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Jurisdiction and Procedure of the Court of Justice of the European Communities

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NOTES

JURISDICTION AND PROCEDURE OF THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

I. INTRODUCTION

The Court of Justice of the European Communities is the final adjudicatory body for questions arising under the three Community treaties[1]—the European Economic Community Treaty (EEC), the European Coal and Steel Community Treaty (ECSC), and the European Atomic Energy Community Treaty (EURATOM). Since none of the treaties confers upon the Court the power to adjudicate questions involving the domestic laws of Member States,[2] the Court's jurisdiction extends only to interpretation of Community law.[3] Basically, the jurisdiction of the Court can be divided into the following subject areas: actions against Member States, actions against Community institutions, claims for damages against the Community, and "preliminary rulings" on treaty questions referred to the Court by national courts of Member States.[4]

1. Treaty Establishing the European Coal and Steel Community (ECSC), April 18, 1951; Treaty Establishing the European Economic Community (EEC), March 25, 1957; Treaty Establishing the European Atomic Energy Community (EURATOM), March 25, 1957. The authoritiative English texts of the treaties may be found in TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES (Office for Official Publications of the European Communities, 1973). Unofficial English texts may be found in *United Nations Treaty Series* as follows: ECSC, 261 U.N.T.S. 140 (1957); EEC, 298 U.N.T.S. 3 (1958); and EURATOM, 298 U.N.T.S. 267 (1958).

2. Freidrich Stork & Cie v. High Authority, 5 Recueil de la Jurisprudence de la Cour 63 (Cour de Justice de la Communauté Européenne (1958)) [hereinafter cited as Recueil], *as cited in* E. WALL, THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES 58 (1966) [hereinafter cited as WALL].

3. Formerly, each of the three treaties provided for their own governance through separate institutions. The Merger Treaty joined these institutions, creating, at the same time a single Court of Justice. However, the Court still derives its jurisdiction from the separate treaties. Treaty Establishing a Single Council and a Single Commission of the European Communities (Merger Treaty), April 8, 1965, [1967] Official Journal of the European Communities 2. The authoritative English text may be found in TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES 745 (Office for Official Publications of the European Communities, 1973).

4. *See* 1 A. CAMPBELL, COMMON MARKET LAW 357 (1969) [hereinafter cited as

This paper will deal with the first three areas of the Court's jurisdiction under the EEC Treaty, as well as the procedure of the Court. These areas of jurisdiction emphasize Community law as derived from essentially Community institutions. Questions arising under the Court's referral jurisdiction will not be discussed. Recent decisions will be treated in detail under the relevant topic headings.

II. ACTIONS AGAINST MEMBER STATES

A. *Actions by Community Institutions—Article 169*

EEC article 169[5] empowers the Commission of the European Communities to bring Member States before the Court for treaty violations:

> If the Commission considers that a Member State has failed to fulfill an obligation under this Treaty, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.
>
> If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice.

ECSC article 88, differs subtly in application. It provides that the High Authority of the Coal and Steel Community[6] may take note, in a reasoned "opinion", of the failure of a Member State to meet its obligations under the ECSC Treaty. The difference in wording between "decision" in the ECSC and "opinion" in the EEC is significant, for EEC article 173 specifically prohibits judicial annulment of "opinions", while ECSC article 33 granted the Court power to annul "decisions" of the High Authority. It should be noted that an opinion of the Commission standing alone has no legally binding force, unlike a decision, which is considered binding.[7] Nevertheless, the distinction between opinions and decisions may not be important as a practical matter, since Member State compliance is no more assured under the one than the other. The single most important reason for Member State compliance is that

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CAMPBELL]; D. VALENTINE, THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES 9 (1965) [hereinafter cited as VALENTINE].

5. EURATOM article 141 is identical to EEC article 169.

6. The High Authority of the ECSC has since been merged into the Commission of the European Communities by operation of article 9 of the Merger Treaty, *supra* note 3.

7. *See* EEC art. 189.

failure to comply could ultimately result in a breakdown of the treaty and the concomitant loss of the benefits of an economic community. This motivation for compliance will be present whether or not an opinion is denominated binding.

If a Member State failes to comply with an opinion of the Commission issued under EEC article 169, the Commission may refer the matter to the Court to have this failure judicially declared.[8] But declaring the Member State in violation of the treaty is all the Court may do—the Court has no specific power of enforcement under this article. For example, if a law of a Member State conflicts with the Commission's opinion, the Court may not annul that law, but may only declare the Member State to be in violation of the treaty.[9] Moreover, article 171 makes it incumbent on the states to conform to the judgment of the Court. Thus, only when a Member State has failed to comply with an opinion, and that failure has been referred by the Commission to the Court, may a State be adjudged in violation of the treaty under article 169. And, the Commission may appeal to the Court for this determination even though the Member State has complied with the opinion of the Commission prior to the appeal but subsequent to the prescribed time limits.[10] If, on the other hand, modifying Community legislation intervenes in the period between the opinion and the application to the Court, the Commission might be required to set in motion an entirely new article 169 action.[11]

B. *Recent Decisions under Article 169*

1. *Commission v. Italy.*[12]—Here, the Court was confronted with the question of substantial compliance to an opinion issued by the

8. EEC art. 171. The Court apparently has the power to declare a Member State wholly or partially in violation of the treaty. *See* submissions of Advocate-General Lagrange in *Germany v. High Authority*, 6 Recueil 145 (1959), *as cited in* 1 CAMPBELL, *supra* note 4, at 407.

9. Humblet v. Belgium, 6 Recueil 1145 (1960), *as cited in* 1 CAMPBELL, *supra* note 4, at 407.

10. "[A]lthough admitting that the Italian Government has ultimately respected its obligations, although after the expiration of the aforesaid time, the Commission still retains an interest in obtaining a judgment at law as to whether the failure has or has not occurred." Commission v. Italy, 7 Recueil 633, 653, 2 CCH COMM. MKT. REP. ¶ 8001 at 7110 (1961).

11. Commission v. Italy, 16 Recueil 111, 2 CCH COMM. MKT. REP. ¶ 8086, 9 Comm. Mkt. L.R. 97 (1970).

12. [1973] European Court Reports 101 [hereinafter cited as E.C.R.], 2 CCH COMM. MKT. REP. ¶ 8201 (1973).

Commission, in which it was determined that Italy had not complied with a regulation requiring the payment of premiums for slaughtering dairy cows and for withholding milk from the market. Subsequent to the issuance of the opinion, the Italian Minister of Agriculture implemented procedures for making the payments, pending passage of legislation by the Italian Parliament. No payments had been made, however, by the expiration of the prescribed time for compliance. The Italian Government submitted that Court action was neither necessary nor warranted since the Ministry had already promulgated procedures for paying the premiums. The Court held that the object of the Commission's action was to enforce the payment of premiums required by the regulation: "The object of an action under Article 169 is established by the Commission's reasoned opinion, and even when the default has been remedied subsequently to the time limit prescribed by paragraph 2 of the same article, pursuit of the action still has an object."[13]

In this case the object was to force payment of the premiums rather than forcing the passage of the legislation. It is therefore probable that Italy would have been declared in violation for nonpayment even if the necessary legislation had been passed within the time limits.

2. *Commission v. France.*[14]—The Commission sought to have France declared in violation of the EEC Treaty under article 169 for failure to comply with an opinion seeking the repeal of a French maritime law. The law allegedly conflicted with provisions of the EEC Treaty relating to the free movement of workers. Before the Court, France questioned whether the Commission could bring the action since the French law did not discriminate against nationals of other Member States. The Court held that the Commission was not obligated to demonstrate "legal interest" when applying to the Court under article 169:

> The Commission, in the exercise of the powers which it has under Articles 155 and 169 of the EEC Treaty, does not have to show the existence of a legal interest, since, in the general interest of the Community, its function is to ensure that the provisions of the Treaty are applied by the Member States and to note the existence of any failure to fulfill the obligations deriving therefrom, with a view to bringing it to an end.[15]

13. [1973] E.C.R. at 112, 2 CCH COMM. MKT. REP. ¶ 8201 at 8704.
14. [1974] E.C.R. 359, 2 CCH COMM. MKT. REP. ¶ 8270 (1974).
15. [1974] E.C.R. at 369, 2 CCH COMM. MKT. REP. ¶ 8270 at 9191-3.

3. *Commission v. Italy.*[16]—The Commission charged that Italy had not complied with a regulation requiring the payment of premiums for the grubbing of fruit trees. Italy submitted that political circumstances had made it impossible to carry out the regulation since the legislature had been paralyzed by the crisis of late 1971 and early 1972. The Court, in holding for the Commission, stated: "A Member State cannot plead the provisions or practices of its internal order in order to justify its failure to observe obligations and time-limits arising from Community Regulations."[17]

These decisions reflect the "Community building" purpose of the Court under EEC article 169. Not only does the Court exist to pass on the legality of acts of Member States, but it also exists to ensure that the integrity of the European Community is preserved. The Court is charged, under EEC article 164, with ensuring the respect for law within the Community. So while a Member State may have ultimately complied with the treaty in substance, the Court may nonetheless declare a violation for failure to comply in form in order to preserve respect for opinions of the Commission.

C. *Actions by Member States—Article 170*

EEC article 170[18] permits Member States to air complaints against other Member States for treaty violations. The purpose of this article is to provide the Member States with access to the Court similar to that allowed the Commission under EEC article 169. Under article 170, a Member State must first refer the complaint to the Commission, which is charged with issuing an opinion. If the Commission does not issue such an opinion within three months from the date the complaint was filed, the Member State may appeal to the Court. This gives a Member State the power to set in moton proceedings comparable to those under article 169; however, the process by which the Commission issues its opinion is significantly different under article 170. Article 169 merely provides a Member State "the opportunity to submit its observation" before the Commission issues its opinion. Under article 170, by comparison, the Commission opinion can follow only after an adversary procedure in which the claimant Member State and the respondent Member State are "given the opportunity to submit [their respective cases and] observations on the other party's case

16. [1973] E.C.R. 161, 2 CCH COMM. MKT. REP. ¶ 8207 (1973).
17. [1973] E.C.R. at 172, 2 CCH COMM. MKT. REP. ¶ 8207 at 8780.
18. EURATOM article 142 is identical to EEC article 170.

both orally and in writing." It has been suggested that this interjects the element of legal arbitration into the proceedings before the Commission.[19]

This adversary procedure can be dispensed with in certain circumstances. First, the Commission or a Member State may appeal directly to the Court to enforce a Commission decision requiring a Member State to abolish or modify grants of financial aid from state resources, when the grants are deemed to give a competitive advantage to private beneficiaries.[20] Secondly, when the Commission or any Member State feels that another Member State has distorted Community competition by the use of powers granted under EEC article 233[21] or EEC article 224,[22] then a direct appeal to the Court may be allowed.[23] Thirdly, the EURATOM Commission or any Member State may appeal directly to the Court on the grounds that another Member State has failed to carry out a directive concerning levels of radioactivity in the air.[24]

Despite the elaborate procedures set forth in EEC article 170 for Member State initiation of action against other Member States, it appears that no case has yet been brought under article 170. Rather than subject Community relations to the strain of citing fellow Member States for treaty violations, Member States have preferred to bring irregularities to the attention of the Commission for action under article 169.

III. Actions Against Community Institutions

A. *Annulment of Administrative Acts—Article 173*

1. *Acts Subject to Annulment.*—The Court has power under certain circumstances to annul administrative acts of institutions of the Community.[25] EEC article 173 states "[t]he Court of Justice shall review the legality of acts of the Council and the Com-

19. Valentine, *supra* note 4, at 279.

20. EEC art. 93 provides in part: "If the State concerned does not comply with this decision within the prescribed time, the Commission or any other interested State may, in derogation from the provisions of Articles 169 and 170, refer the matter to the Court of Justice direct [*sic*]."

21. This article protects Member States from the disclosure of information vital to national security and empowers them to enact measures to prevent such disclosures.

22. This article contemplates procedures under which a Member State may act unilaterally in times of crisis.

23. EEC art. 225.

24. EURATOM art. 38.

25. *See* EEC art. 173; EURATOM art. 146 (identical to EEC art. 173).

mission other than recommendations or opinions." Thus, under the article 189 definition of "acts", there are only three that may be annulled—regulations, decisions, and directives.

> Regulations resemble American Statutes inasmuch as they are binding on and directly applicable to private parties in the Member States. On the other hand, a decision binds only the addressee named therein. Finally, directives are addressed and are binding on Member States only; they leave form and means for the achievement of the desired result to the agencies of the Member States.[26]

The principal distinction between recommendations and opinions on the one hand, and regulations, decisions, and directives on the other, is that the latter "acts" have binding force while the former do not.[27] For this reason, the Court has not limited itself to the review of regulations, decisions, or directives to the exclusion of other binding acts. The test to determine which "acts" are cognizable under article 173 is whether the "provisions adopted by the institutions . . . are intended to produce a legal effect."[28] Under this test Council deliberations on the approach the EEC would take toward the European Agreement on Working Conditions in Road Transport were found to be acts cognizable under article 173. "[T]he deliberation . . . could not have been a mere expression or affirmation of a voluntary coordination, but was designed to define a course of conduct that was mandatory for the institutions as well as for the Member States . . . ."[29]

2. *Proper Plaintiffs for Annulment Action.*—Under article 173, an individual may bring an action for annulment "against a decision addressed to that person or against a decision which, although . . . addressed to another person, is of direct and individual concern to the former."[30] The Court clarified the meaning of "direct and individual concern" in *S.A. Alcan Aluminum Raeren v. Commission.*[31] In that case the Commission issued a decision di-

26. W. FELD, THE COURT OF THE EUROPEAN COMMUNITIES: NEW DIMENSIONS IN INTERNATIONAL ADJUDICATION 54 n.2 (1964).

27. *See* EEC art. 189; Confédération Nationale des Producteurs de Fruits et Légumes v. Council, 8 Recueil 901, 2 CCH COMM. MKT. REP. ¶ 8005, 2 Comm. Mkt. L.R. 160 (1962).

28. Commission v. Council, 17 Recueil 263, 2 CCH COMM. MKT. REP. ¶ 8134 at 7526, 10 Comm. Mkt. L.R. 335, 357 (1971).

29. 2 CCH COMM. MKT. REP. ¶ 8134 at 7526, 10 Comm. Mkt. L.R. at 358.

30. EEC art. 173. *See* Confédération Nationale des Producteurs de Fruits et Légumes v. Council, 8 Recueil 901, 2 CCH COMM. MKT. REP. ¶ 8005, 2 Comm. Mkt. L.R. 160 (1962).

31. 16 Recueil 385, 2 CCH COMM. MKT. REP. ¶ 8110, 9 Comm. Mkt. L.R. 337 (1970).

rected to Belgium and Luxembourg that refused to allow Member States to open tariff quotas on unwrought aluminum. Certain aluminum manufacturers sought annulment of this decision on the grounds that the refusal to grant Member States the discretionary power to lower tariff rates denied these applicants the *possibility* of obtaining a benefit. The Court held that the applicants failed to demonstrate a "direct and individual concern" in the decision. Annulment of the decision could directly affect only Member States by conferring upon them the discretionary power to lower duties. "[T]he annulment of the decision . . . cannot confer on the applicants the benefit they seek, as such benefits can only result from the opening of tariff quotas . . . after the member-State concerned has obtained the relevant authorisation."[32]

3. *Grounds for Annulment.*—Under EEC article 173 the grounds for annulment of institutional acts are: (1) lack of competence, (2) infringement of an essential procedural requirement, (3) infringement of the treaty, and (4) abuse of powers.

An act of a Community institution can be annulled, if the institution in question lacked competence under the treaties to act as it did. In one case, it was contended that the Commission lacked the authority it claimed under a Council regulation to confer upon Member States the power to fix the details of certain import licenses.[33] The Court rejected the application for annulment on the ground that the policy guiding the Commission implicitly required a temporary delegation of this power to the Member State.

In a recent case,[34] Continental Can, an American corporation, sued the Commission for annulment of an antitrust decision on the grounds that the Commission lacked competence to take decisions against foreign corporations. Continental Can noted that it had no registered office in the Community, but only did business there through its subsidiary Europemballage, a corporation having separate identity under continental law. The Court of Justice held that the Commission was competent to take the decision, stating, "[t]he applicants cannot dispute that Europemballage is a subsidiary of Continental. The circumstance that this subsidiary company has its own legal personality does not suffice to exclude the

32. 2 CCH COMM. MKT. REP. ¶ 8110 at 7253, 9 Comm. Mkt. L.R. at 346.

33. Scheer v. Einführ- und Vorratsstelle für Getreide und Futtermittel, 16 Recueil 1197, 2 CCH COMM. MKT. REP. ¶ 8129, 11 Comm. Mkt. L.R. 255 (1970).

34. Europemballage and Continental Can Co. v. Commission, [1973] E.C.R. 215, 2 CCH COMM. MKT. REP. ¶ 8171 (1973).

possibility that its conduct might be attributable to the parent company."[35]

For an act to be annulled because of infringement of an essential procedural requirement, the defect must be shown to have substantially contributed to the outcome. Thus, when the Commission improperly failed to release an investigation of price fixing, the Court, nevertheless, found that plaintiff was not prejudiced, since price fixing within the time span in question had never been denied.[36] It has been suggested, however, that since institutions are required to observe all procedures provided for in the treaties, a failure to observe even a minor procedural requirement may constitute an "infringement of the treaty," the third ground for annulment.[37]

In a recent case,[38] the Netherlands sought annulment of a decision refusing to grant it aid from the European Agricultural Guidance and Guarantee Fund for certain food gifts made to third countries. The Netherlands contended that the Commission decision was not sufficiently reasoned under article 190 and therefore infringed an essential procedural requirement. The Court ultimately annulled the decision on other grounds but held that the Netherlands had been so closely involved in drawing up the decision in question that it must be found to have known the reasons. Under such circumstances, detailed reasoning contemplated by article 190 need not be given.

It appears that infringement of a treaty constitutes a valid ground for annulment only when the act complained of violates the letter of the treaty, as well as the tenor. In a case[39] brought under the ECSC Treaty, it was alleged that the act sought to be annulled did not comply with a memorandum issued previously by the High Authority. The Court stated that "the present claim must be rejected since the legality of basic decisions cannot be made to depend on their conformity with the memorandum . . . but solely on their conformity with the Treaty."[40]

35. [1973] E.C.R. at 242, 2 CCH COMM. MKT. REP. ¶ 8171 at 8299.

36. ACF Chemiefarma v. Commission, 16 Recueil 661, 2 CCH COMM. MKT. REP. ¶ 8083 (1970).

37. *See* Valentine, *The Jurisdiction of the Court of Justice of the European Communities to Annul Executive Action,* 36 BRIT. Y.B. INT'L L. 186 (1960) [hereinafter cited as Valentine, *Jurisdiction of the Court*].

38. Netherlands v. Commission, [1973] E.C.R. 27, 2 CCH COMM. MKT. REP. ¶ 8200 (1973).

39. Compagnie des Hauts Fourneaux de Chasse v. High Authority, 4 Recueil 129 (1958), *as cited in* 1 CAMPBELL, *supra* note 4, at 379.

40. 4 Recueil 155, *as quoted in* 1 CAMPBELL, *supra* note 4, at 378. Although the

The fourth ground for annulment, misuse of powers, is derived from the French administrative law concept of *détournement de pouvoir*. The classical definition is "the use [by an administrative authority] of its powers for an object other than that for which they were conferred upon it."[41] In his submissions in *Fédération Charbonnière de Belgique v. High Authority*[42] Advocate-General Lagrange stated:

> The classical definition supposes in the first place that the authority sued has a power which is a discretionary power, at least within certain limits. Indeed, on the one hand, if it has not the power, it obviously cannot turn it away (détourner) from its legal object; and if, on the other hand, it has a power, but subject to such conditions that it is legally obliged to employ it in a certain way and not in another, the possibility of misuse of power does not arise either.[43]

In *Fédération Charbonnière*, the High Authority was given temporary power to subsidize the price of Belgian coal in order to bring it in line with the prevailing price in the rest of the Community. The applicants alleged that the High Authority intended to benefit the Belgian economy generally, rather than bringing prices down to the cost of production. The Court held that annulment was not proper but indicated that had the High Authority acted as the applicant alleged, there would have been a misuse of power.[44]

B. *Suits for Failure of an Institution to Act—Article 175*

The failure of an institution to act can be a proper subject for action before the Court under EEC article 175.[45] Under article 175, the Council or Commission can be brought before the Court to establish its failure to act only if the institution fails to define its position within two months from the date the institution was "called upon to act." Thus, if the institution defines its position during that period, there can be no appeal to the Court, even though the definition of position consists merely of a formal refusal

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memorandum essentially embodied the spirit of the treaty, the Court apparently felt an explicit violation of the treaty was necessary to support an annulment.

41. ALIBERT, LE CONTRÔLE JURIDICTIONEL DE L'ADMINISTRATION AU MOYEN DU RECOURS POUR EXCÈS DE POUVOIR 236 (1926), *as quoted in* WALL, *supra* note 2, at 96.

42. 2 Recueil 199 (1955), *as cited in* 1 CAMPBELL, *supra* note 4, at 379.

43. *Id.*

44. 2 Recueil at 309, *as quoted in* Valentine, *Jurisdiction of the Court*, *supra* note 37, at 195.

45. EEC art. 175; EURATOM art. 148 (identical to EEC article 175).

to take the requested measures.[46]

In interpreting what might constitute a failure to act, the Court has had to reconcile article 175 with the annulment provisions. If an applicant fails to bring an action for annulment of an affirmative act within the time limits specified in article 173, it could circumvent these limits by requesting the institution in question to revoke the measures and by subsequently bringing an action for annulment upon the institution's "failure to act." The Court has held in such circumstances that an application for failure to act must be denied.[47]

> Plaintiffs' view that the parties could request the institution to rescind the act it has adopted, and in case the Commission fails to act, to bring suit in the Court of Justice for illegal failure to take a decision, would open a way of appeal that is parallel to that of Article 173, which would not be subject to the conditions provided in that article.[48]

According to article 175, a private party can appeal to the Court for the failure of an institution to "address to that person any act other than a recommendation or an opinion." Since this article on its face gives extremely broad powers to an individual to charge an institution with failure to act, the Court has found it necessary to impose judicial limitations. In *Mackprang v. Commission*,[49] the Court held that a private party cannot use article 175 to force an institution to pass legislation having a general application. This problem arose again in *Holtz & Willemsen GmbH v. Council*.[50] In *Holtz*, the applicant complained that the Council had failed to enact a regulation granting additional subsidies for the processing of colza and rape seed. The Council contended, however, that the regulation the applicant sought was one of general application and, as such, beyond the scope of article 175. The applicant claimed that the subsidy, although general in form, would be of direct and individual concern to it. Furthermore, oil mills in Italy were already receiving such subsidies, and so, the applicant contended, the proposed regulation would abolish a discriminatory practice. Nevertheless, the Court denied the application, stating, "It ap-

46. Alfons Lutticke GmbH v. Commission, 12 Recueil 27, 2 CCH COMM. MKT. REP. ¶ 8044, 5 Comm. Mkt. L.R. 378 (1966).

47. Societa "Eridania" Zuccherifici Nazionali v. Commission, 15 Recueil 459, 2 CCH COMM. MKT. REP. ¶ 8099 (1969).

48. 15 Recueil at 482-83, 2 CCH COMM. MKT. REP. ¶ 8099 at 8427.

49. 17 Recueil 797, 2 CCH COMM. MKT. REP. ¶ 8155, 11 Comm. Mkt. L.R. 52 (1971).

50. [1974] E.C.R. 1, 2 CCH COMM. MKT. REP. ¶ 8255 (1974).

pears that the action commenced by the applicant has the object of procuring a provision of a general regulatory character having the same legal scope as a Regulation . . . and not an act concerning it directly and individually."[51] In so holding, the Court seemed to say that whenever the action sought by an applicant would have the legal characteristics of a regulation, an article 175 suit is improper, even though some individual concern is, in fact, shown.

IV. DAMAGES AGAINST COMMUNITY INSTITUTIONS

A. *Non-Contractual Liability of Institutions*

EEC article 215[52] governs the non-contractual liability of Community institutions, both for acts of the institutions and for acts of their employees acting within the scope of their employment. Generally, the elements for proving liability of an institution are: a wrongful act, damages, and causation.[53] In one case[54] the High Authority was found to have committed a wrongful act in failing to supervise one of its bureaus. The bureau had instituted a policy of reimbursements for the purchase of a particular type of scrap metal. When the High Authority finally terminated these payments, the applicants sought compensation. The Court held that the High Authority had been negligent in failing to supervise the bureau and that the exercise of due diligence would have prevented the establishment of the rebate program in the first place.

Liability can arise both from an act that has not been annulled[55] and from a failure to act,[56] but for an applicant to bring a successful claim, he must demonstrate that his damages have matured. This is illustrated in a case[57] concerning the withdrawal of reimbursement payments on the purchase of scrap metal. The Court decided that since the High Authority had not completely abolished the reimbursement payments, the applicant's damages were uncertain. "At the most we are here concerned with a future loss,

51. [1974] E.C.R. at 211, 2 CCH COMM. MKT. REP. ¶ 8255 at 9161-18.

52. EEC article 178 establishes jurisdiction for damages provided in EEC article 215.

53. *See* Lagrange, *The Non-contractual Liability of the Community in the E.C.S.C. and in the E.E.C.*, 3 COMM. MKT. L. REV. 10, 25 (1966).

54. Société Fives Lille Caille v. High Authority, 7 Recueil 589, 1 Comm. Mkt. L.R. 251 (1962).

55. 1 Comm. Mkt. L.R. at 251.

56. Alfons Lutticke GmbH v. Commission, 17 Recueil 325, 2 CCH COMM. MKT. REP. ¶ 8136 (1971).

57. Acciaieria Ferriera de Roma v. High Authority, 6 Recueil 362, 4 Comm. Mkt. L.R. 298 (1965).

which it is not possible either to estimate or to regard as certain to exist."[58]

In *Merkur-Aussenhandels GmbH v. Commission*,[59] the Court held that article 215 created an autonomous cause of action for damages that is available without regard to the availability of other remedies. The applicant claimed damages caused by the Commission's failure to fix compensation for the export of barley products as required by an existing regulation. Since the applicant could have achieved the same result by an action for annulment of the Commission's decision not to comply, the Commission expressed doubts whether a separate action for damages would be admissible. Although an action for annulment would have cancelled the decision in question and theoretically restored compensations for all parties similarly situated, the applicant was allowed to bring an individual action for damages under EEC article 215.

B. *Disputes Between Institutions and Their Employees*

Contracts of employment with institutions of the Community are governed by principles of public, as opposed to private, law.[60] "[T]hey are thus subject to the principle that the action of the (public) authority . . . is always subject to . . . good faith . . . ."[61] Accordingly, it has been held that an official accused of improprieties should be allowed a chance to present a defense before dismissal.[62] Furthermore, the official must be allowed a chance to present witnesses and must be kept informed of the progress of the hearing.[63] Nevertheless, institutions have discretionary power to decide the value of an employee's work; therefore, absent a

58. 4 Comm. Mkt. L.R. at 310. In addition, the applicant claims damages from both the Community and a Member State, then the applicant must first exhaust his remedies before the national courts in order to avoid an insufficient recovery. Firma Kurt A. Becher v. Commission, 13 Recueil 369, 2 CCH COMM. MKT. REP. ¶ 8058, 7 Comm. Mkt. L.R. 169 (1967).

59. [1973] E.C.R. 1055, 2 CCH COMM. MKT. REP. ¶ 8243 (1973).

60. Jurisdiction over contracts of employment with institutions of the Community is accorded the Court by virtue of article 179.

61. Lachmüller v. Commission, 6 Recueil 933, 956 (1960), *as quoted in* CAMPBELL, *supra* note 4, at 436. "Good faith" in this context means that the institution does not have unbridled discretion.

62. Alvis v. Council, 2 Comm. Mkt. L.R. 396 (1963) (failure to provide opportunity to be heard was not, however, enough to warrant damages in light of overwhelming evidence of impropriety).

63. Van Eick v. Commission, 14 Recueil 481 (1968).

showing of bad faith the Court will not substitute its own judgment for that of the institution.[64]

V. Procedure Before the Court

A. *The Pleadings*

Proceedings before the Court of Justice are begun by filing a request with the Registrar of the Court.[65] This request must set forth the facts and the legal grounds of the applicant's case.[66] It has been held that Rule of Procedure 38 requires the statement of facts and law to be precise and unequivocal.[67] In one case the Court dismissed an application that merely alleged that the High Authority had exceeded its powers.[68] The applicant failed to define the acts of the institution considered to be excessive and the authority allegedly exceeded.

While Rule 38 does not expressly require an explanation of the alleged damages, in *Luhleich v. Commission*[69] it was held that a precise specification of facts and law requires the applicant to account for his calculation of damages. In *Luhleich* the applicant had been fired from EURATOM's Ispra research facility. In his claim for wrongful discharge, the applicant alleged damages based on his age and professional experience. The claim was denied in part because the allegation contained no explanation of the method the applicant had used to value age and experience.[70]

By the terms of Rule of Procedure 79, the request must be served on the defendant by mail or by hand. In a case in which the Commission sought to impose fines on a party residing in Switzerland, which is not a Member State, the Court held that even though Switzerland did not recognize service by mail of foreign legal proceedings, the Court could not thereby be denied jurisdiction over these particular defendants.[71]

64. Prakash v. Commission, 11 Recueil 677, 5 Comm. Mkt. L.R. 261 (1965).

65. EEC Stat. 19; ECSC Stat. 22; EURATOM Stat. 19.

66. Rule of Procedure 38. An unofficial translation of the Rules of Procedure may be found in 2 CCH Comm. Mkt. Rep. ¶ 4750.

67. Meroni v. High Authority, 8 Recueil 801 (1959).

68. Société Fives Lille Caille v. High Authority, 7 Recueil 589, 1 Comm. Mkt. L.R. 251 (1962).

69. 11 Recueil 727, 5 Comm. Mkt. L.R. 244 (1966).

70. 5 Comm. Mkt. L.R. at 244. *See also* Alifieri v. European Parliament, 12 Recueil 633, 6 Comm. Mkt. L.R. 110 (1966).

71. J.R. Geigy AG v. Commission, 18 Recueil 787, 2 CCH Comm. Mkt. Rep. ¶ 8164, 11 Comm. Mkt. L.R. 557 (1972).

> [T]he Community cannot be denied the right, on the basis of public international law, of taking the necessary steps to safeguard its measures against conduct distorting competition . . . . Thus, service in accordance with . . . Community law does not, simply because it is to be effected in a non-member country, invalidate any subsequent proceedings.[72]

Following the request, a defendant is given thirty days within which to file his defense.[73] By the terms of Rule 40, this defense must set forth all arguments of fact and law relied upon by the defendant. Presumably, the requirement that the statement be precise applies to the defense as well as to the request. According to Rule 41, the applicant may reply to the defense and the defendant may in turn respond in rejoinder. At this stage the parties may not introduce new grounds,[74] but may develop new arguments based on grounds introduced in the original pleadings.[75]

B. *Discovery*

After the defendant's rejoinder, the Court under Rule 44 determines whether formal discovery is needed.[76] First, if the parties themselves appear before the Court, the Court itself can examine the parties.[77] Secondly, the Court may order the production of any documents it deems relevant.[78] Thirdly, the Court can order the testimony of witnesses on its own initiative or at the request of one of the parties.[79] Fourthly, the Court is empowered to seek the opinion of an expert.[80] Fifthly, the Court can order a view of the scene.[81] Lastly, depositions can be ordered by the Court, either on its own initiative or at the request of one of the parties.[82]

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72. 2 CCH COMM. MKT. REP. ¶ 8164 at 8137, 11 Comm. Mkt. L.R. at 637-38.
73. R.P. 40. He may otherwise be subject to default judgment.
74. R.P. 42. *See, e.g.*, Luhleich v. Commission, 11 Recueil 727, 5 Comm. Mkt. L.R. 244, 260 (1966).
75. *See* Compagnie des Hauts Fourneaux de Chasse v. High Authority, 4 Recueil 129 (1957).
76. R.P. 44 provides: "[T]he President [of the Court] shall set a date at which the reporting judge is to present his preliminary report on the question of whether the case needs to be investigated. The Court, after having heard the advocate-general, shall decide whether such an investigation is necessary."
77. R.P. 45.
78. EEC Stat. 21; ECSC Stat. 24; EURATOM Stat. 21.
79. R.P. 47.
80. R.P. 49.
81. R.P. 45.
82. R.P. 52.

C. *Oral Procedure*

Upon completion of discovery, the President of the Court sets a time for oral procedure.[83] This oral hearing is held in open court, unless the Court determines that the circumstances warrant a closed proceeding.[84] The scope of the hearing can be confined only to those questions that need amplification. In one case, the oral procedure was confined to the question of the admissibility of the application, to the exclusion of the merits.[85] At any time during the hearing, the Court can order the amplification of a point by further discovery.[86] In addition, the Court can re-open hearings on a point after they have been closed.[87]

D. *Joinder and Intervention*

According to the terms of Rule 43, the Court can at any time, "Order the joinder of several pending cases bearing on the same object, for the purposes of the written or oral proceedings or of the decree terminating the proceedings."[88] Third party intervention, on the other hand, must be sought before the oral procedure is begun.[89]

By the terms of EEC statute 37, Member States and Community institutions are free to intervene in any case before the Court. EEC statute 37 further provides that "the same right shall be open to any other person establishing an interest in the result . . . save in cases between Member States, between institutions of the Community or between Member States and institutions of the Community."[90] Moreover, it has been held, that the term "any other person" is broad enough to encompass, *inter alia*, trade associations.[91] However broad this term is, such "persons" must possess

83. R.P. 54.

84. EEC Stat. 28; ECSC Stat. 26; EURATOM Stat. 29.

85. Milchwerke Heinz Wohrmann & Sohn KG v. Commission, 8 Recueil 965, 2 CCH COMM. MKT. REP. ¶ 8007, 2 Comm. Mkt. L.R. 152 (1962).

86. R.P. 60.

87. R.P. 61.

88. *See, e.g.*, Confédération Nationale des Producteurs de Fruits et Légumes v. Council, 8 Recueil 901, 2 CCH COMM. MKT. REP. ¶ 8005, 2 Comm. Mkt. L.R. 146 (1962) (six applications joined as to admissibility); Société Industriale Acciaierie San Michele v. High Authority, 3 Comm. Mkt. L.R. 146 (1963) (eight applications joined for the proceedings and judgment).

89. R.P. 93.

90. Thus, the only cases in which private parties may intervene are those in which private parties are already principal litigants.

91. Confédération Nationale des Producteurs de Fruits et Légumes v. Council, 8 Recueil 901, 2 CCH COMM. MKT. REP. ¶ 8005, 2 Comm. Mkt. L.R. 160, (1962).

legal character and must be capable of suing and being sued.[92]

The "interest in the result" that an intervener must show is something more than a general interest in treaty compliance.[93] There must be a real potential for direct injury to the intervening party. Thus, in one case, when the High Authority granted dispensations on the payment of dues for scrap metal to two companies, a French company sought the annulment of this decision, and the two companies in question were allowed to intervene. They faced clear economic injury if the decision granting them dispensations was revoked; therefore, the requisite "interest in the result" was present.[94]

In another case, the Court set forth the principle that intervention must be justified both "in the nature of the case" and "in relation to the submissions of one of the parties."[95] For example, when an intervener attempts to advance arguments "contrary to those of the defendant and arguments against which the latter expressly takes up a position," the Court will deny the request for intervention.[96] Intervention in cases referred to the Court from national tribunals under article 177 is restricted to parties to the original case, Member States, the Commission, and, in certain circumstances, the Council.[97]

E. *Judgment*

1. *Costs.*—Rule of Procedure 63 provides that in each case the Court must make an assessment of costs to be levied against either or both of the parties. Rule 69 provides that costs are to be borne by the losing party, unless the other party has caused vexatious expenses.[98] In one case, the Court left each party to bear his own

92. Lassalle v. European Parliament, 10 Recueil 57, 3 Comm. Mkt. L.R. 259 (1964).

93. Société Commercials Antoine Vloeberghs v. High Authority, 2 Comm. Mkt. L.R. 44 (1962).

94. Société Nouvelle des Usines de Pontlieue Acieries du Temple v. High Authority, 7 Recueil 101 (1959), *as cited in* WALL, *supra* note 2, at 279.

95. Societe Commercials Antoine Vloeberghs v. High Authority, 7 Recueil 391, 2 Comm. Mkt. L.R. 44, 57 (1962).

96. De Gezarmenlijke Steenkolenmijen in Limburg v. High Authority, 7 Recueil at 37 (1959), *as cited in* WALL, *supra* note 2, at 297.

97. *See* De Cicco v. Landesversicherungsanstalt Schwaben, 8 Comm. Mkt. L.R. 67 (1968).

98. When a party has failed in an interlocutory appeal, however, he can be ordered to pay the costs of the appeal, even though the other party has borne the costs of the main issue. *See* Société Rhenane d'Exploitation et de Manutention "Sorema" v. High Authority, 3 Comm. Mkt. L.R. 350 (1964).

costs, since the losing applicant could not have known of circumstances making it necessary to dismiss the application.[99] "This lack of knowledge, which can not be held against the applicants, led them to bring their actions for compensation at the moment they thought appropriate. This circumstance constitutes an exceptional reason, within the meaning of R.P. 69(3) for leaving each party to bear part of the costs."[100]

Costs incurred in national courts are not assessable under Rule 63. In a recent case[101] the Court considered whether costs could be recovered under an article 177 referral from a national court. The Court of Justice held that insofar as referral was merely a step in the procedure before the national court, costs were not recoverable.

2. *Interpretation of Judgments.*—Any party or institution of the Community may apply to the Court for an interpretation of a judgment.[102] A party can, however, only seek interpretation of those portions of a judgment that form the holding of the case, that is, the "operative parts."[103] In a recent decision, *Gesellschaft für Getreidehandel mbH v. Commission,*[104] the Court reiterated the rule that only parties to the original action can request an interpretation of a judgment, even though that judgment might have real consequences to others.

3. *Res Judicata.*—The Court will accord a judgment *res judicata* effect only when there is an identity of parties, cause, and object.[105] For example, a group of lime burners sought to invoke as *res judicata* a 1951 decision of a national court in which it was decided that the lime burners were entitled to payments under a contract with certain cement manufacturers.[106] The cement manufacturers had made payments until 1962, the effective date of article 85, and then stopped the payments claiming that article 85 made the contract illegal. The Court held that the contract rights could not be given the effect of *res judicata,* because the

99. Meroni v. High Authority, 7 Recueil 807 (1959), *as cited in* WALL, *supra* note 2, at 262.

100. *Id.*

101. Bollman v. Hauptzollamt Hamburg-Waltershof, [1973] E.C.R. 269.

102. EEC Stat. 40, ECSC Stat. 37; EURATOM Stat. 41.

103. Associazione Industrie Siderurgiche Italiane v. High Authority, 1 Recueil 278 (1955), *as cited in* WALL, *supra* note 2, at 291.

104. [1973] E.C.R. 1599, 2 CCH COMM. MKT. REP. ¶ 8242 (1973).

105. *See* submissions of Advocate-General Lagrange in *Da Costa en Schaake NV v. Nederlandse Belastingadministratie,* 9 Recueil 59, 2 Comm. Mkt. L.R. 224, 229 (1963).

106. Association Générale des Fabricants Belges de Ciment Portland Artificiel v. S.A. Carriere Dufour, 4 Comm. Mkt. L.R. 193 (1964).

intervening EEC article prohibited enforcement of contracts that were in restraint of trade. To accord a judgment *res judicata* effect, the "cause" involved in a subsequent case cannot be the same if substantially affected by an intervening act of law.

VI. CONCLUSION

The preamble to the EEC Treaty expressly recognizes the purpose of laying "the foundations of an ever closer union among the peoples of Europe."[107] Accordingly, the function of the Court of Justice is to create a workably strong "Community law" in order to effectuate this policy. If viewed in this light, the jurisdiction and procedure of the Court exist in large part as tools to achieve a greater sense of Community identity. Yet the Court is very much an international court in a scheme in which the realities of Member State sovereignty still exist.[108]

The Court deals exclusively with matters arising under the Community treaties. Matters not involving treaty questions are reserved for the national courts of Member States. The Court, in this sense, is an international court, taking cases of supranational importance and rejecting those of national importance. Insofar as the Court sits over cases arising under the operation of the Community as a "separate entity," the Court sits as a Community court.

None of the treaties confers upon the Court jurisdiction to review decisions of national courts. That is not to say, however, that decisions of national courts are not important in the development of Community law. The Court may utilize the laws of Member States to effectuate a treaty policy. For example, in the exercise of its jurisdiction over the non-contractual liability of the Community, the Court is directed to utilize "the general principles common to the laws of the Member States."[109] These "general principles" may also play a role under the Court's annulment jurisdiction. The third ground for annulment under article 173 is "infringement of this treaty or of any rule of law relating to its application." A rule of law relating to the application of the treaty might easily consist of the general principles of national laws, for it was from these common principles that the treaty itself was formed. In a sense,

107. The European Community has recently been given Observer Status at the United Nations, a natural concomitant to the growth of a unified Europe.

108. *See generally* C. MANN, THE FUNCTION OF JUDICIAL DECISION IN EUROPEAN ECONOMIC INTEGRATION (1972).

109. EEC art. 215.

these "general principles" form the "common law" of the Community and can be utilized by the Court when they bear on the interpretation of the treaty.

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