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THE RHINE REGIME IN TRANSITION—RELATIONS BETWEEN THE EUROPEAN COMMUNITIES AND THE CENTRAL COMMISSION FOR RHINE NAVIGATION

DALE S. COLLINSON*

Created by the Treaty of Vienna in 1815, with origins in the French Revolution and the ensuing Napoleonic Wars, the Central Commission for Rhine Navigation is the oldest surviving international organization.¹ The Commission serves as a permanent conference of representatives of four riparian and two nonriparian states,² to ensure the application of the principles of freedom of navigation and equality of treatment for ships of all flags, to draft uniform navigation rules and vessel safety regulations, and to coordinate national engineering projects for maintenance and improvement of the navigability of the Rhine. It is thus directly responsible for preserving the smooth operation of this great European transportation artery,³ and, as such, has had a major impact on the industrial development of the riparian states. Because of its role, it is a paradigmatic case of international cooperation based on mutual interdependence and reciprocal benefits.⁴

Through most of its history the Central Commission was the sole international agency charged with administration of the Rhine, but during the past two decades two rivals have emerged. The mandates of both the European Coal and Steel Community⁵ and the European Economic Community⁶ encompass economic regulation of transport, including that on the Rhine.⁷ To a

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1. A. ROBERTSON, *EUROPEAN INSTITUTIONS* 237 (2d ed. 1966).

2. The composition of the Central Commission has varied over the years. When it was reconstituted following World War II, the members were Belgium, France, the Netherlands, Switzerland, the United Kingdom, and the United States, with the Western occupying powers—France, the United Kingdom and the United States—representing the interests of Germany. See Walther, *Le Statut International de la Navigation du Rhin*, in 2 *EUROPEAN YEARBOOK* 3, at 9 (1956). Germany rejoined the Central Commission in 1950, *id.* at 10, and the United States withdrew, effective January 1, 1965. See *Commission Centrale Pour la Navigation du Rhin, Compte Rendu de l'Activité de la Commission Centrale en 1964*, in 12 *EUROPEAN YEARBOOK* 139 (1966); see also 69 *Revue Générale de Droit International Public* 151-52 (3d Series 1965) [REV. GEN. DR. INT'L PUB.]. Thus the present membership is Belgium, France, Germany, the Netherlands, Switzerland, and the United Kingdom. See generally A. ROBERTSON, *supra* note 1, at 239-40.

3. See generally N. DESPICHT, *THE TRANSPORT POLICY OF THE EUROPEAN COMMUNITIES* 18-20 (1969); Ferraton, *L'avenir des transports fluviaux en Europe*, 43 *REV. DE LA NAV. FLUVIALE EUROPÉENNE* 497 (1971).

4. See Walther, *supra* note 2, at 12. In the broadest sense, the Rhine regime has provided the model for the modern development of a law of international rivers. See, e.g., R. BAXTER, *THE LAW OF INTERNATIONAL WATERWAYS* 27, 45 (1964); G. KAECKENBECK, *INTERNATIONAL RIVERS* 29-31 (1918).

5. Hereinafter referred to as ECSC.

6. Hereinafter referred to as EEC.

7. Article 70, Treaty Establishing the European Coal and Steel Community, April 18, 1951, 261 U.N.T.S. 140, 210 [hereinafter cited as Paris Treaty]; Articles 74-84,

substantial degree, the membership of the Central Commission overlaps with that of the European Communities. Four of the six members of the Central Commission—Belgium, France, Germany and the Netherlands—are among the original six Member States of the European Communities; a fifth Central Commission member, the United Kingdom, will soon join the Communities.⁸ But Switzerland remains outside the Communities, and because of the critical importance of Rhine commerce to the Swiss economy,⁹ has stoutly defended the Central Commission against the competing jurisdictional claims of the Communities. As a result of this generally amicable, but no less real, conflict between the time-honored Rhine regime and the European Communities, both the Central Commission and the Communities have proven powerless to remedy a continuing economic crisis in Rhine shipping, and the Communities have been hamstrung in the elaboration and implementation of Community transport policy.

This article will describe and analyze the development of relations between the Central Commission for Rhine Navigation and the European Communities. Because of the present and historic importance of the Rhine regime, these events merit study for their own sake. In addition, it is hoped some generalizations will emerge concerning relations between international economic organizations and that these may be of use for future analysis of international economic integration.

I. THE CENTRAL COMMISSION FOR RHINE NAVIGATION

A. *Historical Development*

In the Middle Ages the Rhine became both a major channel for European commerce and the focus of fiscal exactions by the myriad riparian rulers. Rhine navigation was greatly impeded by the many tolls¹⁰ and by the right of certain cities to compel passing boats to unload their cargo and offer it for sale or transfer it to local boats.¹¹ As the tolls were paid on goods as well as vessels, they entailed great administrative delay, as well as a monetary burden.¹²

Even during the period of fiscal despotism, cooperation among the riparian

Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 3, 44-47 [hereinafter cited as Rome Treaty]. The Euratom Treaty does not contain any transport provisions. As a result the Rome Treaty applies to transport of nuclear materials.

8. On October 28, 1971 the House of Commons voted to approve the terms negotiated by the Tory Government for entry into the European Communities. *Wall Street Journal*, Oct. 29, 1971, at 3, col. 2. Actual entry will require the adoption of a number of enabling measures, a process expected to be completed by January 1, 1973.

9. Stabenow, *Opportunities for an External Policy of the E.E.C. in the Field of Transport*, 4 COMMON MKT. L. REV. 32, 46-47 (1966-67). See Mangold, *Les Ports Rhénans des Deux Bâle*, 1965 TRANSPORTS 424.

10. It has been estimated that some thirty-two toll stations lay between Strasburg and the Netherlands at the end of the eighteenth century. J. CHAMBERLAIN, *THE REGIME OF THE INTERNATIONAL RIVERS: DANUBE AND RHINE* 156 (1923).

11. See generally *id.* at 145-51.

12. *Id.* at 156.

cities and princes along the Rhine for the common control of river police and for the carrying out of navigation works and improvements was well developed.¹³ The French Revolution was the catalyst for extending such cooperation to the reduction of tolls and the removal of related obstacles to free navigation of the river. Successive treaties between France and the Netherlands (The Hague, 1795), the Margrave of Baden (Paris, 1796), and Austria (Campo-Formio, 1797) declared that the Rhine should be free to navigation by nationals of contracting states.¹⁴ The Convention of the Octroi, concluded between France and the German Empire in 1804, created the first truly international organ for river control.¹⁵ A joint administration, controlled by the French government and by the arch-chancellor of the German Empire, was charged with collection of tolls at a limited number of stations, the toll revenues to be used in part for river maintenance.¹⁶ The Treaty of Paris of May 30, 1814, which marked the end of the Napoleonic Wars, culminated this development by formulating the principle of freedom of navigation in its most extensive form. Article V of the Paris Treaty declared that the Rhine was to be free "to all persons," not just nationals of contracting or riparian states, and charged the future Peace Congress with examining the extension of the same principle to other international rivers.¹⁷

But the Paris Treaty did not definitively settle the Rhine regime. At the Congress of Vienna, several cities and boatmen's associations pressed claims for retention of the ancient restrictions,¹⁸ and a number of the plans for the

13. See generally *id.* at 151-55.

14. Walther, *supra* note 2, at 3.

15. *Id.* at 3-4. See J. CHAMBERLAIN, *supra* note 10, at 164-65.

16. J. CHAMBERLAIN, *supra* note 10, at 165-68. See G. KAECKENBEECK, *supra* note 4, at 33-37; Walther, *supra* note 1, at 3-4.

17. The text of Article V of the Paris Treaty is reprinted in C. BONËT-MAURY, *LES ACTES DU RHIN* 7 (1957).

18. Because of its similarity to modern disputes between the champions of free competition and the defenders of regulated monopoly, the details of the argument are of some interest.

The terms of the peace of Paris threatened directly the monopoly of the associations of boatmen at Cologne and Mayence and the advantages which those cities and Strassburg drew from their existing rights of compulsory transfer. The three cities promptly set to work to protect their imperilled interests, arguing, strangely enough, that the purpose of the negotiators was solely to abolish unnecessary tolls which injured navigation more by delay than by the "actual cost of the tolls," and that there was no intention to affect "the beneficial institution" of obligatory transfer or its corresponding boatmen's monopolies.

An active paper battle was waged between the three cities in defense of their rights and Frankfort in defense of free navigation. The existing institutions were defended, not on the ground of legal and ancient right, but with an appreciation that at the coming Congress a mere legal right, however ancient, would have little influence and the institution must stand or fall on the ground of its practical value to trade. The physical condition of the Rhine requiring various kinds of boats for the various stretches; the necessity to commerce of a plentiful supply of vessels at each of the great mercantile centers, so that prompt transport of goods might be assured; the advantage to merchants of a strict control over both boats and boatmen to guarantee them from loss by wreck or knavery, were put forward as reasons for the maintenance of the monopolies and were all vigorously combated by Frankfort. Representatives were sent to Vienna by both sides, and the struggle between those who would save and those who would destroy these relics

Rhine proposed by national delegations embodied features inconsistent with freedom of navigation.¹⁹ Nevertheless, the agreements reached at Vienna, which established the basic structure of the present Rhine regime, reaffirmed, for the most part, the nations' commitment to the principle of free navigation. Thus Articles 108 and 109 of the Final Act of the Congress of Vienna, which stated general rules applicable to all international rivers, provided as follows:

Article 108

The Powers whose States are separated or crossed by a navigable river undertake to settle by common agreement all matters relating to the navigation of the river. For this purpose they will appoint commissioners who will meet not later than six months after the end of the Congress and who will take as the basis of their work the principles set out in the following articles.

Article 109

Navigation shall be entirely free and, for purposes of commerce, shall be refused to no-one throughout the length of the rivers referred to in the previous article from the point where they become navigable to their mouth; the regulations relating to the control of such navigations shall of course be respected; these regulations shall be uniform for all and as favourable as possible for the commerce of all nations.²⁰

Other articles established the principles of uniformity of treatment and decision-making by common accord.²¹ Finally a series of appendices to the Act determined the basic features of the regimes to be applied to six international rivers: the Rhine, the Neckar, the Maine, the Moselle, the Meuse and the Scheldt.²²

The regime for the Rhine was set forth in Annex 16B,²³ which, besides expanding on the general principles stated in the Final Act,²⁴ established a

of a century-old institution is of great importance in understanding what was in the minds of the plenipotentiaries when they spoke of "freedom of navigation."

J. CHAMBERLAIN, *supra* note 10, at 173-74.

19. See generally *id.* at 175-85; G. KAECKENBEECK, *supra* note 4, at 40-48.

20. A. ROBERTSON, *supra* note 1, at 237 (English translation). An official French text is reprinted in BONËT-MAURY, *supra* note 17, at 7-8; 3 EUROPEAN YEARBOOK 138 (1957).

21. Thus Article 110 specified that toll collection and police control would, so far as possible, be the same for the entire length of the river. Article 111 required that tolls be fixed in a uniform manner independently of the quality of the merchandise and at levels designed to facilitate commerce, and further provided that once tolls had been fixed they could not be increased except by common agreement. Article 112 called for a reduction in the number of toll stations and provided that, once determined, the number could not be changed except by common accord. Article 113 provided for the abolition, in principle, of compulsory transfer rights. 3 EUROPEAN YEARBOOK 138-39 (1957).

22. These appendices were incorporated by reference into the main body of the Final Act and thus had the same force and effect as the Final Act itself. Final Act of the Congress of Vienna, art. 117, BONËT-MAURY, *supra* note 17, at 8; 3 EUROPEAN YEARBOOK 139 (1957).

23. The French text is printed in full in 3 EUROPEAN YEARBOOK 140-47 (1957); excerpts appear in BONËT-MAURY, *supra* note 17, at 8.

24. For example, Articles 3 and 5 determined the maximum level of tolls and limited the number of toll stations to twelve between Strasburg and the Netherlands border. The level of tolls and the number of toll stations between the Netherlands border and the mouth of the river and between Strasburg and Basle were to be fixed proportionately. YEARBOOK, *supra* note 23, at 140, 141. Articles 19 and 20 abolished the compulsory

judicial system to handle private complaints arising out of the application of the Rhine regulation,²⁵ created a staff of inspectors to ensure the administration of the regulations on a permanent basis,²⁶ and instituted a Central Commission to oversee the whole.²⁷ In general terms, the Central Commission was charged with verifying the observance of the common regulation and with maintaining communications between the riparian states on matters affecting navigation.²⁸ It was to supervise the work of the inspectors, to act as an appeals body in judicial proceedings, and to publish annual reports on Rhine navigation.²⁹

The Central Commission's initial task, however, was to draft detailed regulations for the navigation of the Rhine, based on the principles set forth in the Final Act and in Annex 16B.³⁰ The central importance of these regulations as the constitutive instrument for the new Rhine regime was underscored by the rule that, once adopted, they were not to be modified except by unanimous agreement.³¹ Elaboration of the required regulations consumed some fifteen years—from 1816 to 1831, when the Convention of Mayence was signed.³² But this convention was less liberal than the Final Act of the Congress of Vienna in that it limited freedom of navigation for commercial purposes to the vessels of riparian states. Thus not until the signing of the Act of Mannheim, in 1868, was the principle of free navigation for the

transfer rights of Mayence and Cologne and prohibited the exercise of exclusive rights by boatmen associations. *Id.* at 144. See note 18 *supra*.

25. Like many other aspects of the Rhine regime, the judicial system grafted an international branch on a national stock. The courts of first instance, which were to be established in the vicinity of each toll station, were clearly to be national courts since their expenses would be defrayed, and their judges would be appointed, by the ruler in whose territory the court was situated. But the judges would serve during good behavior and would resolve disputes in conformity with the Rhine regulations and in accordance with a procedure that was to be uniform, and as summary as possible, throughout the whole length of the Rhine. Their decisions were to be appealable, at the option of the parties, to either the Central Commission or an appeals tribunal designated by the riparian state. Articles 8-9 of Annex 16B, YEARBOOK, *supra* note 23, at 141-42.

26. The staff was to consist of a chief inspector and three deputy inspectors. Although in general each state represented in the Central Commission was to have an equal vote, the chief inspector was to be selected by the Central Commission under a system of weighted voting—with Prussia having a third of the votes, France and the Netherlands one-sixth each, and the other German states a third collectively. The deputy inspectors were to be allocated among the participating states on a similar basis. Article 13 of Annex 16B, *id.* at 142.

27. Meeting at least once each year and composed of representatives of the riparian states, the Central Commission was to act by majority vote (with each state having one vote); but decisions were to be binding only on those states voting in the affirmative. Article 17 of Annex 16B, *id.* at 143.

28. Article 10 of Annex 16B, *id.* at 142.

29. Article 16 of Annex 16B, *id.* at 143. See generally J. CHAMBERLAIN, *supra* note 10, at 175-84.

30. Article 32 of Annex 16B, YEARBOOK, *supra* note 23, at 147. See also Article 27 of Annex 16B, *id.* at 145.

31. Article 116 of the Final Act of the Congress of Vienna, in A. ROBERTSON, *supra* note 1, at 237.

32. The French text of the Convention of Mayence is reproduced in 18 BRIT. & FOR. STATE PAPERS 1076 (1830-31). For a history of the drafting of the Convention and of its subsequent operation, see J. CHAMBERLAIN, *supra* note 10, at 190-236. See also 2b BRITISH DIGEST OF INTERNATIONAL LAW 79-91 (1967).

vessels of all countries definitively recognized on the Rhine.³³ Although minor modifications were made by the Treaty of Versailles in 1919³⁴ and by a Revision Convention of 1963,³⁵ the Act of Mannheim has remained the basic charter for Rhine navigation for over a hundred years.³⁶

B. *Basic Features of the Present-Day Rhine Regime*

The guiding principles of the Rhine Regime are freedom of navigation for the ships of all nations,³⁷ equality of treatment of domestic and foreign vessels,³⁸ uniform administration,³⁹ and the elimination of all tolls or other fiscal exactions levied solely on the right to navigate.⁴⁰ These principles have generally received an increasingly liberal application over the years, but they have been challenged periodically—most prominently in times of economic distress—by protectionist measures designed to advantage national boatmen or shippers.⁴¹ Moreover, the very generality of the provisions of the Act of Mannheim has permitted apologists for restrictive national policies to argue their compatibility with the Rhine Regime.⁴² This indefiniteness of the

33. See A. ROBERTSON, *supra* note 1, at 238-39.

34. See *id.* at 239. Relevant provisions of the Treaty of Versailles may be found in BONËT-MAURY, *supra* note 17, at 15-16 (French); 2 EUROPEAN YEARBOOK 272-75 (1956) (French); 11 G. MARTENS, NOUVEAU RECUEIL GÉNÉRAL DE TRAITÉS 619-27 (3rd Series 1922-23) (French and English); 2 MAJOR PEACE TREATIES OF MODERN HISTORY—1648-1967, at 1494-99 (F. Israel ed. 1967) (English); 2 TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES OF AMERICA—1776-1949, at 217-21 (C. Bevans ed. 1969) (English). Among other changes, the Treaty of Versailles altered the composition of the Central Commission by introducing, for the first time, representatives of nonriparian states, an innovation of great practical significance for assuring that vessels of all flags would indeed benefit from freedom of navigation. See Biays, *La Commission Centrale du Rhin*, 56 REV. GEN. DR. INT'L PUB. 223, 229-30 (1952).

35. For the text of the Revision Convention, see 35 REV. NAV. INTÉRIEURE ET RHÉNANE 844 (1963). See generally Walther, *La Révision de la Convention de Mannheim Pour la Navigation du Rhin*, 1965 ANNUAIRE FRANCAIS DE DROIT INTERNATIONAL 810. The Revision Convention took effect on April 14, 1967. See 15 EUROPEAN YEARBOOK 125 (1967).

36. The French text of the Act of Mannheim is found in BONËT-MAURY, *supra* note 17, at 9-14; 2 EUROPEAN YEARBOOK 258-71 (1956). An unofficial English translation appears in 1 A. PEASLEE, INTERNATIONAL GOVERNMENTAL ORGANIZATIONS—CONSTITUTIONAL DOCUMENTS 160 (1956).

37. Act of Mannheim, Art. 1, BONËT-MAURY, *supra* note 17, at 9. See also *id.*, art. 7 (freedom of transit for all goods).

38. *Id.* art. 4.

39. See Walther, *supra* note 2, at 16-17.

40. Act of Mannheim, Art. 3. BONËT-MAURY, *supra* note 17, at 9. See generally Walther, *supra* note 2, at 14-18.

41. See generally Walther, *supra* note 2, at 15-16.

42. For example, German exchange control restrictions on payments for transport services rendered by foreign boatmen were introduced in 1949 in response to economic dislocations caused by the World War. When these regulations were attacked as a reservation of cabotage (internal transport) contrary to the principle of freedom of navigation, the German government, supported by a number of academic commentators, replied that, since the Act of Mannheim does not expressly extend to foreign vessels the right to engage in cabotage, its prescription of freedom of navigation and equality of treatment applies only to international navigation. Compare Lupi, *Freedom of Navigation on the Rhine*, 85 JOURNAL DE DROIT INTERNATIONAL 329, 349-57 (1958) with Vitanyi, *La Question de la Réserve des Transports Locaux sur le Rhin*, 73 REV. GEN. DR. INT'L PUB. 953 (1969). See generally Kiss, *Commission Centrale Pour la Navigation du Rhin*, 1955 ANN. FR. DR. INT'L 508. For a discussion of some of the problems arising out of the economic crisis of the 1930's, see Biays, *supra* note 34, at 230-33 & n.19.

Mannheim principles has also been cause for controversy in connection with attempts to apply ECSC and EEC regulations to Rhine transport.⁴³

The present mandate of the Central Commission is substantially the same as that defined in Annex 16B to the Final Act of the Congress of Vienna. Its main function is to ensure the observance of such principles as freedom of navigation and equality of treatment. More concretely, its tasks are:

- (a) to examine any complaints resulting from the application of the Convention and of the regulations made in accordance with its provisions;⁴⁴
- (b) to consider proposals of the riparian governments relating to navigation of the Rhine;
- (c) to act as a Court of Appeal from decisions of courts of first instance relating thereto;⁴⁵ and
- (d) to publish an annual report on the utilisation of the Rhine as an international waterway.⁴⁶

The Commission, as such, holds scheduled semiannual meetings, as well as extraordinary sessions when required. Like other similar international organizations, it assures administrative continuity and continuous preparation of policy measures through an international secretariat and numerous specialized committees.⁴⁷

From 1868 to 1967, Article 46 of the Act of Mannheim empowered the Central Commission to act by absolute majority vote. But such decisions bound only the states that approved them, and a requirement of unanimity soon became the established practice.⁴⁸ Finally, in 1967, the formal voting requirements were amended by the Revision Convention to reflect actual practice.

43. See section III B 2 *infra*.

44. The right of an individual, without the intervention of his own government, to complain directly to an international organization is itself almost unique in international law. Until 1952, there had been approximately twenty-two such grievances, including a complaint against the German exchange control regulation previously mentioned. See note 42 *supra*. See generally Biays, *supra* note 34, at 251-53.

45. Until recently

[t]he competence of the Central Commission as a Court of Appeal [was] something unique in character. . . . [in that, unlike the case of other international tribunals], Member States [had] accepted a right of appeal from their national tribunals to an international commission which [was] not constituted as a court or even made up of lawyers

A. ROBERTSON, *supra* note 1, at 240. The 1963 Revision Commission, see note 35 *supra* and accompanying text, established a distinct Appeals Chamber, composed of judges appointed by the member states. See generally Walther, *supra* note 35, at 818 & 822. Since most litigants in these cases—which typically involve fines for offenses against the rules of navigation and actions for damages resulting from collisions—elect the alternative of an appeal to a tribunal established within the member state of first instance jurisdiction, the judicial jurisdiction of the Central Commission serves mainly as an ultimate guarantee of uniformity of administration. See A. ROBERTSON, *supra* note 1, at 240-41. See also Biays, *supra* note 34, at 270 n.85.

46. Act of Mannheim, Art. 45, as restated by A. ROBERTSON, *supra* note 1, at 240 (footnotes added).

47. The committees deal with such matters as police control, customs, social and labor questions, the transport of dangerous goods, and the economic problems of Rhine navigation. See A. ROBERTSON, *supra* note 1, at 241. For a recent listing of committees, see 16 EUROPEAN YEARBOOK 167-70 (1968).

48. See A. ROBERTSON, *supra* note 1, at 240; Walther, *supra* note 35, at 813.

While the Central Commission may adopt recommendations by majority vote, its decisions are obligatory only if approved unanimously. Moreover, the member states have a period of thirty days within which they may withdraw an affirmative vote.⁴⁹ But more important than the formal voting procedure has been the prevailing community of interests, which has permitted the member states to compromise divergences in national interests to achieve the benefits of mutual collaboration on the Rhine.⁵⁰

II. THE EUROPEAN COMMUNITIES

Together, the three European Communities—the European Coal and Steel Community, the European Economic Community, and Euratom—constitute a continental customs union embracing approximately 185 million people. The goals of the Communities, however, are far broader than the achievement of a customs union. The six member states,⁵¹ soon to be increased to ten,⁵² are to create a Common Market, which will require, *inter alia*, harmonization of taxation systems and corporate law, development of Community external trade policies, and common policies for regulated sectors of the economy, such as agriculture and transportation.⁵³ In February of 1971, the member states further agreed to construct an economic and monetary union during the next ten years, entailing the possible introduction of a common currency and the transfer to Community organs of authority over fiscal, monetary, and general economic policy.⁵⁴

A. Institutions

As befits the extensive powers and broad concerns of the three Communities, their institutional structure is quite complex,⁵⁵ but we need consider only the Commission, the Council, the Parliament, the Court of Justice, and the Economic and Social Committee. Since July 1, 1967, the first four institu-

49. This provision is intended to encourage uninstructed representatives to participate in the voting and thus to avoid postponement of a decision while instructions are sought from the national government concerned. *See generally* Walther, *supra* note 35, at 813-15 & 822.

50. *See id.* at 814.

51. Belgium, France, Germany, Italy, Luxembourg, and the Netherlands.

52. The applicants for membership are Denmark, Ireland, Norway and the United Kingdom. *See* note 8 *supra*.

53. Art. 3, Rome Treaty, *supra* note 7, at 16-17. Progress in the construction of the Common Market has been mixed. For an appraisal of the extent of integration in various fields, *see* L. LINDBERG & S. SCHEINGOLD, *EUROPE'S WOULD-BE POLITY* 70-75 (1970).

54. Resolution of the Council of the European Communities and the Representatives of the Governments of the Member States, 14 EUR. COMMUN. J.O. No. C28, at 1, 3 CCH COMMON MARKET REP. ¶ 9415 (1971). While the time-table for formation of economic and monetary union was disrupted by the monetary crisis precipitated by President Nixon's August 15, 1971 address, work has resumed following the agreement on new exchange rate alignments. *See* Europe, Agence Internationale d'Information Pour La Presse, Daily Bulletin, Dec. 21, 1971, at 5 [hereinafter cited as Europe].

55. *See generally* R. MAYNE, *THE INSTITUTIONS OF THE EUROPEAN COMMUNITY* 15-25 (1968).

tions have been the same for all three Communities,⁵⁶ and the Economic and Social Committee functions under both the EEC and Euratom.⁵⁷

In brief, the Commission—whose members are appointed by the member states but are pledged to “act completely independently in the performance of their duties, in the general interest of the Communities,”⁵⁸—is authorized to propose the adoption of Community measures and generally represents the motive force for continued integration of the economies of the Six. The Council, composed of member state representatives whose identities may vary according to the subject matter under discussion, constitutes the Communities’ primary lawmaking body in the sense that it adopts the principal regulations, directives, and decisions of the Communities and has ultimate power over major policy.⁵⁹ The Economic and Social Committee—101 representatives of the various categories of economic life, such as farmers, workers, and merchants—and the European Parliament—136 delegates appointed by the national parliaments from among their own members—serve primarily as advisory bodies.⁶⁰ The task of the Court of Justice is to “ensure the observance of law in the interpretation and application” of the Community treaties,⁶¹ a mandate it carries out principally through the decision of direct challenges to the legality, under the treaties, of the acts of the Commission, the Council and the member states, and through responses to national courts’ requests for advisory interpretations of the treaties and Community implementing measures.⁶²

56. Originally established as ECSC institutions by the Paris Treaty, the European Court of Justice and the European Parliament were reconstituted as organs of the three Communities in 1958. See Convention Relating to Certain Institutions Common to the European Communities, *done* Mar. 25, 1957, arts. 1-4, 298 U.N.T.S. 269, 270-73. The Executives (ECSC High Authority, EEC Commission and Euratom Commission) and the Councils (ECSC Special Council of Ministers, EEC Council and Euratom Council) were merged into a single Commission of the European Communities and a Council of the European Communities by a 1965 Convention, which entered into force on July 1, 1967. Treaty Establishing a Single Council and a Single Commission of the European Communities, Apr. 8, 1965, 10 EUR. COMMUN. J.O. No. 152, at 2 (1967).

57. See Convention Relating to Certain Institutions Common to the European Communities, *supra* note 56, at art. 5. A Consultative Committee established by the Paris Treaty performs an analogous role under the ECSC. See generally R. MAYNE, *supra* note 55, at 21-22.

58. Treaty Establishing a Single Council and a Single Commission of the European Communities, *supra* note 56, art. 10(2).

59. While the Paris Treaty accorded somewhat greater independence to the High Authority (now the Commission of the European Communities), in practice the relationship between the High Authority and the ECSC Special Council of Ministers was substantially that described in text, which is also that formally prescribed by the EEC and Euratom treaties. See E. HAAS, *THE UNITING OF EUROPE* 480-85 (1958); L. LINDBERG, *THE POLITICAL DYNAMICS OF EUROPEAN ECONOMIC INTEGRATION* 52 (1963).

60. The Parliament also has the formal power, which it has never exercised, to force the dismissal en bloc of the Commission, and recent modifications of the Community budgetary process have marginally increased the Parliament’s formal powers over fiscal policy. See Rome Treaty, arts. 137-44, at 66-69; Lindberg, *The Role of the European Parliament in an Emerging European Community*, in *LAWMAKERS IN A CHANGING WORLD* 101 (E. Franck ed. 1965); 1 CCH COMM. MKT. REP. ¶¶ 5012-14.

61. See, e.g., Paris Treaty, *supra* note 7, art. 31; Rome Treaty, art. 164, at 73.

62. See Rome Treaty, arts. 169-77, at 73-77. See generally G. BEBR, *JUDICIAL CONTROL OF THE EUROPEAN COMMUNITIES* 34-36, 155-59, 178-86 (1962); W. FELD, *THE COURT OF THE EUROPEAN COMMUNITIES: NEW DIMENSION IN INTERNATIONAL ADJUDICATION* 38-60 (1964).

While the formal rules governing adoption of implementing measures vary according to the subject matter of proposed legislation, the procedure specified for elaboration of transport policy under the Rome Treaty is fairly typical. Acting on a proposal of the Commission and after consultation with the Parliament and the Economic and Social Committee, the Council adopts the necessary measures by a "qualified majority vote."⁶³

The Council may amend a Commission proposal only by unanimous vote, whereas the Commission may unilaterally amend its original proposal any time before final action by the Council.⁶⁴ Since in almost all cases at least one member state will identify its long-term interest with defense of the Commission as the agent of supranationalism and continued integration, unanimous consent to amend a Commission proposal over the later's objections is very rare. On the other hand, the power of unilateral amendment enables the Commission, which ordinarily is represented at Council meetings, to mediate conflicting national positions. The treaty voting provisions thus establish the basis for what has

often been likened to a dialogue between the European Commission, an independent body whose task is to define and uphold the general Community interests, and the Council, in which the representatives of the six member States give expression to their own interests and endeavor at the same time to reach beyond them in a Community context.⁶⁵

Since 1965, however, the process has been substantially modified by the introduction of an agreed practice of unanimous voting on issues affecting "very important" interests of one or more member states,⁶⁶ and almost all EEC transport measures have in fact been adopted unanimously.⁶⁷ While the

63. Rome Treaty, art. 75(1) at 45. Prior to January 1, 1966, unanimity was required. *Id.*

In the case of Council action based on a Commission proposal, the Rome Treaty defines a "qualified majority vote" as twelve votes out of a possible seventeen votes, with France, Germany and Italy each casting four votes, Belgium and the Netherlands each casting two votes, and Luxembourg casting one. *Id.* art. 148(2). While the three large countries together control the necessary twelve votes, the interests of the smaller states are protected by the requirements that the Commission initiate the proposal and that amendment of it be by unanimous vote. See note 64 *infra* and accompanying text. When the Council acts without a Commission proposal, the majority of twelve votes must include the votes of at least four states. Thus at least one of the smaller states must approve.

64. *Id.* art. 149.

65. Hallstein, *The EEC Commission: A New Factor in International Life*, 14 INT'L & COMP. L.Q. 727, 729-30 (1965).

66. A commitment to unanimous voting was expressed, in somewhat ambiguous terms, in the Luxembourg Agreement of January, 1966, which ended the 1965 crisis precipitated by the French over financing of the Common Agricultural Policy and the functioning of the Community institutions. See Mayne, *supra* note 55, at 46-47 (text of Luxembourg Agreement); Lambert, *The Constitutional Crisis 1965-66*, 4 J. COMM. MKT. STUDIES 195, 221-23 (1966) (text of French complaints). See generally J. NEWHOUSE, COLLISION IN BRUSSELS (1967).

67. Doussset, *Les Transports*, in 3 LE DROIT DE LA COMMUNAUTÉ ECONOMIQUE EUROPEENE 261, 265 (J. Megret ed. 1971). See also Rome Treaty, art. 75(3) at 45 (directing the Council to act unanimously when establishing transport measures that "might seriously affect the standard of living and the level of employment in certain regions").

dialectical interaction between Commission and Council has continued, the substitution of unanimous voting for qualified-majority voting has greatly slowed the pace of decision-making, and many commentators have speculated that practical necessities will force a return to the qualified-majority rule once the membership of the Communities is expanded from six to ten.⁶⁸

B. *The Role and Scope of Transport Policy*

Both the Paris Treaty and the Rome Treaty single out transportation for special treatment. Since transportation is a regulated sector of the economy in all six member states, an obvious danger of member states autonomy in matters of transport policy was that governments would favor national enterprises or their own national economies at the expense of their Community trading partners.⁶⁹ More generally, transportation is a major economic sector, whether measured by employment, capital investment, or production,⁷⁰ and formulation of Community transport policies was considered necessary to promote market interpenetration, which is an essential element of the common market in goods and services.

Under the Paris Treaty, economic integration was limited to a single market sector, coal and steel, and the High Authority of the ECSC was given no authority to foster integration within the transportation industry itself.⁷¹ But transport policy was considered instrumental in promoting integration, and so the Treaty requires the elimination of price discriminations based on country of origin or destination of the goods carried, which might favor national producers and impede interpenetration of coal and steel markets,⁷² and further provides for the publication of transport charges in order to facilitate the

68. See Macrae, *How the EEC Makes Decisions*, 8 ATLANTIC COMMUNITY Q. 363, 370-71 (1970). *But cf.* N.Y. Times, May 25, 1971, at 1, col. 7 (British Prime Minister Heath reports agreement with French President Pompidou that Council should act only by unanimous agreement when any country thinks its vital interests are at stake).

69. For example, prior to creation of the European Coal and Steel Community, rail transport of coal in West Germany was subject to different tariffs for imported coal and for domestic coal. Over a distance of 400 kilometers, foreign coal paid 24% more than German coal, a discrimination designed to compensate for the locational disadvantage of German Ruhr coal in the south German market, relative to the French Saar and Lorraine coal fields. See Liesner, *The European Coal and Steel Community*, in J. MEADE, H. LIESNER, S. WELLS, CASE STUDIES IN EUROPEAN ECONOMIC UNION 195, 342-51 (1962).

70. A. FISCHER, L'ORGANISATION DES TRANSPORTS DANS LE CADRE DE L'EUROPE DES SIX 13-15 (1968).

71. The final paragraph of Article 70 of the Paris Treaty specifically recognizes that commercial policy for transport, in particular the fixing and modification of rates and conditions of transport and the elaboration of measures of co-ordination or competition among different modes of transport or among different routes, is reserved to the ECSC member countries. Paris Treaty, Article 70.

72. Paris Treaty, Art. 70. Section 10 of the ECSC Transitional Convention, 261 U.N.T.S. 277, provides for the convening of a committee of experts charged with elaborating the measures necessary for the elimination of such discriminatory practices. The committee is also to draw up international tariffs "which take into account total distance and are degressive in nature, yet do not prejudice the distribution of charges among the transport enterprises concerned" and to examine transport prices and conditions for the purpose of their harmonization, so far as is necessary for the proper functioning of the common market in coal and steel products. *Id.*

operation of a basing point pricing system established by the Treaty for coal and steel products.⁷³

Whereas the ECSC is limited to one economic sector, the Rome Treaty envisages the establishment of a broad common market for all sectors of the economy. Accordingly, the EEC Common Transport Policy⁷⁴ is designed to promote market interpenetration generally and to foster integration within the transport sector itself. The CTP is to encompass such diverse matters as frontier taxes on fuel carried in a transport vehicle's own fuel tanks, motor vehicle equipment standards, and programs for investment in highway construction and canal works. The Treaty empowers the Council to establish

- (a) common rules applicable to international transport effected from or to the territory of a Member State or crossing the territory of one or more Member States; (b) the conditions under which nonresident carriers may operate transport services within a Member State; [and] (c) any other appropriate provisions.⁷⁵

Other treaty articles contain provisions on such matters as government aids to transport enterprises,⁷⁶ discrimination by carriers in transport rates and conditions "because of the country of origin or the destination of the goods,"⁷⁷ support tariffs,⁷⁸ and frontier charges.⁷⁹ Finally, Article 84 of the Rome Treaty specifies that the CTP shall apply to rail, road and inland waterway transportation and confers authority on the Council, acting by unanimous vote, to decide to what extent and by what procedure provisions shall be adopted for sea and air transport.⁸⁰

73. Paris Treaty, Art. 60. Coal and steel producers are permitted to depart from the general rule of nondiscrimination to the extent necessary to align their prices with the lowest competitive prices (defined as delivered prices to the purchaser) through another basing point. *Id.*, art. 60(2) (b). Since accurate alignment was thought to require knowledge of transportation costs, Article 70, paragraph 3, of the Treaty specifies that transport rates and conditions applied within and among the member countries are to "be published or brought to the knowledge of the High Authority." *Id.*

74. Hereinafter referred to as CTP.

75. Rome Treaty, art. 75(1) at 45.

76. Aids which meet the needs of transport co-ordination or which constitute reimbursement for certain obligations inherent in the concept of a public utility shall be deemed to be compatible with this Treaty.

Id., art. 77 at 45.

77. Any discrimination which consists in the application by a carrier, in respect of the same goods conveyed in the same circumstances, of transport rates and conditions which differ on the ground of the country of origin or destination of the goods carried, shall be abolished in the traffic within the Community not later than at the end of the second stage.

Id., art. 79(1) at 46.

78. The application imposed by a Member State, in respect of transport effected within the Community, of rates and conditions involving any element of support or protection in the interest of one or more particular enterprises or industries shall be prohibited as from the beginning of the second stage, unless authorised by the Commission.

Id., art. 80(1) at 46.

79. Charges or dues collected by a carrier, in addition to the transport rates, for the crossing of frontiers, shall not exceed a reasonable level, due account being taken of real costs actually incurred by such crossing. . . .

Id., art. 81 at 46.

80. Because of their largely international character, the latter two modes of transport were thought to present special problems. *See generally* Dousset, *supra* note 67, at 261-86.

III. RELATIONS BETWEEN THE CENTRAL COMMISSION FOR RHINE NAVIGATION AND THE EUROPEAN COMMUNITIES

A. *The Legal Framework*

The transport provisions of the Paris and Rome Treaties do not contain any exceptions for Rhine shipping, and it is generally agreed that the powers delegated to the Community institutions extend to transport on the Rhine. On the other hand, certain of the member states of the European Communities have outstanding obligations to third countries under the Act of Mannheim, which obligations may, a priori, conflict with specific ECSC or EEC transport policies. Anticipating the possibility of such conflicts, Article 234 of the Rome Treaty provides that

[t]he rights and obligations resulting from conventions concluded prior to the entry into force of this Treaty between one or more Member States, on the one hand, and one or more third countries, on the other hand, shall not be affected by the provisions of this Treaty.⁸¹

Similar principles are applicable to conflicts between the Paris Treaty and prior agreements to which the member states are a party.⁸²

To illustrate the application of Article 234 of the Rome Treaty we may consider the hypothetical case of a Community regulation reserving intra-Community Rhine shipping to vessels registered in the member states of the Community, the regulation to be executed by officials of the member states acting under national legislation. As such a provision would affect international traffic, we may presume that it would infringe the freedom of navigation of vessels registered outside the Community. In international law, the obligations of the member states to third countries under the Act of Mannheim would survive the conclusion of the Paris and Rome Treaties quite independently of Article 234, and enforcement of the regulation by the member states would thus clearly violate their international obligations.⁸³ But that conclusion would not in itself invalidate the regulation as a matter of Community law or of

81. Rome Treaty, art. 234 at 91. The remainder of the Article reads as follows:

In so far as such conventions are not compatible with this Treaty, the Member State or States concerned shall take all appropriate steps to eliminate any incompatibility found to exist. Member States shall, if necessary, assist each other in order to achieve this purpose and shall, where appropriate, adopt a common attitude.

Member States shall, in the application of the conventions referred to in the first paragraph, take due account of the fact that the advantages granted under this Treaty by each Member State form an integral part of the establishment of the Community and are therefore inseparably linked with the creation of common institutions, the conferring of competences upon such institutions and the granting of the same advantages by all other Member States.

Id.

82. Paris Treaty, art. 71. *See generally* Reuter, *Rapports des Trois Traités avec les Autres Engagements Internationaux Souscrits par les États Membres*, in *DROIT DES COMMUNAUTÉS EUROPÉENNES* 89, 90 (W. Ganshof van der Meersch ed. 1969).

83. *Cf.* Vienna Convention on the Law of Treaties, arts. 36-37, 40, 63 *AM. J. INT'L L.* 886-88 (1969). *See generally* W. BISHOP, *INTERNATIONAL LAW* 144-48 (3d ed. 1971); W. FRIEDMANN, O. LISSITZYN & R. PUGH, *INTERNATIONAL LAW* 367-73, 406-13 (1969).

domestic law. In most national legal systems, legislative assemblies have the power to adopt enactments that contradict international obligations of the state concerned; that is, such enactments are internally effective although they entail breach of an international treaty.⁸⁴ In Community law, however, Article 234 of the Rome Treaty has been interpreted as not just a recognition of the international law subsistence of prior treaty obligations of the member states, but a limit on the legislative power of the Community institutions.⁸⁵ Thus the hypothetical Community regulation, enforcement of which would entail a violation by a member state of a prior treaty obligation, would be ineffective in Community law in the sense that failure of the member state in question to implement the regulation would not be deemed to transgress the Rome Treaty. Moreover, the regulation would obviously not be binding in domestic law.⁸⁶

Although the fundamental rules governing conflicts between European Community transport regulations and the Act of Mannheim are thus clear, to date no proposed or adopted Community measure has presented such a patent conflict as in the hypothetical case. The most controverted measures have involved rate and capacity controls, and the main point of dispute has concerned the compatibility of such controls with the Mannheim principles. The argument has raged intermittently for a decade and a half;⁸⁷ but perhaps the fullest and fairest statement of the opposing positions was set forth in memoranda by the EEC Commission and the Dutch government in the early sixties. Defending the Community's regulatory powers, the Commission asserted that

freedom of navigation cannot be considered a principle which prevents the States and the Community institutions from intervening to safeguard the normal free play of competition on transport markets or on goods markets against possible disturbances.⁸⁸

84. Thus congressional enactments override prior inconsistent treaty provisions. *Reid v. Covert*, 354 U.S. 1, 18 (1957) (dictum); *Whitney v. Robertson*, 124 U.S. 190 (1888); RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 145 (1965). If possible, the courts will construe the statute so as to avoid conflict with the treaty. *Moser v. United States*, 341 U.S. 41, 45 (1951); *Cook v. United States*, 288 U.S. 102 (1933); RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 145, comments *a* and *b* at 446-47 (1965). Provisions in the constitutions of several of the member states of the Communities attempt to make prior treaties or general principles of international law superior to national legislation, but the lack of a tradition of judicial review has cast doubt on the effectiveness of such attempts. See *Etat belge v. Fromagerie franco suisse "Le Ski"*, 7 REVUE TRIMESTRIELLE DE DROIT EUROPÉEN 494 (Belg. cass. Ire 1971) (sustaining supremacy of Community law over subsequent Belgian statute); L. ERADES & W. GOULD, *THE RELATION BETWEEN INTERNATIONAL LAW AND MUNICIPAL LAW IN THE NETHERLANDS AND THE UNITED STATES* (1961); Waelbroeck, *The Application of EEC Law by National Courts*, 19 STAN. L. REV. 1248, 1258-60 (1967).

85. Reuter, *supra* note 82, at 90; cf. *Commission v. Italian Government* (Case No. 61/10), 8 Rec. Jur. 7, 21-23, 1 COMM. MKT. L. R. 187, 203-04 (1962).

86. Pescatore, *Les Relations extérieures des Communautés européennes*, in *Hague Academy of International Law*, 103 RECUEIL DES COURS 1, 160-61 (1961).

87. See section III B *infra*.

88. E.E.C. Commission, Memorandum concerning the Application of the Treaty Establishing the European Economic Community to Rhine Navigation, E.E.C. COMM'N Doc. No. VII/COM(64) 140 (1964), Part I, at 12 [hereinafter cited as E.E.C. Rhine Memorandum]. The legal analysis that forms the basis for the quoted passage is presented *in extenso* in Part II of the memorandum.

The Dutch government, which generally opposed the extension to the Rhine of Community economic regulation, insisted that "freedom of navigation implies not only . . . navigation free from obstacles but also freedom of commercial exploitation and freedom to establish prices."⁸⁹

If the analysis is shifted from the theoretical to the practical it becomes obvious that any dispute respecting the compatibility of EEC and Rhine Regime transport policies could be resolved by the seemingly simple mechanism of an agreement between Switzerland and the member states of the Communities to supplement or amend the Act of Mannheim. Community measures to control transport rates and capacity could be made effective on the Rhine only through Swiss cooperation, so that some such agreement would be required whatever the legal situation. This solution, however, presents two difficulties, one of a legal and the other of an institutional nature.

The legal obstacle is the rights of third countries under the Act of Mannheim, which guarantees freedom of navigation and equality of treatment for the vessels of *all* nations. A substantial body of authority supports the doctrine that treaties may confer rights on third countries that, once accepted, may not be infringed without the third countries' assent.⁹⁰ Obviously that doctrine would not preclude the adoption of measures to supplement the Act of Mannheim.⁹¹ A principal function of the Central Commission for Rhine Navigation is precisely the approval of such measures, and the Act of Mannheim has itself been amended several times, though on matters affecting the institutional structure of the Central Commission rather than the substantive features of the Rhine regime.⁹² But the rights of third countries might be deemed infringed by any fundamental modification of the principles of freedom of navigation and equality of treatment, and an extreme position might consider economic regulation of Rhine transport rates and capacity to be an unacceptable abandonment of those basic principles.⁹³ Still, given the ambiguity of the concepts of freedom of navigation and equal treatment, and assuming the concurrence of Switzerland and Great Britain (the two non-Community members of the Central Commission) with any amendatory convention, the likelihood of a third-country protest is highly remote.

With some over-simplification, the institutional issue may be stated as follows: whether measures for economic regulation of Rhine transport are to be formulated primarily within the framework of the European Community institutions, though extended to the Rhine by agreement with Switzerland

89. Netherlands Ministry of Transport and Waterstaat, Memorandum sur la Politique commune des Transports dans la Communauté économique européenne 31 (1961) (author's translation).

90. See Case of the Free Zones of Upper Savoy and the District of Gex, [1932] P.C.K.J., ser. A/B, No. 46; Vienna Convention on the Law of Treaties, arts. 35-37, *supra* note 78, at 886-87; W. FRIEDMANN, O. LISSITZYN & R. PUGH, *supra* note 83, at 871-73.

91. See text accompanying notes 44-47 *supra*.

92. See text accompanying notes 48-49 *supra*.

93. Cf. E.E.C. Rhine Memorandum, *supra* note 88, Part II, at 4.

and the United Kingdom, or whether such measures will be elaborated under the auspices of the Central Commission, with the Community members of the Central Commission maintaining a common negotiating position. Though the distinction might appear formalistic, in fact such subtle shadings respecting institutional roles have held important implications for the relationships of Switzerland and Great Britain to the European Community member states, of the European Community member states to the European Community Commission, and of the European Community Commission to the Central Commission. To explore these multifaceted relationships, we now turn to three case studies of concrete policy areas.

B. *Case Studies of Regime-Community Interaction*

1. *Rhine Transport Rates for Coal and Steel Products.* It will be recalled that the Paris Treaty lays down a standard of equivalence of rates for comparable transport services and that the Transitional Convention charges a committee of experts with drawing up the necessary implementing measures, which are to be adopted by the member states.⁹⁴ Among the problems that had to be considered by the experts were discriminatory water transport rates, particularly on the Rhine.⁹⁵

In the main, the application of differential rates for comparable water transport services was the consequence, not of conscious discrimination, but of the existence of discrete regimes for domestic and international transport. Belgium, France, Germany and the Netherlands all regulate domestic water transport through a queuing system⁹⁶ for allocating shipping contracts. For obvious reasons, the system is accompanied by officially prescribed transport tariffs. While the queuing system as such is generally not applied to either domestic or international Rhine traffic, the official rates are often mandatory for domestic transport on the river. On the other hand, rates for international Rhine transport are freely determined by market conditions.⁹⁷ As a consequence, an international shipment might cost more, or less, than a shorter domestic shipment over the same route—depending upon the demand and supply conditions at the time.⁹⁸

When the ECSC committee of experts began its deliberations, the question of Rhine transport rates was a topic of major concern for several other private and governmental international bodies. In July, 1951, the Central Commission

94. See note 72 *supra* and accompanying text.

95. For general discussions of the elimination of rate discrimination under the Paris Treaty, see W. DIEBOLD, *THE SCHUMAN PLAN* 154-93 (1959); Liesner, *supra* note 69, at 336-405.

96. The system is called the *Tour de role*.

97. See W. DIEBOLD, *supra* note 95, at 178; Collinson, *Economic Regulation of Transport Under the Common Transport Policy of the European Communities*, 24 *STAN. L. REV.* 221, 266-67 (1972); Liesner, *supra* note 69, at 393.

The compatibility of domestic rate controls with the Mannheim regime was itself a matter of dispute. See 24 *REV. DE LA NAV. INTÉRIEURE ET RHÉNANE* 155, 625 (1952).

98. See, e.g., W. DIEBOLD, *supra* note 95, at 178; Liesner, *supra* note 69, at 393.

for Rhine Navigation called for the convening of an Economic Conference on Rhine Navigation to deal with a "latent permanent crisis" in inland water transport.⁹⁹ The Economic Conference, composed of delegates representing the governments and the two main categories of carriers—individual boatmen and shipping companies—from each of the Rhine states and Belgium, was intended as a forum for the reception of carrier proposals. Moreover, the Central Commission indicated from the outset that it would welcome the creation of broad-based carrier organizations and carrier collaboration to deal with the situation.¹⁰⁰ It is thus not surprising that the final reports of the Conference recommended joint action by carriers to stabilize rates and to control transport capacity.¹⁰¹ Within a few months after the Conference, the boatman profession had seized the initiative tendered to it by the Central Commission and had formed a Consortium for Rhine Navigation (*Consortium de la Navigation Rhénane*) as the vehicle for organizing the recommended carrier cooperation.¹⁰² While the objectives of the Consortium differed greatly from the goals of the ECSC High Authority,¹⁰³ stabilization of rates through private agreement would obviously be one way of reducing, if not eliminating, rate disparities.

The European Conference of Ministers of Transport¹⁰⁴ was another newly created institution interested in the problem of Rhine transport rates. Contemporaneous with the Schuman Plan for a European Coal and Steel Community, proposals had been advanced for the creation of an agency—variously denominated "European High Authority for Transport," "European Transport Office," or "European Transport Council"—with supranational powers and responsibility for integrating European transport.¹⁰⁵ These efforts culminated, in October 1953, in the formation of the more modest ECMT,

99. 23 REV. DE LA NAV. INTÉRIEURE ET RHÉNANE 460 (1951) (communiqué of the Central Commission for Rhine Navigation).

100. *Id.*

101. 24 REV. DE LA NAV. INTÉRIEURE ET RHÉNANE 625-26 (1952) (résumé of the reports of the Economic Conference on Rhine Navigation).

102. 25 REV. DE LA NAV. INTÉRIEURE ET RHÉNANE 184 (1953). To be effective, carrier action would require governmental approval; but the Central Commission, in transmitting the reports of the Economic Conference to the governments, had urged that preliminary carrier negotiations be undertaken while the governments considered the Conference recommendations. 24 REV. DE LA NAV. INTÉRIEURE ET RHÉNANE 728 (1952).

A companion organization, the Union Internationale de la Navigation Fluviale [UINF], was formed in September, 1952, to represent boatman interests before international economic organizations. 24 REV. DE LA NAV. INTÉRIEURE ET RHÉNANE 587 (1952).

103. To mention just two differences, the Consortium was concerned with all transport rates, not just the rates for coal and steel products, and the Consortium's primary aim was to raise carrier revenues, whereas the ECSC High Authority sought to promote rate equality. Further, the High Authority's goals were considered by the Consortium to be inimical to the boatman profession. Elimination of discrimination in rail rates, in particular by the introduction of reduced international through rates, would increase rail competition. And the Consortium tended generally to regard the High Authority as the representative of a "pool" of coal and steel producers seeking to use their combined economic power to force lower rates on transport enterprises. 26 REV. DE LA NAV. INTÉRIEURE ET RHÉNANE 537 (1954); *cf.* 26 *id.* 190 (1954).

104. Hereinafter referred to as ECMT.

105. *See* O. DE FERRON, LE PROBLÈME DES TRANSPORTS ET LE MARCHÉ COMMUN 240-42 (1965); A. ROBERTSON, *supra* note 1, at 214-15.

a permanent conference of the transport ministers of seventeen European countries, charged with achieving "the maximum use and most rational development of European inland transport of international importance" and with co-ordinating and promoting "the activities of international organisations concerned with European inland transport, taking into account the work of supranational authorities in this field."¹⁰⁶ A resolution adopted by the ministers at the time of the creation of the new institution directed the Conference's Committee of Deputies¹⁰⁷ to prepare concrete proposals on the matter of harmonization of rates for domestic and international water transport.¹⁰⁸

The emergence of these many new institutions—the ECSC, the Consortium, and the ECMT—naturally led all concerned to be a bit tentative at first in seizing the initiative. Thus both the experts committee of the ECSC and the Committee of Deputies of the ECMT pressed the profession—the Consortium, in cooperation with the *Union Internationale de la Navigation Fluviale*¹⁰⁹—to complete the agreements that had been recommended by the Economic Conference.¹¹⁰ In October, 1954, the Council of the ECMT adopted a resolution that similarly exhorted the carriers to implement the Conference recommendations and, in the meantime, to eliminate rate disparities through private accords.¹¹¹ The High Authority of the ECSC apparently opposed such encouragement of carrier cartelization on the grounds that it would not ensure the elimination of rate inequalities and would effectively transfer the High Authority's institutional responsibilities to a private agency.¹¹² But the Council of Ministers of the ECSC, stating that "every effort should be made to see that the problem of disparities in water-transport rates was not dealt with by several authorities separately,"¹¹³ resolved on January 20, 1955, to defer to the activity of the ECMT. The Council agreed, however, that it would resume its examination of the problem should it appear that the work of the

106. Protocol Concerning the European Conference of Ministers of Transport, art. 3, Oct. 17, 1953, 184 U.N.T.S. 41, 43, 45.

107. The Conference possesses two organs: A Council, consisting of the ministers of transport of the Member States, and a Committee of Deputies, being senior officials who represent their ministers, prepare the work of the Council and discharge such other functions as are delegated to them.

A. ROBERTSON, *supra* note 1, at 215-16.

108. 25 REV. DE LA NAV. INTÉRIEURE ET RHÉNANE 618-19 (1953).

A working party of the Economic Commission for Europe also was studying the subject of inland water transport rates. See 25 REV. DE LA NAV. INTÉRIEURE ET RHÉNANE 618 (1953). But its efforts had less impact on relations between the Communities and the Central Commission and so are not discussed here.

109. Hereinafter referred to as UINF. See note 102 *supra*.

110. See 26 REV. DE LA NAV. INTÉRIEURE ET RHÉNANE 190, 499 (1954). Apparently the ECSC High Authority also considered the alternatives of applying government rate controls to international Rhine traffic (a solution assumed to require amendment of the Act of Mannheim) or of freeing domestic Rhine traffic from rate control. It quickly became evident that neither alternative would be acceptable to the governments. W. DIEBOLD, *supra* note 95, at 179; Liesner, *supra* note 69, at 395-96.

111. 3 E.C.S.C. HIGH AUTH. GEN. REP. 111 (1954-55); W. DIEBOLD, *supra* note 95, at 179-80.

112. W. DIEBOLD, *supra* note 95, at 180; Liesner, *supra* note 69, at 396.

113. 3 E.C.S.C. HIGH AUTH. GEN. REP. 112 (1955).

ECMT was not likely to produce a satisfactory solution within the near future.¹¹⁴

By April, 1956, it appeared to the High Authority that the ECMT had not generated any practical results, and it urged the six governments to reconsider the matter in the ECSC Council. Following inconclusive Council discussions, the High Authority opened direct bilateral negotiations with the governments, which resulted in the conclusion on July 9, 1957, of an agreement on Rhine transport rates.¹¹⁵ The six governments having unanimously concluded that official intervention to fix rates for international Rhine transport would be impossible without far-reaching modifications of the legal status of the Rhine,¹¹⁶ the agreement adopted the solution of adjusting rates for domestic transport to conform with international rates. That is, the governments undertook "to realize or to provoke the adaptation" of the level of officially prescribed rates for domestic transport to "the level of freely established representative rates, notably rates for long-term contracts, that are applied to comparable [international traffic on the Rhine]."¹¹⁷ Since such an engagement, if unqualified, would obviously limit the ability of the countries concerned to achieve the objectives of their national regulations during periods of prolonged rate depression,¹¹⁸ an "escape clause" provided for mutual consultation in the event "serious difficulties in the field of transport, deep-rooted and persistent disturbance of the market, or any grave deterioration of the general economic situation" should affect implementation of the agreement.¹¹⁹ If mutual consultations failed to eliminate the difficulty in question, a party to the agreement would be free to terminate its obligations.¹²⁰ In March, 1958, the ECSC Council authorized the High Authority to negotiate the extension of the agreement to Switzerland,¹²¹ and a supplemental agreement among the six ECSC member states, the High Authority, and Switzerland was signed in September, 1958, and concluded July 24, 1959.¹²²

114. *Id.*

115. *Accord relatif aux frets et conditions de transport pour le charbon et l'acier sur le Rhin*, 7 E.C.S.C. J.O. 49 (1958) [hereinafter cited as Rhine Rate Agreement]. See 5 E.C.S.C. HIGH AUTH. GEN. REP. 142-43 (1957); 6 *id.* vol. I, at 70-71 & vol. II, at 79-81 (1958); Liesner, *supra* note 69, at 396; 29 REV. DE LA NAV. INTÉRIEURE ET RHÉNANE 496 (1957) (text of agreement and critical commentary).

116. Rhine Rate Agreement, preamble, *supra* note 115, at 50; 6 E.C.S.C. HIGH AUTH. GEN. REP. vol. II, at 79-80 (1958).

117. Rhine Rate Agreement, art. 1, *supra* note 115, at 50-51 (author's translation).

118. Introduced during the 1930's depression, the *tour de rôle* regulations are intended to stabilize the inland water freight market while maintaining rates at a sufficiently high level to enable independent boatmen to stay in business. See generally Collinson, *supra* note 97, at 252-54.

119. 6 E.C.S.C. HIGH AUTH. GEN. REP. vol. II, at 80 (1958); see Rhine Rate Agreement, art. 4, *supra* note 115, at 51. The article 4 procedure also called for consultation of the Central Commission for Rhine Navigation.

120. Rhine Rate Agreement, art. 5, *supra* note 115, at 51.

121. It was understood when the agreement was concluded that it would not become effective within the ECSC until satisfactory completion of negotiations with Switzerland. 29 REV. DE LA NAV. INTÉRIEURE ET RHÉNANE 496, 497 (1957); cf. 6 E.C.S.C. HIGH AUTH. GEN. REP. vol. I, at 71 & vol. II, at 81 (1958).

122. 7 E.C.S.C. HIGH AUTH. GEN. REP. 167 (1959); 8 *id.* at 210 (1960). Attempts

The Rhine Rate Agreement never went into effect. An economic recession in 1958 led to a marked decrease in rates for international transport, but the governments failed to make the corresponding reductions in domestic rates required under article 1 of the agreement.¹²³ Moreover, although article 2 called upon the governments to assist the High Authority in obtaining information about transport rates and conditions, a prerequisite for the High Authority to be able to supervise execution of the agreement, the information was never forthcoming, despite the High Authority's repeated entreaties.¹²⁴ Though a 1960 request¹²⁵ of the German government for invocation of the article 4 consultation procedure—presumably with a view to eventual denunciation of the agreement—was deferred by mutual consent pending further exploration of the possibilities for implementing the agreement,¹²⁶ the impasse persisted and formal article 4 consultations were instituted in 1962.¹²⁷ In the meantime, the profession continued its efforts to resolve the problem of Rhine transport rates as part of a more general solution of the economic difficulties of the industry. The Economic Conference for Rhine Navigation had held a second session in July, 1959, which resulted in a more elaborate plan for the control of Rhine transport capacity.¹²⁸ By the fall of 1962, however, it was possible to predict the failure of the plan due to the lack of generalized carrier support,¹²⁹ though the profession no doubt remained optimistic concerning the prospects of eventual remedial action through the Economic Conference. The consultation procedure continued through 1964, but the question of implementation of the 1957 agreement gradually became submerged in other issues, such as the question of transport rate publicity under the Paris Treaty,¹³⁰ and the agreement must now be considered a dead letter.

2. *Prevention of Rate Discrimination Under the Rome Treaty.* The problem of the relationship of the EEC's transport policy to the Rhine regime was first raised during the drafting of Regulation 1960/11,¹³¹ which implemented the Rome Treaty's prohibition of

all discrimination by carriers which takes the form of making different

were also made to reach an agreement respecting rates for international transport on waterways other than the Rhine. These attempts involved the ECMT but did not affect relations with the Central Commission for Rhine Navigation and thus are not discussed here. *See, e.g.*, 6 *id.* vol. II, at 81-82 (1958); 7 *id.* at 167-68 (1959); 8 *id.* at 210-12 (1960).

123. 7 *id.* 165-66 (1959); Liesner, *supra* note 69, at 396-97.

124. *See, e.g.*, 7 E.C.S.C. HIGH AUTH. GEN. REP. 166 (1959); 8 *id.* 210 (1960); 9 *id.* 185 (1961).

125. *See* 9 *id.* 185-86 (1961).

126. 10 *id.* 234 (1962).

127. 34 REV. DE LA NAV. INTÉRIEURE ET RHÉNANE 606, 720 (1962).

128. *See* section III B 3(a) *infra*.

129. *See* 34 REV. DE LA NAV. INTÉRIEURE ET RHÉNANE 720 (1962).

130. *See generally* S. SCHEINBOLD, THE RULE OF LAW IN EUROPEAN INTEGRATION 150-71 (1965).

131. Council Regulation No. 1960/11, 3 E.E.C. J.O. 1121, 1 CCH COMMON MKT. REP. ¶ 1881 (1960).

charges and laying down different conditions for transporting the same goods along the same routes, because of the country of origin or the destination of the goods¹³²

As an anti-discrimination provision, Article 79(1) is obviously quite limited. For example, it applies only to discrimination in the transport of the same goods along the same routes; discrimination between shippers in comparable, but not exactly the same, circumstances falls outside its strictures, though such discrimination may eventually be dealt with under other transport policy regulations.¹³³ Perhaps because of the limited scope of Article 79(1), the Rome Treaty specifies a relatively short (two-year) deadline for its implementation. Thus Regulation 1960/11 was one of the first EEC transport measures, being adopted by the EEC Council in June, 1960, some six months behind the Treaty schedule.

The structure of Regulation 1960/11 is quite simple. It defines the proscribed discrimination in substantially the language of Article 79(1), specifies the transport operations to which the prohibitory provisions apply, and establishes procedures and sanctions designed to facilitate administrative enforcement. For our purposes, however, the important question is the field of application of the Regulation.¹³⁴

On the Rhine, the incidence of the limited kind of rate discrimination encompassed by Article 79(1) was quite rare, if it existed at all; and some consideration was given during the preliminary discussion of the proposed regulation to exempting Rhine shipping pending joint exploration of the matter with the Central Commission. Such a course was strongly supported in inland navigation circles, where there was considerable inquietude concerning the possibility that a unilateral assertion of EEC competence over Rhine shipping would undermine the predominance of the Central Commission in Rhine affairs.¹³⁵ But in the end the desire for a unified EEC transport policy prevailed, and thus Articles 1 and 2 of the Regulation specify that it applies to all transport of all products—other than ECSC products—by rail, road, or inland water within the European Community, including wholly domestic transport, so long as the place of departure or destination is situated on the territory of a member state.¹³⁶

132. Rome Treaty, art. 79(1) at 46.

133. Article 79(2) of the Rome Treaty states that the prohibition of a specific instance of discrimination in Article 79(1) does not preclude the adoption of other measures under the general transport policy provision, Article 75(1). Rome Treaty, art. 79(2) at 46.

134. See generally Collinson, *supra* note 97, at 285-88; Pinay, *l'Exercice du Pouvoir Réglementaire dans la Communauté Économique Européenne*, 1960 ANN. FR. DR. INT'L 828.

135. Ferraton, *La Commission Économique Européenne Élabore le Règlement Visant à Éviter les Discriminations en Matière de Transports*, 31 REV. DE LA NAV. INTÉRIEURE ET RHÉNANE 484 (1959); see also *id.* at 630.

136. Council Regulation No. 1960/11, *supra* note 131, arts. 1 & 2(1). If a particular transport operation is carried out in part by other modes of transportation or in third

The Regulation formally went into effect on July 1, 1961,¹³⁷ but its actual execution was delayed by the failure of the EEC member states to adopt the necessary implementing measures.¹³⁸ During this time, the Central Commission for Rhine Navigation took under advisement a Swiss memorandum criticizing the Regulation and a request from the Consortium for Rhine Navigation that the Central Commission seek postponement of the application of the Regulation to Rhine shipping.¹³⁹ In December, 1961, as a result of a series of meetings between EEC officials and a Central Commission study group, it was decided that the Central Commission would negotiate the adhesion of Switzerland to a convention applying Regulation 1960/11 on the Rhine.¹⁴⁰ Such a convention was in fact drafted early in 1962 and sent to the EEC Commission and member governments for their consideration,¹⁴¹ but by the end of 1963 the EEC Commission had still not indicated its views on the draft.¹⁴² A fair conclusion is that, as Community attention shifted to more important policy measures,¹⁴³ the pivotal importance of the Rhine problem became manifest, and the EEC Commission decided to seek a fundamental resolution of the question of the relationship of the Rhine regime to EEC transport policy rather than to pursue an ad hoc accord related only to Regulation 1960/11.¹⁴⁴ In any event, in 1964 the Commission did submit to the EEC Council a general memorandum concerning the application of the Rome Treaty to Rhine navigation,¹⁴⁵ and the 1962 draft convention was never ratified.

countries, the Regulation applies only to the portion accomplished by rail, road, or inland water carriers within the European Community. *Id.* art. 2(2) & (3).

137. Council Regulation No. 1960/11, *supra* note 131, art. 4(3).

138. See European Parliament, Written Questions Nos. 42 and 54, 4 EUR. COMMUN. J.O. 1222, 1593 (1961).

139. 33 REV. DE LA NAV. INTÉRIEURE ET RHÉNANE 330 (1961) (report of spring session). See 32 *id.* 793 (1960) (presentation of Swiss memorandum). Article 7(2) of Regulation 1960/11 empowers the Commission to exempt, until January 1, 1964, "certain categories of transport to be determined" (author's translation), and some commentators had previously expressed the hope that the Commission would exercise that authority to delay application of the Regulation to Rhine transport while a joint solution was negotiated by the Central Commission and the EEC. Ferraton, 32 REV. DE LA NAV. INTÉRIEURE ET RHÉNANE 534 (1960).

140. 33 REV. DE LA NAV. INTÉRIEURE ET RHÉNANE 949 (1961).

141. 34 REV. DE LA NAV. INTÉRIEURE ET RHÉNANE 319 (1962).

142. 1963 Central Comm'n Rhine Nav. Ann. Rep., in 11 EUROPEAN YEARBOOK 170, at 176 (1963).

143. In 1961 the EEC Commission published a general memorandum on transport policy, E.E.C. Commission, Memorandum on the General Lines of the Common Transport Policy, E.E.C. Comm'n Doc. No. VII/COM(61) 50 final (1961) ("Schaus Memorandum"), which it followed, in 1962, with an "Action Program," E.E.C. Commission, Action Program for the Common Transport Policy, Comm'n Doc. VII/COM(62) 88 final (1962). The period from 1961 to 1965 was occupied by attempts to achieve a broad consensus on the main objectives of transport policy and on certain key proposals, such as the Commission's suggestion of a bracket-rate system establishing maximum and minimum rates for rail, road and inland water transport. See generally Collinson, *supra* note 97, at 230-46.

144. See Ferraton, 34 REV. DE LA INTÉRIEURE ET RHÉNANE 843 (1962); cf. E.E.C. Rhine Memorandum, *supra* note 82, part I, at 2-3.

145. E.E.C. Rhine Memorandum, *supra* note 88. In order to avoid the inference that silence denoted approval, see 1964 Central Comm'n Rhine Nav. Ann. Rep., in 12

Within the Community, the Netherlands, which generally supported minimal regulation in the transport sector, argued that application of Regulation 1960/11 to Rhine shipping would violate the Act of Mannheim. Relying on Article 234 of the Rome Treaty,¹⁴⁶ the Netherlands refused to implement the Regulation on the Rhine. This insistence led Belgium, France and Germany to take a similar stand, on the ground that Community regulations must be uniformly applied to all Member States.¹⁴⁷ In an effort to end the impasse, the Commission, in April, 1969, initiated a proceeding, under Article 169 of the Rome Treaty, for a determination by the European Court of Justice whether the four states' non-action was consistent with their treaty obligations. By June 8, 1970, however, all four governments had indicated their willingness to implement the Regulation, the Central Rhine Commission reportedly having meanwhile adopted a resolution suggesting that it recognized the validity and applicability of the Regulation, and the proceeding was discontinued.¹⁴⁸

3. *Control of Rhine Transport Capacity.*¹⁴⁹ The most recent events in the evolving relations between the European Communities and the Central Commission for Rhine Navigation have centered on proposals for control of inland water transport capacity. Such proposals have been a major preoccupation of the Central Commission since the early fifties. Although it was not until late 1967 that the EEC Commission presented its first substantive proposal on the subject, the basis for tension between the two institutions was laid at a much earlier stage by jurisdictional claims of the EEC Commission.

(a) *The Rhine Economic Conference and Rhine Capacity Control.* As was noted earlier,¹⁵⁰ the Central Commission convened the first Economic Conference on Rhine Navigation in 1951 as a forum for airing carrier proposals for dealing with the economic crisis in Rhine shipping. Primary responsibility for the crisis was generally attributed to the existence of excess shipping capacity, and the formulation of carrier plans for capacity control accordingly constituted the main activity of this first session of the Economic Conference and of subsequent sessions convened in 1959 and 1963. Although differing in details, all of the plans called for institution of controls over new construction as a means of allaying long-term excess capacity and for temporary immobilization of vessels as a means of correcting short-term excess capacity. In each

EUROPEAN YEARBOOK 139, at 143 (1964), the Secretary General of the Central Commission published a commentary on the EEC Commission's Rhine Memorandum. Walther, *A Propos des Considérations juridiques du Mémorandum de la Commission de la C.E.E. Relatif à l'Application du Traité de Rome à la Navigation du Rhin*, 36 REV. DE LA NAV. INTÉRIEURE ET RHÉNANE 545 (1964).

146. See note 81 *supra* and accompanying text.

147. E.E.C. Rhine Memorandum, *supra* note 88, part 1, at 1.

148. Europe, June 8, 1970, at 11; *id.* June 4, 1970, at 12; *id.* April 9, 1969, at 3.

149. The discussion in this section is adapted from material in Collinson, *supra* note 97, at 320-24, 332-34.

150. See text accompanying notes 99-103 *supra*.

of the plans the administering agency was to be a consortium of carriers. For example, under the draft statutes of the "International Union for the Navigation of the Rhine"—the "UNIR" plan—adopted by the third session of the Economic Conference, Rhine carriers would be compulsory members of a consortium in corporate form. Obligatory annual "compensation dues" would finance a "freight distribution and compensation fund," which would provide payments to carriers whose vessels were temporarily immobilized for purposes of reducing excess capacity. The consortium would be empowered to institute either voluntary or compulsory immobilization measures, and its members would be free to conclude agreements to limit investment in new capacity or to scrap old and unproductive vessels.¹⁵¹

(b) *EEC Commission Reaction to the UNIR Plan.* While the plans proposed by the first two sessions of the Economic Conference quickly became dead letters for lack of widespread support by the Rhine carriers,¹⁵² the UNIR plan drafted by the third session commanded sufficient acceptance to warrant cautious optimism regarding its prospects for adoption and implementation. At its October, 1964 meeting, the Rhine Commission therefore determined to transmit the plan to the governments concerned in order to ascertain whether they were prepared to accept it and, in the case of the Community countries, whether they were willing to give it consideration as an integral part of the Common Transport Policy.¹⁵³ This action spotlighted the issue of relations between the Rhine Commission and the EEC Commission.¹⁵⁴

In response to the initiative of the Rhine Commission, the EEC Commission addressed a short "Note" to the EEC Council.¹⁵⁵ Declaring that the Common Transport Policy should apply to Rhine navigation as well as to other Community transport and cautioning that the UNIR plan might interfere with fundamental decisions yet to be taken under the CTP, the EEC Commission asked the Council to

invite interested Member States to postpone their decision on the

151. See 9 E.E.C. Bull. No. 11, Supp. 12-15 (1966); 32 REV. DE LA NAV. INTÉRIEURE ET RHÉNANE 766 (1960) (report of second session and proposed texts). The provision authorizing agreements among UNIR members to restrict new construction or to scrap old vessels was intended to exempt such agreements from prohibitory national regulations, such as antitrust laws.

152. 9 E.E.C. Bull. No. 11, Supp. 12 (1966).

153. *Id.* at 13.

154. Earlier the Common Transport Policy had figured in the work of the Economic Conference, though in a minor way. During 1961 and 1962 the EEC institutions had endeavored to formulate the guiding principles of the CTP, and the first set of major proposals by the EEC Commission had been published in March, 1963. The key proposal, a general bracket-rate system for controlling domestic and international rail, road and inland water transport rates, was to apply to Rhine transport, and the third session of the Economic Conference had been called in part to consider these EEC developments. 9 E.E.C. Bull. No. 11, Supp. 12. That session ultimately issued an "opinion" that voiced a number of objections to the bracket-rate proposal, stressing in particular the primacy of measures for capacity control. 35 REV. DE LA NAV. INTÉRIEURE ET RHÉNANE 811 (1963).

155. E.E.C. Commission, Note from the Commission to the Council to the E.E.C. Council of March 9, 1965, 9 E.E.C. Bull. No. 11, Supp. 10 (1966).

UNIR plan until the Council, in collaboration with the Commission, has taken up a definite position regarding the fundamental options of the common transport policy¹⁵⁶

At the Council meeting of March 9, 1965, the member states accordingly undertook to consult together prior to any examination of the UNIR plan in the Rhine Commission.¹⁵⁷ This commitment was reinforced when, in June, 1965, the Council agreed on a general program for organization of the transport market, including measures for control of inland water transport capacity.¹⁵⁸

Meanwhile, study of the UNIR plan continued within the Rhine Commission,¹⁵⁹ and a special session was scheduled for July 1, 1966, to consider adoption of a resolution approving the plan.¹⁶⁰ In anticipation of this session, the EEC Commission transmitted a memorandum on the UNIR plan to the EEC Council. The memorandum summarized the Commission's economic and legal objections to the UNIR plan, outlined the main features of a Community plan for inland water transport capacity that the EEC Commission was then preparing, and again urged the EEC member states to suspend their decision on the UNIR plan. As a general criticism, the memorandum noted that the UNIR plan would apply only to Rhine traffic and that, in view of the increasing interconnection of the Community's waterways and the great importance of the Rhine, the existence of such a separate and unique system could lead to distortions in competition between water carriers, ports and industrial basins.¹⁶¹ Presumably this objection could have been met through adaptation of the Community's transport policy to the UNIR plan, but that would have entailed a concession of primary jurisdiction to the Rhine Commission. Among other economic criticisms of the plan, the memorandum objected that principal responsibility for action would be placed in the hands of a private association of carriers without sufficient provision for public supervision, thus creating too great a risk of untrammelled anticompetitive behavior by the member carriers.¹⁶²

This stage of EEC and Central Commission consideration of capacity controls ended in stalemate. The July 1 special session of the Central Commission postponed final action on the UNIR plan.¹⁶³ At its July 28, 1966

156. *Id.*

157. See 9 E.E.C. Bull. No. 11, Supp. 1, 13 (1966). The purpose of the agreed consultation would of course be the preparation of a common position to be adopted by those EEC member states that are also represented on the Rhine Commission.

158. See 8 E.E.C. Bull. No. 8, at 86-87 (1965).

159. On October 13, 1965, the Rhine Commission instructed a working party to prepare a detailed commentary on the UNIR statutes, as well as a draft agreement to be concluded by interested states. A representative of the EEC Commission participated in the working party as an observer and voiced several objections, see 9 E.E.C. Bull. No. 11, Supp. 13 (1966), which, however, apparently had little effect.

160. 9 E.E.C. Bull. No. 11, Supp. 3, 13 (1966).

161. E.E.C. Commission, Memorandum on the UNIR plan and the control of capacity in inland water transport, 9 E.E.C. Bull. No. 11, Supp. 3 (1966).

162. *Id.*

163. 38 REV. DE LA NAV. INTÉRIEURE ET RHÉNANE 481 (1966).

meeting, the EEC Council referred the EEC Commission's memorandum to the EEC Committee of Permanent Representatives¹⁶⁴ for further study.¹⁶⁵

(c) *The EEC Commission Takes the Initiative.* Within the Community, the period from mid-1966 through the end of 1967 was one of intense activity leading to the adoption, in December, 1967, of a "mini-program" for future development of the Common Transport Policy.¹⁶⁶ A month earlier the EEC Commission's long-awaited proposal for control of inland water transport capacity had finally been presented.¹⁶⁷ This proposal, like the one outlined in the June, 1966 memorandum, incorporated the main elements of the UNIR plan, modified to reflect the above-mentioned institutional and economic criticisms.¹⁶⁸ In addition, the proposal covered some matters¹⁶⁹ that were outside the scope of the UNIR plan.¹⁷⁰

As the proposed regulation for control of transport capacity in inland navigation had been so recently presented, it was not included in the EEC Council's "mini-program" of CTP measures to be adopted during 1968 and 1969. Moreover, the priority given to work on the mini-program had the further consequence that the proposed regulation did not come before the Council until 1970.

Meanwhile, the economic situation of the boatmen appeared to deteriorate, and public subventions to induce the dismantling of older vessels were either instituted or under serious consideration in several member states. With the objective of harmonizing or coordinating national actions, the Commission issued a "Recommandation" in July, 1968, calling upon the member states to provide breaking-up indemnities and suggesting common criteria¹⁷¹ and conditions¹⁷² for their application.¹⁷³ Action by the member states in response to the Commission's proposals seems to have been ineffective, for the persistence

164. Composed of the permanent heads of the missions of the six member states to the European Communities, the Committee of Permanent Representatives and its subordinate working groups prepare the work of the Council, that is, they carry out preliminary drafting and political discussions that identify the fundamental issues requiring a political decision at the Council level. *See generally* Noël, *The Committee of Permanent Representatives*, 5 J. COMM. MKT. STUDIES 219 (1966-67).

165. 38 REV. DE LA NAV. INTÉRIEURE ET RHÉNANE 545 (1966).

166. Council Decision 67/690, 10 EUR. COMMUN. J.O. No. 322, at 4 (1967). *See generally* Collinson, *supra* note 97, at 247-51.

167. E.E.C. Commission, Proposition d'un Règlement du Conseil Relatif à l'Accès au Marché des Transports de Marchandises par Voie Navigable, E.E.C. Comm'n Doc. COM(67) 720 final (1967), 11 EUR. COMM. J.O. No. C 95, at 1 (1968). Following the receipt of formal opinions of the European Parliament, 11 EUR. COMMUN. J.O. No. C 108, at 14 (1968), and the Economic and Social Committee, 11 EUR. COMMUN. J.O. No. C 100, at 1 (1968), the Commission modified its initial proposal in several minor respects. E.E.C. Comm'n Doc. COM(69) 311 final (1969).

168. *See* text accompanying notes 160-62 *supra*.

169. *E.g.*, subjective criteria for qualification as a boatman and rules determining access of nonresident carriers to domestic transport.

170. For the details of the proposal, *see* Collinson, *supra* note 97, at 324-28.

171. *E.g.*, age of vessel and size of enterprise.

172. *E.g.*, length of the period during which a beneficiary would be barred from putting new capacity into service.

173. Commission Recommendation 68/335, 11 EUR. COMMUN. J.O. No. L 218, at 10 (1968).

of excess capacity was noted as late as April, 1970, by the Central Rhine Commission, which also called on the Rhine states to implement a program of scrapping old vessels.¹⁷⁴

During 1968 a working group of the Central Rhine Commission examined the EEC Commission's proposal and prepared a report, which was adopted by the Rhine Commission in late January, 1969.¹⁷⁵ The report made two points that are of major importance in terms of subsequent developments. First, the working group emphasized the need for speedy action, especially in regard to measures for temporary immobilization.¹⁷⁶ Second, the Swiss and United Kingdom representatives emphasized that their countries would demand equal representation in any institutions created to implement the proposed capacity controls and that they would insist on multilateral negotiations under the auspices of the Central Rhine Commission prior to adoption of a Community regulation.¹⁷⁷ In addition, the report contained several detailed criticisms of the Commission proposal, which signalled, by their individual and cumulative importance, that negotiations would very probably be both prolonged and spirited.¹⁷⁸

The question of capacity control for inland water transport finally came before the Council at the end of January, 1970. In the Committee of Permanent Representatives it had been agreed that priority would be given to temporary immobilization measures, though disagreement persisted concerning the relationship between such immediate steps and future long-term measures.¹⁷⁹ The resolution adopted by the Council gave priority to the drafting of a regulation for temporary immobilization measures in the Rhine and Moselle basins. In addition, it called for the "coordination" of national dismantlement programs, then in operation or in preparation, with the aim of promoting a healthy long-term development of inland water transport capacity.¹⁸⁰ The Council further resolved that, in light of the experience gained in the application of the temporary immobilization measures, it would elaborate, within five years, "coordinated measures" to assure an economical long-term development of transport capacity. Finally, it was decided that the member states, with the participation

174. 42 REV. DE LA NAV. FLUVIALE EUROPÉENNE 347 (1970). For description of the various national measures, see Rogiers & Kempeneers, *Surcapacité dans la Navigation fluviale?*, 1969 ECHOS DES COMMUNICATIONS 99, 167-72.

175. 41 REV. DE LA NAV. FLUVIALE EUROPÉENNE 147 (1969).

176. *Id.*

177. *Id.* at 147, 149. The two delegations were particularly opposed to a procedure by which the Community would first adopt a regulation and then seek its extension to Switzerland.

178. For example, the report proposed that the temporary immobilization indemnities be fixed in advance for the subsequent year, that the temporary immobilization plan be managed and controlled by professional organizations, that provision for absolute prohibition of new capacity be eliminated, and that breaking-up subsidies continue to be administered solely by the governments concerned.

179. See Europe, Jan. 23, 1970, at 6; *id.*, Jan. 21, 1970, at 7.

180. See also E.E.C. Council Regulation No. 70/1107, 13 EUR. COMMUN. J.O. No. L 130, at 1 (1970).

of the Commission, would concert with the other signatories of the Act of Mannheim regarding the temporary immobilization system to be applied on the Rhine.¹⁸¹

Although the Council resolution contemplated that necessary international agreements would be negotiated and concluded by the member states, with the Commission merely "participating" in negotiations, Article 228 of the Rome Treaty specifies that "where this Treaty provides for the conclusion of agreement between the Community and one or more States or an international organization," the agreement is to be negotiated by the Commission and concluded by the Council on behalf of the Community. Nevertheless, the procedure envisaged by the Council resolution is fairly typical of Community practice. As it happened, a long-standing internal dispute over the allocation of foreign affairs powers between the member states and the Community and between the Commission and the Council came to a head shortly after the January resolution, in connection with the negotiation by the member states of a revised draft of a European convention on truckers' working conditions. As a result, in May, 1970, the Commission filed its first judicial proceeding attacking a decision of the Council before the European Court of Justice. Though ultimately ruling in favor of the Council, the court's judgment, delivered at the end of March, 1971, outlined a very broad view of the Community's foreign relations powers and thus generally upheld the position of the Commission.¹⁸²

Meanwhile, preparation of a Community negotiating position on Rhine capacity control continued within the Committee of Permanent Representatives¹⁸³ and informal discussions took place with Switzerland and the United Kingdom,¹⁸⁴ but the institution of formal negotiations was held in abeyance pending the outcome of the court proceeding. Following the court's judgment, Germany reportedly called for formal negotiations between the EEC and Switzerland (thus implicitly supporting the Commission),¹⁸⁵ while France, which had violently attacked the court's judgment and was opposed to Commission conduct of international negotiations, proposed that Italy and Luxembourg adhere to the Act of Mannheim so that the Rhine question could be settled solely within the Central Commission for the Rhine.¹⁸⁶ Finally in August, 1971, the Commission presented a formal proposal that it be autho-

181. For text of the Council resolution, see 1970 Bull. de la Fédération des Industries Belges 460; for a summary, see 1970 Eur. Commun. Bull. No. 3, at 68.

182. *Commission v. Council*, No. 22/70, 3 CCH COMMON MARKET REP. ¶ 8134 (Eur. Ct. J. March 31, 1971). See 1971 CAHIERS DE DR. EUR. 468. See generally Collinson, *The Foreign Relations Powers of the European Communities: A Comment on Commission v. Council*, 23 STAN. L. REV. 956 (1971); Waelbroeck, *l'arrêt A.E.T.R. et les compétences externes de la Communauté économique européenne*, 1971 *Integration* 79.

183. See 4 Eur. Commun. Bull. No. 2, at 71-72 (1971).

184. See *Europe*, Aug. 31, 1971, at 5-6.

185. 43 REV. DE LA NAV. FLUVIALE EUROPÉENNE 376-77 (1971).

186. *Id.* at 416.

ized to commence negotiations with Switzerland. In regard to the terms to be negotiated, the Commission outlined a scheme incorporating the main features of the institutional and temporary immobilization provisions of its 1967 proposal, with modifications to include Switzerland within the decision-making apparatus and to accord greater voice to the professional organizations.¹⁸⁷ At this writing, no action has been taken on the Commission's proposal, discussions at the December, 1971 Council meeting having ended in a deadlock due to French opposition to the conferral of negotiating powers on the Commission.¹⁸⁸

IV. CONCLUSIONS

The preceding case studies do not by any means cover all of the issues that have arisen respecting the interrelation of European Community transport policy and the Mannheim regime.¹⁸⁹ Nor has it been possible within this brief compass to do more than encapsulate the progress of events emerging from the conflict of competing policy proposals and the personalities and politics of the concerned individuals. Still, the case studies do afford the basis for some tentative conclusions and generalizations.

First, the co-existence of the European Communities and the Central Commission for Rhine Navigation has obviously impaired the ability of each body to adopt and implement effective economic regulations for the Rhine. Because of the Act of Mannheim, the jurisdiction of the Communities over Rhine transport has been incomplete, both legally and practically. The result in the case of the Rhine Rate Agreement was that certain alternatives, such as control of rates for international Rhine transport, were precluded and that the solution adopted quickly proved unworkable. The incompleteness of Community jurisdiction similarly led to nonapplication on the Rhine of Regulation 1960/11, a matter of small practical but great symbolic importance since it portended at an early date the future impasse in international transport policy. On the other hand, the birth of the European Communities obstructed the effort of the Central Commission, through the Economic Conference on Rhine Navigation, to promote carrier joint action to ameliorate the economic depression that has prevailed intermittently in Rhine shipping since the late

187. The scheme contemplates that a professional body, acting by majority vote, would propose the measures to be taken which would then be adopted by joint agreement of representatives of the Community and of Switzerland. If disagreement persisted after three days of discussions, the parties would implement temporary immobilization measures independently in their own territory for vessels inscribed in their registers. 14 EUR. COMMUN. J.O. No. C 107, at 1. *See also* Europe, Aug. 31, 1971, at 5-6.

188. Europe, Dec. 6, 1971, at 8. Favorable opinions on the Commission's proposal have been issued by the Economic and Social Committee, *see* 44 REV. DE LA NAV. FLUVIALE EUROPÉENNE 155 (1972), and by the European Parliament's transport committee, *see* Europe, April 29, 1972, at 5.

189. Comparable issues have arisen, for example, in connection with the European Commission's bracket-rate proposal and EEC antitrust regulations.

forties and early fifties. But for the European Commission's competing jurisdictional claims and its insistence that the EEC member states represented on the Central Commission pursue a joint policy there consonant with the eventual principles and mechanisms of the EEC Common Transport Policy,¹⁹⁰ it seems likely that agreement would have been reached long ago on a system for carrier-administered capacity control.

Equally obvious is the great interest that both the Communities and the Central Commission have in prompt resolution of the problems that have resulted from their concurrent jurisdiction over Rhine navigation. The interest of the Communities is even greater than might first appear, for a solution to the Rhine problem is of fundamental importance for the future of the European Communities' policies for all modes of transport. Given the Rhine's importance as a transportation artery, the CTP must be applicable to that waterway, or, at a minimum, must be coordinated with whatever economic regulations are applicable to Rhine transport. Moreover, because of an agreed Community principle of parallelism in the development of regulations for the various terrestrial transport modes,¹⁹¹ inaction in regard to one mode necessarily means inaction in regard to the others. Inability of the Community institutions to prescribe economic measures affecting Rhine transport has hampered the elaboration of a regulatory regime for inland water transport, and this in turn has deadlocked development of the entire CTP.

While tensions between the Communities and the Central Commission have arisen in part because of uncertainty regarding the compatibility of proposed or possible Community measures with the Mannheim regime, the fundamental issues have been political rather than legal. At stake has been the allocation of effective decision-making authority.¹⁹² Because of the principle of parallelism, and a corollary commitment to uniformity in the CTP, the European Commission has viewed challenges to its jurisdiction over Rhine transport as attacks on its authority over transport matters generally; consequently it has refused to admit a special status for Rhine transport, whether a

190. See text accompanying notes 155-56 & 161 *supra*.

191. Rail, road and inland water.

192. This is not to deny the existence of important legal questions. The adoption of certain policies by the Communities would clearly violate the Mannheim principles, thus requiring their amendment and perhaps the reconsideration of the assumptions upon which the Rhine regime is based. For example, the recent proposal of the European Commission for a common charging policy for the use of transport infrastructure provides for toll charges applicable to all inland water transport, including Rhine traffic. European Commission, Proposition de Décision du Conseil Relatif à l'Instauration d'un Système Commun de Tarification de l'Usage des Infrastructures de Transport, art. 6(1), Comm'n Doc. COM(71) 268 final, at 6-7 (1971). Such toll charges would appear to conflict with Article 3 of the Act of Mannheim, which stipulates that "no duty based only on the fact of navigation may be levied on the crafts, on their cargoes nor on the rafts." The Commission's counter-argument that the proposed tolls are only a remuneration for services rendered and not a prohibited obstacle to navigation, European Commission, Mémorandum sur la Tarification de l'Usage des Infrastructures dans le Cadre de la Politique Commune des Transports, Comm'n Doc. COM(71) 268 final, at 25 (1971), is unlikely to gain general acceptance in view of the terms of Article 3.

special legal position or a separate decision-making apparatus. On the other hand, Switzerland has insisted on the primacy of the Rhine regime in order to avoid being put in the position of simply adhering to Community regulations.¹⁹³ The position of the European Community member states has been affected by their attitude toward the strengthening of the Community institutions, with France, for example, preferring on some occasions to uphold the jurisdiction of the Central Commission rather than to cede to the European Commission an increasing role in the conduct of Community foreign relations.¹⁹⁴ Similarly, the Rhine carriers have tended to support the Central Commission, which on the whole is more susceptible to carrier influence.

In a broader perspective, the relationship between the European Communities and the Central Commission might be analyzed as an embryonic political system in which the political actors include nation states, interest groups, and the institutions of supranational organizations. As is to be expected of such an embryonic system—particularly one in which a major subsystem, the Communities, is itself in process of development—the main issues revolve around the allocation of political power. The process is particularly difficult in this case because of the absence of any constitutive document to provide a formal allocation of decision-making authority as a starting point for the development of an effective allocation.¹⁹⁵ Moreover, this is a political system in which ideological and symbolic issues may bear on the basic task of allocating political power. First, there is an underlying conflict of economic philosophies. In the Communities, because government intervention in rail, road and domestic inland water transport is the rule in the six member states, a Community transport policy that seeks to integrate national transport markets has, in its early stages, necessarily emphasized Community controls for transport rates and capacity.¹⁹⁶ In contrast, the Mannheim regime has reflected in practice the *laissez-faire* economic liberalism of the nineteenth century, whether or not prohibition of government intervention be deemed to be enshrined in the principles of equal treatment and freedom of navigation. Certainly the Netherlands and the carriers, with the support of the Central Commission, have steadfastly asserted the right of Rhine carriers to operate free of government interference.¹⁹⁷ Second, on a symbolic level one might characterize the choice between the European Communities and the Central Commission as one between a renescent nationalism represented by the Communities and the spirit of internationalism embodied in the Central Commission or, with a slightly different emphasis, between autarchical policies of the Communities

193. See note 177 *supra* and accompanying text.

194. See text accompanying note 186 *supra*.

195. "The fact that no political subsystem settles jurisdictional disputes within the system . . . also gives rise to strong disintegrative tendencies within the system." M. KAPLAN, *SYSTEM AND PROCESS IN INTERNATIONAL POLITICS* 113 (1957).

196. See generally Collinson, *supra* note 97, at 225, 228 & 238-43.

197. See notes 89, 130 & 178 *supra* and accompanying text.

and more liberal policies encouraging the free flow in international transport of goods and services.¹⁹⁸

The general lesson to be drawn from the preceding discussion is, of course, that relations among international economic organizations may be expected to be governed by the general laws of political action. Such organizations will seek to maximize their decision-making authority, even at the expense of other similar organizations, and other political actors will use struggles between international economic organizations to serve their own ends. Often these conflicts over basic questions respecting the allocation of decision-making authority will delay substantive action, and this in general reduces the effectiveness of the political system.¹⁹⁹

As regional and international economic organizations with real powers of decision proliferate, we may anticipate that problems of overlapping jurisdiction will increasingly arise. Our analysis indicates that policymakers contemplating the creation of such organizations should consider the possibilities of resolving jurisdictional conflicts in advance and, if that is impossible, should weigh the benefits expected from the creation of the new organization against the losses that will result from impairment of decision-making authority due to unresolved jurisdictional conflicts. In political as in economic matters, increased but incomplete integration is not always a second-best solution.

198. A more sympathetic appraisal of the Communities' position would note, however, that the Community territory now embraces virtually the entire length of the Rhine, so that the Communities are merely seeking to reassert autonomous regulatory control over a "domestic" waterway. Moreover, as the carriers have used their freedom in large part to cartelize the industry—substituting private for governmental restrictions—the choice ought arguably to be characterized as one between a fully effective governmental policy in the general interest and a situation in which a favored group would constitute an immune enclave, the existence of which would necessarily distort the competitive position of others. Such an appraisal is itself obviously subject to criticism. For example, it understates the interest of Switzerland in Rhine navigation. It is included here as an indication of the complexity of the issues bearing on the allocation of decision-making authority between the Communities and the Central Commission.

199. The text and the analysis of the case study on Rhine capacity control, *see* text accompanying note 190 *supra*, may appear to overemphasize the quantity of such system outputs as "decisions" and "actions" as an index of the efficiency of a political system. Clearly, decisions differ in quality and must thus be assigned differing values. In any particular instance the parties may prefer nonaction to action and thus failure to act may be deemed a "decision," or an "action" or at least a systems output. Indeed, in a pluralistic society we may weight the rules of the game in favor of the status quo because of a preference for consensus decisions or for protection of the minority against precipitous majority action.

The text may also appear to overemphasize the importance or utility of an authoritative allocation of decision-making authority or of hierarchical organization. There are, of course, various alternatives to hierarchical organization as well as the possibility of joint action through "mutual adjustment" in cases when no authoritative decision-maker exists. *See* C. LINDBLOM, *THE INTELLIGENCE OF DEMOCRACY* 3-9 and *passim* (1965).

The point here is that struggle over decision-making powers during the formative period of a political system or subsystem drains the capacity for other political activity and this is a cost incurred solely because of the dynamics of change and not because of value preferences respecting the process of decision-making. This observation is, of course, generally applicable—consider, for example, the jurisdictional struggles that attend each reorganization of the federal government or the creation of new organs for the governance of metropolitan transport or environmental quality.