THE SCHUMAN PLAN

SOVEREIGN POWERS OF THE EUROPEAN COAL AND STEEL COMMUNITY

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Perhaps the easiest way to miss the legal significance of the Schuman Plan and the Treaty to which it gave rise is to study it in terms of familiar legal concepts. Like most really historical documents, the Treaty Constituting the European Coal and Steel Community, though conditioned by the legal concepts with which its drafters were familiar, makes history primarily because it takes a step beyond those traditional concepts.

It is too early to be sure whether the new sovereignty concepts one sees in the treaty's provisions represent the beginning of a trend. A great deal depends on the interpretations which the organs created by the treaty place upon their powers. A great deal depends also on whether the six countries which have signed the treaty, faced with a new locus of sovereignty for whose existence they were responsible, decide eventually to use their influence to suppress it. At this stage, one can only try to understand the problems which gave rise to the treaty, interpret the hopes and intentions of its drafters, and leave the rest to history.

When M. Schuman first proposed his plan for a European Coal and Steel Community, he must have had well in mind Disraeli's observation that a realist is a man who insists on making the same mistakes his grandfather made. There was little that could be called realistic in the Schuman Plan. And there was a conscious effort to avoid the mistakes of previous generations of statesmen in Europe.

To any realist, Schuman's fundamental proposition, that the nations of Europe should surrender their sovereign powers over their coal and steel industries to a supra-national body, could scarcely be regarded as a serious proposal. His related economic propositions, that the participating countries should remove all national barriers which might prevent the free movement of coal and steel across their borders and that the wage scales of coal and steel workers in the member countries should move toward a common level, could only be soberly appraised as wishful thinking.

Public reaction to Schuman's unreal and presumptively unworkable proposal was largely intuitive. Some of the elements in this intuitive judgment were clear enough, however. The plan struck various responsive chords in Western Europe. It responded to the feeling of many ordinary citizens that Europe's problems would be solved if Europe could be joined in a single political state; it responded to the growing concern in the free world of the dangers which lay in the hostility still existing between France and Germany; and it provided an answer to the common fear of Western Europeans, particularly of the French, that they were spiritually dead, incapable of providing the energy and the spark of inspiration needed for a solution to Europe's problems.

The notion that the surrender of national sovereignties would be a "good thing" was also backed from many quarters by arguments of a more particular sort. To begin with, of course, there were the familiar economic arguments. There was the idea that the markets of each of the countries of Western Europe, taken one at a time, were not big enough to allow the producers of any country to assume the kind of large-scale production that is needed in some industries to bring down costs and prices. There was the conviction in countries such as Italy that the solution to their difficulties lay in the possibility of exporting more of their labor force. There was the feeling in countries such as The Netherlands and Luxembourg that larger markets meant more stability. And behind all these conclusions lay the fairly widespread conviction that if sovereign governments tried to move toward these objectives by intergovernmental agreements of the usual type, that is to say, agreements whose operations were in the hands of the sovereign governments themselves, the agreements would be modified or terminated whenever their operation pinched any of their adherents at a sensitive point.

The limitations on reducing trade barriers by means of the usual type of economic agreement among sovereign states had particular importance in the minds of government officials associated with the Schuman Plan project. To begin with, every government of a democratic state is perforce sensitive to any political pressures on which it considers that its tenure as a government depends. When the survival of a government depends upon it, governments often adopt policies which risk doing injury to the general interests of their national economies. Many European governments, for example, feel compelled by such considerations to subordinate the interests of their consumers to their national agricultural interests. Many of them allow the interests of their national maritime fleets to take precedence over the need for cheap water-borne transportation. Many of them feel compelled to bow to the interests—even to the prejudices—of their national trade unions.[1]

[1] Illustrative is the reaction of the Welsh miners and, hence, of the United Kingdom Government, to the use of Italian miners in English coal pits. Although the employment of Italian miners would be no immediate economic threat to the Welsh, both because of the chronic shortage of miners and the temporary status of the Italians in England, the Welsh resented their presence in the mining towns. This resentment may have been due partly to the fear that the Italians' presence would eventually damage the bargaining position of the Welsh miners, but it was also due to some extent to social factors. See "British Miners Bar Italians from Pits," The New York Times, May 18, 1952, p. 1.

A special manifestation of this general problem appears in the nature of the internal organization of many Western European governments. In some of these countries, the distinction between a governmental agency charged with the regulation of an industry and an industrial organization charged with governmental relations is an extremely vague one. In many cases, government officials do not merely consult with a particular industry; they are directed by it. In some cases there is a formal delegation of governmental powers, such as the power to fix prices or allocate raw materials, to the industry concerned, whereas in other cases the delegation is *de facto* rather than *de jure*. But in both situations, the main locus of power commonly lies in industry, not in government.

In circumstances of this sort, the limitations on the extent to which governments could reconcile their national interests with those of other governments were bound to be very great. From this point of view, national sovereignty was a kind of albatross hanging around the necks of spokesmen of Western European nations. This was some of the setting which conditioned Western Europe for M. Schuman's proposal.

Forerunners of the Schuman Plan

As far as these trends of thinking in Western Europe were concerned, the year 1950 did not appear greatly different from any year which had preceded it. The people of Western Europe had been concerned over the perversities of the acts of national sovereignty for a long time. What may have distinguished 1950 from earlier years and created a new sense of urgency was partly France's fear of the resurgent power and independence of Germany,[2] and partly the concern of many Europeans that the prospective end of Marshall Plan aid would eliminate one of the main cohesive forces in Western Europe. Such factors may have provided the impetus for the execution of a plan which was among the most imaginative Europe had produced in many years.

To evaluate the plan in adequate perspective, it may be worth while to consider very briefly some of the proposals which were its forerunners.

[2] Since the end of World War II France had been engaged in a succession of efforts to prevent German basic industry from expanding too rapidly. Her early efforts were typified by the so-called "level-of-industries" agreement, agreed in principle among the four occupying Powers at Potsdam, which placed specific limits upon the capacity to which certain types of German industry might expand. See Dept. of State, United States Economic Policy toward Germany (Washington, D. C., Publication 2630, European Series 15), Appendix K, pp. 133–139. This was followed by such plans as the International Authority for the Ruhr, which was charged among other things with ensuring that Germany exported a fair share of the coal mined in the Ruhr. See Dept. of State Press Release No. 1028, Dec. 28, 1948. By 1950, the wisdom of following a restrictive course with respect to German industry had become an open question, even in France. In any case, it had become clear in most quarters that none of the devices so far employed could guarantee that German basic industry would not exceed French basic industry in size and strength.

For centuries, the countries of Europe have repeatedly tried to merge their collective political and economic strength through customs unions. Though there were occasional successes, such as the 19th-century German Zollverein which paved the way to the modern German state, most of these efforts were abortive. At times, the failure of such projects could be traced to the protests of ethnic or religious groups. More often, however, the stumbling-block was economic, as one group or another in the countries concerned figured that it stood to lose from the increased competition of producers of the other country in the customs union.[3]

The Benelux union is a case in point. It was not until September, 1944, when pressure groups in both countries were in no position to make themselves heard by their governments, that officials of the Dutch and Belgian governments in exile in London were able to negotiate the Benelux Customs Union Agreement. Although the initial progress was impressive, the countries concerned have been unwilling to eliminate all the trade barriers among them, and further progress seems estopped by the kinds of forces which often tie the hands of democratic sovereign governments. For example, the two countries seem able to do little to reduce the significant differences in their prevailing wage structures; the Belgians hesitate to reduce their high wages because of labor protests, and the Dutch are afraid to raise their low wages because of the concern of Dutch exporters that this would make Dutch products non-competitive. In the same vein, the Belgians insist that agricultural products should be treated in a special category, with Belgian farmers being given special protection from their lower-cost Dutch competitors. And the Belgians and Dutch seem resigned to permitting the "key industries" of Belgium and Holland to employ an elaborate system of consultation and co-ordination, to ensure that competition in the Benelux market will not be too painful to either national group. In short, the Union is incomplete and uneasy, and it will remain so as long as it rests upon the agreement of the sovereigns concerned rather than upon a surrender of sovereignty.[4]

While these customs union proposals have gone their uncertain way, less ambitious but no less imaginative proposals for economic co-operation were making some headway. One of these was a so-called trade liberalization program among the Western European countries participating in the

[3] For an authoritative discussion of the problem, see Jacob Viner, The Customs Union Issue (New York: Carnegie Endowment for International Peace, 1950). For a description of recent customs union projects, see U.N. Dept. of Economic Affairs, Customs Unions (Lake Success, 1947).

[4] Other recent efforts at customs union have not even made as much progress as Benelux. For example, an Italian-initiated effort to achieve a Franco-Italian Customs Union, launched in 1947, soon evolved into a series of detailed discussions, industry by industry, of how the pain of increased competition might be avoided through industry agreements. Negotiations on the Union are now quiescent, with no indication that either party will soon revive them. See Viner, *op. cit.*, p. 74.

Marshall Plan. In 1950, the Organization for European Economic Co-operation (OEEC), in which these countries participated, agreed to the "progressive elimination between one another . . . of quantitative restrictions on the import of commodities . . ."[5] which had previously been imposed by most countries in order to husband their scarce foreign exchange reserves. By stages, the trade liberalization commitments of the Marshall Plan countries have been increased so that most of them are now committed to lift restrictions on goods representing 75 percent of their trade with one another.[6]

But as with customs unions, so with these less ambitious plans, the limits imposed by sovereignty have soon been felt. These limits have appeared in mounting strength as the trade liberalization program has moved forward. To meet their increasingly higher goals of trade liberalization, countries have had to expose more and more of their "sensitive" industries to the competition of foreign imports. Particularly as agricultural and fisheries products have become involved, internal political resistance to further progress on trade liberalization has mounted to proportions which in some countries have proved irresistible.

Partly in an effort to meet these mounting pressures, officials of European governments began several years ago to be attracted to the notion of what might be called "single product customs unions." Simultaneously, in various parts of Europe, the idea began to develop that the process of trade liberalization from this point forward should proceed on a product-by-product basis, that is, that all countries should remove their restrictions simultaneously on one or more agreed products, rather than on the products which each chose independently.

This kind of approach had a number of attractions. In the first place, it would arm officials with a strong argument in meeting the protests of domestic groups. If the textile manufacturers of France complained, for example, that they were being faced with ruinous competition from the United Kingdom, French officials would be in a position to reply that the complaining producers were at the same time being presented with new opportunities to sell their goods in other markets in Europe from which they had up to then been barred.

Another attraction of the single-market approach was the fact that it offered opportunity to the international negotiators to consider special arrangements for individual industries which would ease the shock of

[5] OEEC, Code of Liberalization, Paris, July, 1951, Art. 1(a). The OEEC was created in April, 1948, by the countries participating in the Marshall Plan; 17 Western European countries are full members, while the United States and Canada are associate members.

[6] For a brief account of the operations of the trade liberalization program and the related European Payments Union, see Princeton University, Survey of United States International Finance, 1951 (Princeton, 1952), pp. 239–259.

competition resulting from the elimination of previously existing trade barriers. The experts in the particular industry could appraise the disruptive effects of the proposed elimination of barriers, and could modify the general rules to ensure that the disruption was not so great as to be unbearable for any of the participating countries.

Once the "single product customs union" philosophy became well understood, it led to a great rash of schemes. At least five proposals were developed on this general approach: the Petsche, Pella, and Stikker Plans (sometimes called the PEPESTIK Plans), the French Agricultural Pool Plan, and the Dutch Mansholt Plan. Most of these plans embraced, in one form or another, the notion that trade liberalization should proceed on a product-by-product basis. Most of them made provision of one sort or another for ensuring that the producers in the countries concerned would not be exposed to too rude a shock in the form of increased competition from abroad, at least not all at once. Each looked forward hopefully to the day, with differing degrees of specificity as to when that day would have arrived, when the transitional measures for easing the pain of increased competition could be dispensed with.[7] Each presaged in greater or lesser degree M. Schuman's proposals of May 9, 1950, and the creation on August 10, 1952, by Belgium, France, Germany, Holland, Italy, and Luxembourg, of the European Coal and Steel Community.

Powers Abandoned by the Member States

Political considerations figured much more prominently in the creation of the Schuman Plan than in most of the other plans described above. Nevertheless, the same strands of thinking conditioned the form of all of these plans. The European Coal and Steel Community is organized on the principle of the single market. It recognizes the fact that the pain of shifting from national markets to common international markets is one to be shared, at least in the early stages, by all the nations concerned. But, more important still, it recognizes that arrangements of this sort cannot succeed unless the states concerned give up some of their power to shape future events in the development of the arrangements. For the purposes of this paper the last of these points—the surrender of sovereignty—is the one which needs most elaboration.

There are a number of fairly detailed descriptions in the English language of the provisions of the European Coal and Steel Community, and no particular purpose would be served by an exhaustive summarization of these provisions.[8] More to the point, perhaps, is the consideration of the

[7] For a description of each of the plans, see W. Diebold, Jr., Trade and Payments in Western Europe (New York: Harper & Bros., 1952), Part II.

[8] See, *e.g.*, "An Analysis of the Schuman Plan," Dept. of State Bulletin, Vol. 24, No. 613 (April 2, 1951), pp. 523–528; also A. Philip, The Schuman Plan, European Movement (Brussels, 1951).

way in which certain basic theses of the Community concept are developed by particular provisions.

As one reads through the provisions of the treaty setting up the Community, one thing distinguishes the treaty from the schemes which preceded it. This is the fact that the states participating in the treaty have not simply agreed on a common course of future behavior. Instead they have given up to a new entity, capable of making decisions with which the states themselves might not agree, most of their powers to control the future course of events. The distinction is fundamental to an understanding of the treaty. It is not illustrated by any single provision of the treaty, but by the cumulative effect of all the provisions taken together. This is not to say that the states have denied themselves access to the entity they have created; on the contrary, there are a great many ways in which the states can influence the new sovereign created by the treaty. Yet the distinction is unquestionably there, strong and sharp—a distinction between an agreement to follow a common course of action and an agreement giving up the power to determine that course.

The impression of a real transfer of sovereignty comes about partly because of the extent of the powers which the states have expressly abandoned and partly because of the nature and extent of the powers which the Community has expressly acquired. What powers have the states surrendered? Much of the answer is clear; some of it is not. In rough terms, the states have given up most of the rights which, if exercised, could prevent the coal and steel enterprises of the six countries from behaving as though they were contained within a single country. This means, more particularly, that the states have given up the right to impose tariffs and quantitative limitations on the imports of coal and steel from one another, and on the exports of coal and steel to one another.[9] They have given up the right to grant subsidies to, and to lay special charges on, their national coal and steel industries,[10] to set up systems favoring consumers in their own country over consumers in any of the other five countries,[11] to impose freight rates on movements of coal and steel which benefit their domestic coal and steel industries over the industries of the other five countries,[12] and to require or condone restrictive business practices on the part of their coal and steel enterprises.[13] More than that, the treaty requires the

[9] Treaty Constituting the European Coal and Steel Community, April 18, 1951 (hereafter cited as "Treaty"), Art. 4(a). The authentic French and German texts of the Treaty and related Convention are published in U. Sahm and W. Hallstein, *Der Schuman Plan* (Frankfort-am-Main, 1951), p. 23 *et seq.* Unofficial English translations appear in Convention on Relations with the Federal Republic of Germany and a Protocol to the North Atlantic Treaty, Message from the President of the United States transmitting certain agreements to the Senate, Execs. Q and R, 82d Cong., 2d Sess. (June 2, 1952), pp. 255–328; reprinted in this JOURNAL, Supp., Vol. 46 (1952), p. 107 *et seq.*

[10] Treaty, Art. 4(c).

[11] *Ibid.*, Art. 4(b).

[12] *Ibid.*

[13] *Ibid.*, Art. 4(d).

member states to guarantee that experienced coal and steel workers of any member country will be free to look for employment in any of the other five countries and that they will not be exposed to any discriminatory treatment by reason of nationality if they should take a job outside their native country.[14]

The surrender of sovereign powers goes further still. The six countries surrender the range of powers which modern capitalist states have come to exercise over their industries in time of emergency such as inflation or depression or war. The six countries no longer retain the power to fix prices,[15] to allocate coal and steel products, or to control production of coal and steel.[16] Sovereignty, therefore, is not surrendered by the six countries in niggardly fashion; it is dumped upon the shoulders of the central institutions of the European Coal and Steel Community with a passionate lack of restraint.

Yet in many ways the surrender by the six states of their control over coal and steel production and trade is sharply circumscribed. For one thing, while giving up their powers within the common market, the six countries have tried systematically and painstakingly to retain all their sovereign powers over their trade with outside countries in coal and steel. In short, they have tried for singleness in their "internal" relations and separateness in their external dealings.

This Janus-like character of the common market has called for singular ingenuity not only in the drafting of the treaty, but also in the reconciliation of the treaty's provisions with the trade relations of the six countries to the outside world.

The problem appears in its most generalized form with respect to the most-favored-nation commitments of the six member countries. Each of the six countries has a network of commitments to the other principal countries of the world, guaranteeing to those countries that their products, including their coal or steel products, will receive so-called most-favored-nation treatment when imported into the member country. It has been clear from the first that the treaty would require the breach of these obligations, since none of the six countries intends to allow the coal and steel products of outside countries to enter their territories on the same obstacle-free basis as they are compelled by the treaty to afford to one another's coal and steel products.

Most of these most-favored-nation obligations appear in a single agreement to which all six member countries and twenty-eight other countries, including the United States, are signatories—the General Agreement on Tariffs and Trade (GATT). The existence of these obligations in the GATT was very much in the minds of the treaty's drafters. In order not to present the members of the GATT with a *fait accompli* representing a breach of that agreement, the treaty provided that the Community could

[14] *Ibid.*, Art. 69. [15] Treaty, Art. 61. [16] *Ibid.*, Arts. 58, 59.

not compel the member states to breach the provisions of the GATT.[17] Instead, in a convention annexed to the treaty, the six countries agreed to take joint action to obtain a waiver from the most-favored-nation clauses of the GATT.[18]

Since the Community's powers were limited to those measures which were not inconsistent with the states' obligations in the GATT, the negotiations for the waiver were of critical importance to the Community. After considerable negotiation, the necessary waiver was obtained at the October, 1952, meeting of the contracting parties to the GATT. The waiver is drafted on the principle that the six member states, in lieu of their individual most-favored-nation commitments under the GATT as regards coal and steel products, assume the most-favored-nation obligations which a single contracting party would have if it consisted of the European territories of the member states.[19]

The waiver is especially interesting because its terms reflect the puzzlement and uncertainty of the contracting parties as to the precise nature of the sovereign with which they were dealing. Unsure whether the six member states could guarantee the future behavior of the European Coal and Steel Community, the contracting parties felt obliged to ask for undertakings regarding the future behavior of the Community, not only from the six member countries themselves, but also from the High Authority, the executive arm of the Community. These undertakings do not go as far as to make the High Authority or the Community a signatory to the GATT, but they do represent unilateral commitments by the High Authority of the kind which a sovereign nation would assume.[20]

But the GATT has not been the only problem of this sort for the fledgling

[17] Treaty, Art. 71, par. 2. The language of the article is carefully generalized, so that the GATT itself is not mentioned. The article rather refers to "international agreements . . . concerning commercial policy."

[18] Convention containing the Transitional Provisions (hereafter sited as "Convention"), Sec. 20.

[19] See GATT Doc. G/35, Nov. 7, 1952 (mimeographed), pp. 7–13.

[20] *Id.* at p. 8. Another indication of the uncertainty of the contracting parties in dealing with the new Community is the way in which the waiver treats the possibility that the Community's Court might be placed in the position of adjudicating a dispute between an institution of the Community and a member state on the question whether a particular action required by the Community of the member state would violate that state's obligations under the GATT. The contracting parties felt, quite properly, that any dispute involving this question should be decided within the GATT, not by the Community's Court. On the other hand, they could see no way of binding the Community to such a course. Accordingly, the waiver simply "notes" the representation of the six member states that, if the situation arose, ". . . any recommendation, finding or decision by the Contracting Parties with respect to such action or proposed action of the Community or the member States shall have the same force and effect as it would have if the recommendation, finding or decision were made in respect of such action or proposed action on the part of any other contracting party under the General Agreement."

Community. A variant on the GATT problem stems out of the relation of the six member countries to the Organization for European Economic Co-operation. Under their trade liberalization code, mentioned above, members of the OEEC are committed not to discriminate in the application of the import licensing restrictions which most of them apply.[21] If this rule had been applied by the six member countries to coal and steel imports, it would have meant that the countries—bound not to apply any restrictions on coal or steel imports to one another—would also have had to eliminate all import restrictions on coal and steel from third countries which were members of the OEEC. In recognition of this problem, one of the provisions of the Convention containing the Transitional Provisions records the agreement of the member states of the Community that they consider themselves a "special customs system," entitled under an exception of the OEEC trade liberalization code to discriminate in favor of one another.[22] In the end, however, the OEEC Council determined to grant the member states a formal exemption from the rules of non-discrimination found in the Code. The exemption, which is a studied adaptation of the waiver granted by the Contracting Parties to the General Agreement on Tariffs and Trade a few months earlier, gives the member states the right to abolish coal and steel import restrictions among themselves without being obliged to extend the same treatment to the coal and steel products of other OEEC countries.[23]

Still another problem exists as regards the meshing of the internal functioning of the Community with the external obligations of the states. According to the treaty, in periods of scarcity a system of allocations might be introduced to govern the distribution of coal and steel products within the Community.[24] The provisions relating to allocation systems are somewhat complex, but two features of these provisions are fairly clear. First, member states are not to have any preferred claim on production within their own national boundaries; all production, wherever located in the common market, is placed in a common pool for allocation purposes. Second, the individual member states are to decide the specific country destinations of supplies of coal and steel assigned to each of them for export outside the Community.

These provisions raise certain problems for the member states. To begin with, the states of Western Europe have agreed, partly in the OEEC and partly in the Economic Commission for Europe,[25] to discuss the allocation

21 OEEC, Code of Liberalization, Paris, July, 1951, Art. 7.

22 Convention, Sec. 21. The applicable provision of the OEEC Code is found in OEEC, Code of Liberalization, Paris, July, 1951, Art. 8.

23 See "Coal Pool Freed of Import Quotas," The New York Times, Feb. 8, 1953, p. 10.

24 Treaty, Art. 59.

25 The Economic Commission for Europe is a regional organization of the United Nations. Meeting in Geneva, it includes the principal nations of Eastern and Western Europe and the United States.

of scarce supplies of exportable coal and steel among them, and to abide by the agreed recommendations to governments which develop out of such discussions. Now that the Community exists, the needs of countries in the position of Sweden and Denmark, both of whom rely heavily on Germany for their coke supplies, would be appraised by the institutions of the Community on an entirely different basis from, say, Holland's needs. Holland's needs would be dealt with as a problem of internal allocation within the Community. Outside states like Sweden and Denmark, on the other hand, would have to satisfy their needs from the total amounts allocated by the Community to each member state for export. Such outside states might have some means of influencing the individual member states to increase their share of the coal to be exported at the expense of other outside states competing for the scarce coal or steel; they might also succeed in persuading the appropriate institutions of the Community to increase the over-all size of the export pie from which they expected to obtain a slice. But their position would be basically different in the allocations process from that of a member state of the Community.

So much for the meshing of the six-country Community with the rest of the world as regards their multilateral undertakings. More complex and more uncertain are the bilateral relations between each of these countries and their outside trading partners. Countries which maintain import and export licensing systems commonly enter into bilateral agreements with other countries, in which each of the trading partners undertakes to license specified quantities of products for import or export. Despite the efforts of the six countries to have their relations outside the common market unaffected by the existence of the common market, its existence is bound to affect profoundly the way in which coal and steel will figure in such future bilateral relationships. It is not easy to generalize on the exact nature of these effects. But a few points are clear.

To begin with, an import license for coal or steel issued by any one of the six countries in practice is likely to represent a ticket of admission to the markets of all six. Conversely, an export license issued by any one of the six countries will probably provide an exit point for coal or steel acquired anywhere in the common market. The implications of these facts are rather devious. In periods of shortage, for instance, an export license issued by any of the six countries would seem to be a more valuable document than if the single market did not exist. Yet this conclusion has to be modified by the fact that all six countries would be issuing export licenses. Moreover, none of them would be in a position to help delivery to any outside country by preventing the movements of its coal and steel supplies to other parts of the common market. In short, the hunting license would admit the hunter to broader preserves with more abundant game, but he would encounter more hunters and he would have to conjure with the fact that the game could move more freely.[26] The treaty foresees the possibility that these new conditions could create disturbing and unanticipated results. Accordingly, the Community is empowered to require a member state to modify any of its bilateral commitments if they are "interfering with the application" of the treaty.[27] It is difficult to say exactly where all this would leave a member state as regards its freedom of action in bilateral agreements.

But the reconciliation of the Community's powers within the common market with the member states' powers over their external relations with outside states, difficult though it may be, is not so difficult as a host of other questions of reconciliation between the Community's powers and the states' sovereign powers.

A modern state can influence its internal economic conditions through a great range of devices. It can inflate prices or prevent prices from rising through various monetary and fiscal measures; it can influence the cost of labor through laws regarding collective bargaining or through laws on minimum working conditions; it can encourage or deter investment by its tax provisions on the treatment of capital gains and business income. These devices, so long as they are in the hands of the states, can influence their coal and steel industries and can affect the relation of their coal and steel industries to those of their neighbors, just as profoundly as measures applied specifically to the coal and steel industries alone.

The problem of how to relieve a modern state of control over one or two of its basic industries without impairing the sovereignty of the state in other fields as well was one which gave the drafters of the European Coal and Steel Community Treaty a great deal of trouble. If France devalues her currency, for example, how will the German, Italian and Benelux industries react to the upheaval in France's steel and coal prices, while yet conserving intact the concept of the single market? There is no real answer to the question short of drastic proposals for still further integration of the economies of the six countries. The drafters of the treaty produced the best kind of interim response that could be devised to deal with the problem; they gave the Community certain generalized, albeit limited, powers to offset the effects of the acts of member states which might create a "serious disequilibrium" in the single market, and left it to the Community to figure out how such powers might be used.[28] Accordingly, if the action of a state has harmful effects on its coal and steel industries, the Community can authorize the state to assist the industries

26 The principal exception to this generalization would arise in the circumstances mentioned earlier in the text, in which, because of the existence of extreme shortage, a system of allocation was introduced in the common market. Such a system would normally result in a specified amount of coal or steel being earmarked for export by each member country. Treaty, Arts. 58 and 59.

27 Treaty, Art. 75, par. 2.

28 Treaty, Art. 67.

in order to offset the harm. If the action of a state harms another state's industries, the offending state must modify its action.

In these provisions lies the most amorphous portion of the Community's structure. To what extent will it be compelled to intrude upon and try to inhibit the acts of states which are of general application in their respective economies, in order to preserve the single-market concept for coal and steel? And how vigorously will the states resist this intrusion on their sovereignty?

Powers Acquired by the Community

So far, what we have stressed is the powers which the states have surrendered to the European Coal and Steel Community. To understand the nature of the Community, it is important to consider not only the powers which have been abandoned by the states but also the powers the Community has expressly acquired.

There are two points which need considering under this general heading. The first of these is whether the Community in its operations deals directly with the industries of the six member states, or whether it deals through the states with their respective iron and steel industries. The question is important not only because it may determine the eventual effectiveness of the Community's institutions, but also as an indication of the concept of the Community which was in the minds of the treaty's drafters.

The answer to the question is fairly clear. For the most part, the Community's institutions deal directly with the individuals and enterprises concerned. While we propose to discuss some of the Community's powers at more length below, it may be useful to cite some of them at this point to illustrate the extent to which the Community's operations are conducted directly with nationals of the member states. To begin with, the High Authority may, if it wishes, consult not only governments but also "the various interested parties (enterprises, workers, consumers and dealers)."[29] In certain prescribed circumstances, the High Authority may impose fines and penalties directly on enterprises;[30] it may levy taxes on producers;[31] it may make loans directly to enterprises;[32] it may fix production quotas for individual enterprises;[33] it may require the dissolution of specific restrictive contracts among enterprises[34] and prevent certain objectionable types of mergers by individual enterprises;[35] and so forth. Conversely, enterprises, workers, consumers and dealers "may present any suggestions or observations to the High Authority on questions which concern them."[36] Moreover, individual enterprises may appeal to

29 Treaty, Art. 46, par. 1.

30 Treaty, Art. 47, par. 3; Art. 54, par. 6; Art. 64; Art. 65, Sec. 5; Art. 66, Sec. 6.

31 Treaty, Art. 49.

32 Treaty, Art. 54, par. 1.

33 Treaty, Art. 58, Sec. 2.

34 Treaty, Art. 65, Sec. 5.

35 Treaty, Art. 66, Sec. 1.

36 Treaty, Art. 46, par. 2.

the Community's Court from decisions of the High Authority which adversely affect them.[37] In none of these cases is the sponsorship or intervention of the member states necessary.

The fact that the Community may apply its powers without the intervening buffer of the governments of the member states heightens the importance of the second general question: What is the general animus with which the Community is expected to administer these powers? This is another way of raising the issue whether the spirit of the Community is that of a "free-enterprise" state such as the United States or Canada, or a government-regulated state such as the United Kingdom and Norway during the latter 1940's, or a state regulated by private industry such as Germany or Japan in the early 1930's.[38] The answer to the question is not easy. There are provisions in the treaty which seem to support the hopes of any free trader or any anti-cartelist, and other provisions which seem to confirm the darkest suspicions. Nevertheless, there are a number of strong indications of the animus which governed the treaty's drafters.

The guiding rule of the Community, according to the treaty, will be to "assure the establishment, the maintenance and the observance of normal conditions of competition and take direct action with respect to production and the operation of the market only when circumstances make it absolutely necessary." And the Community is to follow this general course "with as little administrative machinery as possible and in close cooperation with the interested parties." [39]

But this is preambulatory and hortatory. The first real test is whether the substantive provisions of the treaty bear out the preamble. The treaty survives this test rather well. To begin with, the treaty strikes out vigorously against control of the market through monopoly and restrictive business practices. In a series of extraordinary articles, the treaty declares price-fixing agreements, agreements to restrict production or investment, and agreements to allocate markets to be illegal *per se*.[40] This is not the doctrine that "bad" cartels are illegal and "good" cartels desirable,[41] with which students of European cartel legislation are familiar; it is much more nearly the doctrine of the American Sherman Act.

Inevitably, there are exceptions to this rule in the treaty. Permission may be extended by the Community to permit the formation of joint sales agencies and certain other joint activities among enterprises, when the arrangements are "not susceptible of giving the interested enterprises the

[37] Treaty, Art. 33, par. 3; Art. 36, par. 3.

[38] These illustrations, of course, are over-easy generalizations. None of these states is a pure illustration of the concept for which it stands.

[39] Treaty, Art. 5.

[40] Treaty, Art. 65, par. 1.

[41] See, *e.g.*, Foreign Legislation Concerning Monopoly and Cartel Practices, Report of Dept. of State to Subcommittee on Monopoly of Senate Small Business Committee, Subcommittee Print No. 5, 82d Cong., 2d Sess. (July 9, 1952), pp. 5–139, *passim*.

power to influence prices, or to control or limit production or marketing of an appreciable part of the products in question within the common market." Again, this is not the doctrine of European cartel laws but is more nearly analogous—though in some respects different from—the "rule of reason" developed by the American courts in the application of the Sherman Act.

The anti-monopoly provisions of the treaty, as distinguished from its anti-cartel provisions, go considerably further than any provisions of general applicability in American law.[42] Mergers, consolidations, stock acquisitions, or any other measures which might bring about a concentration of control of enterprises in the single market are subject to the Community's prior authorization; and authorization will be granted only if the interested parties will not thereby acquire the sort of power which is outlawed in the provisions regarding cartel agreements. Here again, certain limited exceptions are permitted, but none which significantly impair the general principle.[43]

This, in brief, is the pattern which the treaty sets down for preventing cartels. As long as men administer laws, the intent of the law can become perverted in its application. But the intent, at least, is clear enough.

Next for consideration are the regulatory powers which enable the Community to impose controls directly on enterprises. Here, one comes away with rather a mixed impression. To begin with, the Community does have a substantial hand in influencing the pattern of new investment in the Community. Its power to make loans or extend guaranties to needy enterprises is considerable in itself.[44] In addition, the Community may offer and publish advice on the wisdom of projected investments. Finally, while it cannot prevent an enterprise from investing "its own funds" (presumably retained earnings and depreciation allowances) in any way that the enterprise sees fit, it can prevent the enterprise from borrowing money or selling added shares for the purpose. The prohibition cannot be imposed capriciously; it can only be imposed on the grounds that the projected installations are so uneconomic that eventually they would require some form of direct or indirect assistance to remain solvent. But the power is nevertheless a very formidable one.

[42] Analogous provisions in American law are found in the Public Utility Holding Company Act of 1935, relating to holding companies and their subsidiaries, but these are not of general applicability. 49 Stat. 803, 15 U.S.C. 79 *et seq.* The only rules of general applicability relating to mergers, consolidations and stock acquisitions are found in Sec. 7 of the Clayton Act, 38 Stat. 731, amended by Act of Dec. 29, 1950, 64 Stat. 725, codified in amended form in 15 U.S.C. (1946, Supp. V) 18. But this provision is less sweeping than the provisions in the treaty.

[43] Treaty, Art. 66. The reasons for these provisions are to be found only partly in the drafters' adherence to competition as an economic way of life. More important, perhaps, was the concern of the drafters that cartels, if permitted to develop, might become the real political power of the Community, and might constitute a challenge to the Community's sovereignty.

[44] Treaty, Art. 54.

The Community can also take steps to intervene more directly in the activities of the coal and steel industries when confronted with various types of crises, in much the same way as sovereign states typically have done in the past. "In case of a decline in demand," when the Community appears to be "faced with a period of manifest crisis," the Community may impose a system of production quotas.[45] At the other extreme, when "faced with a serious shortage" of coal or steel products, the Community may impose a system of coal or steel allocations.[46] Here we have all the mechanisms of the *"dirigiste"* state. No more so, however, than the mechanisms which most modern states, including the United States under the American Constitution, have available if they choose to bring them into play. The real test is not whether the mechanisms exist, for their complete absence would be an anachronism in any modern state. The real test is whether the Community will let market forces operate in the usual situation, or whether it will regard itself perpetually as being in periods of "manifest crisis" and "serious shortage."

One final area which deserves some comment is the powers of the Community as regards the control of prices. The normal rule in this field is that the Community should control pricing *practices*, but not prices.[47] The distinction is a critical one. The Community can prohibit a firm from discriminating as between buyers of different nationality but cannot dictate the firm's non-discriminatory price. It can object to the location of the basing point from which a firm quotes an f.o.b. price but it cannot object to the f.o.b. price itself.[48] In certain special situations, however, the Community can also set maximum prices, and, when confronted with a "manifest crisis," can set minimum prices as well.[49] Here again, the existence of the power in a sovereign with responsibilities as broad as those of the European Coal and Steel Community is hardly surprising. What remains to be seen is whether and to what extent the sovereign will apply the power.

Community Institutions

We have spoken rather loosely up to this point of various powers being "vested" in the European Coal and Steel Community. But the vesting of power is a flexible concept. The significant questions are: How firmly vested? And vested in what institution of the Community?

To answer these questions, we must first of all identify each of the institutions of the Community. Of first importance is the High Authority, the executive arm of the Community. In general, the operative powers of the Community rest in this body. Eight of its nine members are desig-

45 *Ibid.*, Art. 58.

46 *Ibid.*, Art. 59.

47 Treaty, Art. 60.

48 The standards governing the Community's rules on pricing practices are set out in some detail in the treaty. They are novel standards, intriguing to the economist and the businessman.

49 Treaty, Art. 61.

nated by agreement among the member states; the eight in turn elect the ninth. The members, though nationals of member states, neither solicit nor accept instructions from these states.[50] A member of the Authority, appointed for six years, could conceivably be reappointed notwithstanding the objections of one of the states.[51]

Having given extensive executive powers to the High Authority, the treaty sets up a companion body to curb the exercise of these powers. This body, the Council of Ministers, is made up of Ministers representing the governments of each of the six member states. In the original Schuman Plan proposals, as made by M. Schuman on May 9, 1950, the existence of a Council of Ministers had not been envisioned. A cynical way of describing the reason for its creation is that it was a concession to those participating states which were intent on preventing the new Community from having any real independence from its creators. But the cynicism would be only partly justified. In the development of the treaty, the problem of meshing the sovereign acts of the Community as regards coal and steel with the sovereign acts of the six countries as regards the rest of their respective communities, loomed larger and larger as a practical problem of government. The creation of the Council of Ministers was one of the devices for dealing with the problem. If it had not existed in the treaty, it would have had to be created later on.

The functions of the Council of Ministers are partly executive and partly advisory. In sensitive fields in which the decisions of the Community might seriously jeopardize the economies of the six countries concerned, the Council of Ministers commonly occupies a decisive rôle in the decision-making processes of the Community.[52] For example, the Council must concur in any action by the High Authority extending certain kinds of loans or guarantees for the purpose of improving steel production or distribution;[53] the Council may compel the High Authority to establish a system of production quotas to deal with a "manifest crisis" brought about by declining demand [54] or to institute allocations in a period of shortage;[55] the Council must concur in decisions, or may compel action, to place limitations on exports to third countries.[56] But, taken by and large, although the powers of the Council limit the High Authority's freedom of action in significant respects, they still leave a great range of executive decisions within the unchallenged province of the High Authority.

The third institution in the quadrumvirate of institutions is the Court. In many ways, this is the most remarkable of all the Community's institu-

50 *Ibid.*, Art. 9.

51 Treaty, Art. 10. The article is rather complex, permitting a veto by a government in some cases but curbing its excessive use.

52 The Council acts sometimes by simple majority vote, sometimes by other stated majorities, and sometimes by unanimous vote, depending on the nature of the issue.

53 Treaty, Art. 54, par. 2.

54 *Ibid.*, Art. 58, Sec. 1.

55 *Ibid.*, Art. 59, Secs. 1 and 2.

56 *Ibid.*, Art. 59, Sec. 5.

tions. Appeals from the acts of any of these institutions are heard and decided by the Court. On the other hand, the Court's review of actions by the High Authority is normally confined to questions of law and does not embrace conclusions of fact.[57] It is important to observe that in some circumstances, appeals may be taken directly by individual enterprises. In other situations, appeals are taken by the states and, in still others, by an institution of the Community, protesting against the acts of another institution.[58] When an issue before any national tribunal of the six member states involves the validity of acts of the High Authority, the issue must be certified to the Court for a ruling.[59] The Court may also accept jurisdiction in connection with various types of dispute involving the treaty in one way or another, such as disputes between the member states "related to the purpose of the present Treaty."[60]

The fourth institution is the Common Assembly. The Assembly, which is drawn either from national parliaments or by direct election in the member states, is the final element in the elaborate system of checks and balances among the institutions of the Community. Its principal power is the right, by a two-thirds vote, to reject the annual report of the High Authority and thereby to compel its members to resign.

Taken as a whole, these institutions are virtually self-contained; that is to say, they operate without resort to the governments of the member states, except in the area in which the Council of Ministers exercises a decisive voice. This is the same as to say that the states have subordinated or surrendered their right to shape the future conduct of the Community to a degree which distinguishes the Community sharply from ordinary international agreements and organizations. And the duration of the treaty —a period of 50 years—re-enforces this general conclusion.[61]

The conception of the creation of a new sovereign force is also emphasized by the provisions of the treaty which describe the status of the Community's officials and the force of the Community's decisions in the member states. Officials of the High Authority collecting information in the territories of the member states have the same rights and powers as officials of the state's tax service.[62] Taxes levied or fines imposed by the High Authority upon enterprises in the various states, in accordance with the High Authority's various powers to tax and fine, are collected by a writ of execution which the state is required to issue whenever it receives a decision to that effect from the High Authority;[63] only the Court of the Community can stay the execution of such a decision. Decisions of the Court are enforced in a like manner.[64]

57 Treaty, Art. 33, par. 1.

58 *Ibid.*, Arts. 33, 35, 36, 37, and 38.

59 *Ibid.*, Art. 41.

60 *Ibid.*, Art. 89.

61 *Ibid.*, Art. 97.

62 *Ibid.*, Art. 86, par. 4.

63 *Ibid.*, Art. 92.

64 *Ibid.*, Art. 44.

A final point bearing on the sovereignty of the Community has to do with the method of amending the treaty. In this sphere, the impression left by the provisions of the treaty is less conclusive. Two processes appear to be available for amending the treaty. One of these is quite extraordinary, because, technically at least, it does not involve ratification by the signatory states. This process is available only for altering the powers of the High Authority,[65] at the end of an initial period of five years. The treaty recognizes the special importance of any amendments of this character by requiring that such amendments may be made with the approval of certain stated majorities of each of the institutions making up the Community, including the Council of Ministers, five of whom must approve, and the High Authority itself.

In addition to this very special provision, another provision exists which deals with the process of amending any part of the treaty.[66] This article is very much like the analogous provision of any international agreement or federal constitution. It simply provides, in effect, that at the end of the initial transitional period of five years, if a two-thirds majority of the representatives of the signatory states want a convention called for the consideration of amendments, such a convention of governmental representatives may be called. Amendments adopted at the convention would have to be ratified by all signatory states before they were effective.

Trends for the Future

What we have tried to do in this paper is not to describe the Treaty Constituting the European Coal and Steel Community in all its aspects, but simply to explore those provisions which seem most germane to a judgment on the nature of the transfer of sovereignty involved in the arrangement. A great many aspects of the treaty remain for further exploration; the Convention containing the Transitional Provisions, for example, which was the subject of perhaps the most heated debates in the formulation of the European Coal and Steel Community, has only received the barest mention. Yet enough has been said of the treaty and the related convention to provide an indication of the principal problems of sovereignty which have been surmounted and of the major problems of sovereignty which lie ahead in the operation of the Community.

The sovereignty of the Community is limited in two ways; one is a limitation of extensiveness, the other a limitation of intensiveness. The limitation on the extensiveness of the sovereignty of the Community is

[65] Treaty, Art. 95. The article refers to ". . . an adaptation of the rules concerning the exercise by the High Authority of the powers which are conferred upon it . . ." The reference to "rules" is not unambiguous, but the ambiguity is principally the result of translation of the word "règles," which has a broader meaning than the word "rules" and is meant here to include the applicable treaty provisions.

[66] *Ibid.*, Art. 96.

briefly this: The Community is designed to be sovereign as to the production and distribution of coal and steel products within the boundaries of the six member countries; but it is to have no sovereign rights as regards dealings outside these boundaries. That is the theory, at least. The application of the theory, as we have seen, is somewhat less than perfect. And there is a possibility that the compulsion of events may ultimately impair the application of the theory further. The need to deal efficiently with the outside world in coal and steel matters and the need for external trade to follow a course which is not inconsistent with the concept of a common internal market may, in the end, break down the neat theoretical dichotomy which the treaty's drafters sought.

The limitation of intensiveness can be summed up with the statement that the treaty's drafters have tried to confine the sovereign powers of the Community to those activities which have the most direct bearing on coal and steel production and distribution. But indirect powers which could profoundly affect the operation of the Community are only imperfectly controlled. In this arrangement, eventual conflicts are certain. The national interests of the member states and the demands of national labor or capital or consumer groups from time to time will force these states to consider taking measures inimical to the common market concept. When that happens—and it will surely happen early in the life of the Community—the states will be confronted with the choice either of integrating their respective economies further, or of trying to modify the steps which they have already taken. This is the decision which will determine whether the Schuman Plan will prove to be the nucleus for a federated Europe or an experiment without long-term historical significance.