

The 'Drama' of the EEA Comments on Opinions 1/91 and 1/92

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The Agreement creating a European Economic Area (EEA), negotiated between the European Community, its Member States and the countries forming the European Free Trade Association (EFTA),¹ and signed 2 May 1992, will parallel the Single Market as of 1 January 1993, subject to ratification. Due to be finalized in October 1991, the whole undertaking, and especially its judicial mechanism, were fundamentally called into question by the European Court of Justice (hereinafter ECJ, or the Court) on 14 December 1991.² Its amended version, resubmitted to the ECJ in February 1992, finally found the Court's modulated approval.³

The principles defined in this context by the Court go far beyond the scope of the agreement actually concerned. The Court's interpretation of the objectives of the Community as opposed to those of the EEA, its analysis of scope and content of judicial mechanisms created by international agreements, the position of 'mixed' association-agreements and of the legal instruments for their implementation in the Community legal order are all of significance for the further development of the 'Constitutional Charter of a Community based on the rule of law'.⁴

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¹ Austria, Finland, Iceland, Norway, Sweden, Switzerland and, as of 1 September 1991, Liechtenstein.

² Opinion of the Court of 14 December 1991 delivered pursuant to the second subparagraph of Article 228(1) of the EEC Treaty – Opinion 1/91 [*Draft agreement between the European Community and the countries of the European Free Trade Association relating to the creation of the European Economic Area*], not yet reported.

³ Opinion of the Court of 10 April 1992, Opinion 1/92 [*Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area*], not yet reported.

⁴ Opinion 1/91, *supra* note 2, recital 21. (My comments are based on the original French version of the Court's ruling. For the sake of clarity, the Opinion will however be quoted according to its

In order to faithfully report the different stages of the 'EEA-Drama', I shall start by exposing the antecedents, negotiating history and content of the Draft EEA Agreement as it stood when first submitted to the ECJ (I); after this, the three most important issues raised by the Court's ruling in Opinion 1/91 shall be presented by summarizing the Court's appreciation (II.A), then analyzing its scope and possible meaning (II.B) (II); I will then describe the main aspects of the Agreement's renegotiated version (III) and proceed, as above, to a summary and analysis of the three major topics which, in Opinion 1/92, restate, modulate or develop the Court's initial evaluation (IV).

This analysis should permit conclusions concerning the constitutional significance of these Opinions. First, the Court may have construed the Community's objectives as creating an obligation of attaining European Union, but this will not prevent the EEA's realization; second, the Court found a practicable solution combining the institution of international tribunals by Agreements concluded by the Community and its Member States with the preservation of the autonomy of the Community legal order; third, the Court practically completed its prior work of reducing the distinctions between '*communautaire*' and 'mixed' agreements and modified the doctrine of 'implied powers' in order to permit the delegation of implementing powers to Community institutions, by way of international agreements, in areas exceeding the Community's material jurisdiction. In some of these fields, there may be indications of the emergence of 'higher', foundational norms of primary Community law (V).

I. Prologue – The History of the EEA⁵

The Contracting Parties' economic relations had been governed since 1972-73, the date of the Community's first enlargement, by Free Trade Agreements (FTAs) between the Community and the individual EFTA countries. In April 1984, at a ministerial meeting convened in order to celebrate the FTAs' final implementation,

English translation as published in 31 ILM (1992) 442, and the French original will only be referred to in case of possibly significant divergences). The formula was first used by the Court of Justice in Case 294/83, *Parti Ecologiste 'Les Verts' v. European Parliament*, [1986] ECR 1339, recital 23.

⁵ In general, see H. Wallace (ed.), *The Wider Western Europe: Reshaping the EC-EFTA Relationship* (1991); Weiss, 'EC-EFTA relations: Towards a Treaty Creating a European Economic Space', 9 *YEL* (1989) 329; Wilson, 'Counterpoint: Austria's Application for Membership in the European Community and Delors' Call for a New EC-EFTA Relationship', 20 *GA. J. Int'l & Comp. L.* (1990) 241; Hurni, 'EFTA-EC Relations Aftermath of the Luxembourg Declaration', 20 *JWTL* (1986) 497; Nervell, 'The Emerging European Economic Space: A Proposed Legal Framework for Expanding EEC-EFTA Relations Beyond the Free Trade Agreements', 21 *Cal. W. Int'l L. J.* (1990) 181; Lucron, 'Vers l'Espace Economique Europeen, l'Europe du Deuxieme Cercle', 339 *RMC* (1990) 527; Coopers & Lybrand, Euroscope, 'Trade Relations EC-EFTA', update of 4 June 1992; concerning the negotiations, see Spinner, 'Europäischer Wirtschaftsraum (EWR): Verhandlungsfortschritte bis Februar 1991', 6 *SJZ* (1991) 99; 'Europäischer Wirtschaftsraum (EWR): Verhandlungsentwicklung bis Mitte Juni 1991', 14 *SJZ* (1991) 237.

the Ministers and Community Representatives issued the ‘Luxembourg Declaration’⁶ in which they stressed the importance of strengthening cooperation and ultimately creating a ‘dynamic and homogeneous European Economic Space’.⁷ Although this expression was never clearly defined, its underlying idea was to parallel the EC’s completion of the Single Market, from which the EFTA countries feared imminent exclusion, by providing, in the form of a single agreement concluded between both trading blocs, a comprehensive material and institutional framework exceeding the FTAs.

The years following the Luxembourg Declaration, successful in various forms of informal cooperation, did not bring the EES into realization. The decisive signal came in January 1989, when Commission President Delors presented the idea of creating a ‘more structured partnership with common decision-making and administrative institutions...’⁸ The EFTA countries’ response being positive, formal negotiations began in June 1990.

The undertaking proved to be complex. At stake was the creation of an area in which the four freedoms and the rules of competition of the EC Internal Market in industrial goods, restricted reciprocal market access for agricultural and fisheries products, structured cooperation in areas such as environment and consumer protection, education and research activities and economic and social policies, as well as joint action regarding economic cohesion would, in the form of a traditional intergovernmental agreement, be uniformly applicable within twenty legal orders. Eventually, a compromise balancing all interests⁹ was reached.

The objective of the whole undertaking was

[t]o establish a dynamic and homogeneous European Economic Area, based on common rules and equal conditions of competition ... and achieved on the basis of equality and reciprocity and of an overall balance of benefits, rights and obligations...¹⁰

⁶ ‘Luxembourg: Ministerial Meeting Between EFTA Countries and the EC and its Member States’, EFTA Bull. 2/84, 6 (1984); Nervell, *supra* note 5, at 182.

⁷ ‘EES’, later to be renamed the EEA; Nervell, *supra* note 5, at 182.

⁸ Speech to the European Parliament of 17 January 1989, Weiss, *supra* note 4, at 352 *passim*.

⁹ EFTA had initially insisted on closer participation in the EC’s decision-making process, as the EEA’s success depended on these countries incorporating the relevant *acquis communautaire* into their national legal orders, but the Community soon realized that an integration of EFTA representatives into its internal procedures was inappropriate. The compromise presented to the Court in Opinion 1/91 was therefore a trade-off – an independent EEA Court as compensation for the EFTA countries’ restriction of sovereignty. See Lucron, *supra* note 4, at 528, for the Community’s view. EFTA’s position is exposed in Spinner, *supra* note 4. The problem of balancing the Contracting Parties’ benefits and obligations reappeared after Opinion 1/91; see De la Guerivière, ‘Espace Européen. Les Douze et les Sept.’, *Le Monde*, 11 February 1992.

¹⁰ Preamble EEA, recital 4 [hereinafter, dispositions contained in the Agreement’s original version and not modified after Opinion 1/91, as well as the final text of the EEA Agreement, will be referred to as Art... EEA, whereas original provisions modified or deleted after Opinion 1/91 will be Art... Draft EEA].

This was seen as necessary in order to achieve

[a] continuous and balanced strengthening of trade and economic relations ... with equal conditions of competition and the respect of the same rules, with a view to creating a homogeneous European Economic Area...¹¹

Following the 'two pillars approach' advocated by the Commission, the EEA 'superstructure' would be composed of two joint organs: an EEA Council endowed with the definition of the general orientations and provision of the political impulse necessary for the EEA's implementation, and an EEA Joint Committee responsible for its supervision, as well as for the first stage of dispute settlement between the parties.¹² Within the 'pillars', EFTA would have to duplicate the EC institutional organization, an EFTA Surveillance Authority (ESA) paralleling, to the extent necessary, the EC Commission's tasks.¹³

The Draft EEA's *ultima vox* for the settlement of disputes between the Parties and the control of the EFTA surveillance mechanism was an EEA Court, independent though functionally integrated with the ECJ and competent to deliver binding decisions concerning the interpretation and application of the Agreement, including its Annexes and Protocols.¹⁴ This EEA Court was not the Agreement's only court: Additionally, EFTA countries' national courts could be given an opportunity to 'ask' the ECJ to 'express itself' on questions concerning the interpretation of EEA provisions,¹⁵ which are '[i]dential in substance to the provisions of the [EC] Treaties...'¹⁶ 'Extent' and 'modalities' of the procedure's application were left to the discretion of EFTA countries' .

The international duplication of EC rules envisaged by the EEA, combined with the setting-up of an independent judicial mechanism, was bound to raise fundamental questions about the Agreement's compatibility with Community law, difficulties which could only be aggravated by the EEA's 'mixity', i.e. the fact that this Association Agreement was to be concluded by the Community in conjunction with its Member States. The 'mixity-issue' was however not raised,¹⁷ but the

¹¹ Art. 1(1) EEA.

¹² Part VII 'Institutional provisions', Articles 89-120 Draft EEA. Arts. 116-117 Draft EEA contained the surveillance and dispute-settlement procedures.

¹³ Art. 116(1) Draft EEA. See the contribution by Krafft in this volume.

¹⁴ Arts. 95-105 Draft EEA. Provisions on the EEA Court's composition and competences were contained in Arts. 95 and 96.

¹⁵ Art. 104(2) Draft EEA and Draft Protocol 34.

¹⁶ Protocol 34, Art. 1.

¹⁷ The issue was far from uncontroversial, the Commission having first threatened Council and Member States with bringing the issue before the ECJ; see *Dispute Between EC Agencies Threatens EEA Deal*, Reuter, Brussels, July 23, 1991.

Commission requested the Court's opinion, under the second subparagraph of Article 228(1) EEC,¹⁸ on the EEA's judicial mechanism.¹⁹

II. Act I: Opinion 1/91

As a preliminary observation, the Court stressed that it would restrict itself to answering the questions raised by the Commission,²⁰ but that no inferences could be drawn from this fact regarding the compatibility of other provisions of the EEA with the EEC Treaty.²¹ Its analysis of the respective objectives of the EEA and EC Treaties and of the Commission's request led the Court to the following conclusion: 'The system of judicial supervision which the Agreement proposes to set up is incompatible with the EEC Treaty'.²²

A. Objective and Context

1. The Court's appreciation (recitals 5, 13-29, 49-50)

The ECJ's first task was to compare the respective objectives and contexts of the EEA and EC Treaties, as the textual identity of certain EEA dispositions with those of

- ¹⁸ The following problems were raised:
- the compatibility of the presence of ECJ Justices in the EEA Court with the ECJ's jurisprudence in Opinion 1/76 (*infra* note 70);
 - the possibility of granting the EFTA countries intervention in procedures pending before the ECJ;
 - the permissibility of EFTA national courts submitting questions to the ECJ;
 - the sufficiency of Art. 238 EEC as legal basis for such an agreement, or alternatively, the legality of amending this Article.
- ¹⁹ The Commission's official motivation was '[t]he sake of legal certainty' (Opinion 1/91, 3), but before the request was filed, the ECJ's opposition of principle to an EEA Court was widely known. Johnson, 'Dismay as Luxembourg Court Rejects Trade Zone', *The Daily Telegraph*, 15 December 1991, at 2. The EC governments, '... on the advice of the President of the European Court...', seemed *ab initio* reluctant to negotiate such a court's installation. McEvoy, 'EC to Resist EFTA Demand for Joint Court', *The Reuter Library Report*, 24 April 1991.
- ²⁰ Recital 1. In its analysis of the EEA's objectives, the ECJ seems not to have attributed too much weight to this self-imposed restraint. An analysis of its dicta in Opinion 1/91 concerning the position of international agreements in the Community legal order, and of the European Parliament's legal objections in Opinion 1/92 raises the question whether, at the least as a matter of judicial policy, the Court should ever accept any such restraint.
- ²¹ Especially the decision-making process and, in competition matters, the separation of tasks between Commission and ESA, *ibid.* This was a warning-signal in the Commission's direction (see *infra* part III.).
- ²² Opinion 1/91, at 51. A complete examination of all aspects of the Court's ruling would exceed the scope of this paper. It would also have to focus on the Court's reading of the Draft EEA's dispositions in a more extended way than is possible here. I will therefore concentrate on the ECJ's three main contributions, in my view, to the Community legal order, and propose alternative readings of the Draft EEA only insofar as this seems essential for the understanding of my argument.

the EC Treaties could not necessarily mean their identical interpretation.²³ The EEA being an international agreement, it had to be interpreted, according to Article 31 of the Vienna Convention on the Law of Treaties, according to its wording and in the light of its object and purpose.

Having initially defined the EEA's main objective as the attainment of 'legal homogeneity',²⁴ the Court later declared that the EEA's goals were free trade and competition in the economic and commercial relations between the Contracting Parties.²⁵ Though present in the Community as well, these were however not its ultimate goals:

It follows *inter alia* from Arts. 2, 8A and 102A of the EEC Treaty that this Treaty aims to achieve economic integration leading to the establishment of an Internal Market and Economic and Monetary Union. In addition, Art. 1 of the Single European Act makes it clear moreover that the objective of all the Community Treaties is to contribute *together* to making concrete progress towards *European Unity*.²⁶

The Court restates and develops this *Leitmotiv* of its ruling in the context of its analysis of the EEA Court, the EC's tasks being defined as

[t]o achieving the objectives set out *in particular* in Arts. 2, 8A and 102A EEC and to attaining a *European Union* between the Member States, as is stated in the Solemn Declaration of Stuttgart of June 19, 1983 (section 2.5) referred to in the first recital in the Preamble to the SEA.²⁷

It then proceeds to establish that the contexts in which the EEA and the Community are situated differ. The EEA creates rights only between the Contracting Parties and foresees no transfer of sovereign competences to the intergovernmental organs it institutes. By contrast, the EEC Treaty, although concluded as an international agreement, is nevertheless the Constitutional Charter of a Community of Law, a new legal order for the sake of which the States have limited their sovereign rights, '[i]n

23 This is the same approach the Court had adopted towards the FTAs in its earlier jurisprudence. See Case 270/80, *Polydor Ltd. and RSO Records Inc v. Harlequin Record Shops Ltd. and Simons Records Ltd.*, [1982] ECR 329, recital 15; Case 104/81, *Hauptzollamt Mainz v. Kupferberg*, [1982] ECR 3641, recital 30. The FTAs' structure followed the EFTA Convention. However, the EEA was much more closely inspired by the EEC Treaty, at least as regards the four freedoms and competition.

24 Recital 5.

25 Recital 15. This twofold definition of the EEA's objective seems to have been decisive for the Court's appreciation of the whole agreement, although the possible ambiguity between the two definitions was never lifted and no textual basis for the Court's understanding of 'legal homogeneity' established. The Contracting Parties had declared that homogeneity was their political goal (Ministerial Declaration of 15 May 1991, 348 *RM C* (1991) 476, at 477, point 17) and the Commission had referred to that goal in its pleadings before the Court (Opinion 1/91, 18). But, contrary to the EEA's final version, the Draft EEA contained no explicit reference to this objective.

26 Recital 17, emphasis added. The Opinion's french version lacks any reference to 'contributing *together*', but refers to 'l'Union européenne'.

27 Recital 50, emphasis added.

ever wider fields'²⁸ and the subjects of which are not only the Member States, but also individuals.²⁹ The essential characteristics of this legal order are its supremacy and the direct effect enjoyed by a whole series of its dispositions.

This interpretation of the Community's objectives leads the Court to conclude that the EEA's objective of *legal homogeneity* cannot be guaranteed even by an '[identity] in [the EEC Treaty's and EEA's] content or wording'.³⁰ A further examination of part of the mechanism of incorporation³¹ and interpretation³² of EEA rules leads the Court to establish that essential elements of the Community legal order are irreconcilable³³ with the characteristics of the envisaged Agreement: The diversity in *finalités*³⁴ and context between EC and EEA render legal homogeneity an unattainable objective.

2. *Polydor revisited*

The Court's definition of the Community's objectives reveals its full meaning if compared to the Court's prior jurisprudence concerning international agreements in general³⁵ and FTAs in particular, the most important ruling for our purposes being *Polydor*.³⁶

²⁸ Recital 21, emphasis added.

²⁹ This whole passage is, of course, directly inspired by the Court's landmark ruling Case 26/62, *Van Gend & Loos*, [1963] ECR I, which the Court also cites; but the Court has rewritten *Van Gend & Loos* in one of its major components: originally, it read '[a]lbeit within limited fields' (at 12, emphasis added). This exemplifies the Court's new approach to the Treaties' objectives.

³⁰ Recital 22.

³¹ Recitals 23-27. Draft Protocol 35 contained binding provisions regarding the Contracting Parties' (CPs') implementation of EEA rules. Clear, precise and unconditional provisions should as such be made part of the CPs' legal orders. If necessary, the CPs would introduce a statutory provision into their national legal orders, to the effect that, in case of conflict, EEA Law would prevail. The Court does not clarify its concerns, but Draft Protocol 35 might have had serious consequences: the supremacy and direct effects of Community law are not constitutionally guaranteed in all Member States. A guarantee of EEA supremacy might have destroyed the Community's legal hierarchy.

³² *Without prejudice to future developments of case-law*, EEA provisions identical in substance to corresponding rules of the EEC and ECSC Treaties and to secondary Community law are to be interpreted according to the ECJ's *relevant* case-law given *prior to the date of the Agreement's signature* (Art. 6 EEA, emphasis added). The ECJ took objection to this idea, because of the EEA's unrevealed objective: In my view (later confirmed by the Court in recitals 42-46), the real aim of the EEA was a partial duplication of the Community legal order in the economic field (neither the 'simple FTA' of recital 15 nor the total 'legal homogeneity' of recitals 5, 22 et seq.) without the political superstructure of European Union. Therefore, binding the Courts (EEA and ECJ) to prior (common-market oriented) jurisprudence might have threatened the Community's freedom of action.

³³ Recital 28.

³⁴ The English translation reads '*aims*', recital 29, a somewhat weaker term than the one used in French.

³⁵ See, concerning GATT, Cases 21-24/72, *International Fruit*, [1972] ECR 1219 and Case 9/73, *Schlüter*, [1983] ECR 1135; concerning the ('mixed') Association Agreement with Greece, Case 17/81, *Pabst & Richartz*, [1982] ECR 1331; concerning the ('mixed') Association Agreement with

An *a priori* denial of direct effects to the future EEA seems however not to have been the ECJ's goal.³⁷ Nor did it conclude that the EEA provisions need necessarily be interpreted in a different way than the corresponding EEC provisions.³⁸ The Court, apparently evaluating the EEA's objectives, was in reality about to redefine the Community's finality.

In *Polydor*, the Court had been asked whether parts of its (prior) jurisprudence regarding Articles 30 and 36 EEC could be applied to an FTA's almost identical provisions. Having established that these provisions were indeed 'in several aspects similar'³⁹ to those of the EEC Treaty, the ECJ concluded that this 'similarity of terms'⁴⁰ was not a sufficient reason for its case-law's transposition:

The scope of that case-law must indeed be determined in the light of the Community's objectives and activities as defined by Articles 2 and 3 of the EEC Treaty. ... [This] Treaty, by establishing a common market and progressively approximating the economic policies of the Member States, seeks to unite national markets into a single market having the characteristics of a domestic market.⁴¹

The *Polydor* reasoning would not have sufficed to show the differences in objective between the Community and the EEA. The Community's objectives under *Polydor* being only economical in nature, and the EEA actually disposing of (at least some) instruments for a certain uniformity of application of the EEA's provisions, these rules should have been perfectly suited for analogous interpretation. But the Court's main interests in this part of the opinion are not the EEA's objectives. A paradigm-shift has taken place.

The first, and least, lies in the economic field – here, the Internal Market, introduced by Article 8A, has replaced the Common Market, and Article 102A has laid the foundations for Economic and Monetary Union.⁴² The second, and possibly

Turkey, see *infra* note 94.

36 *Polydor*, *supra* note 23, concerned the FTA with Portugal, which also gave rise to the Court's ruling in *Kupferberg*, *ibid.*, see also *infra* C.2.

37 Some recitals could be understood in this sense, notably recitals 20 and 49, which insist on the fact that, despite Art. 6 EEA and Draft Protocol 35 (*supra* notes 31-32), the EEA 'in substance' only creates rights and obligations between the CPs as opposed to the supremacy and direct effects characteristic of the Community legal order.

38 *Polydor* and *Kupferberg* read together suggest that certain of the FTA's dispositions are capable of creating direct effects, at the price of a more restrictive interpretation than their EEC counterparts.

39 *Polydor*, *supra* note 23, recital 14.

40 *Ibid.*, recital 15.

41 *Ibid.*, recital 16. This distinction was all the more necessary since the Community disposed of legal instruments capable of achieving the uniform application of Community law and the progressive abolition of legislative disparities within the Common Market, which had no equivalent inside the FTA (recital 20).

42 Both provisions were introduced into the EEC Treaty by the SEA. Whether the Court here finally answered the question of differences in scope between 'Common Market' and 'Single Market' in favour of the latter, seems of minor importance. More important is that the Court seems to have taken account of the fact that Art. 102A EEC had been implemented by the Treaty for the Creation

far-reaching, lies in the political sphere. Here, the Court has, for the first time, addressed a new Community objective, the making of concrete progress towards European Union⁴³ as expressed in Article 1 SEA.⁴⁴ As the language versions of both the SEA's Preamble and Article 1 and the Court's *Opinion* diverge, the scope of this passage depends on the version retained.

The Opinion's French version could be read in the following way. The Court interpreted the SEA's Preamble and Article 1, although Article 31 SEA in principle excludes both provisions from the scope of its interpretative jurisdiction,⁴⁵ in the sense that both had identical goals, namely the attainment of European Union.⁴⁶ As the Court moreover read the *joint nature* of this political objective *out* of Article 1 SEA⁴⁷ and seems to have understood it as creating an enforcing obligation for itself,⁴⁸ all future Community action might have to contribute to making *concrete* progress towards European Union.⁴⁹

The Opinion's English version is more mundane. The Court simply quotes the Community's objectives as they are laid down in the SEA's Preamble and Article 1, including the contradictions contained in these Articles. It will encourage, but not force, the joint attainment of 'European Union', whatever the content of this term. The divergence awaits future judicial clarification.

of European Union (Maastricht Treaty), Europe Documents 1759/60 (1992), a few days before the Opinion.

43 *Supra* notes 26-27.

44 The Court had referred once before to the SEA's Preamble (Case 249/86, *Commission v. Germany*, [1989] ECR 1263, recital 8). This is the first time it addressed its Art. 1.

45 Art. 31 SEA reads, in pertinent part: 'The provisions of the [Treaties] concerning the powers of the [ECJ] and the exercise of those powers shall apply *only to the provisions of Title II and to Art. 32 [SEA]*' (emphasis added). Art. 1 SEA is however part of Title I SEA.

46 In the stronger, French sense of *Union européenne* (*supra* note 26).

47 It is contained in the three equally authentic SEA versions examined (*supra* note 26). Its omission from the Opinion's French version might therefore be deliberate, a legal obligation towards attaining European Union qualified by a requirement of joint action being practically unenforceable.

48 '[I]a Cour de Justice *doit* assurer le respect d'un ordre juridique particulier et *contribuer à son développement*, en vue ... *de réaliser entre les Etats Membres une Union européenne...*' ('[T]he Court of Justice *has to* secure observance of a particular legal order *and to foster its development* with a view ... *to attaining a European Union* among the Member States...'), recital 50, emphasis added.

49 If this is the Court's reading, it could be partially justified through resort to Art. 164 EEC. Of course, Art. 164 EEC does not create a new head of jurisdiction, or, in the Court's own terms, '[does] not permit the Court on its own authority to amend the actual terms of its jurisdiction'; Case 66/76, *CFDT v. Council*, [1977] ECR 305, recital 8. The concrete obligation for the ECJ in Art. 164 EEC, namely to 'ensure that in the interpretation and application of this Treaty the law is observed', could have been understood as constituting a norm of a 'superior order' to that of Art. 31 SEA, *supra* note 45. If respecting Art. 31 SEA jeopardized 'the law', meaning the autonomy or integrity of the Community legal order, the Court, respecting the 'higher' norm, would have been forced to set aside the 'lower'. The Court does not address this question, but even this reading could not solve the problem of the creation of *concrete* Community obligations under Art. 1 SEA.

B. The Judicial System

1. The Court (recitals 30-46, 47-53, 54-65, 69-72)

Having established the fundamental contradiction in objectives between the EC and the EEA, the Court initiated inquiry into the EEA's judicial system.⁵⁰ As the Court had accepted that the EEA would become a 'mixed' agreement,⁵¹ the fact that the EEA Court could be called upon to define the notion of Contracting Parties⁵² and thereby rule on the EC's division of competences⁵³ could jeopardize the autonomy of the Community legal order. This competence

[i]s likely adversely to affect the allocation of responsibilities defined in the Treaties and, hence, the autonomy of the Community legal order, *respect of which must be assured by the Court of Justice pursuant to Article 164 of the EEC Treaty. This exclusive jurisdiction of the Court of Justice is confirmed by Article 219 of the EEC Treaty, under which Member States undertake not to submit a dispute concerning the interpretation or application of that Treaty to any method of settlement other than those provided for in the Treaty.*⁵⁴

Due to the position of international agreements in the Community's legal hierarchy, the decisions of a Tribunal created by such an agreement would be binding on the Community institutions, including the Court of Justice.⁵⁵

⁵⁰ Recital 30. Its declared goal was to find out whether this system could compromise the autonomy of the Community legal order 'in pursuing its own particular objectives'. It is not clear whether the Court here referred to the EC or the EEA, although I think that it meant the Community's objectives defined above.

⁵¹ Recital 2, *supra* note 17. We will return to the 'mixity-problem' in part 3.

⁵² Under Art. 96(1)(a) EEA, the EEA Court was competent for the settlement of disputes between the 'Contracting Parties'. According to Art. 2(c) EEA, 'Contracting Party' either means the Community, the Community and its Member States or the Member States alone. This formula is contained in other 'mixed' agreements – e.g., in an interpretative declaration to the 1963 Association Agreement with Turkey (OJ (1964) 3687, at 3700; see C. Vedder, *Die auswärtige Gewalt des Europa der Neun* (1980) 65, note 434, which declares that for the settlement of disputes, the competence would lie with the ECJ 'or any other existing Court' (Art. 25(2)(4) of the Agreement; see Vedder in E. Grabitz, *Kommentar zum EWG-Vertrag* (September 1987) ad Art. 238 EEC, paragraph 28).

⁵³ The ECJ's 'self-restraint' in this instance seems problematic. Under the second subparagraph of Art. 228(1) EEC, the Court has to give an opinion 'as to whether an agreement envisaged *is compatible* with the provisions of this Treaty' (emphasis added). As the Court had recognized itself in Opinion 1/78 [*International Agreement on Natural Rubber*], [1979] ECR 2871 (recital 30), the interpretative scope of Art. 228 permits investigation of all questions concerning the envisaged agreement, including precisely the scope and extent of the EC's division of competences. If such a fundamental issue of Community law arises, and be it only *incidenter*, the Court should not refrain from addressing this issue, unless its 'self-restraint' had its own reasons (*infra* C.2.).

⁵⁴ Recital 35, emphasis added.

⁵⁵ Recital 39. The Court did not qualify its statement. Under Art. 97 Draft EEA (to which, however, the Court does not refer), the CPs and the surveillance authorities (ESA and EC Commission) were to take all necessary measures to comply with the judgments of the EEA Court. From the point of view of international law, the Court's conclusion therefore was perfectly accurate – the Community could not plead its own 'constitutional' order against a failure to comply with EEA rules or their binding interpretation. From the point of view of Community law, the ECJ could be bound by rulings of the

[A]n international agreement providing for such a system of courts is *in principle compatible with Community law*. The Community's competence in the field of international relations and its capacity to conclude international agreements necessarily entails the power to submit *to the decisions of a court which is created or designated by such an agreement* as regards the interpretation and application of its provisions.⁵⁶

However, the reinsertion of parts of Community law into the EEA, coupled with the Agreement's objective of uniform application, reflected in Articles 6 and 104(1) Draft EEA, must necessarily lead to the future interpretation of Community law being conditioned upon the EEA's interpretation.⁵⁷ The EEA's judicial mechanism therefore infringed Article 164 EEC, and, more generally, the very foundations of the Community.⁵⁸

The danger created by this mechanism for the autonomy of the Community legal order could only be aggravated by the participation of ECJ Justices in the EEA Court's deliberations.⁵⁹ Because of the two instruments' divergent objectives, the ECJ Justices, when sitting in the EEA Court, would have to apply and interpret 'the same provisions but using different approaches, methods and concepts',⁶⁰ making it very difficult, if not impossible, for them to examine in the realm of the ECJ, '*avec une pleine indépendance d'esprit*',⁶¹ questions already examined within the EEA Court. As the EEA's judicial system was in any case incompatible with the EEC Treaty, it was not necessary to enquire further into that question.

As far as the interpretation of EEA provisions by the ECJ following request by national EFTA courts was concerned,⁶² this procedure was in three respects

EEA Court only in so far as these addressed EEA rules corresponding to secondary Community law (as this is ranked below international agreements in the Community legal order) and only if the EEA Court's interpretation did not run counter to the Treaties, but not by interpretations concerning provisions equivalent to primary Community law (in the Community legal order, the Treaties rank above international agreements). This results from Art. 228 EEC; Groux-Manin, *The European Communities in the International Order* (1985) 115-117. The EEA Court being an 'organ' created by international agreement, the ECJ should, according to its own jurisprudence (see *infra* C.2.), be even competent to interpret its 'acts'. This recital therefore probably refers to the Agreement's binding force under international law only.

⁵⁶ Recital 40, emphasis added.

⁵⁷ Whereas Art. 6 EEA conditions the interpretation of EEA rules identical in substance to EC rules upon the EC rules' interpretation, Art. 104(1) Draft EEA reversed this order, thereby conditioning the interpretation of EC rules upon that of EEA rules. This reversal was clearly contrary to the Community legal order, especially to the position of international agreements in its hierarchy.

⁵⁸ Recital 46.

⁵⁹ According to Art. 95(1) and (2) Draft EEA, this functional integration would have consisted in the EEA Court being composed of 5 ECJ Justices and 3 Justices from EFTA countries, whereas an EEA Court of First Instance, competent under Art. 101(1) Draft EEA to review the ESA's application of the competition rules, would have consisted of 3 EFTA Justices and 2 Justices from the EC Court of First Instance.

⁶⁰ Recital 51, emphasis added.

⁶¹ 'with completely open minds', recital 52 (official translation).

⁶² A '*quasi*-preliminary ruling-procedure'. *Supra*, text to notes 15-16. A procedure similar, though not identical, to Art. 177 EEC is contained in an additional Protocol to the Convention on Jurisdiction

fundamentally different from the preliminary ruling procedure under Article 177 EEC: the EFTA countries were free to accept or refuse the procedure's application; there was no obligation for courts of last resort to present questions to the ECJ; finally, it was not guaranteed that the ECJ's rulings would bind these countries' courts:

[A]dmittedly, there is *no provision of the EEC Treaty which prevents* an international agreement from conferring on the Court of Justice jurisdiction to interpret the provisions of such an agreement for the purposes of its application in non-member countries.⁶³

There could be no objection of principle against the EFTA countries' discretion concerning acceptance of this procedure, nor to the highest courts' discretion in bringing matters before the ECJ.⁶⁴ It was however impossible to admit that the ECJ's rulings would be of a purely consultative nature and have no binding effects. Such a procedure would 'change the nature' of the Court's function under the Treaties,⁶⁵ which was to deliver binding decisions. As the Member States' courts would have to take account of the ECJ's answers to EFTA requests, the advisory nature of the EEA procedure could create legal uncertainty concerning the binding force of rulings under Article 177 EEC. By jeopardizing the legal certainty indispensable for the

and the Enforcement of Judgments in Civil and Commercial Matters of 1968 (the 'Brussels Convention'), but was not included in the 1988 'Lugano Convention' duplicating the 'Brussels Convention' for the EC-EFTA 'European Legal Zone'. On the '*Brussels Convention*', see A. Dashwood, R. Hacon, R. White, *A Guide to the Civil Jurisdiction and Judgments Convention* (1987) Chapter 6, at 53. On the 'Lugano Convention', see Fawcett, 'The Lugano Convention', 14 *ELR* (1989) 105; Minor, 'The Lugano Convention: Some Problems of Interpretation', 27 *CML Rev.* (1990) 507. The 'Lugano Convention's objective is also 'legal homogeneity' (*vulgo* 'the uniformity-problem'); the Convention's interpretation is therefore tied to the prior case-law of the ECJ rendered under the 'Brussels Convention' and the CPs state, in reciprocal Interpretative Declarations, that their respective courts (the ECJ for the EC Member States) will 'pay due account' to each other's interpretations; but the European Legal Zone contains no common Court. The ECJ's initial reaction to the 'Lugano Convention' was 'equivocal' (Minor, *ibid.*, at 518).

⁶³ Recital 59, emphasis added. This is not as obvious as the Court states. If the ECJ is to exercise jurisdiction under an international agreement, this competence must result from the Treaties. (As the 'Brussels Convention' [see note 62] was a Convention between Member States under Art. 220 EEC, the ECJ's jurisdiction resulted from Art. 182 EEC, although the 1971 Protocol does not refer to that provision). Until now, it was assumed that the ECJ's competence for the interpretation of international agreements stemmed from Art. 181 EEC (Daig in H. von der Groeben *et al.*, *Kommentar zum EWG-Vertrag*, ad Art. 181, paragraphs 7 and 9; Grabitz in E. Grabitz, *supra* note 52 (September 1987), ad Art. 181, paragraphs 7-9; *contra* H. Smit, P. Herzog, *The Law of the EEC: A Commentary on the EEC Treaty*, ad Art. 181, paragraph 181.05, who however assume that the ECJ may attain such jurisdiction). Absent a grant of jurisdiction, the ECJ could arguably not be given additional competence *via* international agreement without infringement of Art. 4 EEC, under which 'each institution acts within the limits of the powers conferred upon it by this Treaty'. The Court's statement can however be justified as far as it refers to extra-communitarian affairs. The EFTA countries must be free to submit to the Court of Justice, as the EC Treaties are inapplicable to them.

⁶⁴ Although Art. 181 EEC seems only to permit jurisdiction for the ECJ in a manner compatible with the Treaties, such minor deviations from the 'matrix' procedure of Art. 177 may be justified – the 1971 Protocol to the 'Brussels Convention' also departed from Art. 177, and possibly to a greater extent (see A. Dashwood *et al.*, *supra* note 62, at 55, 58).

⁶⁵ Recital 61.

proper functioning of Article 177 EEC, the envisaged mechanism was incompatible with Community law.⁶⁶

Article 238 EEC could not permit the institution of a system conflicting with ‘Article 164 EEC and, more generally, with the very foundations of the Community’;⁶⁷ this incompatibility could not be redressed through a modification of Article 238.⁶⁸

2. *Beyond Opinion 1/76?*

The question whether, and in what configuration, an independent EEA Court could be compatible with Community law, had already caused debate before the negotiations began.⁶⁹ Before unraveling the way in which the Court resolved this question, it is necessary to recall the Court’s prior jurisprudence in this field, Opinion 1/76.⁷⁰

The Convention at stake in these proceedings envisaged the setting-up of a Tribunal composed of Justices from the ECJ and Switzerland and competent for the Agreement’s binding interpretation. According to the ECJ, this could either mean that, in matters covered by the Convention, its jurisdiction would be replaced by the Tribunal’s, or that both jurisdictions would work in parallel, leaving the choice of *forum* open to the Member States’ courts. It was not the Court’s task, under the second subparagraph of Article 228(1) EEC, to proceed to a final interpretation of the provisions in question. Moreover,

[i]t is not feasible to establish a legal system such as that provided for in the Statute ... and at the same time escape the consequences which inevitably follow from the participation of a third State. The need to establish judicial remedies and legal procedures ... *may justify the principle underlying the system adopted.*⁷¹

As divergent interpretations of the Agreement by the judiciaries could not be excluded, the Court was however compelled to emit certain reservations regarding

⁶⁶ That the EC Treaties contain no advisory procedure is perfectly accurate. So is the Court’s conclusion.

⁶⁷ Recital 71.

⁶⁸ Recital 72.

⁶⁹ See in particular ‘EC-EFTA Court?’, Editorial Comments, 26 *CML Rev.* (1989) 341, at 344, pleading for adding EFTA Justices to the ECJ for all EC or EEA matters; Weiss, *supra* note 5, at 361 (an EEA tribunal not including any ECJ Justices); Nervell, *ibid.*, at 211, 212 (an independent arbitration mechanism).

⁷⁰ Opinion 1/76 [*European Laying-up Fund for Inland Waterways*], [1977] ECR 471.

⁷¹ Opinion 1/76, recital 21, emphasis added.

the Tribunal's compatibility with Community law. In the second interpretative variant, ECJ-Justices sitting on the Fund-Tribunal could be prejudiced in their capacity to give 'a completely impartial ruling'⁷² when faced with similar questions before the ECJ. In extreme cases, this could lead to an impossibility of assembling the necessary quorum of Justices. Therefore, 'the Fund Tribunal could only be established ... on condition that judges belonging to the Court of Justice were not called upon to serve on it'.⁷³

In Opinion 1/91, the Court reversed its approach. This calls for three preliminary observations: in the first place, the Court seems much less inclined than in Opinion 1/76 to interpret draft agreements with the caution suggested by their open texture or the participation of third States.⁷⁴ Second, the Court's emphasis lies on the admissibility of judicial mechanisms as such and not on their composition.⁷⁵ Third, this admissibility now depends on the Community objectives as defined in earlier parts of Opinion 1/91.

As in Opinion 1/76, the Court started by stressing the compatibility, in principle, of the creation of international tribunals with Community law,⁷⁶ but, contrary to Opinion 1/76, this proposition seemed half-hearted:⁷⁷ its principal justification stemmed from international law, under which the Community was capable of 'creating or designating'⁷⁸ such tribunals, but not from considerations inherent to Community law.⁷⁹

The EEA Court was deemed incompatible with Community law because the EEA, on the one hand, duplicated part of this law, but on the other envisaged its uniform application and interpretation in the whole territory covered by the Agreement. 'Legal homogeneity' therefore governed the interpretation both of EEA rules and of the corresponding provisions of Community law. As the EEA Court was only bound by the ECJ's prior jurisprudence, though both Courts were expected to

⁷² Opinion 1/76, recital 22. The French version of this recital reads '*de se prononcer en pleine impartialité*'.

⁷³ Ibid.

⁷⁴ There is no trace, in Opinion 1/91, of the Court considering the fact that the EEA was not yet finalized or that third countries could fear submission to foreign judges. This might however be justified by the fact that, at the time of the Court's ruling, the EEA would have been finalized and signed absent a request under Art. 228 EEC.

⁷⁵ *Supra*, text following note 61.

⁷⁶ Opinion 1/91, recital 40, *supra* note 56, Opinion 1/76, recitals 21 and 22, *supra* notes 71-72.

⁷⁷ Opinion 1/76 could mean that the creation of independent judicial mechanisms was possible under Community law, as the Court had left unanswered the first variant, the ECJ's total replacement by the Fund-Tribunal for the Agreement's interpretation; Weis, 'Anmerkung – Gutachten 1/76', 3 *EuR* (1977) 278, at 285.

⁷⁸ Recital 40, *supra* note 56.

⁷⁹ See *supra* note 55. The Court's declaration of the admissibility in principle of international tribunals is, moreover explained by reference to the Community's international capacity which permits submission to international tribunals in the same way as the international capacity of sovereign states. The Community's international capacity is however limited by its objectives.

'take due account' of each other's rulings, the future development of Community law was conditioned upon its prior interpretation in a more limited context, thereby clearly infringing the autonomy of the Community legal order. Concerning the EEA, the difficulty could be solved in a straightforward manner:⁸⁰ interpretative jurisdiction had to remain exclusively with the European Court of Justice.

The Court's assessment of the EEA Court's composition, closely related to the EEA's objective of partial duplication of Community law, contains an additional intriguing feature. As the Community's and the EEA's objectives are fundamentally distinct, the ECJ, even if designated as the only competent Court for the EEA's interpretation, has to retain its *indépendance d'esprit*⁸¹ when dealing with Community matters. Even establishing the ECJ as the only Court capable of interpreting the EEA cannot therefore guarantee total 'legal homogeneity'.

There remained the general question of the compatibility with Community law, in principle or under certain conditions, of the institution of international tribunals in agreements concluded by the Community. The Court did not need to address this issue, but parts of the Opinion suggest that it did. The Court rejected the EEA Court's interpretative jurisdiction of the notion of 'Contracting Parties' as running counter, in particular, to Articles 164 and 219 EEC.⁸² Placed in the general context of international agreements,⁸³ this explanation could be read in two different ways.

On the one hand, the problem of an international tribunal having to interpret the scope of the Community's competences could arise in every 'mixed' agreement, unless the agreement foresaw special mechanisms to the contrary.⁸⁴ No 'mixed' agreement could therefore foresee an international jurisdiction.

On the other hand, the Court's insistence on Articles 164 and 219 EEC⁸⁵ conferring upon it exclusive jurisdiction to safeguard the Community's autonomy can be understood as leading to even more far-reaching results:

Article 164 EEC covers all provisions of primary and secondary Community law. Containing identical provisions,⁸⁶ Articles 164 and 219 EEC should have the same

⁸⁰ The ECJ refrained from drawing this conclusion in the Opinion, but the EEA's negotiators did; see, e.g., McEvoy, 'EC to press on with plans for single market with EFTA', *The Reuter Library Report*, 16 December 1992; Goldsmith, 'EC Commission told to solve EFTA Problem', *International Herald Tribune*, 17 December 1992; 'Jealous Judges', *The Economist*, 3 January 1992, 58. This had also been suggested in the legal literature prior to the Opinion; Schermers, 'Note on *Sevince*', 28 *CML Rev.* (1991) 183, at 185.

⁸¹ *Supra* note 61. As in Opinion 1/76, *supra* note 72, the Court addressed that problem in the context of the ECJ-Justices sitting on the Agreement's judicial mechanism. But the Court did not speak of 'impartiality'.

⁸² Recital 35. *Supra* text to note 54.

⁸³ Which seems justified as the Court did not, in this part of the Opinion (recitals 30-36), draw any argument from the EEA's specific 'partially duplicating' feature.

⁸⁴ E.g., an obligatory 'preliminary' reference by the international tribunal to the ECJ, or precise delimitations, inside the Agreement, between Community and Member State competences.

⁸⁵ Opinion 1/91 seems to be the first occasion at which the Court referred to this Article.

⁸⁶ These two Articles have a passage in common: the reference to the Treaty's 'interpretation and

scope.⁸⁷ In addition, under the Court's settled case-law,⁸⁸ international agreements form an integral part of the Community legal order. Until Opinion 1/91, it was precisely the inclusion of international agreements into Articles 164 and 219 EEC that was controversial.⁸⁹

The Court's argumentation in recital 35 of Opinion 1/91 is not very explicit, but its insistence on the interrelation of Articles 164 and 219 EEC, in the context of its interpretation of 'mixed' international agreements, may have meant that these agreements were indeed covered by both Articles, whose reading would have had far-reaching consequences.⁹⁰

Amending Article 238 EEC could clearly not suffice to avoid these conclusions.⁹¹ The ECJ's heavy reliance on Article 164 EEC as justification of this part of its ruling, as well as the textual ambiguity contained in recital 72 of the Opinion's French version, might however entail an additional conclusion: the Court could have discovered, in Article 164 EEC a 'higher' norm of Community law, part of the Community's very foundations.⁹² The accuracy of this reading and its consequences must be left to further judicial developments.

C. International Agreements in the Community Legal Order – Scope, Position and 'Mixity'

1. The Court's words (recitals 2, 30-34, 37-45, 66-68)

application'. Under Art. 164 EEC, 'the *Court of Justice* shall ensure that in the interpretation and application of this Treaty the law is observed', under Art. 219 EEC (and Art. 87 ECSC, its identical counterpart in this respect), the Member States undertake not to submit 'any dispute concerning the interpretation and application of this Treaty' to any other dispute-settlement than the *ECJ* (emphasis added).

⁸⁷ Schweitzer in E. Grabitz, *supra* note 52, (June 1990) *ad* Art. 219, paragraph 2; Thiesing in H. von der Groeben *et al.*, *supra* note 63, *ad* Art. 219, paragraph 1; more nuanced H. Smit, P. Herzog, *ibid.*, *ad* Art. 219, paragraph 219.03, and *ad* Art. 182, paragraph 182.03., which suggest that Art. 219 should be related to Art. 182, under which Member States may submit disputes concerning 'the subject-matter of this Treaty' to the ECJ's jurisdiction. This reading might give Art. 219 more scope than Art. 164, but should in my view be rejected, as it would prevent Member States from agreeing on foreign dispute-settlement procedures even in cases where the ECJ had no jurisdiction under the EC Treaties.

⁸⁸ See *infra* C.2.

⁸⁹ Whereas Daig in H. von der Groeben *et al.*, *supra* note 63, *ad* Art. 164, paragraph 6, rejects the inclusion of international agreements into Art. 164 EEC, because this could compromise the interests of third countries, Pernice in E. Grabitz, *supra* note 63, (December 1983) *ad* Art. 164, paragraph 10, includes them in Art. 164; H. Smit, P. Herzog, *supra* note 63, *ad* Art. 164, paragraph 164.08, understand the phrase as meaning 'whenever anyone interprets and applies the Treaty'.

⁹⁰ As all international agreements would have fallen under the ECJ's exclusive interpretative jurisdiction, neither the Community, nor its Member States could have submitted to any international Court or Tribunal other than the ECJ itself, if this tribunal could deliver binding decisions concerning (international) parts of the Community legal order. It is improbable that the Court, in Opinion 1/91, was aware of this interpretation's political implications.

⁹¹ *Supra*, note 68.

⁹² The Court twice juxtaposes Art. 164 and the Community's foundations (in recitals 46 and 71).

The Court introduced its analysis of the EEA Court with the following remark:

[i]t must be observed *in limine* that international agreements *concluded by means of the procedure set out in Article 228 of the Treaty* are binding on the institutions of the Community and its Member States and that ... the provisions of such agreements *and the measures adopted by institutions set up by such agreements* become an integral part of the Community legal order when they enter into force.⁹³

As an international agreement was, under Article 177(1)(b) EEC, an act of one of the Community's institutions, the ECJ was competent for its interpretation, be it in the context of preliminary rulings or of direct actions. If the agreement contained an independent judicial mechanism, its decisions were binding on the Community institutions, which was in principle compatible with Community law. However as the EEA duplicated parts of the Community legal order and aspired to 'legal homogeneity' in the EEA's interpretation and application, the future interpretation of Community law would be conditioned upon the interpretation of EEA rules, in a manner contrary to the Community's very foundations.

2. The Court's deeds

At first sight, this part of the Court's ruling seems to be concerned solely with the EEA Court's incompatibility with the Treaties, but it contains another noteworthy development, explanation of which will be undertaken by comparing the Court's words with its prior jurisprudence concerning the position of 'mixed' international agreements in the Community legal order.⁹⁴

Our starting point is *Haegeman*, the first ruling in which the Court addressed the position of international agreements in the Community legal order: the Agreement had been concluded by the Council under Articles 228 and 238 EEC. It was therefore, as far as the Community was concerned, an act of a Community institution in the sense of Article 177(1)(b) EEC. From the agreement's entry into force, its provisions formed an integral part of Community law. Within the framework of this law, the Court accordingly had interpretative jurisdiction.⁹⁵

⁹³ Recital 37, emphasis added.

⁹⁴ The following cases seem particularly relevant: Case 181/73, *Haegeman v. Belgium*, [1974] ECR 449; the Court's jurisprudence concerning the Association Agreement with Turkey: Case 12/86, *Demirel v. Stadt Schwäbisch Gmünd*, [1987] ECR 3719, Case 30/88, *Greece v. Commission [Re Aid to Turkey]*, 2 CMLR (1991) 169, not yet reported, and Case C-192/89, *Sevince v. Staatssecretaris van Justitie*, 15 *EuZW* (1990) 479, not yet reported; Opinions 1/76 [*European Laying-up Fund for Inland Waterways*], *supra* note 70, and 1/78 [*International Agreement on Natural Rubber*], *supra* note 53; Ruling 1/78 EAEC [*Physical Protection of Nuclear Materials, Facilities and Transports*], [1978] ECR 2151.

⁹⁵ *Haegeman*, recitals 3-6. The Court's *dictum* (in recital 5) that international agreements formed an integral part of Community law was limited by its second statement, according to which the Court's interpretative jurisdiction could only reach as far as the Community competences themselves (Pescatore, 'External Relations in the Case-law of the European Court of Justice', 16 *CML Rev.* (1979) 615, at 633). This interpretation remained state of the art until after *Demirel* (Vedder in E.

The *Haegeman* formula can be seen as representing an 'earlier' period of the Court's jurisprudence⁹⁶ in which it seems to have pursued a double objective. On the one hand, the binding force of 'mixed' agreements in the Community legal order was limited to the Community's treaty-making power. On the other, the use of 'mixed' agreements was curtailed, the extent of Community and Member State competences being, on every occasion, precisely delimited.⁹⁷

After *Opinion 1/78* had brought a shift in the Court's approach towards 'mixity',⁹⁸ the jurisprudential development at the heart of our analysis was initiated by the Court in *Demirel*.⁹⁹ First, the Court restated *Haegeman*:

It should first be pointed out that, ... an agreement concluded by the Council under Articles 228 and 238 of the Treaty is, as far as the Community is concerned, an act of one of the institutions of the Community within the meaning of Article 177(1)(b), and, as from its entry into force, the provisions of such an agreement form an integral part of the Community legal system; within the framework of that system, the Court has jurisdiction to give preliminary rulings concerning the interpretation of such an agreement.¹⁰⁰

But the Court finally avoided the pending 'mixity' issue by interpreting Article 238 EEC as necessarily empowering the Community to enter into international commitments in all fields covered by the Treaty.¹⁰¹ It was therefore immaterial that the implementing powers still lay with the Member States.¹⁰²

The next two steps were taken in *Re Aid to Turkey* and *Sevince*.¹⁰³ The first is that the Court extended the *Haegeman* formula to the acts of organs¹⁰⁴ instituted by such

Grabitz, *supra* note 52, at paragraph 34).

96 The 'turning-point' in the Court's approach seems to have come with *Opinion 1/78*, *supra* note 53, *infra* note 100 and *Ruling 1/78 EAEC*, *supra* note 95, *infra* note 113.

97 In *Opinion 1/76*, *supra* note 70, the Member States' participation in the Agreement was found compatible with the Treaty 'solely' for the purpose of amending Treaties concluded with third countries prior to the EEC Treaty (recital 7). In *Opinion 1/78*, *supra* note 53, the Court made the 'communautaire' or 'mixed' nature of the agreement dependent on the budgetary dispositions taken for its implementation by the Community or the Member States (recital 60).

98 The Council and some Member States had raised the question whether the Court, in a procedure under the second subparagraph of Art. 228(1) EEC, was even competent to address the 'mixity'-issue. The Court seems to have responded in two ways. First, quoting all previous Opinions, as well as *Ruling 1/78 EAEC*, it held that it was possible under Art. 228 EEC to deal with 'all' questions concerning the envisaged agreement's compatibility with the Treaty (recital 30). The division of competences therefore was within the Court's reach. Second, the ECJ found that the whole agreement (with the exception of its financial provisions, see previous note) fell under Art. 113 EEC, various dispositions beyond the Community's competence being 'of an altogether subsidiary or ancillary nature' (recital 56). This seems to have been the first hint in the Court's jurisprudence towards the absorption of Member State competences *via* international agreements.

99 *Supra* note 95. As in *Opinion 1/78*, this came as a response to the Member States questioning its interpretative jurisdiction (recital 6).

100 *Demirel*, recital 7.

101 *Demirel*, recital 9. We shall return to this statement's ambiguities in IV.C.2. below.

102 Recital 11, citing *Kupferberg*, *supra* note 23.

103 *Supra* note 95.

agreements, first in an area clearly covered by Community competences, then in matters arguably exceeding their scope.¹⁰⁵ It also held that provisions contained in such acts could create direct effects in the Community legal order.¹⁰⁶

The second and more hidden development lies in the tightening of the *Haegeman* formula: in *Re Aid to Turkey*, the Court omitted the qualification that the international agreement was only part of the Community legal order 'as far as the Community was concerned',¹⁰⁷ in *Sevince*, it deleted the restriction of the Court's jurisdiction to 'the framework of [the Community's legal] system'.¹⁰⁸ From *Demirel* to *Sevince*, the Court extended the Community's legal order, as well as its own interpretative latitude, to all fields covered by 'mixed' agreements.

If, according to that jurisprudence, the whole 'mixed' agreement became part of Community law, the question was bound to arise whether some 'reverse parallelism', in the *ERTA*¹⁰⁹ sense, would attribute to the Community the implementing powers corresponding to the provisions absorbed. Two outcomes were envisageable: either some sort of 'implied power' had to be assumed,¹¹⁰ or another solution had to be found which could avoid that result. The Court had opted for the first alternative at least once in its earlier jurisprudence.¹¹¹ It is the second for which the Court has apparently now settled.

In Opinion 1/91, another modification of the *Haegeman-Demirel-Sevince* formula took place: the reference to Article 238 EEC disappeared.¹¹² The importance of this rephrasing is threefold: first, it establishes that the formula henceforth applies to all international agreements concluded by the Community.¹¹³ Second, in this

¹⁰⁴ *In casu* the ('mixed') Association Council EEC-Turkey.

¹⁰⁵ *Re Aid to Turkey* concerned a Decision granting aid to Turkey out of the Community Budget and addressing only the Community (recital 3), whereas *Sevince* concerned the Decision 1/80 already problematic in *Demirel* and directly addressed to the Member States (*Sevince*, recital 22).

¹⁰⁶ *Sevince*, recitals 14-26. The creation of individual rights by acts of organs of international agreements may also be deduced from Case C-18/90, *ONEM v. Bahia Kziber* of 31 January 1991, not yet published; Weber, *CML Rev.* (1991) 961, at 963.

¹⁰⁷ *Re Aid to Turkey*, recital 12.

¹⁰⁸ *Sevince*, recital 10 (although citing *Haegeman*).

¹⁰⁹ Case 22/70, *Commission v. Council [ERTA]*, [1972] ECR 263. See *infra* IV.C.2.

¹¹⁰ See *infra* IV.C.2.

¹¹¹ Belgium had raised a corresponding question in Ruling 1/78 EAEC, *supra* note 95. The Court's answer was straightforward. As the Convention's implementation would entail close cooperation between Community and Member States, '[t]he relevant provisions of the Treaty, together with the provisions of the Convention itself, which, once it has been concluded by the Community, will form an integral part of Community law, will provide an appropriate legal basis for the necessary implementing measures.' (recital 36). For a slightly different interpretation of this *Ruling*, see H. Rasmussen, *On Law and Policy in the European Court of Justice: a comparative study in judicial policy-making* (1986) 347-349. Indirectly, the same conclusion can be drawn from *Kziber*, *supra* note 106; see Neuwahl, 'Social Security under the EEC-Morocco Cooperation Agreement', 16 *ELR* (1991) 326, at 333.

¹¹² Recital 37, *supra* note 93.

¹¹³ This result stems directly from Art. 228 EEC as interpreted by the Court.

setting Article 228 EEC covers 'communautaire' and 'mixed' agreements alike, confirming both types' absorption by the Community legal order. Third, and most important, the problem of implementation is solved: under *Kupferberg*,¹¹⁴ it results from the binding force of international agreements being part of the Community legal order that the Member States, by respecting commitments arising from such agreements, fulfill an obligation towards the Community under Article 228(2) EEC. This obligation can be enforced *via* the ECJ, under preliminary ruling procedures¹¹⁵ or in direct actions,¹¹⁶ whose decisions the Member States have to obey.

The direct consequence, in Opinion 1/91, of the binding force of international agreements as now defined by the Court is also far-reaching: as under international law, the Court itself is bound by the Agreement, it can be compelled to file a request for amending its Statute, under Article 188(2) EEC, although the Treaty leaves this decision to the Court's discretion.¹¹⁷ Article 228 EEC seems therefore capable of superseding other dispositions of the EC Treaties.¹¹⁸

¹¹⁴ Recitals 11-13, *supra* note 23.

¹¹⁵ Preliminary rulings may have a competence-limiting function. On the one hand, it results from *Sevince* that not only provisions of international agreements, but also acts of their organs are capable of creating direct effects which national courts must protect. On the other, the Court's recent ruling in Joined Cases C-6 and 9/90, *Franovich, Bonifaci et al. v. Italy* of 19 November 1991, 24 *EuZW* (1991) 758 establishes that Member States incur non-contractual liability for failure to implement a measure (*in casu*, a Directive) which, once implemented, would have created individual rights, but could not confer those rights in the absence of implementation because of the Member States' discretion. Should the Court, in future jurisprudence, extend this principle to international obligations concerning the Community or its Member States, the practical difference, from the Member States' point of view, between 'communautaire' and 'mixed' agreements would have vanished. Either provisions of the agreement (or acts of its organs) were given direct effects, or the Member States would incur liability for having jeopardized the attainment of these effects through failure to exercise their discretion.

¹¹⁶ Both terms are used by the Court in recital 39. As 'direct actions' may mean procedures under Art. 169 EEC just as well as procedures under Arts. 173 or 175, the Court reserved the possibility of further jurisprudential developments regarding the scope of the EC institutions' obligations under international agreements. This could especially entail a competence-expanding use of Art. 235 EEC for implementing purposes.

¹¹⁷ Recitals 66-68. The intervention right granted to the EFTA countries in proceedings pending before the ECJ was declared compatible with Art. 188(2) EEC. Under Arts. 20 and 37 of the ECJ's Statute, this right is limited to certain 'privileged applicants'. Art. 188 permits the amendment of these parts of the Statute, but establishes a special procedure, initiated at the ECJ's discretionary proposal. The EEA's binding force therefore seems to result in the Court's obligation to request the necessary amendment of its Statute.

¹¹⁸ The Court was probably unaware of the problem. The Commission and Council curtailing the Court's discretion by concluding an international agreement in the negotiation and drafting of which the Court was not necessarily involved, seems contrary to spirit and wording of Art. 188 EEC. This difficulty can only be solved if recourse is had to a distinction between 'higher' and 'lower' primary Community law: if Art. 228(2) EEC was such a 'higher' norm, it would, in case of conflict, prevail.

III. *Intermezzo* – the Renegotiation

Opinion 1/91 had been a bitter pill, but after initial dismay, the Parties renegotiated. The EEA Court's substitution by some other judicial mechanism was a delicate matter.¹¹⁹ After tortuous negotiations,¹²⁰ a second compromise was reached:

The EEA Court is replaced by an EFTA Court¹²¹ competent for the dispute-settlement between EFTA countries and the revision of ESA's decisions in competition matters.

Legal homogeneity is explicitly included into the Agreement's objectives, although in a modulated form,¹²² and a special 'double-track' procedure for its implementation foreseen. Under Article 105 EEA,¹²³ the Joint Committee has to keep the jurisprudential evolution of ECJ and EFTA Court under constant review and, in case of divergent developments, 'act'¹²⁴ so as to preserve homogeneity.¹²⁵ If this is of no avail, the dispute-settlement procedure contained in Article 111 EEA may apply:

The Community or an EFTA State may bring any dispute concerning the Agreement's interpretation or application before the Joint Committee. If the dispute concerns EEA provisions identical in substance to corresponding EC rules, the Contracting Parties to the dispute may agree to request the ECJ to give a binding interpretation of these dispositions¹²⁶ (paragraph 3). If the scope and duration of safeguard measures or the proportionality of rebalancing measures are at stake, any Contracting Party may submit the dispute to binding arbitration. No question

¹¹⁹ See, e.g., 'EC-EFTA Meeting Inconclusive on EEA Legal Objection', *The Reuter Library Report*, January 1992; 'EC-EFTA in Crucial Negotiations to Save Market Deal', *Reuters BC cycle*, 26 January 1992. The Commission insisted on submitting the whole EEA to the ECJ's exclusive jurisdiction (*supra* II.B.2.). EFTA feared foreign judges.

¹²⁰ EFTA made concessions in the area of competition policy (see Goldsmith, 'EFTA is Said to Offer Compromise with EC', *The International Herald Tribune*, 25 January 1992; 'EC, EFTA Struggle to Save Joint Market', *The Reuter Library Report*, 27 January 1992. The Council extended the Commission's negotiating flexibility (see, e.g., McEvoy, 'Solution in Sight to EC-EFTA Market Impasse', *The Reuter Library Report*, 30 January 1992; Goldsmith, 'EC Ready to Ease Way for 19-Nation Trade Zone', *The International Herald Tribune*, 31 January 1992; 'EC Agrees to be Flexible in Talks with EFTA', *Reuters, BC cycle*, 3 February 1992.

¹²¹ Art. 108(2) EEA. See the contribution by Sevon, *this issue*, at 329.

¹²² Compare the Preamble EEA, recital 15, under which the CPs' objective is '[t]o arrive at and maintain a uniform interpretation and application' of the EEA, to Art. 105(1) EEA ('as uniform an interpretation as possible').

¹²³ This is the main disposition of the new Section 1, 'Homogeneity' (Arts. 105-107 EEA), in the Agreement's institutional dispositions. Art. 106 EEA establishes a mechanism for the exchange of judicial decisions, Art. 107 EEA opens to EFTA courts a binding preliminary-ruling procedure.

¹²⁴ Under Art. 93(2) EEA, the Joint Committee's decisions are taken by agreement between the Community and the EFTA States.

¹²⁵ An agreed *Procès-verbal* clarifies that the Joint Committee's decisions under this provision could never affect the ECJ's jurisprudence.

¹²⁶ If the CPs fail to do so or cannot otherwise settle the dispute, any CP may adopt safeguard measures or provisionally suspend application of parts of the Agreement.

involving interpretation of an EEA provision identical in substance to EC rules may be dealt with in this procedure (paragraph 4).

Finally, Article 56 EEA contains the distribution of competences between ESA and Commission in the area of competition policy.¹²⁷ 'Pure' EFTA cases belong to ESA, 'pure' EC cases (Articles 85 and 86 EEC) to the Commission. The cases affecting trade between CPs are shared. The Commission has competence in all cases affecting trade between EC Member States,¹²⁸ as well as in some situations involving one or more EFTA countries and one EC Member State; the remaining cases belong to ESA.

The Commission had not intended a second delay,¹²⁹ but the European Parliament, 'regretting' the limited scope of the Commission's earlier request,¹³⁰ battled for resubmission.¹³¹ The Commission returned a limited request¹³² to the Court. Limited was the Court's answer.

IV. Opinion 1/92 – the Final Curtain

In the remainder of this article, I shall concentrate upon the confirmation, modification or evolution, in Opinion 1/92, of the principles developed by the Court in Opinion 1/91.

A. The Consequences of Divergent Objectives

1. The Court (recitals 2, 17-29)

As the Court had held in its prior Opinion, the divergences in aims and context between EEA and Community law stood in the way of 'legal homogeneity'.¹³³ Since

¹²⁷ Arts. 53 and 54 EEA, though identical in substance to Arts. 85 and 86 EEC, extend the latter's *champ d'application* to restrictions etc. of competition or abuses of dominant positions within the territory covered by the Agreement (or a substantial part thereof), if these affect trade between Contracting Parties.

¹²⁸ Art. 56(1)(c) EEA contains the only important textual alteration between Draft EEA and EEA and seems to reflect the ECJ's 'warning-signal' (*supra* note 21) in Opinion 1/91 as well as EFTA's major concession (*supra* note 122). ESA only has jurisdiction if the Commission's 'Notice on minor restrictions to competition', OJ C 231/2, 9 September 1986, applies (see Art. 56(3) EEA).

¹²⁹ See 'EC Commission not to refer EFTA Deal back to Court', *Reuters, BC cycle*, 11 February 1992.

¹³⁰ See Opinion 1/92, at 20; 'EP: President Klepsch forwards EEA observations of the Committee of Legal Affairs to the Court of Justice', *Agence Europe*, 27 March 1992.

¹³¹ It first threatened to withhold assent to the Agreement's conclusion (see Brock, 'EC and EFTA Salvage Single-market Deal', *The Times*, 15 February 1992; 'EEC/EFTA: European Parliament to Veto EEA?', *European Report*, No. 1744, 15 February 1992 at 6), then apparently addressed the ECJ itself (see Meade, 'Defiant Tories go to Court over EEA', *The Press Association Newsfile*, 16 February 1992). Finally, it was granted leave to intervene in the second proceedings.

¹³² Restricted to the judicial mechanism and the competition rules.

¹³³ The Court seems to have attributed the same meaning to this term in both Opinions, despite its

these divergences remained, the question was whether the new dispute-settlement procedure contained in Articles 105 and 111 EEA was bound to raise objections similar to those expressed in Opinion 1/91.

If Article 105 EEA empowered the Joint Committee to disregard the binding nature of the ECJ's case-law, this power would adversely affect the Community legal order, respect for which must be ensured by the ECJ under Article 164 EEC. As the principle enshrined in the *Procès-verbal agréé*¹³⁴ however constituted an essential safeguard, indispensable for this order's autonomy, Article 105 EEA was compatible with Community law only if that principle was laid down in a form 'binding on the Contracting Parties'.¹³⁵

The same problem arose with regard to the dispute-settlement procedure contained in Article 111 EEA, but as Article 105(3) EEA established a link between the two procedures, these had to be interpreted 'systematically and consistently', which necessarily implied that the principle contained in the *Procès-verbal agréé ad Article 105 EEA* had to apply to both Articles.¹³⁶ As this principle was binding on the CPs, the powers conferred upon the Joint Committee by Article 111 EEA would not endanger the EC's autonomy.

2. Divergence maintained, homogeneity created

On the one hand, because of the EEA's more restricted aspirations, the Joint Committee's decisions should not be allowed to jeopardize the Community's pursuance of its own more far-reaching objectives.¹³⁷ This meant preventing the Parties from 'overruling' the ECJ's Community related jurisprudence. On the other hand, even if these decisions took account of the EEA's inherent limitations, they should not compromise the ECJ's interpretative function of EEA dispositions. This meant preventing the 'overruling' of the ECJ's EEA related jurisprudence. Moreover, for the sake of preserving the unity of the Community legal order, these considerations had to be realized for all Contracting Parties, although the Court's 'partner' was the Joint Committee.

There was only one solution: tying, in all cases involving the EEA's interpretation, first the Joint Committee, then the Contracting Parties (i.e. the Member States, although they had no direct influence on the Joint Committee's decisions¹³⁸) to the Court's jurisprudence. The Court's 'linkage' argument does not

remodeling by the CPs.

134 *Supra* note 127.

135 Recital 25; ruling, at 30.

136 Recital 28.

137 Apart from its frustration with the weakness of the EEA's dispositions on parliamentary cooperation, this seems to have been the gist of the Parliament's observations, see Opinion, at 20.

138 *Supra* note 126.

seem to be totally persuasive¹³⁹ and appears to be principally geared towards avoiding the result reached in Opinion 1/91,¹⁴⁰ but the Court's concern for the EC's autonomy should be approved.

The consequence of this 'tie-in' is striking: if the CPs can in no circumstance deviate from the Court's case-law, this creates, in the areas covered by the EEA, *de facto* legal homogeneity, regardless of the differing objectives. The EC may deepen its own integration, while at the same time concluding agreements as comprehensive as the EEA, but integration has to prevail. Should the CPs not respect the Court's jurisprudence, there will be no EEA.¹⁴¹ Contrary to Opinion 1/91, Opinion 1/92 achieves partial¹⁴² homogeneity in spite of divergent objectives.

B. Clarifications on Jurisdiction

1. The Court (recitals 19, 30-36 and 37)

The Court's interpretation of Articles 105 and 111 EEA was the only one consistent with its jurisdiction under Article 111(3) EEA. Although powers attributed to the Court by the Treaty could only be modified *via* Article 236 EEC, an international agreement concluded by the Community could confer jurisdiction on the Court, if this did not change the nature of the Court's function as conceived in the Treaty, which was to deliver binding decisions. It was in that context that Opinion 1/91 had accepted this proposition.

The procedure of Article 111(3) EEA was 'admittedly'¹⁴³ not to entrust the ECJ with the settlement of a dispute, which continued to be the Joint Committee's responsibility, but as the ECJ's interpretation would be binding on 'the Contracting Parties and the Joint Committee alike',¹⁴⁴ the Court's jurisdiction at the request of the CPs in dispute was compatible with the Treaty.

As the arbitration procedure was not available for the interpretation of EEA provisions identical to EC rules, it could not adversely affect the Community legal order. The Agreement no longer foresaw an EEA Court and the EFTA Court would exercise its jurisdiction only within EFTA.¹⁴⁵

¹³⁹ Arts. 105 and 111 EEA were only unilaterally 'linked', in the sense that failure to attain homogeneity *via* Art. 105 could lead to interpretation by the ECJ under Art. 111(3). But this could have no influence on other cases in which the Joint Committee could adopt decisions under Art. 111 EEA.

¹⁴⁰ Opinion 1/92 is the first instance in which, under Art. 228 EEC, an envisaged agreement was held 'conditionally compatible' with the Treaty.

¹⁴¹ Through the adoption of safeguards or the Agreement's suspension, *supra* note 128.

¹⁴² *Supra* note 122.

¹⁴³ Recital 34.

¹⁴⁴ Recital 35.

¹⁴⁵ Recital 19. As, in the area of competition policy, *supra* text to notes 127-128, the EFTA Court is competent to hear proceedings concerning individual Member States, the Court seems to have

meant the preservation of Community competences.

2. *Extension and restriction*

The Court's justification of its jurisdiction, apparently restating Opinion 1/91,¹⁴⁶ alters the scope of its earlier proposition. The EEA's interpretation under Article 111(3) EEA may in the Court's reading be binding *erga omnes*,¹⁴⁷ but the 'linkage' between Articles 105 and 111 EEA at least establishes that all CPs have *locus standi*.¹⁴⁸

This jurisdiction's legal basis is not defined. Article 238 EEC¹⁴⁹ is not quoted by the Court in this context in either Opinion 1/91 or 1/92. Article 181 EEC¹⁵⁰ seems not to be applicable either, probably because it refers to 'arbitration'.¹⁵¹ In the light of its analysis in Opinion 1/91¹⁵² and the Court's comment upon Article 111(3) EEA's binding force,¹⁵³ the Court may have envisaged Article 228 EEC,¹⁵⁴ possibly confirming our hint at this Article's 'higher' position.¹⁵⁵

The Court's jurisdiction, extendible as it now seems, has however been limited *ratione materiae*. Gone are the references to Articles 164 and 219 EEC¹⁵⁶ and the threat of their far-reaching consequences. Besides the ECJ, the establishment of other courts is possible, as long as they do not reach the 'hard-core' of Community law.¹⁵⁷

¹⁴⁶ *Supra* note 63. In Opinion 1/91, this statement was only justified as far as it concerned EFTA countries.

¹⁴⁷ *Supra* note 144. As such a binding force does not exist even under Art. 177 EEC, provision which might have served as the Court's model, this remark should not be understood too technically.

¹⁴⁸ The Court gave full meaning to 'the CPs to the dispute' in Art. 111(3) (i.e., also the Community Member States), although the procedure could be initiated only by the Community (or an EFTA country) and the Joint Committee's decisions only involved the Community, *supra* note 126.

¹⁴⁹ Art. 238 EEC refers to 'special procedures', and could therefore serve as a legal basis, but also explicitly states that amendments to the Treaty induced by association agreements necessitate recourse to Art. 236 EEC.

¹⁵⁰ For which I have pleaded concerning the first Opinion, *supra* notes 63-64.

¹⁵¹ 'Admittedly' (*supra* note 143), Art. 111(3) EEA institutes no dispute-settlement mechanism. This could be read as implying an ECJ 'political question-doctrine', under which the Court would refrain from direct intervention in disputes involving Member and EFTA States' governments.

¹⁵² *Supra* part II.C.

¹⁵³ *Supra* notes 144 and 147. This remark could be understood as follows: The Joint Committee is bound by rulings it had requested. So are the 'Parties to the dispute'. The remaining Member States could be bound *via* Art. 228(2) EEC (*supra* part II.C.2., especially *Kupferberg*).

¹⁵⁴ The Court's distinction, in recital 32, between modification of powers and conferral of new powers is not totally convincing, as the Treaty contains no general interpretative jurisdiction at the request of states or institutions. In this respect, the EEA modifies the Treaty's judicial structure. The same is true about the *e contrario* argument in Opinion 1/91, *supra* note 63. The Court sanctioning every new head of jurisdiction, provided this leads to binding decisions, is too far-reaching a reading to be proposed absent further judicial confirmation.

¹⁵⁵ *Supra* note 118.

¹⁵⁶ *Supra* II.C.2.

¹⁵⁷ In the assessment of its own jurisdiction, the ECJ avoided the reference to EEA provisions 'identical in substance' to EC rules, contained in Art. 111(3), thereby confirming its general interpretative jurisdiction. The arbitration panel's interpretative exclusion was reduced to EEA provisions 'identical' to EC rules (Art. 111(4) EEA reads 'identical in substance'), which reduction is essential

C. Article 238 EEC and the Doctrine of ‘Implied Powers’

1. *Roma locuta* (recitals 38-42)

Concerning Article 56 EEA,¹⁵⁸ it followed from the Court’s case-law¹⁵⁹ that the Community’s authority to enter into international agreements arose not only from express attribution by the Treaty, but also from other Treaty provisions and measures taken pursuant to these provisions by the institutions. The Community was therefore empowered, under the EEC competition rules and measures implementing those rules, to conclude international agreements in this field.

[T]hat power necessarily implies that the *Community* may *accept* rules made by virtue of an agreement as to the *sharing* of the respective competences of the Contracting Parties in the field of competition, provided that those rules do not change the *nature of the powers of the Community and of its institutions* as conceived in the Treaty.¹⁶⁰

Article 56 EEA was therefore compatible with Community law.

2. *Demirel à l’envers*

The doctrine of ‘implied powers’¹⁶¹ in the Community’s external relations, created progressively by the Court in *ERTA*, *Kramer* and Opinion 1/76,¹⁶² states that in the absence of express external powers (Article 113 or Article 238 EEC¹⁶³), the Community’s authority to enter into international agreements may flow implicitly from other Treaty provisions and measures adopted on their basis by the Community institutions.

[W]henver Community law has *created* for the institutions of the Community *powers within its internal system* for attaining a specific objective, the Community has authority to

for a panel’s efficiency, as even the ‘factual assessment’ of a rebalancing measure’s proportionality contains interpretation. Concerning the EFTA Court, see *supra* note 145.

¹⁵⁸ *Supra* text to notes 127-128.

¹⁵⁹ Recital 39, citing *ERTA*, *supra* note 109, Joined Cases 3, 4 and 6/76, *Cornelis Kramer et al. [Kramer]*, [1977] ECR 741 and recital 3 of Opinion 1/76, *supra* note 70.

¹⁶⁰ Recital 41, emphasis added.

¹⁶¹ See in particular Tizzano, ‘The Powers of the Community’, in *Thirty Years of Community Law, European Perspectives* (1983) 43, at 47-49; Kovar, ‘Les compétences implicites: jurisprudence de la Cour et pratique communautaire’, in P. Demaret (ed.), *Relations extérieures de la Communauté européenne et marché intérieur: aspects juridiques et fonctionnels* (1986) 15; Lenaerts, ‘Les répercussions des compétences de la Communauté européenne sur les compétences externes des Etats membres et la question de “preemption”’, *id.* at 37; see also L.J. Constantinesco, ‘Note *ad ERTA*’, *RTDE* (1971) 796; Tomuschat, ‘Note *ad Kramer*’, 12 *EuR* (1977) 157; Weis, ‘Note *ad Opinion 1/76*’ (*supra* note 77); Groux, ‘Le parallélisme des compétences internes et externes de la Communauté économique européenne’, 1 *CDE* (1978) 3; Hardy, ‘Opinion 1/76 of the European Court of Justice – The Rhine Case and the Treaty-Making Powers of the Community’, 14 *CML Rev.* (1977) 561.

¹⁶² *Supra* note 159.

¹⁶³ *ERTA*, recital 16.

enter into the international commitments *necessary for the attainment of that objective* even in the absence of an *express provision* in that connection.¹⁶⁴

The doctrine's applicability therefore depends on two conditions: there has to be an internal competence covering the envisaged agreement,¹⁶⁵ and international action has to be necessary¹⁶⁶ for the attainment of an internal Community *objective*.¹⁶⁷ If both conditions are fulfilled, the external competence, once exercised, is exclusive.¹⁶⁸

Applying this doctrine to the EEA's division of competences in competition matters is problematic. First, the Community's internal competence does not cover the powers envisaged by the Agreement¹⁶⁹ and cannot be extended *via* 'necessity' or 'efficiency' arguments¹⁷⁰ because the Community's internal competition policy can be implemented without international agreements.¹⁷¹ Second, according to the ECJ's settled case-law,¹⁷² the Community's internal jurisdiction in competition matters is necessarily concurrent to that of the Member States.

Finally, the EEA is based on an explicit Community competence, Article 238 EEC. In this respect, the ECJ's prior decision, *Demirel*,¹⁷³ attains specific significance.¹⁷⁴

¹⁶⁴ Opinion 1/76, recital 3, emphasis added.

¹⁶⁵ The Court's extension, in *Kramer* (recitals 30-33), of the Community's regulatory conservation power to the high seas is in my view no argument to the contrary. It was justified by being the 'only way' of attaining the internal Community objective 'both effectively and equitably' (*id.*).

¹⁶⁶ In Opinion 1/76, *supra* note 164, the agreement's 'necessity' for the common transport policy was unquestionable: Navigation on the Rhine could only be regulated efficiently if Switzerland was Party, *supra* note 70, recital 2.

¹⁶⁷ Opinion 1/76 did not use 'objective' in its technical sense (Arts. 2 and 3 EEC), thereby permitting recourse to 'implied powers' in every imaginable situation. On the contrary, until Opinion 1/92, the Court always established a concrete legal basis for 'implied powers'.

¹⁶⁸ *ERTA*, recital 31; Opinion 1/76, recital 7.

¹⁶⁹ *Supra* note 127. The Commission had recognized that fact in its pleadings concerning Art. 53 EEA (Opinion, at 17), but did not address the issue with regard to monopoly control, although Art. 54 EEA could give rise to an extensive transfer of powers from the Member States to the Community.

¹⁷⁰ As in *Kramer*, *supra* note 165.

¹⁷¹ In this respect, Opinion 1/92 can also be distinguished from Ruling 1/78 EAEC, *supra* note 111, where the fact that the envisaged system 'could only function in an effective manner, within the ambit of Community law' (recital 32) led the Court to the assumption of 'implied powers' for the Convention's implementation.

¹⁷² See Case 14/68, *Walt Wilhelm v. Bundeskartellamt*, [1969] ECR 1, recitals 3-4 and 9, under which, as long as the Council had not authoritatively established the distinction between Community and national competition rules under Art. 87(2)(e) EEC, both rules could be applied to one factual situation. For a more recent restatement, see Joined Cases 253/78 and 1-3/79, *Procureur de la République v. Giry and Guerlain S.A.*, [1980] ECR 2327.

¹⁷³ *Supra* text to notes 99-101.

¹⁷⁴ Advocate General Darmon had directly addressed the possibility of justifying Community competences *via* 'implied powers', but had rejected that solution as unnecessary because the Turkey-Agreement was specifically geared towards future accession to the EC (an explicit reference thereto being contained in its Preamble), which justified granting the Community 'the most

[S]ince the agreement in question is [1.] an association agreement [2.] creating special, privileged links with a non-member country, [3.] which must, at least to a certain extent, take part in the Community system, *Article 238 must necessarily empower the Community to guarantee commitments ... in all fields covered by the Treaty.*¹⁷⁵

The *Demirel* criteria being fulfilled in the case of the EEA, Article 238 EEC should have been a sufficient basis for Article 56 EEA, but essential factors distinguish Opinion 1/92 from *Demirel*. In *Demirel*, through the Agreement's conclusion by the Community, some Member State competences had become an integral part of the Community legal order; this was recognized by the ECJ *ex post facto*, in an area where implementation still lay with the Member States. In Opinion 1/92, the Court's reasoning sounds like an *ex ante* justification for the attribution, *via* international agreement, of regulatory powers to an institution whose powers stem from the yet uncompleted Agreement.

Two explanations are possible. Both confirm our reading of Opinion 1/91:¹⁷⁶ on the one hand, the Court may have revolutionized the doctrine of 'implied powers' for the sake of 'expansion'.¹⁷⁷ This hypothesis must be left to future judicial confirmation.

Opinion 1/92, on the other hand, may have modified the doctrine of 'implied powers' in a more limited way. Clarifying its scope,¹⁷⁸ the Court may have relied on the doctrine's second component, the 'necessary and proper' clause,¹⁷⁹ for delegating, to the Commission, implementing powers¹⁸⁰ necessary for the EEA's realization.¹⁸¹ This reading can be substantiated textually: the Community is empowered to accept the sharing¹⁸² of competences between CPs, provided the

extensive powers' (*id.* 3737, at 3741). This argumentation is inapplicable to the EEA, as recital 14 of its Preamble merely states that the EEA in no way prejudices future accession.

¹⁷⁵ *Demirel*, recital 9 (emphasis and annotation). I read this recital as an 'answer' by the Court to AG Darmon. The Court deduced therefrom that, given the internal Community competence regarding freedom of movement of (Community) workers, Member States could no longer interfere with the competence attributed to the Community by the Agreement regarding Turkish workers.

¹⁷⁶ *Supra* II.C.2.

¹⁷⁷ In the sense of Weiler, 'The Transformation of Europe', 100 *Yale L.J.* (1991) 2403, at 2442.

¹⁷⁸ Opinion 1/92 represents the first use of the doctrine outside a 'common policy'.

¹⁷⁹ Accepted for the Community in Case 8/55, *Fédération Charbonnière de Belgique v. High Authority*, [1954-56] ECR 245, at 299.

¹⁸⁰ *Durchführungskompetenzen*. Admittedly, these powers are far-reaching. In addition to the competition cases, the dispositions on state-aids (Arts. 91-92 EEA, not submitted to the Court's appreciation), extending Arts. 92-93 EEC to 'trade between Contracting Parties', empower the Commission to take binding decisions against Member States in cases where trade *between Member States* would not be affected.

¹⁸¹ The EEA's competition system would clearly remain lacunar absent inclusion of 'trans-border-cases' (*supra* notes 127 and 180).

¹⁸² Art. 87(2)(e) EEC, *supra* note 172 could even confirm this theory under the classical 'implied powers' doctrine. If the Community, internally, is capable of 'sharing' existing competences, it must be capable thereof, and to the same extent, externally.

nature of the powers of the Community (concurrent) and of its institutions (*in casu*, Commission – implementing, and ECJ – supervising) remain unaffected.

V. Epilogue

This note has attempted, by giving an overview of the antecedents, negotiating history and successive structures of the EEA Agreement and exposing the technical intricacies of the two Opinions related to this Agreement, to show the general importance of these Opinions for the development of the Community legal order.

In the first place, the attainment of European Union may or may not have been established as a Community obligation, but its importance as a Community objective has been affirmed. This does not prevent the Community from concluding comprehensive, legally binding international arrangements, but the Community's autonomy and originality must be guaranteed.

Secondly, the conflict between the Court of Justice's comprehensive jurisdiction inside the Community and the latter's participation in international judicial mechanisms has, after initial hesitations, been solved in a satisfactory manner. The ECJ is still competent for the interpretation of international agreements in their entirety, but this does not exclude jurisdiction by international tribunals, as long as the Community's legal 'hard core' – primary and secondary Community law and international dispositions identical to its substance – remains the Court's prerogative.

Finally, the Community has been attributed the indispensable instruments for becoming a powerful actor in the international arena. 'Mixture' as a distinct legal category has practically faded. Additionally, the Community has been empowered to accept implementing responsibilities exceeding its internal capacities, if these are necessary for the attainment of its international aspirations.

In some of these fields, 'higher' levels of primary Community law may be evolving, possibly laying the bases for a future *verfassungsrechtliche Grundordnung*. The 'Drama' of the EEA thus found a positive solution, at least for the Community. For EFTA countries, on the contrary, it painfully revealed the frustrating dichotomy between an important actor and a powerless audience, condemned to passivity.