The European Court, the rule of law and the reach of judicial power in the European Union

Article (Accepted version) (Refereed)

THE EUROPEAN COURT, THE RULE OF LAW AND THE REACH OF JUDICIAL POWER IN THE EUROPEAN UNION

Trevor C. Hartley

Professor of Law Emeritus

London School of Economics

It is generally thought that a judiciary is an essential element of a State. Having a judiciary is what distinguishes a State from a mere political organization—a guerrilla movement or resistance organization, for example. However, if that State is to be governed by the Rule of Law—if it is to be a *Rechtsstaat* in Continental terminology—that judiciary must be independent. This much is agreed. However, more controversial questions arise when one asks how extensive the powers of the judiciary should be. In particular, should the judiciary have exclusive competence to rule on important constitutional questions, or should it be possible to make provision for other bodies to do so? This is the question to be discussed in this article: it will be discussed with reference to the Court of Justice of the European Union ("ECJ"). It is question which could be of special importance to the United Kingdom in the context of Brexit since any dispute-resolution system laid down in a post-Brexit agreement between the United Kingdom and the European Union would have to pass the scrutiny of the ECJ.

The EU Treaties provide a mechanism for such scrutiny: art. 218(11) TFEU states that a Member State, the European Parliament, the Council or the Commission may obtain the opinion of the ECJ as to whether an agreement between the European Union and a non-member State is compatible with the EU Treaties.[1] This means that a single Member State, or one of the political institutions of the EU, can trigger the procedure for bringing the matter before the ECJ.

The recent decision of the ECJ in the *Achmea* [2]case has focused attention on these issues. The case concerned a bilateral investment treaty (BIT) concluded in 1991 between the Netherlands and what was then Czechoslovakia. In the treaty, each State guaranteed fair treatment to investors of the other State. It also contained a provision, art. 8, for the settlement of disputes by arbitration. When Czechoslovakia broke up, Slovakia succeeded, in 1993, to the rights and obligations of Czechoslovakia under the treaty. In 1994, Slovakia joined the European Union.

In 2004, Slovakia opened up its market to private health-insurance services. Achmea, a Dutch company, set up a subsidiary which offered such services in Slovakia. Subsequently, Slovakia imposed restrictions on private health-insurance operators and, even though these were subsequently held unconstitutional by the Slovak Constitutional Court, Achmea nevertheless considered that they had caused it damage. It therefore brought arbitration proceedings against Slovakia under the investment treaty. The arbitration took place in Germany. Each party appointed one arbitrator and the two arbitrators appointed the chairman. In 2012, the arbitrators awarded Achmea €22.1 million damages. Slovakia then brought proceedings before the German courts to annul the award. The case reached the German Federal Supreme Court (*Bundesgerichtshof*), which made a reference to the ECJ.

[1] Although the ECJ's judgment is called an "Opinion," it is in fact binding.

[2] *Slowakische Republik (Slovak Republic) v Achmea* (C-284/16) ECLI:EU:C:2018:158 (Grand Chamber). The judgment is available on "Curia.EU," the ECJ's website.

The main issue was whether the arbitration provisions in the BIT were compatible with arts 267 and 344 TFEU. Article 267 confers jurisdiction on the ECJ to give preliminary rulings on the interpretation of the EU Treaties and the validity and interpretation of acts of the EU,[3] when a reference is made to it from a court or tribunal of a Member State. When a ruling on such a matter is necessary for its decision, any court or tribunal of a Member State may make a reference; a court or tribunal from which there is no appeal *must* make a reference.

Article 344 provides:

> "Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein."

Taken together, these provisions could be read as precluding the submission to arbitration of questions concerning the interpretation or application of the EU Treaties. Since an arbitral tribunal of the kind in issue in the case is not able to make a preliminary reference to the ECJ under art. 267—it is not a "court or tribunal of a Member State" within the terms of that provision[4]—the system established under the BIT could, if questions of EU law were in issue, deprive the ECJ of its prerogatives under the EU Treaties.

It might be thought that the BIT did not concern the interpretation or application of the EU Treaties: it concerned investor protection and it might appear to lay down its own set of criteria for this purpose. However, the facilitation of cross-border economic activity lies at the heart of the European Union. The EU Treaties contain provisions on the free movement of goods across borders, the free movement of services, the free movement of capital and the right of businesses from one Member State to establish themselves in another. There are extensive rules of EU law to achieve these objectives. There could be other concerns—for example, the protection of public health—which might require the adoption of provisions which could potentially conflict with those needed to achieve the economic objectives. The ECJ recognizes this and believes that these two objectives should be balanced. It follows from this that both the economic objectives and the extent to which they could be overridden by other objectives are, in the last analysis, matters for EU law. Thus, the subject-matter of the BIT was by its very nature liable to involve EU law.

The ECJ considered that, in view of its limited nature, the possibility of judicial review by the German courts was not sufficient to overcome the objections discussed above. In previous cases, the ECJ had held that, in relation to commercial arbitration, the requirements of efficient arbitration proceedings justify the review of arbitral awards by the courts of the Member States being limited in scope, provided that the fundamental provisions of EU law can be examined in the course of that review and, if necessary, be the subject of a reference to the ECJ.[5] However, arbitration proceedings such as those under the BIT are different from commercial arbitration. While the latter originate in the freely expressed wishes of the parties, the former derive from a treaty by which Member States agree to remove from the jurisdiction of their own courts, and hence from the system of judicial remedies laid down in the EU Treaties, disputes which may concern the application or interpretation of EU

[3] The present wording of art. 267 TFEU refers to "acts of the institutions, bodies, offices or agencies of the Union." In its original form (art. 177(b) EEC), it referred to "acts of the institutions of the Community."

[4] *Nordsee Deutsche Hochseefischerei v Reederei Mond Hochseefischerei Nordstern* (102/81) ECLI:EU:C:1982:107; [1982] E.C.R. 1095. The position would be different if it formed part of the judicial system of the Member State in question. See, further, [43]–[49] of the judgment in *Achmea* (C-284/16) ECLI:EU:C:2018:158.

[5] See [54] of the judgment in *Achmea* (C-284/16) ECLI:EU:C:2018:158.

law. In those circumstances, the ECJ held, the considerations relating to commercial arbitration cannot be applied to arbitration proceedings under the BIT.[6]

For these reasons, the ECJ held that, by concluding the BIT, the Member States Parties to it established a mechanism for settling disputes between an investor and a Member State which could prevent those disputes from being resolved in a manner that ensures the full effectiveness of EU law.[7] Its final ruling was that arts 267 and 344 TFEU preclude a provision in an international agreement concluded between Member States under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept.

This ruling caused surprise—consternation, even—in some arbitration circles. However, it finds support not only in the words of the Treaty, but also in a line of previous decisions stretching back some forty years. We now turn to these cases.

The *Laying-up Fund* case

The first case arose when over-capacity of inland-waterway vessels on the Rhine–Moselle waterway system caused a severe fall in rates, a fall which threatened carriers with bankruptcy. The EU (then the EEC) stepped in to solve the problem. Its plan was to establish a fund which would pay owners if they laid up their vessels. This would reduce capacity and thus restore equilibrium between supply and demand. The fund was to be called the Laying-up Fund for Inland Waterway Vessels. It was to be financed by a levy on all vessels using the waterway.

A difficulty was caused by the fact that Swiss vessels also operated on the waterway and any solution had to include them. This meant that a programme could not be put into effect solely within EU jurisdiction. The result was an international treaty between the European Union, Switzerland and six Member States: Belgium, the Netherlands, Luxembourg, France, Germany and the United Kingdom. The reason these Member States participated in their individual capacities was that there had been two earlier conventions on the matter, one concluded in 1868 and the other in 1956, and it was necessary to ensure that any conflict between these earlier conventions and the new one would be resolved in favour of the latter.

The Laying-up Fund was itself an international organization, with legal personality, modelled on the EU (EEC) itself. Its organs were a Supervisory Board (analogous to the EU Council), a Board of Management (analogous to the Commission) and a court, the Fund Tribunal. The Supervisory Board consisted of one member from each of the EU Member States[8] and one member from Switzerland. The non-voting chairman was a representative of the Commission. It took decisions by a majority, but that majority had to include the votes of three of the five States with the greatest interest in the subject-matter of the Fund.[9] Within the narrow limits of its competence, it had the power to adopt measures with direct effect in the EU and Switzerland.

The jurisdiction of the Fund Tribunal in relation to the Fund was to be similar to that of the ECJ in relation to the EU. This included the power to give preliminary rulings on the interpretation of the Fund Agreement on references from national courts in the EU and Switzerland. It was to have one

[6] At [55] of the judgment in *Achmea* (C-284/16) ECLI:EU:C:2018:158.
[7] At [56] of the judgment in *Achmea* (C-284/16) ECLI:EU:C:2018:158.
[8] At its own request, Ireland did not participate.
[9] These were Belgium, Germany, France, the Netherlands and Switzerland.

judge from each of the six EU States that were Parties to the agreement and one from Switzerland. Under the proposed regulation submitted by the EU Commission to the EU Council for the conclusion and implementation of the Agreement, the six judges from EU Member States were to be nominated by the ECJ from among its own members.

The case came before the ECJ (under the procedure outlined above) for an Opinion on whether the proposal agreement was compatible with the EU Treaties (then the EEC Treaty).[10] The court held that it was not. It accepted that in principle the EU could conclude an agreement with a non-Member State to establish an international organization with legal personality capable of taking action within a field falling within EU jurisdiction (the common transport policy). However, various aspects of its structure were held unacceptable, especially the unequal rights of the Member States.

It might be thought that the jurisdiction given to the Fund Tribunal to interpret the Fund Agreement would not cause problems, since the Agreement was a separate instrument from the EU Treaties. However, the ECJ had held a few years previously[11] that an international agreement between the EU and a non-member State constitutes an act of an EU institution in terms of what is now art. 267(b) TFEU (then art. 177(b) EEC).[12] This meant that the ECJ itself had jurisdiction, on a reference from a court or tribunal of a Member State, to give preliminary rulings on the interpretation of the Laying-up Fund Agreement. Since the Fund Agreement gave the Fund Tribunal jurisdiction to do this, a conflict could arise.[13]

Two different interpretations of the relevant provision had apparently been put forward in the course of the hearing before the ECJ. One was that the jurisdiction of the fund Tribunal would replace that of the ECJ in this regard; the other was that both the Tribunal and the ECJ would have jurisdiction and that Member-State courts could choose which one they would send the reference to.[14]

The ECJ's response to this was remarkably conciliatory. It declined to say which interpretation was correct and expressed the hope that there was only the smallest possibility of a conflict of jurisdiction. However, it did say that no one could rule out *a priori* the possibility that the two courts might give different interpretations of the same provision, thus prejudicing legal certainty.[15] The ECJ accepted that the need to give effective legal protection to individuals in a scheme in which a non-member State participated might justify the principle on which the system was based.[16] However, the court was not willing to accept that some of its own members would serve as members of the Tribunal. It said that if the Fund Statute were interpreted so as to give jurisdiction to both the Tribunal and the ECJ to interpret the Agreement, the six members of the ECJ required to sit on the Fund Tribunal might prejudice their position with regard to questions which might come before the ECJ after being brought before the Fund Tribunal, or *vice versa.* It therefore ruled that the Fund Tribunal could be established only if the judges belonging to the ECJ were not called upon to sit on it.

[10] *Laying-up Fund for Inland Waterway Vessels* (Opinion 1/76) ECLI:EU:C:1977:63; [1977] E.C.R. 741. The procedure was triggered by the EU Commission.
[11] *Haegeman v Belgian State* (C-181/73) ECLI:EU:C:1974:41; [1974] E.C.R. 449.
[12] This was based on the fact that the assent of the EU took the form of an act of the Council. There is, however, a difference between the act by which an entity assents to a treaty and the treaty itself.
[13] At [17] *et seq.* of the Opinion.
[14] At [19] of the Opinion.
[15] At [20] of the Opinion.
[16] At [21] of the Opinion.

In this Opinion, the ECJ showed that it was willing to make compromises in order to cater for the legitimate interests of non-member States which were participating in a scheme that was both in their interests and in those of the EU. There is nothing in the decision which suggests that an organization of this kind cannot be created if it is correctly structured.

The *First EEA* Case

The next case to consider is one which seems particularly relevant to the problems which might arise if the UK were to conclude an agreement with the EU after Brexit. It is the *First EEA* case,[17] and was decided in 1991, some fourteen years after the *Laying-up Fund* case. It concerned the Agreement to set up the European Economic Area (EEA), a treaty to which the Parties were the EU, the Member States of the EU and the EFTA countries.

As is well known, the purpose of the EEA was to extend large parts of the EU system to additional European countries (the EFTA States), thus producing what was then the world's largest economic area. It was to be based on common rules and equal conditions of competition, and was to contain adequate means of enforcement. The agreement provided for the setting up of a court, the EEA Court, which was to be composed of eight judges, five of whom were to be from the ECJ.

This agreement was referred in draft to the ECJ, on the initiative of the Commission, under the same procedure as before. At the request of the Commission, the ECJ considered only the judicial provisions of the Agreement. In view of its importance, it is worth considering the court's Opinion in some detail.

Part III of the Opinion

The ECJ started its analysis by asking whether the fact that many provisions of the EEA Agreement were identical to provisions of EU law meant that they should be interpreted in the same way. The significance of this was that an important objective of the EEA Agreement was to attain homogeneity in the interpretation and application of the law between the EEA and the EU: the idea was that the law in the relevant areas should be the same, and should be interpreted in the same way, in the two entities.[18] This would promote fair competition between companies in the EU and those in the EEA.

After referring to art. 31 of the Vienna Convention on the Law of Treaties 1969, which states that terms in an international agreement must be interpreted in accordance with their context and in the light of the object and purpose of the agreement, the ECJ compared the aims and context of the EEA Agreement with those of the EU.

The EEA Agreement was concerned with the application of rules on free trade and competition similar to those that apply in the EU. As far as the EEA was concerned, however, these were ends in themselves; for the EU, on the other hand, they were a means towards something much greater: the establishment of an internal market, and economic and monetary union, these things all being part of the even greater objective of European unity. The ECJ also pointed out that the EEA Agreement merely created rights and obligations among the Contracting Parties: there was no transfer of sovereign rights to a supranational entity. In contrast, the court said, the EU Treaties (then the EEC Treaty) constituted the "constitutional charter" of a Community (now a Union) based on the rule of law: the EU Treaties had created a new legal order for the benefit of which the Member States had

[17] *First EEA* case (Opinion 1/91) ECLI:EU:C:1991:490; [1991] E.C.R. I-6079.
[18] This was stated in the Preamble to the EEA Agreement.

limited their sovereign rights.[19] The ECJ therefore concluded that the divergences between the aims and context of the EEA Agreement and those of EU law stood in the way of the achievement of homogeneity in the interpretation and application of the law in the EEA.

Part IV of the Opinion

The ECJ next asked itself whether, in the light of this contradiction, the proposed system of courts might undermine the autonomy of the EU legal order in pursuing its own particular objectives. In this connection, it considered two issues: the meaning of the term "Contracting Party" in the EEA Agreement, and the effect that the case-law of the EEA Court might have on the interpretation of EU law.

The meaning of "Contracting Party" could be relevant in two contexts. First, the EEA Agreement gave the EEA Court jurisdiction to settle disputes between the "Contracting Parties."[20] Secondly, the Agreement gave a "Contracting Party" the right to bring such a dispute before the EEA Court.[21] Thus the EEA Court might have to decide who constituted a Contracting Party in order to interpret these provisions. The term "Contracting Party" was defined in art. 2(c) of the Agreement: as far as the Community (EU) and its Member States were concerned, it could be either (1) the Community and the Member States, or (2) the Community alone, or (3) the Member States alone. Which it was would depend on the respective competences of the Community and the Member States under the EEC Treaty and the ECSC Treaty. In other words, the EEA Court would have to interpret the EU Treaties by ruling on the division of competence between the EU and the Member States in order to decide whether it had jurisdiction in a case before it.

The jurisdiction thus conferred on the EEA Court could, the ECJ said, affect the allocation of responsibilities as defined in the EU Treaties (EEC Treaty) and thus the "autonomy of the Community legal order."[22] The exclusive jurisdiction of the ECJ in this regard was, the court said, confirmed by what was then art. 219 EEC (now art. 344 TFEU).[23] For this reason, the ECJ held that to confer such jurisdiction on the EEA Court was incompatible with EU law.[24]

The ECJ next considered the effect that the case-law of the EEA Court might have on the interpretation of EU law. It began by pointing out that both an international agreement between the EU and a non-member State,[25] and measures adopted by institutions set up under such an

[19] At [21] of the Opinion.
[20] EEA Agreement, art. 96(1)(a).
[21] EEA Agreement, art. 117(1).
[22] At [35] of the Opinion.
[23] At [35] of the Opinion. Article 344 TFEU is the provision (set out above) under which the Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for in the Treaties.
[24] At [36] of the Opinion.
[25] This was first decided by the ECJ in 1974 in *Haegeman v Belgian State* (C-181/73) ECLI:EU:C:1974:41; [1974] E.C.R. 449 and formed part of the court's reasoning in the *Laying-up Fund* case (Opinion 1/76) ECLI:EU:C:1977:63; [1977] E.C.R. 741, discussed above.

agreement,[26] are part of EU law. This meant that the ECJ had jurisdiction under the EU Treaties to interpret both the EEA Agreement and any measures adopted by the EEA.[27]

The ECJ next said that where an international agreement provided for a court with jurisdiction to settle disputes between the Parties to the agreement, and therefore to interpret the provisions of the agreement, the decisions of that court would be binding on the ECJ if it was called upon to interpret the agreement in so far as it was part of the EU legal system.[28]

The ECJ said that such an agreement would in principle be compatible with EU law. The competence of the EU in the field of international relations, and its capacity to conclude international agreements, necessarily entail the power to grant jurisdiction to a court, created or designated by such an agreement, to interpret and apply of the provisions of the agreement.[29] However, the EEA Agreement took over an essential part of the rules governing economic and trading relations within the EU, provisions which constitute, for the most part, fundamental provisions of the EU legal system.[30] This had the effect of introducing into the EU legal system a large body of EEA rules next to a body of identically worded EU rules.[31] Moreover, the EEA Agreement expressed the intention of securing the uniform application of the Agreement throughout the territory of the EEA, a territory which included the EU. This necessarily affected the interpretation of both the provisions of the EEA Agreement and the corresponding provisions of EU law.

Although the EEA Court was under an obligation to interpret the provisions of the Agreement in the light of decisions of the ECJ given prior to the date of signature of the Agreement,[32] it would not be subject to any such obligation with regard to decisions given after that date. Thus the objective of ensuring homogeneity of the law throughout the EEA could determine not only the interpretation of the rules of the EEA Agreement but also the interpretation of the corresponding rules of EU law. Therefore, the system of courts set up under the Agreement was contrary to what was then art. 164 EEC:[33] conferring such competence on the EEA Court conflicted with "the very foundations of the Community."[34]

Part V of the Opinion

The ECJ said that the threat posed to the EU court system was not reduced by the fact that judges from the ECJ were to sit on the EEA court.[35] Indeed, this could make things worse,[36] since the ECJ judges would have to use different approaches to interpreting the same concepts, depending on

[26] This was decided by the ECJ after its Opinion in the *Laying-up Fund* case but shortly before its Opinion in the *First EEA* case: see *Sevince v Staatssecretaris van Justitie* (Case C-192/89) ECLI:EU:C:1990:322; [1990] E.C.R. I-3461.
[27] This could occur both in the case of a preliminary reference under what is now art. 267 TFEU, and in proceedings under what are now arts 258–260 TFEU (failure by a Member State to fulfil its obligations under EU law).
[28] This could occur in various contexts—for example, on a reference for a preliminary ruling from a court in an EU Member State.
[29] At [40] of the Opinion.
[30] At [41] of the Opinion.
[31] At [42] of the Opinion.
[32] See art. 6 of the Agreement.
[33] Now art. 19(1) TEU, first paragraph, second sentence.
[34] At [46] of the Opinion.
[35] At [47] of the Opinion.
[36] At [48] of the Opinion.

whether they were sitting on the ECJ or the EEA Court.[37] For this reason, it would be very difficult, if not impossible, for a judge sitting on the ECJ to approach a question with a completely open mind if he had already considered the same question as a member of the EEA Court. However, since the judicial system set up by the EEA Agreement was in any event incompatible with the EU Treaties, the ECJ did not give this question further consideration.

This ruling would probably make it impossible for judges currently serving on the ECJ ever to sit on a judicial body set up under an agreement between the UK and the EU after Brexit—at least, if the UK–EU agreement contained provisions based on the EU Treaties.

Part VI of the Opinion

The next question was whether the machinery set up by the EEA Agreement for EFTA States to allow their courts to ask the ECJ to "express itself"[38] on the interpretation of the EEA Agreement was compatible with EU law.[39] This system had three features which differentiated it from the system for preliminary references under the EU Treaties:[40] the first was that the EFTA States could choose whether or not their courts would be able to make such references; the second was that, unlike the position in EU law, a court from which there was no appeal would not be obliged to make a reference; and the third was that there was no provision stating that an EFTA court which had made such a reference would be bound by the ECJ's ruling.

In considering this issue, the ECJ first pointed out that there was no provision of the EEC Treaty which prevents an international agreement from conferring jurisdiction on the ECJ to interpret the provisions of the agreement for the purposes of its application in non-member countries. For this reason, the ECJ raised no objection in principle to the scheme. Nor did it object in principle to the freedom the EFTA States were given to authorize or not to authorize their courts to make preliminary references to the ECJ, or to the fact that there was no obligation on the part of courts from which there was no appeal to make a reference.[41] However, it *did* object to the fact that its rulings would not necessarily be binding on EFTA courts.[42] From this, the ECJ concluded that the provisions in question were incompatible with EU law in so far as they did not provide that rulings by the ECJ would be binding.[43]

This is interesting because it implies that, if this were desired, provision could be made for references to the ECJ from UK courts under a post-Brexit agreement, provided that the judgments given by the ECJ were binding.

Final Ruling

[37] At [51] of the Opinion.
[38] This is a literal translation of the French verb, *s'exprimer*. It was presumably used in view of the fact that the rulings of the ECJ would not be binding.
[39] Article 104(2) of the EEA Agreement and Protocol 34.
[40] Now, art. 267 TFEU.
[41] At [59] and [60] of the Opinion.
[42] At [61]–[65] of the Opinion. It gave two specific reasons for this (in addition to a general objection in principle). The first was that Member-State courts would have to take such rulings by the ECJ into account when they ruled on the application of the EEA Agreement: if the rulings were not binding, doubts might arise about their legal value for courts in the EU. The second was that Member-State courts might even come to doubt the binding effect of ECJ rulings given in a purely EU context. For an indication, in an entirely different context, of the ECJ's reluctance to give non-binding opinions on a reference from a Member-State court, see *Kleinwort Benson v City of Glasgow District Council* (C-346/93) ECLI:EU:C:1995:85; [1995] E.C.R. I-615.
[43] At [65] of the Opinion.

After considering certain other matters,[44] the ECJ gave its final ruling: the system of judicial supervision proposed under the Agreement was incompatible with the EEC Treaty.

The *Second EEA* Case

After the ECJ's ruling in the *First EEA* case, the Agreement was renegotiated to meet the ECJ's objections. The provisions regarding the proposed EEA Court were scrapped; instead, provision was made for the EFTA States to establish a separate court—the EFTA Court— among themselves.[45] This was done in a separate agreement, the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (ESA/Court Agreement).[46] The EFTA Court only has jurisdiction over the EFTA States and the EFTA Surveillance Authority. Otherwise, its jurisdiction is modelled on that of the ECJ; the main heads are:

1. actions against EFTA States for failure to fulfil an obligation under the EEA Agreement or the ESA/Court Agreement;[47]
2. settlement of disputes between two EFTA States regarding the interpretation or application of the EEA Agreement (or certain other instruments[48]);[49]
3. advisory opinions on a reference from a court in an EFTA State;[50]
4. appeals against penalties imposed by the EFTA Surveillance Authority;[51]
5. annulment (judicial review) actions regarding decisions of the EFTA Surveillance Authority;[52]
6. actions against the EFTA Surveillance Authority for failure to act where required to do so by the law;[53] and
7. tort actions against the EFTA Surveillance authority for compensation for damage caused by it.[54]

The revised version of the Agreement was put before the ECJ in the *Second EEA* case.[55] In its judgment, it noted four important changes in the agreement:[56]

1. the proposal to establish the EEA Court was abandoned;[57]
2. the dispute-settlement procedure made provision for references to the ECJ to interpret the relevant rules;

---

[44] One was whether it would be possible to give EFTA States the right to intervene in proceedings before the ECJ (the court said that it would, provided that the Statute of the Court were amended) and whether the system of courts envisaged under the EEA Agreement could be authorized under art. 238 EEC, a provision which provides for association agreements (the court said that this does not provide any basis for setting up a system of courts which conflicts with art. 164 EEC and, more generally, with the very foundations of the Community).

[45] Article 108(2), which provides: "The EFTA States shall establish a court of justice (EFTA Court)."

[46] The Parties were Iceland, Liechtenstein and Norway. The Agreement also established the EFTA Surveillance Authority, a body given the task of ensuring that the EFTA States comply with their obligations under the EEA Agreement.

[47] ESA/Court Agreement, art. 31 (equivalent to arts 258–260 TFEU).

[48] These are the Agreement on a Standing Committee of the EFTA States and the ESA/Court Agreement.

[49] ESA/Court Agreement, art. 32.

[50] ESA/Court Agreement, art. 34 (equivalent to art. 267 TFEU).

[51] ESA/Court Agreement, art. 35 (equivalent to art. 261 TFEU).

[52] ESA/Court Agreement, art. 36 (equivalent to art. 263 TFEU).

[53] ESA/Court Agreement, art. 37 (equivalent to art. 265 TFEU).

[54] ESA/Court Agreement, art. 39 (equivalent to art. 268 TFEU).

[55] (Opinion 1/92) ECLI:EU:C:1992:189; [1992] E.C.R. I-2821.

[56] Part III of the ECJ's Opinion.

[57] Explained above.

3. provision was made for the EFTA States to authorize their courts to ask the ECJ to give a decision on the interpretation of the EEA Agreement, not just (as in the previous version) to "express itself" on the matter; and
4. the ECJ was no longer required to "pay due account" to decisions of other courts.

In its Opinion, the ECJ made clear that an agreement such as the EEA Agreement is compatible with the EU Treaties only if it does not contain any provision which restricts the freedom of the ECJ in its interpretation and application of EU law: no other body must be given the power to make decisions which would bind the court in this regard. However, except in one regard, it interpreted the revised EEA Agreement as complying with this requirement.[58] As a result, it held that the Agreement was compatible with the EU Treaties, provided that the court's concerns were met in this regard.[59]

It should finally be noted that the ECJ said that its powers under the EU Treaties can be modified or eliminated only by means of an amendment to the Treaties; however, new powers can be conferred on it by an agreement between the EU and a non-member State, provided that this does not change the "nature of the function" of the court as conceived in the EU Treaties.[60]

Following this Opinion, the revised EEA Agreement was approved. It came into force on 1 January 1994.

The *ECHR* case

In 1990, it was proposed that the European Union (then the European Community) should become a Party to the European Convention on Human Rights (ECHR).[61] A reference was made under the usual procedure to obtain the opinion of the ECJ as to whether this would be compatible with the EU Treaties.[62]

Joining the ECHR was a somewhat different proposition from joining an organization like the EEA: the ECHR had already been in existence for many years[63] and all the EU Member States were Parties to it; it had its own court, the European Court of Human Rights (ECtHR) and this court had jurisdiction to hear proceedings brought by both Contracting States and individuals on issues arising under the Convention. Since the provisions of the ECHR were not modelled on provisions of EU law, the issues in the previous cases did not arise. However, the ECJ had itself developed a judge-made doctrine of human rights which to a large extent was modelled on the ECHR and it would strike down EU legislation (regulations, decisions, etc.) which it regarded as contrary to human rights.[64] If the European Union became a Party to the ECHR, judgments of the European Court of Human Rights would become binding on the Union. This would not only have a profound effect on the EU doctrine of human rights, but would also have a considerable impact on general EU law since it would require

[58] See especially [20]–[30] of the Opinion.
[59] There was an understanding that decisions of the Joint Committee would not affect the case-law of the ECJ; however, the ECJ said that this rule had to be laid down in a form binding on the Contracting Parties to the EEA Agreement: final Ruling, first paragraph.
[60] At [32] of the Opinion.
[61] The Convention for the Protection of Human Rights and Fundamental Freedoms, better known as the European Convention on Human Rights, was opened for signature in Rome on 4 November 1950 and came into force in 1953.
[62] (Opinion 2/94) ECLI:EU:C:1996:140; [1996] E.C.R. I-1759.
[63] The ECHR was signed before the first of the EU Treaties (the ECSC Treaty, signed on 18 April 1951) but it came into force after it. The ECSC Treaty terminated in 2002.
[64] See the line of cases beginning with *Stauder v City of Ulm* (Case 29/69) ECLI:EU:C:1969:57; [1969] E.C.R. 419.

the ECJ to strike down EU legislation which was contrary to the ECHR as interpreted by the European Court of Human Rights.

The ECJ's judgment was short. It noted that there was no provision in the EU Treaties that expressly gave the European Union the power to join the ECHR. In previous cases, however, the ECJ had held that treaty-making power does not necessarily have to be express: it can also be implied.[65] If EU law gives the institutions of the European Union powers within its internal system for the purpose of attaining a specific objective, the Union is empowered to enter into the international commitments necessary for the attainment of that objective even in the absence of an express provision to that effect.[66] Although the EU Treaties gave the Union no general power to enact internal rules on human rights, upholding human rights is an important EU objective, and there is a provision in the EU Treaties (then art. 235 EC; now art. 352 TFEU) stating that if action by the Union (Community) is necessary to attain one of the objectives of the Treaties and the Treaties have not provided the necessary powers, the EU Council, acting unanimously, may adopt the appropriate measure after obtaining the consent of the European Parliament. However, the ECJ held that this could not be used to enable the European Union to become Party to an agreement which would have had constitutional significance.[67] So the EU could not join the ECHR without an amendment to the EU Treaties.

When reading this case, one cannot help feeling that the ECJ was loath to give the European Court of Human Rights extensive powers over the European Union, but was unable to come up with a convincing reason: it could hardly have said that the ECtHR could not have the power to give binding interpretations of the ECHR. So it had to fall back on the argument that the treaty-making powers of the EU were insufficient.

The *European Common Aviation Area* case

The *European Common Aviation Area* case[68] (decided in 2002) concerned a proposed Agreement to establish a common aviation area in Europe. The Parties were the EU (then the European Community) and a number of non-member States in Europe.[69] The EU Member States were not Parties. Its aim was to make access to the air-transport markets of the Contracting Parties subject to a single set of rules based on the relevant legislation in force in the EU (Community) relating to free market access, freedom of establishment, equal conditions of competition, safety and the environment.

The Agreement contained rules modelled on provisions of EU law. Courts of the non-member States could be given the power to make references to the ECJ; if they did so, any ruling given would be binding on them. The Agreement required the Contracting Parties to ensure that the rights derived from the Agreement would be capable of being invoked before national courts. It also provided that, in cases which could affect air services under the Agreement, the EU (Community) institutions would enjoy the powers specifically granted to them under the provisions specified in the Agreement. The ECJ was given exclusive jurisdiction to review the legality of decisions taken by the EU institutions under the Agreement. The Agreement did not establish any court to interpret its provisions. Since its

[65] See the line of cases beginning with *Commission v Council* (*ERTA* case) (Case C-22/70) ECLI:EU:C:1971:32; [1971] E.C.R. 263.
[66] At [26] of the Opinion.
[67] At [35] of the Opinion.
[68] (Opinion 1/00) ECLI:EU:C:2002:231; [2002] E.C.R. I-3493.
[69] Most of them subsequently joined the EU.

terms were negotiated by the Commission on the basis of the ECJ's Opinion in the *EEA* case, it is not surprising that the ECJ held that it was compatible with EU law.

The *European and Community Patents Court Agreement* case

The last decision to consider is the *European and Community Patents Court Agreement* case (2011),[70] a case which concerned proposals to enhance the protection given to patents in Europe. Since patents are territorial, a patent-holder only has protection in the territory of the State (or other entity) which granted the patent. If he wants protection in several States, he must normally file a separate application in each one and comply with the formalities required by each of them. This was particularly burdensome in Europe, which consisted of a large number of States, each with its own patent system. Even in the European Union, patents were originally a matter for the Member States. While in the United States an inventor could obtain a patent for the whole US by filing a single application with the federal authorities, in the EU he had to file separate applications in each Member State.

The first step in improving the situation took place in 1973, when the European Patent Convention was signed in Munich. The Parties include all the EU Member States together with a large number of non-member States. Under the Convention, it was possible for an inventor to patent his invention in all the States Parties to the Convention by filing a single application with the European Patent Office to obtain a "European patent." This was a significant advance. However what the inventor got from this procedure was not a single patent covering the combined territories of the States Parties, but a bundle of individual *national* patents—one for each State Party. Each separate patent was governed by the law of the State to which it applied. If the patent was infringed, the patent-holder had to bring separate actions in the courts of each State in which the infringement had occurred. The same was true for other proceedings involving the patent.

The proposed European and Community Patents Court Agreement (to which the Parties were to be, on the EU side, both the Member States and the European Union) was intended to rectify this by creating a single court in which proceedings could be brought for all infringements (and other matters) regarding the European patent. This was to be called the European and Community Patents Court and was to consist of a court of first instance, with local and regional divisions, and a court of appeal, which would hear appeals from the court of first instance.

There was a parallel proposal for the creation of a unitary EU patent—one single patent for the whole EU—and infringement and other proceedings with regard to this patent would also be subject to the jurisdiction of the new Patents Court. The proposed Agreement made provision for references from the Patents Court to the ECJ on points of EU law, since this would arise with regard to the proposed unitary EU patent. The Patents Court of first instance *could* make references and the court of appeal was *obliged* to do so when a ruling on a point of EU law was necessary for it to decide the case before it. Rulings given by the ECJ under this procedure were to be binding on the Patents Court.

An application was made to the ECJ to ascertain whether this proposal would be compatible with EU law. In its Opinion, the ECJ made clear that the issue was not the powers of the proposed Patents Court regarding the European patent (the bundle of patents available under the European Patent Convention of 1973), but its powers regarding the proposed Community patent (the unitary EU

[70] (Opinion 1/09) ECLI:EU:C:2011:123; 2011 [E.C.R.] I-1137. For a useful comment on this case, see Lock, "Taking National Courts More Seriously? Comment on Opinion 1/09" (2011) 36 E.L.Rev. 576.

patent). It also made clear that the issue was not the effect of the proposed Agreement on its own powers but the effect of the proposed Agreement on the powers of *Member-State* courts. The ECJ could hardly have said that its own powers would be affected since, under the law as it stood at the time, patent proceedings fell within the exclusive jurisdiction of Member-State courts.

After noting that the Patents Court was outside the institutional and judicial framework of the EU, and was an organization with legal personality under international law, the ECJ said that the Patents Court had exclusive jurisdiction in a significant number of actions brought by individuals in the field of patents. Member-State courts would be divested of this jurisdiction. The ECJ had held in previous cases that when the EU concluded an international agreement with non-member States, it had competence to grant jurisdiction to interpret that agreement to an international court created by the agreement. However, the proposed European and Community Patents Court Agreement gave the Patents Court jurisdiction to interpret not only the provisions of the Agreement but also the future regulation on the Community patent (the proposed unitary EU patent) and other instruments of EU law, both EU legislation (regulations, directives, etc.) and Treaty provisions. It might be required to decide a dispute before it in the light of fundamental rights and general principles of EU law[71] and even to examine the validity of EU acts.[72]

Although the ECJ itself had no jurisdiction in the field of patent law—that jurisdiction belonged exclusively to the Member-State courts—the ECJ nevertheless held that the Member States could not, by conferring that jurisdiction on the Patents Court, deprive their courts of their task of implementing EU law and their power to refer questions to the ECJ in this regard.[73] This conclusion might seem strange in view of the fact that the Patents Court itself had the power and, in the case of the appeal court, the obligation to refer questions of EU law to the ECJ. The ECJ's answer to this was to say that if Member-State courts failed to make references when they should have done so (or failed to give effect to the ECJ's ruling after having done so), there were two remedies available. The first was that any person who suffered harm could sue the Member State in question for damages in the courts of that Member State. The idea that a State may be liable to compensate someone for a wrong decision by a court is highly controversial, but the ECJ has nevertheless held that, where EU law is involved, such an action is theoretically possible.[74] The second way in which a remedy may be obtained is through legal proceedings in the ECJ itself against the Member State in question.[75] Neither of these remedies would apply in the case of the Patents Court. So the ECJ held that the draft Agreement was not compatible with the EU Treaties.

This ruling breaks new ground in a number of ways. First, it shows that the ECJ is concerned not only with protecting its jurisdiction to interpret and apply EU law, but also that it is concerned with protecting the jurisdiction of Member-State courts. It obviously regards Member-State courts as more amenable to its control than an international court. Secondly, it shows that the ECJ is not concerned only with the EU Treaties and basic constitutional principles, but also with EU legislation—for example, regulations—in the field of patent law.

Conclusions

[71] These are principles created by the ECJ itself.
[72] At [71]–[79] of the Opinion.
[73] At [80] of the Opinion.
[74] *Köbler* (C‑224/01) ECLI:EU:C:2003:513; [2003] E.C.R. I‑10239. Such liability exists only in exceptional cases where the court has manifestly infringed EU law.
[75] Under arts 258–260 TFEU. See *Commission v Italy* (Case C‑129/00) ECLI:EU:C:2003:656; [2003] E.C.R. I‑14637.

It will be clear from the cases discussed that the law in this area is almost entirely based on policy. The Treaty provisions are important, but they are regarded simply as underpinning the wider policies inherent in the EU Treaties.[76] These were most clearly expressed in the *First EEA* case,[77] where the ECJ said that the goal of the European Union was European unity. The ECJ considers that it is its task to ensure that the law is interpreted with this in mind. Consequently, it will object to any international agreement which confers powers on another entity which could be used to thwart the attainment of EU objectives. For this reason, it would be futile to search for a narrow formula which encapsulates the law. If a proposed treaty is considered to pose threats of a new kind, the ECJ will create new rules as to what compatibility requires.

In spite of this, a few observations are in order. First, it is clear from the *European and Community Patents Court Agreement* case[78] that, though the ECJ is primarily concerned with protecting its own jurisdiction, it has now extended this concern to the jurisdiction of Member-State courts. The official reason for this is that Member-State courts are in some sense regarded as also being EU courts: in the *Patents Court* case, the ECJ referred to them as "ordinary" courts within the European Union legal order.[79] Secondly, it is clear that the ECJ is concerned not only with its right to interpret the EU Treaties but also with its right to interpret EU law derived from other sources. In the *Patents Court* case, the issue was the interpretation and application of the proposed EU regulation on the Community patent (the unitary EU patent). There is no doubt that the position would be the same regarding general principles of EU law, the judge-made principles (including human rights) that play an important role in the EU legal system.

Treaties between the European Union and a non-member State are in a special position. In so far as they apply within the EU, they constitute EU law, but in so far as they apply at the international level, they constitute international law. Moreover, if they have legal effect within the territory of the non-member State, they may constitute part of the law of that State. The consequence of their being EU law is that they can form the subject of a reference to the ECJ from a court of a Member State.[80] This gives the ECJ the power to interpret them in so far as they apply within the EU. Another consequence is that if a Member State fails to fulfil an obligation under such a treaty, proceedings may be brought against it in the ECJ.[81]

---

[76] For this reason, it is not proposed to discuss the Treaty provisions in detail; however, it is worth noting that the exact meaning of art. 344 TFEU is unclear. Does it apply only if the legal *proceedings* are between Member States, or is it sufficient if the *agreement* is concluded by Member States? In the ECJ's 2011 decision in the *European and Community Patents Court Agreement* case (Opinion 1/09) ECLI:EU:C:2011:123; 2011 [E.C.R.] I-1137, paragraph [63] of the Opinion suggests that it does not apply unless the legal proceedings are between Member States. However, the final Ruling in the *Achmea* case (C 284/16) ECLI:EU:C:2018:158, states that art. 344 precludes a provision in an international agreement concluded between Member States under which an investor can bring proceedings against a Member State before an arbitral tribunal. So the ECJ's present view seems to be that it is sufficient if the *agreement* is between Member States. If this is so, it would mean that art. 344 would not apply to an international agreement concluded by the EU unless the Member States were also Parties to it; however, the ECJ has never seemed to attach any weight to whether or not the Member States are also Parties to the agreement.

[77] (Opinion 1/91) ECLI:EU:C:1991:490; [1991] E.C.R. I-6079.

[78] (Opinion 1/09) ECLI:EU:C:2011:123; 2011 [E.C.R.] I-1137.

[79] At [80] of the Opinion.

[80] *Haegeman v Belgian State* (Case C-181/73) ECLI:EU:C:1974:41; [1974] E.C.R. 449.

[81] Under arts 258–260 TFEU.

A ruling by the ECJ on the interpretation of such a treaty would not, however, apply at the international level and would not be binding on the non-member State.[82] An international agreement between the EU and a non-member State may in principle provide that the agreement is to be interpreted by a special dispute-resolution body set up by the agreement itself.[83] This is, however, subject to an important proviso: the agreement must not take over an essential part of the EU legal system.[84] This is because the practical effect of this would be to allow the dispute-resolution body to interpret fundamental provisions of EU law in a way that would be binding on the European Union. This would infringe the ECJ's right to be the exclusive interpreter of EU law.

Assuming this requirement is met, the rulings of the special dispute-resolution body would bind the non-member State and the European Union on the international level. In the *First EEA* case, the ECJ said that they would also be binding on the EU institutions, including the ECJ itself: if the ECJ were called upon, by way of a preliminary ruling or otherwise, to interpret the agreement in so far as it was part of EU law, it would have to follow the ruling.[85] This means that if the UK and the EU conclude a post-Brexit agreement and that agreement establishes a special dispute-resolution body to interpret the provisions of the agreement, that body will be able to give interpretations of the agreement which are binding on the EU and on the ECJ, provided that the agreement does not contain provisions modelled on essential provisions of EU law.

In practice, a post-Brexit agreement would probably require the United Kingdom to comply with certain provisions of EU law. If a special dispute-resolution body were established, it could decide in general terms whether the UK had complied with its obligations under the agreement. However, if the point at issue was whether the UK had complied with a provision of EU law, and if this raised the question what that provision required, that Issue could not be decided by the special dispute-resolution body.

In the *First EEA* case, the ECJ said that there was no provision of the EU Treaties which prevents an international agreement from conferring jurisdiction on the ECJ to interpret the provisions of the agreement for the purpose of its application in non-member States.[86] This was said in the context of a proposal to permit the courts of EFTA States to make preliminary references to the ECJ on the interpretation of the EEA Agreement. However, it said that this would be acceptable only if the ruling given by it was binding on the non-member State court.[87] It is probably possible to conclude from this that a special dispute-resolution body set up under a post-Brexit agreement could be given the power to make a preliminary reference to the ECJ for the interpretation of EU law, or provisions of the agreement modelled on EU law, provided that any ruling given by it was binding on the dispute-resolution body.[88]

The insistence of the ECJ that it should control the interpretation and application of EU law might seem unwarranted in a purely British context. However, it would be understandable in the case of a

[82] It was expressly stated by the ECJ in the *Haegeman* case (C-181/73) ECLI:EU:C:1974:41; [1974] E.C.R. 449 that it could interpret an international agreement only in so far as it applied as part of EU law: see [4] and [6] of the judgment.
[83] *First EEA* case (Opinion 1/91) ECLI:EU:C:1991:490; [1991] E.C.R. I-6079, at [39]–[40] of the judgment.
[84] *First EEA* case*,* at [41] of the judgment.
[85] *First EEA* case*,* at [39] of the judgment.
[86] At [59] of the judgment.
[87] At [61]–[65] of the judgment.
[88] This was made clear in the *Second EEA* case (Opinion 1/92) ECLI:EU:C:1992:189; [1992] E.C.R. I-2821. Under the revised EEA Agreement, the Joint Committee (part of the dispute-resolution mechanism) could ask the ECJ to interpret provisions of the Agreement modelled on provisions of EU law. The ECJ did not object to this.

State with a written constitution and a supreme court with constitutional functions. It would be hard to imagine, for example, that the US Supreme Court would look kindly on an international agreement which permitted some other body to give rulings on the interpretation of the Constitution which were binding on the United States. It is equally hard to imagine that any US Government would want to do this.

It might be objected that the European Union is not a State and that it does not have a constitution. However, the ECJ has for many years considered that the EU Treaties are the "constitutional charter" of the Union.[89] Moreover, even though the ECJ does not consider the EU to be a State, it may well consider that its ultimate goal is to become some kind of federation. So, from an EU perspective, the ECJ's approach is understandable.

[89] *Les Verts v Parliament* (C-294/83) ECLI:EU:C:1986:166; [1986] E.C.R. 1339, at [23] of the judgment. This was repeated in the *First EEA* case (Opinion 1/91) ECLI:EU:C:1991:490; [1991] E.C.R. I-6079, at [21] of the judgment.