

I. SUITS AGAINST THE COMMUNITY IN AMERICAN COURTS

An American enterprise which suffered damages at the hand of the Community might prefer to sue the Community in tort in an American court since courts of Member States have no jurisdiction and an action before the Community Court may be inconvenient. It would be necessary, of course, for the American court to acquire jurisdiction by attachment of Community assets or otherwise. Again, an enterprise may wish to bring a contract claim before an American court in the hope that a judgment could perhaps be satisfied out of the Community's American assets. Obviously the jurisdictional provisions of the Treaty by themselves would not be a bar to such suits because the United States is not bound by the E.E.C. Treaty.\textsuperscript{144}

A number of questions would arise in connection with a suit in an American court. The limited scope of this survey allows mere listing of some of these questions without any attempt at an examination:

1) Will the plaintiff enterprise be able to sue the Community in a state court only or will the federal courts be also available? While federal jurisdiction may be desirable as a matter of policy it is questionable whether it could be sustained under the Federal Constitution or present law.\textsuperscript{145}

2) If the contract between the enterprise and the Community stipulates jurisdiction of the Community Court, will an American court nevertheless accept jurisdiction? If the court should consider the stipulation as an arbitration agreement within the scope of an arbitration statute applicable in the jurisdiction it might grant a stay of the proceeding if such remedy is available under that statute.\textsuperscript{146} However, because of the nature of the Community Court as a judicial body, because of the direct enforceability of its judgments


within the Community, and despite the misleading Treaty terminology, the American court is more likely to view the stipulation not as an "arbitration clause" but as an agreement specifying jurisdiction of a "foreign court." In that event a modern American court might decide whether or not to take jurisdiction not on the basis of the so-called rule against "ouster" of jurisdiction but rather in the exercise of its discretion under the doctrine of forum non conveniens, perhaps taking also into account the equality of the bargaining positions of the parties.\textsuperscript{147}

3) Will the Community be able to maintain successfully a claim of immunity against suit in an American court? It is possible, if not likely, that the legal status of the Community in the United States will be determined by special Congressional legislation which would simultaneously authorize accreditation of a Community diplomatic mission in Washington. In the absence of such legislation the following observations may be pertinent.

Traditionally, American courts grant immunity from suit to states under a rule of international law originally founded on the concept of the equality and sovereignty of states.\textsuperscript{148} The courts have been liberal in according this immunity, responding to and at times going beyond the wishes of the executive branch.\textsuperscript{149}

On the other hand, surveying the practice of the United States in 1946, a distinguished American commentator concluded that the United States has denied the existence of any obligation under customary international law to extend to public international organizations or their officials any immunities; a demand for a special status has been "uniformly resisted" on the ground that such status "is

\textsuperscript{147} Application of Hamburg-American Line, 135 Misc. 715, 238 N.Y. Sup. 331, affirmed without opinion, 228 App. Div. 802, 239 N.Y. Sup. 914 (1930) holding that a clause stipulating exclusive jurisdiction of "Hamburg Courts" and German law as the applicable law is not an agreement to arbitrate within the meaning of the Arbitration Law. The Court observed that "[I]n any event, the clause cited in the contract herein is not sufficiently broad to be construed as an agreement to arbitrate." Contra an earlier opinion of a lower court in Kelvin Engineering Co. v. Blanco, 125 Misc. 728, 210 N.Y. Sup. 10 (1925). On agreements attempting to give exclusive jurisdiction to foreign courts see I Ehrenzweig, CONFLICT OF LAWS 145-150 (1959); Case-Notes, 23 So. CAL. L. REV. 595 (1950); Sudburg v. Ambi Verwaltung K.A.A., 213 App. Div. 98, 210 N.Y. Sup. 164 (1925) and other cases in 56 A.L.R. 2d 806 (2d Cir. 1955) cert. den. 350 U.S. 903, 76 Sup. Ct. 182 (1955) and Learned Hand in Kreger v. Pennsylvania R. Co., 174 F. 2d 556, at 561 (2d Cir. 1949).

\textsuperscript{148} Harvard Research in International Law, Competence of Courts in Regard to Foreign States, P. C. Jessup, Reporter, 26 AM. J. INT'L. L. SUPPL. 451-738 (1932). For a recent expression of this thought see Loomis v. Rogers, 254 F. 2d 941 (D.C. Cir. 1958).

\textsuperscript{149} Berizzi Bros. Co. v. S.S. Pesaro, 271 U.S. 562 (1926); Republic of Mexico v. Hoffman, 324 U.S. 30 (1945); Ex parte Peru: The Ucayali, 318 U.S. 578 (1943).
as yet dependent upon treaty or upon the municipal law and practice of the state concerned, and . . . there is, therefore, no justification under the law of the United States for conceding any privileged position to international organizations . . . in this country." 150 Since 1946 the United States has become a party to a number of treaties creating international organizations which grant to these organizations in the territories of the member states privileges and immunities necessary for the fulfillment of their purposes.151 Such grant is based not on the extension of the concept of sovereign immunity but rather on the recognition that independence from local authority is necessary for the organizations to fulfill their international functions.152 The International Organizations Immunities Act enacted in 1945 accords immunity in American courts to public international organizations in which the United States participates pursuant to a treaty or under authority of an act of Congress and which have been designated by the President through an executive order. The immunity includes "the same immunity from suit and every form of judicial process as is enjoyed by foreign governments" except insofar as immunity may be waived.153

It has been vigorously argued that whatever the state of international law may have been in the past a new rule of customary international law has been established by consistent national practice in recent years which requires non-member states to grant immunity to any international organization which they have "recognized." 154

150 Preuss, The International Organizations Immunities Act, 40 AM. J. INT'L L. 332, at 333 (1946); 4 Hackworth, Digest of International Law 419-423 (1942). Cf. Note, The Status of International Organizations under the Law of the United States, 71 HARV. L. REV. 1300, at 1309-1312 (1958). In one case before a lower court arising prior to the Immunities Act judicial immunity was granted to an international organization of which the United States was a member without a treaty provision requiring immunity. In that case a writ of attachment, directed to the Pan American Union as garnishee and based on judgment against an employee of the Union, was struck down in the attachment proceeding before the Municipal Court of the District of Columbia, the Court having sustained the plea to the court's jurisdiction. Penfield, The Legal Status of the Pan American Union, 20 AM. J. INT'L L. 257 (1926).

151 E.g., Charter of the U.N. art. 105.


154 Lalive, L'Immunite de juridiction des etats et des organisations internationales, 84 RECUEIL DES COURS 293, 304, (1953, Vol. III); on U.S. practice id. 319-324; on Coal-Steel Community id. 376-383; for a more recent survey of American and foreign practice see Dinh, Les privileges et immunites des organismes internationaux d'apres les jurisprudences nationales depuis 1945, 1957 ANNUAIRE FRANCAIS DE DROIT INTERNATIONAL 262.
The Community could not assert immunity from judicial process in American courts on the basis of any treaty or under the Immunities Act. Whether or not it could prevail on the basis of customary international law is a question. However, it is likely that the courts would follow a request for immunity from the Department of State. Whether or not the Department would make such a request is another question. The United States has "recognized" the Communities in the sense that it has had considerable dealings with them as entities endowed with international legal personality. The United States has concluded agreements with the Coal-Steel Community and Euratom and maintains official relations with all three Communities through a special diplomatic mission in Brussels. The United States is expected to negotiate agreements on tariff concessions with the Community rather than with the individual Member States within the framework of the General Agreement on Tariffs and Trade (G.A.T.T.) It could also be argued that immunity ought to be granted because the Community may be more nearly likened to a "state" than any other international organization. In the absence of new legislation the Department may nevertheless be reluctant to do more than to point generally to the United States relations with the Communities but refrain from a specific

164a It could hardly be argued that the U.S. "participates" in the Community within the meaning of the Immunities Act.
156 In one case where immunity was claimed by the International Refugee Organization before an American court in the U.S. Zone of Occupied Germany, the Court denied the existence of any obligation to accord on German territory immunity on the basis of a treaty or the Immunities Act but nevertheless granted immunity on the basis of a policy statement by the United States High Commissioner, "the highest executive authority" in the U.S. Zone, which the Court held it could not question. Apparently as a make-weight argument the Court added: "... because of the fact that I.R.O. is an agency of many foreign governments, it would seem all the more reasonable that the High Commissioner should not permit an action in our courts that would directly affect other sovereign powers." The opinion certainly does not indicate that the Court recognized any obligation to grant immunity under customary international law. Anton Schaffner v. International Refugee Organization, Civil Case No. 11, Opinion 665, U.S. Ct. App., Allied High Commission for Germany, Aug. 3, 1951, in 46 Am. J. Int'l L. 575 (1952). Had the case arisen in the United States I.R.O. could have claimed immunity under the Immunities Act and Executive Order 9887, 3 C.F.R., 1943-1948 Compilation.
160 Cf. E.E.C. art. 111(2), 113(3).
request for immunity, leaving it to the courts to decide the immunity issue on the basis of common law. One factor which may be considered relevant is the provision in the E.E.C. Treaty to the effect that subject to the powers conferred upon the Community Court by the Treaty "cases to which the Community is a party shall not for that reason alone be excluded from the competence of domestic courts or tribunals." One could argue that since the Community in principle is subject to suit in contract before domestic courts, it should not enjoy immunity in American courts. On the other hand, the availability of a remedy against the Community either in the Community Court or in a national court within the Community would reduce the importance of the American forum for the plaintiff suing the Community and thus the need for denying immunity.

It has been suggested that the uncertainty as to the immunity of the Coal-Steel Community in American courts was one of the reasons for stipulating the jurisdiction of the Community Court in disputes arising from obligations issued by the High Authority in the United States. Even if immunity is granted in principle to the Community, the question arises whether it may nevertheless be disallowed in a given case—and the suit permitted—on the ground that in the matter before the Court the Community has acted in a "proprietary" function (for instance, when it entered into a contract to buy securities for purposes of investing funds for which it is responsible) rather than in a "governmental" function. This distinction, which applies to activities of states under the more recent commercial treaties concluded by the United States and which is advocated by the United States Department of State, regrettably has not been established by judicial decision as a rule of American law as yet.

The Community has been endowed with sufficient "domestic" legal personality in the Member States and we may assume that the court would recognize the Community's capacity to sue.

162 Delaume, 6 Am. J. Comp. L., supra note 140, at 208-209.
2. ENFORCEMENT OF JUDGMENTS AGAINST THE COMMUNITY

If an American enterprise obtains a judgment against the Community, how can it be enforced? As pointed out above, under the Treaty the courts of the Member States may not levy execution against the Community assets without an authorization from the Community Court regardless of whether the judgment was rendered by a domestic or foreign court or by the Community Court itself. Thus if enforcement of the judgment is sought within the Community an application for authorization will have to be made to the Community Court.

In considering the application the Court will have to decide whether the foreign judgment should be given effect (i.e., whether it should be accorded *exequatur*). Since the law governing the recognition of foreign judgments varies in the Member States, the Court may seek to develop its own rules based on principles common to the national laws. Unless the Court adopts the French rule authorizing in fact a complete review of the foreign judgment, it may limit itself to considering whether the recognition of the foreign judgment would be contrary to public policy of the Community, whether the foreign court had jurisdiction, and possibly whether reciprocity exists in the recognition of foreign judgments. It could, however, be argued that the *exequatur* proceeding must take place in the competent national court which ultimately will direct the execution upon the Community assets and that the Community Court has no other function than to decide whether immunity against execution will be waived. Under the first of the two possible interpretations suggested above an “authorization” by the Community Court would have the force of its judgment. The competent national court in the Community would be required to perform the execution against Community assets on a showing of nothing more than the authenticity of the “authorization” paper.

If enforcement of a judgment against the Community is sought in a non-Member State such as the United States with respect to the Community’s assets located there, the outcome will depend in the first place upon the question, discussed above, whether the Community is given immunity from judicial process. It may be of interest to note, however, that American courts deny execution against assets belonging to a foreign state even where they disallow the immunity

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of such state from suit. International organizations to which the Immunities Act is applied would presumably enjoy similar immunity.

3. ENFORCEMENT OF JUDGMENTS OBTAINED BY THE COMMUNITY

If the Community obtains a judgment against an enterprise either in a national court of a Member State or in the Community Court, will such judgment be enforceable outside the Community and specifically in the United States? If the judgment was rendered by a court in a Member State, the American court would apply its rules concerning suits on foreign judgments. If the judgment was rendered by the Community Court, the American court will consider it more likely a "foreign judgment" than an arbitral award. If the Community Court's judgment was rendered in a suit on a contract in which that Court's jurisdiction was stipulated, it is difficult to conceive of reasons based on lack of jurisdiction or public policy justifying an American court's denying enforcement.

It is most improbable that an American court would allow enforcement of a Community Court judgment imposing, for instance, a penalty against an American enterprise for violation of an antitrust provision of the Treaty. Such judgment would very likely be refused enforcement on the general principle refusing enforcement of foreign penalties.

V. THE COMMUNITY COURT: PROCEDURE AND SOURCES OF LAW

An enterprise seeking relief in the Community Court will be directly concerned with the procedures applicable in cases before the Court and the sources of law upon which it will draw.

A. PROCEDURE AND FINALITY

1. TIME LIMITATIONS

An enterprise must bring its appeal for annulment within two months from the time it was notified or had knowledge of the act.

169 If the Court follows the doctrine of reciprocity under Hilton v. Guyot, 159 U.S. 113 (1895), lack of reciprocity would be difficult to establish before the Community Court has had occasion to pass upon the conclusiveness of an American judgment.
170 Stumberg, supra note 168, at 118-119, 130.
it seeks to contest. Suits for inaction of an institution may be brought only after the institution has failed to act during a period of two months following a request for action; the suit must be brought within two months after the lapse of that period. A party with résidence habituelle outside of Europe is given an additional month. Actions in tort must be brought within five years from the "occurrence of the circumstance giving rise thereto," while the limitation on contract claims, where jurisdiction of the Court has been stipulated, presumably will be determined by the "law applying to the contract." The bar resulting from the lapse of the time limitations may be overcome by proof of an "Act of God or force majeure."

2. PROCEDURE

The proceeding before the Court is divided into a written and an oral stage. Like the French Conseil d'Etat, the Court is grouped into chambers to which the President of the Court assigns cases and which prepare the cases for public hearing and final disposition. This procedure differs from that of the International Court of Justice where chambers may be utilized with the consent of the parties only. The Court may appoint a rapporteur from among the judges to guide the case through the preliminary investigation ("instruction") after the basic documents, such as the complaint, the answer, and replies, have been filed. As is true in cases before the French Conseil d'Etat, but not in those before the International Court of Justice, the written proceeding and the preliminary investigation

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171 Art. 173 para. 3.
172 Art. 175 paras. 2–3. These time limitations are increased by specified periods of time to allow for the distance of the parties from the Court. Règlement de procédure art. 81 § 2 (hereinafter cited as Rules of Procedure), [1959] Journal Officiel 350, at 368. For certain modifications of the texts of the Rules in the four languages see [1960] Journal Officiel 13–16.) A decision of the Court provides for an additional two days if the parties reside in Belgium, six days for Germany, Metropolitan France and the Netherlands, ten days for Italy, fifteen days for other European countries, and one month for all other countries. [1959] Journal Officiel 378.
173 Protocol on the Statute of the Court art. 43 (hereinafter cited as Protocol).
174 Art. 215.
175 Protocol art. 42.
177 Rules of Procedure arts. 45–54.
178 SCHWARTZ, op. cit., supra note 177, at 131–147.
179 Statute of the I.C.J. art. 43(5) which shows the large scope of the oral proceeding before that Court.
of the case by the chamber are more important than the oral hearing. During this preliminary investigation witnesses are called either by the parties, or—in keeping with the inquisitional nature of the Court's procedure—by the Court; expert testimony may be taken upon a Court order calling for *expertise*.

Oral hearings are scheduled only after all relevant information has been collected, testimony heard, and expert reports received in the preliminary investigation. During the oral hearing the parties have a final chance to argue their views and the Court Advocate General presents his conclusions and observations to the Court, but evidence may be submitted only by order of the Court. Both the preliminary investigation and the oral hearing are public unless otherwise ordered by the Court.

In all proceedings an enterprise, whether a natural or legal person, must be represented by counsel who is a member of the bar of one of the Member States or who is a professor of law whose national law allows him to practice before national courts. There is no separate bar of the Community Court. Thus, the conditions for admission to practice before the Community Court are midway between the strict requirements of the United States Supreme Court, which has a special bar of its own, and the much looser provisions of the International Court of Justice which require that parties be represented by "agents" without specifying their qualifications.

The legal department of the High Authority has defended the Authority before the Court and has acquired an outstanding reputation in presenting the Community view in the face of what at times appeared to be cryptic complaints by some plaintiffs. The legal departments of the Authority and of the E.E.C. and Euratom Commissions have now been consolidated into a "common service" composed of some forty-nine lawyers. Since so much of the formal power

181 Rules of Procedure arts. 47 and 49; Schwartz, op. cit. supra note 177, at 127–138, explains that in the Conseil d'Etat an "order for expertise" means the calling of expert witnesses, by the Court, from a permanently established list of experts in particular professional fields. These experts have the power to conduct their own investigation and to submit a report on their findings. The latter is also true of the Community Court procedure. Rules of Procedure art. 49.

182 Rules of Procedure arts. 54–55.


184 Rules of Procedure art. 60.

185 Rules of Procedure arts. 46 § 2 and 56.

186 Protocol art. 17 pars. 2 and 5; Rules of Procedure art. 36.


188 Rules 5–6 of the United States Supreme Court, 28 U.S.C. Appendix 1958; Statute of the I.C.J. art. 42.
of decision has been shifted in the new treaties from the "executive" to the Councils of Ministers, some appeals may now have to be directed against acts of the Councils. The question will therefore arise as to who will conduct the defense of the Councils against such appeals: will it be the "common service" which has the legal talent with accumulated valuable experience or will the Councils be defended by the small legal section in the Secretariat of the Councils?

For purposes of service all parties must elect domicile at the seat of the Court and specify persons who are authorized to accept service of all communications and documents. The proceeding is conducted in one of the four official languages of the Community—Dutch, French, German, Italian. If the defendant is a Member State, or a person, natural or legal, of the nationality of a Member State, the language of that state will be used; if the defendant is an institution of the Community, or a person, natural or legal, of the nationality of a third country, the language of the plaintiff will be used. In all cases, the Court may, however, make special arrangements.

3. THE JUDGMENTS OF THE COURT

The judgments of the Court are final. They are not subject to review except in three specified cases. (1) A judgment may be reviewed by the Court upon the application of a third party which is affected by the judgment but was not represented in the case. (2) The Court may be asked by an interested party or institution to interpret its judgment if difficulties arise as to its meaning and scope. Strictly speaking, this is not a case of review of the judgment, since the request for an interpretation may not be used as a means for obtaining another determination of the case on the merits. (3) Finally, a case may be re-opened and judgment reviewed in the sense of a proceeding de novo—if, within a ten year period, a new fact is discovered which would have "decisive influence," but the appeal must be instituted within three months after the appellant learned the new fact.
Judgments vary in form. Some follow the syllogistic pattern of French courts while others are in the narrative form of German (and American) courts as well as of the International Court of Justice.

In striking contrast to the rights of litigants in an American court, parties before the Community Court have a right to a decision by the Court which takes account of their main lines of argument. If a judgment fails to consider one of the party's principal arguments, the party concerned may request the Court for a ruling.¹⁸⁶

The Court has the power to render judgments by default. Like the International Court of Justice, the Court in such cases is required to examine not only whether it has jurisdiction but also whether the claim "seems to be well founded."¹⁹⁶ As pointed out previously, the judgments of the Court are enforceable in Member States on the same conditions as administrative acts of the Community institutions.

B. THE COURT'S SOURCES OF LAW ¹⁹⁷

The Treaty contains no general and comprehensive statement of the sources of law analogous to Article 38 of the Statute of the International Court of Justice.¹⁹⁸ The Community Court draws upon the Treaty and extrinsic aids to its interpretation, upon international law, national laws of the Member States, and general principles common to these national laws, and upon acts and practices of the Community institutions.

I. THE TREATY

The most important source of Community law is, of course, the Treaty, to which several lists, protocols, and supplementary conventions are annexed.¹⁹⁹ It is the standard by which all activities of the

omits the limitation contained in the Statute of the I.C.J. whereby a review is excluded if the party failed to discover the fact through its own negligence.

¹⁸⁶ Rules of Procedure art. 67.
¹⁹⁵ Rules of Procedure art. 94 §§ 1–2; Statute of the I.C.J. art. 53.
¹⁹⁷ Steindorff, ARCHIV DES VÖLKERRECHTS supra note 67, at 52–55.
¹⁹⁸ Statute of the I.C.J. art. 38: "i. The Court.... shall apply:
(a) international conventions, ... ;
(b) international custom, ... ;
(c) the general principles of law recognized by civilized nations;
(d) ... , judicial decisions and the teachings of the most highly qualified publicists. ... ."
institutions are tested. Its provisions are to be interpreted in the light of the provisions laying down the general principles and objectives of the Community. The practice in the United Nations where Charter provisions are consistently interpreted in the light of the “Purposes and Principles” of the United Nations offers an analogy. In the Geitling case, for example, the Court utilized the general principles stated in Article 4 of the Coal-Steel Community Treaty to interpret the concept of “discrimination” of the anti-cartel article.

Some clarification may be also gained by comparing the text of a provision in the French, German, Italian, and Dutch versions of the Treaty, all of which are equally authentic. The purpose of such a comparison (which at times may compound the confusion rather than clarify) is not to arrive at a majority vote but to seek clarification of the true scope of the provision, to find that version which serves the ends of the Treaty best.

Of the preparatory materials commonly used as extrinsic aid for the interpretation of a treaty relatively few documents are available reflecting the opinions of the negotiators of the E.E.C. Treaty and the positions of the governments during the negotiations. Foremost among them is the “Spaak Report.” On the other hand, a number of reports of Member Governments to their parliaments, their statements at the time of the ratification debates, and records of these debates are available. They have, however, a limited value for purposes of establishing the intent of the Treaty framers, and most of these materials are in any case not very enlightening.

The four volumes of judgments of the Court rendered under the Coal-Steel Community Treaty offer an important “extrinsic aid” since many of its provisions were included verbatim in the E.E.C. Treaty. This use of precedent would be justified on the presumption that the continued use of a term indicates the intent to accept its established interpretation. Caution is in order, however, when the...
connotation of an identical term is varied in the new Treaty, however slight the variation may be. Thus, as shown above, détournement de pouvoir (misapplication of power) is a ground for appeal against administrative acts in both Treaties. To the extent that a definition of its meaning is needed under the new Treaty, the Coal-Steel jurisprudence will serve as a valuable precedent although it must be used with circumspection.  

2. INTERNATIONAL LAW

It has been suggested that to the extent that the Court applies international law it should look to Article 38 of the Statute of the International Court of Justice as the best general statement of sources of international law.  

Several types of international agreements may provide a source of Community law: those concluded by the Community as a person under international law with third states (for example, trade agreements), those concluded among Member States, and finally those to which the Treaty makes explicit reference. Such reference is contained, for example, in Article 131, paragraph 3 of the Treaty which provides for the association of the overseas territories with the Community "in conformity with the principles stated in the Preamble" to the Treaty; the Preamble, in its eighth paragraph, refers to the Charter of the United Nations. The result of this reference is that the association of the overseas territories under the Treaty must not only conform to the particular provisions of the Treaty but also take into consideration the principles of the United Nations Charter, such as the principle of self-determination, however limited the legal content of this principle may be at this time.

The Court will resort to customary rules of international law and general principles when interpreting the above international agreements, when defining the relations of the Community with third countries (such as the right of active and passive legation), and perhaps as a subsidiary source when enunciating a rule applicable to

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201 Mathijsen, op. cit. supra note 50, at 90 and 157–158. Fitzmaurice, Some Problems regarding the Formal Sources of International Law, Symbolae VerziJl 161–168, 173–176 (1958) includes natural law as one of the sources of international law.
202 Cf. art. 220.
3. NATIONAL LAWS OF MEMBER STATES AND GENERAL PRINCIPLES COMMON TO THEM

The Treaty refers explicitly to national law, for instance when it provides that forced execution of a pecuniary obligation imposed upon an enterprise by an institution shall be governed by the rules of civil procedure in force in the Member State where it takes place.\textsuperscript{210}

The Treaty refers explicitly to the "general principles common to the laws of the Member States" as the source of law to govern Community tort cases. The Court is required to scrutinize the six national legal systems for common principles, a task of some magnitude considering the differences among these systems.\textsuperscript{211} This source is reminiscent of the general principles of law of civilized nations included in Article 38 of the Statute of the International Court of Justice.

In cases of contracts to which the Community is a party the Treaty requires reference to "the law applying to the contract concerned." How will the Community Court determine the choice-of-law rule pointing to the applicable law? One possibility would be for the Court to refer to the choice-of-law rule of some other forum—as American federal courts since \textit{Erie v. Tompkins}\textsuperscript{212} have done in diversity-of-citizenship cases, applying the choice-of-law rule of the State in which they are sitting. The Community Court could, for instance, refer to the choice-of-law rule of the national court which would have had jurisdiction if the contract had not stipulated the jurisdiction of the Community Court.\textsuperscript{213} Another possibility would


\textsuperscript{209} Case 8-55, Sammlung, Vol. II, 297, at 312.

\textsuperscript{210} Art. 192.


be for the Court to apply the substantive law of the court of the jurisdiction in which, in the absence of the Community Court, the plaintiff would presumably have sought relief—an approach followed at times by special international tribunals. Since courts in more than one state may well have jurisdiction with respect to the contract case in question, as well as for other reasons, the better rule might be for the Community Court to develop its own choice-of-law rules from the general principles common to the laws of the six Member States. Since the jurisdiction of the Community Court in contract cases must in any event be stipulated by the parties, the contract may stipulate also the law which the parties wish to govern the contract. New York law, for example, was stipulated as governing High Authority obligations issued in the United States. The Coal-Steel Community Treaty contains no provision concerning the applicable law in tort or contract cases involving the Community comparable to the provision in the E.E.C. Treaty discussed above.

Where will the Community Court seek a rule of law in those instances in which the Treaty is silent and contains no specific reference to national law or to the common general principles? The answer to this question will have a profound effect on the growth of Community “common law.” When the Treaty provides that “any . . . legal person” has the right of appeal to the Community Court, the Court most likely will look to the national law of the appellant to determine whether or not it is a “legal person.” In most instances, however, the Court may be well advised to look to the common general principles rather than to an individual na-


215 The Permanent Court of International Justice stated in the Serbian and Brazilian Loan Cases:

“The Court, which has before it a dispute involving the question as to the law which governs the contractual obligations at issue, can determine what this law is only by reference to the actual nature of these obligations and to the circumstances attendant upon their creation, though it may also take into account the expressed or presumed intention of the Parties. Moreover, this would seem to be in accord with the practice of municipal courts in the absence of rules of municipal law concerning the settlement of conflicts of law.”


216 High Authority and Bank for International Settlements, Tenth supplemental Indenture to the Act of Pledge dated November 28, 1954, 5% Secured Bonds (Eleventh Series), June 1958, Art. III, sec. 10. However, questions with respect to the interpretation or application of the Act of Pledge are to be determined “in accordance with the law which would otherwise be appropriate for such determination.” See Salmon, note 140 supra, at 278.

217 Art. 173 para. 2.
tional law in order to develop Community definitions of such concepts as "worker," "non-wage-earning activities," "current payments," and the like. 218 In one case the Coal-Steel Community Court applied a principle common to the laws of the Member States, that is that a party is deemed to have notice of a letter when it has come in regular course "within the internal sphere of the addressee." 219 In another case the Court, faced with an administrative law question for which it could not find a rule in the Treaty itself felt compelled to make the decision "taking into account the rules recognized in the legislation, doctrine and jurisprudence of the Member States." 220

Even where the Treaty concept may have been adopted from a particular national system, such as the French notion of détournement de pouvoir, the Coal-Steel Community Court has sought to devise a Community definition rather than looking to French law only. 221

4. ACTS AND PRACTICES OF THE INSTITUTIONS

The acts of the Council and the Commission adopted in the exercise of their power are a vital source of Community law. The regulations and other acts of the institutions will eventually have to fill important gaps in the Community legal framework. The "law-making" process is dependent upon more or less specific authorization in the Treaty. It may extend somewhat beyond these confines, however, under the "general clause" of Article 235 which authorizes the Council to take measures, which while not expressly sanctioned in the Treaty, are necessary for the achievement of its objectives. The same clause in the Coal-Steel Treaty has already been invoked by the High Authority. 222 Finally, the practices of the institutions may lay a basis for customary rules.

To what extent does the Court itself "make law" drawing upon

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218 Arts. 48(2), 52 para. 2, 67(2). See Reuter, Aspects de la Communauté Économique Européenne, 1958 REVUE DU MARCHÉ COMMUN 161, at 168 (No. 3).
220 Joint E.C.S.C. cases 7-56 and 3-57 to 7-57, id. 83, at 118-119.
221 Lagrange, supra note 200, at 857 and n. 14. Perhaps the same approach could apply to the Coal-Steel provisions concerning the tort liability of the Community which employ the French distinction between faute de service and faute personnelle. See generally, Kautzer-Schroeder, supra note 134, at 201. Much, op. cit., supra note 134, particularly at 31, 67-77.
222 The provision is art. 95 of the E.C.S.C. Treaty. In its decision 27-58, [1958] Journal Officiel 486, the High Authority, with the unanimous consent of the Council utilized art. 95 to institute a subsidy to the coal industry in order to prevent unemployment resulting from the extraordinarily high stock piling of coal. In decision 22-59, [1959] Journal Officiel 418, art. 95 was used to grant temporary unemployment compensation to Belgian coal workers.
the sources indicated above? The jurisprudence of the Court itself is unquestionably an important source of law particularly where the Court interprets incomplete and ambiguous provisions of the Treaty. "Wherever there are courts, the law grows in the hands of the judges." Some view the Court’s power to "make law" with misgivings. Since the Court is not subject to any control, these critics are not prepared to concede that it can "make law" in the sense that the other institutions make law. Continental legal theory is more strongly opposed to judge-made law than is the common law tradition. Yet it seems likely that the Community Court, in due course, will play a significant role in the development of Community law. The need for the Court to assist in adapting the broad Treaty provisions to concrete situations is accentuated by the fact that there is no Community legislature endowed with general legislative power and that the Treaty may be formally revised only through a cumbersome amendment process requiring the ratification by all Member States.

CONCLUSIONS

Enterprises—whether natural or legal persons, whether nationals of a Member State or of a third State such as the United States—are accorded the right to appeal to the Community Court against administrative acts of the Commission and of the Council which directly and specifically affect them on the grounds defined in the Treaty. Similarly, under specific circumstances enterprises may contest the failure of the institutions to issue an administrative act. The adequacy of these legal remedies will depend to an important degree on the jurisprudence of the Court, whether it will, for instance, continue the practice of the Coal-Steel Community Court and interpret broadly the right of appeal. The Coal-Steel Community Court utilized the concept of détournement de pouvoir to give private parties standing to contest general decisions. In view of the limiting language of the E.E.C. Treaty, the question may arise whether the Court will be able or willing to grant appeals under that Treaty in all situations where "direct and specific concern" of the enterprise affected would warrant it.

Under an arrangement resembling somewhat a federal system


225 For two classic statements, see Laun, Das Freie Ermessen und seine Grenzen 105 (1910), and Hauriou, Principes de droit public 33–40 (1916).
national courts of last resort must refer to the Community Court for binding determination questions concerning the Treaty or acts of the Community institutions which arise in proceedings before these courts. Where the right of a party depends on the proper application of the Community law, the adequacy of its legal remedy may depend on the compliance by the national courts with the Treaty mandate. In at least one case a national court gave less than the intended effect to this Treaty mandate and refused to submit certain questions to the Community Court. A possible solution would be the development by the Community Court of a procedure similar to the writ of *certiorari* in American law whereby the Community Court on request of a party could direct the national court of last resort to submit to it the record. Such procedure would deepen the “breach” in the “integrity of national systems.”

Where the Community becomes liable to an enterprise for damages on account of an act of a Community employee or of a Community institution, the enterprise may seek recovery in the Community Court only. This Court will decide the case in accordance with the general principles common to the laws of the Member States. Where, on the other hand, an enterprise has entered into a contract with the Community, it may sue on such contract in the competent national court only, unless the jurisdiction of the Community Court is stipulated in the contract. In case of such stipulation, the Community Court will decide the question of contractual liability in accordance with “the law applying to the contract concerned.” Thus from the viewpoint of the development of a “quasi-federal legal system,” the Court has the potential to develop a “Community law” not only in the sphere of the administrative and constitutional law of the Community, but also in the private law sphere by drawing upon general principles common to the laws of the Member States.

The armory of legal remedies will, of course, not depend only on the attitude of the Court. The regulations and other administrative acts which the institutions are required to issue for the implementation of the Treaty will have an important impact on the remedies of the enterprises in the Community.