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European Foreign Affairs System and the Single European Act of 1986

Ever since I began teaching international law in the late 1950s I have been interested in the ways international treaties and custom are reflected in national legal orders. Joseph Gold's worldwide surveys of the application of the International Monetary Fund Agreement in national courts, which have appeared over the years with a regularity of the changing seasons, have proved a treasure trove of significant practice in a newly emerging field. These essays, although indispensable, have been mere episodes in Sir Joseph's oeuvre. His commentaries and analyses of modern international financial law, characterized by a carefully controlled prescriptive orientation, have influenced greatly the working of the International Monetary Fund. He has succeeded, where many have failed, in fusing effective practice with scholarship of the highest order. As most eminent lawyers, a poet at heart, may he continue his rich, productive life for many years to come! It is a rare pleasure for me to be able to offer a contribution in honor of this outstanding citizen of the European Community and my loyal friend.

I. The System at a Glance

The contemporary European system for conducting foreign affairs is unique. In the European Community of twelve embracing more than 320 million people, there is a complex division of foreign affairs powers between the Member States and the Community institutions. Although they remain sovereign states, the Member States share their authority over economic and monetary policies with the Community. They retain full control of their armies and defense; until mid-1987 they also fully controlled their diplomatic policies. Thus in this

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system, foreign affairs are conducted neither strictly by states, nor by the Community; rather some affairs—primarily defense—are conducted by individual states alone; some—such as diplomatic policy—by states in consultation with each other within the European Political Cooperation framework; some—such as the foreign trade policy—by the Community alone as an entity; and some—primarily those exceeding the Community authority under its constituent treaty—by the Community together or in parallel to the states. In some contexts the Community has replaced the Member States—as within GATT for most purposes—and in others—as in a number of multilateral treaties—it appears as an additional person in the international arena.¹

The European integration movement has been compared to the never-ending process of building a medieval cathedral:² spurts toward heavenly heights alternating with stagnation, followed by new leaps upward. The purpose of this essay is to analyze the latest “spurt” in the process, the adoption, in the context of the “Europe 1992” project, of the Single European Act of 1986, as it concerns the foreign affairs system.

II. On the Origins: The European Parliament's Scheme and the “Europe 1992” Project

The European Economic Community (EEC) was successful in removing, ahead of the 1970 deadline, the internal tariff barriers and establishing a common external tariff as the principal instrument of its common trade policy toward the outside world. Community market organizations have replaced national agricultural regulations. Progress was made toward the free movement of services, companies, and capital, and a common competition policy. Nevertheless, a great number of nontariff barriers and other obstacles to the creation of a genuine home market remained; and, except for the limited European Monetary System, little was achieved toward an effective coordination of national economic and monetary policies. By the mid-seventies and early eighties the pace of the development slowed down considerably. Most of the institutional energy was absorbed by disagreements over the budget, the expensive agricultural policy, and the negotiations for enlargement of membership from the original six (France, German Federal Republic, Italy, Belgium, Netherlands, Luxembourg) to nine (United Kingdom, Denmark, Ireland), ten (Greece), and finally twelve (Spain and Portugal). Equally important, economic recession with high inflation and unemployment made it difficult for governments to make the concessions necessary for further advance. The Community law-making machinery, seriously

1. For a detailed treatment, see Stein with Henkin, *Towards a European Foreign Policy? The European Foreign Affairs System from the Perspective of the United States Constitution* in 1 *INTEGRATION THROUGH LAW* Book 3, at 3–82 (M. Cappelletti, M. Seccombe & J. Weiler eds. 1986).

2. J. PELKMANS & A. WINTERS (with H. WALLACE), *EUROPE'S DOMESTIC MARKET I* (1988). See generally 1992: ONE EUROPEAN MARKET? (R. Bieber, R. Dehousse, J. Pinder & J. Weiler eds. 1988).

hampered by the unanimity practice in the Council, ground almost to a halt. Economic structures became, if anything, more rigid as European companies faced increased competition from Asia and the United States, especially in the high technology sectors. International investment seemed to turn its back on the Community.³

Several initiatives sprang up to combat the "Eurosclerosis" and revive the movement toward European unity. A series of reports and declarations at the highest levels of government held out the bright, albeit ambiguous, vision of a European Union.⁴ It was, however, left to the European Parliament, directly elected since 1979, to give concrete substance to the European Union concept in a draft treaty approved on February 14, 1984. That scheme would provide for gradual transfer of competencies from the intergovernmental arena to Community discipline and thus would transform the Community into a substantially more integrated system.⁵

Parallel to this ambitious political enterprise was the move initiated under the leadership of the French President of the Community's executive Commission, Jacques Delors, and broadly supported by European business circles. The focus of the "Europe 1992" project has been not on far-reaching institutional restructuring but rather on breaking down the regulatory, tax, and other barriers that have obstructed the building of a home market, at a tremendous cost to governments, enterprises, and the public. This cost, and the potential benefits from removing the internal barriers, were quantified in a monumental research project commissioned by the Community.⁶ The linchpin of the vigorous campaign has been the Commission's White Paper on "Completing the Internal Market" of June 1985, offering a detailed legislative program of some 300 measures (later pared down to 279) to be in place by the year 1992.⁷

It was the European Parliament's intention to circumvent the procedure for the amendment of the Community treaty, which would require a formal approval by the national governments.⁸ The Parliament had hoped that its draft would be referred directly to the national legislative bodies and approved by them as a new

3. M. CALINGAERT, *THE 1992 CHALLENGE FROM EUROPE: DEVELOPMENT OF THE EUROPEAN COMMUNITY'S INTERNAL MARKET* 6-8 (1988); J. PELKMANS & A. WINTERS, *supra* note 2, at 1-3, 6.

4. De Zwaan, *The Single European Act: Conclusion of a Unique Document*, 23 *COMMON MKT. L. REV.* 747, 747-48 (1986).

5. 27 *O.J. EUR. COMM.* (No. C 77) 33 (1984).

6. Even granting "a fairly broad margin of error," the report projects an increase in the Community's GDP of about 4-7%, creation of 1.8 million new jobs, reduction of unemployment of 1.5 percentage points, average reduction of consumer prices of 6.1% (cooling inflation), a decrease in the public budget deficit of about 2.2% GDP and improvement in the Community's external balance of up to 1% of GDP. P. CECCHINI (with M. CATINAT & A. JACQUEMIN), *THE EUROPEAN CHALLENGE 1992—THE BENEFITS OF A SINGLE MARKET* 97, 103 (J. Robinson Eng. ed. 1988).

7. Commission of the European Communities, *Completing the Internal Market* (White Paper from the Commission to the European Council, Milan, June 28-29, 1985), COM (85) 310 final (Brussels, June 14, 1985).

8. Treaty Establishing the European Community, Mar. 25, 1957, 298 *U.N.T.S.* 11, art. 236.

European constitution. The governments, however, refused to accept this revolutionary idea. Nevertheless, the Parliament's work provided the major impetus for the calling of an intergovernmental conference, which, however, did not consider the Parliament's proposal. Instead the conference produced drafts of two separate instruments, a treaty amending the three constituent Community treaties and a treaty providing a normative basis for the European Political Cooperation (EPC) mechanism, as it has evolved on a voluntary basis since 1970. After considerable controversy, however, a consensus was ultimately reached to fuse the two drafts into a single treaty, a symbolic gesture toward the idea of a European Union comprising both economic and political elements. Some governments objected to including a reference to European Union in the title, and this explains why the treaty is called "Single European Act of 1986."⁹

The Act, little more than debris from the European Parliament's scheme, has been the subject of criticism both because it has not gone far enough toward a "European Union," and because of the many ambiguities.¹⁰

On the positive side, a new deadline of December 31, 1992, is set for the completion of the internal market as "an area without internal frontiers"; the law-making process is facilitated by the removal of the unanimity requirement in the Council, particularly in matters relating to the internal market (except for tax matters, movement of persons, and workers' rights); the influence of the European Parliament on legislation is modestly strengthened by a procedure for a "second reading";¹¹ and the Community competence in "second generation policies," environment, research, and technology, is confirmed. Only the future will tell whether the broad text on monetary policy and economic and social "cohesion" will lead to concrete action. Beyond the incorporation of EPC, the Act contains only a few specific provisions concerning the conduct of foreign affairs.

9. Single European Act [SEA], BULL. EUR. COMM., Supp. 2/86 (effective July 1, 1987). See also Decision adopted by the Foreign Ministers on the Occasion of the Signing of the Single European Act, containing a series of implementing details, 19 BULL. EUR. COMM. 1986/2, at 115-16 [hereinafter Decision]. The Danish Government was not prepared to accept the term "European Union" while other governments felt that the Act does not advance unity enough to warrant the title. Jacqué, *L'Acte unique européen*, 32 REV. TRIM. DR. EUROP. 575, 580 (1986). The preamble to the Act speaks of the will "to transform relations . . . into a European Union."

10. European Parliament Resolution of Jan. 16, 1986, 29 O.J. EUR. COMM. (No. C 36) 144 (1986); Jacqué, *supra* note 9, at 580; Pescatore, *Some Critical Remarks on the "Single European Act"*, 24 COMMON MKT. L. REV. 9, 11 (1987) (viewing the Act as "fundamentally deceptive"). For a response and defense of the Act, see Ehlermann, *The Internal Market Following the Single European Act*, 24 COMMON MKT. L. REV. 361 (1987); see also Nuttall, *European Political Cooperation and the Single European Act*, 5 Y.B. EUR. L. 203-32 (1986).

11. Bieber, Pantalis & Schoo, *Implications of the Single Act for the European Parliament*, 23 COMMON MKT. L. REV. 767, 779-86 (1986). The Act also provided for the establishment of a court of first instance (with appeal to the Court of Justice of the Communities) to deal with cases involving complaints of Community staff against Community institutions and with competition cases. Single European Act [SEA], *supra* note 9, arts. 4, 11 and 26. See Council Decision of Oct. 24, 1988, 31 O.J. EUR. COMM. (No. L 319) 1 (1988).

III. The European Political Cooperation

A. HOW MUCH UNITY?

The dialectics of unity and separateness are dramatically apparent in the introductory common provisions of title I of the Act: "The European Communities and European Political Cooperation shall have as their objective to contribute together to making concrete progress towards European unity, (in French, '*Union européenne*')") but each is to continue to operate under radically different and separate regimes. For the Community this regime is the Community Treaties as modestly amended in title II of the Act; for EPC it is title III, confirming and supplementing the procedures agreed in specified reports and "the practices gradually established" since 1970. Article 1 names specifically the reports of Luxembourg (1970), Copenhagen (1973), London (1981), and the Solemn Declaration on European Union (1983).¹²

Along with EPC, a practice has evolved for the Heads of State or of Government to meet periodically as "the European Council" in order to give highest level political guidance "from the summit" on both Community and EPC matters. Like EPC, the European Council has been given a treaty foundation in the "Common provisions" of title I.¹³ It is to "bring together" the Heads of State or of Government and the President of the Commission; and they "shall be assisted by the Ministers for Foreign Affairs and by a Member of the Commission," as has been the custom in the "common law" of the past. However, the European Council has not been made an institution of the Community, nor is it mentioned in title III dealing with EPC. Since nothing is said of its functions, its role presumably will continue as determined by the documents and practice incorporated by article 1.¹⁴

I have dealt with the working, accomplishments, and problems of EPC since 1970 elsewhere¹⁵ and I shall limit myself here to some observations on title III of the Act proper. That title, as we shall see, offers more or less comprehensive, albeit quite general, rules to govern EPC, so that the incorporation of the previously evolved practices may be viewed as redundant and conceivably cause difficulties in case of a conflict between these written rules on one hand and past practices on the other. However, the reference to practices may help to fill any gaps that might appear in the application of the Act. In case of an imaginary conflict, the provisions of title III would prevail.

12. SEA, *supra* note 9, art. 1.

13. *Id.* art. 2.

14. *Id.* art. 3(2).

15. Stein, *European Political Cooperation (EPC) as a Component of the European Foreign Affairs System*, 43 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 49 (1983) and sources cited therein. For an informative update, see Brückner, *European Political Co-operation: Danish Perspective*, 5 Y.B. EUR. L. 191-202 (1986). See also EUROPEAN POLITICAL COOPERATION IN THE 1980s (A. Pijpers, E. Regelsberger & W. Wessels eds. 1988).

B. THE OBLIGATIONS

Two semantic features, each pointing in an opposite direction, are symbolic of the underlying compromise. The concept "European foreign policy" replacing "common external policy" used in an earlier proposal points toward more unity; the addressees of the obligations, on the other hand, are the "High Contracting Parties" rather than the "Member States," indicating the separateness.¹⁶

There is no obligation to put in place "a European foreign policy," only to "endeavor jointly to formulate and implement" it.¹⁷ This formulation, broad and noncommittal as it appears on its face, seems nevertheless to represent a step forward from the earlier concept of coordination of foreign policy views, attitudes, and positions. More specifically, the parties undertake "to inform and consult each other on any foreign policy matters of general interest," a somewhat broader clause than an earlier EPC text.¹⁸ They are to ensure that their combined influence is exercised "as effectively as possible through coordination, the convergence of their positions and the implementation of joint action."¹⁹ Although they remain ultimately free to determine their individual national policy stance, they undertake to consult before their final decision, to take "full account of the positions of the other parties," and to give "due consideration to the desirability" of the "common European positions"; and such positions are to constitute "a point of reference" for their national policies.²⁰ Longer-term planning is contemplated rather than merely spasmodic reaction to crises of the day that had characterized EPC particularly in the earlier years: the parties are gradually to develop "common principles and objectives."²¹ A concomitant negative undertaking obliges the parties to avoid any action or position that would "impair[] their effectiveness as a cohesive force in international relations or within international organizations."²²

Understandably, title III does not define further the concept of "foreign policy matters of general interest on which consultation is required." In the past, as I have indicated in my earlier writing, a number of foreign policy issues were at

16. Jacqué, *supra* note 9, at 610; Lodge, *The Single European Act: Towards a New Euro-Dynamism?*, 24 J. COMMON MKT. STUD. 203, 217-19 (1986). The two components of the Act were drafted in two different committees and there was no inclination to reopen the text. *See infra* note 29 on the inconsistency. However, the words "being members of the European Communities" were added on the first occurrence of the "High Contracting Parties" (art. 30(1)). Nuttall, *supra* note 10, at 210.

17. SEA, *supra* note 9, art. 30(1); Lodge, *supra* note 16, at 217-18 (that this is more than a semantic difference).

18. SEA, *supra* note 9, art. 30, 2(a). "[I]mportant questions of foreign policy of interest for the twelve as a whole" appeared in the 1981 London report and the 1983 Solemn Declaration on European Union. J. DE RUYT, L'ACTE UNIQUE EUROPÉEN 230 (1987).

19. SEA, *supra* note 9, art. 30, 2(a).

20. *Id.* art. 30, 2(c), paras. 1, 3.

21. *Id.* art. 30, 2(c) para. 2.

22. *Id.* art. 30, 2(d). This is the so-called "Falkland clause." Nuttall, *supra* note 10, at 213. *See also* art. 30, 7(a).

least initially excluded from EPC by a common understanding (e.g., apartheid in South Africa).²³ No such exclusion is mentioned here. The only reference to the scope of EPC is the specific inclusion of "the political and economic aspects of security," again a compromise solution (actually adopted in practice since 1981), between those, such as Italy, which pleaded for inclusion of additional aspects of defense, and those strongly opposed (particularly Ireland, also Greece and Denmark).²⁴

Perhaps the most controversial point of the negotiations was the degree of EPC links with the "rejuvenated" Western European Union, to which only some, but not all, parties belong (and which was favored by Italy and France), and with NATO, of which Ireland is not a member and France does not participate in its integrated commands. The final neutral formula adopts the posture of the EEC Treaty on this issue; it makes it clear that the individual parties are free to continue to cooperate with the two institutions but does not envisage any EPC role.²⁵

C. INSTITUTIONAL ASPECTS

Institutional arrangements, involving exclusively national diplomats, have now been defined in more or less specific terms. The principal EPC "organ" is the twelve "Ministers for Foreign Affairs," in reality a conference of the same men or women who sit in the general Council of the Community. The initial taboo against consecutive meetings of the Community Council and the EPC conference that was discarded some years ago is now formally removed, and the Commission's full participation is confirmed.²⁶

Unanimity ("common agreement") has been the rule in EPC, but during the negotiations for the Act, Italy, mindful of the difficulties in reaching unanimity, proposed "a principle of consensus *respecting the majority opinion*." Greece, on the other hand, opposed any restraints on the right to dissent and to block the "consensus." The final text enjoins the parties "as far as possible, [to] refrain from impeding the formation of a consensus and the joint action."²⁷ Jacques interprets this subtle formula as retaining the principle of consensus but recommending the dissenting minority to abstain. He is, however, correct in

23. Stein, *supra* note 15, at 55-56.

24. Expressly included in this article is the maintenance of technological and industrial conditions necessary for security and the obligation to work to that end both at the national level, and where appropriate, in "competent institutions and bodies," meaning Community institutions, which some delegations insisted could not be mentioned directly in a security context. Nuttall, *supra* note 10, at 212. J. DE RUYT, *supra* note 18, at 236-37; SEA, *supra* note 9, art. 30, 6(a), (b).

25. SEA, *supra* note 9, art. 30, 6(c). See EEC, *supra* note 8, art. 233.

26. SEA, *supra* note 9, art. 30, 3(a), (b). On the "taboo," see Stein *supra* note 15, at 53, specifically footnote 14. On the venue of the EPC meetings, see section IV of the Decision, *supra* note 9, at 116. On languages, see *id.* section V.

27. SEA, *supra* note 9, art. 30, 3(c).

pointing out the danger of the common positions being weakened by a number of reservations, as foreshadowed in an extreme form by certain deviant attitudes of Greece.²⁸ In any case, the move from unanimity to consensus may be of some importance since consensus could harbor opposition that would surface under a unanimity rule.

The government of the party that holds the rotating Presidency of the Community Council is identified as the "Presidency of European Political Cooperation" and, as was the case in the past, it is made responsible for initiating action, "representing the positions of the Member States" in the outside world and preparing and convening the meetings.²⁹ It also supervises the Political Committee, composed of directors of the political departments in the national Foreign Ministries, which is the principal second level mechanism with the task of giving impetus, maintaining continuity, preparing the discussions of the Ministers, and directing various working groups.³⁰

Under the Political Committee, another group of national diplomats, the "European Correspondents' Group," monitors the implementation of EPC and studies "general organizational problems."³¹ Although the Act makes no mention of it, national officials and groups have been linked by a special, coded telex system ("COREU, *correspondence européenne*").

A quasi-institutional element has emerged in practice in the form of the organized cooperation of the ambassadors of the Member States posted in third states and at the seats of major international organizations, with the ambassador holding the Presidency of the Council acting as spokesman. The Act adopts, and calls for an intensification, of this form of cooperation.³²

The only "revolutionary" change is the addition of a Secretariat, a much contested issue in the past both as to its location and its function. It is seated in Brussels (since France ceased to insist on Paris) and it has auxiliary duties of assisting the Presidency.³³ A senior Italian diplomat was appointed Secretary General and five diplomats are seconded to his staff for six-month terms—"a compromise between the French conception of a substantial Secretariat and that

28. Jacqué, *supra* note 9, at 611. See J. DE RUYT, *supra* note 18, at 234-35 (curiously sympathetic to the Greek position).

29. SEA, *supra* note 9, art. 30, 10(a), (b). For the practical arrangements made to alleviate the administrative and other burdens of the Presidency, see Stein, *supra* note 15, at 54-55. Note the use of the "Member States" rather than "the High Contracting Parties" here and also in SEA, art. 30, 10(d), indicating inconsistency in drafting.

30. SEA, *supra* note 9, art. 30, 10(c), (d), (f). The Presidency, at the ministers' and political directors' level, is assisted by representatives of the preceding and succeeding Presidency in contacts with nonmember governments, the so-called "Troika formula."

31. *Id.* art. 30, 10(e). The Political Committee or the Ministers must be convened within forty-eight hours at the request of at least three "Member States." *Id.* art. 30, 10(d).

32. *Id.* art. 30, 9. The modalities of this cooperation are set forth in some detail in section II of the Decision, *supra* note 9, at 115-16.

33. *Id.* art. 30, 10(g). For detailed provisions, see section III of the Decision, *supra* note 9, at 116.

of a low profile.”³⁴ Secretariat members do not have the status of European officials but are given diplomatic immunity, which enhances their position somewhat.³⁵ It will be interesting to observe whether this new factor, combined with the formalization of the institutions in a legal instrument, will change the chemistry of the process, and contribute to a bureaucratization or “legalization” that is feared by some commentators.³⁶

Until the establishment of the Secretariat, EPC did not have any institution of its own; groups of national diplomats conducted all of its business. Grabitz suggests that in a political-sociological sense, the Act has given rise to a composite organization, “a confederation without any name,” uniting the three Communities and European Political Cooperation. He rightly concludes, however, that neither the composite creature nor EPC alone possesses the minimum characteristics required for organizations with international personality and legal capacity.³⁷

D. FORMS OF ACTION

The parties are to “endeavour to adopt common positions” in international institutions and in international conferences; when only some, but not all, parties take part they “shall take full account” of the positions agreed in EPC; a “political dialogue with third countries and regional groupings” is to be organized whenever necessary. The formulation of the last-mentioned clause was influenced by the relationship with the Central American countries.³⁸ Except for the representational responsibility in relation to third countries given to the Presidency,³⁹ these are the only functions dealing with the EPC’s links to the outside world.

The external manifestations of the EPC process have appeared in the form of declarations following the meetings of the Ministers or the Heads of Governments, démarches with a third state, diplomatic missions entrusted to the President-in-Office, or common positions adopted in international fora. Beyond that—since EPC has had no instrumentalities of its own—it has had to rely for implementing action on individual governments or on the Community employing its own powers. As an example, at the outbreak of the Falkland war, an economic

34. *Europe*, Agence internationale d’information pour la press, Luxembourg-Bruxelles, No. 4458 (N.S.), at 3 (Dec. 24, 1986).

35. SEA, *supra* note 9, art. 30, 11.

36. Jacqué, *supra* note 9, at 609.

37. Grabitz, *Die Einheitliche Europäische Akte: Rechtliche Bewertung*, 9 *INTERGRATION* 95, 96 (1986), quoted in Glaesner, *The Single European Act: An Attempt at an Appraisal*, 10 *FORDHAM INT’L L.J.* 446, 452 (1987).

38. SEA, *supra* note 9, art. 30, 7, 8. The “common positions” in international institutions and conferences are limited to “the subjects covered by this Title,” thus excluding monetary and economic matters. Nuttall, *supra* note 10, at 213.

39. See text accompanying note 29 *supra*.

embargo against Argentina was agreed upon in EPC but it was put into effect by the Community, employing its common trade policy power. The Act has not brought about any change in this respect.⁴⁰

E. ON CONSISTENCY BETWEEN COMMUNITY AND EPC POLICIES

In view of the "common objective" mandated for the Community and EPC, it is logical for the Act to require that the policies resulting from the two processes must be consistent. This is perhaps the only unqualified, albeit by its nature quite broad, obligation written in the Act. It is the Presidency and the Commission that are given "special responsibility" for ensuring the consistency.⁴¹ No mention is made of the European Council, which in the past has been perceived as the ultimate coordinating forum, but there is no evidence of an intention to discontinue this practice. By virtue of article 31, however, EPC is excluded from the jurisdiction of the Court of Justice of the European Communities,⁴² which means that a controversy over possibly conflicting policies cannot be resolved through the ordinary Community judicial process.

It is conceivable, for instance, that consensus on political and material support for a third state is made impossible in EPC by the opposition of a single member, while the Community Council voting by qualified majority, approves a financial aid measure in favor of the same state despite the negative vote of the identical opponent.⁴³ Again, a dispute may arise whether a novel subject, such as an antiterrorist measure impinging on movement of workers, falls within the competence of the Community or should be dealt with by national authorities pursuant to an agreement reached in EPC. Past experience with disputes over the scope of the Community's treaty-making power suggests that such controversies may also pose uncertainties for the third states concerned. Although the Court of Justice would not be able to adjudicate such disputes, it retains its authority to define the scope of the Community's powers and interpret the constituent Community Treaties: obviously in exercising this authority it cannot be required to ignore EPC.

The question might also arise as to the alternative means of dispute settlement in case of a deadlock over the consistency issue that cannot be resolved through negotiations between the parties and institutions concerned. One must assume that by excluding any recourse to the Court of Justice, the Member States are no longer bound by the undertaking in article 219 of the EEC Treaty not to submit

40. Stein, *supra* note 15, at 61-68.

41. SEA, *supra* note 9, art. 30, 5. Both the British and the Franco-German drafts, which served as the principal bases for the negotiations, placed responsibility for ensuring consistency on the Member States themselves, but "this was thought to be insufficiently operational." Nuttall, *supra* note 10, at 211.

42. SEA, *supra* note 9, title IV, art. 31.

43. Krenzler, *Die Einheitliche Europäische Akte als Schritt auf dem Wege zu einer gemeinsamen europäischen Aussenpolitik*, 21 *EURO. R.* 384 (1986).

a dispute concerning the interpretation or application of that Treaty to any tribunal other than the Court of Justice. That means, in theory at any rate, that such normal means of dispute settlement as third-party conciliation or arbitration would become available to the Member States and the Community.⁴⁴ Yet, recourse to such external proceedings would appear paradoxical and is most unlikely in a substantially integrated system such as the Community.

Whatever may be its practical implication, the exclusion of the Court is further evidence of the member governments' passionate attachment to national sovereignty over foreign policies and their aversion to any "judicialization" of the diplomatic processes. This opposition in principle may have been reinforced by the distrust of the Court in some quarters, due to its consistently broad interpretation of the Community's independent foreign affairs powers at the expense of national treaty powers.⁴⁵

IV. More "Democratization": The European Parliament

Title II of the Act purports to increase somewhat the influence of the European Parliament on lawmaking in the Community by introducing a new "cooperation procedure" with the Commission and the Council. The procedure, which still falls short of "co-decision," applies principally to legislation designed to complete the internal market.⁴⁶

In the field of foreign affairs, the Act confirms, but does not modify appreciably, the Parliament's participation in the EPC mechanism, as it has evolved over the years: The Parliament is to be "closely associated" with EPC; the Presidency shall keep it regularly informed of the foreign policy issues pending before EPC and ensure that its views are duly taken into consideration.⁴⁷ At the occasion of the signing of the Act, the Ministers of Foreign Affairs adopted a decision specifying the modalities of the dialogue between the Parliament and the Presidency: presentation of a program at the beginning of each Presidency's six-month term and of a report at the end of the term, an annual written report on the progress of EPC, the Presidency's participation in the Parliament's general debate on foreign policy, informal colloquy four times a year between the Presidency and Parliament's Political Affairs Committees, answers to parliamentary questions and resolutions, etc.⁴⁸ De Ruyt reports that the effort of the Belgian and other delegations to provide for an annual meeting between the Parliament and all the Foreign Ministers (rather than with the Presidency only) failed because the majority was afraid that such meeting would

44. See generally Freestone & Davidson, *Community Competence and Part III of the Single European Act*, 23 COMMON MKT. L. REV. 793, 795-800 (1986).

45. Stein with Henkin, *supra* note 1, at 19-22, 43-51.

46. Bieber, Pantalis & Schoo, *supra* note 11, at 767.

47. SEA, *supra* note 9, art. 30, 4.

48. J. DE RUYT, *supra* note 18, at 242; Decision, *supra* note 9, section I, at 115.

publicly expose divergent views among the Ministers.⁴⁹ The limitation in the past practice to inform the Parliament through its Political Affairs Committee appears to have been eliminated so that the information process may include the plenary as well.⁵⁰

Two innovations of some importance signal a qualitative, albeit limited, upgrading of the Parliament's powers from purely advisory to normative. In the first place, the Parliament was given the power to approve or disapprove, rather than to give only a nonbinding opinion, on the admission to the Community of new members.⁵¹ This may prove of some practical significance in view of the recent application for full membership by Turkey and the lively debate on the desirability of EEC membership in Norway, Austria, and some other states members of the European Free Trade Association.

Again, the Parliament was given a similar power of veto with respect to the conclusion of "association agreements" such as the wide-ranging Lomé Convention concluded by the Community with sixty-six Pacific, Caribbean, and African states.⁵² These agreements, according to article 238 of the EEC Treaty, remain subject to a unanimous vote in the Community Council. The new power of the Parliament, however, does not extend to other agreements, such as the crucial trade agreements falling within article 113 that require only a qualified majority vote rather than unanimity in the Council. Because of this more liberal voting requirement, and since the content of the "association agreements" is not defined in article 238, the Member States in the Council have shown a distinct tendency to classify proposed agreements as falling within article 238, which gives each Member a veto in the Council, rather than an agreement under article 113.⁵³ Ehlermann suggests that this tendency will now be reversed since the Member States—choosing the lesser of the two "evils"—may prefer action under article 113 to the new complication arising out of the Parliament's power of co-decision. Moreover, if EEC article 238 should be interpreted in the light of the judicial doctrine of parallelism between internal and external powers of the

49. *Id.*

50. Bieber, Pantalis & Schoo, *supra* note 11, at 787.

51. SEA, *supra* note 9, art. 8 (amending art. 237, EEC Treaty). Parliament must act by an absolute majority of its members.

52. *Id.* art. 9. A Committee report calls for extending the new power to trade and cooperation agreements and for revising the procedures to ensure that the Parliament be consulted before the initiation of the negotiations, and it suggests that the Parliament must be in a position to lay down conditions to its assent. 1988-1989 EUR. PARL. SESS. DOC. A 2-0086-88, Report drawn up on behalf of the Political Affairs Committee on the Role of the European Parliament in the field of foreign policy in the context of the Single European Act (Rapp. Mr. L. Planas Puchades) (May 26, 1988). See also EUROPEAN PARLIAMENT, RULES OF PROCEDURE rules 32-35 (4th ed. 1987).

53. For a perceptive analysis, see Ehlermann, *L'Acte unique et les compétences externes de la Communauté: un progrès?* in RELATIONS EXTÉRIEURES DE LA COMMUNAUTÉ EUROPÉENNE ET MARCHÉ INTÉRIEUR: ASPECTS JURIDIQUES ET FONCTIONNELS [hereinafter RELATIONS EXTÉRIEURES] 79, 89 (P. Demaret ed. 1988).

Community,⁵⁴ as granting the Community the internal power to implement an association agreement by its own legislation, the Parliament would be able for the first time to claim the authority of full co-decision in the Community's internal law-making process. This would constitute "an unexpected victory" for the Parliament, exceeding by far its competence under the new "cooperation procedure" mentioned earlier.⁵⁵ At least some Member States, however, are likely to resist any such interpretation with great vigor.

In any event, the two new additions to the Parliament's powers are likely to induce the Council and the Commission to maintain still closer contact with the Parliament in order to avoid the risk of a veto of either a membership application or an association agreement negotiated with a third state or international organization. The "voice of the people" is marginally strengthened—at some cost, perhaps, of the efficiency of the process.

V. Research, Technology, Environment: International Aspects

Apart from title III on EPC, foreign affairs are mentioned expressly, albeit incidentally, in the context of the Community policies on research, technology, and environment.⁵⁶ In these areas whose true importance has become apparent in the last decade only, the Community has been active as promoter and regulator. Yet, except for the European Coal and Steel Community Treaty (article 55) and the Euratom Treaty (article 7), there was no specific legal basis for Community power in these fields. The EEC institutions had to draw on the implied powers in article 235, analogous to the "necessary and proper power" clause in article I of the Constitution of the United States. To be adopted pursuant to this article, a measure must be shown to be necessary to attain, "in the course of the operation of the common market," one of the Community objectives, and it must be approved unanimously in the Council. Thus in order to fit an environmental protection measure within the strictures of this article, the Commission had to seek a justification in terms of the economic objectives of the EEC treaty; the Commission's rationalizations have become increasingly strained.

The Single Act amends the EEC Treaty to bring these areas expressly within the Community competence. It thus removes the need for the Community institutions to rely on article 235. Moreover, in the field of research and technology, once the Council approves unanimously a multiannual framework

54. Ehlermann, *supra* note 53, at 89–90. The above doctrine was articulated by the Court of Justice of the Community in *Commission v. Council (the ERTA Case)*, 17 E.C.R. 263 (1971), 10 COMMON MKT. L.R. 335 (1971).

55. Ehlermann, *supra* note 53, at 89–90. The claim is reminiscent of the holding by the U.S. Supreme Court in *Missouri v. Holland*, 252 U.S. 416 (1920) (conclusion by the United States of an international agreement with Canada provided the Congress with power to legislate which (at the time) it would not have had in the absence of the international agreement).

56. SEA, *supra* note 9, art. 24 (adding new title VI to part III of the EEC Treaty), *supra* note 8.

program, the specific measures of cooperation with third countries, including international agreements to be concluded in accordance with the standard treaty-making procedure,⁵⁷ may be adopted by qualified majority in the Council.

This liberalization of the voting procedure, however, is not carried over into the environmental field. In that field, "[w]ithin their respective spheres of competence," the Community and the Member States are to cooperate and make arrangements with third countries or international organizations, but unanimity in the Council is the general requirement here. Nevertheless, the Council is expressly authorized to "define those matters on which decisions are to be taken by a qualified majority," including the conclusion of international arrangements.⁵⁸

In the past, a controversy has often arisen over whether a proposed international agreement fell within the treaty-making power of the Community or of the Member States. To protect national power the Act stipulates that the Community shall act only where the desired objective of protecting the environment can be attained better at the Community level than by national action ("the subsidiarity principle"); more specifically, even when the Community acts, Member States remain free to introduce more stringent measures "compatible with the Treaty." This ambiguous effort to preclude or limit the accepted preemptive effect of Community law has been criticized for allowing geographic fragmentation of Community territory through divergent national environmental regulations. Substantial flexibility allowing for divergent climatic and other conditions is clearly desirable. The particular language of the Act, however, justifies concern about the preservation of the independent treaty power of the Community and the supremacy of treaties concluded by the Community over national law, as defined by the Court of Justice. An interpretative declaration attached to the Act was designed to alleviate that concern.⁵⁹ Considering the declaration and the clause in the Act mentioned above that the Community and the Member States act "within their respective competence" and that national measures must be "compatible with the Treaty," one must conclude that although the Members may adopt or maintain national measures, once the Community decides to cover a specific aspect by a regulation or in the context of an international convention, any national legislation must be consistent with the common action.⁶⁰ In any event, the Court of Justice will have the last word on any controversy of this type.

57. EEC, *supra* note 8, art. 228. Ehlermann considers the reference to EEC art. 228 superfluous on its face and speculates about possible reasons for it. Ehlermann, *supra* note 53, at 84.

58. SEA, *supra* note 9, art. 24, title VI, inserting art. 130 S, para. 2, in the EEC Treaty, *supra* note 8.

59. Declaration [on Article 130 R of the EEC Treaty] Re paragraph 5, second subparagraph attached to SEA reads: "The Conference considers that the provisions of Article 130 R (5), second subparagraph [concerning agreements with third parties] do not affect the principles resulting from the judgment handed down by the Court of Justice in the AETR case." SEA, *supra* note 9, Final Act, BULL. EUR. COMM., Supp. 2/86, at 24.

60. Glaesner, *supra* note 37, at 458. See also Ehlermann, *supra* note 53, at 86-87. The author raises a pertinent question whether the "cooperation procedure" with the Parliament which applies,

VI. Other Aspects Affecting Third Countries or Their Nationals

Several provisions of the Act are of direct interest for third states or their nationals. Thus, the unanimity requirement in the Council is replaced by a qualified majority vote for extending the benefits of the liberalization of the cross-frontier supply of services to non-Community nationals, for coordination of exchange policies between the Member States and third countries, and for any autonomous change or suspension of duties in the common customs tariff of the Community.⁶¹

The easing of the procedure for modification of the common customs tariff, which was generally viewed as indispensable, appears to be the only specific provision dealing with the Community's common trade policy toward third states. One might have expected that, along with the completion of the internal market, the Act would provide a deadline for filling in the many remaining gaps in the Community's trade policy. Individual Member States currently maintain as many as 1000 quantitative or other restrictions on imports from third states, including "voluntary" export restraint agreements and industry-to-industry agreements, aimed largely at imports from Japan, the newly industrializing Asian countries, the nonmarket states of Eastern Europe, and in some instances (such as quotas in the General System of Preferences) at Third World imports as well.⁶²

These restrictions, whether or not conforming to the EEC Treaty, are inconsistent with the home-market concept and require national border controls inside the Community that the Commission's White Paper insists should be abolished. To complete the Community trade policy it would be necessary either to phase out the national measures or perhaps replace at least some of them (e.g., those concerning Japanese cars or textiles generally) with protective arrangements adopted by the Community itself. Clearly, the governments were not prepared to enter this thorny thicket in the context of the negotiations for the Act. Nor is there any mention in the Act of moving the control over the entry of third country nationals to the external frontier of the Community. Such a decision would require Community-wide agreement on such matters as visas, crime, terrorist, and drug controls.⁶³

inter alia, to international agreements on research and technology is the appropriate method for the Parliament's participation in Community treaty-making. *Id.* at 90.

61. SEA, *supra* note 9, art. 16(1), (3), (4).

62. M. CALINGAERT, *supra* note 3, at 83. See also J. PELKMANS & A. WINTERS, *supra* note 2, at 7, 101-103; Europe, *supra* note 34, Oct. 14, 1988, at 6, No. 4873 (N.S.) (Mr. Horst G. Krenzler, Director General for Foreign Relations at the Commission).

63. See generally Mattera, *L'achèvement du marché intérieur et ses implications sur les relations extérieures* in RELATIONS EXTÉRIEURES, *supra* note 53, at 217-18. In the General Declaration on articles 13 to 19 of the Single European Act, adopted at the signing of the Act, the parties declared that nothing in the Act shall affect their right to take whatever measures they consider necessary for controlling immigration from third countries, combatting terrorism, crime, drug traffic, and illicit

VII. Concluding Observations

The Single European Act is a bizarre conundrum in international law, a creature of a diplomatic bargain. It is a treaty joining amendments of three earlier treaties with "provisions" incorporating an ongoing regime based on political understandings. Its contribution toward the declared objective of "European unity" in the sphere of foreign affairs at any rate is little more than marginal.

The Act does not provide for an institutionalized European foreign policy. Quite to the contrary, it reaffirms the stark separation between the diametrically different regimes dealing with foreign trade and diplomatic policies. Moreover, the Act perpetuates the dysfunctional separation of foreign diplomatic and defense policies. Little more than a "personal union" of the principal actors and loose cooperative arrangements link the two regimes, the substantially integrated Community and the pristinely intergovernmental EPC. This inherently unstable situation is the result of an uneasy compromise between forces pressing for further integration and the governments and their bureaucracies, unwilling to relinquish their traditional powers.

If one takes a minimalist point of view, however, the Act represents an incremental advance:

- a. By turning a fragile political undertaking to consult on foreign policy into a treaty obligation, albeit a widely open-ended one, the Act strengthens the commitment and provides a modicum of additional restraint on unilateral action. It has been suggested, on the other hand, that the conversion of the political commitment into a treaty obligation, and generally the codification of EPC in a normative instrument, may mean that any further evolution of the mechanism may be achieved only by a treaty amendment—a view that is hardly persuasive. When the parties intended to block any institutional change through means other than treaty amendment—as they did with reference to economic and monetary policy—they said so expressly in the Act.⁶⁴ Whether it is wise to delegitimize in advance any evolution through means less burdensome than a "constitutional" amendment is another question.
- b. The Act confirms that the Community and EPC are coordinate and membership in both is indivisible. A withdrawal from EPC is no longer a matter of terminating a mere political pledge and would raise questions of treaty violation.

trade in art works. See also the Political Declaration by the Governments of the Member States on the free movement of persons pledging cooperation of the Member States, "without prejudice to the powers of the Community," particularly as regards entry, movement, and residence of third country nationals and as regards combatting terrorism, crime, drug traffic, and illicit trade in works of art and antiques. SEA, Final Act, BULL. EUR. COMM., Supp. 1/86, at 24, 25.

64. SEA, *supra* note 9, art. 102A, 2, inserted by art. 20 of the Act. This "blockage" is probably due at least in part to constitutional concerns in Denmark and elsewhere. Glaesner, *supra* note 37, at 451.

- c. The objective of "European unity" is given a treaty basis and that may assist the Court of Justice in its teleological interpretation of the constituent treaties. Moreover, the codification of the Community objectives in the areas of research, technology, and environmental protection confirms the Community foreign affairs powers in these disciplines.
- d. The Act provides a normative basis for the Commission's standing to participate in EPC although the scope of its authority remains undefined. As in past practice, the Commission may influence the outcome, but it is not one of the actors counted for the purpose of consensus.
- e. The upgrading of the powers of the European Parliament from mere "advice" to obligatory "consent" with respect to admission of new members and limited type of international agreement may prove important if it serves as a precedent for extending the Parliament's voice in treaty-making generally.
- f. The newly introduced Secretariat should improve the continuity in the EPC process although, as I mentioned above, some commentators fear a bureaucratization of the mechanism whose principal virtue thus far has been its flexibility. There is also a potential for friction with the Commission, the Secretariat of the Council, and national diplomats.
- g. Those "pro-Europeans" inclined to see the world through rose-tinted spectacles may draw some comfort from the clause that commits the parties in 1992 "to examine whether any revision" of the EPC mechanism "is required."⁶⁵ Yet it proved impossible to provide that the revision should be in the direction of a closer union.

The Act, as we have seen, has two principal facets: the incorporation of EPC and the liberalization of the voting procedure in the Community Council, designed to assure the completion of the internal market within the 1992 deadlines. The true impact on Europe's foreign affairs and its position in the world will depend on the success of the "Europe 1992" enterprise. As of this writing (March 1989), a surprising 47 percent of the legislation proposed in the Commission's White Paper has been enacted by the Council.⁶⁶ The remaining proposals, however, that are still to be acted upon contain some of the pivotal and most controversial items of the program, such as tax harmonization and complete removal of national frontier controls inside the Community. Moreover, the Council legislation in the form of "directives" must be transformed into national

65. SEA, *supra* note 9, art. 30, (12).

66. The measures approved include full liberalization of the free movement of capital, radical simplification of customs procedures, substantial deregulation of road transportation, further measures toward opening of the government procurement markets (including telecommunications), a new method of harmonization of national technical regulations and standards, mutual recognition of professional qualifications, first steps in liberalizing financial services and air transport. *See generally* M. CALINGAERT, *supra* note 3, at 29-64; Report on the Progress required by Article 8B of the Treaty (presented by the Commission), COM(88) 650 final (Nov. 17, 1988).

legal orders by legislative or administrative action in the twelve Member States, a process that has proved difficult and has required increasing intervention by the Commission and the Court of Justice.⁶⁷ If one assumes, nevertheless, that the legal framework will be substantially in place as projected, the crucial factor will be the response on the part of the economic actors. Will the European business sector be ready to take advantage of the new opportunities offered by the vast, substantially deregulated, highly competitive market, through imaginative trans-border interactions? Will labor cooperate in the necessary, and at times painful, restructuring of the industries? Will management be prepared to plan globally using advanced information and technology systems? A revitalized Europe would speak with greater credibility and its influence and bargaining power in the international arena would increase measurably.

If one is inclined to take a benign view of the Single European Act, one may say that it conforms to Jean Monnet's recipe for gradual integration: define in clear terms the albeit limited goals to be achieved within specific deadlines that are broadly acceptable at a given time, and add such institutional arrangements that all agree are indispensable for achieving the goals. The assumption of the "pro-Europeans" is that a united, even though substantially deregulated, market will require more centralized decision making. The institutional deficiencies and contradictions will be exposed and this will force the next phase in the building of the European cathedral.

67. Commission of the European Communities, XXI General Report on the Activities of the European Communities 1987, para. 92 Ct, (1988); Fifth Annual Report to the European Parliament on Commission monitoring of the application of Community law (1987), COM(88) 425 final, Table No. 6, at 52 (1988).