# The Doctrine of Implied Powers in the Area of Treaty-Making: A Study of Decisions of the European Court of Justice

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## I. Introduction

The European Court of Justice's role in interpreting the Treaties which created the European Community has allowed it to clarify the division of powers between the Community and the Member States. Through its decision-making it has expanded the treaty-making authority of the EC far beyond the situations provided for by express grant of powers. This paper will explore the Court's development of the Community's treaty-making power through reliance on the doctrine of implied powers. The greater part of the study consists of an analysis of six cases in which the Court dealt with the power of the Community to negotiate and conclude international agreements. The sections which follow include observations on those six cases, a discussion of implied powers in United States law, and a conclusion in which decisions of the European Court of Justice, the United States Supreme Court, and the International and Permanent International Courts of Justice are compared. My aim has been to illuminate the actual standards applied by the European Court of Justice, with additional references to the affect of the Court's institutional structure on its decision-making and the differences between the Community and United States conceptions of implied power.

## II. The European Court of Justice

### 1. The ERTA Case: Commission v. Council, Case 22/70

#### a. Facts

The ERTA case grew out of an attempt by the Member States to conclude the European Road Transport Agreement, for which negotiations began in 1962. At the Council meeting of March 20, 1970 the attitude to be taken by the Member States in the negotiations was discussed. The Commission subsequently lodged an application for annulment of the Council deliberations with the Court, arguing that the power to conclude the Agreement rested with the Community, not the Member States. The Council stressed that the application was inadmissible since the March 20th discussions did not constitute an "act" open to review under Art 173. In dealing with this question the Court found it necessary to determine whether the power to conclude the agreement lay with the Community or the Member States. It concluded that the power was the Community's, but found that in this case the Member States would have to be allowed to act since negotiations over the Agreement had begun prior to the adoption of Council Regulation No. 543/69 which dealt with the subject-matter internally.

b. Advocate-General's Opinion

The opinion of Advocate-General Dutheillet de Lamothe contained a powerful warning to the Court regarding the EC's treaty-making authority. He asserted that should the Court recognize the Community's authority to negotiate and conclude the European Road Transport Agreement, it would conclude that EC authorities exercised not only expressly conferred powers, but also "those implied powers whereby the Supreme Court of the United States supplements the powers of the federal bodies in relation to those of the confederated States". The Advocate-General noted that a recognition of implied powers with regard to negotiations with third countries would far exceed the intentions of the framers and state signatories of the Treaty. He proposed to the Court a "relatively strict" interpretation in this sphere. According to Dutheillet de Lamothe, Community powers should be viewed as "conferred powers" (in French, competences d'attribution), which may be widely construed only when they are "the direct and necessary extension of powers relating to intra-Community questions". The Advocate-General also argued that the EC's treaty-making powers should not be widely construed,

since Article 235 existed in order to vest in the Community whatever powers it might need, making such a construction unnecessary. To summarize the content of the Advocate-General's argument, he concluded that implied powers are never acceptable in Community law, that wide interpretation is available only in relation to internal rather than external questions, and that the latter sort of extension can take place only when "direct and necessary".

c. Decision

Although the Court does not mention the term "implied powers" in the ERTA judgment its attitude towards the idea that such powers exist as a basis for concluding agreements with third states appears in the beginning of its decision. Without responding to the Council's argument that an express provision is necessary for a finding that EC powers exist, the Court concludes that "in the absence of specific provisions . . . one must turn to the general system of Community law". The Court proceeds by introducing two terms, first "capacity" and then "competence". Without defining these terms it concludes that Article 210, which states that the Community shall have "legal personality", "means that in its external relations the Community enjoys

the capacity to establish contractual links with third countries over the whole field of objectives defined in Part One of the Treaty". In regard to competence, the Court finds that the EC's authority to enter into international agreements, in any particular case, must be determined with regard to "the whole scheme of the Treaty no less than to its substantive provisions". It concludes that "Such authority arises not only from an express conferment by the Treaty . . . but may equally flow from other provisions of the Treaty and from measures adopted, within the framework of those provisions by the Community institutions".

d. Analysis

i. Advocate-General's Opinion

The Advocate-General's argument that Article 235 negated all necessity of relying on wide interpretation in the ERTA case could, in reality, be applied to all uses of wide interpretation to supplement Community powers and to all findings of implied powers as well, if there is actually a real difference between the two.

Antonio Tizzano, in his discussion of implied powers in Community law comes to a conclusion entirely opposite to the Advocate-General's view. According to Tizzano reliance on Article 235 and

analogous provisions (Art. 95 (1) ECSC and Art. 203 EAEC) is rendered necessary only when there is absolutely no possibility of granting powers to the institutions on the basis of express treaty provisions or by application of "all the principles developed . . . by the Court of Justice for reconstituting and defining the system." (30 years of Community Law, 1983, p. 49). Tizzano argues that any other finding would "formally devalue" the actions which have been taken by the Court regarding implied powers, and do away with all plausible explanations for the Court's continued vigorous use of the doctrine alongside wide reliance on Article 235.

Here one should note that at the time ERTA was decided, resort to Article 235 was extremely infrequent. The Advocate-General himself, after arguing that the Article made any use of wide interpretation unnecessary, admitted that its use was extremely difficult from a legal point of view, based on the provisions then in force. Thus, the question may have been resolved in the Court's eyes based on real problems involved in actual use of Article 235. Still, the issue must be reexamined in light of the Summit of Heads of State or Government held in Paris in 1972 (See Tizzano, supra, p. 51).

There the Member States expressed the opinion that it was "advisable to use as widely as possible all provisions of the Treaties, including Art. 235 . . ." Following this announcement, which was reinforced by endorsements of this position each time EC institutions were asked to produce programs of action in sectors which required recourse to Article 235, use of the article become widespread. The necessity argument can be answered, however, in a way consistent with Tizzano's view, if the phrase "and this Treaty has not provided necessary powers" (Article 235) is read as including both express and implied powers and if the latter are considered as having come into existence at the time the Treaty was concluded. Only in a case where neither express or implied powers exist should Article 235 be relied upon. Going one step further, if an implied power is "discovered" by the Court in an area which has earlier seen the use of Article 235, all future actions should be based on the implied power. However, the Court will not be able to find an implied power under these circumstances without concluding that the earlier use of Article 235 was unfounded, since the power in question did in fact exist in the Community, contrary to the requirements of Article 235.

ii. Court's Judgment

The first point to take note of regarding the Court's judgment is its interpretation of Article 210 which reads as follows:

Article 210 EEC

"The Community shall have legal personality."

The Court's interpretation of the article appears in recital 14 of ERTA:

Recital 14

"This provision, placed at the head of Part Six of the Treaty, devoted to 'General and Final Provisions', means that in its external relations the Community enjoys the capacity to establish contractual links with third countries over the whole field of objectives defined in Part One of the Treaty, which Part Six supplements".

It is difficult to imagine, from a literal reading of Article 210, how the Court made the jump from the wording of the article to the meaning they assign it. Recital 14 contains a clue that the Court itself was aware it was not intrepreting Article 210 strictly, but instead pinpointing a meaning not expressly set down in the measure. For rather than conclude that the article "creates" a Community capacity in international affairs, the Court concludes that Article 210 "means that in its

external relations the Community enjoys the capacity to" make international agreements.

A comparison of Article 6 ECSC with recital 14 of ERTA reveals the probable source of the Court's reading of Article 210 EEC. Article 6 ECSC is the "equivalent" provision of the European Coal and Steel Community Treaty and reads, in part, as follows:

> Article 6 ECSC
>
> "The Community shall have legal personality. In international relations, the Community shall enjoy the legal capacity it requires to perform its functions and attain its objectives . . ."

Thus, Article 6 ECSC begins with a sentence identical to the first sentence of Article 210 EEC, but it goes on to include a separate statement on the Community's legal capacity in international relations. An examination of this statement and a comparison of it to recital 14 of ERTA reveals a startling resemblance between the two. The key words in Article 6, "international relations", "legal capacity", and "objectives", have been transposed into recital 14 as "external relations", "capacity", and "objectives". Interestingly, Advocate-General Dutheillet de Lamothe seized upon the difference between Article 210 EEC and Article 6 ECSC as evidence that the authors of the

Rome Treaty intended to strictly limit the EC's authority in external matters to the cases laid down by the Treaty. The Court, however, blurs the distinction between the provisions by reading into Article 210 EEC the very terms it lacks when compared with Article 6 ECSC. By denying the Advocate-General's argument the Court takes a key step in creating the legal structure necessary to support powerful and varied actions by the Community in foreign affairs.

The Court seems not to rely on the intention of the drafters of the Treaty or of the Member States in its interpretation of Article 210 EEC, but on a method similar to the one later used in Continental Can (1973) E.C.R.215 Case 6/72. There the defendants argued that Article 86 had been wrongly interpreted by the Commission as providing a basis for merger control in the EEC. The ECSC Treaty, the defendants pointed out, expressly provided for such control, but no such express provision appeared in the EEC Treaty. The Court rejected comparison of the two treaties with the object of proving the framers intent as a method of interpretation. Instead it looked to "the spirit, general scheme and wording of Article 86, as well as to the system and objectives of the Treaty". Although the Court found

for the defendant, it upheld the Commission's extensive interpretation of Article 86. The Court's interpretation in both ERTA and Continental Can can be regarded as examples of wide interpretation. It would be valuable to consider whether this differs at all from the method involved in finding implied powers, a subject which will be taken up in the analysis of the Natural Rubber opinion. .

The Court's key statements on the aspect of competence, in which it identified implied Community powers to conclude the European Road Transport Agreement, are contained in recitals 16 through 22:

Recital 15

"To determine in a particular case the Community's authority to enter into international agreements, regard must be had to the whole scheme of the Treaty no less than to its substantive provisions".

Recital 16

"Such authority arises not only from an express conferment by the Treaty--as is the case with Articles 113 and 114 for tariff and trade agreements and with Article 238 for association agreements--but may equally flow from other provisions of the Treaty and from measures adopted, within the framework of those provisions, by the Community institutions".

Recital 17

"In particular, each time the Community, with a view to implementing a common policy envisaged by the Treaty, adopts provisions laying down common rules, whatever form these may take, the Member States no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules".

Recital 18

"As and when such common rules come into being, the Community alone is in a position to assume and carry out contractual obligations towards third countries affecting the whole sphere of application of the Community legal system".

Recital 19

"With regard to the implementation of the provisions of the Treaty the system of internal Community measures may not therefore be separated from that of external relations".

Recital 20

"Under Article 3(c), the adoption of a common policy in the sphere of transport is specially mentioned amongst the objectives of the Community".

Recital 21

"Under Article 5, the Member States are required on the one hand to take all appropriate measures to ensure fulfillment of the obligations arising out of the Treaty or resulting from action taken by the institutions and, on the other hand, to abstain from any measure which might jeopardize the attainment of the objectives of the Treaty".

Recital 22

"If these two provisions are read in conjunction, it follows that to the extent to which Community rules are promulgated for the attainment of the objectives of the Treaty, the Member States cannot, outside the framework of the Community institutions, assume obligations which might affect those rules or alter their scope".

These recitals are often analyzed as containing rules on the exclusivity of implied Community treaty-making power, but in fact the very basis for those powers is revealed these recitals themselves. The

analysis of this phenomenon, however, is complicated by the fact that not one, but three, separate rules can be identified. These appear in recitals 17, 18 and 22, and reflect variations on either the conditions under which a power to conclude international agreements will be found or the result of fulfillment of those conditions. The common feature of each recital lies in the fact that when its conditions are fulfilled the Member States are no longer capable of concluding a particular group of international agreements.

The first of these rules, which appears in recital 17, can be used as an example. There the Court concludes that "each time the Community, with a view to implementing a common policy envisaged by the Treaty, adopts provisions laying down common rules . . . the Member States no longer have the right . . . to undertake obligations with third countries which affect those rules". The key to conceptualizing this statement as a rule regarding powers, though it might seem at first to speak to exclusivity alone, is to look for its "mirror image". Its mirror image is based on the fact that in a system of government like the Community, where authority is divided between the Community's institutions and the Member States, the treaty-

making power must rest somewhere. Thus, the mirror image of recital 17 consists of the positive statement of Community treaty-making power which can be formulated based on the prohibitive statement of the recital itself.

If one applies the "mirror image" approach to recital 17 of ERTA the positive rule which results reads as follows:

> Rule 1
> When the EC adopts common rules in order to implement a common policy envisaged by the Treaty, it has the authority to undertake obligations with 3rd States which would affect those rules.

The second rule is located in recital 18 where it is presented, interestingly enough, in a positive statement rather than a negative one, making it unnecessary to apply the mirror image approach. Summarized in the same fashion as Rule 1, it reads:

> Rule 2
> When the EC adopts common rules in order to implement a common policy envisaged by the Treaty, it has the authority to assume and carry out obligations towards third states which would affect the whole sphere of application of the Community legal system.

Like the first rule, the third is based on a prohibition of Member State action, in this case stated in recital 22. Applying the "mirror image"

approach, and summarizing the rule, it would read as follows:

> Rule 3
> When the EC adopts common rules in order to attain the objectives of the Treaty, to the extent those rules are promulgated to reach such objectives, the EC has the authority to assume obligations towards third states which might affect those rules or alter their scope.

Support for the "mirror image" approach is found in two decisions of the Court. The first, Van Gend en Loos v. Nederlandse Administrative (1963) ECR 1 Case 26/62, concerned a tariff classification made under Dutch law which the plaintiff challenged as being contrary to Article 12 EEC. In a preliminary ruling under Article 177 the Court noted that "the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights . . ." In Costa v. ENEL (1964) ECR 585 Case 6/64, also an Article 177 case, the Court gave even more direct support to the "mirror image" approach. Here the Court examined the Italian government's contention that a national court which was obliged to apply national law could not avail itself of Article 177. In its answer the Court found:

> "By creating a Community of unlimited duration, having its own institutions, its own

> personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the states to the Community, the Member States have limited their sovereign rights . . ."

The key phrase here is "real powers stemming from a limitation of sovereignty".

J.A. Winter in his Annotation on Case 22/70 gives support to the "mirror image" approach. Winter first notes that the Court did not explicitly say that if certain conditions were met the Community would obtain treaty-making power. Instead, he argues, the Court took pains to point out only that the Member States no longer have the right to conclude international agreements when such conditions are met, and that the Community alone is in a position (rather than "has authority") to conclude them. Thus, according to Winter, one is:

> "tempted to conclude that the general formula concerning the loss of state power in the external field cannot simply be applied to the question of whether the Community has come into the possession of treaty-making powers . . . this would mean that the extinction of state authority in the external field would not automatically give rise to a Community authority to conclude international agreements".

In the end, Winter rejects this analysis with the observation that this line of thought, whatever its attractions, "leads to the wholly unacceptable conclusion that there may be occasions in which the treaty-making power is vested neither in the Member States, nor in the Community". Since a design that would deprive the Member States of power without allowing that power to be exercised by the Community could not be imputed to the Court, Winter concludes that an equivalent external power on the part of the EC must necessarily exist with regard to treaty-making.

Now that we have examined the technique of deriving the rules of ERTA from the "mirror image" approach, as well as case law and scholarly authority which lend support to the process, we can note that each of the three rules represents a different concept of EC treaty-making authority and that each, if applied, would lead to different results. Before comparing the rules, however, a preliminary question must be asked. Are these really rules of implied powers? Implied powers are usually viewed as powers which are not expressly granted by a constituting document, but which are necessary in order that those expressly granted be functional. Yet an

examination of the above rules nowhere reveals the term "necessity." This dilemma can be explained if the rules are looked at as providing for an "automatic" finding of necessity if their conditions are fulfilled.

The concept of automatic necessity has two important consequences. First, the Court frees itself from having to make an individual inquiry regarding the existence of necessity in every case where the Community might claim, or certain EC institutions might reject, treaty-making power based on internal competences. The second effect is related to the ongoing debate over whether necessity is a political concept leaving practically unlimited discretion to the competent institutions, or a legal principle that puts decision-making power in the hands of the Court, as described in Peter Bruckner's "Foreign affairs powers and policy in the Draft Treaty establishing the European Union" in Bieber, Jacque and Weiler (eds), An Ever Closer Union (1985).) Through its decision, the Court limited institutional discretion to decide the question of necessity. Once the conditions set up by the rules are fulfilled, the finding of an implied treaty-making power is automatic. The Council in particular, and the Member States, are forced to

accept EC treaty-making power. That power cannot be restored to the Member States by the institutions, as even the Council admitted in ERTA, where it stated that it had "no authority to 'restore' . . . a power conferred on the Community by Treaty" (p. 261). Remaining questions include whether these powers are exclusive and whether they can be delegated to the Member States, but first the similarities and differences between the three rules will be discussed.

The rules are similar in that each mentions the adoption of common rules by the EC as a condition for finding Community treaty-making power. This fact led to great curiosity following the decision as to whether common rules would always be required for a finding of implied treaty-making power. The controversy was cleared up to some extent in The Rhine Case , where the Court, after stating that a grant of internal power implied external power as well, concluded that: "This is particularly so in all cases in which internal power has already been used in order to adopt measures which come within the attainment of common policies. It is, however, not limited to that eventuality". The Rhine Case, however, did not clarify the issue entirely since in the situation envisaged there competence would not be exclusive.

The three rules differ in important ways as well, the most striking being Rule 1's reference to "common rules in order to implement a common policy", which can be compared with "common rules in order to attain the objectives of the Treaty" of Rule 3. Clearly, Rule 1 is narrower than Rule 3, but how much narrower is uncertain. "Common policy" is a term used in the Treaty to refer to three specific areas of Community action: the common commercial policy towards third countries, common agriculture policy, and common transport policy. Each of these is mentioned in Article 3 as an activity of the Community, and to each a subsequent section of the Treaty is devoted. Yet it is not uncommon for commentators to refer to areas other than these when discussing the Community's "common policies". Stein, Hay and Waelbroeck, for example, in their textbook "European Community Law and Institutions in Perspective" devote a chapter to "common policies" within which they discuss social, regional, industrial, transportation, energy, environmental, economic and monetary policies of the Community. Interestingly, they do not even mention the common agricultural policy or common commercial policy and they include a variety of subjects which are not referred to as "common policies" by the

Treaty. Articles 103 through 109 for example, which the authors refer to as being concerned with economic and monetary policy, mainly provide for a coordination of national powers, and by the authors' admission give Community institutions very few powers. Part of the confusion may result from the Treaty itself, which under Part 3, "Policy of the Community", refers only to the common commercial policy (Articles 110-116). The common agricultural policy (Arts. 38-47) and common transport policy (Articles 74-89) are found instead in Part 2, "Foundations of the Community".

No matter how one chooses to define "common policy", rules adopted "in order to attain objectives of the Treaty" must certainly be broader. Recital 14 of ERTA refers to Part One of the Treaty as laying down a "field of objectives". The preamble, as well, can be viewed as setting forth objectives, although the legal force of that section might be questioned. The extremely broad goals listed there like "economic and social progress" and "the constant improvement of . . . living and working conditions", which is actually described as "the essential objective" of the treaty-makers, cause one to hesitate before assuming that the Court meant to refer to so much.

Looking at Part One alone, however, reveals a host of possibilities. Article 3 of Part One mentions "the institution of a system ensuring that competition in the common market is not distorted" as an activity of the Community. As this is a Community objective, under Rule 3 of ERTA, agreements with third states could be concluded based on common rules adopted under Articles 85-95, which set up the system for Community regulation of competition. The approximation of laws "to the extent required for the proper functioning of the common market" is mentioned as a Community activity by Article 3 as well. Here again, agreements with third states could be signed, this time based on common rules adopted under Articles 100-102, titled "Approximation of Laws". One might even argue that all internal rules are adopted in order to meet Community objectives, directly, or indirectly, which would lead to quite an extensive treaty-making power indeed.

Rule 3's reference to the "objectives" of the Treaty calls to mind the description of capacity based on Article 210 in recital 14. It should be noted, however, that the two statements are not identical. Rule 3's definition of treaty-making power is not so broad as to merge with recital 14's

definition of capacity. The conclusion of agreements is not allowed whenever necessary to meet the objectives of the Community. Instead it is acceptable only when common rules to meet those objectives have been adopted. Thus, a situation where external powers would exist without matching internal powers is avoided. In fact, a rule allowing treaty-making based on Treaty objectives alone would not be a rule of implied powers under the usual meaning of the term, since underlying powers which require the implication of further, nonexpress powers, would not even exist. This possibility, which would be a reversal of the doctrine of parallelism, does not arise under any of the three ERTA rules since the adoption of common rules ensures that internal powers already exist. Thus the inclusion of the phrase "carry out" was unnecessary in Rules 1 and 3.

Rule 2 is the most problematic of the three rules since the meaning of obligations "which would affect the whole sphere of the Community legal system" is unclear. It seems to represent an intermediate position between Rules 1 and 3. Like Rule 1, it only takes effect in relation to common policies of the Community. But instead of supporting only those agreements which would affect

common internal rules which have already been adopted, it may have been meant to provide treaty-making powers in the whole "sphere" of a common policy, even in an area where internal rules have not yet adopted.

Another important difference exists in relation to which body has the ability to characterize the aim of common provisions under the various rules. In recital 17 the Court concludes that "each time the Community, with a view to implementing a common policy . . . adopts provisions . . . the Member States no longer have the right . . . to undertake obligations which affect those rules". In recital 22 the words "with a view to implementing a common policy" are replaced by "to the extent to which Community rules are promulgated for the attainment of the objectives of the Treaty". The first version represents a subjective test of intent. The phrase "with a view to . . ." calls for a judicial inquiry which is limited to discovering the goals which the institutions hoped to achieve through their legislation. The second version, in contrast, could be interpreted as either a subjective test, or as an objective test in which the Court itself will make the determination as to the true objective of internal rules. The latter possibility would

represent increased willingness on the part of the Court to monitor the legislative process, and if adopted in future cases would represent increased judicial activism.

We have already seen that Rule 3 is broader than Rules 1 and 2 in that the former refers to Treaty "objectives" while the latter mention common policies envisaged by the Treaty. This fact is reinforced by wording that appears at the end of each rule. In Rules 1 and 2 the Court concludes that the Member States no longer have the right to undertake obligations which affect those rules. Rule 3, however, forbids Member States obligations which might affect those rules or alter their scope. Thus, in Rule 3 it seems that absolute certainty of an effect on internal rules is not required to trigger a mirror image finding of implied powers.

When the ultimate holding of the Court is examined in ERTA it appears for an instant that the Court has made a complete turn-around in the final stages of its decision. For in the end, it allows the Member States to conclude the European Road Transport Agreement though it earlier found that power resided in the hands of the Community alone. Close examination of recitals 90 and 91, however,

shows that the Court did not retreat from its earlier analysis in the ultimate paragraphs. In recital 90 the Court found that "in carrying on the negotiations and concluding the agreement simultaneously in the manner decided on by the Council, the Member States acted, and continue to act, in the interest and on behalf of the Community . . ." It went on in recital 91 to find that "in deciding in these circumstances on joint action by the Member States, the Council has not failed in its obligations . . ." The words "in the manner decided on by the Council" and "in deciding . . . on joint action" make quite clear the Court's view that Member States' action was dependent upon authority delegated by the Council. Thus the determination as to the division of power set out earlier in the opinion is left in place despite the decision to allow the Member States' action to stand.

One particular problem which comes up under the analysis of ERTA presented so far simply cannot be ignored. It is possible that an agreement's effect on internal rules may lead to Community power to make a Treaty the purpose of which does not fall within the Community's objectives under the Treaty. One possibility would be for the Court to try and

read the Community's objectives broadly enough to cover a particular treaty, but it is easy enough to imagine that there might be occasions when an agreement would still be out of the Community's reach. A second possibility would be for the Court to insist on treaty amendment to enlarge the objectives set out for the Community there. For practical reasons this would be unworkable. Treaty amendment is a difficult process and the problems of reaching an agreement could make it effectively impossible to accomplish, thus creating the legal vacuum so essential to avoid. A third alternative would consist of "mixed agreements", in other words, the process by which Member States and the Community together negotiate and conclude an agreement with third countries. The Court could rule that where a particular agreement came within the Community's powers because it "would" or "might" affect internal rules, it would have to join with the Member States in order to act because the objectives of the agreement were not amongst the objectives of the EC. The problem with this approach is that in the case of implied treaty-making power based on ERTA's rules of automatic implied power, the Community's power is by nature exclusive, since it mirrors a primary finding that the Member States cannot act.

A fourth and final alternative which would solve the exclusivity problem would be to conclude that the Community can sometimes take action based on its powers even when the objectives sought are outside its own scope. This would seem to be supportable in particular if a requirement of unanimity was imposed upon any such action. The Community has in fact applied economic sanctions under these very circumstances, a phenomenon which shall now be looked at in greater detail.

The problem of economic sanctions developed out of the fact that the Community exercises exclusive power over the common commercial policy under Article 113. The Member States can apply economic sanctions under Article 224 alone, which creates an exception in favor of Member State action based upon the existence of a security interest. In this situation, if a security interest does not exist, the danger of a legal vacuum is present since economic sanctions are applied primarily for political reasons and would therefore seem to be outside the scope of acceptable Community action. This potential vacuum has been filled, however, by Community action based on Article 113.

In a key example of Community action under these circumstances, the Council adopted Regulation

No. 877/82, thereby suspending for one month the importof all products originating in Argentina (O.J. 1982, L 102/1 of 16 April 1982). The regulation was based on Article 113 of the EEC Treaty. Pieter Jan Kuyper in "Community Sanctions against Argentina: Lawfullness under Community and International Law" (Essays in European Law and Integration, p. 141), describes these measures as being in strong contrast to those taken one month earlier against the Soviet Union in relation to the crisis in Poland. In the latter case, the essential provisions were buried in a highly technical Council Regulation for the amendment of the import regime for particular products originating in the USSR.
As Kuyper writes, "The Argentine case is, however, the first one in which the nature of measures can be openly gauged from the terms of the Regulation. This can be characterized without any doubt as an important milestone in the development of the Communities".

Thus there is evidence that in at least one context, the Community has exercised its powers in order to achieve objectives outside the scope of those mentioned in the Treaties. It seems that a similar strategy would offer the best solution for the problem of treaty-making in areas of exclusive

Community power generally, and in particular in relation to implied powers resulting from ERTA's rules.

An analysis of ERTA would not be complete without some discussion of the institutional workings of the Court. The fact that dissenting opinions are forbidden, and the fact that the Court must reach a unanimous result, has led to the variety of rules presented by the Court. Close reading of the opinion reveals two major conflicts: the first over whether an individual finding of necessity or a broader, "automatic" rule should serve as the basis for finding implied power, and the second relating to which broad rule in particular should be adopted. The latter fact has already been discussed in detail, but the former is worthy of note. There seems to have been a desire on the part of the judges favoring a broad rule to make their reasoning express, but it appears that a compromise on the Court tempered this formulation. Thus two of the three ERTA rules were framed in the negative, as restraints on Member State action, while the third, Rule 2, though coming closest to a positive statement of power, still contains somewhat ambiguous terms.

Recital 18 (Rule 2), we can remember, states that "As and when such common rules come into being, the Community alone is in a position to assume and carry out contractual obligations towards third countries . . ." The words "in a position to" are curiously vague, and thus it may be worthwhile to compare them to the French version, which is the original language of the case. There the Court states: "qu'en effet, au fur et a mesure de l'instauration de ces regles communes, la Communaute seule est en mesure d'assumer et d'executer, avec effet pour l'ensemble du domaine d'application de l'ordre juridique communautaire, les engagements contractes a l'egard d'Etats tiers". A search for the meaning of the term "etre en mesure de" reveals two possibilities in particular: the first is "in a position to", and the second "having the power to". The Larousse Dictionnaire Moderne Francais-Anglais includes the terms "to be in a position to" and "to have the power to". According to Harrap's New Standard French and English Dictionary the phrase can be translated as "to be in a position to", to have the power to", or "to be able to". It appears that "etre en mesure de" was selected as a compromise term by members of the Court who disagreed over whether a broad, "automatic" rule of

implied powers should be formulated.

An examination of the passages which follow the Court's enunciation of the three ERTA rules supports this view. From recital 23 onwards a series of findings are made which can only be interpreted as a separate finding of the existence of necessity applicable in this case alone. In recital 23 we are told that the objectives of the Treaty in transport matters are to be pursued within the framework of a common policy. In recitals 24 and 25 specific powers of the Community in relation to transport are mentioned. In recitals 26 and 27 the Court notes that the provision creating these powers is "equally concerned" with transport to and from third countries and thus "assumes that the powers of the Community . . . involve the need in the sphere in question for agreements with the third countries concerned". The usual elements in an implied powers finding by the Court are present here: express powers are mentioned in conjunction with objectives whose achievement they were meant to ensure, and a need for unenumerated powers is referred to. Had there been full agreement on the broad rules laid down in recitals 17 through 22 there would have been no reason to include this separate finding of implied powers. The presence of these recitals does

not derogate from the force and affect of ERTA's broad rules, but it serves to illustrate a dispute over reasoning amongst the justices in a case in which all the members of the Court clearly agreed only on the result.

2. Opinion on the Draft Agreement for a Local Cost Standard

a. Facts

Opinion 1/75 resulted from a Commission request for an opinion of the European Court of Justice under Article 228 (1). The object of the request was to determine the compatibility of the draft "Understanding on a Local Cost Standard", drawn up under the auspices of the OECD, with the EEC Treaty. More specifically, the Commission asked whether the Community had the power to conclude the Understanding, and if so, whether that power was exclusive.

Prior to their request, the Commission had conveyed to the Council a recommendation for a decision in regard to the Community's position within the OECD on the Standard. Under the Recommendation, which was based on Article 113 of the EEC Treaty, the Commission would express the Community's position as laid out in the directives annexed.

b. Opinion

After ruling that there was no reason the request for an opinion should not be admitted, the court moved to the question of whether a Community power existed to conclude the Understanding. The Court examined Articles 112 and 113 in formulating a reply. According to the Court, under Article 112 "the member states shall, before the end of the transitional period, progressively harmonize the systems whereby they grant aid for exports to third countries, to the extent necessary to ensure that competition between undertakings of the Community is not distorted". Since the grant of export credits clearly fell within the system of aids granted by Member States for exports, the subject-matter of the standard laid down in the Understanding clearly related to a field in which the Treaty expressly recognized a Community power. In addition, the Court found that according to Article 113, "the common commercial policy shall be based on uniform principles, particularly in regard to . . . export policy . . ." The Court stated that export policy, and common commercial policy more generally, necessarily covered the subject-matter of the Understanding. Thus, "the subject-matter covered by

the standard contained in the Understanding in question" fell "within the ambit of the Community's powers".

Next the Court examined whether an agreement made within a common commercial policy area could be made prior to the adoption of internal rules on the same subject. The Court found that "A Commercial policy is in fact made up by the combination and interaction of internal and external measures. . . Sometimes agreements are concluded in execution of a policy fixed in advance, sometimes that policy is defined by the Agreements themselves". The Court also seemed to support the idea that it might be acceptable in some cases to conclude international Agreements without adopting internal measures at all, or at least not simultaneously. This conclusion follows from the Court's finding that "the implementation of the export policy to be pursued within the framework of a common commercial policy does not necessarily find expression in the adoption of general and abstract rules of internal or Community law".

Finally, the Court noted that the common commercial policy was conceived for the defense of the common interests of the Community, and that this conception was "incompatible within the freedom to

which the member states could lay claim by invoking a concurrent power so as to ensure that their own interests were separately satisfied in external relations, at the risk of compromising the effective defense of the common interests of the Community". Therefore the Member States could not be allowed to exercise concurrent power in either the Community or international sphere. The fact that the obligations and financial burdens inherent in executing the agreement would be borne by the Member States was found not to influence the result.

c. Analysis

Opinion 1/75 dealt with the express treaty-making power granted to the Community in regard to the common commercial policy. That fact alone does not preclude use of the doctrine of implied powers since it can function to expand express treaty-making power, as well as create new treaty-making powers, as we shall see when we look at the Natural Rubber opinion. In Opinion 1/75, however, reliance on the doctrine was unnecessary as the Court found the Understanding was directly covered by the terms of the common commercial policy. Though not directly related to the issue of implied powers, the Opinion still constitutes a link

in the chain of treaty-making cases. It is consistent with ERTA in that both cases reject the possibility of concurrent Member State treaty-making authority. The Court's concern in both is unity and uniformity within the Common Market. One should note though that in Opinion 1/75 the Court avoided a broad statement that would cover all common commercial policy agreements. Instead the finding was that:

> "It cannot therefore be accepted that, in a field such as that governed by the Understanding in question, which is covered by export policy and more generally by the common commercial policy, the Member States should exercise a power concurrent to that of the Community, in the Community sphere and in the international sphere".

Most importantly, the opinion foreshadows the handling of an important issue in the implied powers area--the necessity for common internal rules prior to a finding of implied treaty-making power. The Court's finding that common rules need not be adopted prior to use of the express treaty-making power granted in Article 113, was adapted to apply to a somewhat different situation in the context of Opinion 1/76. There the Court concluded that the fact that express internal power had not yet been used to adopt internal measures would not preclude a

finding of the existence of a necessity for implied treaty-making powers. According to the Court it was "particularly so" that an express external power would lead to an implied external power in a case where internal power had already been used to adopt measures, but this result was "not limited to that eventuality".

The Kramer Case: Cornelis Kramer and others, Joined Cases, 3, 4 and 6/76

a. Facts

The Kramer Case came before the European Court of Justice as the result of criminal proceedings brought against various Netherlands fisherman (Cornelis Kramer and others) accused of infringing rules enacted by the Netherlands government. Those rules were adopted in order to carry out an agreement which had been worked out between the Netherlands, certain other Member States of the Community, and third countries within the context of the North-East Atlantic Fisheries Convention (NEAFC). The fishermen, amongst the elements of their defense, argued that the Agreement's conclusion fell within the powers of the Community alone, and therefore should not have been entered into by the Netherlands government. Thus,

it was argued, the national measures adopted to carry out the agreement were incompatible with Community law, and therefore, were invalid as a basis for criminal proceedings.

Because all of the defendants in the proceedings argued that the measures were incompatible with Community law, the Netherlands District Courts decided to request a preliminary ruling on the interrelation of certain legal provisions under Article 177. The first question they asked the Court was whether the Member States possessed the power to fix quotas like the ones imposed by Netherlands legislation. The second question inquired into whether the Community held an exclusive power to conclude agreements whose objective was to maintain fish stocks. Third, they asked whether quotas like those laid down by the Netherlands were compatible with Community law. Finally, they inquired as to whether specified Treaty provisions were directly applicable within the Member States.

b. Advocate-General's Opinion

Advocate-General Trabucchi suggested that the first task in responding to the District Court's request was to establish whether the power to

conclude international agreements for the conservation of fishery resources belonged exclusively to the Community or whether the Member States could still act on their own account taking into consideration, in light of the ERTA decision, the fact that Community legislation governing the fishing industry had already come into force.

The Advocate-General suggested that if it should be found that the Member States did not possess a power of this sort, there would be no need to answer the other questions. On the other hand, should it be determined that the Member States did possess power in this area, the question would be whether they could legitimately lay down restrictions of the type they imposed, which included quotas, in view of the Community's common rules.

Advocate-General Trabucchi noted that the opinion of third states, and any difficulties which they might place in the way of the Community's participation in the NEAFC, could have no effect on the identification of powers conferred upon the Community by the Treaty system. The Advocate-General then stated that "the interpretation of Community law leads me to the conclusion that, even on an international level,

provision can be made for conservation of fish stocks only by the Community". Resistance by third states, he found, could not serve to deprive the Community of its powers or transfer them back to the Member States. In case of such resistance, "the Community could authorize its Member States to act on its behalf, sticking strictly to the guidelines which it laid down for them". The Advocate-General pointed out that the fact that objectives pursued by the States in accepting restrictions on the freedom to fish were both sound and necessary, should not obscure the fact that ecological issues were not the only ones involved. International regulation of fishing involved an important economic and commercial aspect as well, which should be taken into account in deciding what sorts of international measures should be agreed to. In the end, the Advocate-General concluded that there was no doubt the Community had been vested with authority to negotiate and conclude international agreements dealing with control of fishing on the high seas. On the question of whether the Member States were still entitled to act in this area, however, the Advocate-General stated that, at least on a transitional basis, the Member States had limited residual authority to enter into international

commitments in connection with conservation of fish stocks.

c. Judgment

The Court refashioned the questions put to it, so that it first examined the authority of the Community to enter into the NEAFC agreement. On this point it concluded that the Community possessed an implied power to conclude international agreements for the conservation of biological resources of the sea. On the Member States' power to assume similar commitments it found that they possessed transitional concurrent authority in the area being investigated, which had existed when the matter arose before the District Courts but which would end when the Council adopted common measures for sea resource conservation as required by Article 102 of the Act of Accession. According to the Court, the direct applicability of the Treaty provisions was irrelevant based on the answers to the earlier questions.

d. Analysis

i. Advocate General's Opinion

Early in Advocate-General Trabucchi's opinion a restatement of the principle embodied in the ERTA

judgment can be found. According to Trabucchi, the judgment embodied the principle "that the exercise, in any specific field, of the Community's internal legislative powers implies that the Community is alone vested with the powers, hitherto possessed by its Member States, to enter into international commitments in that particular field".

The Advocate-General's restatement can be contrasted with a description of the ERTA principle given by Professor Michel Waelbroeck in his article titled "The Emergent Doctrine of Community Pre-emption--Consent and Re-delegation" in Courts and Free Markets, vol. 2. The comparison sheds light on the Advocate-General's reading of the rule in ERTA, both in terms of the finding of necessity generally, and the three distinct rules in the case. Waelbroeck, in describing the decision, writes that "Whenever the Community has, in the exercise of its internal powers, adopted common rules in a specified area, and it is necessary for international commitments to be entered into in respect of that same area, the Community has the power to enter into such commitments".

There is a crucial difference between these two descriptions of the ERTA rule: Waelbroeck inserts the phrase "and it is necessary for international

agreements to be entered into" into his reading of the case, while Advocate-General Trabucchi seems to have read ERTA as providing for implied powers automatically upon fulfillment of the conditions set out in the case by the Court. In other words, Trabucchi, in contrast to Waelbroeck, did not view the ERTA decision as requiring a "second look" into the necessity of treaty-making powers following a finding that the conditions set out in the rules were fulfilled.

At the same time, the readings of ERTA by Trabucchi and Waelbroeck are similar in one interesting respect. Trabucchi refers to rules "in any specific field . . ." while Waelbroeck uses the term "in a specified area". The fact is, that the first and second rules refer to common measures in the area of "a common policy", while the third refers to common rules "promulgated for the attainment of the objectives of the Treaty". That ERTA sets up different boundries for the application of its principles thus seems to have been perceived by both Waelbroeck and Trabucchi. They avoid the inconsistent nature of recitals 17, 18, and 22 of ERTA by not specifically defining the area of application of the rules they describe.

Following his restatement of the principle embodied in ERTA, the Advocate-General Trabucchi discusses the idea that power to enter into international agreements could result from internal rules regardless of whether the agreements in question would apply inside or outside the geographical area subject to the sovereignty of the Member States. He notes that "the automatic extension of internal Community powers to the external field has its raison d'etre and legal justification in the functional relationship which exists between the exercise of the external powers and the exercise of the internal powers in the same field". This wording is striking in Trabucchi's use of the term "automatic" to characterize the process through which the Community's exercise of internal legislative powers results in implied external powers in the same area. The Advocate-General then proceeds, in a fashion consistent with ERTA, to analyze the process of making the determination that implied external Community powers exist. According to the Advocate-General:

> "when . . . external powers . . . directly affect a sector which, in the Community, is already governed by common legislation and can, therefore, affect the functioning of the common machinery and rules laid down by the Community for that sphere of activity, it is essential to

> establish that functional relationship between internal powers and external powers which requires the Community to assume also the latter powers in conjunction with the actual exercise of its internal legislative powers in the sector concerned".

Thus we see Trabucchi doing exactly what one would expect him to do based on our earlier analysis of the ERTA case. He relies on an "effects test", through which he examines whether the use of external power will affect internal rules in order to determine whether Community powers exist. Underlying this discussion is the idea that what is at stake is actual Community power, not limitations on the use of their own powers by the Member States. This is consistent with ERTA, which also avoids as the basis for its reasoning the concept of Member State self-restraint as required by Article 5 of the Treaty. That provision requires that Member States "abstain from any measure which could jeopardize the attainment of the objectives of this treaty". The other interesting feature of this statement by the Advocate-General is his use of the phrase "can . . . affect" rather than "would . . . affect" or "do . . . affect". By this Trabucchi makes clear that the affect of external powers on internal rules need not be certain. This is consistent with Rule 3 of ERTA, which refers to

international agreements which "might affect those rules or alter their scope" as opposed to Rules 1 and 2 which describe obligations "which affect those rules".

In Section 4 of his opinion Advocate-General Trabucchi sets about actually comparing the NEAFC agreement to Regulations No. 2141/70 and No. 2142/70. Regard must be given, he concludes, to the "actual tenor and the aims" of the rules involved in order to determine whether the Community's rules were such as to prevent the Member States from acting. He reviews the content of the regulations and characterizes No. 2141/70 as laying down common rules for fishing, setting up a pattern of coordination among the Member States in regard to their structural policies for the fishing industry, and providing for action which would contribute to the improvement of productivity and production and marketing conditions. Regulation No. 2142/70, he concludes, provided for the establishment of producers' organizations, a pricing system, and a system of trade with third countries. The Advocate-General then points out that in ERTA the Community provisions and the agreement concerned had "one and the same purpose" while Kramer could be distinguished from this, since the regulations

described did not involve substantive rules on conservation but only a vesting of the Community with power that had not yet been exercised. The Advocate-General finally stated that the issue of whether the Member States could "continue on their own account to enter international agreements" required "the aim of the international agreement in question to be viewed in the light of the aim of the common market rules".

Advocate-General Trabucchi's emphasis on the aim of common Community rules in Kramer appears to conflict with the ERTA principle. According to the ERTA rules, "purpose" was relevant only in defining the group of internal Community measures which when "affected" by an international agreement would result in Community power. We can remember here the reference in recitals 17 and 18 to common rules adopted "with a view to implementing a common policy" and recital 22's mention of Community rules "promulgated for the attainment of the objectives of the Treaty". The ERTA decision, however, does not condition the application of the principle which results in an automatic finding of implied powers on a finding that the purpose of internal measures and an agreement is the same, as the Advocate-General seems to suggest. Even if a situation existed where

for example, the object of an international agreement under consideration by the Member States was conservation and internal Community measures were passed in order to set down a common structural policy for fishing, the "automatic rule" of implied powers in ERTA should still apply. As mentioned earlier in the analysis of ERTA, it is possible to imagine a situation where the purpose of a Member State agreement might not even be among the objectives of the Community as set out in the treaty, and yet part or all of that agreement would be outside the power of the Member State for affecting internal Community rules. This would hold true even though the purpose of the agreement was not among the Community's objectives, and as described earlier, should be seen as resulting in a situation where the Community might even act outside the scope of its set objectives. If a difference in purpose were allowed to mean that a Member State agreement would stand, though in conflict with internal Community measures, the whole treaty scheme might be subverted since common internal policies could be thwarted by conflicting, localized treaties.

The Advocate-General mentioned the importance of the "tenor" of Community common measures in his opinion as well. The meaning of the term is not

well fixed, but the combination of "tenor" and "aim" (discussed above) seems in spirit compatible with a British argument contained in the summary of observations submitted to the Court. That argument for limiting application of the ERTA rule went as follows:

> "The Court's judgment in the ERTA case gives rise to difficulties of interpretation particularly with regard to ground 17 of the judgment which states that when the Community 'adopts provisions laying down common rules' Member States are no longer entitled to enter into obligations with third countries which affect those rules: In the opinion of the British Government this doctrine does not apply if, as is the case in those proceedings, the subject-matter of the 'common rules' and the agreement entered into with third countries are not identical".

There is no clear statement in the ERTA decision supporting either the British government's attempt based on subject-matter, or the Advocate-General's effort founded on purpose, to limit the principle of the case. This fact is emphasized by the failure of both the British government and the Advocate-General to cite any part of the decision in support of their arguments. This would certainly have been a logical step had the opportunity existed. An analysis of the Kramer judgment reveals no clue that the Court has chosen to accept these limitations.

ii. Court's Judgment

Looking at recital 17/18 we see that the Court prepared the way for a finding of implied powers, as in ERTA, by reading Article 210 to mean that the Community "enjoys the capacity to enter international commitments over the whole field of objectives defined in part one of the treaty . . ." When it moved on to a discussion of the Community's authority, however, it was necessary to expand upon the ERTA statement to take account of the fact that the Act of Accession, rather than the Treaty alone, would serve as the basis for finding implied powers in Kramer. As a result, the Court concluded that "regard must be had to the whole scheme of Community law" instead of "the whole scheme of the Treaty", which was the formulation utilized in ERTA. This point was emphasized in recital 19/20, where the Court ruled that "such authority arises not only from an express conferment by the treaty, but may equally flow implicitly from other provision of the Treaty, from the Act of Accession and from measures adopted, within the framework of those provisions, by the Community institutions". The equivalent statement in ERTA is nearly identical, but does not contain the words "Act of Accession", which in fact

had not been adopted at the time the ERTA case was decided.

Another interesting difference between the ERTA and Kramer versions of this recital is the addition of the word "implicity" in the latter of the two. Recital 16 in ERTA simply states that the "authority to enter into international agreements . . . arises not only from an express conferment . . . but may equally flow from other provisions. . . ", while in Kramer the phrase is, "may equally flow implicitly from other provisions". The addition of the word "implicitly" was not essential to the result, but it functions to make even more clear the Court's reliance on the doctrine of implied powers to expand the Community's express treaty-making power.

The Kramer and ERTA decisions can be contrasted in terms of the method used to detect implied treaty-making authority. In ERTA the Court used a one-step process in which the power to regulate transportation internally was found to necessitate the power to conclude international agreements in the same area. The Court relied instead on a two-step process in Kramer. First it determined that the Community's power to regulate fishing internally extended outside the territorial waters of the Member States to the high seas. Then it concluded in recital 30/33 that:

> "The only way to ensure the conservation of the biological resources of the sea both effectively and equitably is through a system of rules binding on all the States concerned, including non-member countries. In these circumstances it follows from the very duties and powers which Community law has established . . . on the internal level that the Community has authority to enter into international commitments for the conservation of the resources of the sea".

This two-step process was necessary because the factual situation was different in Kramer than in ERTA. The activity to be regulated took place not solely in Member State territory, but in part upon waters outside their jurisdiction. This situation could actually have arisen in ERTA had the contemplated agreement covered shipping on the high seas as well as road transportation.

The Court's two-step process in Kramer is interesting in that it raises the possibility that the Court may be willing to base implied treaty-making power on internal powers which are themselves implied. External power in these circumstances could be thought of as "secondary implied power". This possibility follows from the recital 30/33 finding that the Community's internal power to regulate fishing on the high seas results from "Article 102 of the Act of Accession, from Article 1 of the said regulation and moreover from

the very nature of things . . ." One could argue, based on the word "moreover", that even without the previously listed express sources of internal Community power to regulate this area, the Court would have found an implied power based on the "nature of things". In fact, according to F. Burrows in "The Effects of the Main Cases of the Court of Justice in the Field of the Member States", these previously listed sources do not provide the power to make internal rules regulating fishing on the high seas. Burrows asks what the authority is for the proposition that the Community has the power to adopt these sorts of rules and concludes that "There was nothing in the EEC Treaty, the regulations cited or the Act of Accession which said anything of the kind". Thus, in Burrow's mind "The only guidance we are given in the judgment as to the origin of this legislative power is that it follows 'from the nature of things'". What, then, is "the very nature of things" in terms of the Court's interpretive method? E.L.M. Volker characterizes this statement in his "Contribution to the Discussion" at the Amsterdam Colloquium on Division of powers between the European Communities and their Member States in the field of external relations. According to Volker:

> "As regards the conclusion, that 'the rule-making authority extends to the high seas', is based on the internal power of the Communities combined with 'the nature of things', this indicates no more than the--by now familiar--necessity criteria laid down by the Court in its earlier judgments. This can be read from the next sentence in the judgment, i.e. that this is the only way in which this matter can be dealt with effectively and equitably".

It is clear from the above that Volker views the phrase "the nature of things" as an example of Court reliance on the doctrine of implied powers. If both Burrows and Volker are correct in their analyses, we can view Kramer as not simply suggesting the possible existence of secondary implied powers, but as an actual instance of their use. The implications of this interpretation of Kramer are very wide indeed. All sorts of circumstances can be contemplated in which a two-step process, leading to secondary implied powers, could push the boundries of the Community's treaty-making powers beyond the most liberal expectations.

The key phrase quoted above, "the only way to ensure the conservation of the biological resources of the sea . . .", reveals the existence of necessity in this case and a critical difference between the reasoning here and in the ERTA decision

as well. In Kramer as in ERTA, regulations had already been passed by the Community before the agreement was concluded. But instead of relying on ERTA's rule of automatic implied powers by examining the NEAFC agreement to see whether it "affected" the Community's internal measures, the Court made an individual examination of necessity in the Kramer case.

In reality, the facts of Kramer presented the Court with a very serious dilemma. If it applied the rule of automatic implied treaty-making powers of ERTA, and thereby found that the NEAFC agreement did indeed affect Community regulations 2141/70 and 2142/70, the result would have been an exclusive treaty-making power on the part of the Community based on the dual nature of the ERTA rules, which create both power and exclusivity. The option available in ERTA of allowing the Member States to act through a finding of "delegated" Community power did not exist in Kramer since the NEAFC agreement had already been concluded six years earlier, and no decision similar to the Council deliberation of March 20, 1970 in the ERTA case had taken place at that time. We can remember here that the Council deliberation of March 20, 1970 endorsed Member State action, and was interpreted by the Court in ERTA as

a delegation of Community power. The Court's alternative under the automatic rule, of finding that the NEAFC agreement did not affect the Community's internal measures, would have left the Member States treaty-making authority intact and not resulted in a finding of Community power.

The Court in the final analysis, took a middle road which allowed it to conclude that an implied Community treaty-making power existed to conserve the biological resources of the sea, but which also made it possible to find that concurrent Member State power existed for a transitional period in the same area. We can speculate that if the agreement involved had not yet been concluded, the Court would have been more likely to find the Community's internal rules "affected" by the contemplated obligation, and thus condition any Member State action on the authorization or delegation of Community power. It would seem in the future as well, that where an agreement has not yet been concluded, the Court will be more favorably disposed to rely on ERTA's rules of automatic implied powers.

It would certainly be incorrect to conclude that the Court through the Kramer decision either overruled or discredited the rule of automatic implied powers in ERTA. It is true that it did not

rely on the concept for its finding of Community treaty-making power, but in essence the Court found that one condition for application of the automatic rule--that the agreement in question "affect" or "potentially affect" the internal measure--was not fulfilled. This is suggested by recitals 35 through 38 of the Kramer judgment, where the Court emphasized the limited nature of the provisions adopted by the Community. In recitals 40 and 41 one should note that the Court ruled the Member States' authority was transitional and would end when the Council adopted "measures for the conservation of the resources of the sea". Thus, when common substantive measures were in place which could be affected by Member State agreements, the nature of the implied treaty-making power would shift from concurrent to exclusive. One could argue that the basis of those powers would change as well, from individual necessity to automatic implied power based on the ERTA rule.

Generally speaking, we can conclude from Kramer that where internal measures exist, but will not be affected by an international agreement, the necessity for Community treaty-making powers may still be present and it will be possible to find them on an individual basis. An implied power

discovered through an individual finding of necessity, however, will not necessarily be exclusive.

The Court revealed certain priorities in dealing with the competing values present in the Kramer case. In its resolution of the issues the Court attempted to balance the immediate need for tools to cope with the actual problems of sea resource conservation such as internal measures and international agreements, with a clear desire to further the process of progressive integration. This it did while trying to take into account economic, social and environmental aspects of the problems at hand. The most serious danger facing the Court was the clear consequence of deciding that Regulations 2141/70 and 2142/70 had been affected by the NEAFC agreement. The result would have been a finding that the Member States had lacked the power, six years earlier, to negotiate and conclude the addition to the 1959 fishing convention. Many hours of negotiations would have been made fruitless, a tangible solution for fishing problems would have been abandoned, and doubts would have been raised for third countries regarding the reliability of Member States as treaty partners. Most critically, the Member States would have been thrown into the

position of having to breach either European Community or international law.

The Court's product in the Kramer case took account of the various needs involved in a flexible and pragmatic manner, by balancing the practical result of a finding of exclusive European Community power with the ideal of commonly created and enforced rules. It left the ERTA decision's rule of automatic treaty-making powers intact and made clear that either an effect on internal rules, or an individual finding of necessity would serve as equally valid foundations for finding implied powers. By avoiding the conclusion that the treaty-making power rested exclusively in the hands of the Member States at the time of the NEAFC agreement, and would shift to the Community at a future date, when substantive rules were introduced, the Court upheld a vision of implied powers as existing from the time of adoption of the Treaties, thereby reinforcing its role as an interpretor, rather than an amender of the treaties. The balancing of priorities by the Court mark this case as a pragmatic endorsement of the process of progressive integration.

4. The Rhine Case: Opinion given pursuant to Article 228(1) of the EEC Treaty, Opinion 1/76

a. Facts

The Commission, following the Article 228 procedure, requested that the Court give an opinion as to whether the draft Agreement establishing a European laying-up fund for inland waterway vessels was compatible with the provisions of the Treaty. The draft Agreement resulted from a series of negotiations between the Commissioner, Switzerland and six Member States, whose object was to eliminate disturbances arising from a surplus carrying capacity for goods by inland waterway. It was necessary to involve Switzerland in any plan to resolve the situation because Switzerland enjoyed a right of navigation on the waters concerned which had resulted from earlier international agreements concluded with certain Member States.

The system created by the draft Agreement consisted of temporarily laying-up a part of the available carrying capacity in exchange for financial compensation to carriers who would agree to voluntarily withdraw their vessels from the market for limited periods. The framework for the system was to be the "European laying-up fund for inland waterway vessels" which was contemplated as an international public institution with legal

personality.

In its request for an opinion the Commission asked first about the legal basis for the Agreement and justification for the participation of particular Member States. Second, it asked whether the grant to fund organs of the power to make decisions having general effect and direct applicability in the Member States was compatible with the Treaty. Finally, it inquired about possible conflicts with the Treaty resulting from the organization and powers of the Fund Tribunal.

b. Opinion

The Court examined the object of the system created by the draft Agreement, and found it an important factor in the common transport policy. In fact, Article 75 supplied the necessary legal basis to establish the system concerned within the European Community. In this case, it was "impossible fully to attain the objective pursued by means of the establishment of common rules pursuant to Article 75 of the Treaty" due to the participation of Swiss vessels in navigation on the waterways in question. The Court found that even where the power of the Community to conclude such an agreement was not expressly laid down in the Treaty,

"the Community has authority to enter into the international commitments necessary for the attainment of that objective even in the absence of an express provision in that connexion".
This was held to be so particularly in cases where internal power had already been used to adopt measures within the common policies, but was not limited to that eventuality. Although internal measures were only adopted when an agreement was concluded and made enforceable, the power to bind the Community nevertheless would flow by implication from the provisions creating the internal power.

c. Analysis

In the Rhine case implied powers were approached from the point of view of an individual finding of necessity rather than an ERTA-style finding of automatic implied powers. This had to be so, for in the Rhine case common internal rules had not been adopted at the time the Agreement came under the Court's consideration, so the "effects test" of ERTA could not possibly come into play.

The fact that internal rules did not exist when the conclusion was made that an implied Community treaty-making power existed made this case unique when it was decided. At the same time, some

precedent for allowing Community treaty-making prior to the finding of internal rules did exist, in Opinion 1/75. F. Burrows discusses the fact that under Opinion 1/75, "there did not have to be internal measures first, before the Community had the power to act externally under Article 113", in his article on "The Effects of the Main Cases of the Court of Justice in the Field of External Competences on the Conduct of Member States". Burrows notes that this principle was not confined to cases falling within Article 113, and concludes that "here then was a foretaste on important advances in ERTA doctrine . . ." Michael Hardy, in his commentary, "Opinion 1/76 of the Court of Justice", points out this similarity as well in arguing that the Court has shown consistency in its view of express and implied treaty-making power.

That the Court was willing to find an implied treaty-making power in the Rhine case despite the lack of existing internal rules should be examined in light of the fact that the Court allowed the Member States to participate in the Agreement alongside the Community. Might it be that the Court was willing to find implied treaty-making powers, despite the nonexistence of internal rules, only because the Member States also participated in the

agreement? In this regard we should note the Court's statement in recital 7 of the Opinion. There it concluded that the Member States were justified in participating because Article 3 of the Agreement required them to amend certain international accords which had been concluded prior to the existence of the European Economic Community. It went on to find that:

> "The participation of these States in the Agreement must be considered as being solely for this purpose and not as necessary for the attainment of other features of the system . . . . except for the special undertaking mentioned above, the legal effects of the agreement with regard to the Member States result, in accordance with Article 228(2) of the Treaty, exclusively from the conclusion of the latter by the Community".

Based on this wording, it appears that had Article 3 been excluded from the Agreement, the Court would still have found implied Community treaty-making power, despite the nonexistence of internal Community rules. Thus, it seems that the Court will be willing to imply Community treaty-making power in the absence of common internal rules, even without Member State participation in an agreement.

5. The Euratom Case: Ruling delivered pursuant to the third paragraph of Article 103 of the EAEC Treaty, Ruling 178

a. Facts

The draft Convention on the Physical Protection of Nuclear Materials, Facilities and Transports was drawn up in 1977 under the aegis of the International Atomic Energy Agency. The Convention required participating states to take appropriate measures to prevent the loss, theft, misuse, or damage of nuclear material, to arrange for cooperation and coordination between national agencies, and to make certain activities, like the theft or damage of nuclear material, a punishable offense under criminal law. A dispute developed as to whether the Community should participate in the agreement alongside the Member States. The dispute centered on Article 4, which required participating states not to import or export, or permit the import or export of, nuclear material unless that material was at all times during international transfer subject to the precautions laid down by the Convention.

The case was brought under Article 103 of the European Atomic Energy Community Treaty, which sets out the following procedures:

> Article 103
> "Member States shall communicate to the Commission draft agreements or contracts with a

> third State, an international organisation or a national of a third State to the extent that such agreements or contracts concern matters within the purview of this Treaty.
>
> If a draft agreement or contract contains clauses which impede the application of this Treaty, the Commission shall, within one month of receipt of such communication, make its comments known to the State concerned.
>
> The State shall not conclude the proposed agreement or contract until it has satisfied the objections of the Commission or complied with a ruling by the Court of Justice, adjudicating urgently upon an application from the State, on the compatibility of the proposed clauses with the provisions of this Treaty. An application may be made to the Court of Justice at any time after the State has received the comments of the Commission".

As required by Article 103, the Belgian Government communicated the draft Convention to the Commission, which responded with a letter containing the same message that it earlier sent to Council: The Member States could not obligate themselves under Article 4 (1) of the draft Convention without impeding the application of the EAEC Treaty. And further, since the Convention fell within the Community's powers, the only satisfactory solution was for the Member States to participate in the Convention alongside the Community. The Government of Belgium referred the matter to the Court in order to clarify the interpretation of the Treaty in regard to the Community's participation.

b. Decision

The Court first reviewed Articles 101, 102, and 103. Article 101 provides that: "The Community may, within the limits of its powers and jurisdiction, enter into obligations by concluding agreements or contracts with a third State, an international organisation or a national of a third State". Article 102 determines the procedure applicable to the conclusion of such obligations. The Court then reformulated the Belgian Government's questions, asking whether the participation of Member States in the Convention would conflict with the Treaty provisions relating to division of powers if the Community was not allowed to participate. It asked as well whether the Community had the necessary powers to ensure implementation of provisions to which it might subscribe.

After reviewing the content of the draft Convention the Court concluded that it was "undeniable that the draft convention 'concerns' in various ways matters within the purview of the EAEC Treaty", thus meeting the requirement of Article 103. It based this finding on a comparison of the draft Convention and the objects of the EAEC Treaty, and on the fact that the Convention and the Treaty

concerned the same materials and facilities.

The Court then looked into whether the Community exercised "jurisdiction and powers" in the field of supply and the nuclear common market giving it the right to participate in the proposed convention. The Court found that the exercise of a number of Commission prerogatives in the field of nuclear material movement and supply would be affected by the obligations contained within the draft Convention. On this basis it concluded that:

> Recital 15
> ". . . it would not be possible for the Community to define a supply policy and to manage the nuclear common market properly if it could not also, as a party to the Convention, decide itself on the obligations to be entered into with regard to the physical protection of nuclear materials insofar as its functions . . . were affected".

Next the Court examined certain EAEC provisions which, it was proposed, invalidated the previously discussed considerations. First, under Article 195 EAEC the Community institutions were bound to comply with conditions of access to ores, source materials and special fissile materials laid down in national rules and regulations made for public policy or public health reasons. The Court pointed out that Article 195 was not intended to settle questions of power in relations between the Community and the

Member States. Instead, the Court found, it required EC institutions to comply with Member State requirements based on public health or public policy, and thus did not effect the Community's right or obligation to take measures guaranteeing security or its ability to enter international commitments for the same end. Second, the Court discussed Articles 62(2), 74 and 75, under which certain categories of nuclear materials were removed from the ambit of provisions relating to the supply system. The Court emphasized that the Treaty made provision for close supervision of material not falling within the monopoly of the Supply Agency. The Court concluded that these provisions left intact the principle of exclusive jurisdiction of the Community with regard to nuclear supplies and its general responsibility for the normal functioning of the nuclear common market. Consequently, it found:

> Recital 18
>
> " . . . if the Member States, without the participation of the Community, were to enter into obligations such as are contained in particular in Article 4 of the draft convention and if they wished to implement such obligations they would necessarily interfere with the scope of the jurisdiction of the Community and they would thus impede the application of the EAEC Treaty".

The Court next analyzed the safeguard provisions of the Treaty on the suggestion that these were aimed only at ensuring that nuclear materials were not diverted by the person possessing them, while the Convention served to avoid intervention by unauthorized third parties. It concluded that a restrictive interpretation of the safeguard provisions was unjustified, and that even if it was accepted, an area of conflict between the rules of the draft Convention and the EAEC Treaty would still exist. The exclusion of the Community from participating, it found, would hinder the functioning of the safeguards and compromise the subsequent development of that system to its full scope: "From this aspect the power of the Community to participate in the proposed convention would also appear to be undeniable".

Finally the Court examined the effects of the system of property ownership set up by the EAEC Treaty. The Court noted that the right of ownership of special fissile materials was granted to the Community while the right of use and consumption was reserved to the Member States. According to the Court, this system signified that no matter how nuclear materials were used, the Community would remain the exclusive holder of rights forming "the

essential content of the right of property", which was held to include the right to dispose of special fissile materials. Because the right of ownership was concentrated in the Community, the Community alone was in a position to ensure that the needs of the public were safeguarded in its own field. Even the right of use under Article 87 was subject to an express reservation in regard to compliance with Treaty obligations, including safeguard provisions and rights of the Supply Agency. As a result, if a new requirement of general interest should appear, it would be primarily for the owner of the nuclear materials to meet it. The aim of the Treaty was "to place the Community in a strong position to enable it to accomplish fully its task of general interest". On this basis too, the Court found, the Community possessed "a well-founded title to participate in a convention whose object is to reinforce the physical protection of materials of which it is the owner . . ."

In its concluding remarks on the division of jurisdiction and power the Court noted that though the Treaty concerned, in part, the jurisdiction of the Member States and, in part, that of the Community, "the centre of gravity of the draft convention . . . concerns matters within the

purview of the Treaty". To this the Court added a second observation, which it considered "more specifically legal in nature", and "no less decisive". It found that:

> recital 32
> " . . . The system of physical protection organized by the draft convention could only function in an effective manner, within the ambit of Community law, on condition that the Community itself is obliged to comply with it in its activities. To the extent to which jurisdiction and powers have been conferred on the Community under the EAEC Treaty the Member States, whether acting individually or collectively, are no longer able to impose on the Community obligations which impose conditions on the exercise of prerogatives which thence forth belong to the Community and which therefore no longer fall within the field of national sovereignty. Therefore, to the extent to which the Community is to be bound to comply with the convention it is necessary that it should assume such obligations itself; that is the sense of Article 101, which states that it is 'the Community' which may enter into obligations by concluding agreements or contracts, and of Article 184 which confers legal personality upon it".

c. Analysis

The primary question with regard to the Euratom case is whether it is an implied powers case at all. Does the EAEC Treaty, unlike the EEC Treaty, grant the Community full treaty-making power with respect to all areas where the Community has internal power? In other words, is there an express grant of treaty-making power which sets up a system

of complete parallelism between internal and external powers? The clause which could arguably do so is Article 101.

> Article 101
>
> "The Community may, within the limits of its powers and jurisdiction, enter into obligations by concluding agreements or contracts with a third State, an international organisation or a national of a third State.
>
> Such agreements or contracts shall be negotiated by the Commission in accordance with the directives of the Council; they shall be concluded by the Commission with the approval of the Council; which shall act by a qualified majority.
>
> Agreements or contracts whose implementation does not require action by the Council and can be effected within the limits of the relevant budget shall, however, be negotiated and concluded solely by the Commission; the Commission shall keep the Council informed".

The critical issue is whether the first paragraph of this clause should be interpreted as meaning that where the Community has internal powers under the EAEC Treaty, it also has external powers. Alternatively, it could be read as confirming that where the EAEC Treaty expressly refers to international agreements, the Community can indeed make treaties. The wording of Article 101 itself arguably supports either assertion. Its ambiguity lies in the fact that the phrase "within the limits of its powers and jurisdiction . . ." leaves unanswered the question of what the Community's

powers and jurisdiction actually are.

One can support the idea that this provision does not expressly create a situation of full parallelism by pointing out that the provision does not say, "The Community may, to the extent of its internal powers and jurisdiction, enter into obligations by concluding agreements or contracts . . ." On the other hand, one might counter, what would be the logic of including a separate treaty article simply to confirm that the Community can make international agreements wherever the EAEC Treaty says it can? One possibility would be that the Article functions to limit the Community's treaty-making powers to areas which have been expressly provided for by the EAEC Treaty. Arguing against this, however, is the general sense of Article 101, whose intent seems to have been to grant rather than limit Community action. This is revealed by the first three words: "The Community may . . ." A second, and more plausible explanation is that Article 101 confirms the international legal personality of the EAEC. This is supported by the fact that under this interpretation Article 101 would not simply duplicate Articles 184 and 185, as those do not specifically refer to personality at the international level. An examination of these articles will confirm that fact:

Article 184
"The Community shall have legal personality".

Article 185
In each of the Member States, the Community shall enjoy the most extensive legal capacity accorded to legal persons under their laws; it may, in particular, acquire or dispose of movable and immovable property and may be a party to legal proceedings. To this end, the Community shall be represented by the Commission".

We shall look now to legal commentators, the "analysis of the arguments submitted by the parties", and the ruling itself to investigate the scope of the Community's express treaty-making powers under the EAEC Treaty and consequently, whether the Euratom ruling should be analyzed as an express or implied powers case.

Ami Barav adopts the view that the Euratom ruling involves a case of express treaty-making power in his article entitled, "The Division of External Relations Power Between the European Economic Community and the Member States in the Case-Law of the Court of Justice". There he writes, "The Court's case-law on express grant of external power reveals two approaches . . . In this respect, the Court held in Ruling 1/78 . . ." Catherine Flaesch-Mougin goes even farther than simply refering to Ruling 1/78 as an express powers case. She argues that Article 101 sets up an express

system of parallelism between internal and external powers, in "Jurisprudence: Cour de Justice, 14 Novembre 1978" (Cahiers de Droit Europeen 1981, p. 70-142). After mentioning the EEC Treaty Flaesch-Mougin states that "contrairement a ce dernier, le traite CEEA consacre expressement l'existance d'une regle de parallelisme de competences internes et externes".

In its argument submitted to the Court, the Commission referred to Article 101 when it emphasized that the draft Convention would restrict the transfer of nuclear materials in order to support its conclusion that the Community had the power to enter into the obligations contained in Article 4 of the draft Convention. When the Commission mentioned Article 101 EAEC, it did so as follows:

> "Under Article 101 of the Treaty the Commission is expressly given very wide external powers in particular with regard to supply and supervision. Thus in particular under the last paragraph of Article 52 and under Article 53 and 61 of the Treaty it has the necessary powers to undertake, on an international level, that no transfers of special fissile materials contrary to the convention shall henceforth be made".

The first sentence of this statement appears to relate not to the first paragraph of Article 101,

but to the second and third, which discuss the Commission's role within the Community. In other words, it seems that this statement was not meant to address the division of powers between the Community and the Member States, but rather the division of powers on a horizontal plane between the various Community institutions, since it refers to "the Commission" rather than "the Community". On the other hand, if one looks at this in the context of the preceding paragraph, the Commission appears to have been referring to division of powers on a vertical, rather than a horizontal plane since in that paragraph the power question is discussed in terms of "the Community" and "the Member States". This alternate view regarding the Commission's interpretation of Article 101 is supported by its use of the word "necessary". Had the Commission wanted to say that Article 101 expressly created full parallelism between internal and external Community powers, it could have left this word out and instead said, "it has the powers to undertake . . ." As it stands, the Commission's position appears to be that the Community has powers at an international level when "necessary", i.e., as a result of the doctrine of implied powers. However, perhaps "necessary" should be read

differently in this context. For the Commission's statement seems to use the word in the sense of "sufficient" powers, at the international level, rather than in the sense of powers "necessary" for the effective exercise of express Community powers. One can conclude that the Commission's understanding of Article 101 is not absolutely clear from the context in which it is mentioned. The thing which is certain is that the Commission refrains from explicitly arguing that Article 101 creates full parallelism between internal and external powers. The Council does not mention Article 101 in its argument at all, which is understandable considering the ambiguous nature of the Article and its desire that the Community not participate in the Convention.

Finally, we must look at the statements of the Court in regard to Article 101. In recital 2, after quoting Articles 1 and 2 the Court finds that: "Taken as a whole these provisions define the powers and jurisdiction of the Community in the field of external relations". But throughout a relatively long opinion, the Court never mentions Article 101 again until the end of the opinion. In recital 32 it concludes that:

> "to the extent to which the Community is to be bound to comply with the convention it is necessary that it should assume such obligations itself; that is the sense of Article 101, which states that it is 'the Community' which may enter into obligations by concluding agreements or contracts, and of Article 184 which confers legal personality upon it".

Its last mention of Article 101 occurs in recital 33 where it finds that:

> "the exclusion of the Community from participation in the Convention would detrimentally affect the powers conferred upon it by the Treaty with regard to supply and the nuclear common market, the responsibilities borne by it with regard to security and the comprehensive nature of its right of ownership . . . The Member States are not to intervene in the exercise of these prerogatives; in accordance with the division of powers set out in Article 101 of the Treaty that right is conferred upon the common institutions alone".

On the one hand, the Court uses the phrase "in accordance with the division of powers set out in Article 101" in recital 33. This is consistent with recital 2, where the Court concludes that Articles 101 and 102 together "define the powers and jurisdiction of the Community". On the other, the Court nowhere comes forward and states that Article 101 means that where the Community has internal power it consequently has external power. These recitals can be seen as cloaking the Court's own

conclusions regarding the Community's powers under the EAEC Treaty. The Court implies that it is simply applying the words of Article 101, but it does not explain what is written there. The Court leaves unanswered the question of whether Article 101 should be read as expressly creating complete parallelism between internal and external powers.

If we assume that the ruling is not based on express powers flowing from Article 101, it is necessary to investigate whether the Court may have founded its ruling on individual grants of express treaty-making power which are present in the EAEC Treaty. In recital 33, quoted above, the Court notes that exclusion of the Community from participation in the convention would affect its powers with regard to supply and the nuclear common market, responsibilities relating to security, and the comprehensive nature of its right of ownership. Does the EAEC Treaty in fact supply grants of treaty-making power in all those areas?

In the field of supply and the nuclear common market the Court notes that Article 52(b) refers to contracts relating to supply of materials coming from outside the Community. It notes as well that Article 64 mentions agreements or contracts between the Community and third States or international

organizations. After presenting other, similar provisions, the Court concludes that these reflect "the care taken in the Treaty to define in a precise and binding manner the exclusive right exercised by the Community in the field of nuclear supply in both internal and external relations". Although the Court uses the term "right" it appears to mean "power" in this context. Next the Court introduces, in a fashion similar to the cases previously discussed, the familiar doctrine of implied powers. The Court finds in recital 15 that:

> It thus appears that it would not be possible for the Community to define a supply policy and to manage the nuclear common market properly if it could not also, as a party to the Convention, decide itself on the obligations to be entered into with regard to the physical protection of nuclear materials in so far as its functions in the fields of supply and the nuclear market were affected".

All the usual elements in the implied powers formula are present here. Express power exists, both internally and externally, to define a common supply policy and create a nuclear common market. The Court shows the existence of necessity, without actually using the word, by saying that "it would not be possible" to carry out these functions properly if the Community could not also decide on obligations "with the regard to the physical

protection of nuclear materials". Community power will exist to the extent that "functions" are affected. Thus it seems that actual use of express powers is not required.

In the next section, beginning at recital 16, the Court discussed the general reservation made by Article 195 EAEC according to which the institutions of the Community were instructed to comply with conditions of access to nuclear materials set down in national rules and regulations for reasons of public policy or public health. The argument seems to have been that this provision supported not only internal rules but international agreements by Member States grounded in public policy or public health. The Court noted that the Article referred to requirements laid down by Member States in their natural territory. The Court was unwilling to give the provision a broader definition since it constituted a "reservation", and thus an exception to the general principles previously discussed. This should be seen, though it was not labeled as such, as an example of narrow interpretation based on a comparison of fundamental Treaty principles and an exception-creating provision.

In the Court's discussion of safeguards, which followed, it outwardly contemplated a proposed

"restrictive interpretation". The suggestion was that the security provisions were meant as a check on possible diversion by the person rightfully in possession of nuclear materials to a purpose other than the one declared, rather than prevention of intervention by third parties. Thus the Court was faced with a choice between two conflicting interpretations of a Treaty provision, a situation ripe for resolution by either wide or narrow interpre- tation by the Treaty. The label which would be applied depended on which provision was more consonant with the Treaty as a whole. The Court examined the preamble in regard to Treaty objectives, Article 2(e) regarding Community tasks, and the term "safeguards" itself in order to determine how safeguards should be conceptualized. It concluded that the term was sufficiently comprehensive, within the meaning of the Treaty, to include measures of physical protection.

The Court then contemplated what the result would be if it found that safeguards "as specifically laid down" in the Treaty did not encompass diversions by third persons. Here the Court relied on the doctrine of implied powers noting that the Commission had laid down regulations concerning the application of the safeguards

provisions, and that the Community had power to assume obligations in regard to third States which would need to be guaranteed. The exercise of these powers, it concluded, "would be hindered and its responsibility set at naught" if the Community was excluded from participation in the Convention. In addition, the subsequent development of the system "to its full scope implied by the very concept of 'safeguards'" would be compromised. One should note the explicit use of the term "implied".

The Court next addressed the question of Community participation from the point of view of ownership of the nuclear materials referred to by the Treaty. The Court noted that the Community was exclusive holder of the rights forming "the essential content of the right of property", including the right to dispose of special fissile materials. Because the right of ownership was concentrated in the Community, it alone was in a position to ensure that the general needs of the public were safeguarded in its own field. As a result, when a "new requirement" or "unforeseen situation" arose, it was the Community which held the power to deal with the situation. Consequently, the Community had "a well-founded title" to participate in the Convention.

Here there are similarities to implied powers reasoning in that the Court is stressing "new" or "unforeseen" circumstances not contemplated by the Treaty. The Court emphasizes the existence of what it apparently sees as a beneficial concern or objective, namely, "the general needs of the public". Unlike a typical finding of implied powers by the European Court of Justice, however, the Court does not examine necessity from the point of view of allowing EC action where essential to the adequate use of a power given by the Treaty. (Here we should note that the Court refers to "property right", but that can be seen as being composed of various powers.) Instead, the Court seems concerned with the idea that the Community alone is "in a position to ensure" that the general needs of the public are safeguarded in its field. As in recital 18 of ERTA, "in a position" in this context can be taken to mean "has the power". Thus the Court looks at an objective of the Convention (to fulfill the needs of public) and finds a necessity that the Community participate because it exclusively controls a field of application of the Agreement. If this does, indeed, consist of an example of use of the implied powers doctrine, this particular formula seems to represent a dramatic change from past. Necessity is

investigated by looking at the objectives of the contemplated agreement (instead of the objectives of the Treaty according to the "old" formula) and then asking whether the Community must participate because the Member States cannot alone fulfill the Agreement's obligations.

If we turn to the third and final part of the Court's decision we find, interestingly enough, a similar power formulation, which the Court introduces as "specifically legal in nature". According to the Court:

> Recital 32
> "The system of physical protection organized by the draft convention could only function in an effective manner, within the ambit of Community law, on condition that the Community itself is obliged to comply with it in its activities. . . . to the extent to which the Community is to be bound to comply with the convention it is necessary that it should assume such obligations itself; that is the sense of Article 101 . . ."

Here again, the Court examines the aim of the Convention and whether it can function effectively without Community participation, instead of looking at the aim of express treaty-making powers and whether those can function without implying the treaty-making power of the Community. One can consider whether a formula such as this, allowing treaty-making by the Community wherever the

Community must participate in order for a contemplated agreement to function effectively, might not be equivalent to full parallelism of internal and external powers.

At this juncture, however, we must consider once more Ami Barav's statement that this case, and recital 32 in particular, are examples of case law on the concept of "necessity" in the context of an express powers decision. There is the further problem of the Court's holding that the conclusion it comes to in recital 32 "is the sense of Article 101". The dilemma of Article 101 frankly seems to be left unanswered by this case, and with it the question of whether the Court is introducing a new test for finding implied powers.

On a final note, the Court brings up the relevance of Article 192 in Part Three of the ruling. Article 192 EAEC, like Article 5 EEC, imposes an obligation on the Member States that they "abstain from any measure which could jeopardise the attainment of the objectives of this Treaty". Here it is necessary to pause and think about a basic premise in this paper: that the Treaties could not, and the Court would not, create a system in which certain agreements could not be concluded by either the Community or by the Member States. This

idea forms the basis of the "mirror-image" analysis in ERTA. Could not, then, Article 192 EAEC and Article 5 EEC be seen as potential sources of implied treaty-making power for the EC? Clearly, the fact that Member States have a duty to abstain from jeopardizing measures, could not be taken to mean that the Community can take such measures. Only when a shift from the Member States to the Community as treaty-maker would "cure" the jeopardizing effects of an agreement, could the Community claim implied powers. In other words, where the Member States are obligated to abstain from making an international agreement because it would jeopardise the attainment of Treaty objectives, the Community would have the power to make the same agreement so long as when concluded by the Community itself, the Treaty's objectives would no longer be jeopardized. A treaty that would jeopardize the Community's objectives, no matter which government entity signed it, could not be concluded at all. This proposition, though admittedly far-reaching, would avoid the possibility of a legal vacuum in which nobody was competent to conclude agreements that, in fact, would work to aid the Community in meeting its objectives, or at least not interfere with them. A necessary consideration

in evaluating this possibility would be whether Article 5 EEC and Article 192 EAEC constitute mere statements of principle, or whether they are directly applicable.

6. The Natural Rubber Opinion: Opinion of the Court given pursuant to the second sub-paragraph of Article 228(1) of the EEC Treaty, Opinion 1/78

a. Facts

The Commission sent a "Recommendation for a decision on the negotiation of an international agreement on natural rubber" to the Council on October 5, 1978. The agreement referred to had been the object of negotiations in which the Community had participated within the United Nations Conference on Trade and Development (UNCTAD) since January, 1977. In its recommendation for a decision, the Commission took the position that the Community alone was competent, under Article 113 of the Treaty, to participate in negotiation and conclusion of the agreement. Several Member State delegations in the Council, however, took the view that the Commission recommendation should be based on both Articles 113 and 116 of the Treaty and that both the Community and the Member States should participate. The negotiations proceeded on the

basis of the second formulation, and the Commission, pursuant to Article 228(1), asked the Court to give an opinion as to the extent of the Community's powers to negotiate and conclude the Natural Rubber Agreement.

b. Opinion

The Court concluded that the Community's right to participate in the agreement was not contested. Instead it determined that the disagreement was over whether the subject-matter of the agreement came entirely within the powers of the Community or whether it fell partially within the scope of the Member States' powers in a way that would justify the joint participation of the Community and the Member States. The court reviewed the functions of UNCTAD and examined the nature and objectives of the Nairobi Resolution, which created the framework for the Natural Rubber negotiations. After describing the nature of the agreement itself and resolving with the question of admissibility in favor of the Commission's request, the Court proceeded to discuss the subject-matter and objectives of the agreement in order to answer the competence question. The central issue raised, according to the Court in recital 37, was whether the rubber agreement came

"as a whole or at least in essentials within the sphere of the 'common commercial policy'". Both the Council and Commission agreed that the agreement was closely connected with commercial policy, but could not agree on whether Article 113 covered the subject-matter of the agreement entirely.

The Court concluded that the Community was competent to conclude commodity agreements as well as traditional commercial agreements. In addition, it found that where "organization of the Community's economic links with non-member countries may have repercussions on certain sectors of economic policy . . . as is precisely the case with the regulation of international trade in commodities, that consideration does not constitute a reason for excluding such objectives from the field of application of the rules relating to the common commercial policy". Finally the Court examined whether the arrangements for financing the buffer stock could negate the Community's exclusive competence in common commercial policy matters. It concluded that should the charges for maintaining the stock be borne directly by the Member States, that would "imply the participation of those States in the agreement together with the Community".

c. Analysis

At first glance the Opinion of the Court in Natural Rubber seems unrelated to the doctrine of implied powers because the case involves the common commercial policy, where treaty-making power is expressly provided by the Treaty. It seems instead that the only task might be to define the content of the common commercial policy itself. However, the doctrine of implied powers comes into play in relation to this area too. Article 113 admits that its listing of various elements of the common commercial policy is incomplete, as a look at its first paragraph will show:

Article 113
1. "After the transitional period has ended, the common commercial policy shall be based on uniform principles, particularly in regard to changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalization, export policy and measures to protect trade such as those to be taken in case of dumping or subsidies".

Even if it did not include the words "particularly in regard to . . ." the possibility of using the doctrine of implied powers to broaden Article 113 would still have existed. It is thus important to examine the Natural Rubber opinion in order to ascertain whether the treaty-making power

of the Community has been expanded through reliance on the implied powers doctrine to broaden the boundaries of the express treaty-making power within the common commercial policy itself.

The first step is to look for wording in the opinion which resembles the usual formula for finding implied powers. In recital 43 the Court points out that ". . . it is clear that a coherent commercial policy would no longer be practicable if the Community were not in a position to exercise its powers also in connection with a category of agreements which are becoming, alongside traditional commercial agreements, one of the major factors in the regulation of international trade". Similarly in recital 44, the Court finds that, "it would no longer be possible to carry on any worthwhile common commercial policy if the Community were not in a position to avail itself also of more elaborate means devised with a view to furthering the development of international trade". The words "it would no longer be possible" and "it would no longer be practicable" convey the idea that the power to conclude commodity agreements is necessary to successful implementation of the common commercial policy. Necessity, as we have seen, is a key element in the formula for finding implied powers.

The formula for implied powers includes two other elements as well: an express power on which the implied power is based, and an objective for which the express power was provided and which will not be attainable without the implication of unwritten powers. The objective in this case is the implementation of a "coherent" or "worthwhile" common commercial policy. The third element, that of express powers is slightly more difficult to locate. To say that the express power here is the power to implement the common commercial policy seems to get us nowhere, since it is that very policy which we are trying to define by identifying the individual powers which make it up. It is more useful to examine Article 113, which gives a partial listing of aspects of the common commercial policy, and specifically mentions "the conclusion of tariff and trade agreements". Article 114 then goes on to grant the power to conclude these agreements to the Council, acting "on behalf of the Community". From the existence of necessity, express power and related objectives, we can conclude that the Natural Rubber opinion contains elements in its reasoning which form the basis for a finding of implied powers, and which reveal the existence of a Community power to conclude international commodity agreements.

Side by side with the implied powers doctrine, however, strands of another sort of reasoning appear. The critical passage is recital 49 where the Court finds that:

> "having regard to the specific nature of the provisions relating to commercial policy in so far as they concern relations with non-member countries and are founded, according to Article 113, on the concept of a common policy, their scope cannot be restricted in the light of more general provisions relating to economic policy and based on the idea of mere coordination".

Thus the Court introduces elements of the method termed "wide" or "narrow" interpretation. This method is utilized by the European Court of Justice as well as various national and international courts, according to Professor F. Dumon in his article titled, "The Case-law of the Court of Justice--a critical examination of the methods of interpretation". (p. III-123) Dumon does not begin his discussion by defining wide and narrow interpretation, but instead quotes from Charles de Visscher, who has written on the subject in relation to international courts in "Problemes d'interpretation judiciaire en droit international public". According to de Visscher:

> "a strict interpretation is necessary if the provision in dispute derogates from the general law which is acknowledged to apply . . .; if the provision . . . derogates from the 'normal rule' in a certain field; if, when the court is faced with two provisions of equal authority, one of which appears to have a wider scope than the other, a strict interpretation reconciles the wording of the two provisions and to that extent accords with what was in all likelihood, the common intention of the parties; or if the clause to be applied deviates either from the underlying concept or from the general structure of the treaty".

From Charles de Visscher's examples it is possible to conclude that the method involves an element of comparison or conflict, where two "rules" or "concepts", as Dumon puts it, (p. III-123), must be reconciled. Thus, the aspect of being "wide" or "narrow" is always a relative question, taken in relation to a second rule or concept of law with which the first is being compared. The object seems to be to consistently uphold the "broader" or more "fundamental" legal principle. Whether a court will label its interpretation "wide" or "strict" is simply a function of which provision, the "more" or "less" fundamental, the Court is trying to interpret. Thus it is assumed implicitly that different provisions or concepts can be ranked in order of importance. This idea is encapsulated in a quotation set down by De Visscher: "Comme l'observe L. Soirat, 'L' extension ou la restriction d'un texte douteux suppose deja l'existence d'une systematique qui assigne a la disposition contestee une place dans un ensemble donne'" (p. 92).

One must analyze, however, whether the European Court of Justice is using the terms "wide" and "narrow" as they are described above. A brief examination of various cases may be helpful in this regard. A search of the Court's decisions shows

that "wide", "narrow", "broad", and "strict" interpretation have been mentioned in 157, 59, 56, and 102 cases respectively. Fortunately, Dumon provides a sampling of these decisions, and we shall work from the group he has selected. In Government of the Federal Republic of Germany v. Commission of the European Economic Community (Case 24/62 of July 4, 1963 [1963] ECR 63), the Court of Justice held that Article 25 EEC had to be interpreted restrictively because it contained derogations from the common external tariff, a "foundation" of the Community. This clearly fits into de Visscher's fourth example of a clause that deviates from the underlying concept or general structure of a treaty. The element of comparison is present as between the article in question and the general concept of the Treaty. In Jean Ryners v. Belgian State (Case 2/74 of June 21, 1974 [1974] ECR 631) the Court faced the question of whether the terms of Article 55, which provides that the provisions of Chapter 2--Right of Establishment, of the EEC Treaty should apply "to activities . . . connected, even occasionally, with the exercise of public authority", covered a person who practiced the profession of advocate. The Court held that "having regard to the fundamental character of freedom of

establishment and the rule of equal treatment with nationals in the system of the Treaty, the exceptions allowed by the first paragraph of Article 55 cannot be given a scope which would exceed the objective for which this exemption clause was inserted". Once again, the Court compared a clause creating an exception with more fundamental treaty principles. In Carmelo Angelo Bonsignore v. Oberstad-direktor der Stadt Koln (Case 67/74, 1975 ECR 297), the Court's task was to interpret Council Directive No. 64/221 the object of which was to coordinate special measures concerning the movement and residence of foreign nationals on the basis of public policy, public security or public health. The Court concluded that the article in question departed from the rules concerning the free movement of persons and that as exceptions they would have to be strictly construed. This falls in line with the pattern of comparison seen in other cases and corresponds to de Visscher's second example, of a provision which derogates from the "normal rule" in a certain field.

We shall now look at cases involving wide interpretation in order to see whether they too conform to the pattern. Of the numerous cases in which the Court relies on this method, we will look at two.

In Plaumann & Co. v. Commission of the European Economic Community (Case 25/62 of July 15, 1963 ECR 95) the Court was called upon to interpret Article 173 in order to determine whether the words "another person" in the provision that "any natural or legal person may . . . institute proceedings against a decision . . . which, although in the form of . . . a decision addressed to another person, is of direct and individual concern to the former" referred to Member States or not. The Court found that:

> "this Article neither defines nor limits the scope of these words. The words and the natural meaning of this provision justify the broadest interpretation. Moreover, provisions of the Treaty regarding the right of interested parties to bring an action must not be interpreted restrictively. Therefore, the Treaty being silent on the point, a limitation in this respect may not be presumed".

In his discussion of strict and wide interpretation Professor Dumon makes the statement that "lawyers of our background confer a strict interpretation on any provision which is capable of adversely affecting human liberty or dignity" (p. III-129). In complementary fashion the Court seems to find in the Plaumann case that important rights are at stake and therefore wide interpretation is required. One troubling issue presents itself. Most of the

examples we looked at in relation to strict interpretation contain a comparative element, but here only one provision is involved. In fact the aspect of comparison is still evident. Though one provision alone is involved the Court is asked to choose between two possible interpretations, consistently with de Visscher's fourth example. It chooses the one more consonant consistent with the important principle at stake, namely, access to justice.

In Anita Cristini v. Societe nationale des chemins de fer francais (Case 32/75 of September 30, 1975 (1975) ECR 1085), the plaintiff argued that the reduction card issued by the French national railway agency should have been issued to her although she was Italian and according to French law the cards could only be issued to French nationals. The basis for her argument was Article 7 of Council Regulation No. 1612/68 of October 15, 1968, which related to freedom of movement for workers in the Community. In trying to define the concept of social advantage under the regulation, the Court noted that certain Article 7 provisions referred to relationships deriving from contracts of employment, while others had nothing to do with such relationships and even assumed that the employment contract had been

terminated. The Court concluded under these circumstances that:

> "the reference to 'social advantages' in Article 7(2) cannot be interpreted restrictively. It therefore follows that, in view of the equality of treatment which the provision seeks to achieve, the substantive area of application must be delineated so as to include all social and tax advantages, whether or not attached to the contract of employment".

This example reveals an element of comparison, as between different provisions in Article 7, as well as reliance on the fundamental principle of "equality of treatment" in deciding which of the two types of provisions should be given priority.

Why then one may ask, looking back to the opinion in International Rubber, did the Court rely on both the implied powers doctrine and wide interpretation? Each method served a different purpose, as an examination of the opinion will reveal. The implied powers doctrine was used to show that although Article 113 expressly mentions only the conclusion of "tariff and trade agreements", new types of instruments not expressly mentioned would be interpreted as falling within the Community's authority as well. This was so in particular, according to the Court, because commodity agreements were becoming, "alongside

traditional commercial agreements, one of the major factors in the regulation of international trade". In other words, the Community was faced with the development of an important new form of agreement. Without the power to enter commodity agreements "it would no longer be possible to carry on any worthwhile common commercial policy".

The function of the method of wide interpretation was different from the one described above. It served to answer the argument that the agreement had economic policy as well as common commercial policy aspects. The Court concluded that though both aspects were present, the fact that an agreement might have repercussions on certain sectors of economic policy did "not constitute a reason for excluding such objectives from the field of application of the rules relating to the common commercial policy". In coming to this conclusion the Court examined the Treaty provisions dealing with the common commercial policy and economic policy, finding that the latter were "more general" and were "based on the idea of mere coordination" while the former were "specific" and concerned "the concept of a common policy". Thus it seems that the Court, in choosing between various possible characterizations of the agreement, chose the one

which better reinforced the more fundamental aspect of the European Community, the common commercial policy.

The conclusion which can be suggested here as to the difference between wide interpretation and the doctrine of implied powers is that the former is a method of choosing between conflicting aspects of law while the latter is a method of expanding powers which can be used, where appropriate, in conjunction with wide interpretation. Wide interpretation, it should be noted, is not always used to resolve power questions. The two methods should not be viewed as identical, however, they can come together if the Court is faced, for example, with choosing between different interpretations of a Treaty provision, one of which is based upon a literal reading of a questioned passage, the other on an implied powers approach. If the Court concludes that the latter is more consistent with underlying Treaty principles it can opt for wide interpretation based on the implied powers doctrine. In a certain sense, every instance of reliance on the implied powers doctrine can be viewed as a choice between a literal reading and a non- literal approach. In that respect every finding of implied powers, it might seem, should be viewed as a case of wide interpretation by the

Court. But if a third possible interpretation can be imagined, even more extensive than the implied powers approach, the latter would be "narrow" in comparison. The conclusion can only be that these terms have no meaning in and of themselves but instead are always relative, and dependent on the options at hand.

## 7. Observations

Parallelism is a term frequently used in relation to the theory of implied powers developed by the Court in the area of treaty-making. It refers to the concept that the Community's treaty-making powers are equal to its internal powers even where the former are not expressly granted by the Treaty. Judge Pescatore, a member of the Court of Justice, writes of the division of opinion among authors that existed prior to the ERTA decision in "External Relations in the Case-Law of the Court of Justice of the European Communities" (16 Common Market Law Review 1979, 615-645). According to Pescatore, some held the view that the Community's treaty-making powers were limited to the ones actually described in the Treaty, a theory based upon the principe d'attribution, whereas others felt that competence in external matters was

co-extensive with the Community's internal powers, the latter idea being expressed by the Latin maxim: in foro interno, in foro externo. Can one conclude that the Court has adopted, through its decisions in the area of treaty-making, a model according to which the EC can conclude treaties in any area where it has internal power?

From Pescatore's description of the ERTA judgment one might get the impression that the judgment created a system of parallelism between internal and external powers. He notes that one question remained open even after the decision, in that it was not clear whether a finding of implied power could only be made after internal rules were adopted. But to some extent he gives the impression that, at least in the area of common policies, parallelism of power does exist. In his description of that judgment he notes, "Considering that the Treaty provides for a common policy in the field of transport, the Community is vested with the power to enter into agreements with third countries relating to this subject matter, although the relevant articles of the Treaty do not expressly confer on the Community authority to this effect" (p. 619). Pescatore bases this conclusion on recital 19 of ERTA, under which ". . . the system of internal

Community measures may not therefore be separated from that of external measures". Pescatore wisely does not refer to any need for a finding of necessity, since the ERTA rules led to an "automatic" assumption that it exists. However he fails to note the requirement that an agreement "affect" internal rules, which is a condition for finding treaty-making power under ERTA. ERTA creates "parallelism" between internal and external powers only in cases where the conditions set out in its rules are fulfilled. When Pescatore discusses the question of necessity of internal measures raised in the ERTA judgment, in the context of Opinion 1/76 he states that the latter "puts an end to the uncertainty inherent in the ERTA judgment as to whether an external competence may be recognized also in cases where the Community, though having jurisdiction, has net yet covered the field by internal measures". The critical word here is "may". Opinion 1/76 does not stand for the proposition that even in the absence of internal rules the existence of an internal power reveals the existence of an external power in the same area. Rather, it stands for the idea that the nonexistence of internal rules will not preclude a finding of implied treaty-making power so long as other

conditions are fulfilled. The key condition will be "necessity". On the basis of all that has been discussed so far, one is forced to question a comment put forward by Judge Pescatore in his "Contribution to the Discussion" at the Amsterdam Colloquium Communities and their Member States in the field of external relations" (1981). Pescatore quotes the phrase "in foro interno, in foro externo" after which he states:

> "This principle was enshrined by Article 6 of the ECSC Treaty; though this provision was forgone in the clauses of the EEC Treaty, it has been reconstrued by the Court's case-law".

In fact, from the above examination it seems that parallelism has not actually been instituted by the Court.

We have seen that necessity is a key condition for finding that treaty-making powers can be implied from express grants of internal power. What exactly does necessity mean in the sense in which it is used by the Court? Professor Kovar, in "La contribution de la Cour de justice au developpment de la condition internationale de la Communaute europeenne" (1978 Cahiers de droit europeen p. 527-573) writes that:

> "il convient d'eviter toute confusion entre la preuve de la necessite d'une action de la Communaute et l'evaluation de son opportunite. Ce sont deux appreciations distinctes par leur nature comme par leurs consequences. La premiere, comme en temoigne l'avis de la Cour est une operation essentiellement juridique puisque ressortit a l'interpretation du traite. La seconde implique des appreciations qui, pour l'essentiel, ne relevent pas du droit".

Ami Barav, as well, has made valuable comments on this topic in the "General Discussion" at the first day of the Amsterdam Colloquium (Division of powers between the European Communities and their Member States in the field of external relations, p. 89). There he states as follows:

> "I disagree with Mr. Fischer's statement that the decision by the Community on the necessity of entering into international agreements, which is at the centre of Community power, is a political decision. The concept of necessity, as it emerges from the case law of the Court, is a truly legal one. The Court's case law establishes one point with respect to the appraisal of necessity: you must see whether exclusively internal legislation is enough to achieve a specific treaty objective, and, if it is not, whether the international agreement is suited for that purpose. This is a legal question. One would probably draw a distinction similar to the one made in French administrative law, between, on the one hand, the wisdom and the desirability, 'l'opportunite' of an action, and, on the other, the legality and the necessity thereof. I do not think, therefore, that the concept of necessity, which is so important in determining not only the legal basis but also the scope of the Community's external power, is a purely political one".

The critical part of this quotation is the passage in which Ami Barav states that you must see whether exclusively internal legislation is enough to achieve a particular Treaty objective, and if not whether an international agreement will serve the same purpose: This tests can be termed an "impossibility test", with "impossibility" referring to the hopelessness of achieving Community objectives without the implication of implied powers. An examination of the cases we have looked at bears out Ami Barav's interpretation of necessity.

Use of the term cannot be profitably assessed in ERTA because under the automatic rules the concept was not analyzed. Even in the supplementary individual finding of necessity in recitals 23 through 28 the Court does not mention a specific standard to be applied. Instead in recital 27, the Court simply concludes that the powers of the Community "involve the need . . . for agreements with the third countries concerned" without further explanation. Opinion 1/75 was based upon the express treaty-making power granted in Article 113 and did not involve a finding of implied powers or an analysis of necessity. Necessity was looked at in recital 30/33 of the Kramer case, in which the

Court found an implied power on the part of the Community to conclude agreements for the conservation of sea resources. The Court first noted that on an internal level, the Community has power to conserve these resources. The Court next pointed out that "The only way to ensure the conservation of the biological resources of the sea both effectively and equitably is through a system of rules binding on all the States concerned . . ." We should note the idea of impossibility conveyed by "the only way". A particularly clear example of the Court's concept of necessity appears in recital 2 of the Rhine opinion. There, after discussing the express powers granted by the Treaty in transport, the Court found that, "In this case, however, it is impossible fully to attain the objective pursued by means of the establishment of common rules pursuant to Article 75 of the Treaty, because of the traditional participation of vessels from a third state, Switzerland . . . It has thus been necessary to bring Switzerland into the scheme in question by means of an international agreement with this third State". Here the very word "impossible" was used. Recital 15 of Euratom should be noted, despite the issue regarding whether the ruling should be seen as an implied or express powers case, as it contains

wording particularly consistent with the impossibility test. There the Court concluded that:

> "It thus appears that it would not be possible for the Community to define a supply policy and to manage the nuclear common market properly if it could not also, as a party to the Convention, decide itself on the obligations to be entered into with regard to the physical protection of nuclear materials in so far as to its functions in the fields of supply and the nuclear market were affected".

Finally, in Natural Rubber the Court introduced the doctrine of implied powers in order to determine that the Community was capable of negotiating and concluding commodity agreements. The Court found in recital 43 that, "a coherent commercial policy would no longer be practicable if the Community were not in a position to exercise its powers also in connexion with a category of agreements which are becoming, alongside traditional commercial agreements, one of the major factors in the regulation of international trade". Once again the idea which is conveyed is one of impossibility.

Nonetheless, it is important to keep in mind that the Court may have taken a step towards introducing a new concept of necessity in relation to implied treaty-making power in the Euratom case. One should note once again the Court's approach in recital 32 of that case, where it examined the draft

Convention and found that it could only function in an effective manner on condition that the Community itself was obliged to comply with it in its activities. The Court concluded that to the extent to which the Community was bound to comply with the convention it was necessary that it assume such obligations itself. In the Natural Rubber opinion, which was handed down after the Euratom case, the Court relied on similar reasoning to find that the Member States should participate in the Natural Rubber Agreement. It again looked at the objectives and purposes of the agreement envisaged, and in recital 60 found the Member States would have to participate if they were to be responsible for implementing the financing provisions. Introduction of the idea that Member States or the Community should participate in an Agreement if implementation requires action or compliance on their part would explain the seemingly inconsistent judgments regarding the effects of Member State financing of an Agreement in Opinion 1/75 and the Natural Rubber opinion. These judgments could be seen as resulting from a shift in the standard applied by the Court.

An interesting comment by Judge Pescatore follows the same type of reasoning and can be compared with the above examples. In his

"Contribution to the Discussion" at the Amsterdam Convention (supra), Pescatore observed that behind the Court's reasoning in ERTA two arguments were paramount. According to Judge Pescatore the first of these was that "As a consequence of the internal transfer of power, the Community alone is enabled to implement the commitments which are to be entered into". It almost appears as if Pescatore was reading this argument into the case after the fact in an effort to pave the way for a new type of interpretation in the treaty-making area. The consistency between Judge Pescatore's comment and recital 32 in Euratom is so clear that it cannot help but to support the idea the latter may indeed represent a new trend in the Court's definition of necessity. Our next step shall be to examine the concept of necessity in the decision-making of the United States Supreme Court in order to determine whether it is indeed identical to the European Court of Justice's conception, and thus whether Advocate-General Dutheillet de Lamothe's warning in ERTA that the Court risked introducing implied powers doctrine of the United States Supreme Court into European Community law was well founded.

## III. The United States Supreme Court

It is not possible to make a direct comparison between US and EC law because in the United States the power to make treaties is granted in full to the federal government by Article II, section 2 of the Constitution. Thus there has been no need to apply the doctrine of implied powers to questions of treaty- making in regard to division of power between the U.S. Government and the fifty States. The implied powers doctrine has been relied upon heavily, however, in relation to other sorts of power questions. The leading case in the area in U.S. constitutional law is undoubtedly McCullogh v. The State of Maryland.

### 1. McCullogh v. The State of Maryland 4 Wheat. 316, 4 L. Ed. 579 (1819).

#### a. Facts

The leading American case on the doctrine of implied powers, McCullogh v. The State of Maryland 4 Wheat. 316, 4 L.Ed. 579(1819), arose following the Maryland legislature's adoption of an act imposing a tax on all banks or bank branches in the state not chartered by the Legislature. An action for penalty provided by the statute was brought by John James, suing for himself and the State, against James

McCullogh, cashier of the Baltimore branch of the Bank of the United States. The case was decided against McCullogh by the Maryland Court of Appeals. By writ of error it was taken to the Supreme Court.

b. Decision

Chief Justice Marshall observed that the state of Maryland denied the obligation of a law passed by the legislature of the Union and that McCullogh contested the validity of an act which had been passed by the Maryland legislature. Involved in these claims, Marshall concluded, was the United States Constitution, "in its most interesting and vital parts . . . the conflicting powers of the government of the Union and of its members". First it had to be asked whether the Congress had power to incorporate a bank, and if so, whether the state of Maryland could tax a branch of that bank without violating the Constitution.

Marshall concluded that the United States government was one of enumerated powers. It could exercise only those powers which had been granted to it. The power to establish a bank was not among the enumerated powers, but Marshall pointed out that the Constitution did not contain a clause requiring all grants of power to be express. A constitution was

not a legal code, and to require "an accurate detail of the subdivisions of which its great powers will admit . . . could scarcely be embraced by the human mind". A constitution should be marked out only in outline, while the minor ingredients which composed important objects would "be deduced from the nature of the objects themselves".

Marshall noted that although the word "bank" or "corporation" did not appear among the enumerated grants in the Constitution, the powers to collect taxes, borrow money, regulate commerce, declare and conduct war, and raise and support armies were all expressly provided to the federal government. The government, Marshall found, must be allowed to select its means whenever it was under a duty or, alternatively, enjoyed a right to act. Anyone objecting to a "particular mode of effecting the object" took on the burden of establishing that exception. Marshall proceeded to examine the arguments against the constitutionality of the Bank, in the end concluding that the power to incorporate belonged to the federal government and that Maryland's imposition of a bank tax was unconstitutional.

c. Analysis

The critical element of Chief Justice Marshall's opinion appears in his discussion of the federal government's power to charter a bank. He admits that important expressly enumerated powers do not auto- matically draw after them powers "of inferior importance" simply because they are inferior. But he asks whether that construction should "be preferred which would render . . . operations difficult, hazardous, and expensive". "Can we adopt" he inquires, "that construction . . . which would impute to the framers . . . the intention of impeding" the exercise of express powers "by withholding a choice of means?" Thus the Chief Justice takes into account factors such as difficulty and expense, while emphasizing the idea of a "choice of means" for the government.

Marshall goes on to discuss the term "necessary" from the necessary and proper clause of Article I section 8 of the Constitution, asking about the sense in which the word necessary is used:

> "Does it always import an absolute physical necessity, so strong that one thing, to which another may be termed necessary, cannot exist without that other? We think it does not . . . To employ the means necessary to an end, is

> generally understood as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable".

After noting that "This provision is made in a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs" he writes:

> "To have declared that the best means shall not be used, but those alone without which the power given would be nugatory, would have been to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances".

Finally, he concludes:

> "We admit, as all must admit, that the powers of the government are not to be transcended. But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional".

The fact that Marshall prefers to rely on the word "means" instead of "powers" should not be understood as representing a distinction in his mind between the two terms. It is clear that he sees the

ability of the federal government to incorporate a bank as a "power" from the following passage:

> "The power of creating a corporation is never used for its own sake, but for the purpose of effecting something else. No sufficient reason is, therefore, perceived, why it may not pass as incidental to those powers which are expressly given . . ."

The conclusion one can take from the passages set out above is that for the Court in McCullogh the concept of necessity is not absolute. The fact that options for achieving a particular goal already exist does not rule out the possibility of relying on implied powers to provide alternative means of potentially greater benefit. Legislative choice is emphasized by this approach.

## IV. Conclusion

A comparison of European Court of Justice and United States Supreme Court decisions reveals a major difference in the concept of necessity. In the European Community an impossibility test is applied, meaning that powers will be implied only if there is no other way of using an express power to reach the objective for which it was granted. In the United States, however, Chief Justice Marshall flatly rejected a similar approach. Prior to that decision, the issues had been refined in

an on-going debate between then Secretary of State Thomas Jefferson and then Secretary of the Treasury Alexander Hamilton over the constitutionality of the bill creating the first Bank of the United States, the same issue which the court was to rule on in McCullogh v. Maryland. In Jefferson's view, "necessity" referred only to those powers without which explicit grants of power would be nugatory. Hamilton opposed this approach, arguing that "[t]he only question must be . . . whether the means to be employed . . . has a natural relation to any of the acknowledged objects or lawful ends of the government". Laurence Tribe, in "American Constitutional Law" (The Foundation Press, 1978) describes the Jefferson-Hamilton dispute as a disagreement over "whether 'necessary' meant 'absolutely or indispensibly necessary', or meant only that the means must be 'needful, incidental, useful, or conducive to' an expressly delegated end of power". As we have seen, Marshall adopted Hamilton's view.

An examination of International Court of Justice decisions based on implied powers reveals a conception of necessity much closer to the Court of Justice's view than the United States Supreme Court's rulings. In Reparation for Injuries

Suffered in the Service of the United Nations (I.C.J. Rep. 1949, p. 174) the Court examined the Competence of the United Nations to bring a claim against a State to obtain reparation for damage caused by the injury of a U.N. agent in the course of performing his duties. The International Court of Justice found as follows:

> "Whereas a State possesses the totality of international rights and duties recognized by international law, the rights and duties of an entity such as the Organization must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice. The functions of the Organization are of such a character that they could not be effectively discharged if they involved the concurrent action, on the international plane, of fifty-eight or more Foreign Offices, and the Court concludes that the Members have endowed the Organization with capacity to bring international claims when necessitated by the discharge of its functions".

The Court based the finding of necessity in the above example on the idea that the United Nations "functions" could not be effectively discharged without an implication of nonexpress powers.

The Permanent Court of International Justice, in Advisory Opinion No. 13 (P.C.I.J. Rep., Series B, 12-18) was asked to inquire into the competence of the International Labour Organization to draw up and propose labour legislation to protect certain classes of workers which also incidently regulated

the same work when performed by the employer herself. The Court came to the following conclusions:

> "It results from the consideration of the provisions of the Treaty that the High Contracting Parties clearly intended to give to the International Labour Organization a very broad power of co-operation with them in respect of measures to be taken in order to assure humane conditions of labour and the protection of workers. It is not conceivable that they intended to prevent the Organization from drawing up and proposing measures essential to the accomplishment of that end. The Organization, however would be so prevented if it were incompetent to propose for the protection of wage-earners a regulative measure to the efficacious working of which it was found to be essential to include to some extent work done by employers".

This holding is reminiscent of the European Court of Justice's ruling in the Kramer case in that there it was impossible to regulate fishing in the territorial seas of the Member States without regulating fishing on the high seas as well. The International Labour Organization's competence was based upon the fact that it was essential to the efficacious working of an express power to adopt regulations, a standard which falls in line with the previous case.

The fact that the interpretation of the "necessity" requirement by the European Court of

Justice is consistent with the International Court of Justice, and the Permanent International Court of Justice rather than the United States Supreme Court, cannot help but make one question the outpouring of excited reactions following the ERTA judgment. The decision appears rather less revolutionary than previously thought, and Advocate-General Dutheillet de Lamothe's dire warnings concerning the introduction of "American-style" implied powers seem somewhat unconvincing. Nonetheless, the unexpected nature of the European Court of Justice's decision should not be ignored, for in certain respects it faced greater obstacles in its finding of implied powers than did the United States Supreme Court. First, there was the factor of Article 235 EEC, in that the Treaty already contained a provision taking into account the need for action in certain areas where the powers granted by the Treaty were not sufficiently broad. Second was the fact that the EEC Treaty, unlike the United States Constitution, contained no express provision supporting a finding of implied powers. It is true that Marshall in McCullogh v. Maryland specifically made the point that even in the absence of the "necessary and proper" clause his finding would have remained the same. Still, that remark was only one of

speculation, while in the European Community the situation was one of fact. Though the conventional teaching regarding the introduction of implied powers reasoning in the treaty-making area should probably be tempered, the contribution of the European Court of Justice remains a profound example of the integrative capacity of the Court.

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