

**THE DOCTRINE OF IMPLIED POWERS WITH  
SPECIAL REFERENCE TO  
THE INTERNATIONAL SEA-BED AUTHORITY –IV**

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## VI) CASE LAW OF THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

In this Chapter criteria for deciding the extent of powers of the European Communities and its organs, ie the doctrine of implied powers, before the Court of Justice of the European Communities, are examined by analysing cases of the Court.

### A. *Publication of Lists Cases*

In two cases in 1960, the Court held that the High Authority of the ECSC was incompetent to make particular Decisions in the absence of express provisions in the relevant Treaty and in view of the lack of implied powers. Within the ECSC, all measures and practices in any of the Member States which create a discrimination in transport rates are illegal.<sup>(1)</sup> In Chapter IX of the ECSC Treaty dealing with transport it is provided under Article 70, paragraph 3 that:

The rate scales, prices and tariff provisions of all sorts applied to the transport of coal and steel within each Member State and among the Member States shall be published or brought to the knowledge of the High Authority.

Under this provision the High Authority passed Decision 18/59.<sup>(2)</sup> The High Authority set out in Article 1 that the Member States of the Community had failed to fulfil one of the obligations under the Treaty by not publishing details of transport contracts for the movement of coal and steel, and in Article 2 set out the manner in which these details were to be published.

Both the Italian and the Netherlands Governments challenged the validity of the Decision on the grounds that under the terms of Article 70, paragraph 3, set out above, no power was granted to enable the High Authority actually to take a Decision on this matter.

The Court decided that the High Authority of the ECSC did not have power to take a Decision in the absence of express provisions and in view of the lack of implied powers on this matter.

The Court determined whether the Treaty grants regulatory powers to the High Authority by express terms. On this the Court held:

a comparison of Article 70, para 3, and the provisions of Article 60, section 2 (a) reveals that, in a parallel matter, the Treaty, when imposing the obligations to publish prices contained in Article 60, grants to the High Authority powers concerning its application, by specifying that publication shall be made to the extent and in the form prescribed by the High Authority after consulting the Consultative Committee.

One can see from the fact that, as concerns the publication of

rates, prices and conditions of sale applied on the common market, the Treaty has expressly granted a legislative power to the High Authority, providing even for control by the Consultative Committee, which is proof of the importance which it attributes to this matter and to the High Authority's control over it.

The absence of any *ad hoc* provision in Article 70 indicates, conversely, that, in respect of transport, the text of the Treaty denies the High Authority any power to take any executory Decision.<sup>(3)</sup>

The Court denied the High Authority legislative competence in the absence of express provisions, but the Court found it necessary to examine whether the competence was implicitly derived from other provisions of the Treaty, or from its power with regard to the general economic policy.

The High Authority claimed that the provision of Article 60, paragraph 2, subparagraph (a), implicitly requires the publication of lists, prices, and tariff provisions applicable to the transport of products originating within the ECSC. In the opinion of the High Authority, without that publication, the publication of price lists and conditions of sale of products stipulated under the provision would become unworkable and pointless. The Court examined the relevant Decisions of the High Authority concerning prices and transport costs, and concluded:

According to this contention, the obligation to publish prices involves the publication of transport tariffs because this obligation arises by implication from the notions of "prices" and "conditions of sale" referred to in Article 60. In law and in fact it is incorrect that in Article 60 the terms "prices" and "conditions of sale" include those of the goods themselves and those of the transport.

Indeed, the seller can only be required to publish his own prices and not the prices applied by a transport enterprise . . . .<sup>(4)</sup>

Then the Court proceeded to examine whether the High Authority can claim the regulatory powers in respect of transport by Article 70, paragraph 3.

In effect although it is true that, by virtue of a general principle, applied by Article 70 in regard to transport, the control of discriminations and punitive actions with respect to them is entrusted to the High Authority, nevertheless it cannot be deduced from this principle that the High Authority has been granted a power of decision relating to an anticipatory control by means of prescribing the manner of the publication of price lists or prices.

Its competence is by way of an exception and is conditional upon a renunciation by Member States, which in this instance the Treaty does not contain, either expressly or by implication.<sup>(5)</sup>

B. *E.R.T.A. Case*

The right of the EEC to negotiate with non-EEC States on matters of common policy was examined by the Court in the *E.R.T.A. Case*.<sup>(6)</sup>

The facts were as follows. On 19 January 1962, the European Agreement on the Work of Crews of Vehicles engaged in International Road Transport (*E.R.T.A.*)<sup>(7)</sup> was signed under the auspices of the United Nations Economic Commission for Europe by five Member States of the EEC and a number of non-EEC States, but it was never ratified. In 1967 revision of the Agreement was started under the Economic Commission for Europe. At the same time as negotiations under the Economic Commission for Europe were taking place, similar subject matter was discussed within the EEC, which culminated in Regulation 543/69 of 25 March 1969.

In March 1970 at a meeting of the Council of the European Communities, it was said that the Member States would carry on and conclude the negotiations for *E.R.T.A.* as Member States, but would agree to co-ordinate what they did both with each other and the Commission of the European Communities. The Council further agreed that the Commission were not to take part as such in the *E.R.T.A.* negotiations, and were to submit amendments to Regulation 543/69 to bring it into line with the *E.R.T.A.*<sup>(8)</sup>

In May 1970 the Commission of the European Communities started proceedings in the Court to annul the European Communities Council's "decision" of March, claiming that the Council had no authority to adopt such an act as it contravened Article 228, paragraph 1, and Article 75 of the EEC Treaty.<sup>(9)</sup> It asked the Court to annul it, arguing that in matters falling within the substantive scope of Regulation 543/69, authority to enter into international agreements had passed from the Member States to the Community. Under those circumstances the negotiation and conclusion of the *E.R.T.A.* by the Member States constituted a violation of the rights of the Community and deprived the Commission of the possibility of carrying out the tasks which Article 228 assigns to it in the field of treaty-making.<sup>(10)</sup>

The position of the two institutions opposing each other in this legal dispute clearly reflected the interests which each has a duty to safeguard: the Commission represented the interests of the Community and its institutions, claiming that the principle of attributed (or enumerated) powers should not be applied with the utmost strictness in the field of the Community's external relations in an area with so many international aspects as transport. The Council, on the other hand, clung to a narrow definition of the Community's external powers and sought to protect the sovereignty of the Member States in the foreign field from an allegedly illegal limitation by the Community.

The Advocate General largely concurred with the Council's opinion that no such breach of Treaty obligations could be found in the present case. He

submitted that the Treaty provided no basis for Community competence to negotiate and conclude treaties in the field of transport. In his view the appeal should be declared inadmissible since there was no Community competence and failing such competence the disputed act could not have originated in the Council acting as a Community organ, so that it was not challengeable under Article 173.<sup>(11)</sup>

The Court decided that the Community had power to negotiate with non-EEC countries on matters of common policy on the basis of implied powers of the Community.

After examining whether there is Community competence in the external field of the sphere of transport, the Court held:

In the absence of specific provisions of the Treaty relating to the negotiation and conclusion of international agreements in the sphere of transport policy . . . one must turn to the general system of Community Law relating to agreements with Non-Member States.<sup>(12)</sup>

Then the Court examined the system and competence of the EEC concerning agreements between the Community and non-Member States. At first, and in general, the Court pointed out that the Community enjoys legal personality by virtue of Article 210 of the EEC Treaty and defined it as the capacity enjoyed by the Community in its external relations to establish contractual links with non-Member States over the whole extent of the field of objectives in Part One of the Treaty.<sup>(13)</sup> Secondly, in a concrete case, the Court held that in determining the Community's authority to enter into international agreements, one must have regard to the whole scheme of the Treaty no less than to its specific provisions.<sup>(14)</sup> And it held that such authority to enter into international agreements

may arise not only from an explicit grant by the Treaty — as is the case with Articles 113 and 114 for tariff and commercial agreements and with Article 238 for Association agreements — but may equally flow from other provisions of Treaty and from steps taken, within the framework of these provisions, by the Community institutions.<sup>(15)</sup>

By examining the objectives of the Community concerning a common policy in general and transport in particular,<sup>(16)</sup> the powers of the Council to implement the objectives,<sup>(17)</sup> and steps taken by the Council,<sup>(18)</sup> the Court came to the conclusion that the Community had authority to enter into international agreements regarding international transport.<sup>(19)</sup>

The Court also stated that a combination of Treaty provisions and steps taken within the framework of these provisions can have the effect of divesting the Member States of their power to act externally and of supplying the Community with a treaty making authority.<sup>(20)</sup>

C. *Export Credit Case (Opinion of 22 November 1975)*

In this Opinion the Court examined the power of the EEC to conclude an international agreement with non-EEC countries.

On 14 July 1975, the Court received a request under Article 228, paragraph 1, subparagraph 2 of the EEC Treaty<sup>(21)</sup> by the Commission of the European Communities.<sup>(22)</sup> The opinion of the Court was sought on the compatibility with the EEC Treaty of a draft "Understanding on a Local Cost Standard", which stipulated the grant of export credit within the system of aids granted by Member States for exports; in particular, whether the Community had the power to conclude this Understanding.

The Court, in its Opinion of 22 November 1975,<sup>(23)</sup> affirmed that the power of the Community to enter into commitments with non-EEC countries derives implicitly from the provisions of the Treaty of the EEC granting the Community powers over internal matters provided that the aim is the achievement of one of the objectives of the Community. The Court said:

the subject-matter covered by the standard contained in the Understanding in question, since it forms part not only of the sphere of the system of aids for exports laid down at Article 112 of the Treaty but also, in a more general way, of export policy and, by reason of that fact, of the sphere of the common commercial policy defined in Article 113 of the Treaty, falls within the ambit of the Community's power. In the course of the measures necessary to implement the principles laid down in the abovementioned provisions, particularly those covered by Article 113 of the Treaty, concerning the common commercial policy, the Community is empowered, pursuant to the powers which it possesses, not only to adopt internal rules of Community Law, but also to conclude agreements with third countries pursuant to Article 113 (2) and Article 114 of the Treaty.<sup>(24)</sup>

D. *Cornelis Kramer Cases*

In the case of *Cornelis Kramer et autres*,<sup>(25)</sup> the Court followed the reasoning in the *E.R.T.A. Case*,<sup>(26)</sup> concerning the treaty-making power of the EEC, when it decided the Community's authority to enter into international commitments.

The facts were as follows: Netherlands fishermen were prosecuted in Netherlands courts for breaking Netherlands law limiting the catch of certain species of fish. The Netherlands courts referred to the Court of Justice of the European Communities the question whether the Netherlands authorities, in adopting a binding recommendation of the North-East Atlantic Fisheries Commission established under Article 3 of the North-East Atlantic Fisheries Convention 1959, had done so compatibly with Community Law.

To answer this question the Court found it necessary to consider whether the EEC has authority to enter into international commitments.<sup>(27)</sup>

It was held that the Community has the power to enter into international commitments on matters of conservation of biological resources of the sea on the basis of implied powers of the Community.

The Court held:

In the absence of specific provisions of the Treaty authorising the Community to enter into international commitments in the sphere of conservation of the biological resources of the sea, one must turn to the general system of Community Law in the sphere of the external relations of the Community.<sup>(28)</sup>

After it defined the personality of the Community as having the capacity, in its external relations, to enter into international commitments over the whole field of objectives defined in Parts One and Six of the Treaty, the Court held in respect of the implied powers as follows:

To establish in a particular case whether the Community has authority to enter into international commitments, regard must be had to the whole scheme of Community Law no less than to its substantive provisions. Such authority arises not only from an express conferment by the Treaty, but may equally flow implicitly from other provisions of the Treaty, from the Act of Accession and from measures adopted, within the framework of those provisions, by the Community institutions.<sup>(29)</sup>

After examining the obligations of the Community regarding a common policy in general<sup>(30)</sup> and agriculture in particular,<sup>(31)</sup> the power to implement the objectives,<sup>(32)</sup> and the regulations pursuant to the policy laid down,<sup>(33)</sup> the Court held:

It follows from these provisions taken as a whole that the Community has at its disposal, on the internal level, the power to take any measures for the conservation of the biological resources of the sea, measures which include the fixing of catch quotas and their allocation between the different Member States.<sup>(34)</sup>

And it concluded:

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 States. In these circumstances it follows from the very duties and powers which Community Law has established and assigned to the institutions of the Community on the internal level that the Community has authority to enter into international commitments for the conservation of resources of the sea.<sup>(35)</sup>



E. *Watersay Vessels Fund Case (Opinion of 3 May 1977)*

The Court also gave an Opinion on the matter of the EEC's power to conclude an international agreement with non-EEC countries on 3 May 1977.<sup>(36)</sup> In this request,<sup>(37)</sup> the Commission of the European Communities asked whether a draft Agreement establishing European laying-up fund for inland waterway vessels is compatible with the provisions of the EEC Treaty. The system envisaged involving the Communities a certain delegation of powers of decision and judicial powers to bodies which were independent of the common institutions.

In order to implement a common transport policy provided for in Article 74 of the Treaty, Article 75, paragraph 1,<sup>(38)</sup> instructed the Council of Ministers of the EEC (as it then was) to lay down, according to the prescribed procedure, common rules applicable to international transport to or from the territory of a Member State or passing across the territory of one or more Member States. In this case, however, it was impossible fully to attain the objective by means of the establishment of common rules pursuant to Article 75 of the Treaty because of the traditional participation of vessels from a non-EEC country, Switzerland, a non-member of the EEC, navigated her vessels by the principal watersays in question, which were subject to the system of freedom of navigation established by long established international agreements. It was thus necessary to bring Switzerland into the system in question by means of an international agreement. The power of the Community to conclude such an agreement is not expressly laid down in the Treaty. The Court, citing its judgement of *Cornelis Kramer Cases*<sup>(39)</sup> concluded:

whenever Community law has created for the institutions of the Community power within its internal system for the purpose of attaining a specific objective, 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 connection.

This is particularly so in all cases in which internal powers has [sic] already been used in order to adopt measures which come within the attainment of common policies. It is, however, not limited to that eventuality. Although the internal Community measures are only adopted when the international agreement is concluded and made enforceable. . . . the power to bind the Community vis-a-vis third countries nevertheless flows by implication from the provisions of the Treaty creating the internal power and in so far as participation of the Community in the international agreement is, as here, necessary for the attainment of one of the objectives of the Community.<sup>(40)</sup>

## F. Conclusion

The Court in *Gouvernement de la République Italienne c. Haute Autorité de la C.E.C.A.*<sup>(41)</sup> and *Gouvernement du Royaume des Pays-Bas c. Haute Autorité de la C.E.C.A.*<sup>(42)</sup> hesitated to apply the theory of implied powers, although the Court recognised its existence in doctrine and practice in Community Law, saying:

Indeed, both theory and case law are in agreement in admitting that the rules established by a Treaty imply powers without which these rules cannot be properly or reasonably carried out.<sup>(43)</sup>

Those conclusions must be considered under the fact of partial integration in the ECSC Treaty.<sup>(44)</sup> It seems that the partial integration of the Community - - ie, the fact certain powers were retained by Member States, is one of the reasons the Court hesitated to apply the theory of implied powers.

The test applied under Community Law by the Court concerning implied powers of the Communities states that competence may arise not only from an explicit grant by the Treaties but may equally flow implicitly from other provisions of Treaties and steps taken, within the framework of these provisions, by the Communities' institutions.<sup>(45)</sup> This test was first stated in the *E.R.T.A. Case*<sup>(46)</sup> and followed in the *Export Credit Case*,<sup>(47)</sup> the *Cornelis Kramer Cases*,<sup>(48)</sup> and the *Waterway Vessels Fund Case*.<sup>(49)</sup>

In cases before the Permanent Court of International Justice and the International Court of Justice, it was held that the implied powers flow from the text of conventions, as contrasted with measures taken under the conventions. It is necessary to bear in mind here that under Community Law, the implied powers flow from steps taken, within the framework of provisions of the Treaties, as well as from other provisions.<sup>(50)</sup> Yet implied powers do not solely derive from those steps taken by the institutions. This can be better understood by examining the reasoning of the Court concerning the source of implied powers. The implied powers in question under Community Law are the external competence of the Communities, and the Court sees these as flowing from the grant to the Communities of internal competence, and from the creation of powers, within their internal system for the purpose of attaining a specific objective, to the institutions of the Communities. Council Regulation 543/69 of 25 March 1969 in the *E.R.T.A. Case* and Regulations 2141/70 and 2142/70 of 21 October 1970 in the *Cornelis Kramer Cases* were cited by the Court as evidence of the existence of the Communities' external competence concerning the objects under the provisions of the Treaties. Consequently those steps taken by the institutions of the Communities are not regarded as the sole source of the implied powers of the Communities.

In the present writer's view there seem to be three reasons why the Court is restricted in applying the theory of implied powers under Community Law.

Firstly, the Court performs a type of "watch-dog" role to ensure the legality of the decisions of the executive, that is to say, that they are in conformity with the Treaties. In regard to this function, it will appear, from provisions such as Article 33 of the ECSC Treaty, Article 173 of the EEC Treaty and Article 146 of the Euratom Treaty, which confer general jurisdiction on the Court, that the Court is essentially the arbiter holding the balance between the different institutions of the Communities.<sup>(51)</sup> Its primary concern is to check on the action of the executive organ to see that it does not transgress the limits of its competence under the Treaties. The European Parliament also serves as a check on the actions of the executive and can, in certain circumstances, force it to resign. This is a power not possessed by the Court. It can be said, therefore, that the European Parliament constitutes a political check and the Court a legal check. Together they constitute a guarantee against any abuse of power by what might otherwise become an authoritarian international executive. Secondly, the precision with which the Treaties of the European Communities and Community Law have developed as a complex series of exact rules under the Treaties, prevents the Court from going too far. Precision in Community Law is evident if one compares the powers, duties and functions of the Communities and their institutions with those under the Charter of the United Nations. Finally, although these provisions do not open unlimited opportunity to increase the powers of the Communities,<sup>(52)</sup> the existence of "small revision" clauses<sup>(53)</sup> enables, the Communities to create supplementary powers through a simple procedure. For these reasons, regardless of the great number of judgements and opinions which the Court has given, there are only a few occasions in which the Court has had recourse to its carefully circumscribed theory of implied powers.

(1) ECSC Treaty, Art 4(b) provides:

The following practices are hereby abolished and prohibited within the Community, as incompatible with the common market for coal and steel, under the conditions laid down in the present Treaty:

\* \* \*

(b) Measures or practices which discriminate between purchasers and between consumers especially as regards price and delivery terms or transport rates.

(2) (1959) 2 Official Journal of the European Communities, Legislation 287.

(3) *Gouvernement de la République Italienne c. Haute Autorité de la C.E.C.A., Affaire 20/59*, (1960) VI/II *Recueil de la Jurisprudence de la Cour* 663, Valentine, *The Court of Justice of the European Communities* (1965), vol 2, 294 at 301-302; *Gouvernement du Royaume des Pays-Bas c. Haute Autorité de la C.E.C.A., Affaire 25/59* (1960) VI/II *Recueil de la Jurisprudence de la Cour* 723, Valentine, op. cit., 315.

ECSC Treaty, Art 60, para 2, subpara (a), provides:

the price scales and conditions of sales applied by enterprises within the single market shall be made public to the extent and in the form prescribed by the High Authority after consulting the consultative Committee.

(4) Valentine, *ibid*, 302.

(5) *Ibid*, 303.

(6) *Affaire 22/70*, (1971) XVII *Recueil de la Jurisprudence de la Cour* 263. (1971) 10 C.M.L.R. 335. The present writer also referred to C.M.L.R. for the translation.

(7) It is also called A.E.T.R., *Accord Européen sur les Transports Routiers*.

(8) *E.R.T.A. Case*, *supra* at note 6, at 265-266.

(9) EEC Treaty, Art 228, para 1, subpara 1, provides:

Where this Treaty provides for the conclusion of agreements between the Community and one or more States or an international organisation, such agreements shall be negotiated by the Commission. Subject to the powers conferred upon the Commission in this field, such agreements shall be concluded by the Council after the Assembly has been consulted in the cases provided for by this Treaty.

EEC Treaty, Art 75, para 1, provides:

With a view to implementing Article 74 and taking due account of the special aspects of transport, the Council, acting on a proposal of the Commission and after the Economic and Social Committee and the Assembly have been consulted, shall, until the end of the second stage by means of a unanimous vote and subsequently by means of a qualified majority vote, lay down:

(a) common rules applicable to international transport effected from or to the territory of a Member State or crossing the territory of one or more Member States;

(b) conditions for the admission of non-resident carriers to national transport services within a Member State; and

(c) any other appropriate provisions.

(10) *E.R.T.A. Case*, *supra* at note 6, at 266-267.

- (11) *Ibid*, 285 et seq. See also text accompanying notes 7-11 of Chapter II *supra*.
- (12) *Ibid*, 274.
- (13) *Ibid*, 274.
- (14) *Ibid*, 274.
- (15) *Ibid*, 274.
- (16) EEC Treaty Arts 3 (c) 5 and 74.
- (17) EEC Treaty Art 74.
- (18) Council Regulation 543/69 of 25 March 1969, (1969) 12 Official Journal of the European Communities, Legislation No. L77/49.
- (19) *E.R.T.A. Case*, *supra* at note 6, at 276.
- (20) *Ibid*, 274-275.
- (21) EEC Treaty Art 228, para 1 subpara 2 provides:  
The Council, the Commission or a Member States may, as a preliminary, obtain the opinion of the Court of Justice as to the compatibility of the contemplated agreements with the provisions of this Treaty. As agreement which is the subject of a negative opinion of the Court of Justice may only enter into force under the conditions laid down, according to the case concerned, in Article 236.
- (22) See text accompanying notes 38-42 of Chapter IV *supra*.
- (23) (1975) 18 Official Journal of the European Communities, Information and Notices No. C268/18. Henceforth referred to as *Export Credit Case*.
- (24) *Ibid*, 21-22.
- (25) *Affaires jointes* 3, 4 et 6/76, [1976] *Recueil de la Jurisprudence de la Cour* 1279. (1976) 18 C.M.L.R. 440. Henceforth referred to as *Cornelis Kramer Cases*.
- (26) *Affaire* 22/70, (1971) XVII *Recueil de la Jurisprudence de la Cour* 263 at 274.
- (27) *Cornelis Kramer Cases*, *supra* at note 25, at 1308.
- (28) *Ibid*, 1308-1309.
- (29) *Ibid*, 1309
- (30) EEC Treaty Art 3 (d).
- (31) EEC Treaty Arts 38 para 3, and 39-46, and Annex II.
- (32) EEC Treaty, Arts 39 and 43, para 2
- (33) Council Regulation 2141/70 of 20 October 1970, (1970) 13 Official Journal of the European Communities, Legislation No. L236/1, laying down a common structural policy for the fishing industry and Regulation 2142/70 also of 20 October 1970, (1970) 13 Official Journal of the European Communities, Legislation No. L236/5, on the common organisation of the market in fishery products.
- (34) *Cornelis Kramer Cases*, *supra* at note 25, at 1310-1311.
- (35) *Ibid*, 1311.
- (36) Opinion 1/76, (1977) 20 Official Journal of the European Communities, Information and Notices No. C107/12, Henceforth referred to as *Waterway Vessels Fund Case*.
- (37) This request was also done under Art 288, para 1, subpara 2 of the EEC Treaty. See text accompanying notes 38-42 of Chapter IV *supra*.
- (38) EEC Treaty. Art 74 provides:  
The object of this Treaty shall, with regard to the subject covered by

this Title [Transport], be pursued by the Member States within the framework of a common transport policy.

See *supra* at note 9 and accompanying text for EEC Treaty, Art 75.

(39) *Affaires jointes* 3, 4 et 6/76, [1976] *Recueil de la Jurisprudence de la Cour* 1279.

(40) *Waterway Vessels Fund Case*, *supra* at note 36, at 12.

(41) *Affaire* 20/59, (1960) VI/II *Recueil de la Jurisprudence de la Cour* 663. See A of this Chapter.

(42) *Affaire* 25/59, (1960) VI/II *Recueil de la Jurisprudence de la Cour* 723. See A of this Chapter.

(43) Valentine, *The Court of Justice of the European Communities* (1965), vol 2, 294 at 302.

(44) *De Gazamenlijke Steenkolenmijnen in Limburg c. Haute Autorité de la C.E.C.A.*, *Affaire* 30/59, (1961) VII *Recueil de la Jurisprudence de la Cour* 1 at 44-45.

(45) See also Resolution by the European Parliament of 12 September 1978 on the Position of the European Communities in Public International Law, for the implied powers of the European Communities. (1978) 21 Official Journal of the European Communities, Information and Notices No. C239/16.

(46) *Affaire* 22/70, (1971) XVII *Recueil de la Jurisprudence de la Cour* 263 at 274. See text accompanying notes 12-19 *supra*.

(47) (1975) 18 Official Journal of the European Communities, Information and Notices No. 268/18 at 21-22. See C of this Chapter. Although the test of granting implied powers is similar to the other three, in this Opinion, no mention was made of the legal personality of the Communities and absence of the explicit provision granting the particular powers internally or externally.

(48) *Affaires jointes* 3, 4 et 6/76, [1976] *Recueil de la Jurisprudence de la Cour* 1279 at 1309. See D of this Chapter.

(49) *Opinion* 1/76, (1977) 20 Official Journal of the European Communities, Information and Notices No. C/107/4 at 12. See E of this Chapter.

(50) *E.R.T.A. Case*, *supra* at note 46, at 274 and the *Cornelis Kramer Cases*, *supra* at note 48, at 1309. In the *Export Credit Case*, the Court found that the provisions of EEC Treaty, Arts 112 and 113 are sufficient to grant the competence in question internally. See *supra* at note 47, at 21. In the *Waterway Vessels Fund Case*, the Court, citing the *Cornelis Kramer Cases*, followed the reasoning in the case. See *supra* at note 49, at 12. And no step taken by the institutions was involved in those Opinions.

(51) See text accompanying note 34 of Chapter IV *supra*.

(52) In the first place, recourse to the provisions is limited by the objectives of the Treaties. Extensive interpretation as to the nature of these objectives is, of course, always possible, but the strongest guarantee against abuse is the required unanimity of the Council, since nearly every extension of Communities' powers is the result of a further limitation of the sovereign powers of the Member States represented in the Council. Furthermore, the existence of "amendments" clauses, viz ECSC Treaty, Art 96, EEC Treaty, Art 236 and Euratom Treaty, Art 204, means that the procedures of "small revisions" may not lead to a modification of the Treaties. It can only create supplementary powers and work as a case-by-case basis. Art 236 of EEC Treaty provides:

The government of any Member State or the Commission, may submit to

the Council proposals for the revision of this Treaty.

If the Council, after consulting the Assembly and, where appropriate, the Commission, expresses an opinion in favour of calling a conference of representatives of the Governments of Member States, such conference be convened by the President of the Council for the purpose of determining in common agreement the amendments to be made to this Treaty.

Such amendments shall enter into force after being ratified by all Member States in accordance with their respective constitutional rules.

(53) ECSC Treaty, Art 95, para 1; EEC Treaty, Art 235; Euratom Treaty, Art 203. Art 235 of EEC Treaty provides:

If any action by the Community appears necessary to achieve, in the functioning of the Common Market, one of the aims of the Community in cases where this Treaty has not provided for the requisite powers of action, the Council, acting by means of a unanimous vote on a proposal of the Commission and after the Assembly has been consulted, shall enact the appropriate provision.

See for instance Council Decision 80/1270, (1980) 23 Official Journal of the European Communities, Legislation No. L375/68; Council Decision 81/420, (1981) 24 Official Journal of the European Communities, Legislation No. L162/4; Regulation 3245/81, (1981) 24 Official Journal of the European Communities, Legislation No. L328/1; Regulation 3744/81, (1981) 24 Official Journal of the European Communities, Legislation No. L376/38.

## VII) GENERAL CONCLUSIONS

The International Sea-Bed Authority is established by the United Nations Convention on the Law of the Sea 1982 as an international organisation with international legal personality and such powers as are implicit in and necessary for the exercise of those powers and functions with respect to activities in the Area. The Sea-Bed Disputes Chamber has wide jurisdiction concerning application and interpretation of the Convention. As was concluded in Chapter II, powers and functions cannot be derived from the concept of international legal personality alone, and speculation about the text of the constituent document is necessary. We must here note the tests for granting implied powers to the Authority, and examine the conditions governing the jurisdiction of each respective Court which were discussed in Chapter IV, ie lack of jurisdiction for authoritative interpretation in the International Court of Justice and application of Community Law in the Court of Justice of the European Communities.

### A. *The International Sea-Bed Authority*

It seems that the tests relating to the granting of the implied powers to the International Sea-Bed Authority under the Convention of the Law of the Sea 1982 are somewhat reserved and restrictive compared to the tests developed in cases before the Permanent Court of International Justice and the International Court of Justice. Under Article 157, paragraph 2, of the Convention, except for the “existence of broadly expressed powers” test, no mention is made of the tests concerning the implied powers of an international organisation, which were established in the Advisory Opinion on the *Personal Work of Employers Case*<sup>(1)</sup> by the Permanent Court of International Justice, and which seem to have been followed in the Advisory Opinion on the *Reparation for Injuries Case*.<sup>(2)</sup> But those two tests which are not provided for in the Convention may be applied as rules of international law under Article 293, paragraph 1.<sup>(3)</sup> It is possible to argue that those two tests are included in the Convention by means of the words “consistent with this convention” of Article 157, paragraph 2. The test in question under Article 157, paragraph 2, is the first “existence of broadly expressed powers” test of the *Personal Work of Employers Case*, which was elaborated in the *Reparation for Injuries Case*. The test of implied powers established by the Permanent Court of International Justice and the International Court of Justice is that an international organisation must be deemed to have those powers which, though not expressly provided for in the constituent document, are conferred upon it by necessary implication or intendment because they are essential to the performance of its functions from the existence of broadly



expressed powers.

The "necessity" test for the criteria of granting implied powers was first advanced by Judge Hackworth in his Opinion in the *Reparation for Injuries Case*,<sup>(4)</sup> but the view was not shared by the majority of the Court. Although the fact is that the "necessity" test has never been applied by the Permanent Court of International Justice or the International Court of Justice, the Convention on the Law of the Sea 1982 seems to have adopted that very test by Article 157, paragraph 2, and Article 176. Article 157, paragraph 2, provides:

The Authority shall have such incidental powers, consistent with this Convention, as are implicit in and necessary for the exercise of those powers and functions with respect to activities in the Area.

Article 176 provides:

The Authority shall have international legal personality and such legal capacity as may be necessary for exercise of its functions and the fulfilment of its purposes.

Both Judge Hackworth in the *Reparation for Injuries Case* and the United States' contentions in the *Effect of Awards Case*, although having regard to the implied power of an organ of an international organisation, resorted to the "necessity" test from the standpoint of the restrictive approach to the implied powers. In contrast the opinions of the International Court of Justice applied the "essential" test. Consequently, the test of granting implied powers in the Convention seems to be more reserved and restrictive than the one adopted in the cases by the two international courts.

On the other hand the test applied by Judge Hackworth in the *Reparation for Injuries Case* and the test established in cases by the Court of Justice of European Communities seem to be even more reserved and restrictive than the test under Articles 157, paragraph 2 and 176.

The test of Judge Hackworth says that implied powers flow from a grant of express powers, and are limited to those that are necessary to the exercise of the power expressly granted. Applying this test in the *Reparation for Injuries Case*,<sup>(5)</sup> he granted the United Nations the competence to institute legal proceedings and to claim for damage suffered by the Organisation itself, but denied its competence to claim for damage suffered by its employees and persons entitled through the employees, saying no necessity for the exercise of the power in question was shown to exist and there was no impelling reason why the Organisation should become the sponsor of claims on behalf of its employees.<sup>(6)</sup> His approach seems to be the one taken later in the Convention as far as the criteria for granting implied powers is concerned, but he placed a limitation on the ground of invoking implied powers by saying that implied powers flow only from expressly granted powers, and exclude func-

tions of an international organisation. In this respect, because the Convention under Article 157, paragraph 2, includes functions of the Authority as well as powers of the Authority as the grounds for invoking its implied powers, the Convention seems to have taken the wider approach to this question.

The test applied under Community Law in the Court of Justice of the European Communities is that the competence may arise not only from an explicit grant by the constituent documents but may equally flow implicitly from other provisions of the Treaties and from steps taken, within the framework of those provisions, by the institutions of the European Communities.<sup>(7)</sup> Although including the steps taken by the institutions of the Communities as a source of the implied powers of the Communities gives the impression that the Court took a flexible approach to the task of deciding the grounds of invoking the implied powers, as it was concluded in Chapter VI,<sup>(8)</sup> those steps are regarded by the Court solely as evidence of the existence of the Communities' internal competence and no implied power is derived solely from those steps taken by the institutions. Therefore the Court may have recourse to the theory of implied powers only in order to implement an express power, not in order to recognise a new power which is not declared in the texts of the Treaties. The Court granted the Communities the power to enter into an international agreement or commitment with non-EEC countries with respect to the matters within the objectives of the Communities. in the *E.R.T.A. Case* and the *Watersay Vessels Case*, the matter was transport policy and in the *Cornelis Kramer Case*, it was biological regulation. In the *Export Credit Case*, the Court recognised the Communities' external competence to grant export credit. It formulated a carefully circumscribed theory of implied powers under Community Law and, in practice, recognised the competence of the Communities to enter expressed aspects of external relation.

It is therefore submitted that so far as the implied powers of an international organisation are concerned, the definition of the theory of implied powers under the Convention on the Law of the Sea 1982 is more reserved and restrictive than one in those cases decided by the Permanent Court of International Justice and the International Court of Justice, and more flexible than that held by Judge Hackworth in the *Reparation for Injuries Case* and that expressed under Community Law.

#### B. *Organs of the International Sea-Bed Authority*

Each principal organ of the Authority and the Enterprise is responsible for exercising those powers and functions which are conferred upon it. In exercising such powers and functions each organ must act in conformity with the distribution of powers and functions.<sup>(9)</sup>

The tests which were applied by the International Court of Justice in the *Effect of Awards Case* and the *Certain Expenses Case* concerning the implied powers of an organ of an international organisation are essentially the same as those applied to the organisation itself. The "necessity" test was not followed in either case. The test was claimed to be applied by the United States Government concerning the implied power of an organ of the United Nations in the *Effect of Awards Case*.<sup>(10)</sup> In the *Certain Expenses Case*, the Court showed no inclination to apply the "necessity" test to the establishment of the peace-keeping forces by the General Assembly and the Security Council.

The reasoning in the *Effect of Awards Case* by the International Court of Justice, with regard to the lack of jurisdiction of the Court to decide the measures to be taken to exercise the implied power, seems to be reflected in the text of the Convention. The Court, affirming the General Assembly's implied power to create a judicial body, held:

The precise nature and scope of the measures by which the power of creating a tribunal was to be exercised, was a matter for determination by the General Assembly alone.<sup>(11)</sup>

Article 189 of the Convention imposes a limitation on the jurisdiction of the Sea-Bed Disputes Chamber with regard to decisions of the Authority, and the Chamber has no jurisdiction over the discretion of the Assembly and the Council provided that discretion is exercised in conformity with the rules, regulations and procedures,<sup>(12)</sup> with the exception of rendering non-binding advisory opinions under Article 191.<sup>(13)</sup>

The reasoning in the *Certain Expenses Case* by the International Court of Justice with regard to the legality of the organ's action toward the third party,<sup>(14)</sup> does not seem to be reflected in the Convention. The reasoning says that if the act involving liability is within the organisation's authority, it is irrelevant to third parties which organ of the organisation has been involved for the responsibility of the organisation, and in the absence of procedures for determining the validity of the act of the organs, each organ must be deemed to have a power to determine its own jurisdiction. The basis for the Court's decision was as follows:

In the legal systems of States, there is often some procedure for determining the validity of even a legislative or governmental act, but no analogous procedure is to be found in the structure of the United Nations. Proposals made during the drafting of the Charter to place the ultimate authority to interpret the Charter in the International Court of Justice were not accepted; the opinion which the Court is in course of rendering is an *advisory opinion*.<sup>(15)</sup>

The International Court of Justice in this case drew the power of an organ to determine its own jurisdiction from the absence of a jurisdictional clause.

This proposition is not applied to the Authority. The Assembly as a supreme organ of the Authority, decides such a matter,<sup>(16)</sup> when the Convention is silent about which organs are entrusted with the function in question, consistent with the distribution of powers and functions among the organs of the Authority. The Sea-Bed Disputes Chamber is endowed with wide jurisdiction to settle disputes concerning the interpretation and application of the Convention between State Parties and also between a State Party and the Authority with a limitation under Article 189 on the Chamber's jurisdiction to review the Authority's decision.<sup>(17)</sup>

Application of implied powers theory to the organs of Authority is under some limitations. The competence to settle disputes over the interpretation of the Convention is shared by two organs. One is the political organ, the Assembly, and the other is a judicial organ, the Chamber. The Assembly which establishes general policies, follows mainly political principles, and is unlikely to apply the theory of implied power, which is a judicial principle. The Chamber is endowed with sufficient jurisdiction to invoke the implied powers of the organs and is capable of applying the theory of implied powers. Nevertheless, there seem to be some reasons which prevent the Chamber from resorting to the theory as far as the implied powers of the organs are concerned. Most of the disputes between the developed countries and the third world countries during the Third United Nations Conference on the Law of the Sea were concerned with the distribution of powers and functions between the Assembly and the Council. This was one of the reasons why the United States decided to postpone her signature of the Draft Convention. Areas in dispute had included for example: the status of the Assembly as a supreme policy-making organ and the Council as an executive organ; the constitution and voting procedure of the Council; deferment of voting in the Assembly; and the course of adopting the rules, regulations and procedures by the Council and the Assembly. The parties, after long deliberation, decided the allocation of the powers and functions, which is now formulated as the Convention. Careful discussion with regard to the allocation of the powers and functions of the organs and, as a consequence, the precision of the text of the Convention seem to lead the Chamber to judicial conservatism.

### C. *General*

The system of the peaceful settlement of the disputes arising from the interpretation and application of the Convention is flexible enough. The judicial organ in charge of the task, the Chamber, has wide jurisdiction to settle the disputes, and access to it is wide enough to allow enterprises and individuals to bring their claims. Moreover the Convention is one of the most crucial compromises between the developed countries and the developing

countries. Therefore, although it is dangerous to predict at this early state of the history of the Convention, there seems to be enough scope for the theory of the implied powers to be resorted to by these entities.

- (1) [Advisory Opinion] [1926] P.C.I.J., Series B, No. 13, 1.
- (2) [Advisory Opinion] [1949] I.C.J. Reports 174.
- (3) Art 293, para 1, of the Convention provides:  
A court or tribunal having jurisdiction under this section shall apply this convention and other rules of international law not incompatible with this convention.
- (4) Supra at note 2, at 198. Note that he insisted that implied powers flow from a grant of express powers, and are limited to those that are "necessary" to the exercise of the power expressly granted, and not from functions as stipulated under Art 157, para 2, of the Convention.
- (5) Ibid, 196-197.
- (6) Ibid, 198.
- (7) *E.R.T.A. Case, Affaire 22/70*, (1971) XVII *Recueil de la Jurisprudence de la Cour* 263 at 274; *Cornelis Kramer Cases, Affaires jointes 3, 4 et 6/76*, [1976] *Recueil de la Jurisprudence de la Cour* 1279 at 1309.
- (8) See text accompanying note 50 of Chapter VI supra.
- (9) Art 158, para 4 of the Convention. See supra at note 6 of Chapter I.
- (10) [1954] I.C.J. Pleading, *United Nations Administrative Tribunal*, 139-141, 141-143 and 315-317.
- (11) [Advisory Opinion] [1954] I.C.J. Reports 47 at 58.
- (12) Art 160, para 2, subpara (f), and Art 162, para 2, subpara (o).
- (13) See text accompanying notes 15-22 of Chapter I supra.
- (14) [Advisory Opinion] [1962] I.C.J. Reports 151 at 168-169.
- (15) Ibid, 168.
- (16) Art 160, para 2, subpara (n) of the Convention. See also supra at note 12 of Chapter I.
- (17) See text accompanying notes 15-22 of Chapter I supra.

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