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W. Paul Gormley

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## INDIVIDUAL PETITION TO THE COMMISSION OF THE EUROPEAN ECONOMIC COMMUNITY\*

W. PAUL GORMLEY†

The right of an *individual, group, or non-governmental entity* to obtain a hearing on the merits of a dispute before the Court of Justice of the European Economic Community has been severely restricted by the Rome treaties.<sup>1</sup> In curtailing the broader right of individual petition formerly contained in article 33 of the Paris Treaty,<sup>2</sup> article 173 of the EEC Treaty has placed community organization and member states in a favored position.

Admittedly, the treaty drafters clearly desired to restrict individual *locus standi*. Article 173(2), containing the right of direct petition to the Luxembourg tribunal, provides: "Any natural or legal person may, under the same conditions [as a member state, the council or the commission] appeal against a decision addressed to him or against a decision which, although in the form of a regulation or a decision addressed to another person, *is of direct and specific concern to him*."<sup>3</sup> The latter portion of article 173, paragraph 2, has caused a shift in the court's jurisprudence. Previously, this writer has directed criticism against the treaty makers,<sup>4</sup> as well as against particular judgments of the court deemed too conservative, such as *Confédération Nationale des Producteurs de Fruits et Légumes v. EEC Council*<sup>5</sup> and *Fédération Nationale de*

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† Associate Professor of Law, The University of Tulsa.

1. Treaty Establishing the European Economic Community, 4 European Yb. 413 (1958) [hereinafter cited as EEC Treaty]; Treaty Establishing the European Atomic Energy Community, 4 European Yb. 455 (1958) [hereinafter cited as EURATOM Treaty].

2. Treaty Establishing the European Coal and Steel Community, 1 European Yb. 353 (1955) [hereinafter cited as ECSC Treaty].

3. (Emphasis added.) Article 173, EEC Treaty.

4. GORMLEY, THE PROCEDURAL STATUS OF THE INDIVIDUAL BEFORE INTERNATIONAL AND SUPRANATIONAL TRIBUNALS 148-56 (1966); and Gormley, *The Procedural Status of the Individual Before Supranational Judicial Tribunals*, 41 U. DET. L.J. 405, 421-24 (1964).

5. Cases Nos. 16/62 and 17/62, 8 Recueil de la Cour [hereinafter cited as Recueil], CCH Common Market Reporter ¶ 8005, at 7181 (1963) [hereinafter cited as CCH

*la Boucherie en Gros et du Commerce en Gros des Viandes v. EEC Council*.<sup>6</sup> These decisions, in short, held general regulations could not be challenged by private persons in associations even though they were indirectly injured.

Relying on the interpretation given to the superseded article 33, ECSC, this writer prefers a more flexible approach, while at the same time conceding certain merits of the court's rulings.<sup>7</sup> The problem is essentially that the jurisdiction of the court has been circumvented by the EEC Treaty. Consequently, the judges are unable to liberalize treaty articles as are the constitutional domestic tribunals. Indeed, an attempt to return to the broader ECSC standard would constitute an abuse of their judicial function of strictly interpreting the language set forth in the text.<sup>8</sup>

The language of article 33, ECSC, also governing the scope of ar-

Common Mkt. Rep.]. See the criticism by GORMLEY, *THE PROCEDURAL STATUS OF THE INDIVIDUAL BEFORE INTERNATIONAL AND SUPRANATIONAL TRIBUNALS* 150-53 (1966); and Gormley, *The Procedural Status of the Individual Before Supranational Judicial Tribunals*, 41 U. DET. L.J. 405, 423-24 (1964). On these previous occasions the writer took the position that the Court interpreted the EEC Treaty in too conservative a fashion and that the judges should have reached a contrary result, on the theory that the decisions of the Commission were of direct concern to the associations. He is still firmly of the same opinion.

6. Cases Nos. 19/62, 20/62, 21/62, and 22/62, 8 Recueil 943, CCH Common Mkt. Rep. ¶ 8006, at 7192 [hereinafter referred to as *Fédération Nationale*].

7. *E.g.*, *Fédération Nationale*, *supra* note 6; *Milchwerk Heinz Wöhrmann & Sohn, KG v. EEC Comm.*, Cases Nos. 31/62 and 33/62, 8 Recueil 965, CCH Common Mkt. Rep. ¶ 8007, at 7200 [hereinafter referred to as *Wöhrmann*]. See in particular, *Plauermann & Company v. EEC Comm.*, Case No. 25/62, 9 Recueil 197, CCH Common Mkt. Rep. ¶ 8013, at 7265 [hereinafter cited as *Plauermann*]. *Accord*, *Société anonyme belge "Glucoseries réunies" v. EEC Comm.*, Case No. 1/64, 10 Recueil 811, CCH Common Mkt. Rep. ¶ 8024, at 7404; *Alfred C. Toepfer KG v. EEC Comm.*, Cases Nos. 106/63 and 107/63, 11 Recueil 525, CCH Common Mkt. Rep. ¶ 8031, at 7456; *Getreude-Import-Gesellschaft mbH v. EEC Comm.*, Case No. 38/64, 11 Recueil 263, CCH Common Mkt. Rep. ¶ 8033, at 7484; *Marcello Sgarlata v. EEC Comm.*, Case No. 40/64, 11 Recueil 279, CCH Common Mkt. Rep. ¶ 8034, at 7491.

See especially the discussion by Bebr, *Judicial Remedy of Private Parties Against Normative Acts of the European Communities: The Role of Exception of Illegality*, 4 C.M.L. Rev. 7-9 (1966).

8. Article 164, EEC Treaty. See 1 *AMERICAN ENTERPRISE IN THE EUROPEAN COMMON MARKET: A LEGAL PROFILE* 70-72 and 502-05 (Stein & Nicholson eds. 1960); FELD, *THE COURT OF THE EUROPEAN COMMUNITIES: NEW DIMENSION IN INTERNATIONAL ADJUDICATION* 14-21 (1964); LAGRANGE, *THE ROLE OF THE COURT OF JUSTICE OF THE EUROPEAN REGIONAL COMMUNITIES* 54-71 (Shimm ed. 1962); LANG, *THE COMMON MARKET AND THE COMMON LAW* 14-20 (1966); 1 VALENTINE, *THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES* 17-30 (1965); Donner, *The Court of Justice of the European Communities*, 17 *RECORD OF N.Y.C.B.A.* 232 (1962); Feld, *The Judges of the Court of Justice of the European Communities*, 9 *VILL. L. REV.* 37 (1963); P. Herzog, *The Procedure Before the Court of Justice of the European Communities*, 41 *WASH. L. REV.* 438, 450-53 (1966); Mashaw, *Federal Issues In and About the Jurisdiction of the Court of Justice of the European Communities*, 40 *TUL. L. REV.* 21, 27-36 (1965); Note, *The Court of Justice of the European Communities*, 51 *IOWA L. REV.* 129 (1965).

ticle 35, to be examined in detail below,<sup>9</sup> provided: "*The enterprises, or the associations . . . shall have the right of appeal on the same grounds against individual decisions and recommendations affecting them, or against general decisions and recommendations which they deem to involve an abuse of power affecting them.*"<sup>10</sup> The ECSC court, in existence from 1953 to 1958, had the power to render a broad interpretation of "affecting them, directly." Moreover, the practice of the ECSC tribunal was to cut the sentence into two separate portions: "[first part] enterprises, or the associations . . . shall have the right of appeal . . . against individual decisions and recommendations affecting them, [second part] [O]r against general decisions and recommendations which they deem to involve an abuse of power affecting them." Here, the sentence is cut into two distinct parts in order to permit an enterprise to challenge "decisions or recommendations of the High Authority" on either of two grounds: (1) that the decision affected the petitioner directly, or (2) that petitioner deemed that such general decision or recommendation affected him directly. But under article 173<sup>11</sup> of the EEC Treaty the second ground for appeal is no longer afforded individuals. Although member states still may contest an action brought by another member state, by the council, or by the commission—"on grounds of lack of jurisdiction, substantial violations of basic procedural rules, infringements of this Treaty or of any rule of law relating to effect being given to it or of misuse of powers,"—private entities must meet a more stringent procedural test. The new treaties provide: "Any natural or legal person may, under the same circumstances, appeal," but in the case of an *individual* or enterprise, such violation must be "of direct and specific concern to him."

Thus, a restriction has been placed upon the right of an individual

9. See *infra* notes 18, 31, and 46.

10. (Emphasis added.) GORMLEY, *THE PROCEDURAL STATUS OF THE INDIVIDUAL BEFORE INTERNATIONAL AND SUPRANATIONAL TRIBUNALS* 140-52 (1966).

11. The full text of Article 173, EEC Treaty, reads:

The Court of Justice shall review the lawfulness of acts other than recommendations or opinions of the Council and the Commission. For this purpose, it shall be competent to give judgment on appeals by a Member State, the Council or the Commission on grounds of incompetence, of errors of substantial form, of infringement of this Treaty or of any legal provision relating to its application, or of abuse of power.

Any natural or legal person may, under the same conditions, appeal against a decision addressed to him or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and specific concern to him.

The appeals provided for in this Article shall be lodged within a period of two months dating, as the case may be, either from the publication of the act concerned or from its notification to the appellant or, failing that, from the day on which the latter had knowledge of that act.

to initiate an action. The above restrictions contained in article 173 are mandatory on the court. Specifically, the drafters desired to change the text of article 33 of the ECSC Treaty in order to stop the Luxembourg tribunal from interpreting the concept of personal interests or "abuses affecting them" in such a sweeping manner. Authors of the treaties, as well as the *six ratifying States*, intended that the broad interpretation given by the ECSC court be cut down so that an individual would only be permitted to appeal an action affecting him personally. Whereas under article 33 of the ECSC Treaty *only a general interest and belief* had to be alleged to obtain a hearing, under the EURATOM and ECC treaties the particular regulation or decision must be "of direct and specific concern to him" (an individual) at the time an action commences. A possible future injury does not come within the requirements of article 173 (a result contrary to article 33).

In spite of the desire on the part of writers or statesmen to effect changes, the establishing treaties are fundamental and, thereby, have the status of constitutional documents. This principle was articulated in one of the early cases heard in Luxembourg.<sup>12</sup> The treaty is supreme, with the effect that the court has no competence to impose treaty revisions. The ECSC tribunal has held that the basic document—as originally written—absolutely binds the judges. Not only are the member states, community organs, and individuals doing business (within the six) subject to constitutional-type restrictions, the judges are similarly bound. Unquestionably, this norm of treaty superiority controls interpretations of the later EEC Establishing Treaty.<sup>13</sup> Thus the justices properly refrain from attempts to liberalize the *locus standi* of private individuals, regardless of their sympathy as indicated in their subtle arguments.<sup>14</sup> For ex-

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12. French Government v. High Authority, ECSC, Case No. 1/54, 1 Recueil 7 (1954). 2 VALENTINE, *op. cit. supra* note 8, at 18.

13. See especially, N.V. Algemene Transport—en Expeditie Onderneming van Gend & Loos v. Netherlands Fiscal Administration, Case No. 26/62, 9 Recueil 1, CCH Common Mkt. Rep. ¶ 8008, at 7207 [hereinafter referred to as Van Gend and Loos]. See also Kleding-Veroopbedrijf Co. v. Robert Bosch Co., Case No. 13/61, 8 Recueil 89, CCH Common Mkt. Rep. ¶ 8003, at 7133 [hereinafter referred to as Bosch case]. *Accord*, Da Costa en Schaake N.V. v. Netherlands Fiscal Administration, Cases Nos. 28/62, 29/62, and 30/62, 9 Recueil 59, CCH Common Mkt. Rep. ¶ 8010, at 7233 [hereinafter referred to as Da Costa]. *Accord*, Flaminio Costa v. Ente nazionale Energia elettrica impresa già della Edison Volta, Case No. 6/64, 10 Recueil 1141, CCH Common Mkt. Rep. ¶ 8023, at 7384 [hereinafter referred to as Costa v. E.N.E.L.]. See Sasse, *The Common Market: Between International and Municipal Law*, 75 YALE L.J. 695 (1966). Erades, *International Law, European Law and Municipal Law of Member States*, 15 INT'L & COMP. L.Q. 117, 120-27 (1966).

14. See the Conclusion of Advocate-General Lagrange in the Plaumann case, *supra* note 7, at 7276-81. *Cf.* his comments as to Article 35, ECSC, *id.* at 7278. *Accord*, Advocate-General Gand in Alfons Lütticke GmbH, Dr. Otto Suwelack KG, and Kurt Siemens & Co. v. EEC Comm., Case No. 48/65, CCH Common Mkt. Rep. ¶ 8044, at 7607 (1966) [hereinafter referred to as Lütticke].

ample, Advocate-General Gand, in his conclusion to the *Lütticke* case,<sup>15</sup> maintained: "regardless of how subtle the suit may be, all of the plaintiff's acts from the beginning were intended to force the Commission to set in motion the procedure of Article 169 against the Federal Republic of Germany."<sup>16</sup> Gand's position accorded with the earlier positions of Advocate-Generals Karl Roemer<sup>17</sup> and Maurice Lagrange.<sup>18</sup>

Though condemning the regression in the area of direct appeal, this writer agrees that required changes cannot be effected by the judges; rather, the treaty itself must be revised.<sup>19</sup> In this regard, the scope of article 173(2)—insofar as possible "judicial legislation" is concerned—*has been so firmly delineated* that further discussion here would be superfluous. Nevertheless, the judges cannot perform a legislative function,<sup>20</sup> even though the scope of appeal remedies provided for in article 173(2) is too restrictive to adequately serve a supranational community.

With this appeal limitation imposed by article 173, an alternative remedy may be found in article 177(2) (which this writer believes is the

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15. *Lütticke*, *supra* note 14, at 7597.

16. *Id.* at 7607. See Article 169, EEC Treaty, *infra* notes 37, 54-55.

17. Plaumann, *supra* note 7, at 7276-81. See especially Roemer's discussion of the earlier Paris Treaty in relation to the later Article 177(2), EEC Treaty, *id.* at 7276-77.

18. Confédération Nationale des Producteurs de Fruits et Legumes, *supra* note 5, at 7189-92. Lagrange states:

An association regularly organized under the national laws to which it is subject is obviously a "legal person," from the moment it is recognized by such laws as entitled to such qualification, from which it naturally derives the right to sue and be sued. It is certain that a strict interpretation of the second paragraph of Article 173 would result in associations being nearly always denied, by virtue of this provision, the right to sue, for it is difficult to imagine that a decision should be directed at an association as such, or that a regulation or decision directed at another person should "concern it directly and individually" as an association.

*Id.* at 7189. Cf. Fédération Nationale, *supra* note 6. The successful defense raised by defendant, the EEC Council, alleged:

The *defendant* maintains that Article 173 of the EEC Treaty, which requires that the act in question be of *direct concern* to the individuals, is more restrictive than Article 33 of the ECSC Treaty, which provides in a more general manner for the right of individuals to attack individual decisions "*concerning them.*" This condition laid down in Article 173 would be met by "a person for whom the opposed provision creates, modifies or eliminates rights from which he benefits or obligations for which he is responsible, where, in short, the effect of the measure on the person concerned is immediate and not indirect," so that, contrary to what would happen within the framework of the ECSC Treaty, "this condition is not met when such measure is effective after a third party's legal act based on the act in question has occurred."

*Id.* at 7196.

The similarity of this defense with the "law making" pronouncement of Lagrange is significant, since the correct norm of community law has now been established, when the force of cases 16/62 and 17/62, *supra* note 5, are added by way of support.

19. See *infra* note 93.

20. See *supra* note 7 and the cases cited therein. See the writer's Recommendations concerning the required legislative reform, *infra* note 93.

best procedural remedy available to individuals). Specifically, paragraph 2 may be termed the *indirect right of appeal*. Its text—enabling a private individual to have an issue certified by a municipal forum in order to obtain a binding judgment from Luxembourg—states: “Where any such question [involving treaty interpretation] is raised before a court or tribunal of one of the Member States, such court or tribunal *may, if it considers that its judgment depends on a preliminary decision* on this question, request the Court of Justice to give a ruling thereon.” Precisely, article 177(2) permits a lower national tribunal to request a preliminary decision. Such action, however, is not mandatory. Even so, article 177(2) has afforded opportunities for individuals to have their claims sent to the EEC tribunal. On the other hand, a more potent provision, article 177(3), requires referral from the highest courts: “Where any such question is raised in a case pending before a domestic court or tribunal from whose decisions no appeal lies under municipal law, such court or tribunal *shall refer* the matter to the Court of Justice.”

Indeed, the superiority of community law by the use of indirect petition has been recognized in article 177(3) by a line of cases beginning with *Bosch*,<sup>21</sup> and culminating in *Van Gend and Loos*.<sup>22</sup> The court reiterated its basic position in *Da Costa*<sup>23</sup> where it resolved differences between paragraphs 2 and 3 (that is, the mandatory duty, rather than the option, on the part of a national judge to transfer questions to Luxembourg for interpretation). In short, paragraph 3 contains a mandate imposed on the highest national forums, and arising simultaneously with ratification of the treaty. The judges in *Da Costa* rejected the advice of their advocate-general and ruled that a national appellate court had an absolute duty to request such an interpretation.

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21. *Supra* note 13.

22. *Supra* note 13. See especially, Anthony, *Comments on the Common Market*, 41 WASH. L. REV. 423, 429-31 (1966) and Mashaw, *supra* note 8, at 37-53.

23. See *supra* note 13 and the cases cited therein. In this regard, the Court stated:

If the last paragraph of Article 177 unconditionally requires that national courts—such as the Tariefcommissie—from whose decisions there is no possibility of appeal under domestic law submit to the Court of Justice any questions of interpretation raised before them, the authoritativeness of its interpretation could nevertheless deprive this obligation of its reason and thus render it meaningless. This is particularly true when the question raised is substantially similar to one that has already been the object of a preliminary ruling in a similar case. . . . Article 177 always allows a national court, if it finds it appropriate, to again refer questions of interpretation to the Court of Justice. This is made clear in Article 20 of the Statute of the Court of Justice, *according to which the procedure provided for the settling of pre-judicial questions is automatically set in motion as soon as such a question is referred by a national court.* (Emphasis added.)

*Id.* at 7238.

Cf. GORMLEY, THE PROCEDURAL STATUS OF THE INDIVIDUAL BEFORE INTERNATIONAL AND SUPRANATIONAL TRIBUNALS 162-64 (1966).

Unlike article 173, article 177 continues to remain a battleground, for new exceptions to its scope are arising,<sup>24</sup> largely because the supra-national system functions concurrently alongside six national legal structures. Notwithstanding the usefulness of article 177 in the *Bosch, Van Gend and Loos*, and *Da Costa* cases, the employment of article 177(2) and (3) remains too limited to compensate for the "down-grading" of article 173 and the superseding of article 33, ECSC. Nevertheless, under present jurisdictional standards, article 177 constitutes the only remaining avenue of appeal open to private persons and groups within the six. As will be shown subsequently, articles 169, 175 and 184 have been ineffective. Moreover, these exceptional articles have been interpreted more rigidly than has article 173.<sup>25</sup>

#### PURPOSE OF THE STUDY

As it became evident that articles 173 and 177 could not afford the degree of *locus standi* required by private persons, alternative lines of appeal were sought. An attempt was made to use article 184<sup>26</sup>—pursuant to

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24. In particular, three exceptions can be cited by way of illustration: 1) where no doubt exists as to the meaning of the EEC Treaty no interpretation by the court is required; 2) where it is not necessary to obtain an interpretation of an Article in order to decide the particular case, no referral is justified; and 3) where the EEC Court has previously given a decision on the same question there is no duty on the part of a national forum to again seek the aid of Luxembourg Tribunal.

See *Fédération Nationale*, *supra* note 6; *Wöhrmann*, *supra* note 7; and *Da Costa*, *supra* note 13, for examples of the above three exceptions. At present there exists a growing problem of concurrent jurisdiction between municipal tribunals and the EEC Court arising from the application of Article 177. In numerous instances, national courts need not refer a question to Luxembourg but may render its own interpretation of the treaties. *Blume v. Praag*, Belgium Commerce Court, Antwerp. CCH Common Mkt. Rep. ¶ 8017, at 7332; *Société Arlab Import-Export v. U.N.E.F.*, Commerce Court of the Sein, France. CCH Common Mkt. Rep. ¶ 8018, at 7339; "Cameras," Court of Appeal, Munich. CCH Common Mkt. Rep. ¶ 8020, at 7348; and *Nicolas v. Photo-Radio Club*, Court of Cassation, Paris. CCH Common Mkt. Rep. ¶ 8026, at 7421.

This basic norm has been clearly enunciated by the EEC Court. *Costa v. E.N.E.L.*, *supra* note 13. *Albatros v. SOPECO*, Case No. 20/64. 11 Recueil ——. CCH Common Mkt. Rep. ¶ 8029, at 7437; *Van Der Veen v. Sociale Verzekeringbank*, Case No. 100/63, 10 Recueil 1105, CCH Common Mkt. Rep. ¶ 8032, at 7472; *Dingemans v. Sociale Verzekeringbank*, Case No. 24/64, 10 Recueil 1259, CCH Common Mkt. Rep. ¶ 8037, at 7525; *Firma C. Schwarze v. Einfuhr-und-Vorratsstelle*, Case No. 16/65, 11 Recueil 1081, CCH Common Mkt. Rep. ¶ 8039, at 7548; *Dekker v. Bundersversicherungsanstalt für Angestellte*, Case No. 33/65, 11 Recueil 1111, CCH Common Mkt. Rep. ¶ 8043, at 7592; and *Société Technique Minière v. Maschinenbau Ulm GmbH*, Case No. 56/65, ——. Recueil ——. CCH Common Mkt. Rep. ¶ 8047, at 7685.

See also *Bebr*, *supra* note 7, at 29-31.

25. *FELD, THE COURT OF THE EUROPEAN COMMUNITIES: NEW DIMENSION IN INTERNATIONAL ADJUDICATION* 41 and 70-71 (1964). See *infra* note 39 and the text cited therein.

26. Where a regulation of the Council or of the Commission is the subject of a dispute in legal proceedings, any of the parties concerned may, notwithstanding the expiry of the period laid down in Article 173, third paragraph invoke the grounds set out in Article 173, first paragraph in order to allege before the



allegations of inapplicability, or of illegality—as a means of securing a judicial determination. Sadly, article 184 was interpreted as restrictively as articles 173 and 177 in the *Wöhrmann* case,<sup>27</sup> and the first attempt by German milk importers to employ an alternative remedy failed. Hence, article 184 should be conceived as a counterpart to articles 169 and 175 (and 95). Article 184 constitutes a precedent controlling these other articles.

The specific scope of this present study concerns the feasibility of an individual petitioning the commission or the council in order that an executive organ can subsequently take the individual's complaint before the court in the event a member state has violated a treaty obligation. Authority for such petition is found in article 175, especially paragraph 3.

Should the Council or the Commission in violation of this Treaty fail to act, the Member States and the other institutions of the Community may refer the matter to the Court of Justice in order to have the said violation placed on record.

No proceedings arising out of the said reference shall be heard unless the institution concerned has been called upon to act. If within two months of being so called upon, the institution concerned has not made its attitude clear, the said proceedings may be brought within a further period of two months.

*Any natural or legal person may bring proceedings before the Court of Justice, under the conditions laid down in the pre-*

Court of Justice that the regulation concerned is inapplicable. The text of Article 156, EURATOM Treaty, is identical.  
27. *Supra* note 7.

The plaintiffs infer from the fact that Article 184 does not specify the jurisdiction to which a dispute implicating a regulation must be submitted that it can be assumed that the inapplicability of this regulation may be invoked before the Court; that thus would be opened a means of appeal parallel to that of Article 173.

This, however, is not the meaning of Article 184. Its wording and placement rather suggest that a declaration of inapplicability of a regulation may be made only by the Court of Justice itself in the course of proceedings involving some other provision of the Treaty, and then only incidentally and with limited effect. Above all, it is to be inferred from the reference to the time limits in Article 173 that Article 184 may be applied only in proceedings before the Court of Justice, and circumvention of the time limits provided in the former article will not be allowed. Thus, Article 184 has as its sole object the protection of those covered against the application of improper regulations, without, however, calling into question the validity of the regulation itself, which has now become unassailable through the expiration of the time limits of Article 173.

*Id.* at 7203.

*But see* GORMLEY, THE PROCEDURAL STATUS OF THE INDIVIDUAL BEFORE INTERNATIONAL AND SUPRANATIONAL TRIBUNALS 153-56 (1966); and Bebr, *supra* note 7, at 29-31.

*ceding paragraphs, on the ground that one of the institutions of the Community has failed to send him a formal document, such document not being a recommendation or an opinion.*

Accordingly, the possibility still exists that an individual, unable to utilize the lines of appeal set forth in articles 173 and 177, may be able to call upon the commission or the council to present his case before the court in a type of *amicus curiae* proceeding. This approach was originally suggested by procedures developed by the Council of Europe wherein the European Commission of Human Rights has competence to espouse alleged violations of the European Convention of Human Rights before the Court of Human Rights, a regional court not susceptible to direct individual petition. The possibility of indirect action was first suggested by Justice Donner, former president of the EEC Court, in his 1965 Hague Academy lectures.<sup>28</sup>

Unfortunately, the subsequent *Lütticke* case<sup>29</sup> diminished drastically the availability of an indirect remedy by applying the norm of: "a decision affecting the applicant personally," in the same manner as applied under article 173, discussed below.<sup>30</sup> Generally, however, article 175 (along with article 169) should be evaluated within the broader context of the series of remedies available to individuals, including article 95(1) and (3). In short, the specific topic under investigation necessitates consideration of all exceptional procedures raised in the three cases, and thus the topic of individual *locus standi* will be re-examined in light of the 1966 holdings.

#### PETITION ON THE GROUND OF INACTION

As a general thesis, the use of article 175 as a means of indirectly presenting an issue to the court has value—for a limited area of jurisdiction remains, provided the commission or council has previously handed down a decision.<sup>31</sup> Within this context, the remedies examined in this study must be conceived as being exceptional, rather than representing

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28. Donner, *Relations between the Competence of the European Communities Court and Municipal Tribunals*, — RECUEIL DES COURS — (1965).

29. *Supra* note 14, at 7603.

30. *Infra* note 37 ff.

31. This concept is stated by Gand in *Lütticke*.

Thus, it is through a formal "call upon the Commission to act," within the meaning of Article 175, that the proceedings were started. In order to rule on the plea of inadmissibility, the scope of that article of the Treaty of Rome must therefore be defined. We will see that the possibilities it affords individuals are conspicuously smaller than those provided for under Article 35 of the Coal and Steel Treaty. . . .

*Supra* note 14, at 7604.

As to the role of the EEC Commission, see generally Hallstein, *The EEC Commission: A New Factor in International Life*, 14 INT'L & COMP. L.Q. 727, 735 (1965).

a change in the court's jurisprudence. Considered in favorable light, these three cases may be held to constitute a marginal area existing on the fringes of articles 173 and 177. Therefore, the use of an individual complaint to an executive organ still has considerable latent potential, even though it has less immediate usefulness than the older remedy formerly available under article 35 ECSC Treaty. Indeed, the loss of individual *locus standi* was recognized by Gerhard Bebr long before the *Lütticke* case.<sup>32</sup> In 1962 Professor Bebr equated articles 35 ECSC and 175 EEC, along with articles 33 ECSC and 173 EEC, as one phase in the overall reduction of the procedural safeguards formerly enjoyed by private persons and groups. Tragically, Professor Bebr's prophecy proved all too valid.<sup>33</sup>

Since the original use of article 175 was first suggested by Justice Donner, one further ramification has arisen, namely the need to employ article 169 to actually bring the alleged offending state within the court's jurisdiction. Consequently, the rights set forth in article 175 must be used in conjunction with the sanctioning power inherent within article 169. Regardless of the approach chosen, the basic philosophy of the EEC Treaty remains unshaken—member states may appeal against general recommendations or opinions but private persons may not. That is to say, under article 175 *member states and community organs need not*

32. *But see* BEBR, JUDICIAL CONTROL OF THE EUROPEAN COMMUNITIES 121-28 (1962). He very properly draws a sharp distinction between an opinion and a decision. Concerning the loss of individual *locus standi* he concludes:

Perhaps the greatest difference between the ECSC Treaty and the Rome Treaties in this respect, however, appears in reference to the parties which may appeal inaction. The ECSC Treaty limits this appeal to coal and steel enterprises and their associations, to Member States and to the Council. Similarly, the Rome Treaties recognize the right of private parties, Member States and the Council to appeal an inaction of the Commission or the Council, as the case may be. But in addition even the Commission, the Assembly—and formally even the Court—may appeal an inaction of the Council and/or Commission. This may be inferred from the explicit language of the first paragraph of the EEC Treaty, Article 175 (Euratom 148). . . .

*Id.* at 121.

33. Moreover, the opening passages of Gand's Conclusion illustrate the similarity of Bebr's position, *id.* at 121-28, with the later judgment of the Court.

In addition, Article 175, paragraph 3, provides that "any natural or legal person may bring proceedings before the Court of Justice, under the conditions laid down in the preceding paragraph, on the ground that one of the institutions of the Community *has failed to send him a formal document, such document not being a recommendation or an opinion.*" As a result the main purpose of a suit for inaction brought by a natural or legal person is to obtain the adoption of a legal act which, because of its nature and destination, must be *directed* to the person requesting it and which can only be a *decision*. This is what Advocate General Roemer stressed in his conclusions in a similar case, *Rhenania et al.*, Case No. 103/63 (Recueil Vol. X, page 839), which was non-suited.

*Supra* note 14, at 7604-05.

*prove an individual or special interest* as must private enterprises.<sup>34</sup> Obviously, differing degrees of relief are thereby available to these various legal entities.<sup>35</sup> This writer submits that *the basic purpose and fundamental philosophy of a supranational common market has been violated*.<sup>36</sup> The present inequality, placing states and community institutions in a favored category, must be rectified.

#### RECENT CASE LAW

##### *Lütticke's Use of Articles 169 and 175*

The factual situation that gave rise to the use of articles 169<sup>37</sup> and 175 is found in *Alfons Lütticke v. EEC Comm.*,<sup>38</sup> which in turn resulted from an unsuccessful attempt by plaintiff in the 1962 *Wöhrmann* case. The important point is that these cases pressed by Lütticke and his associates explore *the realm of individual protection within the common market*. Accordingly, the *locus standi* of private enterprises is now fairly well fixed and certain insofar as present treaties are concerned. Henceforth, private enterprises may accurately determine those instances in which it will be possible to institute proceedings before the judicial branch.

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34. This same restrictive philosophy can be seen in Article 9, Regulation 17, implementing Articles 85 and 86, EEC Treaty, CCH Common Mkt. Rep. ¶ 2401, at 1700. See also PRACTICAL GUIDE TO ARTICLES 85 AND 86 OF THE EEC TREATY AND RELEVANT REGULATIONS: A MANUAL FOR FIRMS; reprinted CCH Common Mkt. Rep. ¶ 2801, at 1961. See particularly, CCH Common Mkt. Rep. ¶ 2833, at 1979-80. Samkalden & Druker, *Legal Problems Relating to Article 86 of the Rome Treaty*, 3 C.M.L. REV. 158, 164-68 (1965).

The same conclusion applies as between Article 175, EEC and Article 3 of Regulation 17. Steindorff, *The Right to Request Administrative Action Under EEC Cartel Law and Its Enforceability*; cited in CCH Common Mkt. Rep. ¶ 4642.47, at 3841. The similar effects of Article 35, ECSC, 175 EEC, and Regulation 17 seem to assure that the basic limitations set forth in 173 will not be liberalized.

Likewise, the same rationale applies to Articles 33 and 35, ECSC. *E.g.*, *De Gezamenlijke Steenkolenmijnen in Limburg v. High Authority*, ECSC, Case No. 30/59, 7 Recueil 34. Cited in CCH Common Mkt. Rep. ¶ 4646.55, at 3841. See generally, CCH Common Mkt. Rep. ¶ 4646, at 3840-41.

35. See Annot., CCH Common Mkt. Rep. ¶ 4646.

36. *Cf.* "Conclusions" *infra* note 93.

37. A major line of precedent setting forth the obligations of member states and their susceptibility to court action had previously been established. However, the court chose to limit its decision to a determination of a more limited issue, namely did an infraction actually occur. Oftentimes the court does not decide if the infraction had subsequently been corrected. Hence, prior judgments involving 169 can be distinguished. *E.g.*, *EEC Comm. v. Italy*, Case No. 7/61, 7 Recueil 633, CCH Common Mkt. Rep. ¶ 8001, at 7103; *EEC Comm. v. Luxembourg and Belgium*, Cases Nos. 2/62 and 3/62, 8 Recueil 813, CCH Common Mkt. Rep. ¶ 8004, at 7166; *EEC Comm. v. Luxembourg and Belgium*, Cases Nos. 90/63 and 91/63, 10 Recueil 1217, CCH Common Mkt. Rep. ¶ 8028, at 7423-2; and *EEC Comm. v. Italy*, Case No. 45/64, 11 Recueil 1057, CCH Common Mkt. Rep. ¶ 8038, at 7536. See *infra* note 72 and the cases cited therein.

38. *Supra* note 14.

In the 1962 action wherein articles 173, 177 and 184 were employed by the same plaintiff, the court—in its landmark *Wöhrmann* verdict—enunciated the limited procedural rights accorded individuals. In short, only an executive decision personally affecting a private enterprise directly, will provide grounds for judicial review.<sup>39</sup> Undaunted, plaintiffs sought a new line of attack on the theory the EEC Commission was guilty of inaction arising from the following situation. The plaintiffs (in these three cases)<sup>40</sup> specialized in the importation of powdered and dried milk products into Western Germany. The majority of these goods originated from France, Belgium and the Netherlands. The dispute with the West German Government arose from the imposition of a turn-over equalization tax on the import of their milk products. Such tax had been in effect since January 1, 1962. Plaintiff contended this tax violated the EEC Treaty, to which all municipal laws must yield.<sup>41</sup> Accordingly, several informal letters were sent to the commission between December 1962 and July 1963.

The commission, however, did not take the desired action, namely a proceeding against the Federal Republic of Germany. Consequently, a formal request pursuant to article 175(2) was sent to the commission in the form of a letter.<sup>42</sup> A declaration was sought specifically declaring the four per cent turnover equalization tax a violation of the ban against discrimination contained in article 95 of the treaty.<sup>43</sup> It was demanded

39. *Supra* note 11. Bebr, *Judicial Remedy of Private Parties Against Normative Acts of the European Communities: The Role of Exception of Illegality*, 4 C.M.L. REV. 7-9 (1966); Gormley, *The Procedural Status of the Individual Before Supranational Judicial Tribunals*, 41 U. DER. L.J. 405, 421-24 (1964); Sasse, *supra* note 13.

40. *Wöhrmann*, *supra* note 7; and *Firma Alfons Lütticke v. Hauptzollamt Saarlouis*, Case No. 57/65, — Recueil —, CCH Common Mkt. Rep. ¶ 8045, at 7608 (June 16, 1966) [hereinafter referred to as *Second Lütticke*]. See especially, *Lütticke*, *supra* note 14, at 7598, for the factual background of the cases.

41. Cf. *Van Gend and Loos*, and *Bosch* cases, and *Costa v. E.N.E.L.*, *supra* note 13.

42. In this letter, which the Commission received on March 17, 1965, the plaintiffs' attorney requested that the Commission:

(1) Adopt a decision under Article 175, paragraph 1, of the EEC Treaty, declaring that since January 1, 1962, the imposition by the Federal Republic of Germany of a four percent turnover equalization tax on imports of powdered milk and other dried milk products . . . was a violation of the ban on discrimination contained in Article 95 of the Treaty;

(2) Decide to open proceedings under Article 169 of the EEC Treaty against the Federal Republic of Germany for the purpose of removing the turnover equalization tax on the products described in item (1) for the period beginning January 1, 1962, give the Federal Republic of Germany an opportunity to submit its comments, and proceed under Article 169, paragraph 2, if it does not comply with the opinion of the Commission within the proper period of time;

(3) Inform my clients of the decisions requested in items (1) and (2). *Lütticke*, *supra* note 14, at 7599. Cf. *Gand's* analysis of the Letter, *id.* at 7604.

43. A Member State shall not impose, directly or indirectly, on the products of other Member States any internal charges of any kind in excess of those

further that the commission instigate judicial proceedings against the German Government under article 169 for the purpose of removing the turnover tax on their products for the entire period following January 1, 1962, the date on which the EEC entered into its Second Phase. This date, therefore, constitutes the turning point in this study due to the new community obligations to be implemented by the six member states. Nevertheless, a stumbling block arose when Lütticke attempted to compel the German State to fulfill these obligations.

Under the theory advanced by plaintiffs, if German authorities did not comply with a commission request to remove the tax, then steps should be taken under authority of article 169(2). Subsequently, the commission did take steps, resulting in a reduction in the turnover tax from four to three per cent, effective April 1, 1965. The commission, however, "decided not to insist that the Federal Republic of Germany reduce the tax retroactive to January 1, 1962."<sup>44</sup>

In brief, the substantive issue became: Does the failure by the commission to correct the "violation" back to January 1, 1962 (the beginning of the Second Phase), constitute inaction; or, alternatively, did the reduction of the tax after April 1, 1965, terminate any violation of article 95? Interestingly, similar disputes are common in American administrative law.<sup>45</sup>

The main issue in *Lütticke* is an alleged failure to act, whereas in the earlier *Wöhrmann* and *Plaumann* adjudications, interpreting articles 173 and 184, actions of the community were challenged as being illegal.<sup>46</sup>

The defense interposed by the German Government maintained that the letter sent by the commission "is not a decision within the meaning of Article 173, paragraph 2, and of Article 189, paragraph 4, of the EEC Treaty and cannot, therefore, be the subject of a suit for annulment."<sup>47</sup> This submission was accepted by both the court and Advocate-General Gand. The tribunal held that the commission's communication could not be subjected to a suit for annulment. "No measure adopted by the Com-

applied directly or indirectly to like domestic products.

Furthermore, a Member State shall not impose on the products of other Member States any internal charges of such a nature as to afford indirect protection to other productions.

Member States shall, not later than at the beginning of the second stage, abolish or amend any provisions existing at the date of the entry into force of this Treaty which are contrary to the above rules.

44. Lütticke, *supra* note 14, at 7599.

45. *E.g.*, DAVIS, ADMINISTRATIVE LAW §§ 16.01-16.14, 292-325 (1959).

46. See Annot., CCH Common Mkt. Rep. ¶ 4646, at 3837. See also *id.* at 3840-41 for a discussion of Article 35, ECSC Treaty, as applicable under the concept of failure to act, and the older ECSC cases cited therein.

47. Lütticke, *supra* note 14, at 7599.

mission in this phase of the proceedings has binding effect."<sup>48</sup> Specifically, article 175 could not be used as a ground for relief because of compliance by the commission with the two-month time limit contained in article 175(2). On prior occasions, this writer has criticized the severe "statutes of limitations" applicable to articles 173 and 184 (and also the six-month period permitted for appeals to the Court of Human Rights, Council of Europe).<sup>49</sup> Because articles 173 and 175 are counterpart provisions, the same two-month time period—during which the action *must* be brought—controls. No extension can be expected. As the court stated:

Under Article 175, paragraph 2, suits for inaction are admissible only when the institution has not taken a position within two months from the date on which it was called upon to act. It has been established that the Commission took a position and sent notice of it to the plaintiffs within such time-limit. The plea of inadmissibility, therefore, has merit.<sup>50</sup>

The rationale of this holding is that there was no further legal duty on the part of the commission to act. The commission had already fulfilled its obligations under the Treaty and had functioned properly as a matter of law. Procedurally, plaintiffs had submitted a request in the form of a letter.<sup>51</sup>

This ruling means that henceforth, an individual may only file a claim for inaction if the commission has: (1) failed to take any form of action; and (2) refused to send any document (or communication). Thus, it appears that articles 169 and 175 have been interpreted more restrictively than has article 173.

48. *Id.* at 7603.

49. GORMLEY, *THE PROCEDURAL STATUS OF THE INDIVIDUAL BEFORE INTERNATIONAL AND SUPRANATIONAL TRIBUNALS* 167-68 (1966). As to the Council of Europe, see *id.* at 96-100. "The writer believes that a change should be made in the wording of Article 26 [European Convention of Human Rights] in order to provide a more realistic time period. Admittedly, the Commission [of Human Rights] is protecting States to a greater degree than individuals." *Id.* at 98. Gormley, *The Procedural Status of the Individual Before Supranational Judicial Tribunals*, 41 U. DET. L.J. 405, 430-31 (1964). As to the Council of Europe see *id.* at 319-22.

50. Lütticke, *supra* note 14, at 7603. A similar stand was taken by the Advocate-General on the ground that the earlier ECSC criterion had been curtailed.

The fact that Article 175, paragraph 3, thus precludes the possibility for an individual to bring a suit for inaction because of a failure to apply the procedure provided for in Article 169 against a Member State is not accidental, but was *intended by the drafters of the Treaty to exclude for individuals the right they had under the combined provisions of Articles 33, 35, and 88 of the Coal and Steel Treaty*. Any interpretation that might lead you to follow your earlier decisions within the framework of the Treaty of Rome would certainly be contrary not only to its provisions but to the intent of its authors as well. (Emphasis added.)

*Id.* at 7605.

51. See Gand's discussion of the legal effect of plaintiffs' Letter, *id.* at 7598.

The right of individual petition is further complicated by the need to employ article 175 in connection with article 169. In fact, the court must necessarily treat these two articles as a single legal concept for the reason article 175 can afford some basis for relief within the two-month period, provided a decision addressed directly to individuals is present. On the other hand, article 169 may afford the commission the competence required to institute legal proceedings against a member state in the event a treaty violation exists. Indeed, the merging of these two articles into a single legal entity has the effect of further restricting the *locus standi* of individuals.<sup>52</sup>

As Gand surmised, the basic philosophy of article 173 (and 175 to force the commission to activate article 169 procedure) is unmistakably clear. Plaintiff's dialectic skill cannot defeat the German defense.<sup>53</sup> Simply, an informal letter from the commission does not constitute a decision. The primary purpose of article 169 is to afford a means of settling disputes between the commission and member states, and such a ruling will bind the state and require implementing action in the event that the Establishing Treaty has been violated.<sup>54</sup> The absolute duty to implement judicial decisions arising from article 175 proceedings is found in article 176(1). Unfortunately, individuals, pursuant to article 175, cannot activate article 169 procedures; they have no right to demand action from the council or commission. Furthermore, the letter in question has "no legal effect on the persons to whom it is addressed, who have no right to demand that the Commission set in motion the procedure provided for in Article 169."<sup>55</sup> Different standards apply as between private enterprises, states, and the EEC.<sup>56</sup>

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52. In connection with Article 171, EEC, imposing an obligation on member states to "take the measures required for the implementation of the judgment of the Court," in the words of Article 171.

53. Lütticke, *supra* note 14, at 7605.

54. *Ibid.* Furthermore Gand holds, as to the procedure pursuant to Article 169:

In contrast, under Article 169 of the EEC Treaty, the Commission may not find, in a binding legal act, that a Member State has violated the Treaty. It may only refer this to you, following a procedure whose principal step is the publication of the reasoned opinion. Before issuance of this reasoned opinion, the State concerned must have been given an opportunity to submit its comments. The measures provided for in Article 169 therefore provide a procedure designed to settle a dispute between the Commission and a Member State . . . [Commission opinions] are in no case directed to the person who has requested the Commission to take action.

*Id.* at 7605.

55. *Id.* at 7606. Gand in his last two pages, *id.* at 7606-07, presents the best (and most scholarly) discussion of the status of states, community organs, and individuals. *Accord*, I VALENTINE, *op. cit. supra* note 8, at 274-77. *Cf.* Société des Usines à Tubes de la Sarre v. High Authority, Cases Nos. 1/57 and 14/57; cited *id.* at 275 n.30.

56. What is certain is the fact that while the other Member States may, indirectly through Article 170, oblige the Commission to issue a reasoned opinion



By way of comparison, article 88, ECSC, formerly afforded a broader basis for relief, because its scope was determined by article 33. As is true of article 33 ECSC and article 173 EEC, articles 88 ECSC and 169 EEC contain differing individual safeguards. Precisely, article 169 is more restrictive than the earlier article 88. These two provisions (and also articles 35 ECSC and 175 EEC) must be harmonized and liberalized at such time as the three executives are merged. As the following discussion indicates, the judges are bound strictly by treaty provisions and have no means of accomplishing the needed changes.

Advocate-General Gand articulates this legal norm of community law:

All this leads us to the conclusion that when the Commission refuses to comply with a request to set in motion the procedure provided for in Article 169 it is not adopting a decision that can be contested under Article 173, paragraph 2. True, this was not the sole object of the letter sent in the name of the plaintiffs, who had also wished to be informed of the action taken on their principal request. The letter they are contesting is, in this respect, an answer to their requests, but it cannot be appealed. Here we can only repeat the words of the Advocate General in Case No. 103/63, when he said that notice of acts of this type "is only a secondary adjunct, a reflection of the act proper, having no legal content of its own," which, therefore, is subject to the same legal treatment.<sup>57</sup>

The result is obvious; a severe blow seems to have been dealt individual procedural status. Such a conservative standard is, however, *inconsistent with the fundamental aims and purposes of a true Common Market*, as compared with the standard advocated in subsequent recommendations.<sup>58</sup> Tragically, only member states—but not individuals—can force the court to examine *substantive issues*, unless a decision has been rendered.<sup>59</sup> In sum, the council and commission have a *legal duty* to institute proceedings in the event a member state violates treaty obligations. But only another member state can *demand* action; a private individual

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on an alleged failure on the part of a State under conditions somewhat similar to those of Article 169, natural or legal persons, in contrast, are afforded no avenue of this nature. . . . Here again they [plaintiffs] fail to understand that express rules permit a complaint for failure on the part of a Member State to be brought to the Court only by the Commission on the basis of Article 169 or by another Member State on the basis of Article 170.

Lütticke, *supra* note 14, at 7606.

57. *Ibid.*

58. See *infra* note 88.

59. Lütticke, *supra* note 14, at 7607 and 7601.

does not possess a corresponding right, even though he has been injured by illegal action or inaction.

A possible solution is offered to the above dilemma: *Illegality or inaction should be considered to constitute an existing fact*. In this event, individual consequences resulting from community regulations would be recognized. Thus, the court could take "judicial notice" of *factual consequences* for the sole purpose of assuming jurisdiction. This proposed solution can be compared against present cases. In the *Plaumann*, *Wöhrmann*, and *Lütticke* cases, plaintiffs argued they lost money because of complying with community regulations (or the failure of their government to conform with such regulations). Regrettably, the court did not examine these claims, and thus was not able to determine whether or not any illegal action, or lack of action, had in fact taken place. Certainly, the German equalization tax—in relation to plaintiff's losses—is a fact capable of examination. Under current practice, however, the final determination cannot be made, except through the indirect approach available pursuant to article 177.

Interestingly, Gand moved beyond the scope of the instant case, and in his last paragraph advised defeated plaintiffs that an additional course of action remained, namely a referral from a German national court under article 177, previously herein designated as the best procedural remedy available to private persons and non-governmental entities.<sup>60</sup> Consequently, Gand made specific reference to the second *Lütticke* case—*Firma Alfons Lütticke v. Hauptzollamt Saarlouis*,<sup>61</sup> still pending at the time of the first judgment. By resorting to article 177, EEC, plaintiffs were not deprived of all legal protection. Realistically, the second *Lütticke* case reached a more favorable result, although Lütticke still did not receive a full examination of his claim.<sup>62</sup>

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60. *Supra* notes 23 and 24; GORMLEY, THE PROCEDURAL STATUS OF THE INDIVIDUAL BEFORE INTERNATIONAL AND SUPRANATIONAL TRIBUNALS 148-56 (1966); Gormley, *The Procedural Status of the Individual Before Supranational Judicial Tribunals*, 41 U. DET. L.J. 405, 424-26 (1964).

61. Second *Lütticke*, *supra* note 40; LANG, THE COMMON MARKET AND THE COMMON LAW 20-26 (1966).

62. A careful reading of Gand's Conclusion indicates the possibility of even a fourth action by Lütticke through the use of 177.

[W]hile the avenue offered by Article 169 is closed to individuals *because the authors of the Treaty wanted it so, the plaintiffs are not necessarily deprived of all legal protection, since they can resort to Article 177*. This is not purely theoretical protection, as proved by Case No. 57/65, which, in a referral by the Fiscal Court of Saarbrücken, raises the question of the direct application of Article 95 of the Treaty. (Emphasis added.)

Lütticke, *supra* note 14, at 7607.

However, a very lengthy discussion was raised by Germany in its defensive pleading. See *id.* at 7602. But, plaintiffs correctly detect the weaknesses of this stand, plus the inherent limitations of 177.

## LÜTTICKE'S SUBSEQUENT USE OF ARTICLE 177

Not only were articles 169 and 175 controlled by article 173, but a similar fate awaited article 95. Though article 177 affords the procedural remedy by which the German Fiscal Court of Saarbrücken can request a preliminary decision, no substantive rights are set forth in the language of article 177. Therefore, if a treaty violation is to be alleged, article 95(1) and (3) must be applicable. Article 95(1) provides: "A Member State shall not impose, directly or indirectly, on the products of other Member States any internal charges of any kind in excess of those applied directly or indirectly to similar domestic products." More specifically, article 95(3) commands: "Member States shall, not later than at the beginning of the Second Stage, eliminate or amend any provisions existing when this Treaty comes into force which conflict with the above rules." Obviously, article 95(3) becomes the important provision regarding the equalization tax imposed after January 1, 1962. The language of the above paragraph seems clear; yet a further point had to be resolved: Does article 95(3) impose a duty only on member states or may *individuals* also benefit?

Before considering the inapplicability to individuals of article 95, the present stage of the emerging European Community is first examined. A fully developed Common Market has *not* been achieved; instead, the EEC is in the process of emerging from the First into the Second Stage, the Second Stage having commenced on January 1, 1962, the key date in both *Lütticke* judgments. Thus, individual rights stemming from article 95(1) and (3) became effective on that date, and no equalization tax may be levied after January 1, 1962. On the other hand, it is invalid to assume that no true common market exists presently. On one extreme, the EEC has been erroneously conceived as a matured federal structure; but equally fallacious is the view that the three common markets—insofar as the procedural rights of sovereign states are concerned—are not supranational entities.<sup>63</sup> Rather, the EEC is still in the process of development, despite the efforts of President de Gaulle to prevent the organization from achieving a single agricultural policy. Likewise, the developmental nature of the EEC may be illustrated by the current difficulty of obtaining ratification of the Protocol, merging the

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This German procedure would be too lengthy and time-consuming to have the effects the authors of Article 177 had expected of that article. Under Article 177, the Court of Justice has the opportunity only after five or ten years have elapsed to rule on a violation of the Treaty by a Member State. It is then too late to still eradicate completely the effects of such violation.

*Id.* at 7602.

63. See the discussion of supranational, *infra* note 88.

EEC and EURATOM Commissions and the ECSC High Authority into a single executive branch—an organ intended to serve all three communities. Without doubt, such ratification eventually will take place. Nevertheless, in its present embryonic stage, the EEC is unable to adhere to consistent policy in all areas. For example, the agricultural regime within the Six will undergo major changes during the coming decade. Similarly, antitrust measures will be viewed differently at a future time.<sup>64</sup>

Against this conflicting sphere of interests, in terms of the power retained by national governments as it clashes with supranational authority, the delicate role of the court must be appreciated. An even more striking illustration of this role can be seen from the large number of cases involving treaty issues decided by national courts. In view of the fact that only the highest municipal forums are required to refer questions of treaty interpretation to Luxembourg, a great many lower tribunals are interpreting treaty law, with the effect the corpus of community law is becoming decentralized—a result disturbing to this writer who believes a supranational community must be superior to and free from national interference. Yet, a higher degree of centralization must await a more advanced stage of integration. In other words, until a mature common market has become a reality, disputes of concurrent jurisdiction will continually arise, as evidenced by the line of cases involving article 177 in which the proper spheres of municipal law and community law had to be resolved.<sup>65</sup> In short, the EEC tribunal cannot be compared with national supreme courts. Nor is it realistic to view the tribunal as a true federal court.<sup>66</sup>

Plaintiffs in *Wöhrmann* and the two subsequent *Lütticke* cases

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64. *E.g.*, Regulation 17, *supra* note 34, which administrative act is in accord with Articles 173, 169, 175, and even Article 95, in that the member states have been placed in a favored position by curtailing Articles 33, 35, and 88, ECSC. See also *Etablissements Consten and Grundig-Verkaufs-GmbH v. EEC Comm.*, Cases Nos. 56/64 and 58/64, — Recueil —, CCH Common Mkt. Rep. ¶ 8046, at 7618 (July 13, 1966); *Italy v. EEC Comm.*, Case No. 32/65, — Recueil —, CCH Common Mkt. Rep. ¶ 8048, at 7704 (July 13, 1966).

65. See *supra* notes 13, 21-24 and the cases cited therein. See also the later pronouncement of this basic position. *Hessische Knappschaft v. Maison Singer et Files*, Case No. 44/65, — Recueil —, CCH Common Mkt. Rep. ¶ 8042, at 7582 (Dec. 9, 1965). In brief, the Court held that Article 184 cannot be incorporated into Article 177; therefore, individuals cannot request an interpretation. It is for the national judge—alone—and not the parties to make such a request. LANG, *op. cit. supra* note 61, at 16-19.

66. 1 AMERICAN ENTERPRISE IN THE EUROPEAN COMMON MARKET: A LEGAL PROFILE 70-71 and 502-05 (Stein & Nicholson eds. 1960); Bebr, *The Development of a Community Law by the Court of the European Coal and Steel Community*, 42 MINN. L. REV. 845 (1958); Cohn, *Aspects of the Procedure Before the Court of Justice of the European Communities*, 1 SOL. 309 (1962); Gormley, *The Significant Role of French Administrative Jurisprudence as Presently Applied by the Court of the European Communities, With Emphasis on the Administrative Law Remedies Available to Private Parties*, 8 S.D.L. REV. 32, 53-55 (1963).

could not get around one obstacle—the sizeable residual of power retained by the member states. Accordingly, it follows that equal procedural rights can become a reality only at a later stage of supernational development.

#### INDIVIDUAL RIGHTS CONTAINED IN ARTICLE 95

Article 177 has enabled the German court to request an opinion relative to the applicability of articles 95(1) and (3) in connection with articles 12 and 13. The controversy focuses upon three questions sent from the Saar tribunal to Luxembourg as follows:

(1) Does Article 95, paragraph 1, of the EEC Treaty produce direct effects and create personal rights for individuals which the national courts must recognize?

(2) If the first question is answered in the negative, does Article 95, paragraph 3, of the EEC Treaty, in conjunction with Article 95, paragraph 1, of the EEC Treaty, produce direct effects and create personal rights for individuals which the national courts must recognize?

(3) If the second question is also answered in the negative, does Article 95, paragraphs 1 and 3, of the EEC Treaty, in conjunction with Article 12 or Article 13 of the EEC Treaty, produce direct effects and create personal rights for individuals which the national courts must recognize?<sup>67</sup>

The first two issues—paragraphs one and three (of article 95)—were answered in the negative, with the result that at “first impression” article 95 appeared doomed to follow articles 173, 169, and 175. Nevertheless, *exceptional circumstances* arise when articles 95(1) and (3) are used in conjunction with articles 12 and 13, because the date January 1, 1962 (the beginning of the Second Stage) sets in motion “the rules mentioned in Article 14.”<sup>68</sup> In the instant litigation, the court looked to the basic prohibition—ignored in the first *Lütticke* case—and held that member states must refrain from introducing new customs duties on importation or exportation; moreover, that they must refrain from increasing existing duties or any type of charges affecting other member states. Therefore, the basic prohibition imposed on member governments which benefit individuals is unmistakably set forth. Furthermore, article 13 imposes an additional duty on states to abolish existing customs duties,

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67. Second *Lütticke*, *supra* note 40, at 7609.

68. Article 13(2), in part, EEC Treaty, referring to the lengthy text of Article 14.

during the transitional period.<sup>69</sup>

As is often the case with community law, several articles must be employed as a single legal concept to achieve a desired goal. Regretfully, treaty articles do not stand alone; consequently, the precise legal precedent set forth in any particular judgment seems open to later re-examination. To illustrate, article 95 places obligations primarily on governments (as is usually true in public international law),<sup>70</sup> but not directly on individuals. Still, further analysis seems appropriate since the prohibition against discrimination is addressed to member states. Nevertheless, this limitation does not mean that individuals cannot benefit—directly. Henceforth, *the individual may arise as a beneficiary of community law* in situations where he may not be a full *sui juris* subject of the legal order.<sup>71</sup> This result has been recognized by Advocate-General Gand, as being consistent with the scheme of the EEC treaty.<sup>72</sup>

The basic obligation superimposed (as set forth in the third paragraph)—and the important consideration—is that national courts must

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69. Article 13 provides:

1. Customs duties on importation in force between Member States shall be progressively abolished by them in the course of the transitional period under the conditions laid down in Articles 14 and 15.

2. Charges in force between Member States having an effect equivalent to customs duties on importation shall be progressively abolished by them in the course of the transitional period. The Commission shall, by means of directives, fix the timing of such abolition. . . .

70. In regard to a more typical public law-type interpretation, Plaintiffs offered the following analysis as to the issue of precedence of community law over national law.

As for the question of whether Article 95 creates personal rights for individuals which the national courts must recognize, the plaintiff feels that the "self-executing" concept should be avoided as being unsuitable. It suggests that a distinction be made, as in Roman law, between *leges imperfectae*, *leges minus quam perfectae*, *leges perfectae*, and *leges plus quam perfectae*. It alleges that since all of the Treaty provisions are *leges perfectae*, they have the direct effect in issue here. Article 95 is such a *lex perfecta*. The plaintiff then undertakes to refute the arguments that led the Finanzgericht to an opposite conclusion.

Second Lütticke, *supra* note 40, at 7610.

71. Under present theories of international law, private persons are deemed to be either subjects, objects, or beneficiaries of the legal order. From the standpoint of community law, individuals and non-governmental entities are deemed to be subjects of the law; however, pursuant to Article 95 they can also benefit, even though the text is not addressed directly to them. As to the various theories of individual procedural standing see GORMLEY, *THE PROCEDURAL STATUS OF THE INDIVIDUAL BEFORE INTERNATIONAL AND SUPRANATIONAL TRIBUNALS* 23-32 (1966); NORGAARD, *THE POSITION OF THE INDIVIDUAL IN INTERNATIONAL LAW* 34-78 (1962); REMEC, *THE POSITION OF THE INDIVIDUAL IN INTERNATIONAL LAW ACCORDING TO GROTIUS AND VATTEL* (1960); Gormley, *An Analysis of the Future Procedural Status of the Individual Before International Tribunals*, 39 U. DET. L.J. 33 (1961).

72. Second Lütticke, Gand's Conclusion, *supra* note 40, at 7614-17, in which prior cases are distinguished. Cf. *Firma Waldemar Deutschmann*, Case No. 10/65, 11 Recueil 601, CCH Common Mkt. Rep. ¶ 8035, at 7506, cited by Gand, *id.* at 7617. See also EEC Comm. v. Luxembourg and Belgium, Cases Nos. 2/62 and 3/62, 8 Recueil 813, CCH Common Mkt. Rep. ¶ 8004, at 7166. See *supra* note 37 and the cases cited therein.

enforce "private benefits" because no discretion remains available to national authorities subsequent to January 1, 1962. Article 95(3) "creates for the Member States, not an obligation to refrain from acting, but an obligation to act,"<sup>73</sup> according to Gand. This positive duty, arising with the second stages must be enforced by national forums<sup>74</sup> rather than the EEC Tribunal.<sup>75</sup> Thus, self-executing provisions are present. No further implementation by national legislation is required, as was stressed by Gand.<sup>76</sup>

At this point an unanswered question remains: What practical relief has been secured? True, a pronouncement from the EEC Court has been obtained, which judgment must be implemented by the German Government because of article 176.<sup>77</sup> The Luxembourg tribunal, however, has been unable to resolve the basic controversy submitted to it on three different occasions. These three cases have established one fundamental fact of life—the only effective course of action remaining is to be found in article 177. The curtailment of other articles has increased the stature of article 177, despite its obvious weaknesses. Although a review of German tax law was obtained, a full examination of plaintiffs' claims could not be secured since the national court decides which issues shall be certified to Luxembourg. No corresponding authority is possessed by individuals or groups. This fundamental limitation had been clearly enunciated as early as December 15, 1965. Article 184 could not be in-

73. Second Lütticke, *supra* note 40, at 7617.

74. *Ibid.*

75. The most important passage in the Court's opinion holds:

Article 95, paragraph 1, contains a prohibition against discrimination that creates a clear and unconditional duty. Apart from paragraph 3, there is no condition attached to this duty; no further measures on the part either of the Community or of the Member States are necessary to implement it or to give it effect. *The prohibition is therefore complete, legally perfect, and can thus produce direct effects in legal relations between Member States and the persons subject to their laws.* The fact that the prohibition against discrimination is addressed to the Member States *does not mean that individuals cannot benefit by it.*

As for paragraph 3 of Article 95, it does, in fact, create a duty for the Member States to "suspend" or "amend" the provisions that are contrary to the rules set forth in the preceding paragraphs. *This duty, however, allows the Member States no margin of discretion as to the deadline—January 1, 1962—by which such measures must have been taken.* After that date, in order to be able to apply paragraph 1 directly, the national courts need only find, in a given case, that the act implementing the internal provisions in issue were adopted after January 1, 1962. . . . (Emphasis added.)

*Id.* at 7611.

76. Though the court slights this vital question of self-executing provisions, Gand very properly takes an affirmative stand. *Id.* at 7615-16.

77. "An institution originating an act subsequently declared null and void or an institution whose failure to act has been declared contrary to the provisions of this Treaty shall take the measures required for the implementation of the judgment of the Court of Justice."

corporated into article 177.

In *Hessische Knappschaft v. Maison Singer et Fils*,<sup>78</sup> the court held: [I]t is for the national court, and not for the parties in the action pending before it, to refer to the Court of Justice. Consequently, only the national court has the power to decide what questions are to be submitted to the Court of Justice. The parties may not change their context or have them declared moot.<sup>79</sup>

Interestingly, an identical point was raised in the first *Lütticke* case.<sup>80</sup> The German Government contended, as a matter of strategy, that article 177 was in fact the correct remedy. Despite this sophistry, it seems clear that article 177(3) cannot fill procedural gaps in community law caused by the restriction of articles 173, 169, 175, and 184. One additional "regression" not very clearly set forth in the short opinion—and likewise ignored by Gand—is the "distinguishing" of an internal tax vis-à-vis a customs duty. In the second *Lütticke* case, the court held that each of

78. *Supra* note 65.

79. Case No. 44/65, — Recueil —, CCH Common Mkt. Rep. ¶ 8042, 7582, at 7585 (Dec. 9, 1965).

The Court of Justice, therefore, cannot be compelled, within the special procedure of Article 177, to concern itself, on the request of one of the parties, with a question that should be submitted not by the parties but by the national court itself, or with a motion based on Article 184. Furthermore, a contrary view is based on a failure to recognize that the drafters of Article 177 intended to establish a direct cooperation between the Court of Justice and the national courts in non-adversary proceedings, in which the parties have no right of initiative and in the course of which they are merely invited to submit comments.

*Ibid.*

*Accord*, Bebr, *Judicial Remedy of Private Parties Against Normative Acts of the European Communities: The Role of Exception of Illegality*, 4 C.M.L. Rev. 29-31 (1966). He concludes that only national judges have the competence to formulate issues. "[P]rivate parties may not in their written observations go beyond the questions as formulated by the national court." *Id.* at 31.

80. See note 62 *supra* and the text cited therein. A similar conclusion is reached by Bebr, *supra* note 79, at 31.

Were the procedure of the E.E.C. Treaty Article 177 really meant as a judicial remedy for private parties, as it is sometimes maintained, would it not be logical if private parties could advance their own additional charges of nonvalidity of a Community act, independently of the questions as formulated by the national court? But nothing of the sort. The fact that it is the national court which formulates the preliminary questions and that the parties are limited in their written observations by them demonstrates that this is an objective Community control instituted as a Community constitutional control. *The fact that a private party may eventually benefit from a preliminary ruling of the Court of Justice may not change the objective purpose of the procedure of Article 177.* Merely because private parties may draw a possible benefit from a preliminary ruling this alone is not a sufficient ground for assimilating the procedure of Article 177 to an exception of illegality. (Emphasis added.)

Obviously, the writer wishes that the EEC Court and Professor Bebr had reached contrary results.



these two areas is governed by *completely different rules*. The practical effect of this holding is that *Van Gend and Loos* has been restricted. Theoretically, community law prevails over municipal legislation, but the scope of EEC superiority has been curtailed in favor of state competence. Articles 12 and 13 cannot be applied to the same factual situation, or in the same manner, as article 95. In other words, internal taxes, whose purpose is to equalize domestic levels, cannot be treated the same as a customs duty (or an internal tax having the effect of a customs duty). In the second case, the Court decided the tax in question was merely designed to equalize. Unfortunately, no further explanation was provided, nor was any comparison with prior rulings in *Bosch* or *Van Gend and Loos* given. Nevertheless, the rule of community superiority will undergo further limitation. The full impact of this trend cannot be accurately predicted.

Additional authority supports the above conclusions. In *Etablissements Consten and Grundig-Verkaufs GmbH v. Commission of the European Economic Community*,<sup>81</sup> decided July 13, 1966, the Court held that article 85(1)<sup>82</sup> cannot be employed to attack a general regulation of the commission.<sup>83</sup> A general directive from the commission cannot be addressed to individuals so as to constitute a decision.<sup>84</sup> Furthermore, an-

81. Cases Nos. 56/64 and 58/64, — Recueil —, CCH Common Mkt. Rep. ¶ 8046, at 7618. See especially the discussion by Ebb, *Common Market Law in Process: The Grundig Case and the Interplay Between National Law and Treaty Law*, 41 WASH. L. REV. 489 (1966). See generally, Dekeyser, *Territorial Restrictions and Export Prohibitions Under the United States and the Common Market Antitrust Law*, 2 C.M.L. REV. 271 (1964).

82. The key portion of Article 85(1) provides:

The following shall be deemed to be incompatible with the Common Market and shall hereby be prohibited: Any agreement between enterprises, any decisions by associations of enterprises and any concerted practices which are likely to affect trade between Member States and which have as their object or result the prevention, restriction or distortion of competition within the Common Market. . . .

83. The court reached a similar result as to Article 19 of Regulation 17, *supra* note 34, at 1713. Individual third parties, though affected by the Commission's action, had no right to demand a hearing. See also Roemer's Conclusion in *Consten and Grundig* case, *supra* note 81, at 7660, in which reference is made to the *Bosch* case, discussed *supra* note 21 and accompanying text. See also Roemer's further analysis *id.* at 7673, and 7682-83. Regretfully, in this very rare instance, the court did not follow the advice of its Advocate General, which action further indicates the conservative nature of the court's jurisprudence.

84. *Id.* at 7650. The Court said:

It is generally desirable for the Commission to extend its inquiries as far as possible to all persons who may be affected by its decisions. However, an interest on the part of Grundig's other dealers in the legal validity of agreements between Consten and Grundig, to which they are not parties but which actually work to their advantage, could not furnish them grounds to claim an automatic right to be invited to the proceedings which the Commission opened with respect to such agreements. This plea, therefore, is without merit.

*Id.* at 7655.

other July 13, 1966 holding, *Republic of Italy v. Council and Commission of the European Economic Community*<sup>85</sup> reached a similar result as to articles 85, 86, 87, and 184. This later case again re-inforced the basic rule: *individuals may only contest illegal actions of direct concern to them*. The court repeatedly has maintained that article 173 controls these exceptional procedures.<sup>86</sup> The court declared:

Under Article 184, any of the parties to a dispute involving the validity of a regulation may invoke the inapplicability of that regulation on the grounds described in Article 173, paragraph 1. It is not the purpose of that provision to enable a party to contest the applicability of any regulation by means of any suit whatever. The regulation claimed to be illegal must be directly or indirectly applicable to the situation that is the subject of the suit.<sup>87</sup>

#### CONCLUSIONS

The three principal cases examined have dealt with the various treaty provisions outlining individual procedural rights. Yet, except for the use of article 177 in the second *Lütticke* case, little relief has been obtained—aside from a pronouncement on the applicability of article 95, an opinion binding the German National Court. Despite the use of a half-dozen specific provisions, a hearing on the merits of an illegal tax imposed on imported milk from France, Belgium and Luxembourg, was not to be given by the EEC court. In the first case (*Wöhrmann*) no direct appeal was possible; in *Lütticke* the commission was not forced to act; whereas in the second *Lütticke* holding, only three questions previously certified by the national court were considered.

Although plaintiffs had legal rights, they had no power to compel the commission to proceed, since a violation of treaty rights resulting in severe financial loss is not a *fact* of the type susceptible to “judicial notice.” Of course, a contrary result can be expected if a member state is subsequently placed in a similar situation; affirmative action can be demanded. Accordingly, an individual petition to a community organ serves only the limited function of providing information; it is never a source of compulsion. Therefore, no broad generalization can be made to the effect that private persons have the right to petition the commission. Article

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*Accord*, as to Articles 85 and 86, *Italy v. EEC Comm.*, *supra* note 64.

85. Case No. 32/65, — *Recueil* —, CCH Common Mkt. Rep. ¶ 8048, at 7704. Article 85 is considered in connection with Regulation 17, *supra* note 34. The specialized scope of this study precludes an examination of the antitrust area.

86. *Id.* at 7717-19.

87. *Id.* at 7720. *Accord*, Advocate-General Roemer, *id.* at 7723.

175 may be deemed an extraordinary remedy controlled by the executive's discretionary power.

In view of the relief not achieved in *Lütticke*, the fundamental question of the future judicial role of the Court of Justice in a supranational community in relation to EEC organs, member states, and private enterprises is timely. Insofar as individual rights within a supranational entity are concerned, several elements are necessary in the opinion of Professor Paul Reuter.<sup>88</sup> In advocating the EEC is in reality a supranational entity, he stresses that three fundamental concepts of supranationality are present: 1) complete independence of community organs from national control; 2) the transfer of competence plus the power of action to the community; and 3) a direct relationship between individuals and EEC organs, especially the Court of Justice. The key element from the standpoint of this study is that the EEC has the power to move directly against nationals and even aliens physically located within the Six.<sup>89</sup> Thus, in a *supranational institution*—possessing great political power—individuals, enterprises, and non-governmental entities require a corresponding right of action. This basic notion of justice was overlooked by the drafters of the later Rome treaties establishing EURATOM and the EEC. The elimination of article 33, ECSC, in favor of the more conservative article 173, EEC, has resulted in *Lütticke's* rights existing without corresponding legal remedies. This legalistic approach can be seen in the recent *South West Africa* case,<sup>90</sup> decided July 18, 1966. The pres-

88. Reuter, *La Communauté du Charbon et de l'Acier*, 86 RECUEIL DES COURS 543-48 (1952 II); cited in Robertson, *Problems of European Integration*, *id.* at 146 (1957 I). See GORMLEY, *THE PROCEDURAL STATUS OF THE INDIVIDUAL BEFORE INTERNATIONAL AND SUPRANATIONAL TRIBUNALS* 133-36 (1966); and Gormley, *The Right of Officials and Employees of the Common Market To Invoke Immunity Against Their Sending States*, 17 SYRACUSE L. REV. 446, 453-59 (1966). See especially REUTER, *JURIDICAL AND INSTITUTIONAL ASPECTS OF THE EUROPEAN REGIONAL COMMUNITIES* 35-53 (Shimm ed. 1962).

89. Article 9, ECSC, Articles 1-8, EEC, and 1-3, EURATOM, in connection with 41, ECSC, and 150, EURATOM. See Erades, *International Law, European Community Law and Municipal Law of Member States*, 15 INT'L & COMP. L.Q. 117, 120-27 (1966); Gormley, *The Procedural Status of the Individual Before Supranational Judicial Tribunals*, 41 U. DET. L.J. 405, 408-10 (1964); Van Panhuys, *Conflicts Between the Law of the European Communities and Other Rules of International Law*, 3 C.M.L. REV. 420 (1965).

See especially the Court's reference to Article 1, EEC Treaty, in connection with 177; *Flaminio Costa v. E.N.E.L.*, *supra* note 23, at 7391. Article 1, EEC, is deemed to create direct effects between member states (and their nationals) with the EEC; hence, domestic courts must safeguard community rights. The self-executing obligations require no implementing legislation.

90. Second Phase, Judgment. [1966] I.C.J. Rep. 6. President Sir Percy Spender enunciated the traditional norm of individual moral and political rights, which are incapable of judicial enforcement. Speaking for the narrow majority of six judges, he stated: "In the international field, the existence of obligations that cannot in the last resort be enforced by any legal process, has always been the rule rather than the exception—and this was even more the case in 1920 than today." *Id.* ¶ 86, at 46. Thus, as in

ent *locus standi* of individuals is now briefly considered within the realm of: 1) the positivistic school of jurisprudence and 2) the broader sociological context in which the actual purpose of a common market becomes the primary test.

Jurisconsults presently serving on the Court have no power to modify the text of the three establishing treaties. Moreover, their judicial function precludes their offering suggestions for any expansion of existing jurisdiction. Unlike American state and federal judges, civil law jurists are forbidden to assume a role of leadership looking toward improvement in the administration of justice. This limitation must be recognized by anyone examining the EEC through Anglo-Saxon eyes.

Because a full common market does not presently exist, the delicate position of the court must be appreciated. Consequently, the tribunal must adhere rigidly to the intention of the treaty drafters. Because their intention was to eliminate individual *locus standi*, the court must enforce the mandate.

One may ask what the purpose of a common market is insofar as private persons are affected? The answer offered here is that the availability of a judicial hearing is a basic human right inherent within any legal system, including a supranational common market. Further, an individual or enterprise injured by the community, or by the failure of a member state to fulfill treaty obligations, should have the right of action necessary to rectify the situation. This notion of fundamental justice—inherent within theories of natural law—must be given serious consideration by member governments and the EEC at such time as changes are made in the three existing treaties.

A continued denial of justice because of legal technicalities will lead to a sharp political reaction. Again, it is possible to draw an analogy with the despicable judgment of the International Court of Justice in the recent *South West Africa* case.<sup>91</sup> In brief, the mass outcry in Africa, Asia, Latin America, and Europe against The Hague Court's refusal to examine the merits, indicates the popular reaction that can arise from a major judicial default. Even though the cases discussed above do not present as dramatic an illustration of a denial of justice as does *South West Africa*, one inescapable fact remains: Within the more limited six-member EEC a strong counter action is bound to take place because of the homogeneous nature of the communities' legal system, which are

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classical international law, substantive rights may exist without judicial remedies in the community's legal system.

91. *Ibid.* See the writer's forthcoming condemnation of the majority opinion; Elimination of the Interstate Complaint: Southwest Africa Cases and Resulting Procedural Deficiencies in the ICJ.

based on Greco-Roman notions of justice,<sup>92</sup> exemplified in the *Jus Naturale*. In other words, common political and legal ideals will eventually prevail over restrictive procedural standards.

#### RECOMMENDATIONS

The main improvement has already been suggested, namely a revision of article 173(2) in order that the superseded article 33(2), ECSC, may once again become the legal norm. Indeed, even more liberal *locus standi* seems in order.<sup>93</sup> Along with this fundamental change, articles 88, ECSC, and 169, EEC, should be harmonized along with articles 35, ECSC, and 175, EEC. Once the basic modification in article 173(2) has been effected, these "alternative treaty articles" will probably be brought into line with the main procedural standard. Actually, article 173 has no counterpart in civil law; it is not a typical judicial remedy. Conversely, administrative tribunals, modeled on the French *Conseil d'Etat*, can give relief in the event of illegal actions by public agencies or for a failure to act (including *détournement de pouvoir*).<sup>94</sup> Similar competence, however, has been denied the Luxembourg tribunal.

These recommendations should be activated at the time of merger of the three executive organs—the High Authority, ECSC, and the commissions of the EEC and EURATOM—into a single entity serving all three communities.<sup>95</sup>

92. Ténékidès, *Regimes Internes et Organisation Internationale*, 110 RECUEIL DES COURS 271 (1963 III). See in addition, Erades, *supra* note 89; Hay, *The Contribution of the European Communities to International Law*, [1965] PROC. A.S.I.L. 195; Scheingold, *The Court of Justice of the European Communities and the Development of International Law*, *id.* at 190.

93. *Accord*, Rasquin & Chevallier, *L'article 173, a linéa 2 du Traité C.E.E.*, 2 REVUE TRIMESTRIELLE DU DROIT EUROPÉEN 31 (1966).

Ce serait nier, et l'existence de ce droit communautaire, et celle de la Communauté elle-même. Les politiques peuvent se battre sur des mots, mais les juristes doivent comprendre que la consécration de la situation actuelle, en matière de recours des particuliers, peut mettre en cause l'édifice communautaire plus sûrement que les querelles de vocabulaire sur la supranationalité, car les réalités finissent toujours, les illusions s'étant évanouies, par imposer leur loi.

Une révision de l'article 173, alinéa 2, s'avère donc indispensable. Le droit de recours étant ouvert aux particuliers dans des limites raisonnables, on pourra, pour le maintenir dans ces limites, faire confiance à la Cour qui a déjà prouvé à maintes reprises sa prudence et sa sagesse.

*Id.* at 46. *Accord*, GORMLEY, THE PROCEDURAL STATUS OF THE INDIVIDUAL BEFORE INTERNATIONAL AND SUPRANATIONAL TRIBUNALS 182-83 (1966).

94. AMERICAN ENTERPRISE ON THE EUROPEAN COMMON MARKET: A LEGAL PROFILE 228-32 (Stein & Nicholson eds. 1960); Gormley, *The Significant Role of French Administrative Jurisprudence as Presently Applied by the Court of the European Communities, with Emphasis on the Administrative Law Remedies Available to Private Parties*, 8 S.D.L. REV. 32, 62-68 (1963).

95. For a general discussion of the problem of merging and harmonizing the remaining separate institutions of the three communities see Houbert, *The Merger of the*

Despite the desirability of above mentioned improvements, the exercise of extreme national sovereignty will probably prevent the adoption of these required modifications. Sadly, European states are not yet prepared to surrender additional sovereignty to a supranational institution. Consequently, needed solutions must be evaluated against political realities. But if justice cannot be given injured individuals and private enterprises the continued existence of the EEC will be at least seriously threatened.

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*Executives of the European Communities*, 3 C.M.L. REV. 37 (1965). See also LANG, *op. cit. supra* note 61, at 6-7.

Treaty Establishing a Single Council and a Single Commission of the European Communities, Signed Brussels, April 8, 1965. Unofficial translation, EEC; reprinted 4 INT'L LEGAL MATERIALS 776 (1965).