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THE BRUSSELS ENTENTE: EXPORT COMBINATION IN THE WORLD STEEL MARKET*

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Within a single geographical area one hundred miles in radius lies one of the most powerful production centers in the world. Almost two-thirds of all steel entering world trade today is produced within a basin containing parts of France, Germany, Belgium, Luxembourg and the Netherlands.¹ Between World Wars I and II, steel producers in this area were joined together in the International Steel Cartel.² With the adhesion of British and American steel producers to the working rules of the International Steel Cartel in 1938, almost ninety-eight per cent of world steel exports were regulated by restrictive production and marketing arrangements.³

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1. Rieben, *The Scope of the Common Market in Coal and Steel*, 1956 WORLD AND EUROPE SERIES 6, No. 1 (published and translated into English by the High Authority of the European Coal and Steel Community). This monograph reprints material that originally appeared in the *Revue Economique et Sociale*, July 1955 (Switzerland).

2. Lederer, *La Sidérurgie européenne, et les cartels avant le plan Schuman*, *Politique Etrangère*, Aug.-Dec. 1951, pp. 397-412 (France). See RIEBEN, *DES ENTENTES DE MAÎTRES DE FORGES AU PLAN SCHUMAN* 181-309 (1954) (hereinafter cited as RIEBEN).

3. HEXNER, *INTERNATIONAL CARTELS* 205-16 (1945). For general insight into pre-war steel arrangements see his work *THE INTERNATIONAL STEEL CARTEL* *passim* (1943).

In contrast, the establishment of the European Coal and Steel Community (ECSC) in 1951 has signalled an emancipation of the trade of its members.⁴ Among France, Germany, Belgium, Luxembourg, the Netherlands and Italy, considerable progress has been made toward the establishment of a unified common market by the elimination of the following artificial impediments to trade: (1) customs duties and quantitative restrictions on coal and steel movements;⁵ (2) discriminatory transport rates on the basis of nationality;⁶ (3) government regulation of prices;⁷ (4) government subsidies;⁸ (5) price discrimination for sales on the common market;⁹ (6) cartels and agreements in restraint of trade.¹⁰

The entire thrust of the ECSC is toward economic expansion.¹¹ In the founding of the Community, a fundamental assumption was that a general increase in the standard of living in the six member countries could come only from an increase in production and productivity:

"The mission of the European Coal and Steel Community is to contribute to the expansion of the economy, the development of employment and the improvement of the standard of living in the participating countries through the creation, in harmony with the general economy of the member States, of a common market.

. . . " 12

The restrictionist philosophy of the former cartels was discarded in no uncertain terms by M. Jean Monnet, one of the principal architects and promoters of the Community: "[T]here can be no Schuman plan that will raise living standards if cartels are permitted."¹³

4. During 1956 trade of steel commodities among the Member States of the Community was running 140% ahead of similar exchanges in 1952: 5.1 million metric tons against 2.1 million. Haute Autorité, *Bulletin Mensuel d'Information*, April 1957, p. 5.

5. Article 4(a) of the Treaty Establishing the European Coal and Steel Community signed in Paris on April 18, 1951, and concluded (by art. 97) for a period of fifty years from its entry into force. An authorized English translation has been published by the High Authority and all references herein are to that document (hereinafter cited as *TREATY*).

6. *Id.* art. 4(b).

7. *Id.* arts. 4, 5, 67, 86.

8. *Id.* art. 4(c).

9. *Id.* arts. 4(b), 60.

10. *Id.* arts. 5, 58, 61, 65.

11. In presenting details of the Community's General Objectives, the High Authority has stated that steel production capacity should rise to 73.5 million metric tons by 1960 and to 86 million by 1965, while a figure of 105 million tons was forecast for 1975 as a basis for estimating coal and coke needs. *Bulletin From the European Community for Coal and Steel*, April-May 1957, No. 23, p. 10 (hereinafter cited as *Bulletin*). This periodical is published in English by the Washington, D.C. office of the Information Service of the High Authority.

12. *TREATY* art. 2.

13. *N.Y. Times*, Jan. 19, 1951, p. 8, col. 3.

The two principal means for the promotion of the ECSC's economic growth are the *common market* and the *common institutions*.¹⁴ The *common market* is intended to promote a rational system of production and distribution by establishing and promoting normal conditions of competition.¹⁵ In three stages, beginning with coal, iron ore, and scrap on February 10, 1953, steel on May 1, 1953, and special steels on August 1, 1954, the common market came into being.¹⁶

It is the task of the *common institutions*—the High Authority,¹⁷ the Common Assembly, the Council of Ministers, and the Court of Justice—to insure that this Community lives up to the expectations of the ECSC Treaty,¹⁸ for, unlike other attempts at European integration, the ECSC approaches integration from a realistic, matter-of-fact basis.¹⁹ It is no mere society to promote trade liberalization. In the High Authority it has established a centralized body with truly executive powers;²⁰ it can make decisions that are directly binding on individual firms within the Member States without prior reference to the governments concerned.²¹ High Authority decisions can be enforced by fines and other sanctions.²² Its operations are financed by a levy on ECSC firms.²³ Clearly, there has been a delegation of sovereignty by the Mem-

14. TREATY art. 1.

15. *Id.* arts. 2-5. At the outset, the reader must understand the distinction between the *common market* and the *export market*. The former refers exclusively to sales to consumers within the national boundaries of the Member States. All other sales are export market sales, or sales to "third countries," *i.e.*, non-member States. The Treaty clearly distinguishes between these two markets. For example, price lists and conditions of sale for common market sales must be published by all coal and steel producers. They need not publish their export sale schedules. TREATY art. 60.

16. Bulletin, Oct. 1954, No. 1, p. 4. When the Treaty was negotiated it was realized that the creation of an expanded market comprising six previous national markets would lead to serious economic and social disturbances in those industries that had for some time enjoyed the fruits of governmental subsidies, protective tariffs and other artificial advantages prohibited by the Treaty. The Belgian collieries in particular faced the strong possibility of being closed out en masse. The newly inaugurated Italian steel industry was in much the same position. Accordingly, a transitional period of five years, ending in February 1958, was adopted during which time the designated industries would be allowed special privileges and financial assistance and be expected to adapt themselves to the rigors of a competitive market. Thus, rather than demanding an unrealistic and abrupt change in these industries, time for a gradual transition was allowed. However, these concessions were only for the prescribed period of five years after which time the industries were to be on their own. See Convention Containing the Transitional Provisions, TREATY 101-30.

17. To advise the High Authority there is a Consultative Committee composed of fifty-one members which includes seventeen representatives of producers, consumers, merchants and workers. See TREATY arts. 18, 19, 58-62.

18. For a description and analysis of the legal structure of the organs of the Community together with an excellent legal examination of the Treaty as a whole, see Bebr, *The European Coal and Steel Community: A Political and Legal Innovation*, 63 YALE L.J. 1 (1953).

19. See *The European Coal and Steel Community*, 21 PLANNING 225 (1955).

20. *Id.* at 226.

21. TREATY arts. 14, 15.

22. See, *e.g.*, *id.* arts. 47, 64-66.

23. *Id.* arts. 49-53.

ber States in a significant area of their national economy to a supra-national authority.²⁴

Viewed against this background, the Brussels Entente²⁵ assumes a highly significant and disturbing position. Aptly described as a "European Steel Cartel: Reduced Model,"²⁶ the Entente has manifested the characteristics of the classic form of market regulation by producer interests, and would seem to have constituted itself heir to the pre-war International Steel Cartel.²⁷ It is, in fact, what must be considered the product of a rather natural attempt on the part of European steel producers to inject a measure of stability into the world steel market. But while the form is old, the context, as represented by the European Coal and Steel Community, is new. The Entente, by conducting itself in the export market in a manner categorically forbidden in the common market, raises serious questions of the compatibility of two institutions, one oriented toward control by combination, at least as to export trade, the other dedicated to the maintenance of a free competitive common market within the international community.

In this Article an attempt will be made to examine the origins, character, and operations of the Brussels Entente, from its inception in 1953 until the end of 1956, when "boom" conditions still prevailed on the world steel market. The legal status of the Entente, in relation to the Treaty of the ECSC, will also be investigated. In addition, some attention will be paid to the actions and deliberations of the various common institutions of the Community as well as bodies outside the

24. For a description and examination of the powers granted ECSC organs to interfere in the affairs of Member States, see MASON, *THE EUROPEAN COAL AND STEEL COMMUNITY* 54-74 (1955).

25. It should be emphasized that the Entente is a private producers' organization. It is neither an agency of the ECSC nor sponsored by it in any way.

26. RIEBEN 479.

27. As has been pointed out elsewhere, a great deal of confusion exists concerning the meaning of the term *cartel*, and necessarily this shortcoming must be reflected in any discussion of international restrictive trade practices. HEXNER, *INTERNATIONAL CARTELS* 35-42, 170 (1945). Hexner defines a cartel as a "voluntary, potentially impermanent business relationship among a number of independent, private entrepreneurs, which through co-ordinated markets significantly affects the market of a commodity or service." *Id.* at 24. The Information Service of the High Authority has defined a cartel in this manner: "Cartels are formed when separate companies engaged in the same line of business agree to follow policies designed to limit or eliminate competition." Bulletin, April 1955, No. 6, p. 2. One of the Belgian signatories to the Protocol establishing the Brussels Entente, M. Pierre van der Rest, head of the Comité de la Sidérurgie Belge, and former President of the Consultative Committee has publicly protested against the Brussels Entente being considered as a cartel. Van der Rest, *La Sidérurgie européenne dans le cadre du Plan Schuman*, *Revue Economique et Sociale*, July 1955, pp. 175, 192 (Switzerland). It may be recalled that when the first model of the International Steel Cartel was constructed in 1926 an indignant author protested that it was not a cartel but merely an entente, or understanding. NATAN-LARRIER, *LA PRODUCTION SIDÉRURGIE DE L'EUROPE CONTINENTALE ET L'ENTENTE INTERNATIONALE DE L'ACIER* 301 (1929).

Because of these verbal difficulties, the author is not interested in establishing that the Brussels Entente does or does not come within any particular set of definitions. Rather, this examination is confined to the character of the Entente and its impact on the development of the European Coal and Steel Community.

Community which have been concerned with the Entente. Finally, some conclusions will be offered concerning the future relations between the Entente, the Community, and "third countries," that is, countries not members of the Community.

ORIGINS OF THE BRUSSELS ENTENTE

Objectives and Ambitions of the Entente

Both the ECSC and the Entente are products of a period marked by a phenomenal rise in world steel productivity.²⁸ This fact is particularly important for an insight into the factors which contributed to the formation of the Entente. Even before the ECSC common market for steel was opened in May 1953, steel producers' representatives had concluded their first independent agreement to insure their freedom from competition in export sales. Pursuant to negotiations in Paris between the ninth and eighteenth of March 1953,²⁹ representatives of steel associations and works in Belgium, Luxembourg and France concluded an agreement relative to the creation and maintenance of a common export policy, the fixing of minimum prices and the establishment of a central bureau in Brussels.³⁰ Concluded for an indefinite period, the arrangement was effective March 20, 1953. While German, Italian and Dutch producers did not commit themselves to the arrangement at that time, they were formally invited to join.³¹

The objectives of the Brussels Entente are neither novel nor difficult to understand. Stated simply, its objectives are: (1) to reduce "cut-throat" competition among Continental steel producers in export sales to third countries; (2) to achieve a stabilization of prices on these export markets.³²

28. In 1937-38, world steel production amounted to some 106 million metric tons. By 1948, notwithstanding the wide devastation resulting from World War II, it had increased to 130 million tons. In 1956, world steel production amounted to 282 million tons, or more than twice as much as 1948 production. See *Steel in Western Europe*, 1953 ROTTERDAMSCH E BANK Q. REV. No. 3 (Netherlands); see also RIEBEN 473-76; Continental Iron & Steel Reports (The Hague), *passim* (hereinafter cited as CISR); The Metal Bulletin (London), *passim* (hereinafter cited as TMB); Le Monde (Paris), April 13, 1957, p. 14, col. 2; N.Y. Times (Int'l ed.), Jan. 3, 1957, p. 7, cols. 6-7.

Of world steel production, European producers in what is now the ECSC accounted for 39.6 million metric tons in 1953. Bulletin, Oct. 1954, No. 1, p. 3. In 1956, they produced 56.7 million metric tons, amounting to approximately 20% of world steel production. Bulletin, Feb.-March 1957, No. 22, p. 8.

29. CISR 7845-46 (March 27, 1953); TMB, March 27, 1953, p. 9, col. 1.

30. The text of the agreement is Annex I to this Article, p. 1114 *infra*. (Citations to Annex hereinafter refer to author's annexes set out at pp. 1114-16 *infra*.)

31. Annex I, para. 7, p. 1114 *infra*.

32. Van der Rest, *La Sidérurgie européenne dans le cadre du Plan Schuman*, Revue Economique et Sociale, July 1955, pp. 175, 192 (Switzerland); RIEBEN 477-78; TMB, April 17, 1953, p. 24, col. 2; *id.*, May 15, 1953, p. 27, col. 2 (statement of Pierre Ricard of the French Chambre Syndicale); *id.*, Nov. 27, 1953, p. 13, col. 1 (statement of Pierre van der Rest).

The most comprehensive attempt to understand and explain such an instrument as the Brussels Entente is provided by a recent study of the causes and evolution of international steel agreements.³³ In his study, Henri Rieben lays stress on the extreme sensitivity of regional European steel producers to the fluctuations of the export market and the corresponding urge to regulate the nature of the necessary adjustments. The relative economic position of the members of the Brussels Entente is strikingly similar to that of the members of the 1926 version of the International Steel Cartel. For while they represent substantially less than a half of world steel production, they nonetheless supply approximately sixty-five per cent of the world's total volume of steel exports.³⁴ It is reliably estimated that approximately twenty to twenty-five per cent of the steel production of the Community is normally exported to third countries.³⁵ It is Rieben's central point that "*under the Schuman Plan as under the International Steel Cartel, the maintenance and development of exports constitutes for Europe a vital necessity.*"³⁶ He cites as a consideration of long-run significance the accelerated development of steel-producing capacity in countries that were formerly importers of steel products, principally from Continental producers.³⁷ Another significant long-term concern to Continental producers is the threat of increasing competition from the United States, particularly in Latin America and in Asia.³⁸ Short-term factors can readily be appreciated from the economic circumstances in 1953-1954 attending the creation of the Entente: namely, a woefully sagging market, with British exporters making a strong bid in markets outside the Community.³⁹

33. RIEBEN.

34. *Id.* at 473. See also *Steel in Western Europe*, 1953 ROTTERDAMSCHIE BANK Q. REV. No. 3 (Netherlands); HIGH AUTHORITY, THIRD GENERAL REPORT ON THE ACTIVITY OF THE COMMUNITY 68 (1955); HIGH AUTHORITY, FOURTH GENERAL REPORT ON THE ACTIVITY OF THE COMMUNITY 59 (1956); Haute Autorité, Bulletin Mensuel d'Information, April 1957, p. 5.

35. RIEBEN 473. The United Kingdom exports approximately 15% of her steel production and the United States exports approximately 5%, primarily flat products. *Ibid.*

36. *Ibid.* (Emphasis in original.)

37. *Id.* at 475-76. Rieben points out that the aggregate steel production capacity of Australia, Burma, Ceylon, India, Pakistan, the Philippines, Egypt, South Africa, Southern Rhodesia, Argentina, Brazil, Chile, Colombia, Mexico, Peru and Venezuela has more than doubled from 1939 to 1953 increasing from 2.8 to 6.6 million metric tons.

38. *Ibid.*

39. Through the last months of 1953, the domestic and export markets of United Kingdom reflected a confident tone described as the "crest of a wave." TMB, Nov. 24, 1953, p. 17, col. 3. However, by January 1954, British producers were also facing export difficulties. TMB, Jan. 12, 1954, pp. 8-9. It was even reported that "Conceivably Britain might be prepared to join in export marketing and price arrangements, but if so it is to be hoped that *all parties* will observe such arrangements closely; in the past, certain foreign producers were, to put it mildly, somewhat careless in keeping to their contractual arrangements." *Id.* at p. 9, col. 1. (Emphasis in original.)

Organization: Phase One

At its inception, the Entente consisted of two principal organs.

1. *The General Commission.* Composed of two members from each participating country given mandates by their respective producer associations, this Commission was to establish general export policy and fix the minimum prices and conditions of payment. In addition, it was to act in a judicial capacity when violations of export policy were proven.⁴⁰

2. *The Permanent Bureau.* With offices in Brussels, this body was to provide administrative and fact-gathering assistance to the General Commission. Every three days, steel associations of the members were to inform the Permanent Bureau of the detail of all orders received by member works, or on their account, with a complete listing of all tonnages, products, destinations, prices, and conditions of sale.⁴¹ In addition, any complaints concerning violations of export policy by member works were to be reported to the Permanent Bureau. If probable cause were shown the Bureau would order an investigation to be made by the governing board of the national steel association whose member was accused of wrongdoing. Upon proof of violation, the matter would be submitted to the General Commission for action.⁴²

It should be noted that the scope of the agreement was carefully framed. It concerns only the export market and not sales on the common market. Secondly, it is worthy of mention that nowhere in the first agreement was there any specification of penalties.⁴³

Although the General Commission was authorized to spell out a complete export policy, the thrust of the agreement, as it then stood, concerned only the establishment and observance of the fixed minimum prices for the products covered by the agreement.⁴⁴ There was no explicit mention of tonnage quotas among the members nor any reference to a system of geographical division and assignment of export markets. However, the early pattern of prices of the Entente indicates an initial predisposition to impose a system of geographical price discrimination. For example, in 1953 three price areas were ordained: (1) The United States and Canada (generally assigned the lowest

40. Annex I, para. 1, p. 1114 *infra*.

41. Annex I, para. 2, p. 1114 *infra*.

42. Annex I, para. 3, p. 1114 *infra*.

43. Annex I, *passim*, p. 1114 *infra*.

44. See Annex I, para. 6, p. 1114 *infra*, for list of steel products subject to regulation by the Entente.

prices); (2) Latin America (the highest prices); (3) all other destinations (prices somewhere in between).⁴⁵

As was observed at the time, just prior to the signing of the agreement, all bookings of new export deals were suspended for a forty-eight hour period in the member countries.⁴⁶ One of the obvious purposes for this was to inform buyers of the new regime and possibly impress them with the desirability of placing new orders before higher prices went into effect. At the outset, however, doubts were expressed that the Entente as then constituted could long survive, let alone achieve its purpose. The discipline of member producers to abide by the minimum prices established was seriously questioned. Indeed, even during the forty-eight hour "sales holiday" observers had already detected some irregularities.⁴⁷

Within three weeks from the effective date of the agreement, the first price increases were announced by the Entente.⁴⁸ Still the market remained dull. As might have been expected, the fixing of a common export price caused some consternation in the third countries affected.⁴⁹ Yet within a month after Germany acceded to the agreement, she was echoing the cries of her industrialists that the agreement was a failure because it had no teeth.⁵⁰

During the summer months, the pressure on the fixed prices increased. With the reduction of export quotations by the British Iron and Steel Federation, members of the Entente began to see the necessity for some price reductions themselves.⁵¹ A sagging market was still in prospect. Belgian and Luxembourg groups had already announced their decision to reduce daily production.⁵² Instances of underquoting official minimum prices appeared no longer as isolated cases but as part of a widespread pattern.⁵³ Members of the Entente were forced to recognize that if the Entente was to hang together it would have to heed the overriding laws of supply and demand.⁵⁴ It was simply im-

45. See, *e.g.*, CISR 7856, 7860-61 (April 9, 1953).

46. *Id.* at 7838, 7845-46 (March 27, 1953).

47. *Id.* at 7845.

48. *Id.* at 7860-61 (April 9, 1953).

49. *Id.* at 7872-73 (April 18, 1953).

50. *Industriekurier* (Dusseldorf), May 30, 1953, p. 11, col. 2. Unconfirmed reports indicate that German steel producers formally acceded to the Entente during May 1953. Interview in Luxembourg, March 27, 1957. Italian producers are said to have joined in June 1955. Interview in Brussels, March 19, 1957.

51. CISR 7997-98 (July 27, 1953).

52. *Id.* at 8024-25 (Aug. 8, 1953).

53. *Id.* at 8037-38 (Aug. 18, 1953).

54. During this time the policy of the Entente was one of determined resistance to a price reduction, notwithstanding a reliable report that its minimum prices were too high compared with those of competitors. See CISR 8024-25 (Aug. 8, 1953).

possible to hold the line on prices by consent. Sanctions would be the only way to enforce discipline. Accordingly, in September 1953, a meeting in Luxembourg of producers' representatives from every country in the Community resulted in the Entente's entering a new phase.

Organization: Phase Two

Since most of the complaints concerned the persistent underquoting of minimum prices by member works and non-member dealers, most of the reform was devoted to this problem. The organization of the Entente was changed in several significant respects. First, an independent Control Commission was established to investigate all complaints of policy violations by member works.⁵⁵ This body replaced the rather inefficient machinery of the earlier agreement whereby the national steel federation whose member was complained of did the investigating. Second, a formal distinction was made between the fixing of minimum prices, conditions of payment, etc., and the establishment of general export policy. The former assignment was given to a Commercial Commission consisting of two members from each of the member associations. In practice these men were generally sales managers or sales specialists of the larger works or steel associations.⁵⁶ Over-all, general policy was established by a Committee of Presidents consisting of one member from each signatory group. This body again was responsible for final action upon proof of any violation of Entente prices or policy.⁵⁷

Perhaps most significant in the evolution of the Entente was its new authority to impose penalties of up to \$50 per ton by simple majority vote of the Committee of Presidents for any violation of the agreement reported by the Control Commission.⁵⁸ The *Fiduciaire Suisse*, which had performed a similar service for the International Steel Cartel before World War II, was selected by common consent to fill the role of the Control Commission.⁵⁹ Of hardly less significance is the fact that when steel producers' representatives of Germany, France, the Netherlands, Belgium, and Luxembourg signed⁶⁰ the agreement on September 7, 1953, almost two-thirds of the world steel exports became subject to the regulations of the Brussels Entente.

The heart of the agreement consists of the obligation undertaken by the management of each steel works, or authorized steel association

55. Annex III, para. 3, p. 1115 *infra*.

56. Annex III, para. 1, p. 1114 *infra*.

57. Annex IV, preamble and paras. 4, 5, pp. 1115-16 *infra*.

58. Annex IV, para. 4, p. 1116 *infra*.

59. CISR 8068-69 (Sept. 19, 1953); RIEBEN 477.

60. Annex III, pp. 1115-16 *infra*.

representative on behalf of all member works, to: (1) respect minimum prices and other conditions of sale established by the Entente; (2) impose identical conditions on their agents, representatives and independent dealers with whom they dealt; (3) not contract to supply steel for a longer period than allowed by the Entente; (4) not permit their representatives or dealers with whom they do business to reduce their commissions; (5) assume individual responsibility for any infractions by their agents or dealers with whom they do business.⁶¹

In addition the following obligations were assumed: (1) to participate in any collective boycott of any independent dealer who violates the terms imposed on him by the works party to this agreement;⁶² (2) to produce on request of the Control Commission any and all originals of documents relating to sales allegedly made in violation of Entente policy by the works, its agents or dealers with whom they do business. (Refusal to do so constitutes proof of a violation.)⁶³ (3) to comply with any requests or instructions transmitted to the signatory by the Control Commission in connection with its work and to cooperate in any investigations deemed necessary by that body.⁶⁴

Organization: Phase Three

The early months of 1954 brought no encouragement.⁶⁵ Notwithstanding the strengthening of Entente machinery, the steel export market as well as the common market of the Community continued to decline. As a consequence, clandestine underquoting of official minimum prices continued.⁶⁶ Although this underquoting was quite widespread, the conduct of the German producers infuriated the other members. It is reported that in January, 1954 Germany was able to almost double her export orders over the level achieved in the last nine months of 1953. It was admitted that this could only be done by major price concessions. Following a meeting in Brussels in early March, German producers sought to make amends by "voluntarily" restricting their export bookings for the month of March to twenty to twenty-five per cent of their monthly average during the preceding six months.⁶⁷ That this was not a gesture of magnanimity will be indicated *infra*.⁶⁸ Later that month the Entente entered phase three with the imposition of export quotas, on a tonnage basis, for member steel associations.

61. Annex IV, para. 1, p. 1115 *infra*.

62. *Ibid*.

63. *Id.* at para. 2, p. 1116 *infra*.

64. *Id.* at para. 3, p. 1116 *infra*.

65. CISR 8253-54 (Feb. 22, 1954); TMB, Feb. 19, 1954, p. 23, col. 2.

66. CISR 8259-60 (Feb. 22, 1954); *id.* at 8640-43 (Dec. 18, 1954). See also *id.* at 8229-30 (Jan. 30, 1954).

67. *Id.* at 8276 (March 4, 1954); TMB, March 5, 1954, p. 24, col. 1.

68. See text at note 153 *infra*.

It is reliably reported that even at the September 1953 meeting, some members of the Entente favored the imposition of tonnage export quotas.⁶⁹ However, because of an inability to agree on specific arrangements, no decision was made at that time other than to instruct the Commercial Commission to continue its investigation of the matter.⁷⁰ After numerous discussions, the Commercial Commission committed itself to the imposition of mandatory export quotas at its meeting of March 23, 1954.⁷¹

Not all the representatives were enthusiastic about the imposition of export tonnage quotas, some preferring other arrangements. For example, one of the reported proposals was to inaugurate a kind of *export comptoir* in which all export orders would be centralized and subsequently pooled for transfer to works on a priority basis, depending on relative need for the business.⁷² The ultimate plan, however, as agreed upon by the Committee of Presidents, was to establish an over-all tonnage quota for exports fixed at 325,000-400,000 tons per month for the Entente as a whole.⁷³ Each of the national steel associations was in turn allotted a percentage quota of this overall tonnage. The initial basis for the determination of these percentages was to be the period of sales by the respective member associations during the fifteen months between October 1, 1952 and December 31, 1953.⁷⁴ However, the French and Luxembourg producers insisted upon the first nine months of 1953 as the reference period, and this was ultimately adopted.⁷⁵ In early April the export quotas of the member groups were established:⁷⁶

Belgium-Luxembourg	56.7%
France	24.0%
Germany	16.3%
Holland	3.0%

69. CISR 8068-69 (Sept. 19, 1953); TMB, Sept. 25, 1953, p. 21, col. 2.

70. TMB, Sept. 25, 1953, p. 21, col. 2. In CISR 8073 (Sept. 29, 1953) it was stated: "The question of eventual export quotas has also been discussed, but no concrete arrangements have been made yet. Whether such measures will be laid down in the future depends on coming developments of the market and the economic situation. Agreements on export prices and export quotas would in any case mean an export cartel similar to the International Iron and Steel Combine of pre-war years."

71. *Procès-verbal* of meeting of L'Entente de Bruxelles on March 23, 1954, prepared by the Groupement des Hauts-Fourneaux et Acieries Belges, signed and circulated by M. Wattillon, Directeur, Division Commerciale. The proceedings concerning sales policy and price control are described at pp. 2-5. See also TMB, March 26, 1954, p. 25, col. 1.

72. See, e.g., CISR 8287 (March 4, 1954).

73. CISR 8302-03 (March 26, 1954); TMB, March 26, 1954, pp. 25-26.

74. *Ibid.*

75. TMB, April 9, 1954, p. 26, col. 1.

76. CISR 8321-22 (April 6, 1954); TMB, April 9, 1954, p. 26, col. 1. Contemporaneously, M. Pierre Ricard of the French Chambre Syndicale indicated the desirability of an "export agreement" between Continental and British steel producers.

It was not intended, however, that these quotas remain immutable. Indeed, the meetings of the Entente during this period, as might be expected, were marked with bitterness, recriminations and suspicion.⁷⁷ German producers made it quite clear that they were by no means reconciled to a permanent quota of 16.3 per cent, particularly since their quota in the former International Steel Cartel was 38 per cent.⁷⁸ Notwithstanding that a firmer tone was detected on the market, the quota system as tentatively agreed upon was extended for another month until the end of May.⁷⁹ By the end of May the market had so dramatically improved that the Entente announced modest price increases for certain products.⁸⁰ Meeting again on July 13, the Entente announced fresh price increases⁸¹ as new orders for steel began to reach peak levels. By November 1954, it was almost impossible to place orders on the export market for less than ten per cent above the minimum prices of the Entente.⁸² Before the close of the year, most of the Belgian mills that just a few months before were considering "emergency" measures were operating at full capacity.⁸³ This "boom"⁸⁴ continued until the end of 1956, the period under study.

ATTITUDE OF THE COMMON INSTITUTIONS OF ECSC

The institutional structure of the ECSC is basically a tripartite one in which the High Authority functions as the executive, the Common Assembly as the legislative, and the Court of Justice as the judicial branch. In addition the High Authority has an advisory adjunct, the Consultative Committee, which is composed of representatives of all interested groups—producers, workers, consumers and distributors. The Council of Ministers, a body made up of representatives of the

77. CISR 8337 (April 17, 1954).

78. *Id.* at 8350-51 (April 28, 1954).

79. TMB, May 7, 1954, p. 24, col. 2. Subsequently, it was reported that the aggregate monthly export quota of the Entente was raised to 425,000 metric tons. TMB, May 25, 1954, pp. 18-19.

80. *Id.*, June 11, 1954, p. 19.

81. CISR 8456-58 (July 15, 1954).

82. *Id.* at 8591-92 (Nov. 3, 1954).

83. *Id.* at 8605-07 (Nov. 15, 1954). German plants were working at full capacity with three shifts. *Id.* at 8616 (Nov. 26, 1954).

84. The boom beginning in mid-1954 was quite different in its origins than that arising from the Korean War. In the first place, exports to third countries in the autumn of 1954 remained stable, while in 1951 they exceeded the level of the preceding year by more than 40%. Secondly, a considerable rise in prices took place in 1951, in respect to both countries now members of the Community and third country sales. During the 1954-55 period, price increases were noticeably more modest. No small measure of this "steadiness" must be attributed to the stability fostered by the operation of the unified common market of the ECSC. See CISR 8621-22 (Nov. 26, 1954); see also Steel Review: The British Iron & Steel Federation Q., April 1956, p. 21.

Member States, also consults with the High Authority on matters of national economic policy.⁸⁵

The Common Assembly

Consisting of some seventy-eight representatives of Member States of the Community, the Common Assembly's primary strength lies in its power to focus public attention and criticism on the policies of the Community. Moreover, by a two-thirds majority vote it can remove the members of the executive, the High Authority, on a motion of censure.⁸⁶ It may be said of the attitude and activity of the Common Assembly toward the question of the Brussels Entente, that there has been no great alarm regarding its possible deleterious effects on the achievements of the Community.⁸⁷ While two of its sub-groups have at various times devoted some attention to the general problem of restrictive business practices in the steel sector both on the common market and on the export market, no dangerous relationship between the Brussels Entente and the operation of the common market has been seen and the public records of the Assembly make no reference to any request being directed to the High Authority to pursue the matter. Indeed, it appears to be taken on faith since June 1953 that there has been no danger because the High Authority had said so. Finally, it should

85. Bulletin, Oct. 1954, No. 1, pp. 4-6.

86. The powers, rights and role of the Common Assembly are set out in arts. 20-25, 38, 78, and 95 of the TREATY. For a description and analysis of its structure and operation see INSTITUTE DES RELATIONS INTERNATIONALES, LA COMMUNAUTÉ EUROPÉENNE DU CHARBON ET DE L'ACIER 59-66 (1953). See also MASON, THE EUROPEAN COAL AND STEEL COMMUNITY 49-50 (1955). For a comprehensive history of Community activity from 1952 to 1955, with an emphasis on the role of the Assembly, see LA COMMUNAUTÉ EUROPÉENNE DU CHARBON ET DE L'ACIER, ANNUAIRE-MANUEL DE L'ASSEMBLÉE COMMUNE *passim* (1956).

87. While the Assembly has at several times heard addresses on subjects which included references to the Brussels Entente, it has not felt the need, apparently, to adopt any resolution regarding it specifically. On January 16, 1954, a resolution was adopted relative to the investment policy of the High Authority. As a part of that resolution the Assembly went on record: "The first objective of the policy of investments of the Community must be the reduction of costs, particularly in the steel industry. . . ." JOURNAL OFFICIEL DE LA COMMUNAUTÉ EUROPÉENNE DU CHARBON ET DE L'ACIER, 3e année, No. 2, at 242-44 (1954).

A 1954 report of the Commission on the Common Market, a sub-group of the Assembly, dealing with the steel sector noted a reduction in prices on the common market, based on data supplied by the High Authority, and continued: "In the same vein, one must remark that in the steel industry cartels have exercised an activity whose influence on the market is incontestable. This problem was similarly before the Commission at its meeting on November 13, 1953. In this regard, the High Authority has responded that the industries in question have been for some thirty years oriented, in a sense determined, be it by governments or by cartels. The High Authority has declared that it has firmly resolved to persuade the enterprises of the considerable advantages offered them by a free market. The High Authority believes that the industries are in agreement with this general principle but that it would have to embark upon an 'educational mission.'" RAPPORT FAIT AU NOM DE LA COMMISSION DU MARCHÉ COMMUN 14 (Doc. No. 13, Session Ordinaire, M. H. A. Korthals, Rapporteur) (1954). The Report also reveals the strong interest of the Commission in coal cartels, including coal export cartels. *Id.* at 21-27.

be remembered that there still exists today in the ranks of the Common Assembly, among men who are parliamentarians in their own countries as well, a wide range of opinion about the desirability of restrictive trade practices.

Attitude of the High Authority

Immediately after the opening of the common market for steel, M. Jean Monnet, first President of the High Authority, reaffirmed the determination of the High Authority to insure that the price of steel remained truly free on the common market and that the prohibition of the Treaty against marketing and price agreements by producers was strictly observed.⁸⁸

1. *Phase One.* The official attitude of the High Authority toward the Brussels Entente was first expressed by Albert Coppe, Vice President of the High Authority, in June 1953. Stressing that he was speaking quite deliberately to avoid all misunderstanding, he stated before the Common Assembly that two distinct considerations would determine the High Authority's attitude toward the Entente: (1) any influence of the Entente on the common market, an inquiry based on article 65 of the Treaty; (2) any influence on international trade and the markets of third countries, an inquiry based on article 3(f) of the Treaty.

He then declared:

"[T]he High Authority has concluded that the export entente which now exists does not tend, in the actual conditions of the common market, as the agreement is known to the High Authority, to prevent, restrain or distort the normal operation of competition on the common market.

"The High Authority has not had, therefore, to intervene to authorize it.

"I would like to state that in our opinion this agreement does not place in danger the equitable limits of prices applied on the external markets with which Article 3 is concerned and to which I refer." ⁸⁹

As a matter of policy, he stated, the High Authority has adopted a doctrine of prudence and intended to intervene only when absolutely necessary.⁹⁰

88. JOURNAL OFFICIEL DE LA COMMUNAUTÉ EUROPÉENNE DU CHARBON ET DE L'ACIER, DEBATS DE L'ASSEMBLÉE COMMUNE, COMPTE RENDU IN EXTENSO DES SEANCES, Sess. of June 19, 1953, No. 4, at 17.

89. *Id.* at 109-10. TREATY art. 3 provides: "Within the framework of their respective powers and responsibilities and in the common interest, the institutions of the Community shall: . . . (f) foster the development of international trade and ensure that equitable limits are observed in prices charged foreign markets." The relevant portion of article 65 is set out in note 133 *infra*.

90. *Id.* at 110.

2. *Phase Two.* However, soon after the reformation of the Brussels Entente in September 1953, the High Authority felt it could no longer ignore the Entente. Early in November, the High Authority announced that it was "bound to register the fact that steel prices have been fixed, not by firms individually but by agreement between them and under the auspices of national organizations to which they belong."⁹¹ Already said to be under way was an investigation of "producers' agreements—which might be price cartels—and concentrations of industrial power which might act as monopolies."⁹² Thus, for the first time in the modern history of Continental industry, steel producers were served direct notice that a public body was prepared to intervene against the tried and true ways of price fixing and market conspiracy to prevent the frustration of the stated objectives of the Community.

Addressing the Market Commission of the Common Assembly, Vice-President Franz Etzel stated in confirmation that the High Authority was actively conducting an investigation of the operations and organization of steel producers' associations with an eye to their reorganization or their dissolution, in conformity with the anti-cartel provisions of the Treaty. He declared that the High Authority had decided to ask the steel men to dissolve the export entente on their own initiative without High Authority intervention. If this approach were rejected, he stated that the High Authority was conscious of its responsibilities under article 61(c) by which it was empowered to fix minimum or maximum export prices.⁹³

Attitude of the Consultative Committee

Accordingly, on November 20, 1953, the High Authority notified the President of the Consultative Committee that it wished to consult the Committee regarding the propriety of fixing minimum or maximum prices for steel exports, as well as the levels to be so fixed. A special commission of the Consultative Committee was convened to study these questions on November 27, 1953.⁹⁴

91. 1 NEWSLETTER OF THE EUROPEAN COAL AND STEEL COMMUNITY—SCHUMAN PLAN 3 (Luxembourg 1953).

92. *Id.* at 4.

93. HAUTE AUTORITÉ, RAPPORT MENSUEL, DOCUMENT DE TRAVAIL À L'USAGE DES SERVICES DE LA HAUTE AUTORITÉ, 1ère année, No. 3, at I, 1-I, 3 (1953). No express mention was made of proposed action under any other provision of the Treaty. Article 61(c) provides that the High Authority may fix minimum or maximum export prices, adapted to the nature of the export market, if such action can be effectively supervised. This may be done, however, only after a showing of danger resulting from the state of the market or that international trade is jeopardized by producers charging inequitable prices in foreign markets.

94. *Rapport de la Commission Chargée d'Etudier l'Opportunité de Fixer des Prix Minima ou Maxima pour les Produits d'Acier à l'Exportation vers les Pays Tiers*, COMITÉ CONSULTATIF (Doc. No. 8355f, *Procès-Verbal* Doc. No. 8329f) (1953).

The report of the special commission was adopted by the Consultative Committee the following week.⁹⁵ This report was prefaced by the remarks of the spokesman of the steel producers participating in the Brussels Entente:

"Taking account of the declarations made by certain representatives of the member governments of the Community as well as those of certain members of the High Authority,

"Taking account of assurances given the Luxembourg Parliament at the time of the Treaty ratification,

"Taking account, finally, of the provisions of the American antitrust legislation that authorizes export ententes, the steel producers have the conviction that the provisions of Article 65 provide them with a complete freedom of action in exports to third countries and consequently the price agreement presently in effect is perfectly legal."⁹⁶

The consultation requested by the High Authority was felt to pose three essential questions: (1) the possibility of finding means adapted to the nature of the external markets; (2) the possibility of establishing an effective control; (3) the necessity of such measures.⁹⁷

To the first question the report replied that the inherent character of the export markets requires a system capable of instantaneous adaptation. The unanimous opinion of the Commission was that minimum or maximum prices established by the High Authority *cannot* be adapted to the realities of the export markets. On the other hand, the private arrangement of the producers was preferable in that it was supple and adaptable to market realities.⁹⁸ Secondly, effective control of its minimum prices could not be established by the High Authority.⁹⁹ Thirdly, as to the necessity of such price-fixing the report concluded that the export markets presented no more dangers to steel enterprises than the common market. No abuses to international trade were apparent, and the steel prices charged on the export markets were felt to be equitable.¹⁰⁰

There is no question that the High Authority was taken somewhat aback by this action. The High Authority spokesman at the meeting was constrained to ask whether the Commission preparing the report

95. *Compte Rendu Analytique*, COMITÉ CONSULTATIF, VI^e Sess., at 6 (Doc. No. 8445f) (edition révisée 1953).

96. *Rapport de la Commission*, *supra* note 94.

97. *Id.* at 2.

98. *Id.* at 3.

99. *Id.* at 3-4.

100. *Id.* at 4.

really wanted to mark its opposition to price-fixing by the High Authority in the case where article 65 might be applied.¹⁰¹ He was assured that the Commission was so disposed.¹⁰²

Attitude of the Council of Ministers

Apparently undaunted, the High Authority proceeded to consult the Council of Ministers. It would not be an exaggeration to state that the consultation at the December 21, 1953 meeting of the Council of Ministers proved an even greater fiasco for the High Authority. One of the functionaries at the meeting termed it one of the most "fantastic" that he had ever witnessed before or since.¹⁰³ The consultation opened on the cheerless note of the President that the consultation would be extremely difficult to conduct, if not precluded, because of the lack of any documentation provided by the High Authority.¹⁰⁴ There is little doubt that the representative of the High Authority was shocked by this turn of events.¹⁰⁵ Subsequent developments did not aid his recovery.

In an effort to clarify his position, the High Authority spokesman stated that the High Authority proposed to determine whether the export cartel was in accord with the Treaty, particularly article 65.¹⁰⁶ If the High Authority concluded that the existence of the cartel was in contradiction to the Treaty provisions, it would be its duty, in conformity with article 61(c) to fix minimum prices and also maximum prices for export. The question that the High Authority posed to the Council was whether such price-fixing would be useful, and, if an affirmative answer were given, what level should be fixed. Certainly at that very moment prices were being fixed by the export entente. Did the Council believe them to be equitable?¹⁰⁷

The President of the Council appeared to state the consensus when he closed debate on the subject in the following manner: In the light of deficient documentation supplied by the High Authority the Council did not believe it was in a position to be consulted. However, if despite this view the High Authority believed that a consultation had taken place, it would have to consider that the Council had unanimously given

101. *Compte Rendu Analytique*, *supra* note 95.

102. *Ibid.* To a suggestion that the High Authority dispatch a "voting representative" to the meetings of the Brussels Entente, a stern rebuff was given by the High Authority spokesman. *Id.* at 6.

103. Interview in Brussels, March 19, 1957.

104. *Projet de Procès-Verbal de la 11ème session du Conseil tenue à Luxembourg le 21 décembre 1953*, LE CONSEIL 39 (Doc. No. 35f/54).

105. His surprise is of record. *Ibid.*

106. *Ibid.*

107. *Ibid.*

a negative response¹⁰⁸ to the questions directed to it by the High Authority.¹⁰⁹

RELATIONS WITH INTERNATIONAL ORGANIZATIONS

The General Agreement on Tariffs and Trade (GATT)¹¹⁰ is a multilateral trade agreement signed in 1948 by every major trading nation in the free world.¹¹¹ All the Member States of the Community are also Contracting Parties to the GATT. In order to eliminate the tariffs on coal and steel products within the Community it was neces-

108. *Id.* at 42-43. The Court of the ECSC has not to date been confronted with any case involving the Brussels Entente.

109. One other development at this meeting deserves mention. One member of the Council queried whether it would make any difference to the American Government if minimum export prices were fixed by the Community rather than by a cartel. *Id.* at 39. In fact the United States, although it has warmly supported the ECSC from its inception, has expressed concern as to the kind of competition it must face on world markets from Community steel producers. In 1953 the State Department directed a series of notes to the governments of the Member States of the Community regarding the possibility of friction developing between members of the Community and non-members over the activities of the Brussels Entente. The United States made reference to reports of activities of the Entente which it was feared would tend to increase steel import costs in third countries. Attention was directed to possible violations of international agreements. Because no Community action was contemplated, the United States took the position that it was the responsibility of the individual governments to terminate the Entente, especially in view of foreign aid agreements between this country and European recipients.

The responses to the American note were essentially negative. Most of the Member States indicated an unwillingness to take any action against the Entente. Although the United States has not contested these answers, it has been quite active in pursuing the matter before such international organizations as the General Agreement on Tariffs and Trade (GATT).

110. The General Agreement on Tariffs and Trade, October 30, 1947, 61 STAT. pts. 5, 6, T.I.A.S. No. 1700, as renewed, 1953, T.I.A.S. No. 2886. See Vernon, *America's Foreign Trade Policy and the GATT*, in PRINCETON UNIV. ESSAYS IN INTERNATIONAL FINANCE No. 21 (1954); see also AMERICAN BAR ASSOCIATION, REPORT OF SUBCOMMITTEE TO STUDY THE ORGANIZATION FOR TRADE COOPERATION (1956).

111. It should be pointed out that the Community also "stands trial" before other international organizations. Reference is made here to the Organization for European Economic Cooperation (OEEC) which like the GATT is dedicated to trade liberalization and also granted the Community a waiver from its obligations in order to allow the common market to come into being. Decision of the Council, OEEC Doc. No. C(53)9 (Feb. 7, 1953). It was before the Council of this body that, in June 1954, Denmark made a complaint regarding the activities of the Brussels Entente. Denmark was concerned lest the Entente become as the International Steel Cartel before the second world war, solely concerned with the level of steel producer's profits, regardless of the consequences to the rest of the world. Intervention by the High Authority was urged and the OEEC Council formally requested consultation with the High Authority. OEEC Doc. No. C(54)243 (Aug. 3, 1954), Doc. No. C/M(54)25 (Sept. 24, 1954). As a result, direct discussion between Denmark and the High Authority was held in Luxembourg in February 1955, at which time the latter attempted to convince Denmark that the export prices of the Community were being kept within reasonable limits. Although Denmark maintained certain reservations regarding the High Authority's conclusions, it decided not to pursue the matter unilaterally before the OEEC and the GATT. HIGH AUTHORITY, THIRD GENERAL REPORT ON THE ACTIVITIES OF THE COMMUNITY 30-31 (1955).

sary for the Member States to be relieved of their obligation to extend such relief to every other Contracting Party pursuant to the GATT. Accordingly, the Member States of the Community were granted a waiver from the most-favored-nation clauses of the GATT in November 1952 after lengthy negotiations.¹¹² Under the terms of this waiver, the Community is considered as a single territory insofar as coal and steel trade are concerned and as such assumes most-favored-nation obligations only in regard to non-member countries. The terms of the waiver expressly provide that the Community is to "take account of the interests of third countries both as consumers and as suppliers of coal and steel products, to further the development of international trade, and to ensure that *equitable prices* are charged by its producers in markets outside the Community."¹¹³ In addition, the Member States were obligated to submit an annual report to the Contracting Parties until February 1958 on the measures taken by them toward full application of the ECSC Treaty.¹¹⁴

The first annual report of the Member States of the Community was submitted to the Contracting Parties to the GATT in September 1953 and discussed the following month at the GATT's eighth session.¹¹⁵ The Contracting Parties took note that "producers of the Community applied different prices in different export markets and that they had concluded cartel arrangements regarding export prices."¹¹⁶ The High Authority, attending the sessions as an observer, replied that differential prices for different export markets were fully consistent with a competitive market. Further, the High Authority insisted that there was no showing that export prices of the Community producers were

112. GATT Doc. No. 6/35 (Nov. 10, 1952) (hereinafter cited as GATT WAIVER). See GATT, BASIC INSTRUMENTS AND SELECTED DOCUMENTS 17-22, 85-89 (Supp. 1953).

113. GATT WAIVER. This language is substantially identical with that of TREATY art. 3(f). See notes 89 *supra* and 118 *infra*.

114. GATT WAIVER. In the negotiations regarding the waiver, the Member States of the Community stressed that the integrated economy of the Community would result in an increase of trade potential for non-members of the Community. On the other hand, it was pointed out that certain risks and uncertainties would confront outsiders.

Thus, before the non-member states would agree to surrender some of their rights under the GATT, they required definite assurances that the Community would follow a liberal trade policy and that their vital interests be safeguarded. This concern resulted in the provision of a Preamble to the GATT Decision in which the considerations underlying the decision were expressed.

Each year a "Working Party" of the GATT is convened to discuss and report to the Contracting Parties upon the annual report of the Member States of the Community to the GATT. See *Report of Working Party, Adopted by the Contracting Parties* in GATT, BASIC INSTRUMENTS AND SELECTED DOCUMENTS 85-89 (Supp. 1953).

115. GATT Doc. No. G/56 (Oct. 23, 1953) in GATT, BASIC INSTRUMENTS AND SELECTED DOCUMENTS 101-16 (Supp. 1954).

116. *Id.* at 106.

inequitable in violation of the terms of the waiver granted the Community. If ever inequitable prices were charged, the observer stated that the High Authority would be prompt and definitive to the full extent of its power.¹¹⁷

In subsequent sessions of the GATT there has been much debate over the meaning of "equitable prices," a concept crucial to both the waiver granted the Community by the GATT and to article 3(f) of the ECSC Treaty.¹¹⁸ The Danish representative was firmly of the opinion that the only test of equitable prices was a comparison between the prices charged by the same enterprises on the common market and on the export market. This was his government's understanding when it agreed to the terms of the waiver, he stated.¹¹⁹

The High Authority observer insisted that Community export prices were equitable. In his opinion, whether prices were equitable should be determined primarily on the basis of comparison with the export prices being applied by the producers of other leading countries, such as Great Britain and the United States.¹²⁰ Comparison with prices on the common market should be only a subsidiary test, he insisted.

The GATT was not prepared to deny the High Authority's view. It noted, however, that:

"[T]he exports of the Community amounted to about 65% of world exports, that on all steel markets the share of the Community was larger than that of any competing country and that, in the case of the West European steel market, the influence of the Community was predominant. When, as is the case at the present time, the exporters of the Community adopt a common export price policy, their influence on the formation of prices on export markets is bound to be substantial, and it is suggested that the existence of such price agreement should be taken into account when the equitable character or otherwise of prices charged by Community exporters is discussed."¹²¹

Each year the Community has submitted documentation on prices and price movements to support its contention that steel prices are equitable. Countries such as Denmark and India have submitted data

117. *Id.* at 107-08.

118. Both provisions commit the Community to protect the interests of third countries, article 3(f) of the Treaty requiring the Community to foster international trade and "ensure that equitable limits are observed in prices charged in foreign markets," and the fifth paragraph of the Preamble of the GATT WAIVER charging the ECSC with the duty of ensuring that "equitable prices are charged by its producers in markets outside the Community."

119. GATT, BASIC INSTRUMENTS AND SELECTED DOCUMENTS 154 (Supp. 1955).

120. *Id.* at 155.

121. *Ibid.*

to the contrary. In addition, the Secretariat of the GATT has submitted its analysis.¹²² Still there has been no agreement on the manner of determining "equitableness" and, consequently, there has been no agreement as to whether ECSC steel export prices have been equitable.

In summary it may be said that although the Community has never been censured or held in default of its international obligation to protect the interests of non-member countries, the very existence of a regularized procedure for review, by which the High Authority is called upon to justify its actions or failure to act in the field of external economic policy, operates as a reminder to the Member States of their obligations to the world community.

LEGAL STATUS OF THE BRUSSELS ENTENTE

Since its first public statement on the question, the High Authority has insisted that it has had no legal recourse against *export* cartels as such. Regarding the Brussels Entente, the High Authority has taken the view that so long as the Entente confines its operations to the export market, it could not force the Entente to dissolve.¹²³ Only when the Entente is shown to interfere with competition on the common market will the High Authority take action against the Entente. Having found no such effect on the common market, the High Authority, except for one instance, has mounted no offensive against the Brussels Entente.¹²⁴ Certainly the High Authority's abundance of caution and avoidance of dogma is not totally unwarranted.¹²⁵ At the same time, one hopes that its present position is not immutably fixed, for

122. See, e.g., Note by the Executive Secretary, GATT Doc. No. L/425 (Oct. 1955). In this memorandum the executive secretary made a comparison of Community steel export and internal prices, and compared Community steel export prices with those of the United States and the United Kingdom. Relative to the comparison between Community export and internal prices he concluded that the customary tendency for export prices to fluctuate more widely than domestic prices had continued since the establishment of the Brussels Entente and maintenance of a common export policy. However, the amplitude of fluctuations was seen as smaller than that of earlier postwar years. While *all* export prices for *all* exporting countries were *lower* than internal prices by January or April 1954, by the end of 1954, on the whole, *all* export prices were *higher* than internal prices.

Comparing the export prices of the ECSC, the United States and the United Kingdom, the executive secretary observed that the only feature common to the export prices quoted is that for most products they fell between mid-1953 and mid-1954, and by September 1955, they had risen again to a level generally higher than that of July 1953. United States export prices were determined to be the most stable. The Community's export prices for bars, sections, shapes and wire rods were generally lower than those of the United Kingdom and especially the United States. The Community's prices for most flat products were higher than those of the United States, especially for the thinner varieties.

123. See text at note 89 *supra*.

124. See text at note 93 *supra*.

125. The ECSC Treaty clearly urges minimum intervention by the High Authority and indicates a preference for indirect action. See TREATY arts. 5, 57.

it is this author's opinion that there is very good reason for the High Authority to reconsider its stand in the light of the essential realities of the Community dynamic.

Admittedly, the legal interpretation of the Treaty is not without difficulty. To begin with, there is no single report or document which can provide an indication of the "legislative intent" of the negotiators. This was not an oversight but rather the result of a deliberate decision. Based on the uniqueness of what was being created, it was decided not to limit the rule of law to the particular conceptions of the individual negotiators or the convictions of particular national delegations. However regrettable this decision not to produce *travaux préparatoires*,¹²⁶ it was generally agreed that such a document would inhibit rather than promote the orderly growth of the Community.

In determining the law of the Community, insofar as relations between the High Authority and coal and steel enterprises are concerned, primary consideration must be given to the needs of the Community as elaborated in the text of the Treaty.¹²⁷ This is especially true in those situations where there are no uniform laws of Member States applicable to the question,¹²⁸ as is the case regarding restrictive trade practices. In establishing a Community whose regime is based on competition, clearly a break with the past was envisaged. It was recognized that coveted notions of protectionism had to be scrapped if the ambitious objectives of higher productivity could even be approximated.¹²⁹ The fundamental question posed here is whether the Community in the light of its own condition can survive, let alone grow in a dualistic fashion: competitive on the home market and anti-competitive on the export market.

Many authorities¹³⁰ insist that it can so operate and that this was expressly the intention of Robert Schuman, one of the principal promoters of the Treaty. Much attention was given to his remarks before the National Assembly of France during the ratification debates on the Treaty.

"But the internal market is not the only one capable of development; the exports also can be expanded to the profit of the com-

126. See VALENTINE, *THE COURT OF JUSTICE OF THE EUROPEAN COAL AND STEEL COMMUNITY* 2 (1954).

127. REUTER, *LA COMMUNAUTÉ EUROPÉENNE DU CHARBON ET DE L'ACIER* 202 (1953).

128. *Id.* at 43.

129. See note 87 and text at note 13 *supra*.

130. See, e.g., KRAWIELICKI, *DAS MONOPOLVERBOT IM SCHUMAN-PLAN* 22 (1952); RIEBEN 475; BAYER, *Das Privatrecht der Montanunion*, 1952 *ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT* No. 3, at 325, 369 (West Germany); Ophüls, *Das Wirtschaftsrecht des Schuman-Plans*, 1951 *NEUE JURISTISCHE WOCHENSCHRIFT* No. 10, at 381, 382 (West Germany).

munity, particularly toward the underdeveloped countries. The producers instead of making an unhealthy competition and quarreling for the outside markets can provide and utilize organization together in exporting in common interest.”¹³¹

It is largely on the basis of this statement and a so-called “strict reading” of article 65 of the Treaty that these authorities conclude that the High Authority is without jurisdiction to combat what is strictly an export cartel.

Probably the most ambitious attempt to justify the economic necessity and legality of export cartels alongside the Community has been made by the late Professor Rudolph Isay in a published opinion that he rendered to the Wirtschafts-Vereinigung Eisen-und Stahlindustrie of Germany,¹³² which deals with the question of whether article 65¹³³ restricts the liberty of coal and steel enterprises to participate in export cartels. Professor Isay views article 65, as dealing exclusively with cartels on the common market and states that this limitation could not possibly have been an oversight in the light of extensive discussion on the cartel issue over the past decades. His conviction is that it was out of the question for the Member States to bring export cartels under the prohibition of article 65. Crises and cutthroat competition in such industries as coal and steel, relatively lacking in elastic demand, have proven ruinous. The social consequences of plant shutdowns and widespread unemployment could not have been overlooked, he insists. Although cognizant of the High Authority’s powers to regulate production and prices in times of crisis, he sweeps these measures aside as being unequal to the problem of Community survival.¹³⁴ His straightforward conclusion is that whatever the powers of the High Authority, on the export markets they are simply not adequate substitutes for cartel agreement and activity. Survival of community enterprise, he concludes, can only be preserved by cartel operations.¹³⁵

131. 150 JOURNAL OFFICIEL 8,896 (Dec. 7, 1951).

132. Isay, *Montanunion und Exportkartelle*, 1953 WIRTSCHAFT UND WETTBEWERB 577-91 (Germany).

133. The relevant portion of TREATY art. 65 provides: “1. All agreements among enterprises, all decisions of associations of enterprises, and all concerted practices, tending, directly or indirectly, to prevent, restrict or distort the normal operation of competition within the common market are hereby forbidden, and in particular those tending: (a) to fix or determine prices; (b) to restrict or control production, technical development or investments; (c) to allocate markets, products, customers or sources of supply.”

134. Isay, *Montanunion und Exportkartelle*, in 1953 WIRTSCHAFT UND WETTBEWERB 579-84 (Germany).

135. *Id.* at 584-89, 591. He concludes also that any national cartel legislation in the Member States would not apply to export cartels of the coal and steel industries. See *id.* at 589-90.

Abundant interviews in Luxembourg with officials of the High Authority have convinced the author that Isay's conclusions are not shared in their entirety.¹³⁶

Pre-emption

Before considering the legality of such arrangements as the Brussels Entente under article 65, other provisions of the Treaty should first be considered. Upon an examination of articles 5, 58 and 61 it may be strongly urged that the entire range of production control and price fixing on both the common and export markets has been preempted by the High Authority and that such conduct by the Brussels Entente or any other body is contrary to the Treaty.

Article 5 expressly provides for the establishment and maintenance of competition.¹³⁷ Production control and price fixing, the antithesis of competition, are to be employed only when absolutely necessary.¹³⁸ For example, production quotas can be instituted by the High Authority under article 58 only upon a showing that a "manifest crisis" exists and all other means of indirect action have failed.¹³⁹ Article 61 provides that prices may be fixed by the High Authority on the export market only upon a showing that such action is necessary "because of the dangers to the enterprises resulting from the state of the market."¹⁴⁰ Clearly, these are extraordinary measures to be employed only in abnormal times. If the High Authority is not itself controlling production or fixing prices, it is in effect determining that no crisis exists that would justify such emergency action. For a private producers' group to fix prices or control production in such circumstances is a departure from the norm of competition when the High Authority

136. Interviews with High Authority officials in Luxembourg, Dec. 3-6, 1956. For example, Isay insists that in judging the legality of a cartel on the common market only the *declared intention* of the contracting parties should be considered and not the *objectively measurable effects*. This result follows, he maintains, from a strict reading of article 65 of the Treaty. This view has been informally rejected by the High Authority officials who have considered the question.

137. The relevant portion of TREATY art. 5 provides: "The Community shall accomplish its mission, under the conditions provided for in this Treaty, with limited intervention. To this end the Community shall: . . . assure the establishment, maintenance and the observance of normal conditions of competition, and take direct action with respect to production and the operation of the market only when circumstances make it absolutely necessary."

138. *Ibid.*

139. TREATY art. 58(1) provides: "In case of a decline in demand, if the High Authority considers that the Community is faced with a period of manifest crisis and the means of action provided for in Article 57 (indirect means of action) are not sufficient to cope with this situation, it must, after consulting the Consultative Committee, establish a system of production quotas. . . ."

140. See note 93 *supra*.

has determined such extraordinary action unwarranted. Hence such regulation of export sales is contrary to the Treaty and illegal.

During a time of crisis or when enterprises are in danger the High Authority itself would control production or fix prices. However, even upon a finding of a manifest crisis or danger to the enterprises the High Authority cannot automatically embark upon a restraint of trade. The Treaty provides in articles 58 and 61 that production control and price fixing may be established by the High Authority only after a fair hearing before the Consultative Committee where consumers and dealers as well as producers would be consulted.¹⁴¹ Producers' groups are to be consulted but they are not given any powers of unilateral action. It is inconceivable that such procedural protection is provided against abusive restraints of trade by a public body and that none is afforded against identical abuses by a private producers' group. Indeed this conclusion is compelling considering the delicate decisions that must be made in allocating production quotas, determining the level of prices to be fixed and when they shall be changed, and the like.¹⁴² The responsibility of the High Authority can be enforced by censure and removal;¹⁴³ but the Entente seemingly need account to no one for its decisions.

Thus, the High Authority might have taken the position at the outset that *any* export price fixing or production control by the Brussels Entente would be contrary to the Treaty and hence the basis of its forcible dissolution.

For reasons of its own, the High Authority did not elect to take such a course. It looked only to article 65 of the Treaty and made no claim of pre-emption based on a construction of the Treaty as a whole.

141. See notes 93, 139 *supra*.

142. The export market is so delicate that any system of regulating it must be capable of instantaneous adjustment. On this basis, the Consultative Committee ruled out action by the High Authority in 1953. The High Authority, it was felt, could not act swiftly enough. *Rapport de la Commission Chargée d'Etudier l'Opportunité de Fixer des Prix Minima ou Maxima pour Les Produits d'Acier à l'Exportation vers les Pays Tiers*, COMITÉ CONSULTATIF 3 (Doc. No. 8335f) (1953). Yet the record of the Brussels Entente during the period of a weakened market is hardly one of "instantaneous adjustment." Immediately before the meeting between the Consultative Committee and High Authority on the subject of price-fixing by the High Authority, it was reported that the prices fixed by the Brussels Entente were considered too rigid and exporters were ignoring them by undercutting. TMB, Nov. 27, 1953, p. 13, col. 1. See also CISR 8213 (Jan. 19, 1954) for another example of price practices of the Brussels Entente.

143. TREATY art. 24. It may be argued that if articles 58 and 61 are interpreted to ban cartels, article 65 would have no purpose, and such a view is not to be favored. An answer to this argument is that article 65 is *not* thereby rendered useless since it is not limited to anti-cartel activity but is directed to any joint decision or concerted practice that tends to interfere with competition on the common market. Thus, article 65 would be applicable to prevent two or more enterprises from unreasonably

Article 65

It is submitted that even under the limitations of article 65,¹⁴⁴ sufficient basis exists to take action against the Brussels Entente. Sufficient evidence exists that it tends "directly, or indirectly, to prevent, restrict or distort the normal operation of competition within the common market" The routine fixing of minimum export prices by the Brussels Entente is a matter of widespread public knowledge.¹⁴⁵ The establishment of production quotas for a trial period of several months in 1954 was reported in the press¹⁴⁶ and confirmed by an examination of the secret minutes of the organization.¹⁴⁷ The author has no information that production quotas are operative at this time, but if they are not it is only too clear that they will be imposed by the Brussels Entente as soon as the members can reach agreement upon allocations in the market slump.¹⁴⁸ For, as the Entente recognized in 1953-1954, without production controls it is impossible to maintain a fixed minimum price in a falling market.

The proposition, stated before the Temporary National Economic Committee Hearings in this country,¹⁴⁹ that restraint of trade by producers is a matter of economic necessity, not of malice, is as applicable to the Brussels Entente as it was applicable to the International Steel Cartel. While four of the six national steel industries represented in the Entente are quite interested in export trade, they are not equally dependent upon such sales. Approximately two-thirds of the total steel production of Belgium and Luxembourg is consumed outside their borders. Almost fifty per cent of their production is exported directly to countries not members of the Community. In contrast, Germany

restraining trade by: 1) boycotts and refusals to deal, 2) tying clauses, 3) misuse of patents, 4) decisions to impair quality, 5) restricting investment or interfering with access to normal sources of commercial finance, etc. In short there are a host of anti-competitive practices that can be attacked only under article 65 and not under articles 60 or 61.

144. The material portion of the text of article 65 is set out in note 133 *supra*.

145. Annex I, para. 1, p. 1114 *infra*; Annex III, para. 1, p. 1114 *infra*. See CISR 8176 (Dec. 13, 1953); TMB, April 17, 1953, p. 24, col. 2.

146. See notes 67, 73, 75, 76 *supra*.

147. See note 71 *supra*.

148. See text at note 173 *infra*; Van der Rest, *La Sidérurgie européenne dans le cadre du Plan Schuman*, Revue Economique et Sociale, July 1955, pp. 175, 181 (Switzerland). See also STOCKING & WATKINS, CARTELS OR COMPETITION 106-07 (1948); A CARTEL POLICY FOR THE UNITED NATIONS 5 (Edwards ed. 1945); LOVASZ, INTERNATIONAL CARTELS 1, 13-14 (a League of Nations memorandum published by the Dep't of Econ. Affairs of the United Nations, 1947).

149. "Of course under the cartels prices were good, otherwise there wouldn't be any good reason to have a cartel." Testimony of S. M. Bash, Member, Board of Managers of Steel Export Association of America; Vice-President, Bethlehem Steel Export Corporation. *Hearings, Temporary National Economic Committee of the Congress*, 76th Cong., 2d Sess., pt. 20, at 10922, 10962 (1940). See also STOCKING & WATKINS, CARTELS OR COMPETITION 97, 135 (1948).

exports approximately fifteen to twenty per cent of her production outside the Community and France about the same.¹⁵⁰ The significance of this differential became quite apparent on the two occasions when German steel producers showed signs of defection from Belgian export designs. At the initiation of the Entente in March 1953, the Germans participated in the talks but did not join until several months later.¹⁵¹ During this lapse of time it was sent home to the Germans that unless they joined the group they would face severe competition on the German home market from the Belgians.¹⁵² And again, when the Germans were detected selling a substantial quantity of steel in violation of the minimum prices of the Entente, German producers agreed to curtail their export sales for several months thereafter. This hardly was an act of philanthropy. The clue to this retirement from the export market is contained in an account in a Belgian newspaper *Le Soir* describing the discussions. Terming the German sales "dumping" it stated:

"The German producers will retire from the export market until the end of March. The threats by the Belgian industrialists to compete—at unbeatable prices—on the German home market have therefore not been without their effect." ¹⁵³

Such an artificial division of markets and allocation of customers is expressly forbidden by article 65(1)(c) of the Treaty. Thus, notwithstanding extreme caution on the part of the High Authority, it seems that a prompt investigation of these reports should have been made several years ago. Unfortunately this was not done, and nothing has been done since. An inquiry first planned in 1953 to determine how prices are formed on the common market has never been undertaken, let alone completed. The last indication of why it had stalled was that such an inquiry might prejudice the chances of a European Defense Community being formed.¹⁵⁴ With the demise of that plan in 1954 ¹⁵⁵ it seems that such an excuse for delay is somewhat outdated. Yet, even

150. For years 1952, 1953, 1954, see HIGH AUTHORITY, THIRD GENERAL REPORT ON THE ACTIVITIES OF THE COMMUNITY Tables 14-19 (1955). For 1955 and 1956 production and marketing statistics, see HAUTE AUTORITÉ, ANNEXES AU CINQUIÈME RAPPORT GÉNÉRAL SUR L'ACTIVITÉ DE LA COMMUNAUTÉ Tables 5, 14, 18 (1957).

151. See TMB, April 17, 1953, p. 24, col. 2; Interviews in Brussels, March 19-20, 1957. See also Evelyn, *Cartels and the Coal-Steel Community*, 4 CARTEL 82, 88 (1954).

152. See TMB, April 3, 1953, p. 29, col. 1; *The Price of Steel*, 157 THE STATIST 770 (1953).

153. *Le Soir* (Brussels), Feb. 26, 1954, p. 9, col. 7.

154. Interview in Luxembourg, March 27, 1957.

155. For an insight into the role of the European Defense Community in relation to the ECSC see MASON, THE EUROPEAN COAL AND STEEL COMMUNITY 134-37 (1955).

in the absence of data produced by such a study it is no secret that prices on the common market are fixed by agreement and consultation between producers and not competitively.¹⁵⁶ It is fanciful to expect producers who actively cooperate in fixing prices on the export market to forget all they have learned when they deal with the common market.¹⁵⁷

Another direct effect of the Brussels Entente on the common market is the restraint of trade that results from the engagement of the producers to boycott any independent dealer who, even though not a member of the Entente, violates its prices or policies. The promise by the producers is cast in terms of abstaining from "any future transactions"¹⁵⁸ with such intransigents and is not limited merely to new export sales. Thus, independent dealers who assert their independence can be closed out of sales on the common market for their non-conformist conduct on the export market. Interviews by the author with merchants have confirmed this suspicion.¹⁵⁹

To the author, perhaps the most compelling reason for the High Authority to strike down such groups as the Brussels Entente is their necessarily restrictive effect on the common market. Expanded production and increased productivity are the primary channels through which reduced costs and rational distribution are to be achieved in Community enterprise. It has been conclusively shown that even where producers' groups do not deliberately pursue a policy of creating scar-

156. The High Authority has already remarked on the amazing uniformity of prices of steel producers on the common market. See text at note 91 *supra*. For subsequent comments on price fixing and price rigidity on the common market, see CISR 9461 (Oct. 6, 1956) and CISR 9506 (Nov. 7, 1956). The role of the governments in this rigidity should not be ignored. *Ibid*.

Conceding that the European steel industry is possibly now more competitive than at any time since the early 1920's and that few steel industries anywhere show much price competition, a recent economic study concludes that there is little to suggest that the price behavior of steel in the ECSC is competitive. Root, *The European Coal and Steel Community*, Univ. of Md. Studies in Bus. and Econ., June 1956, No. 1, pt. 2, p. 10.

157. Testimony of H. W. Schroeder, District Sales Manager, New York office, Wheeling Steel Corporation and company representative to the Steel Export Association of America, affirmed that American participation in the pre-war International Steel Cartel would have some effect or a possible effect on the American domestic steel market. When asked how it was possible for him to have this knowledge and yet negotiate with the steel cartel, he responded, "I can keep it, let's say, hidden in my mind." *Hearings, Temporary National Economic Committee of the Congress*, 76th Cong., 2d Sess., pt. 20, at 10979 (1940). Notwithstanding Mr. Schroeder's rather fascinating mental agility, the following conclusion seems more plausible: "[P]roducers who have learned to cooperate in regulating their foreign sales, and have found a means of making their joint program effective are not likely to forget what they have learned when doing business on the home market." STOCKING & WATKINS, *CARTELS OR COMPETITION* 259 (1948). See *International Cartels and Private Trade Agreements*, in *INSTITUTE ON POSTWAR RECONSTRUCTION, AMERICA'S PLACE IN THE WORLD ECONOMY* 118 (New York Univ. Ser. IV, No. 5, 1944).

158. Annex IV, para. 1, p. 1115 *infra*.

159. Interviews in Dusseldorf, May 14, 1957; in Brussels, March 20, 1957; and in Rotterdam, March 11, 1957. See Annex V, p. 1116 *infra*.

city, or seek in advance to fix global supplies, being exclusively concerned with price fixing and not quantitative quotas, the practice of prohibiting acceptance of orders below a minimum price, or long-term contracts, has in itself acted as a curb on quantities supplied to the market.¹⁶⁰ Thus, any development on the export market which restricts the expansion of production necessarily affects the common market because it prevents the reduction in costs and prices that would otherwise result. The relationship between the export and common markets of the Community is so intimate as to make of them almost a single economic entity.

It is of great significance that the Entente controls a greater volume of international steel trade than does the High Authority. While each Annual Report of the High Authority stresses the increased interpenetration of Community products on the common market, the ultimate fact remains that in every year since the creation of the Community more Community steel has been traded outside the Community than across the frontiers of the Member States.¹⁶¹ Whatever success the High Authority has had in eliminating discriminatory transport rates and prices, state subsidies, tariffs and quantitative restrictions,¹⁶² the fact is that more international steel traffic is subject to the restraints of the Brussels Entente than has been emancipated by the High Authority.¹⁶³ Considering these facts it is hard to conceive how the Brussels Entente can fail to affect the common market, directly or indirectly, in every decision it makes. If the fundamental objectives of the Community that are pinned on expansion, efficiency and competition are to be fulfilled, the High Authority cannot ignore the challenge of the Brussels Entente indefinitely. Article 65 provides ample authority for effective action.

CONCLUSION

Quite naturally, countries outside the Community have been most concerned about the activity of the Brussels Steel Export Entente. Particularly those consumers especially dependent upon Community

160. HEXNER, *INTERNATIONAL CARTELS* 78 (1945).

161. See HIGH AUTHORITY, *FOURTH GENERAL REPORT ON THE ACTIVITIES OF THE COMMUNITY* 59 (1956).

162. There is no question that the success of the High Authority in eliminating artificial barriers to trade has been responsible for producing a substantial degree of steel price stability, a major change in European steel marketing. See U.N. ECONOMIC COMMISSION EUROPE, *THE EUROPEAN STEEL MARKET IN 1954*, 51 (1955); U.N. ECONOMIC COMMISSION EUROPE, *THE EUROPEAN STEEL MARKET IN 1955* 55 (1956).

163. In 1956, for example, 8.9 million metric tons of steel were exported subject to the rules of the Brussels Entente. Only 5.1 million metric tons of steel were traded between the Member States. In 1957 and throughout 1958, steel exports, consisting mostly of finished products, substantially exceeded intra-community steel trade, which includes large quantities of scrap and pig iron.

steel supplies have been apprehensive of the development of a new steel cartel within the ECSC. It has been suggested that one of the principal reasons for the formation of the Entente was the determination of Community steel producers to counteract the effects of the development of substantial steel production centers in so-called underdeveloped areas of the world, *e.g.*, Southeast Asia, the Middle East and Latin America.¹⁶⁴ It is submitted that if anything will inject a note of desperation into such developments it is the activity of such a conspiracy as the Brussels Entente.

To date, these "third countries" have contributed substantially to the expansion of Community production, trade and fortune.¹⁶⁵ Fears that Community steel would be displaced have not proven true. On the contrary, experience to date has shown that industrialization in these areas has *increased*, not reduced, the flow of Community steel there.¹⁶⁶ In this regard, Latin America offers a cardinal example. Even though Latin American steel production has quadrupled in the decade since World War II, steel import requirements have not diminished. Despite the production of steel for the first time in Chile, Colombia, Peru and Venezuela, Latin American demand has risen faster than can be met by local supply owing to the vigorous industrial development programs.¹⁶⁷

So long as there remains the prospect of an uninterrupted supply of steel at competitive prices, there is no reason to believe that this type of market expansion will not continue for European steel. However, so long as the Community tolerates such relics of a bygone era as the Brussels Entente, consumers in third countries can never place unqualified confidence in the Community. They will be forced to press for local steel production that will eliminate any dependency on ECSC steel.

164. See note 37 *supra*.

165. See note 161 *supra*.

166. "Technological progress is beyond doubt the best friend of the iron and steel industry. The future holds out years, if not decades of prosperity for the iron and steel industry. This is now recognized the world over." CISR 9562 (Dec. 19, 1956).

167. While the percentage share of consumption provided by imports has fallen steadily as local production has increased, from 91% in 1935-39 to 64% during 1950-54, the absolute level of steel imports has grown from 1.9 million metric tons during 1935-39 to approximately 2.85 million tons in 1950-54. Of all steel imported into Latin America, Community steel producers supply approximately one-half. CISR 1-2 (special ed., Jan. 10, 1957). Southeast Asia as represented by India offers a parallel example. Notwithstanding increased domestic production in 1956 of 1.33 million metric tons, India imported more than 1.6 million tons of steel (CISR 9592 (Jan. 21, 1957)) and was Great Britain's second best customer for tubes, pipes and fittings that year, following Canada by a scant thousand tons. CISR 9608 (Jan. 31, 1957).

Yet as important as Community export policy—or the lack of one—is for third countries, it is probably even more critical for the Community itself. Already the Community has recognized that the cartel problem is one of the most important with which it must deal.¹⁶⁸ Many reliable authorities have underscored the importance of the export market for the Community. The Economic Commission for Europe is already on record as criticising export price policies of the steel producers.¹⁶⁹ By fixing prices, prohibiting long-term contracts and enforcing dealer boycotts, the Brussels Entente can hardly commend itself for any expansion of trade.¹⁷⁰ Indeed any increase in trade has undoubtedly occurred in spite of rather than because of the Entente. In addition there is good reason to believe that the Entente has already threatened the fundamental objectives of the Community by its effects on the common market, not the least of which has been the result of interfering with genuine price competition.¹⁷¹ Men who plot against competition on the export market can hardly be expected to boost it on the common market.

If tonnage quotas for the members of the Entente are not in effect now, it is hardly fanciful to anticipate their reimposition when the market weakens to the extent that it did in 1953-1954.¹⁷² Indeed, this has been made clear by M. Pierre Ricard, late President of the French Iron and Steel Federation, when he stated:

“[P]rice agreements have rarely succeeded, for fraudulent practices are difficult to detect because the customer benefits from the favorable price and, therefore, will not disclose it. The only agreements that matter are those which also concern tonnage. Such an agreement is very desirable”¹⁷³

168. HIGH AUTHORITY, *THE ESTABLISHMENT OF THE COMMON MARKET FOR STEEL* 50 (May 1953).

169. In U.N. ECONOMIC COMMISSION EUROPE, *THE STEEL MARKET IN 1953* 72 (1954), it is stated: “[T]he European steel industry has probably to a certain extent stimulated the growth of steel production overseas by following a short-sighted policy of charging what the market will bear in times of high demand.” This statement was strongly objected to by the Belgian steel industry in the addendum to this report. U.N. Doc. Nos. E/ECE/183/Add. 1, E/ECE/STEEL/79/Add. 1, at 5-6 (1954). *But see* U.N. ECONOMIC COMMISSION EUROPE, *EUROPEAN STEEL EXPORTS AND STEEL DEMAND IN NON-EUROPEAN COUNTRIES* 44-45, 71-72 (1953).

170. See HEXNER, *INTERNATIONAL CARTELS* 79 (1945); STOCKING & WATKINS, *CARTELS OR COMPETITION* 99, 109, 117 (1948).

171. As has been pointed out by STOCKING & WATKINS, *CARTELS OR COMPETITION* 110 (1954), cartel operation rarely tends to reduce costs. The Brussels Entente is no exception. The Entente's standard operating procedure is to fix its minimum price in alignment with the highest price obtaining on the common market for the particular product. Interview in Brussels, March 19, 1957. This can only subsidize the high-cost producers and defeat any genuine interest in cost reduction.

172. See note 148 *supra*.

173. Reported in Evelyn, *Cartels and the Coal-Steel Community*, 4 *CARTEL* 82, 89 (1954).

It is the author's opinion that an export entente can survive scrutiny under the Treaty only when it demonstrates that it does not restrain competition on the common market, even indirectly. Because of the interdependence of the common and export market to such a degree that the development of the common market is inextricably linked to the development of exports,¹⁷⁴ any group fostering agreements, decisions and practices in restraint of steel trade should have the burden of disproving that they affect the common market, directly or indirectly.¹⁷⁵ In all likelihood it is only a group that represents no more than a trade association ruling by consent rather than by coercion that will be able to meet such a burden. Provisions in agreements providing for pecuniary penalties for underquoting the group's minimum prices or conditions of sale would be invalid since such penalties would necessarily increase the production costs of the members fined. Such increased costs would adversely affect the member's ability to compete on the common market. For the same reason any levies or assessments for the group's "fighting fund" against competitors in certain overseas markets would be prohibited.¹⁷⁶ Clearly any imposition of production controls even when designed to apply only to export sales, cannot but affect the common market. Finally, any provisions interfering with freedom of sale by independent exporters, such as boycotts and refusals to deal, would be invalid since distribution control is substantially equivalent in effect to production control. Thus, it would seem that there is an adequate legal basis to take action against the Brussels Entente. As indicated above,¹⁷⁷ either from a construction of the entire purpose of the Treaty, especially articles 5, 58 and 61, or under article 65, the High Authority might strike down the Entente as prohibited activity.

It is one thing, however, to insist that the Brussels Entente may be struck down as an illegal combination in restraint of trade. It is quite another matter to determine the propriety, manner and timing of such a course. In the first instance, there are many responsible persons who insist that in its present form the Entente is a weak and ineffective organization, hardly able to operate in a crisis, and will die of its own defects unless galvanized into strength by an ill-advised assault upon it.¹⁷⁸ Others will point out that to date the Entente has pursued a moderate price policy, particularly in comparison with the Korean

174. RIEBEN 473, 481.

175. Gleiss, *Stahlexportkartell und Eisenpreis*, 1954 AUSSENHANDELSDIENST DER INDUSTRIE UND HANDELSKAMMERN UND WIRTSCHAFTSVERBÄNDE (Cologne).

176. Gleiss, *Mandamunion und Stahlexportkartell*, 1954 DER BETRIEBS-BERATER 965 (Heidelberg).

177. See text at notes 137, 144 *supra*.

178. Numerous interviews in The Hague, Luxembourg, Brussels, Paris, 1956-57.

"boom" period and should not be attacked until it is shown that it is impressing inequitable prices on the export markets.¹⁷⁹ Answers to these contentions have been ably provided, however, in Irwin Hexner's study of international cartels.¹⁸⁰ In this work he indicates that the ideal entente would have no written regulations at all. A large formal organization is hardly necessary in his opinion. As for the present "weakness" of the Entente, it need only be recalled that Ententes and cartels are not always born fully matured. The shortcomings of the 1926 version of the International Steel Cartel were not beyond remedy in 1933.¹⁸¹ So that the present "moderate" price policy of the Brussels Entente does not become a fixed basis for future faith, it should be recalled that at one time even the International Steel Cartel admonished its members not to charge "high" prices.¹⁸²

In any event, it is only too clear that there will be a deep-seated resistance to any forcible attempt to dissolve the Entente. The proceedings of the meetings of the Consultative Committee and the Council of Ministers amply demonstrate this.¹⁸³ Moreover, there are many industrialists who have never been sympathetic to the antitrust policy contained in the Treaty. Thus, it is argued that to force the issue against the Entente too rapidly could result in a frontal attack upon the entire antitrust policy of the Community. To avoid such a showdown, it is urged that the High Authority should continue to strengthen the common market, to build a sound investment foundation and pursue its task of "education" as it progresses. Undeniably there is much merit to such a view. Admittedly, the United States had an antitrust statute twenty years before it had an effective antitrust policy.¹⁸⁴ Developing such a basic policy in the Community, where there has been no genuine competition in the steel industry for as long as thirty years, cannot come about in the span of a few short years.

Still, the threat of the Brussels Entente cannot be put off indefinitely. If the United States was allowed "twenty years of grace" after the Sherman Act was enacted, the Community has been denied this period of accommodation by the accelerating rate of technological advance since 1890, and by the political implications of the phenomenal

179. See remarks of the High Authority observer to the GATT in text at note 117 *supra*.

180. HEXNER, *INTERNATIONAL CARTELS* 64 (1945).

181. See schematic analysis and chronology of the International Steel Cartel in LOVASY, *INTERNATIONAL CARTELS* Table 2 (a League of Nations memorandum published by the Dep't of Econ. Affairs of the United Nations, 1947).

182. HEXNER, *THE INTERNATIONAL STEEL CARTEL* 179 (1943).

183. See text at notes 98, 108 *supra*.

184. Early enforcement of the Sherman Act was, at best, unsystematic. See THORELLI, *THE FEDERAL ANTITRUST POLICY: ORIGIN OF AN AMERICAN TRADITION* (1955).

productive expansion of the Soviet Union and her satellites.¹⁸⁵ In addition, there is the fact that whenever steel producers have been allowed to fix their own market policies without Community intervention, they have unhesitatingly fallen back onto the cartel mold. The tube sector offers the clearest example of this. Tube production and trade, not being subject to the regulation of the Treaty, has reverted to the pre-war form of organization of the International Steel Cartel. After several attempts during 1948-53, the tube cartel was founded in 1955 to fix tonnage and regulate prices in the manner in practice before the war except that domestic sales were not included. Efforts to expand the cartel have been recently reported.¹⁸⁶

The significance of such developments is simply this. Already, the Community is being confronted with a series of concrete examples of a determined return by steel producers to policies of restriction. If the Community fails to exercise its authority where it may do so under the Treaty, it can only yield the initiative to such forces. Only by reasonably prompt and courageous action can it put down the cartelization that is growing up wherever it is not challenged. It is not enough merely to note that there is no proof, beyond a reasonable doubt, that the minimum prices of the Brussels Entente are "inequitable." The difficulties involved in determining the *actual* prices charged for steel commodities on the export market is not a new problem.¹⁸⁷ The substantial contributions that the Community has made and is making to provide an effective alternative to the cartelization of steel production and trade are certainly not to be denied or deprecated. But all the same it would seem fair to urge the Community, particularly the High Authority, to reassess its position regarding the propriety of such groups as the Brussels Entente and take vigorous action to dissolve them. As has been said, free competitive trade at home and cartels abroad make a poor combination. Both patterns being dynamic, there is no simple way to determine which will triumph. Policies toward export trade

185. In 1956 the Soviet Union and her satellites accounted for approximately 22.6% of world steel production, as against 20.1% for the ECSC, 7.4% for the United Kingdom and 36.9% for the United States. HAUTE AUTORITÉ, ANNEXES AU CINQUIÈME RAPPORT GÉNÉRAL SUR L'ACTIVITÉ DE LA COMMUNAUTÉ Table 9 (1957).

186. The cartel's scope includes commercial steel tubes up to a diameter of six inches. Effective until 1960, the tube agreement provides that of the total export allotment of approximately 1.6 million tons, German producers will account for 41%, British 33%, French and Belgian approximately 26%. Special attempts to include the Netherlands and Italy have been noted. See CISR 9590-91 (Jan. 21, 1957). And this is not the only cartel where iron and steel producers and fabricators have been active. Periodically there have been reports concerning such groups as a wire and nail entente (CISR 9127, 9156 (Jan. 21, Feb. 11, 1956)); a railroad car manufacturers entente (CISR 8702-03 (Feb. 22, 1955)); and a producer's agreement regarding galvanized sheets (CISR 9173 (Feb. 21, 1956)), 8776 (April 8, 1955).

187. See HEXNER, *THE INTERNATIONAL STEEL CARTEL* 188-89 (1943).

and commerce have a direct bearing upon competition and the pattern of industrial organization on the internal market.¹⁸⁸

Certainly the High Authority must be aware of this. As the author best understands its official attitude, it is simply that the High Authority prefers an educational to an authoritarian approach. If anything, the High Authority is self-conscious. It recognizes the historical significance of its existence and is reluctant to damage the potential for European unification that it represents.¹⁸⁹ Rather than claim an expansive area of operations it has elected to pursue a more modest role. By operating well in this fashion it feels that a greater measure of public confidence and support for the community idea will be generated.¹⁹⁰ Until this practice proves unworkable, the High Authority will pursue its goals by conciliation and persuasion. It will concentrate on perfecting the common market and by its success hopes to be able to demonstrate the inherent good sense of competitive enterprise for export sales as well. The question that remains is whether the ECSC can afford the luxury of time that such "education" demands.

To make the most of an expanding world demand, the Community must lead, not merely keep pace with, her foreign competitions in inventiveness, efficiency and enterprise. It is submitted that this result is more likely if the individual producers and dealers are able to operate freely in accordance with their own judgment and insight. The system that the Brussels Entente imposes can only serve to weaken incentive to reduce costs and expand trade. By its price policies it tends to create a structure of rigidity in a day when resiliency and initiative are demanded. The great opportunities which lie ahead for the steel producers of the Community have served to focus the attention of the whole world on the effectiveness of Europe's "first antitrust law."

Undoubtedly the community has the power to assert itself against producer hegemony. However, the longer it continues to tolerate the companionship of the steel export entente, the greater are the dangers that this power will atrophy. The prospect of such a result looms disturbingly before all those who share and applaud the Community's goals and aspirations.

188. STOCKING & WATKINS, *CARTELS OR COMPETITION* 414 (1948). See also BERGE, *CARTELS: A CHALLENGE TO THE FREE WORLD* 2 (1944); *A CARTEL POLICY FOR THE UNITED NATIONS* 88 (Edwards ed. 1945).

189. It has been said that the role of the ECSC in European integration is a matter of critical urgency: "Either the [Schuman] Plan is to be regarded as a step toward European federation or as a series of technical arrangements of little outstanding importance." THORP, *TRADE, AID OR WHAT?* 86 (1954). This same theme is developed in RACINE, *VERS UNE EUROPE NOUVELLE PAR LE PLAN SCHUMAN* *passim* (1954).

190. The role that the operation of the ECSC and ECSC personnel played in the development of Euratom and the General Common Market is a matter of widespread public knowledge. See Bulletin, Jan., Feb.-March, April-May, June-July 1957, Nos. 21, 22, 23, 24.

ANNEX I.** BRUSSELS ENTENTE AGREEMENT OF MARCH 19, 1953

In conclusion of negotiations which have taken place between the 9th and the 18th of March, 1953 for the purpose of examining, in common, the situation on the export markets of countries other than those of the Community and their overseas territories, the representatives of the steel industries of Belgium, France, and Luxembourg have agreed to adopt the following arrangements, effective immediately:

1. Immediate establishment of a commission, composed of two members per country, duly authorized by the body of producers of their respective countries, to be charged with the task of analyzing present conditions on the export markets and to determine, consequently, minimum prices, conditions of payment, commissions, etc., that the producers promise to respect. This commission will also be charged with the responsibility of following the market developments.

2. In order to aid the above-mentioned body in its mission, a permanent bureau will be created in Brussels to which the central bureaus of the three interested steel industries will regularly address, every three days, the details of orders received by the works of the group or on their account, together with an indication of the tonnages, products, destinations, price and conditions of sale applicable to their clientele.

3. The permanent bureau may order, in case of violations of conditions fixed in conformity with paragraph 1. above, investigations to be carried out by the national boards of the interested steel associations. The results of these investigations will be communicated to the commission which may formulate in regard to such infringements any remonstrances or recommendations that it deems necessary.

4. The commission will have the mission to search for formulas capable of leading to more precise and more complete agreements concerning the export markets as defined under paragraph 1. and present, to this effect, its conclusions for a period to be determined according to the circumstances.

5. This arrangement, concluded for an indefinite duration, will take effect beginning the 20th of March, 1953; it may be renounced by one of the participating groups from the 1st of June by means of notice given seven days in advance.

6. The agreement thus concluded applies to the following products: semi-finished products, merchant bar, I and U sections, wide flange beams, hoops and tube strip, wire rod, heavy plates, medium and wide plates, hot and cold rolled sheets (less than 3 mm.). Finished carbon steels and special steels are excluded.

7. The producers of Germany, Holland and Italy are invited, from this time, to join this arrangement.

[Dated] March 19, 1953.

ANNEX II. INDIVIDUAL PRODUCERS ADHERENCE TO MASTER AGREEMENT OF MARCH 19, 1953

The undersigned company engages by these presents, to Mr. _____, President of _____, to respect in its export sales of semi-finished products, and finished products defined in the convention, conditions of price, surcharges and other conditions as agreed upon in Paris on the 18th day of March, 1953.

The company agrees to submit to all control measures and verification that may be decided upon in order to assure the effective execution of the agreements made.

Done this _____ day of _____

ANNEX III. AGREEMENT ON EXPORT PRICES PROTOCOL

The representatives of the German, Belgian, French, Dutch and Luxembourg steel industries meeting together in Luxembourg on Monday, the 7th of September, 1953 have agreed to maintain and consolidate the general agreement on export prices for those countries other than those of the Community and their overseas territories concluded since the end of the month of March 1953 on the basis of the protocol dated the 19th of that month.

To this end, they have agreed on the following means of application:

1. The Commercial Commission, instituted pursuant to paragraph 1. of the protocol of the 19th of March, 1953 and composed of two members per country, duly authorized by the body of works of their respective countries, will continue to coordi-

** The text of all annexes was translated from the French by the author.

nate the policy of export sales of works participating in this agreement. For this, it will be concerned particularly with analyzing the conditions on the export markets and determining, consequently, the minimum prices, conditions of payment, commissions, extras, etc., that the works promise to respect. It will be equally concerned with following the market developments, taking account of the competition from similar works in third countries with which they compete.

2. The Common Permanent Bureau created in Brussels pursuant to paragraph 2. of the above-mentioned protocol of the 19th of March, will continue as before its mission of centralization and statistical services. The central offices of the five interested steel industries will regularly notify it, every five days, of the details of business received by the works of the group or for their account with an indication of tonnages, products, destination, price and conditions of sale applied to the customers.

3. A Commission composed of independent persons and designated by common agreement will be in charge of investigations, as a control organ, of quotations or business received which is made the subject of a complaint.

4. This agreement will be applied by means of assurances and guarantees of the subscribed promise of the Director General [of the works] or by the representatives duly authorized from each of the associations of participating countries; the text of this engagement, establishment by common agreement, is attached. [See Annex IV.]

5. The Commercial Commission will also have the responsibility of searching for formulas that will lead to a more precise and more complete agreement regarding the export markets as defined above and submit propositions to this effect to the Committee of Presidents set for the 31st of October, 1953.

6. The present agreement is applicable to the following products: semi-finished products, merchant bar, I and U sections, and broad flange beams, light weight materials, hoop and tube strip, wire rod, heavy plates, medium and wide plates, hot and cold rolled sheets (less than 3 mm.). Finished carbon steels and special steels are excluded.

7. This agreement which is concluded for an indefinite duration, cannot be renounced by any of the participating associations before the first of July, 1954 and then only after the seven days prior notice provided by the initial agreement.

Luxembourg, 7th of September, 1953.

ANNEX IV. EXPORT PRICE AGREEMENT ENGAGEMENT

We the undersigned . . . duly authorized by the . . . company hereby promise on our honor to the Direction Committee, composed of the five Presidents to conform to the obligations resulting from the export agreement concerning countries other than those of the Community and their overseas territories as it has been confirmed by the German, Belgian, French, Dutch and Luxembourg groups according to the protocol of the 7th of September, 1953 and particularly to respect for each destination the minimum prices and extras and other sales requirements including conditions of payment, strictly defined by the Commission charged with the application of this agreement.

The engagement involves on our part the obligation:

1. To take all care to assure the respect of these minimum prices and extras and other sales requirements and conditions of payment by all agents, representatives and sales organizations of our company as well as by the merchants and agents on commission handling our products on the market; these dispositions particularly require, in conformance to the decisions already taken by the Commercial Commission, the continued prohibition of concluding, or making or letting be concluded on behalf of our firm, any transaction in the form of a contract whose terms are to be applied for a period longer than that prescribed.

These dispositions also require the prohibition of representatives and merchants abandoning or ceding to purchasers all or part of their commissions. Our company promises to impose on them the respect for this prohibition and to assume the responsibility for its enforcement. In the case of an infraction committed by a merchant, we promise collectively with all the works participating in the convention to boycott said merchant in any future transactions.

2. To produce, or cause to be produced, upon first request all justifications and all original documents in the possession of our firm or our agents, representatives, sales organizations, or merchants mentioned in paragraph 1., for the investigation or

control of transactions involving steel delivered or to be delivered by our firm and for which there might exist a presumption of an infraction. The refusal to produce these justifications and documents will be considered as proof of the infraction and will lead to the application of sanctions listed in paragraph 4. below.

3. To comply with the requests and instructions of the neutral control bureau relative to its operations in investigation and control, in conformity with paragraph 3. of the protocol of the 7th of September, 1953. This control organ will have all access, that it judges necessary, to the various offices of our firm in order to conduct any investigations that prove necessary.

4. To execute the decisions and sanctions ordered by the Committee of Presidents by simple majority on the report of the Commission established by virtue of paragraph 3. of the protocol and to pay the penalties which may be imposed up to the equivalent of fifty dollars U.S.A. per ton sold in violation of the agreement.

5. The means of payment, possible penalties, as well as their appropriation will be fixed by the Committee of Presidents.

6. These engagements contained in these presents take effect from the 8th of September, 1953.

[Dated] September 8, 1953.

ANNEX V. TYPICAL CONDITION OF SALE IMPOSED ON INDEPENDENT MERCHANT
BY MEMBER OF BRUSSELS ENTENTE

Gentlemen:

We have reserved the matter made the object of our confirmation of sale and annexed hereto regarding the provision of tons of steel destined ultimately to on commission of %, which will be calculated on the net amount of the F.O.B. value of the merchandise.

You are obligated in return:

1. To respect and cause to be respected by the purchasers the destination above indicated;

2. To take all measures to assure that your firm, your agents, and any intermediaries that may be placed between you and the final destination, respect minimum prices (CIF), extras, and other sales requirements including conditions of payment indicated by us. These obligations contain equally the prohibition against you yourself, your agents and brokers who purchase from you, abandoning or ceding to purchasers, directly or indirectly, all or part of the commission that you are accorded by us, all or part of the commission that you allow your agents or brokers.

The same prohibition applies against any abandonment or any cession to purchasers of all or part of the difference that may exist from your profit between the freight rate included in the CIF price indicated and the actual freight rate.

3. To produce, at our demand, in case of a presumption of an infraction, all justifications and all original documents in the possession of your firm or of your agents. The refusal to produce these justifications and documents will be considered as proof of an infraction.

The fact that we take or we transmit the order implicates your acceptances, without reservation, of the conditions enumerated above.

Please be assured, gentlemen, of our distinguished greetings. . . .