1958

The Development of a Community Law by the Court of the European Coal and Steel Community

Gerhard Bebr

Follow this and additional works at: https://scholarship.law.umn.edu/mlr

Part of the Law Commons

Recommended Citation
Bebr, Gerhard, "The Development of a Community Law by the Court of the European Coal and Steel Community" (1958). Minnesota Law Review. 1383.
https://scholarship.law.umn.edu/mlr/1383

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Minnesota Law Review collection by an authorized administrator of the Scholarship Repository. For more information, please contact lenzx009@umn.edu.
THE DEVELOPMENT OF A COMMUNITY LAW BY THE COURT OF THE EUROPEAN COAL AND STEEL COMMUNITY

GERHARD BEBR*

To establish and maintain a common, competitive coal and steel market, the European Community for Coal and Steel has extensive powers. Some of them are supranational in the sense that they are directly applicable to the enterprises of heavy industry and exercised independently of the Member States. The most important powers are, by and large, distributed between the High Authority, the powerful administrator of the Community market, and the Council of Ministers. While the High Authority is one of the truly original concepts of the Community, the Council of Ministers resembles more the traditional body representing governments. The judicial function in the widest sense is performed by a special Court of the Community. Not only Member States and organs of the Community but even coal and steel enterprises and their associations and in specific instances even third persons may have access to the Court.

*Lecturer in Law, Yale Law School.

The author is indebted to M. Roger M. Chevallier, Licencié en Droit, Université de Lille 1952, Diplômé d'Études Supérieures de Droit public & d'Histoire du Droit, Lille 1953, Lauréat de la Faculté de Droit de Lille, 1951, for most able and valuable research assistance.

1. For the official English translation of the Treaty, see High Authority of the European Coal and Steel Community, Treaty Establishing the European Coal and Steel Community (hereinafter cited as Treaty) together with Annexes, Protocol on the Code of the Court of Justice, Convention Containing the Transitional Provisions (hereinafter cited as Annexes, Code, and Convention respectively), Reglement de la Cour (hereinafter cited as Rules) may be found in 2 Journal Officiel de la Communauté Européenne du Charbon et de l'Acier (hereinafter cited as Journal Officiel) 37 (1953).

The judgments of the Court together with the conclusions of the Court advocate may be found in Cour de Justice de la Communauté Européenne du Charbon et de l’Acier, Recueil de la Jurisprudence de la Cour de Justice (hereinafter cited as Recueil).

For the official English translation of the treaties establishing the European Economic Community and Euratom see Secretariat of the Interim Committee for the Common Market and Euratom, Treaty Establishing the European Economic Community (hereinafter cited as EEC Treaty) and Treaty Establishing the European Atomic Energy Community (Euratom) (hereinafter cited as Euratom Treaty) (1957).

2. For a survey of these powers see Bebr, The European Coal and Steel Community: A Political and Legal Innovation, 63 Yale L.J. 1, 20-1 (1953).

4. Id. Art. 27.
5. Id. Articles 33; 35; 36; 37; 38.

For a detailed discussion of this problem see Bebr, Protection of Private Interests Under the European Coal and Steel Community, 42 Va. L. Rev. 879 especially at 883-910 (1956).

6. Thus, for example, Treaty Articles 40, para. 1-2; 63(2b); 66(5), para. 2.
Even this very brief sketch may sufficiently indicate that the Community is an organization sui generis. Any attempt to subsume it under the headings of traditional international organizations is misleading and does violence to the actual nature of the Community. The Community is a creation of practical consideration, purposely shying away from the frozen and petrified concepts of the past. It is a creation of common interest and solidarity of an intensity unknown to traditional international organizations. It is this solidarity which shaped the nature of the Community and its institutional structure.

The Treaty establishing the Community is its constitution. It binds Member States and enterprises alike. Accordingly the enterprises have a double allegiance, being subject to the law of the Community and to municipal laws of their States as well. Thus the Treaty is supraordinated to and coordinated with the municipal laws. It is a peculiar and complex legal symbiosis of the Community law within and above the legal systems of the Member States, marked in specific instances by a penetration into a sphere traditionally reserved to municipal law. The effects of this penetration were so far-reaching that constitutional amendments in some Member States were required.


For the Netherlands Constitutional amendment see: Staatsblad Van Het Koninkrijk der Nederlanden, No. 295 at 491, 495 (1953). English translation
The Treaty merely spells out the principles which should govern the administration of the common market, the exercise of the powers of the Community organs, and the extent of judicial protection. It does not indicate the source of law or the principles according to which the Community law might be developed by the Court. The legal nature of various relations and situations regulated by the Treaty are so different that other laws governed by different legal principles may have to be developed. As an executive of the Community, the High Authority interprets and applies the Treaty in its daily operation, thus developing an administrative law of the Community. Ultimately, however, it is the Court of the Community which by its creative interpretation from case to case formulates its law in all the various branches. Although the Court enjoys a “judicial monopoly,” its jurisdiction, though manifold, is an exception to the rule. Unless otherwise provided for by the Treaty, the municipal courts of the Member States retain their jurisdiction and may interpret certain Treaty provisions. The Treaty may then be interpreted and applied according to different rules of interpretation. These will depend on the nature of legal relations and the interests at stake as well as on the sources of law which regulate them, and on the courts called upon to render the judgment.

may be found in Inter-Parliamentary Union, Constitutional and Parliamentary Information 104 (3d Series, No. 13, Jan. 1953) and 26 (3d Series, No. 29, Jan. 1957).

For further discussion see particularly Bauer, Die niederländische Verfassungshänderung von 1956 betreffend die auswärtige Gewalt, 18 Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht 137 (Germany 1957); van Panhuys, The Netherlands Constitution and International Law, 47 Am. J. Int’l L. 537 (1953); Zimmermann, Die Neueregulation der auswärtigen Gewalt in der Verfassung der Niederlande, 15 Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht 164 (1955).

For the Luxembourg Constitutional Amendment see 30 Pasinomie Luxembourgeoise, Recueil des Lois, Decrets 336 (1957); for an English translation of this amendment see Inter-Parliamentary Union, Constitutional and Parliamentary Information 49 (3d Series, No. 30, April, 1957).


13. See Treaty, Art. 44 according to which the judgments of the Court are directly enforceable in the territory of the Member States. The State’s judiciary must enforce the judgment upon its mere verification of authenticity.

14. Thus, for example, Treaty, Articles 33; 35; 36; 39; 40, para. 1-2; 41; 63(2b); 65(4); 66(5).


See also the judgment of Landesgericht Saarbrücken (Kammer für Handelsachen I) of July 27, 1955 (No. 7-0 268/54) at 7 as published by the High Authority Doc. No. 6354/55 d.
After a brief exposition of the unique nature of the Court and its jurisdiction, this article examines, first, the technique of the Court in applying the various sources of law upon which the Treaty indirectly rests. It turns then to the Court's method of interpreting the Treaty as well as municipal laws specifically and directly referred to by the Treaty.

I. THE COMPOSITION AND NATURE OF THE COURT

The Court is composed of seven judges unanimously elected by the governments of the Member States—a stricter requirement than that prescribed for the election of judges on the International Court of Justice. This may be explained by the greater and far more differentiated powers which the Court of the Community wields. Following the continental practice, the Court renders judgment as a collegiate body. Separate or dissenting opinions are thus unknown. At an early stage in the development of the Community law this seems wise for it avoids judgments whose validity may be seriously weakened by separate or dissenting opinions of individual judges. A certainty of judgment may at this stage count more than its fragile soundness arrived at and impaired by individual opinions. Neither may the Court render advisory opinions as the International Court of Justice does. This shortcoming

16. Treaty, Art. 32, which makes no provision as to the nationality of eligible judges. However that only nationals of the Member States are eligible may be indirectly inferred from the provision of the Code, Art. 3, para. 3 which declares that "only the courts with jurisdiction over the highest members of the national judiciary in each member State shall have the jurisdiction in criminal proceedings against judges whose immunity has been so suspended." (Emphasis added.)

The Court is now also common to the newly established European Economic Community and to Euratom. The composition of the Court is governed, without substantial change, by the Euratom Treaty Convention Relating to Certain Institutions Common to European Communities, Sec. II, Art. 4; and by the EEC Treaty, Convention Relating to Certain Institutions . . . , Sec. II, Art. 4.

See also Euratom Treaty, Art. 139; EEC Treaty, Art. 167.

Unlike the Statute of International Court of Justice, Art. 31, the Code Art. 19, para. 4, excludes the possibility of an ad-hoc judge. Accordingly the party may not invoke the nationality of a judge or his absence on the bench "in order to ask for change in the composition of the Court. . . ." See also Euratom Treaty, Protocol on the Statute of the Court of Justice, Art. 16. The Protocol to the EEC Treaty has an identical provision in Art. 16.

17. I.C.J. Statute, Articles 4(1) ; 8 ; 10.
18. Implicitly Code, Articles 29, 30 ; Rules, Art. 54.
20. The French proposal of Nov. 9, 1950 in Article 26, para. 3 provided for an advisory opinion of the Court:
La Haute Autorité, en accord avec le Conseil, peut demander à la Cour
should not be criticized too harshly. In its wide and multiple jurisdiction the role of an advisory opinion would have been rather limited and secondary.

In its work the Court is assisted by two Court advocates. Their function is patterned after the French Commissaire du Gouvernement at the Conseil d'Etat. The expression "Court advocate" may easily mislead and cause misunderstanding. It must be strongly emphasized that he is neither a judge nor a public prosecutor. Neither does he participate in the deliberation of the Court nor vote with the Court. His only but vital function is to prepare an opinion for the advise of the Court on any question submitted to it. Although not part of the judgment itself, and therefore not legally binding, his opinions may strongly influence the development of the law of the Community. At least this has been the experience with the French Commissaire du Gouvernement whose opinions, in some instances, shaped the development of French administrative law more profoundly than the judgments of the Conseil d'Etat itself. This may not be surprising for the Commissaire speaks his mind more freely than the Conseil being aware that his opinion is not legally binding. The Court advocate might very well follow this tradition.

---

des avis consultatifs sur l'Interprétation des clauses du présent Traité ou des protocoles annexes.

as reproduced by Steindorff, Die Nichtigkeitsklage im Recht der Europäischen Gemeinschaft für Kohle und Stahl 166 (1952).

See, however, I.C.J. Statute, Art. 65.


Also Code, Art. 11.


23. Code, Art. 11, provides:

[T]he function of the Court advocates shall be to present publicly and with complete impartiality and independence oral reasoned arguments on the cases submitted to the Court, in order to assist the Court in the performance of its duties, as defined in Article 31 of the Treaty.

The Court advocate is obliged to prepare a conclusion not only on pending judgments of the Court but also on its Rulings; see, for example, the conclusions of the Court advocate Roemer on the Intervention of the Luxembourg Government in Cases Nos. 7/54 and 9/54, 2 Recueil 149 (1954-5) or on the suspension of execution of an act of the High Authority in Case No. 18/57 R, Dec. 3, 1957 (Case Nold).

24. For this reason it is regrettable that most commentators completely disregard the conclusions of the Court advocate which precede the judgments of the Court.

In an international society which is being integrated, the nature of the Court and its jurisdiction assumes a new role and develops new features.\textsuperscript{26} Even a cursory glance at the Treaty reveals an unusually rich and varied jurisdiction of the Court which eludes any traditional classification.\textsuperscript{27} Thus, for example, the Court is an administrative,\textsuperscript{28} civil,\textsuperscript{29} constitutional\textsuperscript{30} and even international court;\textsuperscript{31} in few instances it operates as a disciplinary tribunal,\textsuperscript{32} and in one or two instances it even functions as an arbitrator.\textsuperscript{33} These multiple jurisdictions make it abundantly clear that the Court of the Community should not be compared with the International Court of Justice\textsuperscript{34}—except perhaps when the Court deals with disputes between Member States concerning the interpretation or application of the Treaty.\textsuperscript{35} The administrative jurisdiction of the Court overshadows its international jurisdiction so much that there is hardly any ground for comparing it with the International Court of Justice. If in this exposition nevertheless such a reference is made, it is only to demonstrate more forcefully the wide abyss which divides these two courts.

\section*{II. The Law of the Community: Its Source and Interpretation}

\subsection*{A. Source of Community Law}

Neither the High Authority nor the Court operate within a well developed legal system. The primary source of the Community law is, of course, the Treaty. But its provisions are general and most of its concepts are left undefined. To regulate economic affairs
whose dynamic nature precludes the formation of rigid and detailed provisions, the Treaty provisions must, to some extent, be coached in general terms and retain certain flexibility, should they be applicable in practice at all. For this reason the Treaty is supplemented by acts of the High Authority issued in response to actual situations. In a few instances the Authority is explicitly obliged to issue general acts; in the majority of cases though it has discretion to do so.37

Unlike the Statute of the International Court of Justice,38 the Treaty is practically silent as to the sources of law and their hierarchy which could or should guide the Court in developing the law of the Community.39 This silence is quite understandable. The Community is such an unprecedented legal experiment that at the time of drafting the Treaty, it was almost impossible to envisage in detail the variety of legal relations and the proper source of law governing them. The relation of enterprises and their associations to the High Authority predominates by far.40 Second stand the relation among the various organs of the Community and their relation with the Member States.41 Finally, the relation among the Member States themselves with regard to the Community Treaty must be mentioned.42 The enterprise-Community relation is such that international law is hopelessly ill-equipped to regulate it.43 In most instances this relation resembles rather the relation of the individual to a public authority of a municipal law. In a sense the Treaty which governs this relation contains strong elements of a public administrative law. The power to fix prices,44 enforce anti-cartel provisions,45 approve certain agreements among enterprises46 and above all to impose sanctions upon violating enterprises47—to cite at

36. Thus, for example, Treaty, Art. 66(1).
37. Id. Art. 60(1).
40. Treaty, Arts. 47; 48; 50; 51(2); 54; 58(2); 59(4, 7); 60; 61; 62; 63(2); 64; 65; 66; 80; 83; 91.
41. Id. Arts. 58(1); 59(1, 3); 61; 63(1, 3); 67; 69; 71; 75; 76; 86; 88; 90.
42. Id. Arts. 70(3); 71; 79; 87; 89.
43. For a sharp refutation of the application of international law see the conclusions of the Court advocate Roemer in Affaire No. 6 (Gouvernement du Royaume des Pays-Bas c. Haute Autorité) 1 Recueil 229, 232 (1954-5).
44. Treaty, Arts. 60, 61.
45. Id. Arts. 65(4, 5), 66(5, 6).
46. Id. Arts. 53, 65(2), 66(2).
47. Id. Art. 64.
random only few examples—indicate sufficiently that the Community is a public organization which operates within a public order of its own.\footnote{48}

To regulate various legal relations, there is not and cannot be one single source of law the Court could utilize. Only an analysis of the Treaty provisions from case to case and a patient examination of the nature of the relations and situations may provide an answer. Such an analysis reveals references to various branches of law and its sources. Leaving aside the Treaty itself and its specific provisions, the general acts of the Authority as well as the slowly developing jurisprudence of the Court, references to municipal law of the Member States are most frequent.\footnote{49} These references are either to municipal laws in general\footnote{50} or they are specifically made to a municipal law of a particular Member State.\footnote{51}

The general reference to municipal law is the richest source out of which the Court will primarily weave a true Community law.\footnote{52} Such a development of law by analogy is of course not unique as is well illustrated by the reception and modification of institutions of municipal law by international law\footnote{53} or by the law of international

\footnote{48. See, for example, the conclusions of the Court Advocate Lagrange in Affaire No. 1-54 (Gouvernement de la République Française c. Haute Autorité) 1 Recueil 35, 69 (1954-5).

49. L'Institut des Relations Internationales de Bruxelles, la Communauté Européenne du Charbon et de l'Acier 232 (1953); see also Delvaux, op. cit. supra note 39, at 93.

50. Treaty, Arts. 6, para. 4; 9, para. 7; 12, para. 2; 31; 33; 34, para. 1; 35, para. 2; 40; 42; 46, paras. 1, 2; 47, paras. 2, 3, 4; 49, paras. 3, 4; 60(1, 2); 63(1, 2); 64; 65(5); 66(1, 5, 6, 7).

51. Treaty, Arts. 1; 4(a); 9, para. 4.

52. Rules, Arts. 10, para. 2; 27, para. 5; 33, para. 2; 53, para. 1; 71, para. 2; 73, para. 1.

53. See also his conclusions in Affaire No. 8-55 (Fédération Charbonnière de Belgique c. Haute Autorité) 2 Recueil 230, 263 (1955-6).}
Aside from this common ground, the purpose of these references is however wide apart. The Treaty refers to municipal laws as potential means for developing a comprehensive legal system of the Community supported by some degree of solidarity. The lack of such a solidarity in the wider international society prevents present international law from such a development.

The general Treaty reference to municipal laws are mere signposts for the general direction along which the Court may develop the Community law. In this creative process, the Court will undoubtedly encounter difficult and vexing problems. Thus it must avoid a servile imitation of municipal laws and its jurisprudence.

The Court forms a synthesis out of municipal laws and brings them in accord with the objectives and needs of the Community and its political and economic climate. This process may differ depending on whether or not the municipal laws generally referred to disclose some fundamental identity or not. If they do, the Court may use them as a starting point for creating the Community law. The Court's creative function is even more extensive when the respective municipal laws are contradictory. As there is no common, underlying principle in this instance, the Court evaluates and weighs these differences, reconciles them, and modifies this result in accordance with the purposes of the Community. Secondly, the general reference to municipal law will not spare the Court of the delicate decision as to whether to apply in its creative process the private or public branch of municipal law. This problem will also be faced when applying sources of law directly referred to by the Treaty. On the other hand, explicit or implicit references to international law as a possible source of the Community law are few. Without undue exaggeration,

54. Id. 133, 142-3, 146-7.

Particularly the jurisprudence of the United Nations and I.L.O. Administratv Tribunals show an interesting reception of institutions of public municipal laws, see Jessup, Transnational Law 84-5 (1956).

In several judgments these Administratvic Tribunals utilized even the concept of 'détournement de pouvoir,' see Bedjaoui, Jurisprudence Comparée des tribunaux administratifs internationaux en matière d'exces de pouvoir, 2 Annuaire Français de Droit International 482, 484-9 (1956).

Particularly noteworthy are the following judgments: United Nations Administrative Tribunal: Judgement No. 2, Aubert v. Secretary-General, Judgement No. 20, Middleton v. Secretary-General.

I.L.O. Administrative Tribunal: Judgement No. 17, Duberg v. UNESCO; No. 19, Wilcox v. UNESCO; No. 22, Fromma v. UNESCO.

55. See the clear warning sounded by Reuter, Le droit au secret et les institutions internationales, 2 Annuaire Français de Droit International 46, 59 (1956).

See also the conclusions of the Court Advocate Lagrange in Affaire No. 8-55 (Fédération Charbonnière de Belgique c. Haute Autorité) 2 Recueil 231, 253 (1955-6).
it may be maintained that the role of international law in the Court's creative process is rather secondary.  

B. Interpretation of Community Law

There are, and can be, no universally valid rules of interpretation of international treaties whether bilateral or multilateral. The widely split disagreement on the proper method of interpretation seems to stem, at least partly, from the failure to recognize that the context within which the treaty is being interpreted is a decisive factor which predetermines the selection of specific rules of interpretation and which also explains the preference given to one rule of interpretation over another one. A change in the context will most likely affect the selection of a rule of interpretation as well. The rules appear therefore artificial and seldom void of arbitrariness. They are only of relative validity and their importance must not be exaggerated. Within their limited usefulness, they should be taken for what they really are—fragile but pliable guides in the hands of an interpreter.

The steady growth of multilateral treaties whose objectives and nature widely differ prompts the interpreter to apply rules of interpretation which would more realistically take into consideration both the peculiarities and divergencies of such treaties and the context within which they operate. There is, therefore, a growing recognition that such treaties require new rules of interpretation or rather a new hierarchy of these rules. This is particularly true in the case of treaties establishing international organizations. The application of these constitutive treaties encounters new situations for whose solution the traditional canons of interpretation appear unsuitable. Reference may be made, for example, to the creative...
force of practices of various organs of international organizations, or to the shallow concept of the intent of parties, the validity of which is gradually replaced by the principle of effectiveness. Because of its unique conception, this consideration has even greater validity for the Community Treaty. The different relations encompassed by the Treaty and governed in practice by a variety of legal sources doom any attempt to apply and develop uniform rules of interpretation. Only diversified rules of interpretation may do justice to these multiple relations and to the nature of interests involved. It is, therefore, quite natural that the Treaty does not indicate possible rules of interpretation leaving the Court free to utilize its own rules.

The political and economic solidarity of which the Community is an expression, will profoundly influence the development of rules of interpretation and predetermine their selection. A natural corollary to this solidarity is the teleological interpretation as the primary, overriding canon of interpretation. According to this rule "a treaty must be interpreted—and not only interpreted, but as it were assisted or supplemented—by reference to its objects, principles, and purposes, as declared, known or to be presumed. In this way, gaps can be filled, corrections made, texts expanded or supplemented, always so long as this is consistent with, or in furtherance of, the objects, principles, and purposes in question." Constitutions of traditional international organizations are increasingly inter-

63. Reuter, les Interventions de la Haute Autorité 58 (Centre Italien d'Etudes, Congrès International d'Etudes sur la Communauté Européenne du Charbon et de l'Acier); also de Visscher, la Communauté Européenne du Charbon et de l'Acier et les Etats Membres 60 (Centre Italien d'Etudes Juridiques, Congrès International d'Etudes sur la Communauté...1957). See, however, the sweeping and dogmatic generalization of the Dutch agent in Affaire No. 6-54, Procès verbal 10, 11.
64. Treaty, Art. 31, merely states: The function of the Court is to ensure the rule of law in the interpretation and application of the present Treaty and of the regulations for its execution.
65. de Visscher, op. cit. supra note 7, at 6.
66. Fitzmaurice, supra note 61, at 8.
preted in the light of their objectives. With even far greater justification may the Court avail itself of this dynamic and creative interpretation of the Treaty, for the operation of the Community will reveal shortcomings of the Treaty and raise problems originally not anticipated. To assure a smooth, undisturbed operation of the Community, the Court will have to resort to teleological interpretation. However, teleological—or sometimes called effective or functional—interpretation may be applied only within the area in which the Community operates. Thus this principle appears necessarily limited by the principle of restrictive interpretation which purports to keep the power of the Community within the limits agreed upon by the Member States in the Treaty. This seems a reasonable assumption. The delicate balance between the interests of the Community on the one hand and that of the Member States on the other—a balance which is also reflected in the mutual relation of these two principles—is ultimately conditioned by political, economic and social realities. The rule of teleological interpretation is therefore merely a relative concept of interpretation.

On the other hand, the nature of the Treaty minimizes the application of other rules of interpretation. Thus, for example, the application of the intent of parties as one of the canons of interpretations appears, because of its ambiguity, doubtful. The travaux préparatoires usually resorted to, as allegedly demonstrating the intent of parties, are more often than not so contradictory that practically any "intention" desired may be proved. As no preparatory protocols were drafted on the Community Treaty, the Court is fortunately spared from being harassed by dubious arguments as to the intent


For further comments Lauterpacht, Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties, 26 Brit. Y.B. Int'l L. 48, 68 (1949).

68. L'Institut des Relations Internationales de Bruxelles, op. cit. supra note 27, at 200.

69. See, for example, Lauterpacht, id. 52; Scelle in 44 Annuaire de l'Institut de Droit International 394, 398 (Part II, 1952); Harvard Research Draft on Treaties 953 (1935).

70. Conclusions of Court advocate Lagrange in Affaire 8-55 (Fédération Charbonnière de Belgique c. Haute Autorité) 2 Recueil 231, 252 (1955-6); also Mosler, Der Vertrag über die Europäische Gemeinschaft für Kohl und Stahl, 14 Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht 1, 14 (Germany 1951-2). Similar observation was made by Rolin in 44 Annuaire de l'Institut de Droit International 392 (Part II, 1952).
of parties. There are additional reasons which militate against applying the intent of drafters as a reliable guide of interpretation. It is hard to believe that all drafters could have fully understood the complex ramifications of the many notions incorporated in the Treaty. In many instances the true intent of parties is a mere agreement in principle. Thus, for example, the nature and extent of professional secrecy of enterprises against the acts of the High Authority,\textsuperscript{71} or the liability of the Community\textsuperscript{72} would have required an extensive comparative study to become really meaningful—a requirement which obviously could not have been met during the drafting conference.

In the absence of travaux préparatoires of the conference, the ghost of the intent of parties as a principle of interpretation may be revived by resorting to governmental reports which accompanied and explained the text of the Treaty submitted to the parliaments for ratification. These reports—particularly the lengthy report of the French delegation—are frequently cited. Although in principle their importance is undeniable,\textsuperscript{73} their precise assessment is difficult to make. Even these reports are not altogether immune from the criticism levelled against the application of the intent of parties as a rule of interpretation. In the opinion of a distinguished authority these governmental reports were basically harmonized and coordinated with each other.\textsuperscript{74} However, since these reports seem to place different emphasis on specific Treaty provisions, a possible conflict between them may not be entirely excluded.

In one of the earlier appeals the application of the principle of intent of parties was set aside by one of the Court advocates who himself had participated in drafting the Treaty. It was the clear intent of the drafters to permit appeals of enterprises and their associations against general acts of the High Authority only on the ground of misapplication of power specifically committed by disguising an individual act in the garb of a general act.\textsuperscript{75} Despite the clear intent to grant enterprises and their associations only a very limited appeal, an appeal which would have in practice offered very little protection, the Court advocate did not hesitate to disregard it.

\textsuperscript{71} Treaty, Art. 47, paras. 2, 4.
\textsuperscript{72} Id. Arts. 34, 40.
\textsuperscript{73} Thus Rolin, 44 Annuaire de l'Institut de Droit International 392 (Part II, 1952), observes with some caution: "Dans la mesure où ces déclarations purement unilatérales seront concordantes, il sera légitime d'en tenir compte dans le processus d'interprétation du traité."
\textsuperscript{74} Conclusions of Court advocate Lagrange in Affaire 8-55 (Fédération Charbonnière de Belgique c. Haute Autorité) 2 Recueil 231, 252 (1955-6).
\textsuperscript{75} Conclusions of Court advocate Lagrange in Affaire No. 3-54 (Assider c. Haute Autorité) 1 Recueil 143, 171-2 (1954-5).
To extent, the protection he pleaded for a broader right of appeal.76 In his interpretation, later re-iterated,77 any misapplication of power implied in a general act which affected interests of enterprises and their associations should be a ground for appeal—an interpretation inspired by the principle of effectiveness. Following the opinion of its Court advocate, even the Court disdainfully dismissed the intent of parties. However, it preferred to justify its interpretation on the ground of the plain meaning of words used.78

A new problem arises out of the relation of the European Coal and Steel Community Treaty with the Treaties establishing the European Economic Community and Euratom. These new Treaties might easily tempt one to interpret their provisions with the purpose of “re-discovering” the intent of parties with regard to some of the obscure provisions of the Coal and Steel Community Treaty. Such a round-about way of interpretation, based itself on the slippery ground of intent, is erroneous and not without hidden pitfalls. Although the Court is common to all three European Communities,79 the extent and nature of its jurisdiction is not identical.80

76. Id. 172-73.
77. Conclusions of Court advocate Lagrange in Affaire No. 8-55 (Fédération Charbonnière de Belgique c. Haute Autorité) 2 Recueil 231, 253 (1955-6).
79. See note 16, supra.
80. Thus, for example, unlike under the Treaty, Arts. 33, para. 1; 36; 37; 66(5), para. 2, the Court has under the new Communities no explicit right to review in specific instances the findings and evaluations of facts as found by the respective Commissions, Euratom Treaty, Art. 146; EEC Treaty, Art. 173. This may be explained by the much larger part the Council of Ministers plays in the operation of these Communities. Only the EEC Treaty, Art. 172 makes a possible exception—if the Council of Ministers decides so. The Article provides that “[T]he regulations laid down by the Council pursuant to the provisions of this Treaty may confer on the Court of Justice full jurisdiction in respect of penalties provided for in such a regulation.” (Emphasis added.)


Erläuterungen zu den Verträgen zur Gründung der Europäischen Wirtschaftsgemeinschaft und der Europäischen Atomgemeinschaft Drucksache #3440, Deutscher Bundestag 2 Wahlperiode 1953, 101 at 147 (Germany 1957).

Also Assemblée Nationale, Documents Parlementaires No. 0002, Avant-Rapport Fait au nom de la Commission des Affaires Étrangères sur le Projet de Loi (No. 4676) . . ., Par July 7 (France 1957).

See however Efron & Nanes, The Common Market and Euratom Trea-
ties: Supranationality and the Integration of Europe, 6 Int’l & Comp. L.Q. 670, 676-7 (1957) who failed to notice this important difference.
Compared with the Coal and Steel Community, the principles upon which these new Communities are based are also different as are their powers whose supranational feature is curbed. The independent legal system of the European Economic Community is.

81. It is of course not possible to present here any detailed differences between the European Coal and Steel Community on one hand, and the European Economic Community and Euratom on the other. Particularly the distribution of powers among the various organs and their exercise are, in comparison with the Coal and Steel Community, substantially modified. In general, it may be stated that under the EEC and Euratom Treaties the Council of Ministers wields far greater powers. Correspondingly the Commissions of these new Communities do not reach the elevated and powerful position of the High Authority of the Coal and Steel Community. Thus the French Documents Parlementaires No. 0002, Avant-Rapport op. cit. supra note 80, at 10 pertinently observes that "le rôle des Commissions est essentiellement technique, elles ne peuvent prendre de décisions d'ordre politique." See further id. 12-13.

Similarly speaks the Luxembourg Exposé des Motifs, op. cit. supra note 80, 37-38 declaring:

"... l'appreciation de l'ensemble des dispositions générales et spécifiques des Traités permet de dire que... l'organe directeur des nouvelles Communautés sera le Conseil des Ministres.... Il appartiendra en effet au Conseil de déterminer la politique des Communautés et de prendre les mesures décisives pour la mise en oeuvre des Traités. C'est principalement par ce trait que la structure institutionnelle des nouvelles Communautés se distingue de la structure donnée à la Communauté du Charbon et de l'Acier, caractérisée par la concentration de l'initiative et du pouvoir d'action aux mains d'une autorité supranationale. Dans les présents Traités, c'est au contraire l'organe représentatif des Etats membres... qui exerce les fonctions décisives pour le fonctionnement des deux Communautés... les Communautés nouvelles sont inspirées plutôt par la conception d'une négociation politique continue, tendant à l'ajustement des intérêts nationaux..." (Emphasis added.)


There is, for example, a striking difference between the powers of the High Authority and the Commission of the EEC concerning the administration of the common market and of regulating competition. Although sanctions may be imposed upon violating enterprises (EEC Treaty, Art. 87 (2a) the manner in exercising this power is to be settled by an agreement between the Commission and the Court (EEC Treaty, Art. 87 (2d). Even so, the Commission has evidently discretion in imposing sanctions as it "may authorize Member States to take the necessary measures, of which it shall determine the conditions and particulars, to remedy the situation." (EEC Treaty, Art. 89(2). Contrast with this the independent powers of the High Authority to impose sanctions. Treaty, Art. 47, para. 3; 50(3); 58(4); 64; 65(5); 66(6).

This shift in power towards the Council of Ministers is, for example, well illustrated by the extended jurisdiction of the Court over the acts of the Council. Under the European Coal and Steel Community Treaty, Art. 38, the acts of the Council may be appealed only on grounds of lack of legal competence or major procedural violation (while the acts of the High Authority may in addition be appealed on ground of violation of the Treaty or of any rule relating to its application, and misapplication of power, id. Art. 33). Under the European Economic Community and Euratom however the acts of the Council of Ministers are subject to appeals on all four grounds of illegality. EEC Treaty, Art. 173, Euratom Treaty, Art. 146.
moreover, explicitly guaranteed. It appears, therefore, highly doubtful to wish to deduce the intent of parties from these Treaties and apply them to the Coal and Steel Community Treaty.

Despite some hesitancy and occasional contradiction, the jurisprudence of the Court already indicates some trend in its rule of interpretation. Its manner appears strongly influenced by the conflict of interests present in any dispute before the Court. Thus when higher interests of the Community clash with interests of individual enterprises an effective interpretation is frequently the rule. Interpreting its power to review and evaluate economic findings underlying the acts of the High Authority, the Court indirectly follows an effective interpretation in order to keep the necessary judicial interference with the Authority's administration at a minimum. To check the considerable powers of the Authority, the Court interprets most extensively the judicial protection of enterprises as provided for by the Treaty. On the other hand, the Court has so far restrictively interpreted the Treaty provisions implying a possible conflict between the Community and a Member State.

C. Teleological Interpretation

The teleological interpretation presupposes, first of all, the determination of the Treaty objectives. Although these fundamental objectives set forth by the Treaty are a broad policy declaration, they are concrete enough to offer a general guidance for the interpretation of the Treaty. Even so, in some instances the interpretation of the Court will depend on its views as to the specific content of these objectives. In this effort the Court may be aided by definition of objectives the High Authority is obliged to prepare regularly. On several occasions the Court explicitly stated that concrete aims of the individual Treaty provisions must always be interpreted in the light of the fundamental Treaty objectives. Thus the Court

82. EEC Treaty, Art. 232(1):
The provisions of this Treaty shall not affect those of the Treaty establishing the European Coal and Steel Community, in particular in regard to the rights and obligations of Member States, the powers of the institutions of the said Community and the rules laid down by the said Treaty for the functioning of the common market for coal and steel.
84. Stone, supra note 57, at 352-3.
85. Treaty, Art. 46, para. 3.
86. Treaty, Art. 52 (Gouvernement de la République Française c. Haute Autorité) 1 Recueil 8, at 23, 30 (1954-5); Judgment No. 2-54 (Gouvernement de la République Italienne c. Haute Autorité) 1 Recueil 73, 90-91 (1954-5); Judgment No. 8-55 (Fédération Charbonnière de Belgique c. Haute Autorité) 2 Recueil 199, 305 (1955-6).

See also the conclusions of Court advocate Lagrange in Affaire No. 1-54,
COAL AND STEEL COMMUNITY has unequivocally accepted the principle of effectiveness of the Treaty as the basic principle of interpretation.

The relation of concrete aims of the Treaty to its fundamental objectives poses a delicate problem with regard to the powers of the High Authority whose exercise is specified and related to individual Treaty provisions. May the Authority use these powers in order to pursue one of the fundamental objectives not explicitly mentioned in a specific Treaty provision? Is the exercise of power of the High Authority limited exclusively to the pursuance of specific aims? The Dutch Government, in one of the earlier cases, contended that the Authority was so limited. Such an interpretation would have, however, rigidly "departmentalized" the powers of the High Authority and deprived it of a flexibility necessary for an efficient administration. Guided by the requirement of effectiveness, the Court refused to follow this narrow Dutch argument declaring that:

[T]he action of the High Authority cannot be criticized on the ground of the Treaty, when the High Authority uses the powers it has under Article 61 of the Treaty to act against certain consequences which are attached to the maintenance of agreement and concentrations, consequences regarding the level of the prices on the common market and also the fulfillment of the objectives described in Article 3.

The most pronounced adherence to the principle of effective interpretation may be found in the Court's judgment in the case of Fédération Charbonnière de Belgique (Fedexchar). In this case one of the basic questions was whether the lack of explicit powers of the High Authority to approximate prices of Belgian coal to coal prices prevailing on the Community market, an aim set forth by Article 26 of the Transitory Protocol, could paralyze the Authority in pursuing this end. The High Authority argued that as a consequence of its responsibility for the pursuance of the Treaty objectives, it must have and exercise powers necessary for their attainment. Following this argument, the Court most emphatically endorsed the principle of effective interpretation. It concluded that it was permissible to use as a:

[R]ule of interpretation generally recognized by international law as well as by municipal laws, according to which the

1 Recueil 35 at 53, 55-56, 59 (1954-5), in Affaire No. 8-55, 2 Recueil 231, 269 (1955-6); and of the Court advocate Roemer in Affaire No. 6-54 (Gouvernement du Royaume des Pays-Bas c. Haute Autorité) 1 Recueil 229, 233 (1955-6).

87. Affaire No. 6-54, Procès verbal 10.
88. Judgement No. 6-54, 4 Official Gazette 119, 129-30 (1955); for the official text see 1 Recueil 201, 222 (1954-5).
89. Judgement No. 8-55, 2 Recueil 192, at 214 (1955-6)
sions of an international treaty or of a municipal law always imply provisions without which the former provisions would have no sense or could not be reasonably and effectively applied. Consequently to be able to discharge its responsibilities in this instance, the High Authority must have the power to fix prices.90

This admirable interpretation was dictated by sheer vital need of upholding the position of the High Authority in relation to Belgian coal mines which, in view of the High Authority's lack of an explicit authority, had claimed the right to fix prices for themselves. In this clash of interests the Court had practically no other choice than to uphold the Community interest—even at the risk of coming dangerously close to exploiting, however tacitly, the doctrine of implied powers.

The few interpretations of the Court of the substantive Treaty provisions which regulate competition, were also inspired by the principle of effective interpretation. Following such a rule the Court, for good reasons, may not wish to engage in a too extensive interpretation which might not be in accord with existing conditions. This reserved and prudent stand may be well understood if the far-reaching effects of a very extensive interpretation of discrimination, restraint of competition or of deconcentration are fully realized.91 Thus interpreting the Treaty in the light of its objectives, the Court may never lose sight and understanding of the conditions which determine the extent to which the Court may safely go in its effective interpretation.

The basic rule of conduct binding upon the enterprises and Member States alike is to be found in Article 4 of the Treaty. Very briefly and generally, this Article prohibits discriminatory measures and practices among producers, buyers, and consumers and their restrictive practices which might tend to divide or exploit the market. By their very nature these provisions seem to be addressed primarily to the enterprises. The States, on the other hand, must not impose import or export duties, quantitative restrictions or special charges in whatever form; or grant subsidies or state assistance to the coal and steel enterprises. These provisions are considered so essential for the operation of the common, competitive market that the Court declared them absolutely and directly applicable throughout the Community without further implementing acts of the High

90. Id. at 305. Author's translation.
91. See the interesting observation of Court advocate Lagrange in his conclusions in Affaire No. 1-54 (Gouvernement de la République Francaise c. Haute Autorité) 1 Recueil 33, 71 (1954-5).
Authority. Particularly the provisions concerning discriminatory practices were found so vital the Court did not hesitate to view them most broadly. It is significant that the Court considered as illegal measures discriminating not only against other coal enterprises but even against first hand dealers who, as a rule, do not enjoy an independent protection of their own before the Court. The High Authority claimed that it "... appear[ed] necessary to protect dealers against discrimination because they distribute approximately one-half of the coal sales..." implying that such a protection is required if free competition is not to be endangered or impaired. Recognizing this key role of the coal dealers the Court protected them against discrimination—an effective interpretation dictated by the desire to uphold free competition.

So far the Court has rather skillfully avoided a comprehensive definition of discrimination or competition. Instead, the Court cryptically referred to some of their elements. Thus, for example, following the Authority's argument, the Court found that a mere possibility of discrimination implied in an agreement of enterprises constituted already a discrimination. Similarly, the mere existence of an agreement which might restrain or distort competition among producers and/or distributors violated, in Court's view, the pro-

92. Judgement Nos. 7-54 and 9-54 (Groupement des Industries Sidérurgiques Luxembourgaises c. Haute Autorité) 2 Recueil 53, 91 (1955-6); see also the conclusions of the Court advocate Roemer in the same Affaire. id. 107, at 135.


94. Judgement No. 2-56 (Geitling c. Haute Autorité) 6 Amtsblatt 166, 181 (1957). This policy is further evinced by the Court's grant of suspension of execution of an Authority's act to a first hand dealer who might lose his dealership because he did not meet the qualification of a dealer as set forth by the Ruhr sales agencies as approved by the aforementioned act of the Authority, Ordonnance in Affaire No. 18-57 R (Nold c. Haute Autorité) 6 (mim.) (1957).

95. Treaty, Art. 80.

96. Judgement No. 2-56 (Geitling c. Haute Autorité) 6 Amtsblatt 166, 175 (1957).

97. Id. at 181.

98. Id. at 171. "Die Hohe Behörde habe dementsprechend... festgestellt, dass die nicht genehmigte Klausel ... eine Diskriminierung ermöglichen würde ... Eine einzige solche Diskriminierung genüge zum Verbot ... ." (Emphasis added.)

99. Id. at 181.

On the other hand, the Court remained silent on the argument advanced by the High Authority according to which the objective effect upon the Community market, and not the subjective intent of parties, is the constitutive element of discrimination, id. at 176.
hibitions of Article 65 of the Treaty. To declare such an agreement illegal, the Court did not require evidence of actually restraining or distorting effects on competition. Reviewing such possible effects of an agreement, the Court arrived at an uncompromising conclusion that:

Any limitation of the group of the first hand dealers restraints or distorts competition; the number of persons concerned is irrelevant. To establish this finding, it is not necessary to appreciate the concrete effects of such a regulation in each instance. This finding is directly derived from the abstract situation as set forth by Article 65(1).

It would be unwise and premature, however, to rely, without reservation, on these extensive interpretations. It is by no means certain that the Court will, in the future, interpret discrimination so extensively as it did in the Geitling case where the possible discrimination and restraint of competition had been so self-evident. Situations might arise in which possible discrimination or restraint of competition might not be so obvious, so that the Court might very well require some evidence of their possible, if not actual, effects.

In many instances, the exercise of powers by the High Authority depends on its appreciation and evaluation of existing economic conditions. As a rule, the Court may not review these findings and evaluation of economic facts which formed the basis of the appealed act of the High Authority. "The Court cannot examine the evalu-

100. Id. at 179. "... sie [die Vereinbarung] teilt die Abnehmer und den Markt auf und ist geeignet den Wettbewerb zwischen den zusammengeschlossenen Unternehmen einzuschränken oder zu verfälschen." (Emphasis added.)

101. Ibid. The Court observed that "Die Feststellung, dass die streitige Klausel den Wettbewerb verfälscht und einschränkt, ergibt sich aus der rein rechtlichen Würdigung der Handelsregelung, ohne dass dafür eine Feststellung und Würdigung wirtschaftlicher Tatsachen erforderlich wäre." (Emphasis added.)

102. Id. at 179; author's translation.

103. Thus, for example, Treaty, Arts. 58, 60(2b), para. 5; 61, 65, 66, 67.

104. According to Treaty, Art. 33, para. 1, the Court may review, in an annulment procedure, the facts and findings of the High Authority only if a misapplication of power or patent misinterpretation of the Treaty are alleged.

On the other hand, when the Court has full jurisdiction ('pleine juridiction'), as for example Treaty, Art. 66(5), para. 2, such a jurisdiction always implies a review of economic facts, irrespective of the grounds of illegality charged. Compared with the review in case of an annulment procedure, the extent of the Court's review in this instance is broader and represents a rule rather than an exception. This is also the practice of the French Conseil d'Etat, Duez & Debye, Traité de Droit Administratif 416-7 (1952).

This difference as to the extent of the Court's review, depending on the nature of the appeal was forcefully stated by the Court advocate Roemer in Affaire 1-56 (Bourgaux c. Assemblée Commune) 2 Sammlung 465, 471 (1955-6):

Der 'recours en annulation' richtet sich gegen einen behördlichen Akt, der auf seine objektive Rechtsmässigkeit geprüft und gegebenenfalls
ation of the situation, based on economic facts and circumstances which led to the Decision, unless the High Authority is alleged to have committed a 'détournement de pouvoir' or to have obviously ignored the provisions of the Treaty. A study of the market situation which would include an evaluation of structural and conjunctural elements, would inevitably lead to such an examination." 105 Such an unlimited review would practically place the administration in the hands of the Court. 106 The Court would become thus a judge of opportunity rather than of legality. For this the Court is neither well equipped nor competent according to the Treaty. Its unlimited review of economic findings and evaluation would interfere with and even jeopardize an effective administration of the common market by the High Authority. For these reasons, the Court rightly interprets restrictively misapplication of power or patent misinterpretation of Treaty to limit the need for such an extensive review. It is an interpretation in favour of a reasonably free and more competent administration by the High Authority.

On several occasions the Court stated a simultaneous pursuance of specific aims together with other objectives, not specifically set forth by the Treaty provision, did not constitute a misapplication of power, provided this objective is one of the fundamental Treaty objectives. 107 "Even if among the motives which do justify the action..."
of the High Authority there had been an unjustified one . . . the Decisions would not, because of that, be vitiated by 'détournement de pouvoir' inasmuch as they do not infringe upon the essential objectives . . . .

Similarly, for the same reason, the Court interprets restrictively a patent misinterpretation of Treaty. As patent misinterpretation is not a ground of illegality by itself, the appellant must first succeed in showing that the act appealed is vitiated by one of the grounds of illegality which also implies a patent misinterpretation. This requirement by itself limits already the possibilities of a successful charge of a patent misinterpretation. According to Article 33 of the Treaty a patent misinterpretation may be committed with regard to "the provisions of the Treaty or of a rule of law relating to its application." Interpreting this provision restrictively, the High Authority advanced the argument that an obvious misinterpretation of economic facts did not constitute a patent misinterpretation of Treaty provisions within the meaning of Article 33 of the Treaty, and that, therefore, a review of economic facts by the Court was inadmissible. "It would be irrelevant if the High Authority had erroneously evaluated an economic situation in material respect as long as this error did not imply a patent misinterpretation of a legal norm." Without taking a direct stand, it seems that the Court implicitly accepted this argument for it refused to review the findings of economic facts. Moreover, the Court does not consider every misinterpretation as being an obvious one:

[T]he word 'obvious' supposes that the provisions of the Treaty have been ignored to such an extent, that this ignoring seems to follow from an evaluation of the economic situation which led to the Decision and which evaluation is obviously wrong when seen in the light of the provisions of the Treaty.

See also the conclusions of the Court advocate Roemer in Affaire 6-54 (Gouvernement du Royaume des Pays-Bas c. Haute Autorité) 1 Recueil 229, at 258-9 (1955-6).

108. Judgement No. 1-54, 4 Official Gazette 8, 22 (1955) ; for the original text of the Judgement see supra note 107.

109. Judgement No. 6-54 (Gouvernement du Royaume des Pays-Bas c. Haute Autorité) 1 Recueil 203, 225 (1954-5) ; conclusions of the Court advocate Roemer in the same Affaire id. 229, 246.

110. Thus explicitly so the Court advocate Roemer in his conclusions in Affaire No. 6-54 op. cit. supra note 109, at 238. It is striking, however, that the Court avoided to take a stand on this issue, see id. 224.

111. Judgement No. 2-56 (Geitling c. Haute Autorité), 6 Amtsblatt 166, at 172 (1957) ; author's translation.

112. Id. at 179.

113. Judgement No. 6-54, 4 Official Gazette 119, 131 (1955) ; the original version may be found in 1 Recueil 203, 225 (1954-5).
It is natural that a mere charge of a patent misinterpretation will not move the Court to review economic facts.\textsuperscript{114} Although not demanding full evidence, the Court requires weighty indications of such a misinterpretation before it feels justified to take up such a review.\textsuperscript{115}

\textbf{D. Extensive Interpretation: Protection of Enterprises}

With great consistency does the Court interpret extensively the protection of enterprises, as for example, the Treaty provisions concerning appeals against allegedly illegal acts of the High Authority\textsuperscript{116} or its formal requirements prescribed for the preparation of its acts.\textsuperscript{117} Such an extensive interpretation is justified by the very nature of the Treaty as a public law of the Community. In its interpretation the Court follows the practice of national courts which usually protect individuals against acts of public authorities extensively and liberally. Moreover, the Court seeks thus to counterbalance the powers of the High Authority and mitigate the inherent inequality between the Authority and the enterprises. Providing for an easy appeal, the Court has a frequent opportunity to control the legality of the Authority's administration. This wise consideration may foster a growing confidence in the judiciary, speed-up the development of the case law and help to create a greater sense of legal security.

An extensive interpretation of protection is already indicated by the Rules of Procedure established by the Court. It should be mentioned that in some instances these Rules grant a more extensive protection than the Treaty itself. Thus, for example, the Court in its Rules extended the period for lodging appeals for annulment originally determined by Article 33 of the Treaty.\textsuperscript{118} Or, to cite another example, the Rules established a right of the appellant to demand in an annulment procedure that the Court renders a judgement by default against the Authority which failed to appear before the Court\textsuperscript{119}—a right which the Statute of the Court, prepared by the Member States themselves, reserved only to cases in which the Court has full jurisdiction.\textsuperscript{120}

It is, however, the jurisprudence of the Court which reveals

\begin{itemize}
\item 114. Judgement No. 6-54, 1 Recueil 203, 225 (1954-5).
\item 115. Judgement No. 6-54, \textit{id.} at 225.
\item 116. Treaty, \textit{Art.} 33, para. 2.
\item 117. \textit{Id.} \textit{Art.} 15.
\item 118. Rules, \textit{Art.} 85.
\item 119. Rules, \textit{Art.} 72.
\item 120. Code, \textit{Art.} 35.
\end{itemize}
the extensive interpretation of the protection of enterprises and their associations. Article 33 of the Treaty provides:

The enterprises, or the associations referred to in Article 48, shall have the right of appeal on the same grounds against individual decisions and recommendations affecting them, or against general decisions and recommendations which they deem to involve a misapplication of power affecting them.¹²¹

This provision must be read in conjunction with Article 80 of the Treaty, according to which “[T]he term enterprise . . . refers to any enterprise engaged in the production in the field of coal and steel. . . .” An attempt was made to distinguish between coal and steel enterprises in the sense that only coal enterprises affected by an Authority’s act dealing with some problems of the coal industry could appeal to the Court and vice versa.¹²² Thus steel enterprises, even though affected by such an act, would have had no right to appeal at all. The Court refused to restrict the appeal of enterprises by the nature of the subject involved in the dispute. Interpreting this provision extensively, it declared that “. . . no provision of the Treaty requires that specialization of producers be related to the nature of the dispute. The silence of the Treaty could not be interpreted to the detriment of the enterprises and the associations.”¹²³ What really matters in the Court’s extensive interpretation is only that the production activity is carried out in one of the fields of heavy industry as defined by the Treaty.

The conditions under which enterprises and their associations may appeal allegedly illegal acts of the High Authority¹²⁴ offer one

¹²¹ Treaty, Art. 33, para. 1, states:
The Court shall have jurisdiction over appeals by a member State or by the Council for the annulment of decisions and recommendations of the High Authority on the grounds of lack of legal competence, major violation of procedure, violation of the Treaty or of any rule of law relating to its application, or abuse of power. However, the Court may not review the High Authority’s evaluation of the situation, based on economic facts and circumstances which led to such decisions or recommendations, except where the High Authority is alleged to have abused its powers or to have clearly misinterpreted the provisions of the Treaty or of a rule of law relating to its application.

The French expression *détournement de pouvoir* as used in Art. 33 is incorrectly translated in English as *abuse of power*—an error which is also perpetrated in the EEC and Euratom Treaties, Arts. 173, para. 1, 145, para. 1 respectively.

Throughout the article preference is given to the expression *misapplication of power* as the English counterpart to *détournement de pouvoir*.

¹²² Judgement Nos. 7-54 and 9-54 (Groupement des Industries Sidérurgiques Luxembourgaises c. Haute Autorité) 2 Recueil 55, 85-6 (1955-6).

¹²³ Id. at 86; author’s translation. See also the conclusions of the Advocate Roemer, id. 107, at 114.

¹²⁴ For a detailed discussion of this problem see Bebr, Protection of Private Interests Under the European Coal and Steel Community, 42 Va. L. Rev. 879, especially at 883-910 (1956).
of the most persuasive instances of a very extensive interpretation by the Court. The Treaty itself is somewhat vague on this point. It left, however, no doubt that for such an appeal a violation of right of an enterprise is not required. The Court has boldly used the flexible concept of "interests affected" as the cornerstone of the enterprises' protection. A skilful manipulation of this concept in the hands of the French Conseil d'Etat has resulted in a very efficient and admirably flexible protection, void of any doctrinal sterility. The Court seems to follow this policy. It views "interests affected" very liberally, being evidently determined to preclude only an actio popularis and spare thus the High Authority from harrassment by unfounded appeals. It is significant that up to now the Court has never dismissed an appeal for annulment for lack of "interests affected."

The extent of the right of appeal of enterprises and their associations depends on whether their interests were affected by a general or individual act of the High Authority. This distinction as to the character of the act is irrelevant for the States which may appeal general or individual acts on the same grounds of illegality. It is, however, of vital importance for the enterprises and their associations. While they may appeal individual acts on any of the four grounds of illegality, their appeal against general acts is limited to misapplication of power only. Despite the far-reaching consequences of this distinction, the Treaty strangely enough does not indicate the difference between these two categories of acts. A restrictive interpretation of the individual character of acts would have precariously impaired the enterprises' protection. To assure them and their associations of the broadest possible protection without endangering though the effective operation of the Community, the Court has extensively interpreted the individual character of an act at the expense of general acts. By this interpretation the Court has enabled the enterprises to protect their interests by appeals based

125. In most instances this is implicit in the Court's accepting the jurisdiction; only occasionally does the Court explicitly state so, as for example, in its recent Ordonnance 18-57 R (Nold c. Haute Autorité) 5 (mim.) (1957). The conclusions of the Court advocates however discuss this question fully; see for example the conclusions of the Court advocate Lagrange in Affaire No. 3-54 (Assider c. Haute Autorité) 1 Recueil 143, 174 (1954-5), in Affaire No. 8-55 (Fédération Charbonnière c. Haute Autorité) 2 Recueil 231, 246-7 (1955-6); and of the Court advocate Roemer in Affaire Nos. 7-54 et 9-54 (Groupement des Industries Sidérurgiques Luxembourgeoises c. Haute Autorité) 2 Recueil 107, 123-5 (1955-6).

126. For further discussion of this question see Bebr, id. 911-8.


128. Id. Art. 33, para. 2.
on all four grounds of illegality. In its interpretation the Court has firmly refused to permit any formalistic considerations to interfere with an effective protection. "... The character of a decision does not depend on its form but on its content," declared the Court. Thus the Court declined to accept the form of publication of an act as being indicative of its character. The effects of an act and its content evidently count more in the view of the Court than its form or the person of the addressee. It is sufficient for the right to appeal of an enterprise or association against a decision or recommendation," observed the Court, "that this decision or recommendation is not general, but that it has an individual character, without showing this character in relation to the appellant." In an equally extensive manner the Court has interpreted the meaning of an act itself. Thus the Court did not hesitate, for example, to consider a letter of the High Authority addressed to the Belgium Government and officially published, or a private communication to an enterprise, as an individual act subject to appeal.

Equally extensively are interpreted the formal requirement of the High Authority of the preparation and motivation of its acts. Such an interpretation helps to assure a legal administration and extends additional, indirect protection to the enterprises. In several instances the Authority must, before taking action, consult with the Consultative Committee, an expert body, or with the Council of Ministers. Although obliged to consult these bodies the Authority is free to disregard their opinions. Nonetheless because of the weighty importance of these opinions which may well prompt the Authority to modify, if not abandon, the proposed act, the Court

129. Judgement No. 8-55 (Fédération Charbonnière de Belgique c. Haute Autorité) 2 Recueil 201, 226 (1955-6); also the conclusions of the Court advocate Roemer in Affaire Nos. 7-54 et 9-54 (Groupe des Industries Sidérurgiques Luxembourg de c. Haute Autorité) id. 107, at 121-2.
130. Conclusions of the Court advocate Roemer, id. at 122.
132. Judgement No. 8-55 (Fédération Charbonnière de Belgique c. Haute Autorité) 2 Recueil 201, 224; also the conclusions of the Court advocate Lagrange id. 231, at 244-5.
134. Treaty, Arts. 19, para. 1, 53, 55(2), 56, 58(1, 3), 59(1, 3), 60(1, 2); 61, para. 1, 62, 68(2); 95, para. 1.
135. Ibid. For example Arts. 37, para. 2, 50(2), 51(1), para. 3, 53(a), 59(6), 60(1), 61, para. 1, 66(1-4), 67(2, 3), 68(5), 73, para. 2.
136. This prescribed consultation must not however be confused with the concurring vote of the Council of Ministers required for some acts of the High Authority, as for example, Arts. 50(2), 58(1), 59(5), 74(2, 3), 56, para. 2(b), 66(3). For further discussion of this question see Bebr, The European Coal and Steel Community: A Political and Legal Innovation 63 Yale L.J. 1, 22-4 (1953).
interprets this obligation extensively. "These rules of procedure are intended to guarantee that the decisions are taken with the necessary circumspection, so that these rules have to be considered as major rules and consequently the Court will have to investigate if these rules have been observed." The High Authority must motivate its acts, the extent of such a motivation is left undefined. The Court found the High Authority obliged to mention in the preamble of its decisions "... the essential elements of the factual establishments which legally justify the measure in question." In the Geitling case the Court forcefully stated that "the reason should contain considerations upon which the decision is based in order to permit a judicial review." Striking down an act for its lack of motives, the Court declared in a recent decision that "... motivation of an opinion is not only prescribed by Articles 5, 15 and 54 of the Treaty, but it constitutes an element essential, nay constitutive, of such an act. The lack of motives is such that it makes the act non-existent.

According to national administrative law which are as a rule governed by the inquisitorial principle, municipal courts may conduct ex officio examinations. The Court, in several instances, also examined ex officio matters which went beyond the charges brought. As already indicated by its Code and Rules of Procedure, the Court has inquisitorial powers which justify an ex officio examination. Fairly uniformly the Court has ex officio examined the receivability of appeal or intervention in all their essential elements. However, the Court seems to waver in its willingness to proceed beyond the charges of appeal and examine additional illegalities. In most instances the Court had to deal with grounds of illegality, particularly with a possible non-observance of major procedural require-

136. Judgement No. 6-54 (Kingdom of the Netherlands v. High Authority) 4 Official Gazette 119, 128 (1955). The official text of the judgment may be found in 1 Recueil 203, 220 (1954-5).
137. Treaty, Art. 15, para. 1.
139. Judgement No. 2-56 (Geitling v. Haute Autorité) 6 Amtsblatt 166, 177 (1957); author's translation.
141. Code, Arts. 24, 25, 28, para. 3; Rules, Chapter II, Sections 1, 2.
142. See for example Judgement No. 6-54 (Gouvernement du Royaume des Pays-Bas c. Haute Autorité) 1 Recueil 203, 219 (1954-5); No. 2-56 (Geitling c. Haute Autorité) 6 Amtsblatt 166, 176 (1957); No. 1-54 (Gouvernement de la République Française c. Haute Autorité) 1 Recueil 9, 19 (1954-55).
ments. Thus, for example, in one instance, the Court examined the observance of major procedural requirement, although the appeal charged only Treaty violation and misapplication of power. The Italian case is particularly noteworthy. During the oral proceedings the Italian Government attempted to bring a new charge of major procedural violation of the High Authority for its inadequate consultation with the Consultative Committee. Additional charges alleged after the submission of the appeal are however inadmissible according to the Statute of the Court which requires that all charges be brought already in the appeal. Unlike the opinion of the Court advocate who dismissed the charge on this ground, the Court concluded that "... this ground has to be examined ex officio, because if it were well-founded an annulment ex officio for violation of the Treaty and major violation of procedure would be justified."

This, however, did not prevent the Court from refusing in the same case to examine additional charges of major procedural violation of the High Authority for insufficiently motivating its act. This ambivalent stand is even more vividly shown in one of the later cases in which the Court refused to admit "... charges which were presented for the first time in the reply, without even being mentioned in the appeal." It is difficult, if not impossible, to reconcile these contradictory stands of the Court in situations which in their substance and nature were pretty much alike. When faced with a

145. Id. at 15.
148. Conclusions of the Court advocate Lagrange in Affaire 2-54, 1 Recueil 107, 116 (1954-55):

... il s'agirait alors là d'un moyen nouveau qui n'a pas été invoqué en temps utile. Les dispositions de l'article 22 du Protocole sur la Statut de la Cour de Justice sont formelles à cet égard: la requête, qui doit être déposée dans le délai de rigueur d'un mois, conformément à l'article 33 du Traité, doit contenir l'exposé au moins sommaire des moyens invoqués. Par ailleurs, il ne s'agit pas, selon nous, d'un moyen d'ordre public, tel que l'incompétence, qui pourrait être soulevé à tout moment et même relevé d'office par le juge.

150. Id. at 100. "Ce moyen, basé sur un vice de forme, n'a été soulevé que dans la réplique. Pour cette raison, l'ordre public n'exigeant pas un examen d'office, la Cour, d'accord avec l'Avocat général, déclare le moyen irrecevable, conformément à l'article 29, paragraphe 3 du Règlement de la Cour."
possible examination ex officio, the Court seems to rely on consideration of equity.\textsuperscript{152} Thus in most instances the Court undertook an examination ex officio in response to a charge of illegality belatedly brought which would have been otherwise inadmissible.\textsuperscript{153} Both the nature of the appeal and of the Court's jurisdiction may have some bearing on the matter as may have the gravity of a possible illegality. This and the prevailing interest in a legal administration seem to prompt the Court to examine it ex officio and set aside the strict requirement of the Statute of the Court.

\textbf{E. Restrictive Interpretation: Conflict of Community and State Powers}

A realistic consideration of political elements inherent in a conflict of competence between the Community and a Member State seems to counsel the Court to interpret the Treaty restrictively and rather in favour of the State. Such an interpretation is conditioned by several factors. First, the powers of the Community are rather an exception than a rule. Second, its specifically reserved powers are so revolutionary that it cannot be assumed that the States wished, in general, to confer more powers on the Community than explicitly provided for by the Treaty. This reserved stand as to the powers retained by the Member States is well illustrated by the strong position of the Council of Ministers in the Community's institutional structure, its powers and prescribed participation in the administration of the common market. To substantiate this general observation, a few selected examples are offered. As the original proposal did not provide for a governmental body,\textsuperscript{154} the subsequent establishment of the Council attests to the importance of the governmental powers for the operation of the Community. This is particularly well reflected in the concurring vote of the Council prescribed\textsuperscript{155} for the High Authority's acts on vital matters and even more so in its unanimous concurrence required for all acts of the High Authority, which though not provided for by the Treaty, appear necessary for the operation of the common mar-

\textsuperscript{152} However, under no circumstances may the Court undertake ex officio a review of economic facts and findings as found by the High Authority; this follows clearly from the language of the provision of Art. 33, para. 1.

\textsuperscript{153} See supra notes 144, 146.

\textsuperscript{154} L'Institut des Relations Internationales de Bruxelles, \textit{op. cit. supra} note 27, at 198.

\textsuperscript{155} Treaty requires a majority vote of the Council in following instances: Arts. 50(2), 55(2) (c), 56(1) (b), 56, para. 2, 58(1), para. 1, 58(3), 59(5), 74 para. 2, 88, para. 3, 95, para. 4, 96, para. 1. Unanimity is prescribed in Arts. 53(b), 54, para. 2, 58(1) para. 2, 58(3), 59(1), para. 1, 59(1), para. 2, 59(2), para. 1, 59(5), 59(6), para. 2, 72, para. 1. 74, para. 2, 95, paras. 1, 2, 98.
Finally, unlike the High Authority, the Council is subject to a very limited judicial control. The Council may not be challenged for a Treaty violation or for misapplication of power and it retains thus considerable freedom and independence. These examples are not intended to minimize the High Authority's supranational powers; they should merely show the role of the States in the Community's structure and the possible effect this may have on the interpretation of a conflict of competence between the Community and a Member State.

The respect of the Court for State powers is well illustrated by the Luxembourg case which has been so far the only one which dealt with this problem. In a nutshell, this case raised the question whether the charges imposed by the Luxembourg Government on all imports of solid fuel constitutes a discrimination within the meaning of Article 4(b)(c) of the Treaty. Being aware of the delicate and explosive nature of the issue—and perhaps also of the dangers of establishing an unpopular precedent encroaching upon State powers—the Court treated the exercise of State powers respectfully. First, the judgement revealed, at least implicitly, that the extent and nature of discrimination committed by an enterprise of Member State are not identical. The whole tenor of this judgement indicates a much narrower interpretation of “governmental” discrimination resulting, according to the Court's explanation, from a partial integration.

According to the Court’s restrictive interpretation this is borne out by Article 67 of the Treaty which “provides only for an intervention of the High Authority with regard to actions by a member State which have ‘appreciable’ repercussions on the conditions of competition in the coal and steel industries...” The Court openly admitted State discrimination declaring:


157. Id. art. 38.

Under the European Economic Community and Euratom the Council of Ministers wields far greater powers than the Commissions do. For this reason the acts of the Council may be challenged on all four grounds of illegality as the acts of the High Authority under the Coal and Steel Community Treaty; EEC Treaty, Art. 173; Euratom Treaty, Art. 146.


159. Id. at 64-5.

160. The Treaty itself actually distinguishes between the discriminations committed by the enterprises or by a Member State. See Arts. 60, 65, 66 and compare with Arts. 4(c), 67(3).

161. Judgement Nos. 7-54 et 9-54, 2 Recueil 55, 97 (1955-6).

162. 5 Official Gazette 190, 213 (1956).
It follows from Article 67 that any action by a member State which might have an appreciable effect on the conditions of competition in the coal and steel industries falling under the jurisdiction of the Community is not necessarily abolished or prohibited by the Treaty and therefore does not necessarily constitute a measure or practice which establishes a discrimination prohibited by Article 4(b)...

Discussing the actual case at the bar, the Court concluded that "...the prohibition of special charges does not affect the right of a member State to impose upon its subjects general charges. It is irrelevant whether the charge is imposed in the form of a tax or a duty or in the form of a compensation which has the same economic effect. ..."

III. MUNICIPAL LAW AS PART OF THE LAW OF THE COMMUNITY: ITS APPLICATION AND INTERPRETATION

In several instances the Court applies and interprets municipal law of the Member States to which the Treaty makes specific reference. Thus, for example, officials of the High Authority who are to verify informations of the enterprises on the spot have the same rights and duties as tax officials of the Member State concerned. An indemnity action of an enterprise against the Community for damages caused by an official abusing his rights will prompt the Court to interpret municipal law regulating the status of tax officials. The Court may, however, interpret municipal law most frequently when dealing with disputes arising out of public or private contracts to which the Community is a party, provided such contracts contain a clause which confers jurisdiction upon the Court. Thus the loan and guarantee agreements concluded by the High Authority with individual enterprises are almost without exception made subject to the jurisdiction of the Court.

The Community knows no law of contracts of its own. For this reason the loan agreements specifically provide that municipal law of the borrowing enterprise should govern. Judging from the principles on which the High Authority's action in the field of financing investment is based as well as from the practice of the

163. Ibid.
164. 2 Recueil 55, 95 (1955-6), author's translation.
165. For examples see supra note 51.
166. Treaty, Art. 86, para. 4.
169. Id. at 284.
High Authority, those agreements are apparently governed by private municipal law. This solution appears deceptively simple and the value of this practice should not be overestimated. Although the application of a specific municipal law is firmly settled, the question remains whether such a contract is really a private rather than a public law contract. It should not be overlooked that one of the parties to the agreement is the Community the public nature of which may hardly be questioned. Such loan agreements, it might be argued, contain necessarily certain elements of public law. The loans and their guarantees are granted to the enterprises for specific purposes after being examined and approved by the High Authority to be in accord with and in furtherance of the higher Community objectives. The conclusion of such agreements might well be considered as an exercise of public powers by the High Authority — a criterion frequently used in an attempt to distinguish between private and public law. Admitted, such a distinction is very difficult even in municipal law as is well evinced by the unsettled and wavering jurisprudence of municipal courts. The Court faces then even greater difficulties in solving this problem. Under these circumstances the only practical solution seems to be to proceed from case to case and examine the type of relation and interests involved.

Applying municipal law the Court is, at least formally, not bound to follow the jurisprudence of municipal courts. For practical and political reasons, however, the Court will most likely do so. The legal system of the Community forms, in a way, a part of municipal law; it would be unwise for the Court to interpret municipal law in a manner contrary to the jurisprudence of the highest municipal courts. It might weaken the respect which its jurisprudence must necessarily command.

IV. CONCLUSION

The present discussion of the interpretation of the Treaty by the Court of the Community cannot claim to be exhaustive. Although it discusses by far the most important aspect of the problem,
out of necessity it leaves aside the interpretation of the Treaty provisions by municipal courts of the Member States as well as the complex question arising out of the relation of the Community legal system with that of the Member States. These problems deserve to be examined in another, separate study. To avoid, however, a distorted picture which these omissions may create, the fundamentals of these problems pertinent to the present discussion will be mentioned at least briefly.

The jurisdiction of the Court is rather an exception than a rule and thus, unfortunately, it is not the only court which may interpret the Treaty. Although in no position to review the validity of acts of the High Authority or of the Council, municipal courts may also interpret the Treaty in disputes brought before them. Frequently such disputes will involve effects caused by Authority's acts within the realm of private law. Interpreting the Treaty provisions municipal courts are not obliged to refer such a question to the Court of the Community. Thus there is no guarantee of a uniform interpretation of the Treaty by municipal courts. A possibly divergent jurisprudence may not be conducive to the uniform growth of the Community law. First, there is an undeniable danger that some municipal courts might lack the necessary understanding of the unique complexities and intricacies of the Treaty—as it was already the case. Second, no neat line may be drawn between the jurisdiction of the Community and that of municipal courts. Complex problems of conflict of jurisdiction are bound to occur—yet there is no guarantee of a uniform interpretation of this knotty problem. Finally, there are possible conflicts of the Treaty provisions as well as of acts of the High Authority with municipal law of the Member States. It would be idle to pretend that these problems may be easily solved. The Treaties establishing the European Economic Community and Euratom seem to clear these uncertainties and forestall such an undesirable development inasmuch as they commit the highest municipal courts of the Member States to refer the interpretation of the Treaty provisions, which might be involved in a dispute before such a court, to the Court of the Community. This is certainly a notable improvement which should help to secure a uniform interpretation of the Treaty.

174. Conclusions of the Court advocate Lagrange in Affaire No. 1-54 (Gouvernement de la République Française c. Haute Autorité) 1 Recueil 35, 60 (1954-5). See also Krawielicki, Director of the Legal Division of the High Authority, in an address delivered in Dusseldorf on Nov. 1, 1953 especially at 14-6 (mim.).
175. Thus the judgement of the Landesgericht Stuttgart, Aug. 10, 1953 (No. 6 Q 7/53) particularly at 15 (mim.).
The Court plays an important part in the operation of the Community as well as in the judicial system of the Member States. Whatever the legal force of the Court's precedents may be, they carry a weight which the municipal courts of the Member States may find difficult to ignore. The creative interpretation of the Treaty by the Court is undoubtedly a potentially powerful force for the development of a true common law of the Community. It would be deplorable if the Court would hamper and stall this development by an application of traditional international law which in most instances is utterly out of place. The creative interpretation is the more important as the Community lacks true legislative powers. For this reason the teleological interpretation of the Court is particularly vital. Admitted, there is a deep rooted aversion of courts against legislation by interpretation. Particularly teleological interpretation may spill over the feasible limits given by the existing economic and political realities. Within these limits, however, the Court should seize every opportunity to promote by its jurisprudence the development of a Community law. Implicitly the Court is entrusted with such a mission; it would be regrettable if the Court through timidity and lack of realistic determination would fail to perform this noble mission. With the establishment of the European Economic Community and Euratom, the Court's jurisdiction is notably extended and the field for its creative interpretation considerably enlarged. Even though these Communities are legally independent organizations, partly based on different principles, and the jurisdiction of the Court differs in each case, it may be safely assumed that the jurisprudence of the Court rendered for the various Communities will mutually influence each other. And in the long run a gradual rapprochement of the various jurisprudences and ultimate fusion is bound to come.

Most important is the Court's administrative jurisdiction. Though the Court may merely annul the acts of the High Authority, this negative intervention may be powerful enough to exert some pressure on the Authority and influence its economic policy. The Court represents thus not only a creative legal force but a political power of no mean proportions as well. Its stature and power is, moreover, further enhanced by the European Economic Community and Euratom. Under these circumstances, the Court may well become a rallying point for the European idea for whose promotion the Court may wisely and boldly employ its entrusted political and legal powers.

176. EEC Treaty, Art. 177, para. 3; Euratom Treaty, Art. 150, para. 3.