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WESTERN EUROPE'S DUAL SYSTEM OF FOREIGN AFFAIRS

The EC and EPC Systems and their Coherence  
after the Single European Act

Thesis submitted for assessment  
with a view to obtaining  
the Degree of Doctor  
of the European University Institute

Members of the Jury

- Dr. Willy DE CLEERCQ      President of the Committee for External Economic Relations  
of the European Parliament, Minister of State
- Prof. Dr. Karl KAISER      University of Cologne, Director of the Forschungsinstitut  
der Deutschen Gesellschaft für Auswärtige Politik (Bonn)
- Dr. Horst G. KRENZLER      Director General for External Relations, Commission of the  
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Florence, April 1991

European University Institute



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Florence, April 1991

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## List of abbreviations

ACP States	African, Caribbean and Pacific States
Art.	Article(s)
ASEAN	Association of South-East Asian Nations
Bull. EC	Bulletin of the European Communities
Cl.	Clause
CDE	Conference on Confidence- and Security-Building Measures and Disarmament in Europe
COMECON	Council for Mutual Economic Assistance
COREPER	Comité des Représentants Permanents
COREU	Correspondance Européenne
CSCE	Conference on Security and Co-operation in Europe
DG	Directorate-General
Doc(s)	Document(s)
EAEC	European Atomic Energy Community (Euratom)
EC	European Community(ies)
ECAC	European Civil Aviation Conference
ECJ	European Court of Justice, Court of Justice of the European Communities
ECR	European Court Reports
ECSC	European Coal and Steel Community
ECU	European Currency Unit
EEC	European Economic Community
EFTA	European Free Trade Association
EP	European Parliament
EPC	European Political Cooperation
EPC Bulletin	European Political Cooperation Documentation Bulletin
ERTA	European Road Transport Agreement
EUI	European University Institute
GATT	General Agreement on Tariffs and Trade
GmbH	Gesellschaft mit beschränkter Haftung
G-24	Group of 24 (Western industrialized countries)
IGC	Intergovernmental Conference

IV

INF	Intermediate Range Nuclear Forces
MEP(s)	Member(s) of the European Parliament
MFA	Multi-Fibre Agreement
NATO	North Atlantic Treaty Organization
OAU	Organization of African Unity
OECD	Organization for European Cooperation and Development
OJ	Official Journal of the European Communities
PLO	Palestine Liberation Organization
RPEP	Rules of Procedure of the European Parliament
SEA	Single European Act
Trevi	Terrorisme, radicalisme et violence internationaux
UK	United Kingdom
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UNGA	United Nations General Assembly
UNO	United Nations Organization
US	United States
USSR	Union of Soviet Socialist Republics
v.	versus
WEU	Western European Union

## Preface

This study would never have been written without the continuous support of two senior officials of DG I of the Commission of the European Communities: Dr. Horst G. Krenzler, who helped the author during a traineeship at the Commission of the EC in 1987 to define the subject and to collect precious inside views on EC and EPC foreign affairs, and Simon Nuttall, who made the author available his comprehensive knowledge and analytical view of EPC and EC/EPC interaction.

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## GENERAL INTRODUCTION

The European Community's actual system for conducting foreign affairs is singular of its kind in the history of international relations: Because of an intricate division of powers between the twelve Member States and the Community institutions, Europe's foreign affairs are conducted neither entirely by its states, which have remained sovereign in international relations, nor by the Community, which has emerged as a new actor on the international stage. Whereas some "classic" matters of external relations - above all those of defense policy - have remained in the realm of national sovereignty, others - in particular those of foreign trade policy - have become matters of exclusive Community competence. The result has been a splitting of the means and the decision-making procedures in the conduct of foreign affairs which is in obvious contradiction to the traditional conception of efficient foreign policy making.

The Community's founding treaties of 1951 and 1957 did neither provide for the development of a common foreign policy nor did they even mention it as political aim. Yet the cooperation of the Member States in the sphere of foreign affairs has been a major political evolution resulting from the Community's existence. The aim to provide for a close general political coordination of the Member States' foreign policies has accompanied the development of the EC almost from the beginning: Already in 1959 the Foreign Ministers of the Six decided to meet regularly to discuss foreign policy questions. The next step, the negotiations on a "Political Union" with close intergovernmental cooperation in foreign affairs as it was proposed in the French government's famous "Fouchet plans" in 1961/62, ended in a failure. But after several years of stagnation the Davignon or Luxembourg Report of 1970, following the new impetus given to the Community by the Hague Summit of 1969, successfully advocated regular meetings of the Member States' Foreign Ministers and Political Directors in order to favour common action in the sphere of foreign affairs. These meetings became so much a part of Member States' diplomatic activity that

from 1975 on the President-in-Office of the EC's Foreign Ministers has appeared before the European Parliament to make an annual report and to answer questions on matters concerning this intergovernmental cooperation, quickly baptized "European Political Cooperation" (EPC). In a step-by-step strategy EPC added to its very scarce and limited initial procedures a series of bodies and rules with the clear aim of broadening the consensus-building process in the formation of a European foreign policy and of improving its capacities of responding to external problems (1). Notwithstanding some very critical comments from outside disparaging EPC as a mere phrase-producing machinery, the governments valued the evolution of the new cooperation structure as a success story, especially after having had evident positive experiences with cooperation in the CSCE negotiations and in Middle East affairs. In their Solemn Declaration of Stuttgart of 1983 the Heads of State of Government therefore even felt induced to describe the strengthening of EPC as one of the main objectives on the way to "European Union" (2).

But in spite of EPC's at least implicit claim to be the one and only foreign policy making structure of the "Europe communautaire" the originally purely "economic" EC system has become an international actor on its own: From the outset, the Community's treaty-making powers as laid down in the three founding treaties (ECSC, EAEC, EEC) and particularly the Common Commercial Policy provided for in the EEC Treaty granted the Community a great potential for taking action in international relations. In the first years following its creation, to a large extent the Community only acted in response to initiatives from abroad. But then it gradually fortified its international position by a series of important trade agreements, such as the preferential trade agreements with countries in the Mediterranean region (starting with Greece in 1961), the agreements on preferential treatment of African, Caribbean and Pacific (ACP) countries (starting with the first Yaounde Convention of 1963), the Commodity Agreements concluded within the framework of UNCTAD (starting with the International Wheat Agreement in 1971), the free-trade agreements with other European States (starting with the 1972 agreements with the EFTA countries), the framework agreements on commercial cooperation with several non-Europe-

an countries (starting with the 1973 agreement with India) and the commercial cooperation agreements with state-trading countries (starting with the trade agreement with the People's Republic of China in 1978) (3). This steadily continued series of trade agreements, together with the Community's coherent action within the framework of the GATT (starting with the Dillon Round in 1961), led third countries to recognize it as an important partner, able to play a decisive role as an independent entity in international relations. A significant indicator of this recognition is the status acquired by the Community in important international organisations, which especially in GATT and the OECD actually far surpasses that of a simple "observer". Besides this, the Community's supranational executive institution, the Commission, has been admitted as a participant to the Western Economic Summits ("Seven Summits"), which have become one of the most important fora of international politics, and, in July 1989, it was entrusted the role of coordinator of the West's economic aid for Eastern Europe's new democracies, which has become known as the G24 or PHARE programme.

Hence, since the early seventies the European Community has two different decision making structures in foreign affairs: on the one hand, its "external relations", formally limited to "economic" matters, are conducted by the Commission and the Council of Ministers of the EC in a partially supranational decision making structure. On the other hand, "foreign policy" issues are discussed by the Member States meeting separately in EPC, taking decisions on a purely intergovernmental basis.

In practice, a clear distinction between external "economic" relations and "foreign policy" issues is of course impossible, so that policies agreed on in the two structures must inevitably overlap. From the beginning this has been the case because EPC's role in international relations has always been heavily dependent on the EC's economic power and instruments; and besides, the Commission and the European Parliament have rather quickly acquired a political role far surpassing the purely economic dimension of activities provided for by the Community's founding treaties.

Despite all the Member States' initial efforts to maintain a

strict differentiation between EPC and EC affairs, these overlappings have generated a close interaction between the two structures, which at least in the beginning was marked by a certain amount of friction and rivalry, especially between the Commission and EPC (4). The close association of the Commission with all levels of EPC decision making, which was finally accepted by Member States in the London Report of 1980, and the fact that the European Councils from 1974 on headed both the EC and the EPC framework, contributed much to the improvement of relations between the two structures (5). Nevertheless the interrelation of EC and EPC not only remained very loose and even more and more confused, but it was also a very provisional one because EPC still was founded only on a set of intergovernmental arrangements without any treaty basis (6).

The great debate on the Community's institutional reform initiated by Altiero Spinelli and instigated by the European Parliament's (EP) Draft Treaty on European Union of 1984, from its outset also touched on the institutional groundworks for decision making in foreign affairs; all the more so since the articles on international relations in the Draft Treaty provided for an increasing transfer of activity from intergovernmental to integrated activity (7). Governments agreed on the need to revise the existing structures but did not follow the line of reform proposed by the EP. During the entire institutional reform debate they had three main aims in the sphere of foreign affairs (8):

- (1) to put EPC on a treaty basis for the first time;
- (2) to make the two systems of EC and EPC more coherent;
- (3) to keep the two systems institutionally rather separate.

The last two of these aims were evidently to some extent in conflict with each other, but this did not prevent the twelve governments from crystallizing all three in the Single European Act (SEA), which, after one and a half years of intensive negotiations, was signed on 17 February 1986 and finally became operative on 1 July 1987 (9).

The SEA's provisions concerning external relations - laid down

mainly in the "Treaty Provisions on European Co-operation in the Sphere of Foreign Policy" in the Act's Title III - until now clearly represents the most important effort ever made by the Community's Member States to create a genuine treaty-based system of foreign affairs. Even a short look at the SEA makes it plain that this system is still a heavily dualistic one because the main characteristics of the EC's and the EPC's different competences and decision making structures have been conserved in the SEA. But nevertheless, by such important provisions as the treaty recognition given to the EPC procedures, the responsibility conferred to the Presidency and to the Commission of ensuring - each within its own sphere of competence - consistency between the policies agreed within the EC and the EPC framework, the introduction of a new permanent EPC secretariat and the strengthening of the EP's powers in external relations, some major modifications have been made to the system as a whole. A striking evidence for their importance is the judgment of the Irish Supreme Court on the ratification of the SEA in Crotty v An Taoiseach on 9 April 1987, in which the Court had to decide whether the provisions contained in Article 30 under Title III of the SEA were inconsistent with the Constitution. In the judgment, which led to a constitutional amendment approved by a referendum, Justice Henchy argued with regard to the SEA's provisions in the sphere of foreign affairs that after the ratification of the SEA "each [Member] State's foreign policy will move from a national to a European or Community level" and that Title III of the SEA "is the threshold leading from what has hitherto been essentially an economic Community to what will now also be a political Community" (10). However, the practical effects of some of the SEA provisions were difficult to foresee, and therefore the SEA's High Contracting Parties have provided for a revision of Title III after five years, that is to say after 30 June 1992 (11).

The revision clause inserted in SEA has become somewhat obsolete by the fact that in December 1990, after several months of preparatory works, the European Council of Rome decided to open parallel to the Intergovernmental Conference on Economic and Monetary Union ("IGC I") also an Intergovernmental Conference on Political Union ("IGC II"). The IGC II has been expressly mandated by the Heads of

State or Government to give particular attention to the aim of the development of a "Common foreign and security policy" which obviously implies a revision of the entire EC/EPC dual system of foreign affairs (12). When in January 1991 IGC II started its work, the subject of a Common foreign and security policy has been one of the first topics on the agenda, and there can be no doubt it will remain a key issue during the entire Conference (13).

Having regard to the important reform attempt made by the SEA in the sphere of foreign affairs and to the fact that the development of a Common foreign and security policy is furthermore one of the principal items on the agenda of the Intergovernmental Conference on Political Union, a thorough analysis of the dual system of foreign affairs now existing within the ambit of the Community Treaties seems to be not only worthwhile but even necessary. By the following study, we intend to provide such an analysis and to make a small contribution to the current discussions on the development of a European foreign policy.

Our exploration of the Community's dual system of foreign affairs will be guided by three main questions:

- (1) What are the principal features of the dual system and how does it work in practice?
- (2) What changes have been brought about by the SEA?
- (3) Whether, in what respect and in which areas the system needs again to be reformed in view of the aim of the formulation and implementation of a European foreign policy which has been provided for by the SEA and is also on the agenda of the Intergovernmental Conference on Political Union?

In order to answer questions (1) and (2) and to create a substantial basis for the answering of question (3), the study will start with a detailed analytical presentation of the present domains, institutions and procedures of both the EC and the EPC systems in parts I (EC), II (EPC) and III (European Council). As the interac-

tion of EC and EPC must be considered to be the suture of the entire dual system and since one of the main aims of the SEA reforms is to ensure the coherence of EC and EPC, we will deal with coherence and interaction between the two structures separately in part IV. All four parts will give special attention to the changes brought about by the SEA and will heavily rely on informations obtained inside of the EC and EPC frameworks on the functioning of the system since 1987. In the fifth and final part we will then draw conclusions from our analytical presentation in respect to (a) the main characteristics of the dual system as it exists today, (b) the effect of the SEA reforms on the system and (c) a further reform of the system in view of the objective of a common European foreign and security policy.

The decision to deal with the EC system, EPC system and the European Council in three separate parts may not seem evident and merits an explanation:

One of the major innovations introduced by the SEA is actually that for the first time it has enshrined in a single legal instrument principles and procedures of EPC - contained in its Title III - and provisions amending the Treaties establishing the EC - contained in its Title II. This combination was meant to emphasize that both the codification of EPC and the reform of the EC Treaties have to be considered as one effort and one instrument of progress towards European unity (14).

But despite the adjective "single" in the title and the common definition of the political objective in Article 1, paragraph 1, which provides that the EC and EPC "shall have as their objective to contribute together to making concrete progress towards European unity", the SEA treats the two systems as strictly separate: It does not provide for organic or functional links between the two structures, which according to the explicit provisions of Article 1, paragraphs 2 and 3, and Articles 3(1) and 3(2) are governed by different rules and exercise their powers under different conditions and for different purposes. In addition, Article 31 SEA stipulates that the jurisdiction of the European Court of Justice (ECJ) does only extend to the provisions of Title II and

Article 32 SEA which means that EPC (dealt with in Title III) is not subject to review by the ECJ. Article 32 SEA, finally, affirms that apart from the provisions dealing explicitly with the Community framework (Article 3(1), Title II and Article 31 of the SEA) "nothing in this Act" shall affect the Treaties establishing the EC (15). From a legal viewpoint, therefore the EC and EPC continue to exist as two completely different systems, although the common legal framework established for both structures by the SEA is - as we will show later - not without significance.

A similar separation has been applied by the SEA with regard to the position of the European Council: Article 2 in Title III for the first time has given a legal basis to this institution, but neither the provisions modifying the Treaties establishing the EC nor the provisions on EPC refer to it. In addition, the provisions of Article 31 and 32 SEA (see above) do not only apply to EPC, but also to the European Council. In legal terms the SEA therefore, has not established any link between the European Council on the one hand and the EC and EPC systems on the other hand (16).

Since this separate treatment in the SEA reflects well the special role and the special status of the European Council in the Community framework, not only EC and EPC, but also the European Council will be dealt with separately in the first three parts.



**Part I**

**THE EC SYSTEM OF FOREIGN AFFAIRS**



## Part I: THE EC SYSTEM OF FOREIGN AFFAIRS

Preliminary remark: The mere fact that accession to the Community means the transformation of a third State into a Member State makes that the case of accession falls outside of the normal sphere of Community external relations. In the following we will therefore leave aside all questions related to the negotiation and conclusion of accession treaties.

### Chapter 1: The domain of the EC system of foreign affairs

From the beginnings of the Community there could be no doubt that the idea of creating a common market was necessarily linked up with that of developing some kind of a common external economic policy: With national economies being heavily dependent on international trade relations and export markets, the new organization had to act as one entity in order to bring to bear the common interests of its Member States in international economic relations. Yet, although intended to pursue far-reaching objectives, the three European Communities do not possess unlimited jurisdiction: Like other international organizations, their domain of activity is defined by the framework of the provisions laid down in their statute. The Community's three founding treaties have conferred upon the EC institutions a set of important tasks in the sphere of external economic relations, which continue to form the basis of the Community's foreign affairs competences (1). The SEA has to some extent enlarged this basis of competences 'explicitly' provided for by the Treaties. However, the domain of the EC system of foreign affairs is not only defined by these explicit competences, but also by the Community's 'implied' competences as they have been developed by the jurisdiction of the ECJ and by the nature (exclusive or not) of these competences. All these aspects will be dealt with in turn.

### 1.1. The explicit competences of the EC system

The texts of the EC Treaties do not set out a list of the subjects falling within the Communities' competences of the kind we can find in federal constitutions. As it is true, again, of most of the international organizations, the competences of the Community are defined in a more complex manner, by confining the relevant rules and the scope of the competences, and by laying down the conditions and the methods for exercising them, in order to ensure that provisions which frequently are of a general character cannot be interpreted as automatically conferring unlimited powers of action upon the Community institutions.

Article 6, paragraph 2, of the ECSC Treaty stipulates that in international relations the Community "shall enjoy the legal capacity it requires to perform its functions and attain its objectives". Paragraph 4 of the same Article provides that "the Community shall be represented by its institutions, each within the limits of its powers". Articles 93 and 94 provide for the maintenance of "all appropriate relations" with the UN, the OECD and the Council of Europe. However, the scope of these provisions is limited by the essentially specialized nature of the ECSC Treaty, which restricts the functions of this first Community to the coal and steel sector. Its range is additionally reduced by Article 71, paragraph 1, which stipulates that "the powers of Member States in matters of commercial policy shall not be affected by this Treaty, save as otherwise provided therein". Since the ECSC Treaty provisions on commercial policy only refer to internal competences of the High Authority, the ECSC does clearly not dispose of an explicit competence to conclude commercial agreements. The Member States, in fact, have always taken the position that they have retained their competences in the field of commercial policy for ECSC products (2).

Because of the particular nature of its subject, the EAEC Treaty contains several very detailed provisions on external relations in

a special chapter (Chapter X, Articles 101-106). Article 101 provides that within the limits of its powers and jurisdiction, the EAEC may conclude agreements or contracts with third States, international organizations or nationals of a third State, and that these shall be negotiated and concluded by the Commission in accordance with the directives of the Council or its approval respectively. The scope of this provision is very large, since Article 1 EAEC Treaty explicitly defines "the development of relations with other countries" as one of the principal aims of the EAEC. The EAEC therefore enjoys a general treaty-making competence over the whole range of the EAEC Treaty (3). As in the case of the ECSC, however, the scope of the EAEC's external competence is considerably limited by the very specialized nature of this Community.

The EEC Treaty, because of its wide economic and political scope by far the most important of the three founding treaties, stipulates in Article 210 that the Community "shall have legal personality". This provision clearly refers to the international legal personality of the Community since Article 211 deals separately with its legal capacity under the laws of the Member States (4). It is generally recognized that this Article does not confer by itself international legal personality upon the Community, not because it does not speak of "international" legal personality, but because providing for it by itself is not sufficient. In contrast to a nation state, the legal capacity of the Community - like that of other international organizations - is not original, but derived from its Member States (5). In the past several different theories have been developed on the criteria necessary to prove the existence of the Community's legal personality in international relations: From a legal viewpoint the most important criterion is the scope of the other external competences conferred upon the Community by its Member States, whereas from a political viewpoint it is the recognition of the Community's legal personality by its international partners (6). Today there is no question of the Community's legal personality not being recognized even by the members of the COMECON, which for many years had contested it for politi-

cal reasons (7).

Article 210 EEC Treaty is an affirmation of the Community's capacity to exercise powers in international relations. However, the EEC Treaty does not provide explicitly for a general external Community competence over the whole range of the Treaty. It only contains several explicit provisions regarding the competence for concluding specific international agreements:

- Article 113, paragraph 1, stipulates that "after the transitional period has ended, the common commercial policy shall be based on uniform principles, particularly in regard to changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalization, export policy and measures to be taken in case of dumping or subsidies". In the case of agreements in general to be negotiated with third States, Paragraph 3 of the same Article provides for the Commission to make recommendations to the Council, "which shall authorize the Commission to open the necessary negotiations".
- Article 238 stipulates that the Community "may conclude with a third State, a union of States or an international organization agreements establishing an association involving reciprocal rights and obligations, common action and special procedures".
- Articles 229 to 231, finally, provide for the establishment and the maintenance of "appropriate relations" with international organizations, particularly with the UN, the GATT, the Council of Europe and the OECD.

The interpretation of these provisions has given rise to a host of controversies of which we only want to mention the most important ones from a political point of view:

With regard to the scope of the common commercial policy provided for by Article 113 EEC Treaty, two conflicting doctrines have been developed: According to the "doctrine of the ultimate objective" (or "doctrine finaliste"), which was held for years by the

Council of the EC, only measures with the aim of altering the volume or the pattern of trade have to be considered as matters of common commercial policy. According to the "doctrine of the instrument" (or "doctrine instrumentale"), held by the Commission, the common commercial policy covers any activity of the Community, which makes use of one or more instruments of commercial policy, particularly in the case of those instruments enumerated in the non-exhaustive list in Article 113, Paragraph 1. Since there have been several occasions - especially in the case of economic sanctions against third States - on which instruments of commercial policy had to be used for non commercial objectives of the Community, the "doctrine of the ultimate objective" evidently represents a more restrictive interpretation of the scope of common commercial policy (8). This clearly shows the reluctance of the Council, i.e. most of the Member States, to accept a progressive transfer of the Member States' foreign affairs competence to the Community level.

The two doctrines collided in a case before the ECJ concerning two Council Regulations (3599/85 and 3600/85) for the implementation of the Community system of generalized preferences (9). In application of the "doctrine of the ultimate aim", the Council had avoided any reference to Article 113 EEC Treaty in the regulations and had indicated only a general legal basis ("having regard to the Treaty") on the assumption that the measures were pursuing both commercial aims and aims of development-aid policy. In February 1986 the Commission thereupon brought an action under Article 173 of the EEC Treaty for a declaration that the two regulations were void. In the spirit of the "instrumental" interpretation of Article 113, the Commission contended, firstly, that the Council had acted in breach of an essential procedural requirement by failing to supply a precise legal basis for the regulations, and, secondly, that it had acted in breach of the Treaty by employing a general legal basis entailing recourse to a procedure involving a decision by unanimous vote. In the opinion of the Commission, Article 113, under which a vote can be taken by a qualified majority, was the only correct legal basis (10).

In its judgment, which came about 26 March 1987, the Court of

*Justice decided definitely against the "ultimate aim" doctrine: It stressed that "the choice of the legal basis for a measure may not depend simply on an institution's conviction as to the objective pursued but must be based on objective factors which are amendable to judicial review".* The Court held with regard to the subject-matters of the regulations, "that the existence of a link with development problems does not cause a measure to be excluded from the sphere of the common commercial policy as defined by the Treaty". The main reason indicated by the Court is "that it would no longer be possible to carry on any worthwhile common commercial policy if the Community were not in a position to avail itself also means of action going beyond instruments intended to have an effect only on the traditional aspects of external trade. A 'commercial policy' understood in that sense would be destined to become nugatory in the course of time." (11). The Court recalled in this regard its Opinion 1/78 delivered on the compatibility with the EEC Treaty of the draft International Agreement on Natural Rubber, in which it had already declared "that it would no longer be possible to carry on any worthwhile common commercial policy if the Community were not in a position to avail itself also of more elaborated means devised with a view to furthering the development of international trade" (12). The concept of "common commercial policy", therefore, has to be understood in a very large sense, which has to take into account even changes in international trade relations which require the extension of that concept beyond the traditional patterns of external trade only. The progressive strengthening of the link between trade and development is evidently a good example for such a change.

It is worthwhile to add that although Article 113 gives no definition of the "common commercial policy", it is also generally acknowledged that the latter covers the taking of unilateral measures (autonomous commercial policy) as well as the negotiation of agreements with third States (conventional commercial policy) (13). Autonomous alterations or suspensions of duties in the common customs tariff are explicitly provided for by Article 28 EEC Treaty. This provision, however, does obviously not extend to alterations of the common customs tariff which are related to the implementa-



tion of common commercial policy since such measures are covered by Article 113 EEC Treaty.

It should also be noted that the EEC Treaty provides for exceptions to Community competence under Article 113: Pursuant to Article 223(1)(b) EEC Treaty, trade with products intended for specifically military purposes continues to belong to the sphere of Member States' competences. Article 224 EEC Treaty allows for national measures to be taken in the event of international crises and other emergency cases. The latter provision is of considerable importance in the context of the imposition of trade sanctions (see sub-chapter 8.3.).

With regard to Article 238 EEC Treaty, the main point in question is that of the delimitation of association agreements as provided for by this Article from commercial agreements to be concluded under Article 113: Since Article 238 does not give a precise definition of the notion of "association", there has been a contradictory practice: For political reasons both externally (considerable political implications of the concept of "association") and internally (different decision making procedures provided for by Articles 113 and 238) it has happened that agreements of a purely commercial content have been based on Article 238, whereas in other cases agreements establishing much closer relationships between the Community and third States have been based on Article 113 only (14). In order to avoid the application of Article 238 for agreements establishing more complex relations with third States, a new category of agreements has even been created - the so-called "cooperation agreements" - which are based on the double basis of Articles 113 and 235 (15). This new category has the double advantage for the Member States that the agreement is cast in a politically neutral setting and that the decision-making is by unanimity. As we will show later, the entry into force of the SEA has added new importance to the question of the delimitation of "association" from "trade" agreements, Article 9 of the Act having conferred upon the EP a co-decision role in the case of the conclusion of an association agreement, a role which it still has not under Articles 113 and 235.

With regard to the external relations competences provided for

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by Articles 229 to 231 EEC Treaty, the Commission's competence to maintain on behalf of the Community appropriate relations with all international organizations as provided for by Article 229, paragraph 2, has been restricted by the Luxembourg Agreement of 29 January 1966 so far as since then the Commission is expressly obliged to consult the Council on the advisability, the procedure for, and the nature of any links it might establish with international organizations (16). We will see, however, that in practice this does not too much hamper the Commission (sub-chapter 3.2.).

It may be noted also that Articles 229 to 231 do not say anything on the Community's participation in international organizations. However, it is generally acknowledged that Article 229 empowers the Community to establish relations with international organizations whenever those relationships relate to the aims and tasks of the Community. In practice this means that - because of the wide scope of these aims and tasks - there are hardly any international organizations the Community cannot establish relations with (17).

Responding to new challenges in the sphere of external relations, the SEA has explicitly conferred additional tasks on the Community in two fields:

- Research and technological development. - In order to strengthen the scientific and technological basis of European industry, new Article 130g(b) of the EEC Treaty stipulates that the Community shall promote "cooperation in the field of Community research, technological development, and demonstration with third countries and international organizations". New Article 130n provides that in implementing the Community's multi-annual framework programme on research and technological development (Paragraph 1), the Community may make provisions for such a cooperation, and that "the detailed arrangements for such cooperation may be the subject of international agreements between the Community and the third parties concerned" (Paragraph 2).
- Environment. - Taking into account the trans-boundary nature of

environmental problems, new Article 130r(5) of the EEC Treaty stipulates that the Community and the Member States, shall within their respective spheres of competence, "cooperate with third countries and with the relevant international organizations", and that the arrangements for Community cooperation "may be the subject of agreements between the Community and the third parties concerned". Yet, one has to note that Community competence in environmental affairs is only subsidiary, since new Article 130r(4) restricts Community action in this field to the cases in which the general environmental objectives laid down in Article 130r(1) "can be attained better at Community level than at the level of the individual Member States".

If one considers the legal principle that 'lex specialis derogat lex generalis', the SEA, through the introduction of special provisions for research and technological development as well as for environment, has excluded in these fields of policy the application of the wide margin of discretion of Article 235 EEC Treaty. However, because of their still very general wording, these new provisions do not bring about any substantive restriction of the Community's possibility of external action in these fields (18). Community cooperation with third States or international organizations in these spheres was not really new at the time of the emanation of the SEA. In the sphere of research and development it already existed in the framework of COST (European Cooperation in the Field of Scientific and Technical Research) which covers an important network of international agreements with several third States like, for instance, the Framework Agreement for scientific and technical cooperation with the Kingdom of Sweden of 1985. In the sphere of environment too the Community had already acceded to a series of international conventions, such as the Paris Convention on the Prevention of Marine Pollution from land-based sources (1975), the Barcelona Convention on the protection of the Mediterranean Sea against pollution (1977) and the Convention on long-range transboundary air pollution (1981). The new Articles 130g, 130n and 130r, therefore, have not really extended the Community's external competences, but have only consolidated and made

explicit an existing and largely exercised competence.

It should be noted that the SEA has neither extended nor even mentioned Community external competences in any other sphere of Community activity. The reasons why are not self-evident: One of the most important objectives of the SEA is certainly to ensure the establishment of the internal market by 1992. Yet, the SEA makes no reference whatsoever to the external dimension of the internal market or, more particularly, to the common commercial policy which, *inter alia*, could serve to protect the internal market against third States. Similarly, although the SEA explicitly confers new legislative competences on the Community in the fields of cooperation in economic and monetary policy (Article 20) and of social policy (Articles 21 and 22), it makes no reference to external competences of the Community in these fields. Finally, the SEA has also not conferred any explicit competence upon the Community in the sphere of development policy, although the Community is developing more and more substantial policies in this area. One reason for this silence on essential aspects of Community external relations is that the Member States took a rather inward-looking attitude during the negotiations on the SEA, their main aim being to achieve the internal market within the Community (19). The other reason, however, is that they were in position to leave aside without much care the problem of new explicit external competences which should have corresponded, at least, to the new internal competences, because problems related to insufficient explicit external competences of the Community had always been resolved more or less satisfactory by the doctrine of implied Community competences.

## 1.2. The implied competences of the EC system

When adopted in 1951 and 1957, the Community's founding treaties established a completely new legal order without providing definite solutions for all the problems which might arise in the course

of their application. This 'lacunae character' of the Treaties, a characteristic, in which the Community legal order differs up to the present day from national legal orders, is particularly evident in the case of the EEC Treaty: It reflects the limited scope of political consent among the High Contracting Parties of 1957 as well as the intention of the Treaty drafters to allow a flexible management of Community competence in the almost revolutionary attempt to achieve economic integration (20). Apart from indications furnished by the preamble and the provisions relating to individual sectors, the EEC's objectives are set out in Article 2, which stipulates that "the Community shall have as its task, by establishing a common market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it". Yet, while specifying the general objectives, the Treaty does neither define nor automatically confer on the Community all the competences necessary for attaining them.

This is particularly true with regard to the Community's competences in external relations: There the EEC Treaty has left open the fundamental question whether the Community's competence is based on the principle of "conferred" competences ("compétences d'attribution") and therefore limited to the external competences expressly provided for by the Treaty, or whether its competence in external relations should be regarded as coextensive with its competence for internal purposes and therefore exist also in cases not expressly provided for by the Treaty.

In the first years of the Community, the external competences provided for by Articles 113 and 238 EEC Treaty and the principle that each of the Community institutions has to act within the competences conferred on it led the majority of legal writers to assert that the Community may act only within the limits of its explicit external competences (21). Yet, when called upon for the first time to consider this issue, the ECJ did not follow this restrictive interpretation:

In March 1970 the Council of the EC decided on the negotiation

and conclusion of a new "European Agreement concerning the work of crews of vehicles engaged in international road transport" (ERTA), which was to be negotiated by the Member States within the framework of the United Nations Economic Commission for Europe. In May 1970 the Commission brought an action under Article 173 EEC Treaty against the Council for an annulment of the respective Council proceedings. It submitted that the negotiation and conclusion of the ERTA, involving as it did a matter coming within the Community's common transport policy, could no longer be carried out by the Member States but only by the Community (22). In its judgment of 31 March 1971, the ECJ acknowledged that "the Community enjoys the capacity to establish contractual links with third countries over the whole field of objectives defined in Part One of the Treaty". It pointed out that "such authority arises not only from an express conferment by the Treaty (...) but may equally flow from other provisions of the Treaty and from measures adopted, within the framework of those provisions, by the Community institutions". "In particular, each time the Community, with a view to implementing a common policy envisaged by the Treaty, adopts provisions laying down common rules (...)", the Court argued, "the Community alone is in a position to assume and carry out contractual obligations towards third countries affecting the whole sphere of application of the Community legal system." It concluded that "the system of internal Community measures may not therefore be separated from that of external relations" (23).

ERTA was a pioneer judgment. Although the expression "implied competence" or "power" does not appear in that judgment, it established the Court's doctrine of implied competences, holding that the Community's competences in common policy areas is paralleled (or "mirrored") by the development of its exclusive external competences (24). This doctrine of parallelism was confirmed and clarified by further case-law of the ECJ:

In Opinion 1/75, delivered on the Community's competence to participate in an "understanding" established in the framework of OECD regarding local cost standards in connection with the granting of export credits, the Court gave a broad interpretation of the common commercial policy provided for by the EEC Treaty. The



Court held that the field of common commercial policy necessarily covers also matters of export credits, since "in fact, such measures constitute an important element of commercial policy, that concept having the same content whether it is applied in the context of the international action of a State or to that of the Community". Arguing that a commercial policy "is in fact made up by the combination and interaction of internal and external measures", the Court went on to say that "the common commercial policy is above all the outcome of a progressive development based upon specific measures which may refer without distinction to 'autonomous' and external aspects of that policy and which do not necessarily presuppose, by the fact that they are linked to field of the common commercial policy, the existence of a large body of rules, but combine gradually to form that body" (25). Opinion 1/75 makes it clear, therefore, that the conclusion of an international agreement by the Community does not necessarily have to be preceded by internal Community legislation in the same field and that, in any case, the concept of "commercial policy" cannot be interpreted more narrowly in the case of the Community's common commercial policy than in the context of the international action of a State (26).

In the Kramer case, which came up by request for a preliminary ruling by a Dutch court in 1976, the question of the scope of the Community's external competences was raised in connection with the conservation of the biological resources of the sea. Some Dutch fishermen, who were being prosecuted for extending their fishing quotas fixed by the Netherlands in accordance with decisions taken in the framework of the North-East Atlantic Fisheries Convention (NEAFC), questioned the right of Dutch authorities to implement these decisions since, in their opinion, the matter had in the meantime passed into to the sphere of Community competence. The ECJ had to give a ruling requested on the basis of Article 177 EEC Treaty by the Dutch judge as to whether the Community alone had authority to enter into international commitments in the field of protection of fishing grounds (27). In its judgment the Court refined the principles of the ERTA judgment by declaring that the Community's "authority to enter into international commitments

(...) arises not only from an express conferment by the Treaty, but may equally flow implicitly from other provisions of the Treaty, from the Act of Accession, and from measures adopted, within the framework of those provisions, by the Community institutions" (28). The Court pointed out that, according to the EEC Treaty, fisheries come under the common agricultural policy and that Article 102 of the Act of Accession had explicitly reaffirmed the Community's competence to ensure protection of the fishing grounds and conservation of the biological resources of the sea. Since the only effective and equitable way to ensure the conservation of these resources is by an international agreement, the Court concluded, "it follows from the very duties and powers which Community law has established and assigned to the institutions of the Community on the internal level that the Community has authority to enter international commitments for the conservation of the resources of the sea" (29). The Court therewith acknowledged not only once again the principle that the Community's external competences may be legally founded on an implied grant of competences, but also that in order to be effectively and equitably exercised, the Community's internal competence requires a capacity of external action of the Community. Consequently, the Community's implied external competences do not follow simply from the Community's exercise of its internal competences, but from the necessarily external dimension of the measures to be taken in order to attain an objective for which internal Community law has assigned "duties and powers" to Community institutions (30).

In Opinion 1/78, delivered on the Community's competence to enter the Draft Agreement establishing a European Laying-up Fund for Inland Waterway Vessels, the Court, recalling its judgment in Kramer, reiterated that the Community's "authority to enter into international commitments may not only arise from an express attribution by the Treaty, but may equally flow implicitly from its provisions". The Court went on to say that it had concluded 'inter alia' that "whenever Community law has created for the institutions of the Community powers within its internal system for the purpose of attaining a specific objective, the Community has authority to enter into the international commitments necessary for

the attainment of that objective even in the absence of an express provision in that connexion". The Court added that "this is particularly so in all cases in which internal power has already been used in order to adopt measures which come within the attainment of common policies". However, the Court also emphasized that a virtual competence of this kind is "not limited to that eventuality" (31). The previous case-law of the ECJ had left open the question whether an external competence of the Community may also be recognized in areas where no common policy exists and in cases where the Community, though having internal competences, has not yet covered the field by internal measures. Opinion 1/76 makes it definitely clear that the Community's external competence may be implicitly deduced from any Treaty provision, not only in areas of common policy, but also in all cases where an internal competence has been established for the purpose of attaining a "specific objective", even if the Community has not yet exercised this competence for internal purposes (32).

The Kramer judgment and Opinion 1/76 have also contributed to the development of the Community's competence to participate in international organizations and in their creation: It has already been mentioned that the Treaty says nothing at all on the participation of the Community in international organizations. In the Kramer judgment the ECJ implicitly but unequivocally acknowledged the Community's right to participate in international organizations in stating that the Member States have a "duty to use all the political and legal means at their disposal in order to ensure the participation of the Community in the [North-East Atlantic Fisheries] Convention and in other similar agreements" (33). In Opinion 1/76 the Court then also recognized the Community's right to participate in the creation of international organizations: It held that the Community is entitled - in the framework of the common transport policy - not only to enter into contractual links with a third country but also "to cooperate with that country in setting up an appropriate organism" such as the European Laying-up Fund for Inland Waterway Vessels. This includes, as the Court expressly added, cooperation "for the purpose of giving the organs of such an institution appropriate powers of decision and for the

purpose of defining (...) the nature, elaboration, implementation and effects of the provisions to be adopted within such a framework" (34). This leaves no doubt about the Community's right to participate in all aspects of the life of international organizations and fills the gap which hitherto existed in the Treaty.

However, participation in and creation of international organizations must be consistent with the principles of the EEC Treaty. This again follows from Opinion 1/76: The Court there declared several structural and operational aspects of the Laying-Up Fund to be incompatible with the Treaty because of the exclusion of a specific Member State, the power reserved to certain Member States to take no part in matters of a common policy and the special prerogatives reserved to certain States in the Fund's decision making by derogation from the Community's concepts of adoption of decisions within a common policy (35).

Any discussion of the Community's implied competences would be incomplete without a consideration of Article 235 EEC Treaty, and this for two reasons: The first is that the ECJ has expressly acknowledged in the ERTA judgment that Article 235 "empowers the Council to take any 'appropriate measures' also in the sphere of external relations" (36). The second is that both the reasoning of the Court in Opinion 1/76 and the wording of Article 235 establish as a condition for the attribution of an implied competence the necessity of an action by the Community in order to attain one of its objectives.

Article 235 empowers the Council, if in the course of operation of the common market an "action by the Community should prove necessary to attain (...) one of the objectives of the Community and this Treaty has not provided the necessary powers", to take, acting unanimously, the appropriate measures upon a proposal from the Commission and after having consulted the European Parliament. Because of its large scope and the required unanimity in the Council Article 235 has on many occasions been chosen, by itself or together with other Treaty provisions, as legal basis for Community agreements (37). Like the doctrine of implied competences, Article 235 offers supplementary means of action for the Community

in cases in which the Treaty has not expressly provided the necessary competences for the attainment of a certain objective.

However, the possibility of implied external competences being conferred upon the Community under Article 235 should not be confounded with the possible implied grant of external competence in terms of the implied powers doctrine of the ECJ: In the field of external relations the doctrine of implied competences can only provide a legal basis in cases where the Treaty or legislation made under it have already assigned internal competences ("duties and powers" as it is said in the Kramer judgment) to the Community. Article 235 on the other hand, can only be resorted to in the absence of such an express grant of competence (38). Such an express grant of competence is still absent, for instance, in the sphere of development policy, and - apart from certain cases of "association" of third countries - Community action in this sphere has actually always been based on Article 235. The main difference between the two possibilities of an implied grant of external competences can therefore be summarized as follows: Whereas the doctrine of implied competences permits to create an external competence on the basis of an already existing internal competence, Article 235 offers the possibility of creating an external competence independently from the existence of an internal competence, on the sole basis of an "objective" of the Community (39). This difference led Advocate General A. Trabucchi in his Opinion in Case 8/73 Massey Ferguson GmbH to the convincing reasoning that the inclusion of Article 235 of the Treaty does not exclude "the applicability of the method of interpretation called 'the doctrine of implied powers' to the extent that the recognition of powers of action conferred on the Community is necessary, not generally to attain the objectives of the Treaty, as this rule provides, but more precisely for the correct exercise of powers specifically conferred on the Community in determined sectors" (40).

Putting together the jurisdiction of the ECJ set out above, it is possible to conclude that the Community's foreign affairs competence may be legally founded on an implied grant of power in three cases, each being linked to different conditions:

- A. Each time the Community, with a view to implementing a common policy envisaged by the Treaty, adopts provisions laying down common rules (conditions posed by the ERTA judgment);
- B. each time an internal Community competence for the purpose of attaining a specific objective exists in conjunction with the necessity to enter an international commitment for the attainment of this specific objective (conditions posed by the Kramer judgment and Opinion 1/76);
- C. each time an external affairs action by the Community proves necessary to attain one of the general objectives of the Community and the Treaty has not provided the necessary competences (conditions posed by Article 235).

This makes it clear that - apart from the special case under Article 235 - the underlying principle of the Community's implied external competences is one of parallelism, the internal competences being paralleled by the external competences. Since the limits of internal Community competence can never be finally settled, this parallelism means that the scope of Community external competence grows in the same measure as the Community extends its sphere of activity and that in this sense Community external competence is indefinite and evolutive. As a result, the internal market programme and the new internal competences the SEA has explicitly conferred upon the Community in the fields of economic and monetary cooperation, research and technological development as well as environmental protection will certainly also contribute to an enlargement of the Community's implied external competences.

There can be no doubt that the doctrine of implied competences has provided, and still provides, considerable impulse for the construction and the definition of the Community's system of foreign affairs and especially for the extension of its external competences. However, because of the lack of a Treaty provision which formally establishes the parallelism of internal and exter-

nal competences and because of the indefinite and evolutive nature of the implied competences, the scope of external Community competence continues to be an inexhaustible source of conflicts between the Community and the Member States. The Community, therefore, still lacks a stable and comprehensive legal basis for external activity comparable to that of which nation states normally dispose.

### 1.3. The nature of the EC competences

The EC Treaties not only do not contain a definite list of the Community's external competences, but also do not share them out precisely between the Community and the Member States, as is the case in federal States or States where wide autonomous competences are granted to smaller territorial entities. Since the ERTA judgment, the ECJ has constantly declared that the nature of the Community's external competences is exclusive, which means that on all external subject-matters which fall within these competences, the Member States may neither claim nor exercise any concurrent or parallel competence. The main reasons advanced by the Court in favour of the exclusive nature of external Community competence are the following:

As the Court proclaimed in the ERTA judgment, after the entry into force of common rules implementing a common policy "the Community alone is in a position to assume and carry out contractual obligations towards third countries affecting the whole sphere of application of the Community legal system" (41). In the same judgment, one finds a further fundamental reason: Community powers to negotiate and conclude the ERTA agreement "exclude the possibility of concurrent powers on the part of the Member States, since any steps taken outside the framework of the Community institutions would be incompatible with the unity of the Common Market and the uniform application of Community law" (42).

The most categorical affirmation of the exclusive character of external Community competence can be found in Opinion 1/75 where

the Court considered it unacceptable "that, in a field such as that governed by the Understanding in question, which is covered by export policy and more generally by the common commercial policy, the Member States should exercise a power concurrent to that of the Community, in the Community sphere and in the international sphere". The Court of Justice's reasons were, first, that "the provisions of Article 113 and 114 concerning the conditions under which, according to the Treaty, agreements on commercial policy must be concluded show clearly that the exercise of concurrent powers by the Member States and the Community in this matter is impossible". The Court went on saying that "to accept that the contrary were true would amount to recognizing that in relations with third countries, Member States may adopt positions which differ from those which the Community intends to adopt, and would thereby distort the institutional framework, call into question the mutual trust within the Community and prevent the latter from fulfilling its task of the defence of the common interest" (43).

The principle of the exclusive nature of the Community's external competences has the double advantage of being perfectly in accordance with the necessities of the unity of the Common market and the defence of the Community's common interests in the world and that of preventing - because of its simple, straightforward prohibition of Member State activity - conflicts between Community and Member States' legislation which could entail the in general extremely complicate and delicate necessity to renegotiate certain agreements (44). However, the strict application of the principle meets with three kinds of serious practical problems:

The first kind of practical difficulty arises every time when Member States, after the coming into force of the Treaty, have entered or want to enter into international obligations in a field of Community competence before the Community has pre-empted this field by the adoption of legislative measures. This is a problem of considerable relevance, since the Community, for obvious reasons, is not in a position to exercise all its external competences at once. The importance and the essentially temporal charac-



ter of these practical difficulties, have induced the Court of Justice to allow derogations from the exclusive nature of external Community competence:

In the ERTA judgment, the Court, after having pointed to the fact that the origin of the negotiations on the ERTA took place before competences were conferred upon the Community to implement the common commercial policy, declared that "in carrying on the negotiations and concluding the agreement simultaneously in the manner decided on by the Council, the Member States acted, and continue to act, in the interest and on behalf of the Community in accordance with their obligations under Article 5 of the Treaty" (45). Similarly in the Kramer judgment, the Court affirmed that "the Community not yet having fully exercised its functions in the matter, (...) the Member States had the power to assume commitments, within the framework of the North-East Atlantic Fisheries Convention, in respect of the conservation of the biological resources of the sea, and that consequently they had the right to ensure the application of those commitments within the area of their jurisdiction" (46). The same kind of reasoning was advanced in Case 61/77, Commission v. Ireland, with regard to the protection of the natural resources of the sea, in which the Court came to the conclusion that Member States are entitled to take appropriate conservation measures "as long as the transitional period laid down in Article 102 of the Act of Accession has not expired and the Community has not yet fully exercised its power in the matter" (47).

The case-law of the ECJ has made it clear, therefore, that Member States retain external competence as long as a transitional period entitles Member States to take measures in a field of Community competence and as long as the Community has not yet sufficiently developed a common policy by the adoption of common rules. In all these instances external Community competence must be interpreted as being only concurrent to that of Member States. However, it is necessary to emphasize that the concurrent external competence of the Member States is transitional in nature - one may even say 'provisional' - and that after the adoption of common rules or after the expiration of the transitional period Member

States must abstain from assuming obligations which affect the respective external Community competence or alter its scope.

The second practical problem of a strict application of the principle of the exclusivity of external Community is of a more political nature: Exclusive external Community competence can lead to a serious political and constitutional dilemma for the Community in all cases in which the exercise of this competence, though widely recognized as being necessary, seems to be impossible because the decision-making process is blocked for political reasons in the Council: In such a situation, on one hand, every attempt by the Member States to assume international obligations in the place of the Community infringes upon the Community's exclusive external competence whereas, on the other, any further delay of Community action may compromise the common interests of the Community or of some of its Member States (48). The case-law of the ECJ has opened up two different ways out of this political deadlock:

In Case 41/76, *Donckerwolcke v. Procureur de la République*, which involved a French system of monitoring imports, the ECJ was called upon to consider how far a Member State is entitled to take protective measures of national commercial policy against deflections of trade. In its judgment the Court recognized that the absence of a fully achieved Community commercial policy can maintain differences in commercial policy between the Member States "capable of bringing about deflections of trade or causing economic difficulties in certain Member States". It pointed out that Article 115 EEC Treaty was intended to resolve difficulties of this kind by giving to the Commission the power to authorize Member States to take the necessary protective measures. With regard to these measures, the Court emphasized however that "as full responsibility in matter of commercial policy was transferred to the Community by means of Article 113 (1) measures of commercial policy of a national character are only permissible after the end of the transitional period by virtue of specific authorization by the Community" (49). This means that in order to take measures to protect a national commercial policy, a Member State has to obtain a double authorization: it needs, firstly, an authorization of the Communi-

ty (Council on proposal of the Commission) to have this policy and, secondly, an authorization of the Commission to protect that policy under Article 115. Further case-law of the Court and Community practice have confirmed the necessity of such a double authorization (50).

In Case 804/79, *Commission v. United Kingdom*, the ECJ had to decide whether the United Kingdom had failed to fulfil its obligations under the Treaty by applying, after a failure to act of the Council, unilateral measures for the conservation of the natural resources of the sea. In its Judgment, the Court, having regard to the inaction by the Council, acknowledged that - although "the transfer to the Community of powers in this matter being total and definitive" - it cannot be made "entirely impossible for the Member States to amend the existing conservation measures in case of need owing to the development of the relevant biological and technological facts in this sphere" (51). However, the Court emphasized that "before adopting such measures the Member State concerned is required to seek the approval of the Commission, which must be consulted at all stages of the procedure". On these grounds, the Court came to the conclusion that, as the conservation of resources "is a field reserved to the powers of the Community, within which Member States may henceforth act only as trustees of the common interest, a Member State cannot therefore, in the absence of appropriate action on the part of the Council, bring into force any interim conservation measures which may be required by the situation except as part of a process of collaboration with the Commission and with due regard to the general task of supervision which Article 155 (...) gives to the Commission" (52).

The result of the *Donckerwolcke* Case is that the Community, in case a national commercial policy is threatened by trade deflections and the Community is at this time not in a position to remedy to this situation, may delegate to Member States some aspects of the exercise of its exclusive competence in the sphere of commercial policy by virtue of a "specific authorization". Such a delegation being an exceptional one expressly provided for by the Treaty, it does not affect the constitutionally exclusive nature of the Community's competence in this sphere. This first way ope-

ned by the ECJ out of the dilemma which might arise from a failure to act of the Community is therefore perfectly consistent with the principle of exclusive external Community competence. According to Case 804/79, in case of a failure of the Community to act, Member States may take interim conservation measures even without a specific authorization of the Community, provided they consult the Commission and seek its approval beforehand. Since this gives the Commission a determining role similar to the one it has by virtue of Article 115, the principle of the exclusivity of Community competence is, again, not affected (53). This is, however, not the case with regard to another possibility of national measures in the sphere of commercial policy, created by the Court in Case 174/84, Bulk Oil:

In this case the Court was referred to by the Commercial Court of the Queen's Bench Division of the (British) High Court of Justice for a preliminary ruling under Article 177 EEC Treaty. It had to answer a number of questions with a view to assess the validity from the point of view of Community law of the policy applied by the United Kingdom in 1981 of quantitative restrictions on the export of crude oil to non-member countries, in this case Israel. In the judgment, the Court, recalling its reasoning in Opinion 1/75, emphasized that Article 113 prohibits the "general exclusion, as a matter of principle, of certain products from the field of application of the common commercial policy". However, it took the view that this does not affect the Council's discretion to exclude, "on a transitional basis", certain products from the common rules on export. The Court, therefore, came to the conclusion that "having regard to the discretion which it enjoys in an economic matter of such complexity, in this case the Council could, without contravening Article 113, provisionally exclude a product such as oil from the common rules on exports to non-member countries, in view in particular of the international commitments entered into by certain Member States and taking into account the particular characteristics of that product, which is of vital importance for the economy of a State and for the functioning of its institutions and public services" (54).

It would appear, therefore, that for the Court, the Council is

entitled, if this is of vital importance for a Member State, to exclude on a transitional basis a certain product from the field of application of common commercial policy and thereby, as well, of the sphere of exclusive Community competence, with the consequence that the commercial policy competence on this product falls back to Member States. The Court may be criticized for not having insisted on the necessity of a "specific authorization" from the Community for such a delegation of competence to Member States, as this had been the case in the *Donckerwolcke* judgment. In failing to do so, the Court has, in fact, accepted an "in blank" delegation to Member States of an exclusive, though not yet exercised, external Community competence (55). One would expect that such an "in blank" delegation may only take place in a system of concurrent competences, and not, in any case, in a sphere of Community competence the Court has constantly declared to be of an exclusive nature. However, the *Bulk Oil* judgment cannot be interpreted as a turning away of the Court from the principle of exclusive external Community competence, but only as some degree of withdrawal from the strict sense of exclusivity due to an extremely pragmatic consideration of the problems in question.

The last, but not least, important practical problem one has to consider with regard to the exclusive nature of external Community competence is that of international agreements which contain elements some of which pertain to exclusive external Community competence, while others still come under the Member States' jurisdiction. In these cases, the joint conclusion, by the EEC and some or all of its Member States, of so-called "mixed-agreements" has been a constant practice from 1961 on (56). However, strong reservations have been expressed with respect to this practice which is not provided for by the EEC Treaty. The Member States are quite successful in finding in many international agreements at least some elements which fall outside exclusive Community competence and justify their participation. For this reason it has been argued that the development of mixed agreements has been intentionally aimed in practice at stunting the use of exclusive Community competences. Some authors regard it even as a threat to the Community's

autonomy in external affairs and an undermining of its treaty-making competence (57).

By virtue of Opinions 1/76 and 1/78, the participation of Member States in international agreements coming predominantly within the sphere of external Community competence is admitted only for very limited purposes: In the former Opinion the Court acknowledged the right of the Member States to participate in the Agreement establishing a European Laying-Up Fund for Inland Waterway Vessels solely for the purpose of making necessary amendments of the Mannheim and Luxembourg Conventions - to which six Member States are parties - for the implementation of the Agreement (58). In the latter Opinion the Court, after having found that the method of financing of the International Agreement on Natural Rubber still remained to be decided, held that the Member States could only participate in this Agreement if the burdens would be directly charged to the budgets of the Member States, rather than to be entered in the Community budget (59).

The cumulative negotiation and conclusion of an international agreement by the Community and the Member States has been accepted in more general terms by the Court in Ruling 1/78, delivered under Article 103 of the EAEC Treaty: There it recognized that the Draft Convention on the Physical Protection of Nuclear Materials, Facilities and Transports drawn up under the aegis of the International Atomic Energy Agency, "concerns in part the jurisdiction of the Member States and in part that of the Community" (60). The Court, therefore, declared 'mixed' participation in the Convention compatible with the provisions of the EAEC Treaty. It added that "throughout the Community the implementation of the Convention may be undertaken in accordance with the same principles as govern the distribution of powers both as regards external relations and within the Community" and stressed "the necessity for harmony between international action by the Community and the distribution of jurisdiction and powers within the Community" (61). It seems, according to this reasoning, that the Court considers mixed agreements as a unavoidable phenomenon in a system of partial integration, in which the Community and the Member States may each simply take part within their own sphere of competence. However, it is

not legitimate to apply the principles enunciated in Ruling 1/78 indiscriminately also to mixed agreements under the EEC Treaty since, by contrast to the ECSC and EEC Treaties, the EAEC Treaty provides in its Article 102 expressly for the mixed conclusion of international agreements.

Despite the fact that the joint participation of the Community and the Member States in international agreements is a firmly established practice in the Community, accepted even by the ECJ in the limited scope set out in Opinions 1/76 and 1/78, one may raise the question whether in the case of the conclusion of a mixed agreement exclusive external Community competence is not undermined. It has rightly been pointed out that the conclusion of a mixed agreement allows the Member States to postpone new transfers of competences and to rule out any pre-emption which - by virtue of the "ERTA-effect" - might arise from a conclusion by the Community alone. By becoming parties to an agreement in addition to the Community Member States are enabled to maintain the discretion to pursue policies of their own on the matters concerned also after the conclusion of the agreement (62). This may be why mixed agreements have been regarded as a negative phenomenon, at least from an integrationist point of view. However, the general principle of mixed agreements is that the Community and the Member States each take part within their own sphere of competence in these agreements. Although this does not rule out attempts to infringe upon the often contentious demarcation line between Community and Member State competence, mixed agreements are essentially the expression of a division of competence and not of concurrent or parallel competence. Consequently, they do not affect the exclusive nature of the Community's external competences.

Because the principle of the exclusive nature of Community external competence is generally acknowledged despite all practical problems, it appears beyond doubt that, by way of signing the EC Treaties, the Member States have irreversibly transferred part of their functions and their sovereignty in the sphere of external affairs to the Community. It has been argued that although the external sovereignty of the Member States has been "limited" by the

Treaties, no "transfer" of sovereignty has taken place because the Member States still retain their sovereignty in international relations (63). This reasoning disregards the fundamental fact that the Member States sovereignty has been limited in favour of the Community which, as a result, is vested with real powers ("pouvoirs réels") which the Member States no longer exercise or only in exceptional cases lay claim to exercise (64). The term "transfer" is clearly the most appropriate way of describing a situation in which real powers once exercised by Member States are now exercised by the Community (65).

' At the end of this chapter it is possible to conclude that on the basis of both explicit and implied competences, the EC system enjoys exclusive competence for all aspects of external relations which fall within the ambit of the Treaty provisions and the common rules adopted in order to pursue the objectives of these Treaties. As a result, the domain of the EC system of foreign affairs is not static, but develops parallel to the progressive extension of Community activities in general. However, all the parts of the EC system's foreign affairs domain which have not yet been preempted by the adoption of common rules are open to the concurrent competence of the Member States. In addition, the parallelism between the internal and the external domain of the EC system resides not on a comprehensive explicit legal basis, but is largely based on the legal doctrine of "established by the ECJ which is interpreted restrictively by the Member States and has frequently given rise to frictions inside of the system.



## Chapter 2: The institutions of the EC

One of the principal characteristics of the new legal order established by the EC Treaties is the existence of specific Community institutions which are independent vis-à-vis the national governments and are vested with the power to make decisions not necessarily requiring unanimity but directly applicable both in the case of all the Member States and of the individuals living within their territory. The institutions form the pillars of a constitutional framework which makes the European Communities differ fundamentally from traditional international organizations or state alliances. It has already been indicated that, although they lack general legislative competence, these institutions have had conferred upon them part of the substantive powers and the sovereignty of the Member States, and this part, conferred on them by the Treaties, is continually increasing. The Community and its institutions therefore have a supranational character, and the decisions taken by the institutions in compliance with the respective Treaty provisions are binding for the Member States. Moreover the constitutional framework of the Community contains important elements of the classical tripartite distribution of the functions of power in a "checks and balances" system, in which the European Parliament and - in a very particular way - the Council of the EC fulfill to some extent the role of the legislative, the Commission of the EC that of the executive and the Court of Justice of the EC that of jurisdiction. Together, the "checks and balances" elements and the supranational character of its constitutional framework make the Community into some sort of prefederal system, where the institutions have the capacity to act in the fields provided for by the Treaties like those of a sovereign state (66).

Article 4 of the EEC Treaty and Article 3 of the EAEC Treaty provide expressly that each institution shall act within the limits of the powers specifically assigned to it. The ECSC Treaty contains no such provision, but it is generally recognized that the ECSC institutions are subject to the same rule (67).

By a special Convention signed together with the Rome Treaties

in 1957, a single Parliament (at first called "Assembly") and a single Court of Justice for the three Communities was created. Since the entry into force of the Merger Treaty of 8 April 1965, the Council of the EC exercises the functions and powers of the Special Council of Ministers of the ECSC and the Councils of the EEC and EAEC. Similarly, the Commission has taken over the functions and powers of the High Authority of the ECSC and of the Commissions of the EEC and EAEC.

We will start our analysis of the role of the EC institutions in the Community's system of external relations with the Commission, since it has been assigned in the constitutional framework of the Treaties the basic role to defend the Community interest.

## 2.1. The Commission

The Treaties provide explicitly for four main functions of the Commission in the sphere of external relations:

- A. to make proposals to the Council for the implementation of the Common Commercial Policy and the negotiation of agreements with third states related to Common Commercial Policy (Article 113 EEC Treaty; function not provided for by the ECSC and EAEC Treaties);
- B. to make proposals to the Council for cooperation and agreements with third countries or international organizations in the fields of (I) research, technological development and demonstration, and (II) environment (introduced by the SEA, new Articles 130n, 130q(2), 130r(5) and 130s EEC Treaty; function not provided for by the ECSC and EAEC Treaties);
- C. to conduct the negotiation of agreements with third states or international organizations within the framework of the directives of the Council (Articles 113 and, without provision for Council directives, 228 EEC Treaty; the same function can be deduced implicitly from Articles 8 and 9 ECSC

Treaty; Article 101 EAEC Treaty confers upon the Commission in addition the competence to conclude international agreements);

- D. to submit to the Council proposals concerning the scope and implementation of common action of the Member States within the framework of international organizations of an economic character (Article 116 EEC Treaty; function not provided for by the ECSC and EAEC Treaties);
- E. to establish and maintain appropriate relations and cooperation with international organizations, especially with the UN, the GATT, the Council of Europe and the OECD (Articles 229 to 231 EEC Treaty; Articles 93 and 94 ECSC Treaty; Articles 199 to 201 EAEC Treaty).

Apart from the function mentioned under (A), the SEA has not modified the role of the Commission in Community external relations (68).

On the basis of the five functions provided for by the Treaties, it is the Commission, in submitting a draft negotiation mandate to the Council, which proposes all negotiations between the Community and third countries or international organizations. It is also the Commission which usually conducts the negotiations on the basis of the negotiating directives issued by the Council. It is, finally, the Commission as well which initials the agreements negotiated and proposes their conclusion to the Council (for details see subchapter 3.1.).

As at 1991 the Commission has prepared and conducted in this way on its own or together with the Member States the negotiations for some 130 bilateral agreements with third countries and for some 30 multilateral agreements. It has negotiated, and negotiates, at numerous international conferences, both global (particularly in the framework of the UNO and the GATT) and regional (like the Council of Europe and the CSCE).

Under Article 113 EEC Treaty, the Commission has also proposed numerous autonomous Community measures producing external effects to the Council. These concern in particular the combating of dumping and other prohibited trade and pricing practices, e.g., by

surveillance measures, quantitative quotas and anti-dumping duties. Important recent examples for such autonomous measures are Council Regulation 2641/84 of 17 September 1984 on the strengthening of the common commercial policy (introducing the "new commercial policy instrument") and Council Regulation 2423/88 of 11 July 1988 on protection against dumped or subsidized imports (new basic rule for anti-dumping measures). It should also be noted that it is usually the Commission as well which is assigned the task to implement (under close control of the Council) autonomous Community measures.

As regards Community relations with international organizations, the Commission in most cases has placed these relations on a formal basis by establishing "working arrangements" with the respective organizations. Where these arrangements provide for procedures for participation, it is usual for the Commission to participate as an observer. It has acquired permanent observer status in many international organizations or their organs, such as the United Nations General Assembly, Economic and Social Council and a series of economic and regional commissions. In general, its observer status enables the Commission only to participate in an advisory capacity in the work without having the right to vote (69). This restriction is due to the persisting problem that traditional international law can accommodate only nation states, or groupings of states, and not the new legal entity constituted by the Community. Yet, in some cases the Commission's status is in fact far superior to that of an "observer": With GATT and the North Atlantic Fisheries Organization the Community's exclusive competence having been fully accepted on the international level, the Commission there takes the place of the Member States and speaks on their behalf (70). A further example of a superior status is the Supplementary protocol No. 1 to the Convention of the OECD, which provides that the Commission shall take part as of right in the work of the Organization, although the Community is not a member of OECD (71).

However, in many cases the Commission is not left by the Member States to exercise its functions on its own: Since many of the agreements negotiated by the Community and many of the internatio-

nal organizations with which the Community maintains relations also deal with matters falling within the jurisdiction of Member States, the Commission often has to share its role of representing the Community with the Member States. For this practice of "dual representation", a wide range of special arrangements has been established, to which we will come back later in more detail (see sub-chapters 3.1. and 3.2.).

In practice, the Commission has acquired a fifth and quite important function in the sphere of external relations which was not explicitly provided for by the Treaties:

The legal personality the Treaties have vested with the Community (Article 210 EEC Treaty; Article 6 ECSC Treaty; Article 184 EAEC Treaty) does not ipso jure confer upon it the right of active and passive legation. Traditional international law cannot accommodate a right of active and passive legation for international organizations, and even Articles 63 and 75 of the "Convention on the Law of Treaties between States and International Organizations or between International Organizations" (Vienna-II Convention), adopted in 1986, still have reserved the concept of the establishment (or severance) of diplomatic relations to nation states (72). However, due to the considerable economic and political importance of the Community, the Commission has been able to develop a dense network of diplomatic representation with third countries, both "active" (by sending delegations) and "passive" (by receiving delegations), to the extent that at the end of 1988 some 135 countries had diplomatic relations with the Community as such (73).

As regards passive legation, the practice of third countries in their dealings with the Commission representing the Community bears strong resemblance to the establishment of diplomatic relations with a State. The delegations of third States accredited to the Commission on behalf of the Community (there were 142 in November 1990) enjoy full diplomatic immunities and privileges and constitute "permanent missions" or - in the case of the ACP countries - "permanent delegations", and not "permanent observation missions" like the representations of non-member states within other international organizations. The heads of the "permanent missions" or "permanent delegations" accredited to the Commission

are ambassadors in the formal sense of the word. Until 1966, the heads of the "permanent missions" had to present their credentials to the President of the Commission alone, a practice which gave rise to one of the French complaints against the Commission which led to the institutional crisis of 1965. Since 1966, therefore, in the case of the EEC and the EAEC the credentials have to be presented at the same time to the President of the Commission and, separately, to the President-in-office of the Council (74). Due to a different division of powers between Council and Commission under the ECSC Treaty, envoys of third countries in the case of the ECSC continue to present their letters of credence only to the President of the Commission (75).

As regards active legation - a possibility, of which the Treaties make no reference whatsoever - the Commission has established two types of permanent external representations (76):

- (1) delegations in third countries or with international organizations, which have either full diplomatic status or de facto diplomatic status granted by an "accord de siège" (in April 1989 these were 31);
- (2) delegations charged with the execution of financial and technical cooperation under the Lomé-Convention in the ACP countries which have no regulated diplomatic status but enjoy de facto - by unilateral concession or agreement - the diplomatic privileges and immunities provided for by the Vienna Convention on Diplomatic Relations of 1961 (in April 1989 these were 50) (76).

In terms of law, these delegations do not represent the European Communities as such, but are missions of the Commission only. It should be noted that in a similar way the Council is represented in third countries by the embassy of the Member State holding the Presidency of the Council (see next sub-chapter, dealing with the "Council"). However, the Commission has been quite successful in enhancing the political status of its external representations, to the extent, that today Commission delegations are treated like de facto diplomatic representations of the Community by most of the

third countries the Community has established diplomatic relations with. This was shown in a significant manner, for example, when in May 1988 the Head of the Commission's newly established delegation in Peking, M. Duchateau, was received by the Head of State of the People's Republic of China to present his letter of credence. The Commission attaches some importance on their Heads of Delegation being accredited on the level of heads of state, since this is traditionally the level on which also the ambassadors of states are accredited. In some cases this still meets with some resistance, more often in monarchies (e.g., Japan) than in republics. By contrast, there is no problem any more for the Commission to have granted diplomatic privileges and immunities to its delegations (78).

The Commission's successful activity in external representation has provoked some resistance from Member States, which fear that the Commission's delegations might cut across their own traditional representation in foreign countries, or even infringe upon the status thereof. The example, though still extraordinary, of the success of the former Dutch Primer Minister Van Agt as Head of the Commission Delegation in Japan shows that these concerns are not purely imaginative: Van Agt clearly excelled the other European heads of mission in Tokyo in prestige and influence before his departure for Washington in 1989.

After several complaints of Member State ambassadors regarding the enhanced role of Commission delegations in third countries, the Commission has to defend more or less permanently its system of external representation against the objections of Member States. This is mainly done in the "RELEX group", the Council working on external relations, but questions related to the precise status or title of a Head of Delegation often also lead to exchanges in the Committee of Permanent Representatives (COREPER). In order to spare the feelings of national foreign services, the Commission does not qualify its representatives officially as "ambassador" and generally agrees to their Heads of Delegation appearing in the listing of diplomatic precedence after the "ambassadors" and "chargés d'affaires en titre". Although not seeking formal approval by the Member States, the Commission also informs them through

the COREPER of its intention to establish an external representation and to nominate a Head of Delegation in advance of formal establishment and formal nomination (79). However, the Commission's position in this sphere of permanent friction has been strengthened to some extent by Article 30(9) of the SEA: By providing for an intensified cooperation of Member States' missions and Commission delegations in third countries and international organizations, this Article has for the first time given an implicit Treaty basis to the existence and the political role of Commission delegations in third countries, and the Commission has not failed to make use of this in their discussions with Member States (80).

Although being still far from resolved, the question of diplomatic status does in no way affect the effectiveness of the Commission's delegations and their access to the relevant authorities of the countries to which they have been accredited. The Commission being the Community's chief negotiator, the most important task of the Commission delegations is to defend and to explain common positions of the EC on questions of international economic relations and economic cooperation to the host countries. Since the delegations dispose of a valuable know-how in judging the possibilities and limits of cooperation between their host countries and the Community, they also play an important role in the preparation and development of external Community policies by the Commission (81).

Parallel with the permanent extension of its external diplomatic representation, the Commission has as well constantly intensified its "ad hoc" diplomatic activity. Officials and experts of the Commission have numerous bilateral, plurilateral or multilateral contacts with representatives of third countries. These are not only destined to resolve "technical" questions but often also have a certain policy preparatory function since they allow to sound the possibilities of deeper cooperation with third countries on a sub-political level. On a higher-level, the Director-Generals of the competent DGs are regularly receiving the ambassadors of third countries and often represent the Commission in important negotiations and international meetings, having a role and a status which are quite similar to those of the German "Staatsekretäre". The Commissioners themselves are engaged in an



intense high-level diplomacy which is in every respect comparable to that of national Ministers. In the (in no way exceptional) week of 17 to 21 April 1989, to take but one example, Commissioners had meetings with the Prime Minister of the USSR, the Foreign Ministers of Yugoslavia, Norway, Mexico, Iceland and Peru, the Minister of Transport of Switzerland, the Ministers of Small and Medium Sized Enterprises of Gabun, and the Ambassadors of the People's Republic of China and of the German Democratic Republic, all meetings taking place in Brussels or Luxembourg (82).

The outstanding role of the President of the Commission in Community external relations is internationally acknowledged since the late 1970s, when after sustained efforts President Roy Jenkins succeeded to establish its right to a place in the World Economic Summits ("Summits of the Seven"). However, this role has been extremely enhanced over the last years by what may be called the "Delors factor". By major political impulses given inside (e.g., the internal market programme) and outside (e.g., the Strasbourg speech in January 1989 on EC-EFTA relations) of the Community and by a remarkable skill in diplomacy and in representing the reality of a new dynamic Community, President Delors has achieved a place on the world stage unmatched by any of his predecessors which has even surprised some of his colleagues in the Commission itself. In third countries too, the President of the Commission is now widely identified as the leading representative of the "new Europe" (83).

To cope with the ever widening demands of Community external relations is primarily the task of three Commissioners specially charged with external relations, supported by their "cabinets", and two Directorate Generals, DG I ("External Relations") and DG VIII ("Development"). Other DGs (mainly II, VI, VII and XI) are only occasionally concerned with questions of external relations if there is something at stake which falls partly within their specific sphere of competence (e.g., DG II in relation to international monetary questions or DG VII in relation to questions of international transport policy). There is also a Political Directorate in the Secretariat General dealing almost exclusively with EPC affairs, to which we will come back later. Although only to a

limited extent due to a wide range of other tasks, general perspectives and prospectives of Community external relations are studied within the "Cellule de prospective", a small embryonic "planning staff", which directly comes under the President (84).

The three Commissioners specially charged with external relations divide their competences mainly along geographical lines which are reflected in the present (1991) administrative structure of DG I and DG VIII (85):

- (1) The Directorates A (GATT; OECD; commercial questions relating to agriculture and fishing; export credits policy; export promotion; internal market),  
 B (relations with Northern America, Australia, South Africa and New Zealand),  
 C (instruments and general questions of external economic policy, including antidumping),  
 D (sectoral economic questions; economic analyses; economic relations in the sphere of research, science and nuclear energy),  
 E (relations with state trading countries; relations with the CSCE; multilateral questions like those of the UN Economic Commission for Europe),  
 F (relations with China, Japan and other countries of the Far East) and  
 G (relations with EFTA and bilateral relations with not state trading countries of northern and central Europe, e.g., Austria)

of DG I are attributed to Vice-President Frans Andriessen.

- (2) The Directorates H (Mediterranean, Near East and Middle East),  
 I (Latin America),  
 J (Asia, without the countries attributed to Directorate F) and  
 K (north-south relations, including relations

with international organizations, generalized tariff preferences and coordination of economic cooperation)

of DG I are attributed to Commissioner Abel Matutes.

(3) The entire DG VIII, which is also responsible for the delegations in ACP countries, with the directorates

- A (Development policy and commercial policy, including relations with UNCTAD),
- B (Western and Central Africa; Caribbean),
- C (Eastern and Southern Africa; Indic Ocean; Pacific),
- D (Management of instruments, including food aid, Stabex and Sysmin) and
- E (Finances),

is attributed to Vice-President Manuel Marin.

This internal structure has at least three disadvantages with regard to a clear-shaped decision-making and handling of external relations:

- there is no Commissioner in charge of the whole sphere of external relations, so that there is no real counterpart to a national foreign minister and no central coordinating instance for the Commission's external activity;
- DG I is split up between two Commissioners, so that the Director General of the most important DG in Community external relations has to serve, so to speak, two "masters" with different competences and different interests;
- the Commission's external delegations are split up, firstly, between DG VIII (delegations in ACP countries) and DG I (all other delegations) and, secondly, indirectly also between three Commissioners.

The principle of the collective responsibility of all Members of

the Commission, the coordinating role exercised by the frequent meetings of the Commissioners' "Chefs de cabinet", the regular co-ordination meetings of the Directors and the Director General of DG I, and the fact that the delegations attributed to DG I have been directly attached to the Director General, limit the negative effects of these structural weaknesses, but do not remove the latter (86).

Another and much more important internal problem of the Commission is the lack of resources: Overall numbers in the Commission's external administrative units and delegations are significantly lower than those of the major Member States and even of some of the medium sized States (87). Due to the ever widening tasks of Community external relations, the good functioning of the respective departments depends today largely on excessively long working times. The officials in charge of external relations have not only to deal with the preparation and the implementation of the Commission's external policy, but have also to participate in numerous meetings of committees and working groups inside the Community (Council and European Parliament) and EPC in order to keep the Commission informed of the positions of the Member States and the Parliament and to explain or, if necessary, to defend the Commission's policy. These additional tasks require a lot of staff and time: In the case of the Commission's presence at the monthly meetings of the EP's Committee on External Relations ("REX"-Committee"), for example, the Commission is usually required to send one A-grade official for every point on the agenda, which means that on the average half a dozen senior officials of DG I have to leave their regular business inside of the Commission for two days every month (88).

In some cases, the administrative units are so understaffed that they can only deal with the most important elements of their tasks, having to leave aside a lot of other aspects which are by no means neglected in national ministries. To give but one example: Normally, the Commission disposes of only one A grade official to fulfill the function of a "relay" (to maintain a sufficient level of information and to prepare briefings on the most important questions) between the Commission delegation within the UN and

DG I, a function, which has to cover UN activity in all parts of the world. Klaus Ebermann, former head of the division "Relations with International Organizations", speaks therefore of a "chain of insufficient structures", which often limit considerably the Commission's capacity to exploit all available information and to react promptly to international events. In December 1990, an internal screening operation on the lack of staff in DG I led to the result that the DG, disposing of 768 officials including delegations in third countries, would need 276 new posts in 1991 alone to cover the most urgent needs. During 1990, the prestigious PHARE programme could only be kept operating on the basis of a redeployment action following to which 24 officials from other DG's were seconded to DG I (89).

Another aspect of the lack of resources is the fact that the Commission sometimes lacks available expertise to cope with new arising challenges in the Community's external relations. To give a recent, although rather exceptional, example: For the historical reason that the Community has not had for most of its existence diplomatic relations with Eastern Europe, but also because of the budgetary constraints, the Commission was extremely short of experts familiar with the countries concerned when suddenly faced with the rapidly growing tasks of relations with "revolutionary" Eastern Europe (90). With their long traditions of relations with Eastern Europe, Member States' Foreign Ministries were not confronted with a similar problem.

However, neither the serious lack of resources nor the suspicious and sometimes not very cooperative attitude of Member States have until now been able to restrict the more and more enhanced role of the Commission in the sphere of external relations: The wide range of the Commission's external activity, the quality of its high-level diplomacy and the ever increasing recognition it has achieved as an international actor make it evident that in political terms the Commission has far surpassed the role of a mere commercial negotiator of the Community in direction of becoming the "general" representative of the Community on the international stage.

## 2.2. The Council

By contrast to the Commission whose role it is to defend the Community interest, the Council constitutes the forum where national interests tend to prevail. The Treaties provide explicitly for seven main functions of the Council in the sphere of external relations:

- A. to decide on Commission proposals for the implementation of Common Commercial Policy (Article 113 EEC Treaty; function not provided for by the ECSC and EAEC Treaties);
- B. to decide on Commission proposals for cooperation and agreements with third countries or international organizations in the fields of (I) research, technological development and demonstration, and (II) environment (introduced by the SEA, new Articles 130n, 130q(2), 130r(5) and 130s EEC Treaty; function not provided for by the ECSC and EAEC Treaties);
- C. to authorize the Commission to open and to conduct necessary negotiations with third countries and international organizations (Articles 113 and 228 EEC Treaty; Article 101 EAEC Treaty; function not provided for by the ECSC Treaty);
- D. to issue negotiation directives to the Commission (Article 113(2) EEC Treaty; function not provided for by the ECSC and EAEC Treaties);
- E. to appoint a special committee to assist the Commission in negotiations relating to the common commercial policy (Article 113(2) EEC Treaty; function not provided for by the ECSC and EAEC Treaties);
- F. to conclude the agreements negotiated by the Commission (Article 228 and 238 EEC Treaty; no power to conclude under the ECSC Treaty; Article 101 EAEC Treaty stipulates that the conclusion of international agreements by the Commission needs the approval of the Council);
- G. to decide on Commission proposals for the implementation of concerted action in the framework of international organiza-

tions (Article 116 EEC Treaty; function not provided for by the ECSC and EAEC Treaties).

The Council decides by qualified majority on all Commission proposals related to measures and agreements related to common commercial policy agreements, international agreements and concerted action in international organizations (Articles 113 and 116 EEC Treaty; Article 101 EAEC Treaty). It should be noted in this context that the SEA has eliminated an inconsistency inside of the Treaties by amending Article 28 EEC Treaty which now empowers the Council to alter the common customs tariff by qualified majority decision: Previously, alterations of the common customs tariff did required different majorities under Article 113 (qualified majority) and Article 28 (unanimity).

The SEA has slightly extended the formal requirement of unanimity in the sphere of external relations since now not only the agreements concluded on the basis of Articles 235 and 238 EEC Treaty (cooperation and association agreements), but also the agreements newly provided for by Article 130n and 130r(5) require unanimity (see function B). Since previous agreements on the respective subject-matters had to be based on Article 235 EEC Treaty requiring also unanimity this does not make any difference in practice. It shows, however, that the Member States are reticent to extent the application of majority voting in the external relations sphere. The rule that the Council can amend Commission proposals only by unanimity has not been modified (Article 149 EEC Treaty; Article 119 EAEC Treaty).

Unlike the Commission, the Council is not a homogeneous structure but consists of various bodies: the specialized Councils of Ministers themselves, a series of more or less specialized committees and working groups, and a Secretariat General whose primary function is to prepare the meetings of the different bodies. The role which the Council with its various bodies fulfills within the Community's system of external relations is difficult to describe without having a short look at the Community's internal decision-making process as regards international negotiations (for more de-

tails see sub-chapter 3.1.):

In practice, the proposals of the Commission for negotiations with third countries or international organizations are at first discussed by the COREPER, that most important committee of the Council, and the specialized working groups the COREPER has established in the Council framework. Depending on whether the COREPER, i.e. the Permanent Representatives ("ambassadors") of the Member States, have been able or not to agree with the Commission on the text of the proposal, the latter then comes either as an "A" point (to be adopted without discussion) or as a "B" point (to be discussed) on the agenda of the Council of Ministers, which in the sphere of external relations normally meets as the Council of Foreign Ministers, commonly called "General Affairs Council" (91). If the Council agrees, it issues corresponding negotiation directives (commonly called "negotiating mandate") to the Commission. In all negotiations related to the Common commercial policy, the Commission has to execute this mandate in close consultation with the special Committee of the Council provided for by Article 113 EEC Treaty, which is commonly called "Committee 113" and which consists of trade specialists delegated by the Member States. At the issue of the negotiations and a final discussion of their results in the COREPER, the Commission proposal to conclude the agreement in question is submitted - again as an "A" or "B" point - to the Council. The Ministers then decide on the conclusion, in most instances after consulting the EP or, if necessary, after having got its assent.

This decision-making process shows how the entire Council structure serves as a clearing house for accommodating the interests of the Member States, which are represented at every level. The process also shows that although the Council of Ministers takes the final decision the fate of a Commission proposal is already largely pre-determined by the discussions in the COREPER. The same is true with regard to the acceptance of the negotiation results by the Council and the discussions in Committee 113. Therefore both committees, the COREPER and the Article 113 Committee, deserve some closer consideration (92):



The COREPER meets on a weekly basis at two different levels: "COREPER I" consists of the Deputy Permanent Representatives and deals only with organizational and procedural questions. All intrinsic policy questions of external relations are discussed by the Permanent Representatives themselves which meet in "COREPER II".

The COREPER's main function in the sphere of external relations - as in all other fields of Community activity - is to prepare the Council meetings. This means in practice that the Permanent Representatives try to agree with the Commission representatives on a text which can be adopted by the Ministers without further discussion (as an "A" point). In most cases the Commission modifies its proposals on the basis of the discussions in the COREPER and the working groups in order to secure their adoption on the ministerial level. In general, both the Member States and the Commission are anxious to reach a compromise already in the COREPER, because this avoids the risk of a "political" clash on the ministerial level with all the polemics and publicity such a clash normally entails. Since open political disputes over questions of external relations are regarded as prejudicial to the external image of the Community, the pressure for reaching a compromise on such questions in the COREPER is often even stronger in the sphere of external relations than in other fields of Community activity. In addition the Permanent Representatives are led by some degree of professional ambition and "esprit de corps" to make every possible effort to predetermine a decision of the Council and to find a solution on their own level, which they generally consider as being less "political", but more "objective".

Decision-making in the COREPER normally entails a lot of time-consuming bargaining, not only between the representatives of the Commission and those of some or all of the Member States, but also among the Member States themselves. The Permanent Representatives, at the meetings normally assisted each by at least one or two specialists from their Representations, can effectively slow down the decision-making whenever they wish to do so, e.g., by announcing that before going further they need new instructions from their ministry. It often also takes a lot of time to solve rather tech-

nical problems on the level of the working groups, in which all the Member States and the Commission are represented by specialized officials.

Like in the entire Council structure, the sixmonthly rotating Presidency usually tries to speed up the process through its influence on the agenda, on the course of discussion and on the time schedule of the working groups. In most cases, the Presidencies plays its role fairly honestly, which enables it to act often as well as an efficient broker. However, it also happens that a Presidency uses its office more or less blatantly to promote national interests. If this becomes too obvious, negative reactions from the Commission or other Member States can lead to a serious deadlock.

Apart from paving the way for the Foreign Ministers' decisions, the Permanent Representatives have also other, less important, functions in the sphere of external relations. They also sit in the Committee of Ambassadors provided of the Lomé Convention and in the various Committees of Association or Cooperation, provided for in the Association or Cooperation Agreements the Community has concluded with certain third States.

The Committee of Ambassadors of the Lomé Convention is composed of the Permanent Representatives, the Ambassadors of the ACP States and a representative of the Commission (from DG VIII). It normally meets twice a year (93). The Committee has the task to review the functioning of the Convention and the achievement of its objectives, and to supervise the work of all committees and working groups set up under the Convention. It can submit proposals to the Council of Ministers of the Lomé Convention and may be the object of a delegation of powers from this institution (94). Despite these wide-ranging functions, the Ambassador of the Presidency and Chairman of the COREPER is normally the only Permanent Representative who attends the Committee meetings, the other Member States being merely represented by their ACP desk-officers. This practice has been repeatedly criticized by representatives of the ACP States who regard it as an indication for the low interest the Permanent Representatives take in their concerns.

The Association or Cooperation Committees are composed of the

Permanent Representatives, the Ambassador of the corresponding third State and a representative of the Commission. The Committees normally meet on a half-yearly basis. The Committees have functions similar to those of the Committee of Ambassadors of the Lomé Convention and prepare the meetings of the Association or Cooperation (ministerial) Councils. Apart from the Chairman of the COREPER, who as a general rule is present in person, the Permanent Representatives most often send lower ranking officials in their place. In general, the discussions inside of these Committees are not very substantive. However, in the rather complex case of the Association with Turkey, proceedings of the corresponding Committee sometimes do have some political relevance.

Like the COREPER, the Article 113 Committee meets at two levels: The "Full Members" are composed of twelve senior officials each of which is drawn from the competent Ministry of one of the Member States (External Trade, Foreign Affairs, Economics or Finance). They deal on a monthly basis with all trade issues of some political importance and are assisted by experts from their Ministries. The "Deputies" are staffed by a mixture of officials from the national Ministries and from the Permanent Representations, depending on the preference of the individual Member State. They deal on a weekly basis with the more technical issues of external trade policy. For matters concerning the Multi-Fibre Agreement, the Article 113 Committee has established a permanent working group ("Textiles Working Group") on the level of the Deputies. In addition, the Committee usually creates ad hoc working groups for negotiations in progress, such as the one for services with regard to the GATT negotiations. The Commission is, of course, represented in all these bodies.

According to the Treaty, the Article 113 Committee's main function is to "assist" the Commission in trade negotiations (94). In practice this means that the Committee's main task is to uphold Member States interests during the negotiation and to leave no doubt with the Commission about what these interests are. Since the "Committee 113" is only an advisory committee, the Commission is legally entitled to disregard its wishes. However, in

general the Commission follows the Committee's advice, because its members reflect the attitude of the Council of Ministers which can block the conclusion of the agreement negotiated by the Commission due to its exclusive power to conclude provided for by Article 228 EEC Treaty.

Despite its watchdog role, the atmosphere inside of the Committee is usually one of cooperation, rather than of antagonism. The representatives of the Member States are anxious to arrive at a clear consensus, and their discussions allow the Commission to ascertain the Member States' attitudes as well as to know when it should refer to the Council for modified or new negotiation directives.

Like the COREPER, the Article 113 Committee has developed some professional pride and "esprit de corps" of its own: Although all matters discussed in the Article 113 Committee have to pass through COREPER before reaching the Council, the members of the Committee usually do not spare any effort to settle the questions at their level and to avoid that the Permanent Representatives will have to discuss them. One reason for this may be that in contrast to the COREPER most of the Committee's members do not come from the Foreign Ministries and may therefore be not too keen on increasing the influence of the diplomats in the COREPER to the prejudice of their own departments. However, there is no evidence of major frictions between the Article 113 Committee and the COREPER.

The extensive activity of the Council Committees described above makes it apparent that the Council structure enables the Member States not only to exercise a tight control on the Commission's activity in the sphere of external relations, but also to force the Commission - by the mere weight of the Council's final decision power - to modify its proposals even before the Council itself decides on them.

Because all the matters of Community external relations are thoroughly discussed and prepared by the COREPER, the Article 113 Committee and the competent working groups, the Ministers themsel-

ves normally focus only on the more general questions of external policy which the Committees have not been able to settle on their level. Although the Treaties have not conferred any substantial power upon the Presidency of the Council, it depends to a large extent on the Presidency to prepare the ground for a compromise on the level of the Council of Ministers. The fulfillment of this task necessitates a lot of beforehand information and consultation:

Shortly before the monthly meetings of the General Affairs Council, the Foreign Minister of the Presidency (the "President of the Council") is briefed in great detail by both his Permanent Representative and the Secretary General of the Council on the items on the agenda and their background, the state of discussions in the COREPER, the different positions taken by the Member States and the chances for pushing an issue through to the decision stage. The Minister also receives a briefing book which has been prepared by the Council Secretariat in cooperation with the Permanent Representative. This briefing book, which is very much appreciated by every Presidency, not only describes every issue on the agenda, but also recommends and explains alternative tactics and even language, i.e. the "right words" which can be used in order to spare certain national sensitivities. On the basis of the briefings, the Minister sometimes gets into touch with one or more of his colleagues before the meeting in order to firm up a majority, to form a personal idea of his colleagues problems, or also to apply pressure when needed. The preparation is completed by a meeting of the President of the Council with the President of the Commission, a more directly concerned Member of the Commission, or even several Members of the Commission. This meeting, which is normally also attended by the Secretary Generals of both institutions and the Chairman of the COREPER, serves mainly to agree with the Commission on certain tactics to be followed during the Council meeting. This final high-level contact with the Commission by no way simply a matter of courtesy: Practice has shown that the most efficient Presidencies are those that have maintained a close and confident working relationship with the Commission (98).

Although the general rule is still that in the General Affairs Council the Member States are represented by the Foreign Minis-

ters themselves, most of them are nowadays supported by a junior minister specialized on European affairs who replaces the Foreign Minister during part of the meeting or even for the whole of it (97). In case exceptional circumstances prevent the Minister from joining the meeting in time, the Permanent Representative takes his place. The latter, however, is not entitled to vote in place of his absent minister - a rule which guarantees the high political level of the Council proceedings (98). Due to a certain political pre-eminence the General Affairs Council enjoys because of its competence for matters of overall European policy, the Commission usually attends this Council on the highest possible level, i.e. the President and all more directly concerned Commissioners and the Secretary General (99).

The discussion of a certain item generally begins with a status report by the Commissioner in charge. If the item is sensitive or if it deals with highly confidential matters, a restricted session is usually called, which means that only the Minister and one of his aides (most often the Permanent Representative) is admitted in the room. In the case of important negotiations in progress, the Commission often requests political support from the Council (almost always in trade discussions with the United States and Japan). If it considers it necessary, the Commission also asks for new or modified negotiation directives. In case of strongly differing interests of the Member States, a compromise solution usually can only be arrived at through persistent efforts and smooth cooperation of the Presidency and the Commission (100).

The most difficult or sensitive items on the agenda are generally discussed - and very often also settled - in the more informal and relaxed atmosphere during lunch. In order not to provoke unpleasant surprises for some of the participants, the Presidency circulates beforehand a list of items to be raised during the lunch which also takes into account the wishes of the Commission. Apart from the Ministers and one Member of the Commission, only the Permanent Representative of the Presidency, the General Secretary of the Council and one senior official of the Commission (usually the Secretary General or his Deputy) are allowed to sit at the table. They ensure that an accurate but informal record

of the discussions is made available for the information of their colleagues and the later formalization of the decisions made during the lunch (101).

At the end of the Council meeting, the President of the Council holds a press conference, in general together with a Member of the Commission. Both the Presidency and the Commission usually avoid to give details about disagreements and sensitive items in order not to jeopardize the chances for future compromises and not to create prejudicial impressions on the international stage. However, the press is most often well-informed through interested national channels, and despite all preventive efforts, even confidential documents have the habit of falling rapidly into the press' hands. The legislative acts formally adopted by the Council (e.g., the decision to conclude an agreement) are later published by the Secretary General of the Council in the Official Journal of the EC.

The meetings of the General Affairs Council are often followed by a meeting of the ACP/EEC Council of Ministers provided for by the Lomé Convention or of one of the Association or Cooperation Councils. The only Minister who attends the whole meeting is usually the President of the General Affairs Council. If other Ministers of the General Affairs Council attend at all, they are only present for a short time, after which they are replaced by their Permanent Representative or even only by a senior official of the Permanent Representation (102). In order to present a united front, the EC side normally strictly abstain from intervening, leaving the floor to the Minister of the Presidency, which speaks on behalf of the Community on the basis of speaking notes carefully pre-prepared by the COREPER and the General Secretariat of the Council. Not too surprisingly, Ministers of the ACP or other associated countries are not very satisfied about this kind of after-piece of the EC General Affairs Council.

The fore going description of the main patterns of the preparation and the running of Council meetings makes plain that the Council is a rather curious halfway house between a legislative institution and a mere framework for negotiations, both among the

Member States themselves and between them and the Commission. Highly abnormal in terms of conventional national politics, the members of the Council have to combine the roles of legislators for the common good of the Community and negotiators on behalf of their national interests. The consequence is that, especially during the Presidency, from the Foreign Minister down to junior officials all national representatives involved in the Council machinery have to cope with the challenge of combining the safeguarding of their governments interests with the need of promoting overall Community interests. For this reason, decision-making inside of the Council is not only extremely laborious, but also always marked by problems of loyalty, which explain to a large extent the frequent failures of the Council machinery to preserve secrecy on important items. It is evident that both the laborious decision-making and the problems of loyalty have a serious negative impact on the efficiency of the Community's system of external relations.

A second important assertion which can be drawn from the practice of Council business is that of the significant role of the Presidency in running the entire Council structure and preparing the ground for compromise solutions. Its role in the sphere of external relations is still more enhanced by a series of other functions: Within several international organizations (e.g., the UN General Assembly, the UN Economic and Social Council and UNCTAD), the Community is not only represented by the Commission, but also by the Member State holding the Presidency, a formula known as "bicephalous" or "dual representation". The Commission representative normally acts as the Community spokesman, but the representative of the Presidency can speak on behalf of the Member States whenever the presiding Member State deems it necessary (103).

In case of the negotiation of an international agreement on raw materials, in which both the Commission and the Member States participate, the spokesman of the joint Community delegation is normally the representative of the Commission. But, depending on tactical or technical circumstances, the common position of the Community is sometimes also presented by the representative of the



Member State holding the Presidency (104).

Last, but not least, the Presidency has also the function to represent the Council in third countries. This does not create additional organizational problems because the Ambassadors of the Member State holding the Presidency automatically act as representatives of the Council as well (105). Not only in the special case of the EPC framework (to which we will come back later), Member States often collectively entrust certain diplomatic functions to Ambassadors of the Presidency. This can entail conflicts of competence with the Head of the Commission Delegation in the respective country (106).

However, despite these additional functions and its important role in the Council's decision-making process, the Presidency of the Council carries in no way the same weight as the Commission in Community external relations. The main reasons for this are, firstly, the Presidency's lack of substantial powers, secondly, its structural weaknesses caused by the half-yearly rotation and the unavoidable discontinuities it entails, and, thirdly, the Presidency's almost total dependency on the positions taken by the Member States, who not only often disagree, but also still like to speak individually on their own behalf on the international stage.

To summarize the position of the Council in the Community system of external relations it can be said that, as the Community's final decision-making authority, the Council represents a strong intergovernmental counterweight to the Commission's implicit claim and actual capacity to act as the "general" supranational representative of the Community on the international stage. However, precisely because of its intergovernmental nature, the Council's role as international actor in Community external relations is far more limited than that of the Commission.

### 2.3. The European Parliament

The EP is the Community institution which since long is pressing

most for an increase of its role in external relations and also the one whose role in this sphere has been increased most by the SEA. Originally, the EC Treaties only provided for a very limited consultative function of the EP in the sphere of external relations: Even in the case of the conclusion of association agreements, where "consultation" of the EP was obligatory, its opinions legally had no consequence. Yet, precisely in this case (as in that of accession), the SEA has shifted the interinstitutional balance considerably in favour of the EP, for the first time conferring on it a function of co-decision in Community external relations:

- A. under the new wording of Article 238 EEC Treaty, the EP has to give its "assent" before the conclusion of an association agreement by the Council, this assent requiring the absolute majority of the votes of its component Members (function not provided for by the ECSC and EAEC Treaties).

The SEA has also introduced an additional, though less powerful, function of the EP related to the conclusion of international agreements:

- B. by virtue of new Article 130q(2) EEC Treaty, the EP participates in the decision-making on agreements with third countries or international organizations in the field of research, technological development and demonstration (provided for by new Article 130n EEC Treaty) on the basis of the so-called "cooperation procedure" (function not provided for by the ECSC and EAEC Treaties) (107).

In addition to these new functions, the EEC Treaty has always provided for a consultative role of the EP in certain cases:

- C. according to Article 228 EEC Treaty, the EP must be consulted before the conclusion of an agreement "where required by this Treaty" (function not provided for by the ECSC and EAEC Treaties).

This means that the EP must be consulted not only on all agreements for which this is expressly provided for (such as international environmental agreements negotiated and concluded under new Articles 130r(5) and 130s EEC Treaty), but also in all cases where the Community competence to conclude an agreement derives from a Treaty provision which requires EP to be consulted, such as Article 75 in the sphere of the common transport policy, or where an agreement is based on Article 235 EEC Treaty (as are usually the cooperation agreements) (108).

Agreements concluded under the awkward "cooperation procedure" provided for by new Article 130q(2) of the EEC Treaty (see subchapter 3.1.) have until now received no dramatic treatment by the EP. The Parliament has not waited very long, however, to make use of the new powers conferred on it by amended Article 238 EEC Treaty:

In December 1987 when it voted on a protocol to the EEC-Turkey association agreement, the vote failed to reach the required absolute majority, specifically in order to get additional information and guarantees from the Turkish government with regard to human rights problems in Turkey. Final approval was only given five weeks later, bringing along a correspondingly delayed conclusion of the protocol (109). In March 1988, because of Israel's policy in the Occupied Territories, the EP rejected three protocols to the EEC-Israel association agreement and returned them to the Council, although it had already signed them (110). Only in October 1988, after the situation in the Occupied Territories had eased a bit and after the Israelian Government had given certain guarantees to the Community, the Parliament in a second reading finally gave its assent to the protocols (111).

The EP may be criticized for having used the protocols in question for political ends which had nothing to do with the content of the agreements: The protocols were, in fact, of a purely technical nature, destined to adapt the corresponding association treaties to the new situation created by the accession of Spain and Portugal. However, there is no doubt that in the case of the EEC-Israel protocols the EP has for the first time in Community

history effectively interfered in Community external relations, causing an embarrassing situation for the Israelian Government as well as for the Council which had already signed the protocols. The case shows that through the new wording of Article 238 the SEA has conferred on the EP a powerful means of influence in the sphere of external relations and also that the Parliament is willing to make use of it. In respect to association agreements, the EP has now clearly reached a position corresponding to the role of the Senate in US foreign affairs (112).

A prominent former Member of the EP, Lady Diana Elles, has supposed that those involved in drafting the new wording of Article 238 EEC Treaty under the SEA had not imagined at the time that the EP would ever use that power to reject an agreement (113). However, the EP can of course only exercise that power when an agreement is actually based on Article 238, and precisely with respect to the choice of the legal basis, Council and Commission have a relatively large margin of discretion:

The EEC Treaty does neither contain a precise definition of association agreements (Article 238), for which the EP's assent is needed, nor a definition of commercial agreements (Article 113), for which neither the EP's assent nor its mandatory consultation is needed. The judgment of the ECJ in Case 45/86 (Article 113 alone or combined with Article 235 for generalized tariff preferences) seeks to establish objective criteria for the choice of the legal basis (114). However, as regards association agreements, the Court has until now established only one criterion: According to the Demirel judgment the Community can conclude association agreements in all fields covered by the Treaty (115). It is evident that this entails no obligation to conclude a certain agreement under Article 238. The Community is actually concluding an increasing number of commercial cooperation agreements which have Article 113 EEC Treaty (alone or together with Article 235) as legal basis but which are in no way secondary to "association agreements" concluded under Article 238 in terms of their political significance, nor different as regards their subject-matter. For instance, before their accession, Spain and Portugal were linked to the Community by preferential trade agreements concluded under

Article 113. No less striking examples are the cooperation agreements with the ASEAN countries, Brasil and India: Despite the fact that all these agreements contain elements of development policy like those with the Mediterranean and ACP countries, unlike the latter they were concluded on the basis of Articles 113 and 235, and not under Article 238 (116).

There is no doubt that the Commission and/or the Council (which has the final word in this regard) can have good reasons to avoid the politically far more committing term "association" in agreements with third countries. However, it is evident that the margin of discretion with regard to the use of Article 113 or Article 238 as legal basis can also serve as a convenient instrument in order to evade the necessity of obtaining the EP's assent for the conclusion of an important agreement. Understandable, the Parliament has repeatedly expressed its concern about such an undermining of its powers under Article 238 (117). Several times already since the entry into force of the SEA controversies have arisen between the EP, the Commission and the Council as regards the application of Article 238 or Article 113. In the case of the EEC/EAEC-Soviet Union cooperation agreement signed on 18 December 1989, for example, the EP took internally the view that this agreement should have been based on Article 238, and not on Article 113 as was first proposed by the Commission and finally decided by the Council (118).

Conflicts between the EP and the Commission and/or the Council concerning the legal basis of an agreement are not limited to Article 238 EEC Treaty. Similar conflicts may also arise, for instance, if the Commission and/or the Council choose Article 113 EEC Treaty with its weakest form of parliamentary participation as legal basis for agreements in the fields of agriculture or transports, instead of basing the agreements on Article 43 ("agriculture") or respectively Articles 75 and 84 ("transports") of the EEC Treaty which all provide for mandatory consultation of the EP (119).

The position of the EP in conflicts on the legal basis is considerably weakened by the wording of Article 228 EEC Treaty, which

stipulates that "the Council, the Commission or a Member State may obtain beforehand the opinion of the Court of Justice as to whether an agreement is compatible with the provisions of this Treaty": This provision actually excludes the EP from the possibility to ask for the opinion of the Court as regards the legal basis of a given agreement (120). This result is clearly inconsistent with the new power of the EP under Article 238 EEC Treaty: In the area covered by this Article, the EP now has a role of co-decision (and, by consequence, also of co-responsibility), but it has as yet no possibility comparable to that of Council, Commission and Member States to have checked by the ECJ the correct application of Article 238 as regards the legal basis of agreements. Following an undertaking of President Delors during the debate on the Commission's annual legislative programme in February 1990, an inter-institutional arrangement was made which provides for regular contacts between the Legal Services of the EP, the Commission and the Council with a view to in-depth discussions on the choice of legal basis (121). Although this arrangement does not remove the problem, it certainly represents a step in ahead as regards the EP's participation in the choice of legal basis.

It has rightly been pointed out, that through new Article 238 of the EEC Treaty the EP is not simply developing greater powers in the sphere of external relations but also greater influence than national parliaments (122). Nevertheless, even on the assumption of a full application of Article 238 as regards the legal basis of agreements, the role of the EP provided for by the Treaties is still rather restricted in two regards: Firstly, all of the existing forms of EP participation in Community external relations (assent, consultation under the cooperation procedure and simple consultation) involve a simple "yes" or "no" to the content of agreements which already have been negotiated and signed and do not bring with them any drafting powers. As regards the assent procedure, the term "negative joint decision-making" has therefore been used (123). In the case of the cooperation procedure, the fact that at the time the agreement is put before Parliament it is as a rule no more open to further amendment, deprives the EP from

exercizing an influence comparable to that it has over internal legislation (124). Briefly speaking, the Treaties do not provide for any form of parliamentary participation during the negotiation process. Secondly, the EEC Treaty does not give the EP any say at all in trade agreements (Article 113). Since this is the most frequent type of agreements concluded by the Community, that restriction is a very considerable one.

The EP has never been willing to content itself with these restrictions. In February 1964 already, the Council therefore undertook to keep the EP better informed of negotiations for association agreements through a special procedure, commonly called "Luns procedure". It provides that a debate may take place in the EP before negotiations on the association of a third country with the Community have started. During the negotiations on agreements of this type close contacts are maintained between the Commission and the appropriate committees of the EP (usually the REX Committee, the Development Committee, and the and Political Affairs Committee). When the negotiations are completed, but before the agreement is signed, the Council or its representative inform the appropriate committees confidentially and unofficially of the substance of the agreement (125).

In October 1973 the Council adopted a similar procedure, commonly called "Westerterp procedure", for the participation of the EP in the field of trade agreements. This provides that before the opening of negotiations concerning a trade agreement with a third country and in the light of the information the Council supplies to the competent committees of the EP, the Parliament may in appropriate cases hold a debate. The Council has also accepted that in the framework of this procedure the Commission keeps the competent committees of the EP informed of the progress of negotiations. When the negotiations are completed, but before the agreement is signed, the President of the Council or his representative acquaint the competent committees of the EP confidentially and unofficially with the substance of the agreement. The Westerterp procedure also provides that the Council informs the EP of the content of such agreements, after their signing and before their conclusion (126).

On account of its experience in applying the Westerterp procedure, the Council was subsequently led to make a distinction between agreements of major importance and other agreements (127). In the case of agreements of major importance, the Council sees the need to hold special meetings with the parliamentary committees and, with a view to enable exchanges of views in greater depth, to supply them in advance with a background memorandum. In the case of other agreements, a tacit procedure is normally applied, by which the Council simply informs the EP in writing when negotiations are opened and concluded. However, the EP may within a period of two weeks, if it so wishes, invoke the procedure for agreements of major importance.

Although they do not provide for formal inquisitorial powers of the EP, the Luns-Westerterp procedures at least to some extent meet the EP's need to be kept informed on the opening, the progress and the completion of negotiations. Yet, they do by no means meet the request for a power of ratification of all international agreements which the EP set out already in its resolution of 13 February 1982 (128). In this respect, an increased say was given to the Parliament by the Solemn Declaration on European Union, adopted by the European Council in June 1983. It provides that in addition to the consultations provided for in the EC Treaties with respect to certain international agreements, the opinion of the EP will be sought also before the conclusion of other "significant international agreements" by the Community. The declaration also provides for a corresponding extension of the existing confidential and unofficial information procedures to the case of all "significant" agreements (129). It should be noted, however, that these procedures do not cover autonomous Community measures in external relations (e.g., anti-dumping measures), and at several occasions it has occurred that EP has not been consulted on important regulations providing for autonomous measures (130).

The EP has incorporated the procedures described above in its Rules of Procedure (RPEP), specifically in Rules 33 (Association Agreements), 34 (Significant international agreements) and 35 (Trade and cooperation agreements not designated as significant).



Yet, some of these rules clearly go beyond the engagements entered by the other Community institutions and are more an expression of the EP's wishes than of inter-institutional reality:

Rule 33(1) provides that, on a proposal from, *inter alia*, the Committee responsible, the EP may ask the Council to be consulted on the negotiating mandate which it intends to give the Commission, *i.e.* before the Council has adopted that mandate. However, the Luns procedure merely provides for a possible debate in the EP before the negotiations commence. The Council has entered no engagement that it will inform or consult the EP on the contents of the draft negotiating mandate for association agreements, and in practice, it indeed neither informs nor consults the EP on the draft negotiating mandates.

Rule 33(4) of the RPEP provides that the EP shall be asked for its assent to an association agreement before signature by the Council. Yet, the Council has undertaken only to do so before conclusion. In May 1988 the President-in-office of the Council, Mr. Genscher, in a letter to the President of the EP, Lord Plumb, took the view that "in practice assent cannot be requested until the particular agreement is signed" because "under international law the authentic and definitive text of an agreement is as a general rule established [only] once it has been signed, subject to conclusion" (131). This clearly shows that the Council finds it advisable that the EP discusses a finished text. In any case, the letter testifies more to the practice than the RPEP do, since the EP is normally notified by the Council only after signature.

Rule 34(2) of the RPEP, in referring to Rule 33(1)-(4), lays down the same procedures for "significant" international agreements. Here again, the Council has not undertaken either to inform or consult the EP on the draft negotiating mandates or to ask for the EP's "assent" before conclusion. In November 1989 the EP has asked the Council to be consulted on the negotiating mandate the Council intended to give the Commission for the negotiation of a cooperation agreement with the countries of the Gulf Cooperation Council (132). One month later the President-in-office of the Council replied that in accordance with the "existing procedures" the Council would only inform the EP on the negotiating mandate

after its adoption (133). In February 1990 the EP asked the Council to consult it regarding the commercial and economic cooperation agreement with Argentina initialled on 6 February 1990 before it was submitted for signing by the contracting parties. Yet, on 26 February the President of the Council replied that the Council would continue to follow the "existing procedures for informing and consulting the European Parliament laid down for this type of agreement" (134). The EP then forwarded its request to the Commission, which replied that "the Council must decide on this matter, since it is responsible for referral to Parliament at this stage" (135). In fact, the EP was consulted on the agreement only after signature.

Rule 35(1) of the RPEP finally provides - like Rule 33(1) - that the EP may ask the Council to be consulted also on the mandates which it intends to give the Commission as regards the negotiation of trade and cooperation agreements not designated as "significant". Once again, the Council has never undertaken to do so, and this Rule has never been applied until now.

To ascertain the level of the EP's information and participation in the sphere of external relations one has to look at the way the undertakings granted are carried out by the other institutions during the different stages of the negotiation process (136):

- (a) The provision of information to the appropriate committees on the preparation of the draft negotiating mandate:

The Commission regularly provides such information through way of oral statements by officials or even by the competent Commissioner at committee meetings (137). Yet, this oral information is not always very detailed and usually does not acquaint the committees with the legal basis the Commission intends to give to the future agreement. Because of their confidential nature, the Commission is not inclined to provide the appropriate committees with the text of draft negotiating mandates (138). This has several times led to exchanges between members of committees and the Commission. However, in October

1989 Commissioner Andriessen has undertaken to improve the level of information on the draft negotiating mandates. In the case of the negotiations with the EFTA countries on the creation of an "European Economic Space" which were started in June 1990, the REX Committee has for the first time received the text of the draft. Following to an undertaking of the Director General of DG I, Mr. Krenzler, of December 1989, the REX Committee is now also regularly provided with detailed tables showing the time schedules for all planned or current negotiations.

(b) The classification of the importance of international agreements:

With regard to Paragraph 2.3.7. of the Solemn Declaration on European Union, the Council informed the EP in March 1984 that it expects the Commission, when it submits its recommendations concerning authorization to negotiate, to inform EP and Council on the question whether an agreement is of "significant importance" (139). The Commission, in fact, notifies the appropriate committee, at the preparatory stage, if it considers the agreement to be "significant". The Commission's usual position is to consider all commercial or cooperation agreements with a country or a group of countries and global negotiations such as the Uruguay Round or MFA as of "significant importance". It normally does not so as regards sectoral agreement with a given country. However, the Commission usually carries out informal soundings with the competent Committee of the EP before indicating to the Council that the agreement in question is not of "significant importance". The committees of the EP usually do not have disagreements with the Commission on matters of this kind.

(c) The provision of information after the adoption of the negotiating mandate but before the opening of negotiations:

Since August 1989 the Council usually communicates the content

of negotiating mandates to the appropriate committees by way of detailed memoranda. However, because of its confidential nature, the committees do normally not receive the text of the mandate itself.

(d) The provision of information on the progress of negotiations:

The Commission regularly keeps the appropriate committees of the EP informed of the progress of negotiations, by means of oral statements of officials in charge of the matters in question. These statements are more detailed than those made on the draft negotiating mandates (see (a)), and in most cases the committee members find this information to be comprehensive and sufficient.

(e) The provision of information to the appropriate committees after initialling but before signature of an agreement:

The appropriate committees regularly receive such information in the form of memoranda of the Council. On very important agreements and upon request of a committee, such information is provided also orally at special joint meetings (so-called "Luns-Westerterp meetings") of all the committees concerned, by the President of the Council or his representative (normally a Secretary-of-state). These meetings were held, for example, in the case of the EEC-COMECON joint declaration, the EEC-Israel association protocols, the cooperation agreement with the Gulf States and the cooperation agreements with the countries of Eastern Europe. Also, the informations given by the representatives of the Council are usually not very substantial and the turnout of the meetings is often rather poor. Because it has proved difficult to convene several committees and as well as the case may be the delegation for relations with the country concerned at a given moment which is also convenient to the President of the Council, the committees do not ask for these meetings as a regular practice.

(f) The consultation of the EP after signature but before conclusion of an agreement:

In practice, the EP is nowadays also consulted on the conclusion of most of the trade agreements based on Article 113. In all these cases the signed agreements are forwarded to the EP by the Council. The EP delivers its opinion in form of a "legislative report" and an accompanying "legislative resolution" which are drawn up by the appropriate committee and are adopted after an amendment stage by the Plenary. However, problems sometimes arise when the Council requests the EP to give an opinion under the "urgent procedure" provided for by Rule 75 of the RPEP. In these cases the appropriate committees usually do not have enough time to consider the agreements in question down to the ground. Therefore, the committees tend to see the request for the "urgent procedure" as an unfair manoeuvre by the Council to put pressure on them and force their member's hands.

It should be noted that in addition to these official information and consultation procedures, a considerable amount of information already passes between the Commission and the appropriate committees in a number of more or less informal ways. In some cases, especially where information is conveyed on a confidential basis, such informal information may even be of greater importance than the formalized information flows. The main types of this second kind of information are: exchanges of views between a Commissioner and/or senior commission officials and the bureaus of committees, exchange of letters or conversations between a Commissioner and chairmen of committees, meetings between rapporteurs and senior Commission officials, and contacts between Commission officials and the committee secretariats.

Despite the remaining shortcomings described above (particularly as regards the draft negotiating mandates and the Luns-Westerterp meetings), it has certainly to be acknowledged - and the MEPs in general also do so - that the level of information of the EP on matters of Community external relations has more and more increas-

sed. However, increased information does in no way also mean that the EP has also an increased influence on the outcome of negotiations.

In practice, the EP can at most try to exercise some influence on current negotiations (i.e. at the latest before the agreements are initialled) by means of holding a plenary debate on the basis of a motion for a resolution (Rule 63 of the RPEP) or an own-initiative report (Rule 121 of the RPEP). In both cases procedures are rather lengthy (140). So that, if the process of negotiation is relatively short, as has been the case with most cooperation agreements concluded with the Eastern European countries since 1989, the EP is forced - in the words of Willy de Clercq - "de courir après les faits" (141).

Also if the EP succeeds in time to hold a plenary debate, it is extremely difficult to ascertain whether in such a case it has actually been able to influence the negotiations. In national parliamentary systems the government as the sole negotiating party in foreign affairs is normally bound to parliament by reason of the fact that its staying in power depends on the support of a parliamentary majority. The resulting bonds and constraints do not exist between, the EP on one hand and, Commission and Council on the other, because in the Community system all institutions are appointed independently. This gives some ground to the presumption that during the negotiations the other institutions usually only take into account the EP's views if they consider it politically expedient in the inter-institutional game and if it does not run contrary to their own line of action. The fact that, in February 1990, the Commission has agreed that MEPs may be included as observers in Community delegations which negotiate agreements, does not change anything in this respect (142).

The EP's role is also very restricted as regards the implementation of agreements: The Treaties do not contain any provision regarding parliamentary participation in this respect. It is true that a number of Association Agreements provide for the setting up of "Joint Assemblies" of MEPs and representatives of the Parliaments of the associated countries (143). Yet, these bodies only

have advisory tasks in connection with the implementation of the agreements (144). It is also true that the EP can use its powers in the budgetary procedure to influence the implementation of agreements, particularly as regards the non-compulsatory financial implications of agreements (where the EP's assent is necessary) and the grant of discharge to the Commission for the implementation of the budget (145). Yet, in this way the EP can only exercise an indirect and not necessarily effective influence on the implementation agreement, and the use of its power in this regard may well have serious negative consequences for the whole Community budgetary procedure. Until now, the EP has never made use of this possibility in the sphere of external relations.

The information and consultation mechanisms described above make it plain that a crucial role in all aspects of the EP's involvement in Community external relations is played by the committees. As has already been indicated, the appropriate committees for matters of external relations are usually the Committees on External Economic Relations (REX), on Development and Cooperation, and on Political Affairs (146). The REX Committee is responsible for all matters relating to foreign trade and agreements concluded in this sector, the Development Committee for examining and monitoring the Community's development policy, and the Political Affairs Committee for all political and institutional aspects of Community external relations. This apparently distinct division of tasks conceals many difficulties of maintaining clear dividing lines between the committees different spheres of responsibility. The Political Affairs Committee's expressly provided responsibility for the "political and institutional aspects" of association agreements, for example, obviously partly overlaps with the general responsibility of the REX and Development Committees for the economic and development policy aspects of such agreements (147). In order to avoid frictions and gaps between the committees as regards the spheres of responsibility, the chairmen of the three committees have undertaken in 1989 to regularly coordinate the activities of their bodies. In last resort, however, it is up to the Bureau of the EP, which is not always immune against partial

attitudes, to decide which committee will be responsible for a certain subject and establish a Report and which committee will deliver an Opinion only (148).

The committees reflect as far as mathematically and politically possible the numeric strength of the Political Groups and as well the national balance of the Plenary. The prestigious and highly appreciated committee chairs can only be assigned with the consent of the Political Groups. The Groups also control the nomination of Rapporteurs (for Reports) or Draftsmen (for Opinions): Since some Reports or Opinions carry more weight than others (on account of the overall political importance of the subject and/or the degree of influence the EP has on it, e.g. because the consultation or the assent procedure is applied), the allocation of Reports and Opinions to the different Political Groups is done on the basis of a point system corresponding to the estimated importance of the Report or Opinion. Each Group is allocated a number of points which corresponds to its numerical strength in the EP, and the Reports and Opinions are 'distributed' on the basis of a hard bargaining between the Groups (149). It is evident that this system does not always guarantee that an MEP being an expert on a certain aspect of Community external relations is allocated a corresponding Report or Opinion.

The Reports (and to a lesser extent also the Opinions) have normally a considerable, if not decisive impact on the attitude the Plenary finally adopts on a given subject. Consensus in committee on a Report usually also leads to consensus in Plenary. However, consensus in Committee is not easily achieved, and it often needs a lot of skill and careful preparation from the side of the Rapporteur to pass the substance of his Report 'undamaged' through the amendment stage in committee (150). In the case of the Rossetti Report on economic and trade relations between the EEC and the EFTA countries (1990), for example, 55 amendments to the draft report were tabled by the REX Committee members, and it took more than five hours of thorough discussion in the Committee before all amendments were adopted, rejected or withdrawn (151). After adoption by the Committee, the Rapporteur still has to manoeuvre his report through the amendment stage in Plenary.



Each Report is divided into two sections: a Motion for a Resolution, which most often expresses approval or disapproval of actions taken by the Commission and/or the Council, and an often very elaborate Explanatory Statement, which describes the reasons for the proposed Resolution. In drafting the Report the Rapporteur is usually not only supported by his Assistant, but also by the Committee Secretariat. Since always several Reports are in preparation at the same time (during the Parliament session of 1984-1989, e.g., 90 Reports were produced by the REX Committee and 79 by the Development Committee), the small Secretariats (only five A-grade officials and their supporting staff in the case of the REX Committee) often have difficulties in coping with the demands of the Rapporteurs, especially as regards help in drafting the Explanatory Statements (152).

During the preparation of the Reports the Rapporteurs, their Assistants and the Committee Secretariats heavily depend on informations given by the appropriate services of the Commission. Embassies of third countries and Permanent Representations may also furnish some material, but the Commission is always the primary source of information (153). The Commission is usually very cooperative in this regard, and there is reason to believe that through this way it tries to exercise some influence on the drafting of the Reports.

Our description of the EP's role in Community external relations would be incomplete without mentioning the EP "Delegations". The EP has established a network of until now (1991) 26 interparliamentary delegations consisting of varying numbers of MEPs, each of which is responsible for one country or a group of countries. Their tasks are (I) to establish and to maintain a dialogue with the Parliament of the countries for which they are responsible, (II) to exchange informations on topical issues with these Parliaments and (III) to provide parliamentary backing for the Community's external policies (154). Whenever possible, these delegations meet at least once a year with members of the parliaments of the respective third countries. On these occasions, thorough and lively discussions on important questions can take place. During the

30th meeting between the responsible EP delegation and the delegation from the United States Congress in January 1988, for example, such discussions took place with respect to unfair practices in EEC-US trading relations and American military aid to the Contras in Nicaragua (155). The concrete impact of these meetings on Community external relations, if there is one, is difficult to measure. However, depending on the personal efforts of the MEPs present, the delegation meetings can certainly contribute to a better mutual information and understanding (156).

To treat as a whole the EP's role in Community external relations, it can be argued that this role is still rather restricted because of the lack of ratification powers for all agreements not based on Article 238 EEC Treaty (association) and because of the absence of formal inquisitorial powers. However, the assent procedure under Article 238 and the EP's continuous pressure for greater influence have considerably strengthened the EP's position during the last few years. The new engagements entered by the other institutions as regards the EP's information and consultation seem to show that it is no longer possible for them to disregard the more and more emerging role of the Parliament in external relations and its claim to exercise democratic control in this sphere.

#### 2.4. The European Court of Justice

The EC Treaties do not expressly provide for a role of the ECJ in the sphere of external relations. The Court's task being to ensure that Community law is observed (Articles 164 EEC Treaty, 32 ECSC Treaty and 136 EAEC Treaty), its role is in principle exclusively an internal one. However, in a Community consisting of openly competing institutions like Commission, Council and Parliament, and composed of Member States with conflicting interests, it is not surprising that the ECJ has also been frequently called upon to decide on matters directly or indirectly related to the

constitutional bases of Community external relations. As we have already seen, this has enabled the Court to establish, *inter alia*, progressively the doctrine of implied external competences and the principle of the exclusive nature of external Community competence, which now belong to the most important corner-stones of Community activity in external relations (see sub-chapters 1.1. and 1.2.). It does not seem to be exaggerated, therefore, to speak of a constitutional role of the ECJ in the sphere of Community external relations (157).

The following seven main functions of the ECJ which can be found in the Treaties and which have not been modified by the SEA, are the framework in which the ECJ can play this constitutional role:

- A. to decide disputes arising between the Commission and the Council which are introduced at the Court as actions for annulment by one of the institutions on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to its application, or misuse of powers (Article 173 EEC Treaty; Article 146 EAEC Treaty; under Article 33 ECSC Treaty, only the Council can be the applicant; under Article 38 ECSC Treaty, the Court may also, on application by the Commission, declare void acts of the EP or of the Council);
- B. to decide similar disputes where the applicant is either a Member State or (if a Community decision is directly addressed to or, although addressed to another person, of direct and individual concern to him) any natural or legal person against the Commission or the Council (Article 173 EEC Treaty; Article 146 EAEC Treaty; under Article 33 ECSC Treaty, only a Member State an undertaking or one of the associations referred to in Article 48 ECSC Treaty can be an applicant; under Article 38 ECSC Treaty, the EP may be a defendant as well);
- C. to decide on actions for failure to fulfil an obligation under the Treaties brought against Member States by the Com-

mission (Article 169 EEC Treaty; Article 141 EAEC Treaty; under Article 88 ECSC Treaty, a Member State can have recourse to the Court against a decision of the Commission finding that the State has failed to fulfil an obligation under the Treaty);

- D. to decide on actions for failure to act brought against the Commission and the Council by the Member States and the other Community institutions (Article 175 EEC Treaty; Article 148 EAEC Treaty; under Article 37 ECSC Treaty, only the Commission can be the defendant);
- E. to decide disputes arising between Member States which relate (I) to a failure by one of them to fulfil an obligation under the Treaty and (II) to any subject matter of the Treaties which is referred to the Court under a special agreement between the parties (Articles 170 and 182 EEC Treaty; Articles 142 and 154 EAEC Treaty; Article 89 ECSC Treaty);
- F. to give, on request by any court or tribunal of a Member State, preliminary rulings concerning the interpretation of the Treaty and the validity and interpretation of acts of the Community institutions (Article 177 EEC Treaty; Article 150 EAEC Treaty; Article 41 ECSC Treaty);
- G. to deliver, on request by the Council, the Commission or a Member State, an opinion as to whether an international agreement envisaged is compatible with the Treaty provisions (Article 228(1) EEC Treaty; under Articles 103 and 104 EAEC Treaty, the Court can only give rulings on the compatibility with this Treaty of international agreements or contracts envisaged or concluded by a Member State, a person or an undertaking; no similar function is provided for by the ECSC Treaty).

The ECJ fulfills these functions in the framework of six different forms of action provided for by the Treaties:

(1) Actions for annulment (functions A and B):

In the ERTA judgment the Court ruled that an action for annulment must be available in the case of all measures adopted by the institutions, whatever their nature or form, which are intended to have legal effects (158). Under all three Treaties, a successful action for annulment results in a declaration made by the ECJ to the effect that the challenged measure is void. This gives rise to an immediate obligation under the Treaties which binds the defendant institution to take the steps necessary to give effect to the judgment, e.g., by revoking or changing a decision. The effect of annulment is 'ex tunc' and 'erga omnes' (159). A recent example for a successful action for annulment in the sphere of Community external relations is Case 45/86, in which the Commission obtained from the ECJ the annulment of two Council Regulations applying generalized tariff preferences on certain products originating in developing countries because they were not adopted on the correct legal basis (160).

(2) Actions for failure by a Member State to fulfill a Treaty obligation brought by the Commission (function C):

Under the EEC and EAEC Treaties the Commission must first give the Member State(s) concerned an opportunity to submit its observations on the matter and then deliver a reasoned opinion. Only if the Member State fails to comply with this opinion in due time, the matter may be brought before the Court (Article 169 EEC Treaty; Article 141 EAEC Treaty). A successful action before the ECJ results in a judgment declaring that there was such a failure. This gives rise to an obligation under the Treaty binding the defendant Member State to take the necessary measures to comply with the judgment (Article 171 EEC Treaty; Article 143 EAEC Treaty) (161). An example of such a successful action relating to external relations is Case 804/79, in which the Commission obtained a judgment from the ECJ declaring that by applying unilateral measures for the

conservation of the resources of the sea, the United Kingdom had failed to fulfil its obligations under the EEC Treaty because the power to adopt, as part of the common fisheries policy, such measures belongs fully and definitively to the Community since the expiration of the transitional period (162).

(3) Actions for failure by the Commission or the Council to act (function D):

Under the EEC and EAEC Treaties only those failures to act that constitute an infringement of the Treaty are susceptible for such actions. Before proceedings may be brought before the Court, the defendant institution must, first, have been called upon to act and second, have failed to define its position within two months of being so called upon (Article 175 EEC Treaty; Article 148 EAEC Treaty). The object of the action is to obtain a judgment of the ECJ declaring that the failure to act is contrary to the Treaty. Such a declaration gives rise to an obligation under the Treaty whereby the defendant institution is required to take the necessary measures to comply with the Court's judgment (Article 176 EEC Treaty; Article 149 EAEC Treaty) (163). Until now the ECJ has never had to decide in an action for failure to act related to external relations.

(4) Jurisdiction over disputes between Member States (function E):

Before a Member State can bring an action against another Member State for failure to fulfil an obligation under the Treaty, it must first bring the matter before the Commission. The action before the ECJ can be started once the Commission has delivered a reasoned opinion or, in the absence thereof, at the expiry of three month of the date on which the matter was brought before the Commission (Article 170 EEC Treaty; Article 142 EAEC Treaty). A judgment of the Court declaring that the defendant Member State has failed to fulfil a Treaty obligation gives rise to an obligation under the Treaty binding the Member State to take the necessary measures to comply with

the judgment (Article 171 EEC Treaty; Article 143 EAEC Treaty) (164). The fact that the Court jurisdiction also extends to disputes between Member States which relate to a subject-matter of one of the Treaties and are referred to it under a "special agreement" between the parties (Articles 182 EEC Treaty, 154 EAEC Treaty and 89 ECSC Treaty) is not without relevance to the sphere of external relations: Such "special agreements" are to be found, e.g. in the internal agreements on the measures and procedures required for implementation of the ACP-EEC Lomé Conventions (165). However, as yet the Court has never had to decide disputes between Member States related to external relations (and rarely in other cases). It seems that the Member States prefer to leave it to the Commission to bring an action against a Member State for failure to fulfil an obligation under the Treaty (166).

(5) Preliminary ruling (function F):

In this procedure the Court can be seized of a question of Community law arising in the context of litigation before a national court or tribunal. The question must relate to the interpretation of "acts" of the institutions of the Community (Article 177 EEC Treaty; Article 150 EAEC Treaty; Article 41 ECSC Treaty). According to well-established case-law, the notion "acts" may cover also international agreements concluded by the Community with third countries (167). A preliminary reference enables the ECJ not only to give an interpretation of the matter of Community law in question but, also, if necessary, to declare an act of the Community institutions void (168). Several preliminary rulings delivered by the Court have had a considerable impact on the development of the Community's external competences, particularly through to the doctrine of implied competences (169).

(6) Opinions on the compatibility of an agreement with the Treaty (function G):

Rule 107(2) of the Rules of Procedure of the ECJ expressly provides that such an opinion "may deal not only with the question whether the envisaged agreement is compatible with the EEC Treaty but also with the question whether the Community or any Community institution has the power to enter into that agreement" (170). A well-known example of such an opinion is Opinion 1/78, in which the Court fully supported the Commission's view that the Community was competent to conclude the International Agreement on Natural Rubber which was under negotiation within the UNCTAD (171). Where the Court takes the view that an agreement is incompatible with the Treaty, the agreement can enter into force only in accordance with the procedure set out in Article 236 EEC Treaty, i.e. pursuant to an amendment of the Treaty (172). The purpose of the Article 228 procedure is to allow for the possibility to forestall the serious difficulties which would result, not only in the Community context but also in that of international relations, from legal disputes concerning the compatibility with the Treaty of international agreements binding upon the Community (173).

Practice has shown that the ECJ main tasks in the sphere of Community external relations are, on the one hand, to interpret the external Community competences with respect to their scope and nature, and on the other hand, to decide disputes between the Community institutions as regards legal bases and procedures.

The main problem which has arisen in respect to the first of these tasks is that the Council and the Member States have not always easily accepted the ECJ's jurisdiction on matters of external Community competence. In the case of the principle of implied external competences established by the ERTA judgment, for instance, several years passed before the Council and its members familiarized themselves sufficiently with that principle to make a more or less frictionless - though in practice often restrictive - application of it at least possible (174). Even at the beginning of the 1980's, the Court of Justice was still heavily criticized by the Legal Adviser to the United Kingdom Permanent Representation for



having acted "in a quasi-legislative manner" in this regard (175). Such an attitude has its reasons: There can be no doubt that the ECJ's 'Community-minded' case-law on the external competences of the Community has not only developed the constitutional bases of these competences but has also had (and still has) a considerable political impact on the development of Community external relations. In a Community composed of Member States which retain sovereignty in foreign affairs, and governed by Treaties of an evident lacunae character in respect to the external competences of the Community, such an impact-full case-law is easily perceived or denounced by a Member State as a proof for judicial law- or policy-making, which automatically poses a problem of acceptability as regards the Court's corresponding jurisdiction (176). The source of the problem of acceptability therefore resides in the nature of the Community system itself, and it is a remarkable achievement of integration through law that under the above-mentioned circumstances the ECJ has nevertheless been able to have fundamental constitutional principles of Community external relations generally accepted by the Member States: In substance, though not in all aspects of their application, the principles of implied external competences and of the exclusive nature of Community external competence are now no longer contested by the Council and its members.

As regards the second task, that to decide disputes between the Community institutions in the sphere of Community external relations, most of the actions brought before the ECJ relate to disputes between the Commission and the Council on the legal basis of Community acts relating to external relations. The decision of the ECJ of 26 March 1987 on the conflict between Commission and Council over the appropriate legal basis (Article 113 EEC Treaty alone or combined with Article 235 EEC Treaty for the generalized tariff preferences) seeks to establish objective criteria for this choice (177). Nevertheless a margin of discretion persists because the various external competences laid down in the Treaties are partly overlapping in their subject-matter, particularly as regards Articles 113 and 238 EEC Treaty. As long as this margin of discretion exists it will also be a source of inter-institutional dispu-

tes and predictably related actions before the ECJ.

The most important unresolved question in respect to such actions is the right of access of the EP to the Court, the more so because as a result of the SEA, Parliament is more affected than ever by the choice of the legal basis of an agreement (see previous sub-chapter). Neither Article 173 EEC Treaty (action for annulment) nor Article 228 EEC Treaty (opinions on the compatibility of an agreement with the Treaty) provide for a right of access of the EP to the ECJ comparable to that of Commission and Council. In giving reasons for its refusal to recognize the EP's capacity to bring an action for annulment, the Court stated in Case 302/87 ("Comitology"), inter alia, that it was the responsibility of the Commission, pursuant to Article 155 EEC Treaty, to ensure that the Parliament's prerogatives were respected and to bring actions for annulment for that purpose if necessary (178).

However, in a recent case the Court came to a somewhat different conclusion. In March 1988 the EP sought under Article 173 EEC Treaty and Article 146 EAEC Treaty the annulment of Council Regulation 3954/87 (EAEC) laying down maximum permitted levels of radioactive contamination of foodstuffs and feedingstuffs on grounds of an incorrect choice of the legal basis. The Council raised an objection of inadmissibility and asked the ECJ to rule on that objection without entering upon the substance of the case. The EP thereupon submitted that the objection should be dismissed, arguing that in the case in question, by contrast to Case 302/87, the Commission was not in a position to discharge its responsibility under Article 155 EEC Treaty since it had based its proposal on a legal basis other than that considered by the Parliament. In its judgment on the objection of inadmissibility raised by the Council, which came about on 22 May 1990, the Court acknowledged that the existence of those various legal remedies provided for by the EEC and EAEC Treaties were not sufficient to guarantee, in all circumstances, that an act of the Council or the Commission which disregarded the EP's prerogatives would be censured. After having pointed out that those prerogatives were one of the elements of the system of institutional balances created by the Treaties, the Court came to the conclusion that an action for annulment brought

by the EP against an act of the Council or of the Commission was admissible provided that the action in question sought only to safeguard Parliament's prerogatives and that it was founded only on submissions based on the infringement of those prerogatives (179). It follows from this judgment that the ECJ is willing to acknowledge an own right of access of the EP to it whenever Parliament seeks to safeguard its prerogatives against another Community institution. This may well strengthen the EP's position also in inter-institutional disputes related to Community external relations, since it can reasonably be argued that enforcement of the correct choice of the legal basis belongs as well to Parliament's prerogatives in view of the EP's rights of participation in the conclusion of international agreements. Such a result shows the considerable impact the Court's jurisdiction can have also in respect to the individual participation of Community institutions in the sphere of external relations.

## Chapter 3: Procedures of the EC

It is only at first sight that procedures seem to have little importance in foreign affairs. But in fact, in order to be able to deal with the complex problems which may arise during the negotiations of international agreements, it is as a general rule necessary to agree beforehand on the procedures to be followed during the negotiations. When an agreement on procedures has been reached, which often needs lengthy pre-negotiations, the substance of the agreement can often be dealt with quite smoothly.

In respect to the external relations of the European Community, procedural questions are not only externally but also internally of particular importance: The EC Treaties do not provide for a unique system for the handling of external relations but establish a number of different procedures. To these various procedures Community practice has added others for particular aspects of external relations not expressly provided for by the Treaties. Since each procedure provides for a different degree of participation of the institutions concerned and in several cases also for different majorities within those institutions, the procedure which is applicable (or chosen, if there is a possibility for a choice) on a given matter of external relations predetermines the degree of influence which the various participants (institutions and Member States) can exercise.

### 3.1. The negotiation and conclusion of international agreements

The negotiation and conclusion of international agreements is obviously the most substantial form of external activity of the Community. It is also the most elaborate one as regards procedures. The procedures applied under the EEC Treaty are partly different from those applied under the EAEC and ECSC Treaties. In our analysis we will focus on the procedures normally used under the EEC Treaty since these are the most frequently applied. In

accordance with practice, these procedures may be divided into eight stages which will be dealt with in turn:

(1) The exploratory talks:

In most cases the initiative for entering negotiations is taken by the interested third States through a request (normally in form of a "note verbale") addressed to the Commission and/or the Council (180). The negotiation properly speaking is preceded by exploratory talks of the responsible Commission services with the third State(s) concerned on possible subjects and dispositions of a future agreement. The know-how of the Commission delegation(s) in the respective third State(s) as regards the possibilities and limits of cooperation between their host State(s) and the Community may play an important role during this exploratory phase. The Commission usually keeps the Council informed of the requests addressed to it by third States and of the development of the exploratory talks by way of statements at COREPER meetings. It often also informally acquaints Member States individually too with these matters in order to get a clearer idea of their attitude and specific interests in respect to the envisaged negotiations. Under the Treaties the Commission is not obliged to do so, but this early information has become a constant practice for the sake of good inter-institutional cooperation. In some cases, particularly when the requests are of considerable political importance, the Commission even seeks formal authorization for entering exploratory talks in order to get some political backing from the Member States and to avoid the risk of being "desavouée" by the Council at a later stage. Early information and consultation of the Council is all the more important as the basic principles of the agreement to be negotiated are often already to a considerable extent predetermined by the result of the exploratory talks (181).

At the issue of the exploratory talks, the responsible Commission services establish a report on the possibilities for negotiating an agreement with the third State(s) concerned

which is addressed to the Members of the Commission.

- (2) The adoption of the draft negotiating mandate ("negotiating directives") by the Commission:

If the exploratory talks have been successful, the report established for the Members of the Commission already includes a draft negotiating mandate which also takes into account the interests of the Member States. After having been formally adopted by the Commission, the draft negotiating mandate is forwarded with an accompanying report on the results of the exploratory talks to the Council in form of a "recommendation". Even in cases where the subject-matter of the intended negotiations would allow for a formal "proposal" of the Commission to the Council, the legally weaker "recommendation" is preferred. The legally stronger form of a formal Commission initiative is in practice reserved for the proposal to conclude the agreement at the issue of negotiations (182). Also, before adoption of the draft mandate by the Council, the appropriate committee of the EP is acquainted with the content of the draft by means of an oral statement by a Commission official or even a Commissioner (see sub-chapter 2.3.).

It should be noted that the only formal obligation for the Commission to seek an authorization of the Council to open and to conduct negotiations, i.e. to ask for a negotiating mandate, is provided by Article 113 EEC Treaty as regards agreements related to common commercial policy (183). Article 228 EEC Treaty, dealing generally with the procedure of negotiating and concluding international agreements, only stipulates that "such agreements shall be negotiated by the Commission". Nevertheless, the rule laid down in Article 113 EEC Treaty is in practice also applied to all negotiations not based on this Article (e.g., in the case of negotiations on association agreements under Article 238 EEC Treaty). In fact, the Commission regularly seeks formal authorization of the Council to enter negotiations. This is not just a matter of inter-institutional politeness: In the past, isolated attempts of the



Commission to negotiate international agreements without previous authorization by the Council have failed due to the Council's opposition to the Commission's autonomous initiative to enter negotiations (184).

It is evident that the extensive application of the authorization procedure provided for by Article 113 represents to some extent a restriction of the Commission's autonomy and margin of manoeuvre in the sphere of Community external relations. However, there can be also no doubt that as long as it is the Council, and not the Commission, which has the power to conclude an agreement, such a practice perfectly corresponds to the inter-institutional balance of power: Allowing for an involvement and co-responsibility of the Council as regards the starting of negotiations, this practice helps to avoid the delicate situation in which the Community would find itself on the international stage if the negotiations entered into by the Commission are accepted by the Council or some of the Member States.

(3) The adoption of the negotiating mandate:

The "recommendation" of the Commission to open negotiations (which has not to be confounded with the specific recommendation provided for by Article 14 ECSC Treaty) has no binding effect. The Council is free to refuse the authorization to enter negotiations or to change the draft negotiating mandate.<sup>?</sup> However, since the Commission has been in close contact with the COREPER and the Member States during the phase of the exploratory talks, the submitted draft negotiating mandate usually represents a compromise text accommodating both the Community interests advocated by the Commission and the interests of the Member States and it therefore normally has very good chances to pass the Council without substantial modifications. In addition, it is in the Council's own interest to reach an agreement with the Commission on the negotiating mandate, since under the Treaties it is exclusively the Commission which is entitled to negotiate agreements on behalf of the Communi-

ty. The Council can in no way enter negotiations by itself. of its own. It is very questionable whether in case of conflict the Treaties would allow the Council to force the Commission to conduct negotiations against or without a prior Commission recommendation, and such a case, which would not fail to entail serious repercussions on the international stage, has in fact never occurred (185). As in many other fields of Community activity, the effective functioning of Community decision-making procedures also in this context depends on a constructive cooperation between Council and Commission in the sense of Article 15 of the Merger Treaty (186).

In most cases the Council decides on the recommendation of the Commission after the COREPER has reached agreement on the texts making up the negotiating mandate. The required majority in the Council depends on the type of agreement which is going to be negotiated: In accordance with the corresponding Treaty provisions, the Council has to decide, for instance, by qualified majority on commercial agreements (Article 113 EEC Treaty) or agreements concluded by the EAEC (Article 101 EAEC Treaty) and by unanimity on cooperation (Articles 113 and 235 EEC Treaty) or association (Article 238) agreements.

The Council gives the authorization to open the negotiations in form of a decision *sui generis* ("Decision authorizing the Commission to negotiate..." e.g., a trade and economic cooperation agreement with country x). Its decision normally contains in annex the adopted negotiating mandate. Although the terms "negotiating mandate" or "negotiating brief" are commonly used in Community practice, they are somewhat misleading: The Commission in fact enters the negotiations not as a mandatory of the Council but out of its own exclusive right to conduct negotiations on behalf of the Community as provided for by the Treaties (187). The official term "negotiating directives", which is based on the wording of Article 113(3) EEC Treaty, is more correct in this regard because it corresponds to the full institutional autonomy the Treaties have conferred upon the Commission in respect to its role as the Community's chief negotiator.



Negotiating "directives" are expressly provided for only in Article 113(3) EEC Treaty, i.e. in respect to the negotiation of agreements related to common commercial policy. In practice, however, the Council uses them for all kinds of agreements to be negotiated (188). There again, Community practice has extended the application of the provisions of Article 113 EEC Treaty to negotiations in general in order to allow for an indirect participation and coresponsibility of the Council in the initiating phase of negotiations, in full respect of the Councils exclusive power to conclude international agreements.

The negotiating mandate (we will continue to use the more current term) has the function to provide the Commission with a framework for the conduct of negotiations and to ensure within its limits full support from the Council and, at least, a majority of the Member States. This framework consists of guidelines regarding the nature (scope, parties, structure, coverage and objectives) and the content (general principles to be laid down in the preamble, undertakings of the negotiating partners in the respective fields of cooperation) of the agreement to be negotiated. The guidelines define the main aims to be pursued by the Commission during the negotiations, the minimal concessions to be requested from the negotiating partner(s) as well as the maximal concessions to be made to them.

The provisions of the negotiating mandate are normally very precise as regards the general aims and principles to be pursued during the negotiations. However, in order to let a certain margin of manoeuvre for the Commission during the negotiations, the provisions of the negotiating mandate are in many cases (but not always!) somewhat less precise in respect to the concrete results which shall be obtained. Several fragmentary provisions taken out of negotiating mandates for trade and commercial and economic cooperation agreements with Eastern European countries which were negotiated in 1989 and 1990 may illustrate this (189):

- Scope of the negotiations:

"The purpose of the negotiations would be the conclusion of an agreement on trade and commercial and economic cooperation between the European Economic Community and the (State X), based on the principle of the effective reciprocity of advantages and obligations".

- Structure of the future agreement:

"The non-preferential agreement would be such as to permit future development. The parties to the agreement could explore together in a Joint Committee any practical possibilities for cooperation in their mutual interest.

The agreement would not involve any financial commitments, nor any financial protocol."

- Trade:

"The parties would undertake to grant each other most-favoured-nation treatment, the scope of such treatment being defined in detail on the basis of GATT definitions. The (State X) would also undertake to grant non-discriminatory treatment, particularly as regards the granting of licences for and the allocation of currency to imports of products originating in the Community (...). The Community would undertake to make efforts towards the progressive removal of specific quantitative restrictions, taking into account the development of trade between the contracting parties, any changes in the market conditions and rules in the (State X) or in the Community, and progress made in implementing the agreement. (...)

An effective and selective safeguard clause will lay down the principle of consultation and will allow the Community to take unilateral measures if necessary."

- Commercial cooperation:

"The contracting parties would undertake to facilitate exchanges of commercial and economic informations on all matters which would assist the development of trade and economic cooperation.

The contracting parties would undertake to facilitate cooperation between their respective customs services, including in the field of vocational training."

- Economic cooperation:

"The contracting parties would encourage the adoption of measures aimed at creating favourable conditions for economic and industrial cooperation, in particular by arranging exchanges and contacts between persons and delegations representing commercial, economic or other appropriate organizations, encouraging and facilitating trade promotion activities (...)."

In addition, the negotiating mandates can also include provisions of some political significance. In the case of the above mentioned cooperation agreements, for example, it was provided for that the preamble would express the attachment of the contracting parties to the Helsinki Final Act and subsequent CSCE documents, and that no reference should be made to the COMECON in the preamble or elsewhere in the agreements.

The Council usually communicates the content of a mandate after its adoption to the appropriate committees of the EP in form of detailed memoranda (see sub-chapter 2.3.).

(4) The negotiation of the agreement:

In practice the negotiations are not conducted by the Commission itself, but by senior officials (in most cases a Director or Director General) of the responsible DGs (e.g., DG I for commercial agreements, DG XIV for fisheries agreements) under the supervision of the Commission. In case of negotiations of particular political importance, the responsible Commissioner himself sometimes takes over the conduct of negotiations for a certain time, especially during the final phase (190). In accordance with the principle of the collective responsibility of the Commission, the Commission plenipotentiary always needs to be empowered by the Commission as a whole (191).

By virtue of Articles 113 and 228 EEC Treaty and Article 101 EAEC Treaty (not expressly under the ECSC Treaty) the Commission is the exclusive negotiator of the Community. However, in practice various negotiating techniques are used which all al-

low for the presence or even active participation of the Member States at the negotiations:

In all cases in which it is not contested by any Member State that the future agreement falls within exclusive Community competence, i.e. in a "purely Community negotiation", the Member States nevertheless do in most cases send senior officials of the responsible ministries to the negotiations which are then included as "observers" in the Community delegation. Although it is evident that these "observers", which do not interfere in the negotiations, have primarily the role of watchdogs for the Member States, they also contribute to the good functioning of the Community negotiating machinery by keeping the Member States' representatives in the responsible committees and working-groups of the Council up to date with the development of the negotiations. It also happens quite often that these "observers" are themselves members of the Article 113 Committee or a responsible Council working group (192). The Community delegations further usually consist of officials of the General Secretariat of the Council. However, the representatives of the Commission have a monopoly on the negotiations, and this puts a brake on possible centrifugal tendencies of Member States.

Things are quite different and much more complicated if a part of the subject-matters of the negotiations obviously still pertains to the competences of the Member States (e.g., the Vienna Convention on the Protection of the Ozone Layer), if the existence or the scope of a Community competence is contested by some or all members of the Council (e.g., the non-agricultural commodity agreements) or in which for political reasons the participation of the Member States is from the beginning a *conditio sine qua non* of the future agreement (e.g., the Lomé I, II, III and IV Conventions). In all these cases the technique normally used is that of a "mixed negotiation" which means that representatives of the Commission and representatives of the Member States fully participate at the same time in the negotiations.

The decision on whether the "mixed negotiation" technique is

to be used, is normally taken by the Council at the same time it adopts the negotiating mandate, although the mandate only constitutes a rough framework for the negotiations from which it is often difficult to tell which competences of the Community or the Member States it would activate (193). In a few cases, e.g., in negotiations related to the implementation of the Lomé Conventions, the use of the "mixed" technique is predetermined by the fact that a pre-existing agreement already provides for a mixed composition of the Community negotiating party in the joint organ which it sets up, such as the Council of Ministers of the Lomé Conventions (194).

In most cases, however, the choice of the negotiation technique is more or less open and, consequently, capable of giving rise to controversies between the Council and the Commission, which for obvious reasons usually advocates a "purely Community negotiation". Very often the decision of the members of the Council to participate in negotiations clearly arises more out of an existing political desire on their part than from a legal assertion of the insufficiency of a purely Community negotiation. The Commission has on several occasions contested Council decisions in favour of "mixed negotiations", in particular because experience has shown that such a decision almost invariably coincides with the subsequent decision of the Council to give as well a mixed character to the negotiated agreement and because the decision often creates a precedent as regards a subsequent renewal of the agreement or even the negotiation of similar agreements (195).

Yet, even if the Commission were to have recourse to the ECJ, the Council has in practice very good chances to carry through this negotiation technique through in the case at hand because of the length of proceedings. This was shown in the case of the International Agreement on Natural Rubber (Opinion 1/78), in which the Commission took the view that the negotiation and conclusion of the envisaged agreement came within exclusive Community competence (196): The Commission's request for an Opinion of the Court of Justice on the compatibility of the agreement with the EEC Treaty and on the compe-

tence of the Community to conclude the agreement, introduced shortly before the start of the main negotiations, had the effect of leaving open the question of the negotiating technique to be used. However, while awaiting the Opinion of the ECJ, the Council provisionally decided to use the "mixed" technique, arguing that previously followed procedures should not be reversed. As the Court did not deliver its Opinion before the end of the negotiations, the final decision on the negotiation technique was never taken by the Council. It is rather unfortunate in this regard that the reference in Article 228 to an agreement that is "envisaged" does not make it too clear at which stage of the negotiations recourse to the ECJ is possible.

The respective influence of the representatives of the Commission and the representatives of the Member States on the course of "mixed negotiations" may differ considerably from one case to another. It depends, firstly, on the degree in which the negotiations touch on subject-matters falling within Community competence and on those falling within Member States' competence, secondly, on the political interests of the Member States which are at stake, and, thirdly, in the case of multilateral negotiations in the framework of international organizations or conferences, on the form of Community participation (only as "observer" or in a higher quality) this organization allows for. The varying degrees of influence of the representatives of the Commission and those of the Member States are to some extent reflected in the composition of the negotiating delegations. Five main formulas of the composition of delegations in "mixed negotiations" have been used until now (197):

- (a) Joint delegation of the Community and the Member States presided by the Presidency of the Council:

This formula is the usual formula for bilateral "mixed" negotiations. It consists of constituting a single delegation of the Community and its Members States, which

is presided by a representative of the Member State holding the Presidency (Minister, Ambassador, expert) and composed of representatives at the appropriate level of the Commission and representatives of the Member States. The Commission has a more or less respected monopoly of the conduct of negotiations on subject-matters of Community competence. However, due to its function of President of the delegation, the representative of the Presidency of the Council is clearly in a better position under this formula to influence the negotiations than the Commission representative. This does not exclude that, depending on individual quality and experience, the Commission representative can considerably increase his impact on the conduct of negotiations.

- (b) Joint delegation of the Community and the Member States with the Commission acting as spokesman ("PROBA 20" formula"; an earlier version was called "formula of Rome" or "Roman formula"):

Also this formula, which is used for multilateral negotiations on commodities, also consists of constituting a single Community delegation composed of representatives of the Commission and of the Member States. By contrast to the formula discussed above, the Commission is "normally" the spokesman for the Community and the Member States on the basis of a common position which has been previously established within the bodies of the Council. Only if required by circumstances of a particular tactical or technical nature, the common position may be presented by the representative of the Member State holding the Presidency or by a representative of another Member State. This formula is based on an arrangement between the Commission and the Council of March 1981 which is usually referred to by "PROBA 20", the name of the document in which it is contained (198). The Commission therefore agreed to leave aside any legal or institutional ar-

guments it could deduce principally from Opinion 1/78 of the ECJ in order to insist on a "purely Community negotiation" of international agreements on raw materials. In return for this concession, the Commission obtained from the Council an assurance that these negotiations would henceforth be conducted with the aim to improve the Community's external image, to reinforce the internal cohesion of the Community and to ensure the heaviest weight to the Community within the agreements and their organs (199).

- (c) Separate delegations of the Community and of each of the Member States, the Community delegation being composed solely of Commission representatives:

Under this formula, which has been used, for instance, during the negotiations on the United Nations Convention on the Law of the Sea of 1982, the Commission is formally the only representative of the Community. However, this does not necessarily mean that its position as a negotiator is stronger than under the other formulas, because each of the Member States has its own delegation and the Commission has no means of prohibiting Member States' delegations from taking differing positions (200). This formula even encourages to some extent "centrifugal" tendencies on the side of the Member States, since none of their representatives, which usually sit very far from each other (in alphabetical order) in the conference-room), is included in the Community delegation with its more direct obligation of Community discipline and solidarity. Even if the obligation of "common action" provided for by Article 116 EEC Treaty is applicable, it is in practice very difficult to prevent infringements of this Treaty obligation. The Commission's negotiating position is particularly weak under this formula whenever the Community, in negotiations within the framework of a permanent international orga-



nization, has only the status of observer and the internal regulations of this organization does neither allow observers to present proposals and amendments nor to sit at the conference table. In these cases, the Commission can only channel its view (the "Community view") through the representatives of the Member States or, in most cases, of the Presidency, and usually it is actually the Member State holding the Presidency which acts as spokesman of the Community.

- (d) Separate delegations of the Community and of each of the Member States, the Community delegation being composed of representatives of the Commission and of the Presidency ("bicephalous formula"):

This formula has been used for several multilateral negotiations in the framework of the UN. If the regulations of an international forum allow for an active negotiating role of the Community delegation, the Commission representative usually acts as spokesman for the subject-matters falling within Community competence, and the representative of the Presidency as spokesman for the subjects pertaining to Member States' competence. The "bicephalous formula" has the disadvantages that the Member State holding the Presidency is represented twofold, and that, again, each member State has its own delegation, which may entail the problems of cohesion mentioned above.

- (e) Separate delegations of the Community and of each of the Member States, the Community delegation being composed of representatives of the Commission, of the Presidency and of the Member States ("multicephalous formula"):

This formula, which has been used, e.g., for the negotiations on the International Cocoa Agreement of 1980, consists basically of the same procedures as the previ-

ous one, but has the additional disadvantage of a double representation of all Member States. It carries the framing of the Commission representatives by Member States' representatives to the extreme.

A problem common to all these formulas of "mixed negotiations" is that of the practical difficulties to deal separately with the subject-matters within the competence of the Community and those within the competence of the Member States. Not only is it sometimes very difficult to identify the subject-matters belonging to one or the other category, but also its tempting for the representatives of the Commission and of the Member States to transgress the limits of their respective sphere of competence. It actually happens quite often that representatives of the Commission interfere in the sphere of Member States' competence, and vice versa. But even if such occasional transgressions can be avoided, the Community and the Member States nevertheless are frequently obliged to change spokesmen when the negotiation change from a subject-matter within of one sphere of competence to one of the other (201). It is evident that under these circumstances Community "mixed" conduct of negotiations may easily appear somewhat confusing, or even confused, to the negotiating partners, to the detriment of the efficiency and credibility of the presentation of the Community's position.

No matter whether the negotiation is a "mixed" or a "purely Community" one, the Commission has in any case to conduct the negotiations in consultation with the responsible committees (COREPER and specialized permanent committees) and/or working-groups of the Council. Although it is legally obliged only to do so for negotiations conducted under Article 113 EEC Treaty (common commercial policy), the Commission follows this practice also for all other kinds of negotiations in order to secure the final acceptance of the negotiation results by the Council (202). Therefore, the consultation procedure applied during the negotiation of commercial agreements is quite typical for the negotiation of agreements in general: The Commis-

sion in these cases regularly seeks the advice of the Article 113 Committee. This committee, in turn, is in permanent consultation with its specialized working-groups on particular aspects of the negotiations, and keeps the Council informed on the state of affairs. It sometimes also requests a clarification of the Council's position on particular points, which it then communicates and explains to the Commission. On the basis of the discussions in the committee, the Commission sometimes also refers to the Council for new or modified negotiating directives. Yet, this is a lengthy procedure which often tries the patience of the negotiating partners. In cases of particular importance or urgency, the Commission therefore sometimes prefers to deviate on its own responsibility from the negotiating mandate "ad referendum", i.e. with the reservation of later approval by the Council. In these cases it is of particular importance for the Commission to ascertain beforehand the attitude(s) of the Member States by consulting their representatives in the appropriate Council bodies (203).

The regular "consultation" of the Council bodies means, in fact, that the Commission negotiates with the representatives of the Member States on all aspects of the Community's position in the current negotiations with third countries. This makes it evident that the Commission is a very particular negotiator on the international stage: It actually plays the role of a "double negotiator" which has permanently to negotiate with two sides, that of the third countries and that of the Member States.

It should be recalled, that during the negotiating process, the Commission also regularly informs the appropriate committees of the EP on the progress of the negotiations, by means of oral statements of officials at committee meetings (see sub-chapter 2.3.).

(5) The initialling of the text of the agreement:

After the negotiating delegations have agreed on the text of

the envisaged agreement, this text is initialled by the negotiators. This procedure is not provided for by the EC Treaties, but it is a current practice in international relations. On the Community side, it is usually the responsible representative of the Commission alone which initials, in accordance with the the negotiating monopoly of the Commission under the Treaties. However, if the "mixed negotiation" technique has been used, the Commission representative may also be joined by representatives of the Member States. It should be noted that the initialling is only an act of authentication of the text of the agreement and does not yet bind the Community under international law (204).

The initialled text of the agreement is then officially forwarded by the Commission to the Council, in most cases already together with the formal proposal to conclude the agreement on behalf of the Community.

(6) The signature of the agreement:

The signature of the agreement, unlike the initialling, according to international negotiating practice, is already part of the conclusion procedure of the agreement. Since Article 228 EEC Treaty provides that agreements shall be concluded by the Council, it is under the EEC Treaty the Council as well which is competent for the signature of the agreement (205). Since the initialling represents only an authentication of the text of the envisaged agreement, the Council is free to request the Commission to renegotiate certain points of the agreement even after the initialling. However, this has rarely happened: Due to the regular consultation of the responsible committees and working-groups of the Council, the Commission has normally secured the approval of the Member States (or, at least, of a majority of them) of the text of the agreement before initialling it. Therefore, the normal course of events is that the text of the agreement is accepted by the Council. The Council then acquaints the appropriate committees of the EP with the content of the text, by way of a written memorandum

or, upon request, even by oral statements at a "Luns-Westerterp meeting" (see sub-chapter 2.3.). The Council approves the agreement by a decision *sui generis* which at the same time authorizes its President to designate and to empower the persons which sign the agreement on behalf of the Council. The President of the Council designates these persons in taking into consideration the political significance of the agreement: Agreements of major importance (e.g., association agreements) are usually signed by the President of the Council himself and the responsible Commissioner or even the President of the Commission. Agreements of a primarily technical nature (e.g., agreements negotiated in the framework of the GATT) are commonly signed by the senior Commission official who has negotiated the agreement. In case of a "mixed agreement" it is usage that a representative of the Commission signs together with representatives of all the Member States which will participate in that agreement (206).

The significance of the signature varies, depending on whether the "solemn procedure" ("procédure solennelle") or the "simplified procedure" ("procédure simplifiée") is applied for the conclusion of the agreement:

Under the "solemn procedure", which is applied in all cases in which the EP is formally consulted before the final conclusion of the agreement (see below) and as well whenever a "mixed agreement" needs to be formally ratified by the Member States, the Council's decision to proceed to signature expressly reserves the formal conclusion to a later decision of approval ("réserve d'approbation"). In case of the "solemn procedure", therefore, the signature only establishes the definitive text of the agreement and does not yet give rise to an obligation under international law to perform the agreement. It should be noted, however, that the signature has also under these circumstances already a considerable political importance.

Under the "simplified procedure", which is applied in all other cases, the Council's decision to proceed to signature expressly states that the signature has the effect to engage

("l'effet d'engager") the Community, i.e. to bind it under international law. In this case, the signature of the agreement is at the same time its conclusion (207).

In all cases in which the EP is formally consulted ("solemn procedure"), the Council officially forwards the signed agreement to the EP.

(7) The Consultation of the EP:

The Parliament gives its opinion (by simple majority) or, if necessary, its assent (by absolute majority of its component Members) in form of a "legislative resolution" which is based on a "legislative report" of the appropriate committee on the agreement in question. The EP then forwards both texts to Council and Commission.

It should be noted that this stage of the procedure is much more complex than its national counterparts since the Community system provides for at least four different formulas of Parliamentary participation in the conclusion of agreements (for details see sub-chapter 2.3.):

- co-decision by "assent" under Article 238 EEC Treaty (association agreements),
- obligatory consultation under Article 235 EEC Treaty (agreements for matters not expressly provided in the Treaty, e.g., cooperation agreements) and in all cases in which Community competence to conclude an agreement derives from a Treaty provision which requires EP to be consulted (e.g., agreements related to common transport policy),
- consultation under the "Luns-Westerterp" procedure (trade agreements),
- cooperation procedure under new Articles 130n and 130q(2) EEC Treaty (agreements on research, technological development and demonstration).

At least one of these procedures, the cooperation procedure introduced by the SEA (new Article 149(2) EEC Treaty), clearly does not fit to international agreements: Providing for a second reading, this procedure confers on the EP the possibi-

lity of proposing amendments to the Council's position or of rejecting this position. However, designed for legislative acts which are amended in the course of the various readings by the institutions, this awkward and lengthy procedure is highly unpractical and inefficient as regards the consultation of the EP on a signed (and therefore already definitively established) text of an agreement.

(8) The conclusion of the agreement:

After having received the EP's opinion or, if necessary, assent, the Council under the "solemn procedure" concludes the agreement by a Council regulation or a decision *sui generis* which definitively approves the text of the signed agreement and authorizes the President of the Council to notify the concerned third State(s) or the depositary institution of this decision (208). In case of a "mixed agreement", the conclusion by the Community usually takes only place after the agreement has been ratified by all participating Member States, a procedure which the Commission is trying to replace by a simultaneous conclusion and ratification by the Community and the Member States (209). As we have pointed out above, a 'purely' Community agreement is already concluded by way of the signature in all cases in which the "simplified procedure" is applied. The Council decision to conclude the agreement, the text of the agreement and the date of its entry into force are published by the General Secretariat of the Council in the Official Journal.

The procedures described above make it evident that the Community has been able to develop a quite original practice for the negotiation and the conclusion of international agreements, which has resulted from the constraints imposed by the division of competence between the Community and the Member States and from the different roles the Treaties have conferred upon institutions which are openly competing with each other. Strongly imprinted by these constraints, the entire process of negotiation and conclusion is

not only rather complex, but also quite laborious, in particular for the Commission, which has to negotiate regularly with both the third State(s) and the Member States.

The lack of a more simplified and more clearly shaped procedure for the negotiation of agreements has three major disadvantages:

Firstly, it makes it sometimes very difficult or even impossible for the Community to respect certain deadlines. In the case of the renewal of commercial agreements, for example, the heaviness of its procedures has already several times prevented the Community from concluding a new agreement before the expiry date of the existing one and it had to proceed to an exchange of letters with the third State(s) concerned in order to maintain *de jure* the provisions of the earlier agreement in force (210). If several agreements have to be negotiated rather quickly and more or less at the same time, as has been the case with the cooperation agreements concluded with the Eastern European countries in 1989 and 1990, the entire system comes under stress and the EP, for instance, is forced "*de courir après les faits*" (211).

The second disadvantage is that the endless internal negotiations of the Community (between the institutions and between the Commission and the Member States) make it extremely difficult to keep texts and proceedings secret. The negotiating mandate, in particular, very often gets known untimely, and this considerably reduces the Commission's margin of manoeuvre in the negotiations (212).

Thirdly, complex and heavy procedures do certainly not serve the Community's external image in general and the credibility of its position during the negotiations in particular. This applies not only to the often confused practice in "mixed" negotiation, but also to the conclusion procedure: A case like the rejection by the EP of the three protocols to the EEC-Israel association agreement in March 1988 after these had already been signed by the Council, brings the Community in a rather delicate situation on the international stage (213). Under current Community practice, nothing can prevent such incidents from happening again.



### 3.2. The participation of the Community in the work of international organizations

Regarding Community participation in international organizations, one has to distinguish between the question of the status of the Community within the framework of these organizations, and the question of the form of Community representation, i.e., the question of which institution or which person is entitled to speak for the Community in these organizations.

In respect to the problem of the status in international organizations, it has already been mentioned (see sub-chapter 2.1.) that the Community here faces the difficulty that in accordance with traditional international law most international organizations only accommodate nation states as members. Therefore, the Community, if it is admitted at all, is usually granted only the status of "observer" in international organizations, which normally excludes the right to vote, sometimes the right to present proposals and amendments and in a few cases even the right to speak.

Pursuant to Article 229 EEC Treaty, Article 199 EAEC Treaty and (limited to UN and OECD) Article 93 ECSC Treaty it is for the Commission to ensure on behalf of the Community the maintenance of all appropriate relations with international organizations. For this reason it is also primarily the Commission which has to deal with the problem of the Community's status in international organizations. The Commission, in fact, is constantly trying to secure and, whenever possible, also to broaden the Community's rights of participation in international organizations, e.g., by insisting on the inclusion of a specific clause on the participation of the Community (or any organization of regional economic integration) in conventions setting up international organizations. Such an "EEC clause", as it is commonly called, may either allow for direct participation of the Community or for its ulterior adherence, depending on whether the Community has or will have competences in the areas covered by the convention (214). The corresponding efforts of the Commission, however, are often not readily supported

by the Council and its members: The Member States are in general reticent about the Community having a membership status in an international organization because they fear that this would increase the Commission's influence on the conduct of certain international affairs and limit their freedom of manoeuvre by imposing greater coordination among them. This reticence is particularly strong as regards the inclusion of the "EEC clause" in a convention for which the Community is not yet competent, with the aim of allowing the Community to adhere to the convention later (215). The reason for this is certainly that some Member States regard such a clause on later Community participation as a dangerous anticipation of a future increase of the Community's external competences.

In practice, the Commission often secures at least a certain degree of Community participation in international organizations by means of establishing "working arrangements" with the organizations in question, which provide for consultations, exchange of information or particular forms of participation in meetings (216). According to the Luxembourg Agreement of 29 January 1966, the Commission has to consult the Council on the advisability, the procedure for, and the nature of any links it might establish with international organizations (217). However, this does not mean that the Commission needs an authorization or a "mandate" of the Council for such links (218). In practice, "consultation" of the Council usually means only that the appropriate bodies of the Council are kept informed by the Commission on the arrangements it intends to establish and on the consultations it is holding in this regard with the respective organization. Since the intended arrangements cannot detract from the full legal membership of the Member States in international organization, the Member States usually do not have disagreements with the Commission on matters of this kind. After the Commission has agreed with the international organization on the terms of such an arrangement, it formally proposes to that organization a series of procedures for future cooperation in a letter signed by a Member of the Commission or the responsible Director General. The concerned organization then replies by letter in which it formally accepts these proposals.

A good example for such an arrangement is the exchange of letters between the Commission and the European Civil Aviation Conference (ECAC) of 1980: On 14 January 1980, Roy Denman, Director General, sent a letter to the President of the ECAC, which contained, inter alia, the following cooperation proposals:

"The Commission and ECAC will exchange all pertinent and useful information and documentation in the field of air transport (...).

ECAC extends a standing invitation to the Commission to participate as observer in all Plenary Sessions and meetings of ECAC Standing Committees.

(...)

The Commission will invite ECAC representatives, where appropriate and in accordance with normal Commission practice, to participate as observers in meetings with experts at any level convened by the Commission and dealing with civil aviation matters." (219).

On 22 January 1980 Eric Willoch, President of the ECAC, in his reply acknowledged the receipt of this letter and confirmed that these proposals were acceptable to ECAC (220). The initiative for such an exchange of letters can also come from an interested international organization: In this case it would be the Commission which, after information of the Council, would confirm the terms of cooperation which have been agreed. This procedure was followed, for instance, in the case of the second exchange of letters between the Council of Europe and the European Community on the consolidation and intensification of cooperation in 1987 (221).

The form of Community representation in international organizations depends primarily on two factors, an "external" and "internal" one: on the one hand, externally to the Community, the status which the Community has acquired de jure or de facto in the respective organization, and, on the other hand internally, the respective arrangement between the Member States and the Commission as regards the role of spokesman for the Community. Not only the "external" status and the corresponding rights of participation of the Community vary from one organization to the other, but

also the "internal" arrangements as regards the role of spokesman: Although under Article 229 EEC Treaty the Commission has the responsibility to ensure the maintenance of all appropriate relations with international organizations, the Treaties do not prescribe an exclusive competence of the Commission for determining the representation of the EC in international organizations. Generally acknowledged is only the right of the Commission to speak on behalf of the Community in all cases in which international organizations deal with subject-matters falling within exclusive Community competence (222). Since most international organizations also deal with subjects still pertaining to the competences of the Member States, the problem of which institution or person is entitled to speak for the Community, can - like the problem of the conduct of "mixed" negotiations - in practice only be resolved by specific arrangements between the Commission, the Council and the Member States. As these arrangements also have to take into account the status of the Community in the respective international organization, which may or may not allow the Commission to act as the spokesman of the Community in the various meetings, it is not surprising that there is no unique or typical "system" of Community representation, but only a broad variety of pragmatic formulas. The examples of Community participation in the work of the United Nations General Assembly (UNGA), of the GATT and of the OECD may illustrate how the problem of representation is solved in practice:

Like the COMECON, the OAU and the League of Arab States, the Community is formally admitted in the UNGA only as an "observer". However, the form of Community representation is somewhat more sophisticated than that of the other "observers": The Community is officially represented in the UNGA not only by the Head of the Commission's delegation, but also by the Permanent Representative to the UN of the Community Member State holding the Presidency of the Council. In accordance with the "internal" Community arrangement on this "bicephalous" formula of representation, the role of spokesman for the Community is performed, depending on circumstances, either by the representative of the Presidency or that of the Commission. In the latter case, it is understood that the Commission representative should speak only where the entire subject-

matter is covered by exclusive Community competence. In practice this formula, which is also used in several other international organizations, increases the Community's possibilities of active participation in the UNGA: As an "observer", the Commission has no right to vote in the UNGA and is only entitled to take the floor in the meetings of the committees and expert groups of the UNGA, and not, in any case, in the sessions of the General Assembly itself. Due to its rights of full membership, the Member State holding the Presidency can also speak on behalf of the Community before the General Assembly and thereby compensate for the restrictions imposed on the Commission's delegation. In addition, the formula also has the advantage that it allows for a flexible handling of the representation problem in all cases in which bodies of the UNGA, like in particular the Second (Economic and Financial) Committee, deal with subject-matters of Community and of the Member States competence in such a mixture that it is impossible to make a clear distinction in every case (223). It should be noted, however, that some still existing reticences from the side of third countries and an often restrictive interpretation of the Commission's right to speak does considerably limit the number of occasions where the Commission representative is allowed to speak on behalf of the Community. During the 43rd General Assembly (1988/89), for instance, only 4 out of 105 Community statements were delivered by the Commission representative (224).

The form of representation is quite different in the framework of the GATT. Due to the Community's exclusive competence for matters of trade policy and to the very pragmatic attitude this organization has adopted in respect to the problem of Community participation in GATT proceedings, the Community is actually almost fully integrated into the legal and institutional GATT arrangements, without detracting from the full membership status of the Community Member States as GATT "Contracting Parties" (225). In practice, this form of Community representation, which has not been formally regulated, works as follows: In most GATT bodies, particularly in the various Multilateral Trade Negotiations Committees and in the Textiles Committee, the Community is represented by a joint delegation of the Commission and of the Member Sta-

tes. These delegations are headed by a representative of the Commission which acts as common spokesman and exercises contractual rights and fulfills obligations on behalf of the Community. Even in the case of the EC trade embargo against Argentina of 1982, it was such a joint delegation and not the Member States individually which invoked within GATT the security exceptions admissible under Article XXI GATT as justification of the embargo. It is only in the Budget Committee that the Community Member States in GATT still individually exercise rights and fulfil duties in their own name as financial contributions to GATT continue to be financed out of the national budgets (226). This does not mean, of course, that in the other GATT bodies the Commission has much freedom of manoeuvre in representing the Community's position: The general policy is agreed upon in the appropriate Council bodies (especially in the Article 113 Committee) in Brussels and the responsibility for the day-to-day conduct of negotiations within the GATT framework is left in the hands of officials of the Representations of the Member States and of the Commission to the UN in Geneva, who regularly meet to coordinate their positions (227).

Community representation is again different in the framework of the OECD: Due to a certain parallelism of the aims pursued by the OECD and the Community in respect to international economic relations, the OECD already in 1960 has formally acknowledged the Community's right to be represented in that organization, in conformity with the institutional provisions of the EC Treaties and the right of the Commission to participate in the work of OECD (228). As a result, Commission representatives enjoy the right to participate independently (i.e. not in a joint delegation with the Member States) and to speak on behalf of the Community on subjects of Community competence in all bodies of the OECD. The only exception is, again, the Budgetary Committee since, like GATT, the OECD is financed out of the national budgets. Also, the Commission is not a full member of OECD and by consequence it is not entitled to vote, which means in OECD practice that it cannot oppose itself to the adoption of a resolution by consensus. Because of the absence of joint delegations, 'intra-Community' coordination between the Commission and the Member States is even more important than in

the GATT. Therefore, the permanent Commission delegation to the OECD organizes regular coordination meetings which are presided by the representative of the EC Member State holding the Presidency and which are aimed at systematic coordination on all subjects pertaining to Community competence (229). Like in all other cases, general policy is agreed upon in the appropriate bodies of the Council.

The examples of Community representation in the UNGA, the GATT and the OECD show that the Community has developed quite pragmatic procedures in respect to the participation in the work of international organizations. There is no doubt that in many cases these procedures are not perfectly compatible with the system of the Treaties, particularly as regards the position of the Commission whose negotiating monopoly on matters of Community competence is often not respected. The Member States' reticent attitude towards Community membership in international organizations is obviously not very helpful here. However, it has to be acknowledged that the formulas which have been developed usually respond to practical requirements imposed by the statutes of the respective organizations (230). At least as long as the Community cannot acquire the rights of full membership (which must not necessarily in all cases strengthen the Community's position), there is no alternative to varying pragmatic solutions for the problem of Community participation in international organizations.

### 3.3. "Common action" of the Member States in international organizations

Article 118 of the EEC Treaty provides that the Member States shall "in respect of all matters of particular interest to the common market proceed within the framework of international organizations of an economic character only by common action" and that "the Commission shall submit to the Council, which shall act by a qualified majority, proposals concerning the scope and imple-

mentation of such common action". It is generally acknowledged that this provision is a subsidiary rule, applicable to all cases where the Community has not yet developed a common policy and/or acquired exclusive competence (231). "Common action" of the Member States therefore in a certain sense complements Community participation in the work of international organizations. The Treaty does not indicate precisely the substantive elements of "common action". In practice it can take such various forms as common negotiating positions, common voting behavior or coordination of the signature of international agreements by the Member States.

Pursuant to Article 116 EEC Treaty it is the Commission which takes the initiative for "common action" of the Member States by submitting a corresponding proposal to the Council. Like in the case of proposals concerning negotiation of agreements, this proposal, which actually often takes the form of a simple "communication", is discussed in the appropriate committees and working-groups of the Council before being officially forwarded. It sometimes happens that such a proposal is made rather late, e.g., only after diverging votes of the Member States in an international organization have shown that a formal decision for common action is necessary. In this case the Commission may first propose a provisional 'negative' common action, e.g., abstention from the signature or the ratification of a given Convention, and then try to agree with the Member States on a proposal for 'positive' common action (232). After an agreement has been reached in the appropriate committees and working groups, the Council usually adopts a proposal for "common action" by a "Community" decision *sui generis* which in most cases contains in annex directives on how to implement the decision in the framework of the respective organization. These directives are binding for the Member States (233). However, in view of the evolutive character of the discussions or negotiations in the respective international organizations, the directives for "common action" are usually drafted in rather general terms (234). This leaves a certain room for centrifugal tendencies of Member States which are difficult to prevent in practice (235).

The "common action" action procedure was applied, for instance, during the seventh session of the United Nations Conference on



Trade and Development (UNCTAD VII): On 13 February 1987 the Commission officially forwarded a communication on UNCTAD VII to the Council which contained a general political analysis and several recommendations. The content of this communication and other Commission recommendations which were kept strictly confidential were then discussed in the COREPER and the UNCTAD working group of the Council. On 22 June 1987 the Council finally adopted what was officially called the "Community position" which covered all subjects of the conference and included a number of general guidelines (236).

It is evident that on the basis of the rather general directives issued by the Council, "common action" can only be secured by frequent coordination meetings between the representatives of the Member States, both in the framework of the Council and at the seat of the respective international organization. The Commission is always represented in these meetings. It usually also acts as the leading coordinator, especially if it also enjoys an 'active' observer status within the international organization (237).

There are also forms of coordination which are not formally based on Article 116 EEC Treaty but which actually come very near to the formal "common action" procedure. In the case of the Western Economic Summit in Venice (June 1987), for instance, the Commission, for the first time, drew up two papers dealing with the international economic situation and with the problems facing the countries in sub-Saharan Africa. While not setting out a "common position" in the strict sense on these issues, they did provide guidance for the representatives of the Member States participating in the Summit (238).

Because of the usually rather general character of the Council directives and the practical difficulties to prevent Member States from infringing obligations under Article 116 EEC Treaty, formal "common action" of the Member States must be regarded as one of the weaker, though still necessary, procedures applied in Community external relations.

### 3.4. Active and passive legation

It has already been pointed out in detail that there exists no official diplomatic representation of the Community as such in third States, but only an external representation of, on the one hand, the Commission and, on the other, of the Council, i.e. the Presidency of the Council (239). The totally different nature of these two forms of external representation is reflected in completely different procedures for active legation:

If the Commission intends to establish a delegation in a third State or is solicited to do so by that State, it first enters into exploratory talks with the country concerned in order to secure the latter's formal approval and the granting of diplomatic facilities. If such exploratory talks are successful they result in an agreement on the conditions of establishment, the inviolability, the diplomatic status and other facilities related to the functioning of the delegation (240). Diplomatic privileges and immunities are usually granted either by an unilateral act (like in the case of the Commission delegations in the USA and Canada) or by a bilateral agreement which often takes the form of a formal "accord de siège" (e.g., Commission delegations in Japan and China). As a general rule, the future Commission delegation is granted de jure or de facto the diplomatic privileges and immunities provided for by the Vienna Convention on Diplomatic Relations, i.e. the same as those of diplomatic representations of States (241). The Commission then designates the future Head of Delegation and seeks formal "agrément" for this person from the host country. After the "agrément" has been given, the Commission officially nominates the Head of Delegation. His credentials are signed by the President of the Commission and by the Vice-President responsible for external relations, but he receives his political instructions usually by DG I. The Commission always seeks, but not always obtains, accreditation on the level of the Head of State, i.e. on the same level as that of ambassadors of States (see sub-chapter 2.2.). It informs the Member States through the COREPER or the RELEX working group of the Council in advance of its intention to establish a delega-

tion and to nominate a Head of Delegation, but it seeks not, in any case, formal authorization for doing so (242).

This procedure has its specific problems: It has already been mentioned (see sub-chapter 2.2.) that the role and the status of the Commission delegations, which have no legal basis under the Treaties until now, is a source of permanent friction between the Commission and the Member States. Another difficulty is that due to the lack of staff in general and of experts specialized in the geographical area concerned in particular, it often needs months and months, sometimes even years, before a Commission delegation is effectively established (243).

For obvious reasons, procedures are much more simple as regards the external representation of the Council: The Ambassadors of the Member State holding the Presidency are automatically also the official representatives of the Presidency of the Council. If a Presidency does not dispose of a diplomatic representation in a certain third country, a special formula is applied according to which the Council is represented by the Member State next in turn to hold the Presidency. As the Ambassadors of the Member States are already accredited by the respective third States, they do not need separate "agrément" and accreditation for the official representation of the Council. Eventual instructions of the Council are usually forwarded to the Ambassador concerned by the Permanent Representation to the EC of the Member State holding the Presidency (244).

Because the Commission carries much more weight in Community external relations than the Council (see sub-chapter 2.2), it is in general the Head of Delegation of the Commission, and not the Ambassador of the Member State holding the Presidency, who is regarded by third States as the representative of the Community. A striking example of this is was given in 1984, when the Community established official relations with the League of Arab States: It is the delegation of the Commission in Tunis (seat of the League), and not the embassy of the Member State holding the Presidency, which by mutual agreement was officially entrusted with the task to maintain liaison in Tunis between the Community and the League (245).

The Community's right of passive legation is exercised jointly by the Commission and the Council. By contrast to the usual practice of international organizations, the procedures applied are to a large extent similar to those of passive legation of States: Before proceeding to the establishment of a mission, the respective third State seeks the approval of Commission and Council. Since the host country is Belgium, diplomatic privileges and immunities have to be granted by the Belgian authorities. By virtue of Article 17 of the Protocol on the Privileges and Immunities of the European Communities of 1965, these privileges and immunities are granted automatically when the mission is accredited (246). After the approval of the Council and the Commission, the third State seeks formal "agrément" for the designated head of mission, which is given jointly by both institutions in the name of the "European Communities". The foreign head of mission, which is officially accredited as "Ambassador to the European Communities", presents his credentials separately to both the President of the Commission and the President of the Council (247). This double accreditation, however particular it may be, does not seem to raise any particular problem in practice.

### 3.5. "Ad hoc" contacts with third States

Apart from the more or less firmly established and institutionalized procedures dealt with above, there are numerous procedures which the Community institutions apply whenever they enter into "ad hoc" contacts with the representatives of third States or international organizations. These procedures are extremely various and it is neither possible to give a full account of them in this context nor to establish a typology. It is evident, for instance, that there is little in common between the procedures applied in respect to Commission participation in Western Economic Summits and those applied when a foreign Head of State is invited to speak before the EP.

However, it is a general characteristic of all these "ad hoc"

contacts that the Community institutions maintain a certain minimum of inter-institutional cooperation which more or less follows the patterns set by the firmly established and institutionalized procedures. In case of official visits of Members of the Commission in third countries, for instance, the Commission usually informs the Council and the Member States according to the following procedure: At least two weeks in advance, the Secretariat General of the Commission informs all Permanent Representations, principally that of the Member State holding the Presidency, and the embassy of the latter about the planned visit. This is usually done by an oral statement in the COREPER and by a subsequent telex which contains all informations available on the organization of the visit, including even such details as the numbers of the flights. These informations are later complemented by briefings on the definitive programme of the visit (248). This does not mean that the Commission seeks approval from the Council and the Member States for the intended visit, but that some kind of minimal code of good conduct is respected as regards the participation of the institutions and the Member States in all aspects of Community external relations. In a Community composed of openly competing institutions and Member States, the respect of such an unwritten code of conduct is actually a *conditio sine qua non* of the functioning of the entire EC system of foreign affairs.



**Part II**

**THE EPC SYSTEM OF FOREIGN AFFAIRS**





## Part II: THE EPC SYSTEM OF FOREIGN AFFAIRS

Preliminary remark: In contrast to the EC Treaties, the various texts on which EPC is based contain several detailed provisions regarding the interaction between EPC and the EC. In this part we will only briefly touch upon these provisions and their implementation, because the interaction between EPC and the EC will be dealt with separately in part IV.

### Chapter 4: The domain of the EPC system of foreign affairs

Unlike the European Community, EPC does not constitute a treaty-based entity under public international law and has not been conferred upon any jurisdictional competence by the Community Member States which 'founded' EPC in 1970: It evolved step by step from a number of reports, declarations and communiqués issued following several meetings of the Foreign Ministers or Heads of State or Government of the EC Member States over the last twenty years. The most important of the EPC principles and procedures laid down in these texts and a few new features have been incorporated in Title III, Article 30 of the SEA which for the first time has given a treaty basis to EPC. However, all these - compared to the EC Treaties - extremely succinct texts form hardly more than a rough framework of general rules governing EPC activity and do not confer any specific foreign affairs competences on EPC. Due to the absence of such competences, the domain of the EPC system is only defined by the general nature of EPC, by the commitments the twelve Member States have entered in respect to it and, finally, by the scope of their cooperation in EPC.

#### 4.1. The nature of EPC

The Luxembourg (or "Davignon") Report, which was established by

the Foreign Ministers of the EC Member States in 1970 and which constitutes the founding text of EPC, defines the "concertation" or "cooperation" of the Member States' Governments in the field of foreign policy as the primary aim of EPC. This cooperation, the Luxembourg Report further states, has the following objectives:

- "(a) To ensure greater mutual understanding with respect to the major issues of international politics, by exchanging information and consulting regularly;
- (b) To increase their solidarity by working for a harmonization of views, concertation of attitudes and joint action when it appears feasible and desirable." (1).

The same objectives are laid down - with almost the same words - in the Copenhagen Report of 1973 (2). The commitment of the Foreign Ministers to the objectives of EPC set out in the Luxembourg and Copenhagen Reports is explicitly renewed in the London Report of 1981 (3). In the Solemn Declaration on European Union of 1983, the Heads of State or Government of the Member States reaffirmed the objective "to strengthen and develop European Political Cooperation through the elaboration and adoption of joint positions and joint action, on the basis of intensified consultations, in the area of foreign policy" (4).

Title III, Article 30(1) of the SEA describes the objective of EPC as being that Member States "shall endeavour jointly to formulate and implement a European foreign policy". The term "European foreign policy" is not further defined in Title III, but paragraph 5 of the Preamble of the SEA lays down three principles of Member States' activity on the international stage which clearly apply to EPC:

- (1) "to aim at speaking ever increasingly with one voice and to act with consistency and solidarity in order more effectively to protect its common interests and independence";
- (2) "to display the principles of democracy and compliance with the law and with human rights to which they are attached";
- (3) to "make their own contribution to the preservation of in-

ternational peace and security in accordance with the undertaking entered into by them within the framework of the United Nations Charter".

All this sounds much more ambitious than the objectives set out in the previous texts, and Article 30(1) of the SEA has actually for the first time recognized the concept of "a European foreign policy" (5). Yet, when it comes to the means by which this ambitious, though not further defined, objective is to be pursued, the previously existing wording on the more concrete objectives of EPC reappears in the SEA as well: In Article 30(2)(a) of the SEA, the Member States undertake to inform and consult each other "so as 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". In addition, Title I, Article 3(2) of the SEA explicitly provides that the institutions and bodies responsible for EPC shall exercise their powers and jurisdiction under the conditions and for the purposes laid down not only in Title III of the SEA, but also in the documents referred to in the third paragraph of Article 1 SEA, i.e. the Luxembourg, Copenhagen and London Reports and the Solemn Declaration on European Union.

The objectives of (1) mutual information, (2) mutual consultation, (3) concertation of attitudes and (4) joint action of the EC Member States in the sphere of foreign affairs therefore thread all the constitutive texts of EPC. These objectives make it apparent that EPC constitutes by nature a structure of intergovernmental cooperation between the EC Member States which is totally different from the constitutionally integrated EC structure. This by contrast to the EC system purely intergovernmental nature is confirmed by other characteristics of EPC:

By establishing EPC, the EC Member States have not created a new organization under public international law, but have merely agreed on a set of arrangements regarding cooperation between their governments. In the SEA, these arrangements have for the first time been embodied in an international agreement. Yet, while this codification may have to some extent increased the binding

force of the arrangements (see sub-chapter 4.2.), it has not altered EPC to an international organization: An essential characteristic of international organizations, the existence of proper decision-making powers, however limited they may be, in respect of Member States or non-Member States is still missing. It is also quite significant in this context that, like the previous texts, the SEA does not provide for a own budget of EPC: The costs of functioning of EPC continue to be borne by the Member States' governments, more precisely by the Foreign Ministry of the Member State holding the Presidency (6).

In the constitutive texts of EPC the Member States have repeatedly entered engagements in respect to the objectives, the procedures and the implementation of their cooperation in the sphere of foreign policy. By contrast to the EC however, Member States have never conferred any legal competence upon EPC and have never transferred any sovereignty to EPC.

As a consequence of the fact that EPC is not an entity of its own and that it has not been endowed with specific competences, the institutions and procedures of EPC are merely means of cooperation between the Member States' governments and do not contain any elements of supranationality. There is, for instance, no institution in EPC which, like the Commission in the EC framework, has an exclusive right of initiative and is therefore in a position to compel the Member States to deal with inconvenient subjects. In EPC, Member States continue to exercise all their competences in foreign affairs by themselves. For this reason common positions and joint actions agreed on in EPC (e.g. declarations or démarches) are officially always taken in the name of "the Twelve" and never in the name or on behalf of "EPC".

Since EPC resides on the undertaking of all Member States to cooperate, decisions in EPC can, as a matter of principle, only be arrived at by consensus, never by the approval of only a majority of the "Twelve". In practice, a dissenting Member State may sometimes decide not to block the adoption of a common position or not to prevent a joint action, due to the existence of a certain 'social' pressure among the Twelve to avoid divergent positions and to act together (7). Article 30(3)(c) of the SEA even explicitly

provides that the Member States "shall, as far as possible, refrain from impeding the formation of a consensus and the joint action which this could produce". However, even in that case the decision is taken by consensus since the non-obstructive attitude taken by the dissenting Member State is actually equivalent to a silent consent.

The EPC's nature is further defined by the fact that its peculiar sphere of activity is that of foreign affairs. It is true that the constitutive texts of EPC contain no precise definition of the subject-matters of "political cooperation" and that EPC occasionally also deals with matters which fall outside of the sphere of foreign affairs strictly speaking, such as, e.g., judicial cooperation between the EC Member States (8). However, the constitutive texts of EPC clearly focus on cooperation in matters of foreign policy, and in practice EPC actually not only deals primarily with foreign policy questions, but is also almost completely monopolized by the Foreign Ministers and the diplomatic services of the EC Member States: As we will see below (chapters 5 and 6), the functioning of EPC resides on the maintenance of the procedural "acquis" of EPC by diplomats of the Member States, and decisions are usually prepared on various levels by diplomats, taken by the Foreign Ministers and implemented by Foreign Ministers or senior diplomats through diplomatic means.

This monopolization of EPC by the diplomatic machineries of the Member States imprints also the 'style' of EPC activity: The maintenance of confidentiality on EPC proceedings and in particular on divergencies between Member States is one of the basic rules of EPC and it has even been explicitly laid down in the London Report (9). Due to the traditional self-discipline of diplomats as regards relations with the public, it only rarely happens that this basic rule is violated. In addition, public statements of EPC are usually drafted very discreetly and often deprived of any more precise indication on common positions or joint actions of the Twelve. In this respect, EPC comes very near to the secret "cabinet diplomacy" of European governments during the 18th and 19th centuries.

Perfectly in line with traditional diplomatic behaviour is also the fact that in the various bodies of EPC any kind of voting is strictly avoided: If a consensus can be reached, it emerges as a result of one or several "tours de table" in which the participating diplomats explain one after the other the positions of their governments and try to agree on a common position (10).

Being conducted by diplomats for diplomats with diplomatic means and in diplomatic manner, EPC may therefore be described as an essentially diplomatic form of intergovernmental cooperation in the sphere of foreign affairs.

However, diplomatic cooperation in the framework of EPC can for at least three reasons not simply be equated with other, more traditional forms of diplomatic cooperation such as cooperation in the framework of state alliances or international organizations:

- (1) EPC is a particularly intense form of diplomatic cooperation: During the last years (1987-1990), some 150 to 200 meetings of the various EPC bodies were held annually. In addition the Ambassadors of the Twelve met more or less regularly, together with officials of the EC Commission, in third countries or at international organizations and conferences. In addition, the exchange of information on the level of the Twelve's Foreign Ministries and on that of their Embassies in third countries has more and more increased: By way of the protected "COREU" telex network, the "Twelve's" Foreign Ministries and the Commission are now exchanging some 10.000 to 12.000 confidential telegrams per year (11). Due to these very intense consultation and information exchange mechanisms, the diplomats of the Twelve have become more and more 'socialized' or even 'Europeanized', not only in respect to their working styles, but also in their perception of foreign policy matters (12).
- (2) EPC is a particularly sophisticated form of diplomatic cooperation: In order to extend the consensus-building process of EPC and to improve its capacity to meet the external

challenges, the Member States have gradually established a complex and sophisticated structure of bodies and procedures. At present, up to 25 different bodies are more or less regularly involved in the cooperation process: the EPC Secretariat, around 20 Working Groups, the Group of Correspondents, the Political Committee, the conference of Foreign Ministers ("Ministerial Meetings") and, on the highest level and outside of the EPC framework strictly speaking (see chapter 7), the European Council. Apart from the regular consultation and information exchange procedures between the Foreign Ministries and between the Embassies, the Twelve have also developed a set of procedures for "associating" the EP, crisis management mechanisms, procedures for cooperation in international fora and, most important, a considerable series of different and flexible practices as regards relations with third countries, ranging from simple "ad hoc" contacts with individual countries to "structured" dialogues with groups of State (see chapter 6).

- (3) EPC is based on the integrated system formed by the EC: EPC has not only been founded by the Member States of the EC, but also from the beginning its aim has been to establish a cooperation "in the specifically political sphere" which should correspond to "the common policies introduced or already in force" in the framework of the EC (13). In this sense, EPC has been created and developed as a complementary structure to the existing EC system. This complementing function in respect to the integrated EC structure not only explains why EPC has become such an intense and sophisticated form of intergovernmental cooperation, but is also the basis of the EPC's role and weight as an international actor: Although EPC is de jure not "carrying the luggage of the Community", the common positions and joint actions of the Twelve are actually perceived by most of the third countries as those of the EC (14). The credibility and the power of EPC in international relations rest, in fact, on the

achievements and the continuity of the EC's integration process (15).

Putting together the various characteristics of EPC mentioned above, the nature of EPC may consequently be defined as a particularly intense and sophisticated form of consensus-based diplomatic intergovernmental cooperation which is based on and complementary to the integrated system of the EC.

#### 4.2. The commitments entered by the Twelve

Due to the absence of a supranational constitutional framework like that of the EC, the intergovernmental cooperation structure of EPC exclusively rests on a set of commitments the twelve EC Member States have entered in respect to that cooperation. In Title III of the SEA ("Treaty provisions on European Cooperation in the sphere of foreign policy") the commitments of the EC Member States in respect to EPC have been put on a treaty basis for the first time. Article 30(1) SEA explicitly states that the "High Contracting Parties" are "members of the European Community", therewith underlining that these commitments are entered by the EC Member States. The respective provisions can be divided into four basic commitments:

##### A. The commitment to the aim of a European foreign policy:

- to "endeavour jointly to formulate and implement a European foreign policy" (Article 30(1) SEA).

##### B. The commitment to prior information and consultation:

- to "inform and consult each other on any foreign policy matters of general interest so as to ensure that their combined influence is exercised as effectively as possible through coordination, the convergence of their positions and the implementa-



tion of joint action" (Article 30(2)(a) SEA);

- to consult each other before deciding "on their final position" (Article 30(2)(b) SEA).

C. The commitment to develop common positions:

- to "ensure that common principles and objectives are gradually developed and defined" in order to increase the "capacity for joint action" (second sub-paragraph of Article 30(2)(b) SEA);
- to "endeavour to adopt common positions on the subjects covered by this Title" in international institutions and at international conferences (Article 30(7)(a) SEA).

D. The commitment to cohesion and solidarity:

- to take "full account of the positions of the other partners" and to "give due consideration to the desirability of adopting and implementing common European positions" in adopting national positions and national measures (first sub-paragraph of Article 30(2)(b));
- to accept that "the determination of common positions" constitutes "a point of reference" for national policies (third sub-paragraph of Article 30(2)(c) SEA);
- to "endeavour to avoid any action or position which impairs their effectiveness as a cohesive force in international relations or within international organizations" (Article 30(2)(d) SEA);
- to refrain, "as far as possible", from "impeding the formation of a consensus and the joint action which this could produce" in order to "ensure the swift adoption of common positions and the implementation of joint action" (Article 30(3)(c) SEA);
- to "take full account of positions agreed in European Political Cooperation" when participating in international institutions and at international conferences in which not all the High Contracting Parties participate (Article 30(7)(b) SEA).

These commitments were already contained in the previous consti-

tutive texts of EPC, i.e. in the Luxembourg, Copenhagen and London Reports and in the Solemn Declaration of Stuttgart. The only major innovation is the wording used in respect to the first and most general commitment: Article 30(1) SEA has for the first time recognized the concept of a "European foreign policy". In the previous texts the Member States had only committed themselves to "cooperation" or "coordination" in the field of foreign policy, and the most 'advanced' term used had been that of a "coordinated foreign policy" in the Solemn Declaration on European Union of 1983 (16). However, the significance of this new wording should not be overestimated: The notion of a "European foreign policy", which is not further defined in the SEA, is at least as vague as it is ambitious, and in the negotiations on the SEA the more committing term "common foreign policy", proposed by Germany and Italy, was at the end deliberately avoided (17).

It is evident that the strength of EPC as an international actor largely depends on the extent in which the commitments of the Member States laid down in the SEA are binding and/or (at least) respected by the Member States. Because of the particular importance of these commitments in an intergovernmental structure like EPC, we will deal more in detail with both the problem of (a) their binding force and that of (b) their respect by the Member States:

(a) The binding force of the commitments

Before the entry into force of the SEA, the commitments of the EC Member States in EPC were purely political commitments in form of intergovernmental arrangements on a certain code of conduct in EPC. The fact that this code of conduct, when still lacking a legal basis, was already strong enough to render possible the development of most of EPC's present "acquis", shows that the political binding force of the Member States commitments is considerable (18). As early as 1977 the Belgian Foreign Minister Henry Simonet felt himself in a position to state before the EP that in EPC "a kind of unwritten law has developed among the Member States. There are no penalties attached, of course, but there is ta-

cit recognition of a rule which may be broken from time to time but which nevertheless exists" (19).

Title III of the SEA has given a legal status to the commitments of the Twelve in EPC. However, although they are now codified in an international agreement, the strength of these obligations is considerably attenuated by their wording (20). The respective provisions, which we have cited above, are in fact a striking collection of vague terms and reservations, such as "to endeavour", "general interest", "convergence of positions", "as effectively as possible", "to increase", "to take full account of", "due consideration", "desirability", "point of reference" and "as far as possible". Any commitment to pursue unconditionally certain objectives or to abstain definitively from certain kinds of national actions is obviously avoided. The rather noncommittal wording used in Title III Sea becomes particularly apparent if it is compared with the stringency of Article 5 EEC Treaty which stipulates that Member States "shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty" and "abstain from any measure which could jeopardize the attainment of the objectives of this Treaty". It may also be recalled here (see General introduction) that pursuant to Article 31 SEA, EPC provisions are excluded from review by the ECJ which is a clear evidence of the Member States aversion to any 'judicialization' and judicial 'communitarization' of EPC proceedings.

Because of the noncommittal character of the SEA provisions, it has been argued that the commitments entered by the EC Member States in Title III are actually nothing more than declarations of intention and, as a result, do not create any obligations for the "High Contracting Parties" (21). However, this assessment underestimates both the legal and the political character of those commitments:

It has certainly to be acknowledged that the obligations of the EC Member States laid down in Title III SEA are defined with such a lack of precision that in practice it would be almost impossible to establish an infringement of those obligations (22). Yet, it has rightly been observed that many important international agree-

ments, which have shaped international relations, contain provisions with a similar dubious legal value, and that even clauses as general as those envisaged in Title III SEA limit, at least formally, the freedom of action of the parties and create the obligation to act in good faith (23). There can be no doubt, that the commitments of the SEA's High Contracting Parties, however vague they may be, have in principle the same legal status and the same legal binding force as, for example, the obligations laid down for the parties under the North Atlantic Treaty or under GATT. However, Title III does not provide for any enforcement mechanisms, and for political reasons it is difficult to imagine that in case of an infringement of the commitments laid down in Title III one or several of the Twelve may have recourse to sanctions provided for under general public international law.

From a political point of view even such a vague commitment as that "to endeavour jointly to formulate and implement a European Foreign Policy" (Article 30(1) SEA) is a rather strong one since it recognizes in form of a treaty provision, i.e. in the most solemn and committing form possible in international relations, a common objective of the EC Member States (24). It is true, the wording of the commitments laid down in Title III SEA leaves an extremely great margin of discretion to the SEA's parties. Yet, because of the political significance of a now treaty-based code of conduct in EPC, the political costs even of violating only the 'spirit' of this code are now higher than in the pre-SEA era. In this sense, the SEA has also increased to some extent the already existing political binding force of this code of conduct.

On the basis of the previous one may conclude that due to the extremely vague character of the obligations laid down and to the lack of efficient legal enforcement mechanisms in EPC, the political binding force of the commitments entered by the EC Member States in EPC certainly by far prevails over their legal binding force.

#### (b) The respect of the commitments by the Twelve

The fact that the binding force of the commitments entered by

the EC Member States in EPC is primarily of a political nature means that the respect of those commitments depends largely on the political will of each of the Twelve to honour the obligations. This political will inevitably oscillates in function of the balance of advantages and disadvantages as perceived from the point of view of national interest.

(1) The advantage of collective diplomacy:

It is evident that the collective political weight of the Twelve in international relations is by far superior to that of which each of them has individually. This is not only true in relations with individual third countries, but also as regards multilateral fora, in which today an increasing number of important international questions are treated. EPC group diplomacy prevents the marginalization of individual Member States and reduces the possibility of international bargaining processes (e.g., among the superpowers or in the UN framework) producing outcomes which adversely affect the EC Member States. In addition, EPC has opened to the Twelve the possibility of a group-to-group inter-regional diplomacy (e.g., in relations with the ASEAN countries and the League of Arab States) which is becoming more and more important in international relations (25).

(2) The advantage of political representation and instrumentalization of the EC:

As a complementary structure of the EC, EPC makes it possible for the EC Member States to present the political view of the EC on the international stage. This means that they can also instrumentalize, or at least try to instrumentalize, the economic strength and the international prestige of the EC for more or less common purposes, the extreme form of such instrumentalization being the use of the common commercial policy instruments of the EC for economic sanctions.

(3) The advantage of collective protection:

If challenged by a third country, a Member State can generally rely on at least some degree of support and protection from the side of its partners in EPC. If one of the Twelve is in favour of a certain political initiative which does not please some of its non-European partners, it can support this initiative inside of EPC without exposing himself alone. This possibility to 'hide itself in the group' allows Member States sometimes the luxury to have two different policies on the same subject: one inside and one outside of EPC (26).

(4) The advantage of consensus-based decision-making:

Since EPC cannot take decisions without consensus, each of the Twelve is assured that its interests and its point of view must be taken into account. Whenever a Member State deems it absolutely necessary, it can block the adoption of common position and prevent a joint action despite all pressure of its partners.

(5) The advantage of flexibility:

EPC is an extremely flexible structure. With the exception of a few areas (see sub-chapter 4.3.), the Twelve can extent EPC activity to any foreign policy question of their choice. Special meetings and contacts can be arranged discretely, rather quickly and without involving a huge bureaucracy, an advantage which is particularly appreciated by diplomats of the Twelve (27).

(6) The advantage of marginal costs:

EPC does only involve marginal costs for holding meetings, maintaining international contacts and financing the small Secretariat. These costs are taken in charge by the Foreign Ministry of the Member State holding the Presidency and are not subjected to a budgetary procedure involving parliamentary control.

It is because of these advantages that EPC is today generally accepted by the Twelve as an important vehicle for their international influence and a major instrument of their diplomatic action.

However, from the national point of view these advantages often do not outweigh the costs of EPC, i.e. the constraints imposed by EPC on national policies. Where there arise conflicts between the "acquis politique" of EPC and areas of a more or less genuine national interest, the latter in many cases ranks higher and, as a result, entails the non-respect of the EPC's code of conduct. The extent in which this is the case is different for each of the four basic commitments mentioned above:

As regards the commitment to the aim of a "European Foreign Policy", it is evident that this commitment is of such a general nature that it is extremely difficult to ascertain whether it is actually respected or not. In principle, every common position and joint action on which the Twelve represents a step forward in respect to the fulfilment of this commitment, and, in turn, every failure of the Twelve to agree on issue of foreign policy must be regarded as a non-respect of this obligation. Having regard to the fact that the EC Member States are now (1991) preparing an Intergovernmental Conference on Political Union which will also deal with the subject of a common foreign and security policy, one may argue - with some benevolence - that the Member States are really "endeavouring" to lay the bases for a "European Foreign Policy" (28).

The commitment to prior information and consultation is usually to a large extent respected in all areas of the "acquis politique" of EPC, due to the well established regular information and consultation mechanisms (29). It is true, that there are exceptions. One of the most well-known cases in this regard is the rather unfortunate impression the British Foreign Secretary Sir Geoffrey Howe gave to his European colleagues when at the EPC meeting of 14 April 1986 he did not mention anything of the US bombing raids on Tripoli and Benghazi which the next were started from bases in the United Kingdom (30). However, the commitment to regular information and consultation of EPC partners has been generally accepted within the Foreign Ministries of the Twelve as an essential

element of their activity. In practice, this clearly limits the cases in which a Member State can surprise the others with a certain political initiative (31).

The commitment to develop common positions in view of increasing the capacity for joint action is in practice somewhat watered down by the fact that the Twelve usually reduce to the smallest common denominator such common positions and joint actions. In cases, in which special national interests are at stake, efforts to develop common positions either totally fail or result in positions and joint actions which are deprived of any political substance (32). It is well known, for instance, that France and the United Kingdom, due to their colonial past, their status as nuclear powers and their permanent membership in the UN Security Council, prefer to act outside the EPC context in matters of decolonization, security and disarmament. However, it has to be acknowledged that the effort to agree on common positions and, if necessary, joint actions is a constant one. The "reflex of coordination" among the Member States, which had already been noted by the Foreign Ministers in the Copenhagen Report, has decidedly introduced a certain European dimension, i.e. a view of the collective dimension of foreign policy matters, on all levels and in all areas of national foreign policy decision-making. It makes it that the Twelve's diplomats normally try to assimilate their in many cases diverging views and positions as far and as often as possible (33). In this sense, at least, the commitment to develop common positions is respected.

The commitment to cohesion and solidarity clearly imposes the greatest constraint on national foreign policies, and it is not surprising that the respective provisions of the SEA are drafted in a particular tortuous wording (34). It is almost a general rule in EPC that whenever there are major diverging political interests at stake cohesion and solidarity among the Twelve come more or less quickly to an end. There are a number of well-known examples for non-respect of solidarity in EPC, such as the attitudes of Italy, Ireland and Denmark during the Falkland crisis, which need not to be recalled here. Two less spectacular, but more recent examples show that the codification of the Member States' commit-



ments in the SEA has not brought up a fundamental change in this regard:

On 15 December 1989 the UNGA adopted a resolution on the cessation of all nuclear-test explosions. France and the United Kingdom, as the sole nuclear powers of the Twelve, voted against, Denmark, Greece and Ireland, as Member States with a constant stance on disarmament issues, voted in favour, and the rest of the Twelve, which felt not particularly touched by the issue, abstained (35). Such three-split votes in the UNGA, of which there were, for instance, no less than 15 out of a total of 99 votes during the first part of the forty-fourth UNGA Session (September-December 1989) in 1989, indicate the persistence of a "hard core" of divergencies which regularly breaks the ranks of the Twelve (36).

After a quick and efficient common reaction of the Twelve on the outbreak of the Gulf crisis in August 1990 - the Twelve agreed on sanctions against Iraq already the day after the invasion of Kuwait - the limits of cohesion and solidarity became again apparent during the last two weeks before the outbreak of the war in January 1991. At an EPC Ministerial Meeting on 4 January 1991, France presented to its partners a 7-point plan for the settlement of the Gulf crisis. Although the Twelve did not fully agree on this plan and preferred to invite Iraq's Foreign Minister Aziz to Luxembourg, France started diplomatic activities to pursue its initiative. On 6 January Aziz bluntly refused the Twelve's invitation which had not been connected with any substantial proposals, and on 8 January US Secretary of State Baker openly criticized the French plan because of the "linkage" made between Iraq's withdrawal from Kuwait and the convocation of an international Middle East peace conference. All this proved to be too much for EPC cohesion: In the few days left before the outbreak of the war, the Twelve's previous common attitude definitively fell into pieces, with the United Kingdom fully supporting the position of the US, Germany and Spain supporting the French plan, the Belgian Foreign Minister Eyskens rather desperately expressing the hope that no one would break ranks in this crisis, and France itself finally up to the last moment more or less openly pursuing the idea of a joint French-Arab peace initiative (37).

The conclusion to be drawn from this short analysis of the Twelve's behaviour in regard to their obligations under the EPC's code of conduct is that the commitments entered are largely respected in the routine business of EPC, i.e. the established information and consultation mechanisms, and in all questions in which no major diverging national interests are at stake. In cases in which the commitments conflict with major national interests, the latter usually prevail and Member States then make full use of the large escape clauses the intergovernmental structure of EPC provides for.

#### 4.3. The scope of EPC

The scope of EPC has never been precisely defined. The term "specifically political sphere" used in Part One of the Luxembourg Report refers with some ambiguity to both general efforts to move towards greater solidarity on all political matters in view of political union and to the attempt to cooperate in the field of international politics (38). The other parts of the Luxembourg Report, the Reports of Copenhagen and London the Solemn Declaration on European Union and Title III of the SEA generally state that the sphere of cooperation in EPC is that of "foreign policy". However, de facto and - since the entry into force of the SEA - also to some extent de jure this apparently comprehensive scope of EPC in matters of foreign policy is limited (a) by the competences of the EC, (b) by the Twelve's diverging security policy bases, and (c) by areas of foreign policy in which certain Member States claim to have exclusive interests, currently called "domaines réservés". We will deal with each of these limitations in turn:

##### (a) The scope limitations imposed by the competences of the EC

It has been shown in Chapter 1 that the EC disposes of exclusive explicit and implicit competences in the sphere of external relations. As an intergovernmental cooperation structure which has

been established outside of the framework of the EC Treaties, the scope of EPC is necessarily limited by the exclusive competences the Twelve as Member States of the EC have definitely conferred upon the EC in the sphere of external relations. This results not only from the legal obligations of the Member States under the EC Treaties, but also from the SEA which for the first time has enshrined in a single legal instrument principles and procedures of both the EC and the EPC structure:

Article 1, paragraphs 1 and 2, and Articles 3(1) and (3(2) of the SEA clearly set out separate bases and spheres of competence for the EC and EPC by referring separately to the constitutive texts and the "powers and jurisdiction" of each of the structures (39). In addition, Title III, Article 30(7)(a) stipulates that in international institutions and at international conferences, the High Contracting Parties shall endeavour to adopt common positions "on the subjects covered by this Title", i.e. the specific subjects covered by EPC. This wording makes it plain that cooperation in EPC does not extend to international institutions or conferences in the external commercial or economic policy fields falling within EC competence (40).

It is evident, however, that the fact that the Twelve are also the Member States of the EC constitutes a permanent temptation for their governments to deal in the purely intergovernmental structure of EPC also with matters falling within EC competence, outside of all obligations imposed by the supranational elements of the EC structure. As the defender of the Community's interest, the Commission therefore has always been (and has had to be) very much on its guard against interferences of the Twelve in matters of Community competence: For a long time the primary role of the Commission's representatives in EPC, as seen by a privileged participant in Community decision-making, has been "to act as kind of traffic-policeman, so as to held up his hand and to say 'Stop! You are getting into very dangerous territory. This is being dealt within the Community.'" (41). Yet, there are often cases in which subject-matters dealt within EPC are so closely related to subject-matters of Community competence that the respective problems can only be dealt with on the basis of a very close interaction

between both structures which may from time to time efface to some extent the boundaries between EPC and EC activity (42).

(b) The scope limitations imposed by the Twelve's diverging security policy bases

The security policies of the Twelve present a picture of extreme diversity and fragmentation. The most particular case is that of Ireland which since the establishment of the new Irish State in 1922 pursues a policy of armed military neutrality. The original reason for Irish military neutrality, the aim of the young Irish State to emancipate itself from the political domination by the United Kingdom, seems to be rather obsolete today. However, public support for neutrality, which by many is seen as a moral issue, is still very strong in Ireland, and the political parties until now have shown little willingness to challenge popular sentiment (43). Therefore, Ireland still is neither a member of NATO nor of WEU and pursues a very independent policy on security and disarmament issues.

With the exception of Ireland, every EC Member State is a member of NATO and, with the additional exceptions of Denmark and Greece, also a member of WEU. Yet, even inside of the alliances they all have different priorities and different perceptions as regards security. The resulting diverging positions in security matters are well-known and only the most important of them may be briefly recalled here: Denmark has strong Nordic loyalties and a particular stance on disarmament issues; for France a considerable degree of national independence in security matters is still a priority objective and it continues to form no part of NATO's military structures; Germany has a particular interest in the security relationship with the US, but also shows a certain sympathy for the development of future "European" security options, particularly in cooperation with France; orientating its foreign policy towards the threat posed by Turkey, Greece has a military threat perception which greatly differs from that of its partners; Spain and, to a lesser extent, Italy, favour "European" security options as a counterweight to the political constraints of NATO membership; the

Netherlands pursue a decidedly pro-disarmament policy in NATO and have no particular sympathy for a "European" defence policy; the United Kingdom has the strongest Atlanticist orientation of all the Twelve and loses no occasion to stress its special relationship with the US, not only in security matters; Belgium and Luxembourg, finally, normally try to reconcile the diverging attitudes of their partners (44).

As a result of this striking picture of diversity and fragmentation and, in particular, of the military constraints connected with NATO and WEU membership, the EC Member States established a distinction in EPC between political and economic aspects of security, which have inofficially always been discussed in EPC, and the military aspects, which are formally regarded as a matter for NATO and WEU (45). After heated debates during the negotiations on the SEA, this distinction has also been codified by the Twelve in Article 30(6)(a) SEA which stipulates that the High Contracting Parties "are ready to coordinate their positions more closely on the political and economic aspects of security".

In the same Article it is more generally recognized that "closer cooperation on questions of European security would contribute in an essential way to the development of a European identity in external policy matters", but the use of the conditional tense clearly shows the unwillingness of the Twelve to commit themselves in this respect. On the particular insistence of Ireland, plans to establish in the SEA an explicit link between EPC and defence cooperation in NATO and WEU had to be dropped during the negotiations. Article 30(6)(c) SEA merely states that "nothing in this Title shall impede closer cooperation in the field of security between certain of the High Contracting Parties within the framework of Western European Union or the Atlantic Alliance". This provision clearly implies that Title III SEA does not authorize in EPC the type of closer cooperation in security matters which some Member States are carrying out in the more military frameworks of WEU and NATO (46). In an answer to an oral Parliamentary Question of MEP Ephremidis, the Danish Presidency on 18 November explicitly stated that in accordance with Article 30 SEA "defence matters (...) fall outside the scope of EPC" (47).

However, the fact that the sphere of military security formally falls outside of the scope of EPC does in practice not mean that questions related to this sphere are totally excluded from discussions in EPC. Insiders of EPC inofficially admit that subjects of military security are from time to time touched upon in EPC meetings and that in these cases the representatives of Ireland do not feel obliged to leave the conference room because of Irish neutrality. The Twelve have also repeatedly made clear since the entry into force of the SEA that they interpret the concept of "political and economic aspects of security" as extending to the promotion of arms control and disarmament, subjects which evidently partly overlap with the sphere of military security (48).

In addition, a certain flexibility appears in the official statements of the EPC Presidency which even does not exclude the use of the term "military security": At the opening of the Fifth Session of the Vienna CSCE Follow-up Meeting in Vienna on 22 January 1988, for example, the German Presidency stated that "in the field of military security, the Member States of the European Community support a continuation of the process begun in Stockholm" (49). A rather liberal view in respect to the boundary between political and military aspects of security was also taken by French President-in-Office De Baucé in an answer to a Parliamentary question before the EP on 12 December 1989: De Baucé admitted that the Twelve's cooperation on security matters is governed by Article 30(6) of the SEA. He stressed, however, that the Twelve "find no difficulty in making their views known on this or that aspect of the arms reduction and arms control talks" and that "the political and military aspects of security questions are often and increasingly indissociable from each other" (50).

These few examples sufficiently show that the restriction to "political and economic aspects of security" is not interpreted too narrowly by the Twelve. Yet, the facts remain that there is no "acquis politique" of EPC in the sphere of military security policy properly speaking and that the Twelve have until now not established any kind of linkage between EPC and the military frameworks in which most of them cooperate. It does not need to be explained further that this almost complete 'absence' of EPC in the field of

military security politics is a capital shortcoming for an inter-governmental cooperation which aims at the development of a "European foreign policy".

(c) The scope limitations imposed by the "domaines réservés" of some of the Twelve

It is not without reason that the commitment the Twelve have entered in Article 30(2)(a), "to inform and consult each other", is complemented by the rather vague words "on any foreign policy matters of general interest". This provides actually an escape clause for all cases in which one of the Twelve considers a certain question or area of foreign policy as an 'exclusive hunting ground' which it wants to keep outside of the "general interest" and clear of any right of involvement on the part of other Member States.

Three basic types of such "domaines réservés" of national foreign policy activity can be discerned in EPC practice:

1. "domaines réservés" resulting from special regional interests of certain Member States, such as from the exclusive relationship France claims to have with large parts of Black Africa;
2. "domaines réservés" resulting from special responsibilities of certain Member States, such as from the special status of France and of the United Kingdom as Permanent Members of the UN Security Council;
3. "domaines réservés" resulting from conflicts between Member States, such as over Northern Ireland or Gibraltar.

The result of the existence of a "domaine réservé" is usually that EPC abstains from dealing with problems related to the respective area. Due to France's special regional interests in Africa, for instance, the Western Sahara and Chad have been to a large extent kept out of the scope of EPC (51).

Insiders of EPC have noted that during the last years the insistence on the exclusivity of "domaines réservés" has somewhat diminished in EPC: The respective Member States show a greater willingness to accept discussions on problems related to their "domaines" (52). This is certainly not only an effect of the "reflex of coordination" (53). The main reason is to be found in the fact that the holders of "domaines réservés" have come to realize over the years that the support of their EPC partners in problems related to their 'exclusive hunting grounds' can be extremely useful and in the case of the introduction of economic sanctions (like during the Falkland crisis) even absolutely necessary. However, this does not mean that the Twelve are beginning to consider the "domaines réservés" as matters of "general interest": France and the United Kingdom, for instance, are usually still only prepared to consult their EPC partners on their "domaines réservés" if in a given case the support of the others is seen to be useful (54). As a phenomenon which seems to be inevitable in a consensus-based cooperation structure, the "domaines" therefore continue to exist and to limit the scope of EPC.

It results from the above that the scope limitations imposed on EPC are in practice quite considerable, particularly in the security field. Yet, apart from these limitations, the flexible character of the EPC structure allows the Twelve to extend their cooperation really to every area of common interest. This is shown by the fact that the Twelve have also established cooperation mechanisms in EPC which clearly fall outside of the sphere of foreign policy properly speaking: In 1976 the Twelve started to cooperate in the sphere of judicial procedures in view of creating a "European Judicial Space", and in form of the so-called "Trevi Meetings" the Ministers of Justice or of the Interior (according to country) of the Twelve have met intermittently since 1976 to coordinate the Twelve's anti-terrorist policies (55). However, the results of cooperation in these fields have proved to be rather modest until now, and EPC has never lost its vocation to the "high politics" of foreign affairs.



## Chapter 5: The institutions of EPC

Title III of the SEA has not only codified the basic principles of the nature and the scope of EPC, but has also for the first time given a treaty basis to the various bodies of EPC which before only existed on the basis of informal intergovernmental arrangements. In addition, the SEA has introduced a new body in the EPC framework, the EPC Secretariat, which is the only permanent body the Twelve have set up until now. The existence of proper EPC institutions has therefore been formally acknowledged by the SEA.

### 5.1. The Presidency

Pursuant to Article 30(10)(a) SEA the Presidency of EPC is held by the "High Contracting Party" which holds the Presidency of the Council of the EC. Article 30(10)(b) SEA provides for four basic responsibilities of the Presidency. These provisions are merely a checklist of arrangements which already existed in the pre-SEA era (56). They paraphrase very briefly the more general functions the Presidency has acquired in EPC practice:

- A. the responsibility for "initiating action" in EPC;
- B. the responsibility for "coordinating" and
- C. "representing the positions of the Member States in relations with third countries" in respect of EPC activities;
- D. the responsibility for "the management of Political Cooperation", in particular for "drawing up the timetable of meetings and for convening and organizing meetings".

Three additional and more particular functions are laid down in Articles 30(4) and 30(5) SEA. They all relate to the interaction

between the EC and EPC:

- E. the function "to regularly inform the European Parliament of the foreign policy issues which are being examined within the framework of Political Cooperation" (Article 30(4) SEA);
- F. the function "to ensure that the views of the European Parliament are duly taken into consideration" (Article 30(4) SEA);
- G. the function to ensure, together with the Commission, that "consistency" between the external policies of the EC and the policies agreed in EPC "is sought and maintained" (Article 30(5) SEA).

Whereas the Presidency has always had the responsibility of "associating" the EP to EPC, the SEA for the first time has explicitly laid down the last two functions. We will come back in detail to the three EC/EPC interaction functions of the Presidency in Part IV.

Although the EC "Presidency" has obviously been the prototype of the EPC "Presidency" and although it is always the same Member State which holds the Presidency of both structures, the role of the EPC Presidency is totally different from that of its counterpart in the EC. Unlike in the Community framework, the Presidency in EPC has developed a fundamental role in the decision-making process and in the execution of policies agreed on. This role has emerged as a result of the four basic functions of the Presidency mentioned above, (a) the initiative function, (b) the coordination function, (c) the representation function and (d) the management function, each of which will be dealt with in turn:

(a) The initiative function

In EPC, the Presidency has not only - like all of the Twelve - a right to propose a discussion topic, the adoption of a common position or a joint action, but also a certain obligation to do so.

From the beginning, the Member States have actually left it to the Presidency to 'run' the entire EPC machinery. As a result, the Presidency is in practice not only expected by the Twelve to manage EPC (see below), but also to initiate discussions among the Twelve in view of adopting common positions and taking joint actions (57).

It needs a lot of skill and careful preparation from the side of the Presidency-in-Office to fulfil its initiative function successfully, because its margin of manoeuvre in this respect is rather limited by the need to secure the consent of all partners. In the interest of all, the Presidency has to avoid unrealistic or premature proposals, but at the same time it must also try to extend the limits of possible common positions and joint actions as far as possible. Before introducing a proposal, the Presidency must therefore ascertain as far as possible the priority objectives of each partner and the limits of its possible concessions. This is mainly done through bilateral contacts and cautious approaches during meetings. On the basis of these prior soundings, the Presidency then has to develop a strategy for the EPC meetings in order to push its proposals through. Since there is only a limited time available for each meeting, it is highly necessary for the Presidency not to waste it in inconclusive discussions. The Presidency therefore usually provides the Member States beforehand with a document giving a framework for the discussions. During the meetings the Presidency then must identify the usually rather small areas of possible agreement and quickly find an equitable compromise proposal or a skillful wording in view of achieving consensus for a common position or action (58).

The success of the Presidency's initiative role depends to a very large extent on the respect of the sensitivities of its EPC partners. It has happened that a Presidency has tried to force the hands of its partners by confronting them with "faits accomplis", e.g., by surprising them at Ministerial Meetings with a complete catalogue of previously not discussed proposals or by officially announcing the convening of a meeting with third countries without prior consultation. Due to the circumstances, the Presidency may in such cases even be able to carry its initiative through. How-

ever, such a "fait accompli" strategy of the Presidency always endangers the political support of the Twelve for the respective initiative, seriously damages the confidence in the Presidency, entails an enduring deterioration of the 'climate' in EPC and considerably reduces the chances for compromises in other areas (59).

(b) The coordination function

The coordination of the positions of the Member States in relations with third countries is a particularly difficult task in an intergovernmental cooperation structure which does not provide for any mechanisms to enforce cohesion and the respect of common positions. The EPC Presidency-in-Office fulfills its coordination function notably through the circulation of a maximum of information among the Twelve (during meetings and in the COREU telex network) and in organizing meetings on all matters of general interest. These coordination efforts also extend to the cooperation between the Embassies of the Twelve in third countries and to the Twelve's cooperation in international fora. They are normally particularly intense in the case of the Twelve's cooperation in the UN framework: In the preparation of and during the forty-second UNGA Session (1987/88), for instance, the Presidency organized 12 meetings of the Twelve's Permanent Representatives to the UN and 220 meetings at expert level in New York in order to coordinate the Member States' positions (60).

(c) The representation function

Common positions and joint actions agreed on in EPC require a diplomatic apparatus to implement them. Since EPC disposes of no diplomatic machinery of its own, the Twelve have conferred the task of implementing common positions and joint actions primarily on the Presidency and its national Foreign Service. Almost from the beginning, this function of representing the common positions of the Twelve on the international stage has proved to be a particularly heavy task for the Presidency, both from the political and from the administrative point of view (61).

In order to assist the Presidency in this task, the Twelve have successively set up two supporting structures: In 1977 they started to delegate a small team of officials from the Foreign Ministries of the preceding and succeeding Presidencies to the Foreign Ministry of the Member State holding the Presidency in order to help the latter in maintaining the continuity of EPC business (62). In order to increase the political weight of EPC representation in international relations, this so-called "Troika" system was later extended to contacts with third countries (63). In most of the important contacts with third States, the representative of the Presidency is now accompanied, at the same level, by representatives of the preceding and succeeding Presidencies (as well as of the Commission). The second supporting structure is the small EPC Secretariat established in 1987 which assists the Presidency in various organizational matters (see sub-chapter 5.6.). Yet, the Presidency continues to bear the full responsibility for the external representation of EPC.

If a statement has to be drafted, a diplomatic contact established, a public or private "démarche" made or simply a letter sent, it is always a representative of the Presidency, at the appropriate political or administrative level, who does it. In multilateral fora, like in the UNGA and in the CSCE framework, the Presidency acts as the spokesman of the Twelve, particularly in the opening sessions of meetings. In regular consultations with third States or groups of third States (e.g., the ASEAN countries), in which, depending on the representation formula applied, some or even all of the Twelve participate, the Presidency always speaks first on behalf of the Twelve. Finally it is also the Presidency which issues the common declarations of the Twelve and explains them to the press (64).

Although firmly established in EPC practice, the representation of the Twelve by the Presidency is one of the most problematic features of EPC. This for two reasons:

The first reason is that the six-monthly rotation of the Presidency usually entails serious discontinuities in the agenda of EPC, the quality of discussions and the implementation of common positions (65). It also practically excludes any long-term plan-

ning. All this seems to be rather inevitable because each Presidency has different priorities, different relationships with third countries, different quantitative and qualitative diplomatic capacities, different administrative structures and a different political weight on the international stage. Particularly in respect to political weight and administrative capacity, it is certainly much more difficult for the smaller Member States to represent the Twelve effectively in international relations, particularly in moments of crisis: Although there is no evidence for an obvious failure, one may think, for instance, that the Luxembourg Presidency was somewhat overcharged both politically and administratively when in January 1991 it suddenly had to cope with the heavy diplomatic challenges of the Gulf crisis in the last days before the expiry of the UN ultimatum (66).

The second reason is that the six-monthly rotation of politicians and diplomats which represent EPC in third countries and international fora evidently does not contribute to a stable image of the Twelve in international relations. The Troika system renders the rotation less abrupt, but its 'multicephalous' form of representation creates problems of cohesiveness which for their part also bring a vacillating element in the Twelve' external image.

#### (d) The management function

Since the very beginnings of EPC, the Presidency-in-Office has always been in charge of managing the entire EPC machinery. In this respect it has to fulfill at least six major tasks (67):

- (1) to prepare the various types of (internal) EPC meetings in Member States and third countries, which includes such various activities as taking initiatives for a meetings, fixing the dates and places of meetings, establishing (in consultation with all partners) the agendas of meetings and preparing papers related to the discussion topics;

- (2) to establish the records of EPC meetings, which includes

the preparation of an "oral report" after each Working Group meeting, the drafting (in collaboration with the European Correspondents) of the "relevé de conclusions" of Political Committee meetings, the establishment of records of formal (if necessary, also of informal) Ministerial Meetings, and the distribution of all these records at meetings and/or through the COREU system;

- (3) the organization of contacts with third countries, which includes the fixing of dates, places and agendas in collaboration with the respective countries and the drafting of the records of these contacts;
- (4) to watch over (with the help of the European Correspondents) the respect of the "coutumier", i.e. the established practices of EPC, which means that the Presidency has to intervene whenever one of the Twelve departs from agreed practices;
- (5) to maintain relations with the EP, which includes, inter alia, the answering of a considerable amount of oral and written Parliamentary questions, the preparation of colloquies with the EP's Political Affairs Committee and the drafting of programme and balance speeches of the President-in-Office before the EP;
- (6) to publish, where necessary, the declarations and documents officially adopted by the Twelve.

It is evident that the administrative burden resulting from all these tasks is a very considerable one for the Member State holding the Presidency. This is not only true for the smaller Foreign Ministries: During the French Presidency of 1989, even senior officials of the "Quai d'Orsay" expressed surprise at the heavy burden which EPC places on the Member State currently in charge (68). Under these circumstances it is not surprising that when holding the Presidency the smaller Member States are often

confronted with very serious organizational problems, not only in respect to the shortage of staff, but also as regards the internal structure of their Foreign Ministries (69). The small EPC Secretariat can only provide a very limited, albeit valuable, support in this regard (see sub-chapter 5.6.).

It follows from the above analysis of the Presidency's main functions in EPC, that the role of the Presidency in EPC is in practice to a limited extent similar to that of the Commission in the EC framework, particularly as regards its initiative and executive functions. In this respect, the Presidency plays clearly a much more important role in EPC than its counterpart in the EC framework, and there is no doubt that through the convening of meetings, the setting of agendas and the preparation of documents, the EPC Presidency is in a position to influence the orientation of discussions and the adoption of common positions (70). However, like in the EC, the Presidency is also in the EPC structure almost totally dependent on the positions taken by the other Member States. These do not only more often than not disagree among each other, but also continue to speak on their own behalf on the international stage whenever they deem it necessary. This considerably weakens both the Presidency's internal decision-making role and its external image as representative of the Twelve. Like the discontinuities caused by the six-monthly rotation (see above), this weakness is profoundly rooted in the purely intergovernmental nature of EPC.

## 5.2. The Ministerial Meetings

The creation of the European Council has deprived the Twelve's Foreign Ministers of their previous status as highest political authority in EPC matters (see chapter 7). Nevertheless the "Foreign Ministers meeting in EPC", as the Ministers officially describe themselves when coming together in the EPC framework, continue to be the principal decision-making organ in EPC. They decide



the Twelve's positions on all major issues, and the work of the Political Committee (see below 5.3.) and of the subordinate working groups of EPC is to a large extent only destined to prepare the Foreign Ministers' meetings.

At least three different types of EPC Ministerial Meetings can be discerned in EPC practice: formal Ministerial Meetings, Gymnich-type meetings and occasional meetings in other frameworks. It should be noted that in all these meetings the Foreign Ministers are joined by at least one Member of the Commission, usually the President of the Commission:

(a) Formal (regular and extraordinary) Ministerial Meetings

Article 30(3)(a) of the SEA has codified the already existing practice that the Twelve's Foreign Ministers meet at least four times a year in formal EPC "Ministerial Meetings" (sometimes also called "Conferences of Foreign Ministers"). Each year at least two such Meetings are usually scheduled in the capital of the Member State holding the Presidency and two on the occasion of a EC General Affairs Council meeting. The dates of these "regular" meetings are fixed well in advance, which entails a certain lack of flexibility in establishing the agenda. However, whenever necessary, the Presidency after consultation of partner may arrange for additional meetings. In January 1991 no less than four of such "extraordinary" Ministerial Meetings were held because of the Gulf crisis (71). Special crisis meetings may also be convened within forty-eight hours at the request of at least three Member States (Article 30(10)(d) SEA).

It is in the formal Ministerial Meetings that decisions are usually made or formalized. Unless circumstances or time constraints force the Foreign Ministers to reach consensus already through the COREU network, they usually wait until the next Ministerial Meeting for deciding on common positions, common declarations and joint actions. In many cases, these decisions are taken on the basis of the prepara-

tory work of the Political Committee and the EPC Working Groups, and the Ministers often only settle the differences which have remained at the level of the Political Committee. The Ministers may also issue instructions to the Political Committee or to their Embassies abroad (72).

(b) Gymnich-type meetings

Since 1974, the Foreign Ministers meet twice a year for informal weekend sessions in usually rather prestigious historical accommodations remote from the capital of the Presidency. These sessions have been baptized "Gymnich-type" meetings because the first one was held in the castle of Gymnich in Germany. The key feature of this type of meetings is their highly informal character which allows the Foreign Ministers to have a comprehensive exchange of views on all foreign policy (and even EC) matters considered to be of general interest without the constraints imposed by a pre-fixed agenda, by the presence of counsellors of their Ministries and by the whole administrative apparatus which normally supports the formal Ministerial Meetings: At Gymnich-type meetings, there is no formal agenda and no official interpretation and with the exception of a the Political Director of the Presidency, the Head of the EPC Secretariat and the Secretary General of the Council (who primarily act as notetakers for the Presidency) no officials are present. At the issue of the meeting, guidelines of an operational nature which may have emerged from the meeting are summarized by the Presidency on a strictly confidential basis (73). If necessary, these guidelines are later formalized in Ministerial Meetings or through the COREU network.

(c) Occasional meetings in other frameworks

Pursuant to Article 30(3)(a) of the SEA, the Foreign Ministers "may also discuss foreign policy matters" within EPC on the occasion of meetings of the Council of the EC. This

provision has codified the long existing practice that the Ministers nearly always use the General Affairs Council meetings to discuss more or less briefly current topics of foreign affairs. Similar discussions also take place in the framework of the European Council meetings (usually at dinner the first evening) and sometimes on the occasion of the UNGA Sessions (74). Like in the case of the Gymnich type meetings, agreements reached during these occasional meetings may afterwards be formalized.

It is obvious that types (a) and (c) of ministerial meetings draw considerable advantage from the existing EC structure: The Foreign Ministers in most cases simply complement their meeting in the EC framework by one in the EPC framework. This has not only organizational advantages, but it also guarantees a frequency of at least one meeting per month. As we will show later, this close connection between the Foreign Ministers' meetings in both structures plays an important role in EC/EPC interaction (see sub-chapter 9.2.).

### 5.3. The Political Committee

Article 30(10)(c) of the SEA provides that the Political Directors of the Twelve "shall meet regularly in the Political Committee" in order to

- A. "give the necessary impetus",
- B. "maintain the continuity of European Political Cooperation"  
and
- C. "prepare the Ministers' discussions".

This brief description of the role and the of functions of the Political Committee (EPC insiders call it "POCO") is more comprehen-

sive than that contained in the London Report of 1981 which only states that the Political Committee "is responsible for directing the work of the Working Groups and for the preparation of discussions at ministerial level" (75).

The Political Committee is, in fact, far more than a simple coordination instance on the intermediate level between the Working Groups and the Ministers' meetings. Being composed of the Political Directors of the Twelve's Foreign Ministries and of the Commission, which during the meetings are normally each supported by one or two senior officials, the Political Committee regroups those of the Member State's senior diplomats which because of their function in the national diplomatic machineries are in the best position to oversee the whole of the Twelve's foreign policy activities. This function is not exactly the same in all of the Twelve Foreign Ministries (in some the Political Director is formally on an equal footing with colleagues of the same rank which head, for example, responsible, the economic section), but the Political Director has always at least a general political authority over his colleagues. Due to the Political Directors' comprehensive expertise and to their direct impact on the work of their national Foreign Ministries, the Political Committee has become the central body in EPC decision-making:

Regularly discussing all foreign policy matters of general interest, the Committee ascertains the areas in which the Twelve can agree on common positions and joint actions. In respect to these areas, it gives mandates to the Working Groups to report on matters of current interest, and, whenever necessary, establishes new Working Groups for specific issues. On the basis of the results obtained in the Working Groups and of the regular exchange of views between the Political Directors themselves, the Political Committee works out all the relevant details of common positions, joint actions and other forms of cooperation between the Twelve. In order to allow a swift adoption of common positions and declarations during the Ministerial Meetings (or even European Council meetings), the Committee tries to reach compromises on all relevant matters before the Foreign Ministers meet. On the basis of the compromises reached and the remaining differences, the Commit-

tee prepares the agenda of the Ministerial Meetings and provides the Ministers with reports on topical questions. Last but not least, the Committee also provides a framework for an often very frank exchange of views which allows the Political Directors to familiarize themselves with the different national viewpoints and to air particularly confidential informations (76).

It is evident that in order to fulfill the various tasks describe above the Political Committee needs to meet quite often: In its regular meetings the Committee meets at least once a month (except in August) for a day and a half in the capital of the Member State holding the Presidency or in Brussels. During these meetings, dinner and lunch are traditionally used as occasions for intense informal consultations. The Political Directors also get together during the European Council meetings to prepare the draft declarations on international problems usually contained in the European Council communiqués. In addition, the Committee meets on the eve of the opening of the UNGA Sessions in order to finalize the opening speech to be delivered in the name of the Twelve by the Foreign Minister of the Member State holding the Presidency. Occasionally, meetings are also held before or during international conferences attended by the Twelve (77). Like in the case of Ministerial Meetings, crisis meetings of the Political Committee may be convened within forty-eight hours at the request of at least three Member States. Since meetings often extend to more than one day, the Political Directors of the Twelve meet at least on 30 days during an average year (78). Due to the frequency of meetings and a rather informal atmosphere the Political Committee has developed a spirit of cohesion and of common purpose which goes even beyond of the "esprit de corps" of the COREPER. This and the high level of discussions explain why from the point of view of an insider of EPC the Political Committee has been described as an "intelligent fraternity" (79).

In respect to both its task of high-level compromise search in view of the decisions to be taken by the Ministers and the "esprit de corps" of its members, the Political Committee can be seen as an EPC counterpart to the COREPER in the EC framework. Its institutional role and its proceedings, however, are much less formali-

zed than those of the COREPER. It should also be noted that the link between political decision-making on the one hand, and administrative implementation on the other, is much closer and more dynamic in the case of the Political Committee because of the direct impact the Political Directors have on the work of their Foreign Ministries.

#### 5.4. The European Correspondents' Group

In each of the Twelve's Foreign Ministries and in the Commission one official, called "European Correspondent", is specifically in charge of all organizational aspects related to EPC. The grade of the European Correspondents, who are direct assistants of the Political Directors, varies from Ministry to Ministry. Today they are in most cases rather junior officials (e.g., on the First Secretary level), whereas in the past even Ambassadors had been appointed for this post (80). Together, these officials constitute the "European Correspondents' Group" which pursuant to Article 30(10)(e) of the SEA is responsible, under the direction of the Political Committee,

- A. "for monitoring the implementation of European Political Cooperation" and
- B. "for studying general organizational problems".

These provisions, although destined to describe existing practices, is not comprehensible without prior acquaintance with these.

The task of "monitoring" the implementation of EPC means in practice that the European Correspondents are responsible for the smooth functioning of EPC mechanisms and procedures in their own services. As the coordinators of EPC inside of the Twelve's Foreign Ministries and of the Commission, they are in charge of managing the COREU network, watching over the respect of EPC procedures by their services and ensuring that common declarations,

meeting agendas, instructions for missions in third countries and other EPC texts are approved or drafted in time. Since the COREU network is open 24 hours a day, the Correspondents must be reachable at every time (81).

As regards the second task of the European Correspondents, the terms "studying general organizational problems" used in Article 30(10)(e) of the SEA are somewhat misleading. It is true that from time to time the Political Committee asks the Correspondents to study certain organizational problems in view of improving the cooperation mechanisms of EPC. In practice, however, the Correspondents concrete organizational tasks are much more important: In addition to their role as EPC coordinators inside their services, the European Correspondents also maintain a permanent liaison with their counterparts in the other Foreign Ministries in order to resolve (by telephone or COREU telex) all problems related to the procedures of EPC, the functioning of the COREU network and the scheduling of meetings. They also meet at least once a month, in good time before the Political Committee, to discuss organizational problems and prepare the Political Director's meetings. Always being present at Political Committee meetings, the Correspondents, finally, have as well the task to establish with the help of the EPC Secretariat and under the responsibility of the Presidency the "relevé des conclusions" of the Political Directors' discussions (82).

### 5.5. The Working Groups

It has already been mentioned that the Political Committee may set up Working Groups for studying specific issues of EPC (83). Until now, around 20 of such Working Groups have been established. The exact number of these Groups and the areas they cover are confidential. However, over the years several Presidencies have admitted the existence of Working Groups on certain topical issues of the Twelve's foreign affairs, such as on the Middle East, Eastern Europe, Latin America, Asia, Southern Africa, cooperation

in the United Nations, cooperation in the CSCE (full title "CSCE/-CDE and other aspects of the Final Act of Helsinki") and combat of international terrorism (in the "Trevi" framework) and Human Rights. Apart from these types of Working Groups which obviously focus on regional issues, major international conferences and specific political topics, EPC has also established Working Groups which focus more systematically on the cooperation between the Twelve's diplomatic machineries on different levels, such as the Working Groups on administrative cooperation between the Foreign Ministries, cooperation between the Twelve's Embassies in third countries and cooperation between the Member States' foreign policy planning staffs (84). Theoretically, the existence of the latter Group ("Group of Planners") could be interpreted as an indication of the Twelve's willingness to develop common long-term strategies for their foreign policies. In practice, however, the meetings of the "Planners" do in no way result in a kind of coordinated foreign policy planning, but only serve for an exchange of views on certain foreign affairs topics currently under examination in the national planning staffs (85).

The Working Groups are made up of the heads of the sections or departments of the Foreign Ministries and of the Commission which are in charge of the matters dealt within the Group. Due to the considerable structural differences between the Foreign Ministries, these officials often come from very different administrative units. In many cases they are accompanied by an official of another administrative unit which is also concerned with the subject-matters of the Group, or at least claims to be so. This makes that the Working Group meetings each involve on average 20 officials from the Foreign Ministries of the Twelve, plus at least one Commission official (86).

The Working Groups do not meet regularly, but only when they receive a mandate from the Political Committee to discuss certain issues and to establish a report on matters of current interest. For this reason there are always several "sleeping" Working Groups which may be revitalized whenever necessary, a further very flexible feature of the EPC structure (87).

If the Presidency considers the representative of a certain Mem-



ber State particularly qualified on an agenda point of a Working Group meeting, it may request that representative to introduce the discussion on that point. The reports established by the Working Groups include a summary drawing the attention of the Political Committee to points which require decisions for future action, or on which the Committee should concentrate (88). After each meeting an "oral report", drafted by a member of the EPC Secretariat under the supervision of the Presidency, is circulated through the COREU network in order to allow the Twelve to make comments on it (89).

The Working Groups contribute substantially to the capacity of EPC to cope with ever widening fields of consultation and common action (90). They help the Political Committee to ascertain more precisely the areas in which the Twelve can agree on common positions and joint action and to determine the details of cooperation in these areas.

#### 5.6. The EPC Secretariat

The setting up of a permanent Secretariat located in Brussels has been the only major innovation the SEA has introduced in the EPC structure. The idea of establishing a Secretariat proper to EPC had been discussed more or less permanently since 1971, but it had always met with strong reticences (91). Several Member States feared that such a Secretariat would sooner or later play an independent political role, the EC Commission was for obvious reasons against the idea of creating an institution for political cooperation between the Member States outside the EC framework and many of the Twelve's diplomats involved in EPC were not enthusiastic about what they saw as an attempt to 'bureaucratize' EPC. As a result of these reticences, which continued to be present during the negotiations on the SEA, the Twelve finally only agreed on the establishment of a very 'light' Secretariat, both in respect to its composition and to its role. Since the role of the Secretariat in the EPC structure is to some extent conditioned by its composition, we will first deal with the latter aspect.

The composition of the new Secretariat was laid down in a "Decision on the Practical Application of Certain Aspects of Title III of the Single European Act" which the Foreign Ministers adopted on the occasion of the signing of the SEA on 28 February 1986 (hereinafter referred to as "Ministerial Decision of 28 February 1986"). Pursuant to this decision, the Secretariat is composed of five officials which are seconded by the Foreign Ministries of each the Presidency-in-Office, the two preceding and the two following Presidencies, for a period covering five presidencies. They have the status of members of the Member States' diplomatic missions in Brussels, to which they are administratively attached (92). The fact that these "desk officers", as they are commonly called, are seconded from national Foreign Ministries and that they remain administratively attached to the latter (even as regards the payment of their travel costs) clearly reveals the Twelve's tendency to keep the Secretariat under close control and to prevent from the beginning the emergence of a more independent role of the new institution (93).

The Ministerial Decision says nothing about the grade of the officials, but in practice the Foreign Ministries always appoint diplomats on the First Secretary level. Their - compared to customary rotation practices in EPC - rather long term in office of two and a half years, allows the five officials to develop stable working practices and to specialize on certain areas of activity of the Secretariat. Each of the "desk officers" is actually responsible for a group of dossiers like, for instance, CSCE matters, relations with the EP or UN affairs. Since the division of tasks takes into account the different experience the diplomats have acquired previously in their career, it usually changes to some extent every six months when a new member is appointed. In fulfilling their duties, the five "desk officers" are supported by a small administrative and secretarial staff of about a dozen employees. Further logistic support (including translation services) is provided by services of the General Secretariat of the EC Council in whose "Charlemagne" building in Brussels the EPC Secretariat has its seat (94).

The procedure for the appointment of the Head of the Secreta-

tiat has not been regulated until now. The Ministerial Decision of 28 February 1986 merely stipulates that the Head shall be appointed "under arrangements to be agreed" between the Twelve (95). Until now, the only fix "arrangement" seems to be that the Head of the Secretariat is appointed by the Foreign Ministers for a term of two and a half years (96). The first appointment, that of the Italian Ambassador Giovanni Jannuzzi in 1986 (renewed in 1989), resulted to a large extent from a process of elimination of Member States which for political reasons at that time were considered to be less good candidates for appointing the Head of the new institution (97). More significant is the fact that the Twelve appointed a professional diplomat which in the diplomatic hierarchy ranks below the Political Directors (98). This put not only an end to the idea of appointing a high-profile "Secretary General", which had been forwarded by France and Germany, but has also secured that the key role of the Political Directors in EPC could not really be challenged by the Head of the new Secretariat (99).

The wings of the EPC Secretariat being already considerably clipped through its composition, the Twelve have also effectively tried to limit the Secretariat's role through a rather precise definition of its functions. Article 30(10)(g) of the SEA provides that the Secretariat shall work under the "authority" of the Presidency and that it "shall assist the Presidency in preparing and implementing the activities of European Political Cooperation and in administrative matters". This provision makes it already quite clear that the High Contracting Parties of the SEA only wanted to create a low-level supporting structure for the Presidency. The same tendency appears in the Ministerial Decision of 28 February 1986 which sets out in detail the tasks of the Secretariat: The terms "assist the Presidency" are used in almost every line and the description of tasks focusses on organizational and administrative aspects, such as the organization of meetings, the preparation of documents and the maintenance of EPC archives (100).

Taking scrupulously into account the Twelve's concerns about a possible independent role of the Secretariat, the Head of the Secretariat, Ambassador Jannuzzi, from the beginning adopted a stra-

tegy for the work of the Secretariat which may be described as minimalist in respect to any autonomous political role of the Secretariat and maximalist in respect to the development of its organizational and administrative functions. When during the first months of its existence the Secretariat was approached by the international press and diplomats of third countries with questions related to EPC, Jannuzzi preferred not to take the risk of frictions with some of the Twelve and established the now strictly observed unwritten rule that the Secretariat may only act as an interlocutor for the outside world in cases in which it is explicitly mandated by the Presidency to do so (101). This early renunciation from any attempt to develop a more autonomous role of the Secretariat may have led to a certain degree of frustration among the desk officers but proved to be a highly efficient 'confidence-building measure' as regards the Twelve's attitude towards the Secretariat. The restrictive line of conduct adopted by Jannuzzi has more and more appeased the initial concerns of the Member States. Asked in May 1989 on her opinion of the Secretariat, the British Minister for European Affairs, Mrs. Lynda Chalker, expressed her full satisfaction about the fact that the Head of the Secretariat immediately consults her and her colleagues whenever the Secretariat is confronted with a "sensitive issue" (102).

Under these circumstances it is not surprising that the first four years of the Secretariat's existence (1987-1990) have shown that its primary role in EPC is actually that of providing organizational and administrative support to the Presidency: The Secretariat organizes the numerous meetings of the EPC Working Groups which are all held at the Secretariat's seat in the Charlemagne building. After each Working Group meeting, the desk officer responsible for the respective Group establishes a draft "oral report" on the discussions which after approval by the Presidency is circulated through the COREU network. On the basis of the "oral reports", the Secretariat helps the Presidency to establish the agenda of Political Committee meetings and to prepare documents the Presidency intends to submit to the Political Directors. After each Political Committee meeting, the Head of the Secretariat and the desk officers which were present at the meeting assist the

European Correspondents in establishing the "relevé des conclusions" of the Political Directors' discussions. As regards the Ministerial meetings, the Secretariat helps the Presidency to draft official declarations to be adopted by the Ministers and secures that the texts submitted to the Ministers are translated by the Council services into all official languages. Immediately after the Ministers' meetings, the Secretariat informs the Foreign Ministries about the decisions which have been adopted and takes care that official statements of the Twelve are simultaneously published in the capital of the Presidency and in Brussels. The Secretariat is responsible as well for the finalizing of official declarations of the Twelve through the COREU network and of their translation into French or English. In relations between EPC and the EP, the Secretariat helps the Presidency in answering Parliamentary questions and in organizing the contacts with the EP. It also assists the Presidency in organizing meetings with third countries and, being now represented in most of these meetings, often supports the Presidency in drafting the final communiqués. Finally, the Secretariat acts as the "memory" of EPC and secures greater continuity in EPC proceedings by maintaining the EPC archives (computerized since 1990), keeping up to date the "couturier" of EPC, i.e. the compilation of established EPC working practices, and establishing half-yearly a "recueil" of texts (official and internal) which have been adopted during the term in office of the last Presidency (103). Although sometimes handicapped by the shortage of staff and the absence of a budget of its own, the Secretariat has proved to be able to cope under normal circumstances with all these different organizational and administrative tasks.

As a result of the growing confidence in the Secretariat's discrete and efficient work, the Presidencies have also in varying degrees entrusted certain conceptional tasks to the Secretariat: The Secretariat now not only usually drafts the EPC answers to Parliamentary questions, but sometimes also provides first drafts for the balance speeches and other interventions of the President-in-Office before the EP as well as for his speeches on behalf of the Twelve in the UNGA (104). Occasionally it has also provi-

ded first drafts for official declarations of the Foreign Ministers and for the EPC part of European Council conclusions (105). However, it should be noted that in all these cases the Secretariat is closely supervised by the Presidency (in particular by the Presidency's European Correspondent) and that it rarely occurs that an EPC text drafted by the Secretariat is not several times checked and amended by the Twelve before being adopted. Since these texts are usually also not allowed to be more than a synopsis of previous official declarations and/or records of meetings, the Secretariat's effective conceptual contribution seems to be rather limited, except for the sensitive use of language which is indeed quite important in EPC.

There is no doubt that despite its limited resources and despite the restrictions imposed on its role the Secretariat has proved its utility through a valuable alleviation of the Presidency's duties and by constituting an element of relative stability in the chain of rotating Presidencies. The fact that the Secretariat is now represented through its Head and/or at least one of its desk officers, not only in all internal EPC meetings but also in most of the meetings with third countries shows that it has been generally accepted by the Twelve as an important part of their cooperation structure (106).

This does not mean, however, that the distrust of the Secretariat on part of the Member States' Foreign Ministries has entirely disappeared. A striking evidence for continuing reserves is the limited supply of information to the Secretariat: Disposing of no diplomatic network of its own, the Secretariat is heavily dependent on the supply of information by the national diplomatic services. Yet, the members of the Secretariat not only receive much less information from their Foreign Ministries than they were used to obtain when still working in their national services, but they are sometimes even advised by their Ministries not to share with the other members of the Secretariat all of the information they receive (107). Since - for reasons to which we will come back later - the supply of information by the EC Commission is a rather low as well, the Secretariat often suffers from a lack of informa-

tion which sometimes puts a constraint on its work.

The continuing reserves of Foreign Ministries and the restrictions the Twelve have imposed on the Secretariat clearly show that in its present form the purely intergovernmental cooperation system of EPC does not leave much room for the development of an autonomous role of a small institution like the Secretariat. Whether the restrictive line of conduct followed by the first Head of the Secretariat has made full use of this admittedly small margin of manoeuvre may be open to question. However, the very positive balance of the Secretariat's work has made it plain that there is now really a need for some permanent institution in EPC, even if the role of this institution is more or less limited until now to organizational and administrative support of the Presidency.

## Chapter 6: Procedures of EPC

Unlike the EC structure, EPC is not the result of comprehensive legal agreements among the Member States but the outgrowth of now over 20 years of incremental and pragmatic adjustment of procedures to the needs of a political cooperation between the Member States' governments which has become more and more intense. Over the years, the small set of basic procedures established by the London Report in 1970 has been more or less constantly refined and complemented, with the result that EPC - despite all its pragmatism - has become a quite complicated and sophisticated diplomatic machinery. Due to the absence (until 1987) of permanent institutions and to the lack of legally binding rules as regards the applicable procedures, the functioning of EPC has always been heavily dependent on the Twelve's consensus on applied and newly introduced procedures. In order to avoid frictions resulting from the application of procedures which have not been previously agreed on, the procedural "acquis" is kept up to date in the "coutumier" of EPC, which may best be described as a permanently revised codex of cooperation procedures among the Twelve.

Since the "coutumier" belongs to the well-protected 'arcana' of EPC and since in general transparency is not one of the virtues of cooperation among the Twelve, we can in this chapter only give a rough and rather sketchy description of the most important procedures applied in the framework of EPC (108).

### 6.1. Procedures for arriving at common declarations

Official declarations constitute the instrument the Twelve most frequently use in order to implement on the international stage common positions they have agreed on. In most cases these declarations are issued as formal "Declarations", "Messages" or "Press Statements" by the Presidency acting on behalf of the Twelve. But under more particular circumstances, the Twelve may also choose



other forms of official declarations, such as, for instance, a "Statement" made by the Presidency in an international forum, an "Explanation of Vote" given by the Presidency in the UN framework, a speech held by a representative of the Presidency on behalf of the Twelve in international conferences or on the occasion of meetings with third countries, or (rarely) a "Joint Declarations" issued together with other States or groups of States (109).

The declarations of EPC do not only deal with major events which have a direct impact on the Twelve but also with a wide range of day-to-day foreign policy issues. It has often been criticized that EPC makes such a large use of declarations and in most cases limits its 'action' to the issue of declarations (110). However, a steadily growing number of questions put to the Presidency and to the EPC Secretariat shows that third countries are often keen to know the Twelve's attitude on a given subject and that their declarations are usually thoroughly analyzed by the countries more directly concerned (111). It should also be noted that today most EPC declarations are not isolated commentaries on certain world events, but important elements in a sequence of actions. They serve as a means of encouraging specific activities and political initiatives on the international stage, such as, for example, the peace process in Central America initiated by the Contadora Group. Declarations are often also intended to give warnings to third countries, like, for instance, to China after the bloody repression of June 1989. Sometimes they even serve as a preparatory step for punitive or coercive measures taken by the EC like, in particular, sanctions or embargoes (such as those decided against Iraq in August 1990) which, again, are announced by public declarations (112).

Although every Member State has the right to propose a common declaration, in practice it is in most cases the Member State holding the Presidency which takes the initiative for the preparation of such a declaration. However, it also happens that one or several of the other Member States are in favour of issuing a declaration, whereas the Presidency is more or less reluctant to do so. In the case of the shooting down of the Korean airliner by the

Soviet Union in September 1983, for instance, the Foreign Ministers of the Twelve in a meeting which almost ended with a major scandal were prevented from condemning the Soviet Union by the obstinate resistance of the Greek Presidency (113).

The procedures applied in order to arrive at a common declaration vary according to circumstances:

.If the intended declaration is related to an issue which allows a certain time for consideration (e.g., a more general statement on the attitude taken by the Twelve on a given subject in an international forum), the declaration is in general successively prepared at the different levels of EPC decision-making (114): Usually, the issue is at first raised by the Presidency in the Political Committee. After a preliminary discussion and an agreement of principle the Committee asks the appropriate Working Group to ascertain more precisely the substance and the limits of the common position(s) which the Twelve intend to make public. The conclusions or eventual recommendations of the Working Group are then forwarded to the Political Committee. In many cases they also form the basis of a draft declaration the Presidency submits to the partners. It is up to the Political Directors to decide on the final wording of the declaration. If the declaration is politically particularly important, it is afterwards formally adopted by the Foreign Ministers at their next meeting. The Ministers usually only discuss the declaration if there have remained differences at the Political Director level. When declarations are issued by Ministerial Meetings, they are as a rule accompanied by a list of posts in third countries where the local representative of the Twelve will draw the declaration to the attention of the host government (115).

In many cases, however, the need to react rather promptly on world events does not leave enough time to the Twelve to prepare common declarations successively in all appropriate bodies of EPC and more often than not the date chosen for a Ministerial Meeting does not fit happily in the course of events. The procedural "acquis" of EPC then allows for a simplified decision-making:

If the event is considered to be of major political importance for the Twelve and if partners agree on the need of an immediate

reaction, the Presidency usually convenes a crisis-meeting of Political Directors or Foreign Ministers. During such meetings the Twelve normally not only try to arrive at a common position but also at a common declaration (116). The text of such a 'crisis' declaration is in general established on the basis of a first draft drawn up by the Presidency which has been circulated beforehand through the COREU network.

If a crisis meeting cannot be arranged in time or if the event, though requiring a quick reaction, is considered to be less important, the Twelve try to reach agreement on a common declaration through the COREU network. In this case, which happens quite frequently, it is usually again the Presidency which establishes and circulates a first draft. Within a time set by the Presidency the partners then have to comment on this draft and can ask for amendments through the COREU network. In order to speed up the process and to force the partners to concentrate more on the substance rather than on the wording of the proposed declaration, the Presidency often sets very short time limits for replies, in particularly urgent cases even of only a few hours. However, the Presidency must take care not to overstrain the use of the instrument of short deadlines because the rule of consensus prohibits the issue of a declaration whose text has not been previously approved by all of the Twelve. It actually rarely happens that partners do not ask for amendments of the proposed text, even in cases in which they only do not fully agree with a certain term used in the draft. Since all amendments (including those related to language only) have to be approved, again, by all of the Twelve, the finalizing of declarations through the COREU network is often a quite laborious and time-consuming procedure (117).

The EPC Secretariat normally secures that the declarations the Twelve have agreed on are published simultaneously in the capital of the Presidency and in Brussels (118). This is not without importance, because the diplomats of third States and the representatives of the international press are accredited in larger numbers in Brussels than in the capitals of the smaller Presidencies.

## 6.2. Procedures for contacts with third countries

In a diplomatic cooperation structure which can only indirectly make use of economic sanctions and totally lacks the capacity to take military measures, joint "action" almost exclusively takes the form of meetings with third countries. EPC has developed various forms of contacts with third countries and each of them more or less responds to specific political needs.

Before looking more closely into these different forms, it should be noted that in EPC the Presidency is solely responsible for establishing and maintaining contacts with third countries in accordance with common positions or joint actions the Twelve have agreed on. However, practice has shown that a representation of the Twelve by the Presidency alone does not necessarily serve best the Twelve's interest. If a special political or public emphasis is required or if it appears expedient to stress the continuity in EPC, representation by the Presidency only is obviously not the ideal formula, particularly if it is one of the smaller Member States which holds the Presidency. For this reason the Twelve in contacts with third countries more and more frequently apply the "Troika" formula, which regroups a representative of the Presidency-in-Office with a representative of each the former and the succeeding Presidencies and of the Commission (see also sub-chapter 5.1.). The "Troika" formula has proved to be a valuable diplomatic instrument which is also appreciated by third countries. According to a senior French diplomat, "some countries are more comfortable talking to three Europeans, whom they might consider to represent a good cross-section of the Twelve, rather than just one who, however faithfully he might present the Twelve's views, might be perceived as lacking a clear mandate on some issues" (119). As we will see below, in a few cases EPC even deploys all of the Twelve.

Although the EPC procedures for contacts with third countries are extremely versatile, it is possible to distinguish between three main types of procedures which will be dealt with in turn:

(a) Procedures for "ad hoc" contacts

In order to respond effectively to requests for contacts by third countries and to external challenges in general, the Twelve must be able to establish 'ad hoc' contacts with third countries. In general, the procedural "acquis" of EPC allows the Presidency to meet individual representatives of third countries to discuss matters of particular interest to the country in question. Depending on the circumstances and political needs, these meetings may take place as one-on-one or Troika meetings, in the third State(s) concerned, in the capital of the Presidency or at the seat of international organizations. The flexibility of the EPC structure even allows the Presidency to meet representatives of third countries in the margin of EPC Ministerial Meetings. The Presidency is also entitled to respond to requests for contacts by groups of Ambassadors of Member States or of organizations with which the Twelve maintain special links, such as the UN, the League of Arab States or ASEAN (120).

As the general rule, the Presidency seeks approval by all of the Twelve before entering "ad hoc" contacts with third countries. A contact may also be proposed by any other Member State than that of the Presidency. If the contact is of major political importance, the Presidency normally first consults the partners on the expediency of the contact and only thereafter tries to reach consensus on the topics to be raised during the envisaged talks, on the level of the meeting (Ministerial, Political Director or Ambassadorial level) and the representation formula to be applied (Troika or other). Consensus on entering "ad hoc" contacts with third countries may be reached by discussions on the Political Director level after preparatory work in the Working Groups, but in all politically important cases, like, for instance, the meeting of the Presidency with PLO chairman Arafat in Strasbourg in September 1988, it requires a previous decision of the Twelve's Foreign Ministers (121).

A special form of "ad hoc" contacts are the so-called "fact finding missions" of EPC. These are tours made by the Presidency (or the Ministerial Troika) in third countries in order to establish a

direct contact with the main actors of countries or regions in crisis and to present the common views and proposals of the Member States as previously agreed on in EPC. Several of such "missions" have been carried out, for instance, in the Middle East and in Southern Africa (122).

The need of reaching consensus among partners often considerably delays the arrangement of "ad hoc" contacts with third countries. During the first six months of 1987, for example, the United Kingdom refused to allow the Belgian Presidency to resume the EPC contacts with Syria that had been broken off as a consequence of the proven Syrian participation, 1986, in an attempt to blow up an Israeli airliner after takeoff from London. All other partners recognized that the political situation in the Middle East required the involvement of Syria in all efforts for settling the region's problems and found that Damascus had made clear conciliatory gestures, but due to British resistance contacts were reestablished only under the subsequent Presidency (123). Also in the case of the establishment of contacts between EPC and the USSR, the Twelve's reaction was somewhat delayed by the difficulties in reaching consensus: Despite a series of positive signs from the USSR, it took a considerable time before the Twelve could finally agree on the expediency, the level and the format of a first meeting above the level of the Twelve's Ambassadors in Moscow: It was only in March 1989 - nine months after the EEC-COMECON joint declaration - that an EPC Troika on the Political Director level met with a Soviet delegation in Moscow (124).

(b) Procedures for "structured" contacts ("dialogues")

During the first years of its existence, EPC's relations with third countries developed merely on the basis of "ad hoc" contacts. It was only after third countries showed a steadily increasing interest in a link with EPC and after the Member States came to appreciate EPC contacts with third countries as an efficient means to win partners, to form coalitions and to make friends that EPC in the mid-seventies started to develop a network of more stable consultative relationships by establishing what is usu-

ally called "structured" contacts or "dialogues" with third States tries and groups of third States (125). This practice has been explicitly confirmed by Article 30(8) of the SEA which provides that the Twelve "shall organize a political dialogue with third countries and regional groupings whenever they deem it necessary".

In contrast to the occasional "ad hoc" contacts, "structured" EPC relationships with third countries provide for more or less regular consultations at one or several levels to be agreed on with the third countries or the group of third countries concerned. In many cases such contacts complement commercial and economic cooperation agreements concluded by the Community. (The procedure for establishing a "structured" contact may be initiated by a demand of third State(s), by a suggestion of the Presidency or of a Member State or by a recommendation of a Working Group or of the Political Committee. The details of the envisaged "dialogue" are usually established on the basis of the demands of the third State(s) concerned, recommendations of the appropriate Working Group and a subsequent assessment of the Political Committee. The final decision for establishing the "dialogue" is always taken on the Ministerial level. The terms of the "dialogue" are fixed in a purely intergovernmental arrangement with the third State(s) concerned. They have no legal binding force and are in most cases not made public.

There is no general rule for the format of "dialogues". The frequency of meetings, their level and the representation formula applied depend on political considerations and on the demands of the Twelve's partners. The level and the representation formula are often, but not always, an indicator for the importance the Twelve attach to the relationship with the respective third State(s). A few examples may illustrate the diversity of EPC "dialogue" formats (126):

- The "dialogue" with the United States, which has been formalized by the EC/US joint declaration of 23 November 1990, provides for (a) bi-annual consultations between, on the one side, the President of the European Council and the President of the Commission, and on the other the President of the Uni-

ted States, (b) bi-annual consultations between the European Community Foreign Ministers, with the Commission, and the US Secretary of State and (c) briefings by the Presidency to US Representatives on EPC meetings at the Ministerial level. This "dialogue" is the most sophisticated one EPC has established until now.

- In the "dialogue" with the countries of ASEAN, the Foreign Ministers of all of the Twelve and at least one Commissioner meet on the average every 18 months with their counterparts of ASEAN; these meetings are completed by more frequent "post-ministerial" dialogue meetings of varying formats (Foreign Minister of the Presidency and a Commissioner, Ministerial Troika or Political Directors' Troika).
- In the "dialogue" with Japan (which is at present, 1990, under revision) the Troika of Foreign Ministers meets two times per year with a Japanese delegation headed by the Japanese Foreign Minister; the "dialogue" also provides for bi-annual meetings of the Troika of Political Directors (Ministerial and Political Directors' Troika formula).
- In the "dialogue" with India, the Foreign Minister of the Presidency and the Ambassadors "sur place" of the preceding and succeeding Presidencies usually meet on an annual basis with their Indian counterparts ("Mini Troika" formula).
- In the "dialogue" with Hungary, the Foreign Minister of the Presidency normally meets annually with his Hungarian counterpart (Ministerial "one-on-one" formula).
- In the "dialogue" with Turkey, the Political Directors of the Troika meet every six months with their Turkish counterpart in the capital of the EPC Presidency (Political Directors' Troika formula).

Like most of the features of EPC, the "dialogues" are characteri-



zed by a high degree of adaptability. Once a "dialogue" is established, additional meetings can be rather easily arranged on an informal basis, e.g. in the margin of international conferences. Sometimes EPC Ministerial Meetings are used as an occasion for an extraordinary "dialogue" meeting. In moments of tension, the structured contacts may rather easily be suspended as well. If necessary, the Twelve can also change the representation formula, transforming, e.g., a Ministerial Troika in a "Mini Troika" in case of agenda problems or a "one-on-one" meeting in a Troika meeting if political circumstances so require (127). In exceptional cases the representation formula may even be changed in order to take into account particular tensions between a Member State and a "dialogue" partner: When Greece held the Presidency, for instance, it was preferred because of Greek-Turkish tensions to have another country from the Troika to maintain links with Turkey (128).

"Dialogue" meetings on the Political Director level normally do not result in public declarations. In most cases, meetings on the ministerial level are followed only by a short press statement. However, ministerial meetings in the framework of the more sophisticated "dialogues" may result in "joint declarations" of the Twelve's Foreign Ministers together with their counterparts. In the case of the seventh EC-ASEAN Ministerial Meeting held in Düsseldorf on 2 and 3 May 1988, for example, the Ministers issued a rather comprehensive joint declaration which covered such major issues as the INF Treaty, the Vietnamese occupation of Cambodia, the idea of an international conference on the Middle East problems and apartheid in South Africa (129).

### (c) Procedures for "démarches"

A "démarche" of the Ambassadors (Ambassador of the Presidency, Troika of Ambassadors or all of the Member States' Ambassadors) made to a host country's government is a form of joint action the Twelve very frequently use to implement common positions in respect to more specific issues which arise in third countries.

In 1990, for instance, the Twelve effectuated around 120 "démarches" worldwide (130). Most of the "démarches" relate either to purely humanitarian cases, for example requests for clemency for people sentenced to death, or to general aspects of the human rights situation in the country concerned (131). However, "démarches" are also occasionally used in order to express the Twelve's concern about certain political decisions of third States. In a "démarche" to the US State Department on 4 February 1988, for instance, an EPC Troika, comprising the Ambassadors of Germany, Denmark and Greece and a representative of the Commission, made known the preoccupation of the Twelve about the envisaged closure of the PLO observer mission to the United Nations (132).

As a general rule it is the appropriate Working Group which submits a recommendation for a "démarche" to the Political Committee which then reaches a decision or refers the matter to the Foreign Ministers meeting in EPC. Human rights issues which may be the object of "démarches" regularly feature on the agenda not only of the Human Rights Working Group but also of the regional Working Groups.

Most of the Twelve's "démarches" rely on confidentiality in order to be effective. Confidentiality often applies not only to the content of a "démarche" but also to the very fact that the "démarche" took place (133).

### 6.3. Procedures for cooperation among missions in third countries

In order to exchange information on political matters and to coordinate their positions in view of increasing joint activities, the Heads of Mission of the Twelve and the representatives of the Commission meet at least once a month in the capitals of all countries in which the Member States have diplomatic posts. In countries of particular political importance for the Twelve, meetings are more frequent than in others. In Moscow, for example, the Twelve's Heads of Mission usually meet every week (134). The London Report of 1981 already explicitly states that "in considering

their response to significant developments in the country to which they are accredited, the "first instinct" of the Member States' Heads of Mission "should be to coordinate with their colleagues". In order to guarantee "sur place" coordination on the highest level, the Report also established the rule that in EPC meetings a Head of Mission may only exceptionally be represented by a member of his Mission (135). Regular meetings also take place between staff members of the Twelve's Missions, particularly in order to discuss administrative matters of common interest such as consular and legal assistance, emergency communications and emergency evacuation plans. In addition, each of the Twelve's missions usually appoints a diplomat on its staff who has a special responsibility for matters of EPC (136).

The meetings of the Heads of Missions are not limited to a mere exchange of views: In response to a request from the Political Committee or, when the situation requires it, on the own initiative of the Heads of Mission, the latter may prepare joint reports on specific issues which may include recommendations for joint actions. Where such reports are made on the initiative of the Heads of Mission, it is for them to decide whether to draft a joint report or to report individually on the basis of their joint discussions. The Head of Mission of the Presidency may also draft an "oral report" on its own authority reflecting the views expressed (137).

The reporting function of the diplomatic missions of the Twelve is particularly intense in the field of human rights: Some of the Presidency's embassies present annual confidential reports on the human rights situation in the country concerned, which are drawn up jointly by the Twelve's embassies. In other cases missions of the Twelve in a particular capital are instructed to produce an "ad hoc" report on human rights (138).

Close cooperation among missions in third countries also contributes to a better preparation and handling of visits from the Twelve's Ministers and EC Commissioners. Ministers and Commissioners normally brief the Heads of Mission on their visit or, failing that, the Head of Mission concerned calls on his colleagues. On the basis of the regular meetings among the Heads of Mission,

Ministers and Commissioners on visit can be made more conscious of and sensitive to specific problems faced by their EPC partners which should be taken into account even in bilateral dealings (139).

In order to prepare contacts on a higher level and to guarantee a more or less regular exchange of views between the Twelve and the host government, the Twelve's Heads of Mission often invite the Political Director and/or other high officials of the host countries' diplomatic service to lunch or dinner. They normally also seek to invite at least once per year the Foreign Minister, but the host countries are not always inclined to accept such an informal contact with the Twelves' Heads of Mission on the ministerial level. In the case of the Twelves' cooperation in Moscow, it was not until February 1989 that a Soviet Foreign Minister for the first time accepted an invitation of the Twelve's Ambassadors. However, as a result of the common positions and joint actions taken by the Twelve, the frequency of meetings between members of their diplomatic representations, regular contacts with the host countries' diplomatic services and occasional joint "démarches" the Twelve's Heads of Missions are more and more dealt with as a group also by the host governments (140).

Despite initial scepticism, the cooperation among missions in third countries is now widely accepted and appreciated by the Twelve's diplomats. Writing on his experiences as British Ambassador in Damascus from 1984 to 1986, Roger Tomkys has acknowledged that the fortnightly meetings of ambassadors "did much in Damascus to ensure a pooling of available information and a certain solidarity and sense of common purpose". He also stressed that the solidarity among colleagues built up in this institutionalized cooperation, common representations made by the Twelve's representatives and joint meetings with Syrian ministers or officials "served to impress upon the Syrian authorities the common purpose of the EC missions in Damascus" (141).

Given the obvious positive results of the Twelve's cooperation in third countries, it is not surprising that Article 30(9) of the SEA provides for an intensification of cooperation between the Twelve's representations. According to the Ministerial Deci-

sion of 28 February 1986, cooperation shall be particularly intensified in the areas of exchange and pooling of information and in several fields of administrative cooperation and mutual assistance (142). Since then, the EPC Working Group for cooperation among missions has worked out a series of proposals for new areas and forms of cooperation. Some of these have been introduced or at least tested in so-called "pilot embassies". The idea of creating joint embassies is also under discussion. However, until now real progresses seem to have been limited to areas of more technical cooperation among missions such as cooperation in the field of health and medical facilities (143).

#### 6.4. Procedures for cooperation in multilateral fora

It has already been mentioned that in Article 30(7) of the SEA the Twelve have undertaken to "endeavour to adopt common positions" in international institutions and at international conferences (see sub-chapter 4.2.). This does not represent an innovation, since the Foreign Ministers in the Copenhagen Report of 1973 had acknowledged already that there was a need to establish Europe's position as a distinct entity "especially in international negotiations which are likely to have a decisive influence on the international equilibrium and on the future of the European Community" (144).

Since the early seventies the Member States have cooperated in numerous multilateral fora, including conferences in which only some of them are represented, such as the Western Economic Summits and the Geneva Disarmament Conference. However, regular and rather sophisticated procedures of cooperation among the Twelve have only been developed in the CSCE framework and in the UN:

Continuing a practice which had been established during the negotiations leading to the Helsinki Final Act, the delegations of the Twelve and the delegation of the Commission in the framework of CSCE negotiations generally meet once a week or, if necessary,

even once a day. This applies not only to the CSCE follow-up meetings, but also to meetings on specific aspects of the CSCE process such as the CSCE expert meetings on human rights and human contacts (145). These meetings "sur place" are primarily destined to guarantee day-to-day coordination and to prepare, if necessary, joint reports and recommendations for the appropriate EPC bodies. The general lines of conduct for the Twelve's representatives and the content of joint statements to be made are normally prepared by the discussions and reports of the CSCE Working Group which meets in Brussels, and then formally agreed on in the Political Committee and the Ministerial Meetings or, if necessary, through the COREU network (146). The Twelve more or less regularly agree on joint statements in the CSCE process, particularly at the opening of the sessions of the CSCE follow-up meetings. These statements are always made by a representative of the Presidency (147).

The Twelve's cooperation in the UN framework is based on similar procedures, and it is still more intense: During the 42nd General Assembly (1987/88), EPC organized "sur place" twelve meetings of the Twelve's Permanent Representatives to the UN and 220 meetings at expert level. On the basis of these frequent meetings and intense consultation in the appropriate EPC bodies, the Twelve were able to agree on 92 oral common statements and explanations of vote, and their missions circulated twelve written joint statements as official UN documents (148). Like in the case of cooperation in the CSCE, "sur place" meetings primarily serve as a means of day-to-day coordination, whereas the substance of common positions and the content of common statements is agreed on in the Political Committee, in Ministerial Meetings or through the COREU network. The reports and recommendations of the UN Working Group, particularly as regards common voting in the UNGA, often forms the basis of new guidelines issued by the Political Directors to the Permanent Representatives in New York. In the case of the annual speech of the Foreign Minister of the Presidency in the name of the Twelve and the Community held at the Plenary Session of the UNGA, all appropriate bodies of EPC are involved in preparing the text of this speech which is often finalized only in a last meeting held

by the Political Directors in New York shortly before the speech has to be delivered (149). The speech is traditionally held on the second morning after the opening of the Plenary Session at the end of September, after the annual speeches of the United States and the USSR. It usually presents a comprehensive, though in its wording often rather general overview of the common positions the Twelve have adopted on all major international topics (150). If the Twelve want to explain common positions on more particular issues, they usually do so in form of joint statements or explanations of vote, both in the UNGA and in its Main Committees (151).

The existing EPC cooperation procedures in international fora prove to be rather efficient as regards the regular exchange of information and day-to-day coordination and in order to guarantee an adequate representation of previously agreed common positions. However, they usually largely fail whenever there are strong divergencies among the Twelve or when a Member State feels that a given issue falls within one of its "domaines réservés". This is not only shown by the persistence of a considerable number of three-split votes in the UNGA (see sub-chapter 4.2.), but also by the fact that despite the common aim of close cooperation in the UN attitudes taken by France and the United Kingdom inside of the UN Security Council continue to be regarded as a "domaine réservé" of these Member States. Recently this became apparent once again when on 15 January 1991 the UN Security Council discussed a French plan for a peaceful solution of the Gulf crisis: The British delegation at the UN followed the United States in rejecting this plan despite the fact that it had previously received public support from the Foreign Ministers of Germany, Spain and Belgium. Having regard to this obvious failure of the Twelve to adopt a common position, the Luxembourg President-in-Office, Jacques Poos, two days later in a press conference underlined the fact that Article 30 of the SEA does not oblige those of Twelve which are Permanent Members of the UN Security Council to consult their European partners concerning initiatives launched within that UN body. This might be regrettable, Poos added, declaring that this type of gap would ha-

ve to be remedied within the Intergovernmental Conference on Political Union (152).



**Part III**

**THE EUROPEAN COUNCIL AND ITS ROLE  
IN THE EC AND EPC SYSTEMS OF FOREIGN AFFAIRS**



Part III: THE EUROPEAN COUNCIL AND ITS ROLE IN THE  
EC AND EPC SYSTEMS OF FOREIGN AFFAIRS

Chapter 7: The European Council and its role in the  
EC and EPC systems of foreign affairs

7.1. The basic features of the European Council

At their conference held on 9 and 10 December 1974 in Paris the Heads of State or Government of the EC Member States agreed to meet, accompanied by the Foreign Ministers, in future at regular intervals "as Council of the Community and in the framework of European Political Cooperation" (1). Under the title "European Council", these meetings of the Heads of State or Government since 1975 have become a major feature of policy-making in the EC and EPC frameworks. However, a formal legal basis for the European Council exists only since the entry into force of the SEA in 1987. Previously the European Council was acting without any legal foundation on the basis of the intergovernmental arrangements agreed on in the Summit Conference of December 1974 (2).

It is in Article 2 of the SEA that the existence of the European Council has for the first time been legally acknowledged. However, this provision lays down only in a very general form the composition of the European Council (Heads of State or Government and President of the Commission, assisted by Foreign Ministers and a Member of the Commission) and the frequency of its meetings (at least twice a year). Beyond this, there are no other provisions in the SEA regulating specifically the functioning and the responsibilities of the European Council. In particular, there are no provisions which govern its relations with the EC and EPC institutions. Classification of the European Council as an EC institution *sui generis* is clearly ruled out by Article 32 SEA, which stipulates that subject to Article 3(1), to Title II and to Article 31 of the SEA, nothing in this Act shall affect the Treaties establi-

shing the EC. Since Article 2 SEA regulating the European Council is not included among the provisions mentioned in Article 32, there can be no doubt that the European Council has not become an additional Community institution (3). It may also be recalled here (see General Introduction) that by virtue of Article 31 SEA the jurisdiction of the ECJ does not extend to the European Council which is therefore not subject to judicial review under Community law.

From a legal viewpoint therefore, the European Council has been neither integrated in the institutional set-up of the EC as provided for by Articles 4(1) EEC Treaty, 3(1) EAEC Treaty and 7 ECSC Treaty, nor in the institutional structure of EPC as is laid down in Article 30 SEA and the earlier constitutive texts of EPC. As regards the EC structure, this result may be explained by the fact that proposals to give the European Council a direct supervisory authority over EC and EPC failed during the negotiations on the SEA because this would have subordinated the EC structure with its supranational elements to an intergovernmental body (4). In the case of the purely intergovernmental structure of EPC, such an additional subordination to intergovernmental policy-making would have been superfluous anyway.

However, the European Council does not exist in isolation alongside the EC and EPC frameworks and it cannot be classified simply as a conference of Heads of State or Government subject only to ordinary international law. This is not only made clear by the fact that the activity of the European Council relates to a very large extent to the EC and EPC structures (see below), but also more generally by the fact that Article 2 SEA, which grants a legal basis to the European Council, forms part of the "Common Provisions" (Title I, Articles 1-3) of the SEA, i.e. the provisions which are common to both the EC and the EPC structures. This means that, though being integrated neither in the EC nor the EPC framework, the European Council forms part of the common legal framework which has been established by the SEA for both structures (5). As a result, the objective of making progress towards European Union which is laid down in the first two paragraphs of the Preamble of the SEA and which includes the sphere of foreign

affairs, applies also to the European Council (6).

No formal rules exist governing the competences of the European Council. Neither the EC Treaties nor the SEA contain provisions relating to its responsibilities. However, in the Solem Declaration of Stuttgart of 1983, the Head of States or Government have specified five basic functions of the European Council "in the perspective of European Union" (7):

- A. to provide "a general political impetus to the construction of Europe";
- B. to define "approaches to further the construction of Europe" and "to issue general political guidelines for the European Communities and European Political Cooperation";
- C. to deliberate "upon matters concerning European Union in its different aspects with due regard to consistency among them";
- D. to initiate "cooperation in new areas of activity";
- E. to express solemnly "the common position in questions of external relations".

It follows from these functions that the European Council has a general competence for European affairs which covers not only the domains of the EC and EPC structures (function A, B, C) including the sphere of external relations (function E), but even extends beyond the "acquis" of both structures, as this is made clear by function D. However, since not even the SEA has established any legal competences of the European Council, its general competence for European affairs remains a purely political one: In legal terms, its decisions, which are usually made public in form of the "Conclusions of the Presidency", "Declarations" or "Communiqués" issued at the end of European Council meetings, are not binding for the EC and EPC structures (8).

Still being placed outside of the EC and EPC frameworks and lacking any legal competence, the European Council has neverthe-

less become an in many cases decisive actor in European policy-making because of its supreme political authority: As it has already been mentioned, the European Council regroups the Heads of State or Government of the Member States, which by definition retain the highest decision-making authority in their countries, and the President of the Commission as head of the Community's executive. The supreme political authority of its members explains why the results of the discussions of the European Council regularly appear on the agendas of the meetings of EC and EPC bodies (see below), although these bodies have no legal obligation to do so and although the Heads of State or Government only rarely issue a corresponding political mandate (9).

The political authority the European Council has over the EC and EPC structures is also shown by the fact that the Foreign Ministers of the Member States, which in both the EC and the EPC frameworks operate as highest decision-making authority, in the European Council meetings participate only in order to "assist" (the term explicitly used in Article 2 SEA) the Heads of State or Government. The Foreign Ministers, in fact, prepare by their discussions in the General Affairs Council and in EPC Ministerial Meetings the list of possible points of debate of the European Council (a formal agenda is against the style of this institution) and in many cases also agree on texts to be formally adopted by the European Council (10). In doing so, the Foreign Ministers meeting in the EC and EPC frameworks have in respect to the European Council a subordinated preparatory function quite similar to that which the COREPER and the Political Committee have in respect to the General Affairs Council and EPC Ministerial Meetings. At least from a political point of view, the European Council therefore simply represents a continuation and in a certain sense even a closing arch of the hierarchical order of EC and EPC institutions, as it is placed "outside" and "above" the EC and EPC frameworks.

As regards decision-making in the European Council, it goes without saying that due to the purely intergovernmental nature of the European Council, decision-making occurs on the basis of consensus amongst all participants. Again similarly to the EPC framework, the Presidency plays a key role in preparing the meetings,

paving the way for compromises and making public the results of the European Council (11).

Summarizing the basic features described above, the European Council may best be described as a treaty-based intergovernmental institution which is formally placed outside of the EC and EPC frameworks, but has a general political competence and authority which covers the domains of both structures.

## 7.2. The role of the European Council in the EC system of foreign affairs

Within the sphere of competence of the EC, the European Council has the capacity to act as the Council of the EC on the basis of Articles 4 and 146 EEC Treaty, Articles 3 and 116 EAEC Treaty and Articles 7 and 27 ECSC Treaty (12). This would require the European Council to give a clear indication of its willingness to act in this manner. In such an event the European Council would enjoy all the powers of the Council of the EC, but at the same time it would be bound by all obligations incumbent on the Council of the EC under the EC Treaties (13). In order to maintain its political authority over the whole EC structure without being subject to the procedural rules of Community decision-making, the European Council has until now never made use of this option to act formally "within" of the EC framework.

In practice, the Heads of State or Government have developed three main forms of dealing at European Council meetings with matters falling within the sphere of Community external competences which have a varying impact on EC foreign affairs:

Firstly, informal discussions may be held on Community foreign affairs issues at meetings of the European Council. Since such discussions are confidential and do not conclude with a common declaration, they only have an indirect effect on the work of the Community institutions. This effect can nevertheless be conside-

rable since the attitude taken by the Heads of State or Government on a certain issue of external relations will be mirrored by the stance adopted afterwards by the Foreign Ministers in the General Affairs Council and may therefore either encourage or discourage certain initiatives envisaged by the Commission (14).

Secondly, the European Council also adopts programme statements laying down the broad outlines of Community policy on certain issues of external relations. Such statements may concern both general positions adopted by the Community on the international stage and individual fields of cooperation with third States. In the Conclusions of the European Council of Madrid (26/27 June 1989), for instance, the Heads of State or Government *inter alia* affirmed their common will to provide support for the opening and the reconstruction of the economies of Poland and Hungary, restated the importance they attached to the successful conclusion of the Uruguay-round, not only as regards trade in goods, but also in respect to services, protection of intellectual property and for action on the specific situation of the developing countries, and stressed their commitment to further consolidation of the privileged relationship between the Community and the ACP countries in respect to the negotiations on the Lomé IV Convention (15). In many cases the European Council combines such programme statements on external relations issues with general instructions on the implementation of the objectives set out in the statements. In respect to the negotiations on the Lomé IV Convention, for example, the Madrid European Council called for the negotiations to be concluded by the end of 1989 (16). The Convention was actually signed on 15 December 1989 (17).

Lastly, the European Council in a few cases also deliberates with a view of taking decisions on individual questions falling within the scope of Community external relations. Since the Heads of State or Government do not make use of the procedural and decision-making arrangements under which the Council of Ministers takes its decisions, their decisions have until now only been embodied in the "Conclusions of the Presidency" or "Declarations" of the



European Council. These decisions can be of considerable significance for the development of Community external relations. At the extraordinary European Council meeting in Dublin on 28 April 1990, for instance, the Heads of State or Government agreed to extend the G-24 aid (PHARE programme) to the German Democratic Republic, Czechoslovakia, Yugoslavia, Bulgaria and Romania, and decided on the basis of a communication of the Commission that the General Affairs Council should immediately start deliberations on special association agreements (commonly called "second-generation agreements") to be concluded with each of the Central and Eastern European countries (18). In May 1990, the Commission in fact produced an action plan to extend the operations of the PHARE programme to cover the above mentioned countries which was subsequently adopted by the Member States and the rest of the G-24 (19). As regards the second-generation agreements with the Eastern European countries, the Commission on 27 August 1990 formally adopted a "Communication to the Council" which contained the basic principles of this type of agreements (20). Executing the decision of Dublin European Council, the General Affairs Council then started to deliberate on these agreements at its meeting of 17 September 1990 (21).

It should be noted that the European Council does not make a clear distinction between the various ways in which it deliberates on a given issue. In practice, the borderlines between the separate forms of discussion are therefore rather fluid, the European Council being not prevented, for instance, from moving on from what was originally an informal discussion to deliberating on a decision to be inserted in the "Conclusions". Programme statements and decisions on individual issues may also be merged with each other.

The fact that the European Council only deals with major issues of Community external relations and the majestic way in which it does so, may create the impression that it has a determining impact on Community external relations. This may also be one of the reasons for which the Heads of State or Government, always keen to stress their supreme political authority, more or less regularly

include declarations on external relations issues in their "Conclusions". However, in practice the impact of the European Council on Community decision-making in the sphere of external relations is limited by the fact that its discussions, programme statements and decisions are largely predetermined by the preparatory work done by the Community institutions. Usually all of the EC agenda items of the European Council pass through the COREPER, with the General Affairs Council making the preliminary substantive exchanges (22). In many cases this already leads to more or less finalized texts which are submitted to the Heads of State or Government for formal adoption without discussion, similar to the "A" points on the agenda of the Council of Ministers (23). An issue of Community external relations is usually discussed by the Heads of State or Government only if it has remained pending in the General Affairs Council or if one or several of the Member States have a special interest in that issue. Decisions of the European Council are often also based on "Communications" or other texts addressed by the Commission to the European Council which sometimes have a status comparable politically, though not in legal terms, to that of the proposals made by the Commission to the Council in the EC framework. The Commission relays these texts usually to the Heads of State or Government through the COREPER, which in this case merely functions as a "pigeon hole" (24). It was on the basis of a "Communication" of the Commission, for instance, that the extraordinary European Council of Dublin on 28 April 1990 decided that the EC Council should start discussions on Association Agreements with the Eastern European Countries (25).

A draft version of the "Conclusions" prepared by the Presidency is often already established and distributed even before the Heads of State or Government have met. The "Conclusions" are usually finalized during the plenary session of the second day of European Council meetings at which both the Heads of State or Government and the Foreign Ministers participate. The presence at this plenary session of the Secretary General of the Council, of two other high officials of the General Secretariat of the Council (usually the Secretary General's Chef de Cabinet and a Director General who varies according to the topic) and of the Secretary General of the

Commission is inter alia destined to prevent the Heads of State or Government from taking decisions without respecting Community rules if concrete Community measures should be envisaged (26).

With regard to the predetermination of the European Council's discussions, statements and decisions by the preparatory work effectuated in the EC framework, the role of the European Council in the EC system of foreign affairs is in practice limited to that of providing political backing on the level of the Heads of State or Government, i.e. the highest possible political level, for major positions adopted by the Community in respect to relations with certain third countries or groups of third countries (like the ACP countries or the Eastern European countries) or in respect to certain multilateral negotiations (such as the Uruguay-round). This backing can be of some importance, both externally and internally: In the view of third countries, it may give more political weight to certain negotiating positions of the Community and reaffirm certain commitments entered into by the Community. Inside the EC framework a formal adoption of certain action programmes or individual decisions in the sphere of external relations may help to set certain priorities in the development of external relations and speed up the corresponding decision-making process. A recent example for the accelerating effect of an European Council interference in Community external relations is the decision taken by the European Council of Strasbourg (8/9 December 1989) that the Council should, as soon as possible, instruct the Commission to negotiate a trade and cooperation agreement with the German Democratic Republic to be concluded during the first half of 1990 (27). The negotiating mandate was actually adopted by the Council already on 22 December 1989 and, after successful efforts of the Commission to speed up the negotiations, the cooperation agreement was signed on 8 May 1990 (28).

The fact that the European Council has a certain impact on the development of Community external relations has gradually also been accepted by the EP which originally was opposed in principle to decisions being taken by the European Council in the sphere of competence of the Community institutions. It has in the meantime become a standing practice of the EP to address resolutions which

often also pertain to issues of Community external relations directly to the European Council before each meeting. On 14 June 1990, for example, the EP adopted a resolution in which it called upon the Heads of State or Government in view of their next meeting in the European Council not to abrogate the economic sanctions imposed by the Community on South Africa before the introduction of a new constitution providing for equal rights of all South African citizens (29). However, formally acting outside of the Community framework, the Heads of State or Government are obliged even less than the EC Council obliged to take into consideration EP resolutions, and the above mentioned resolution on South Africa was actually not even mentioned in the declaration on South Africa the European Council adopted on 26 June 1990 (30).

Not only the particularly weak position of the EP vis-à-vis the European Council - i.e. the striking democratic deficit of the European Council on the European level - but also the mere fact that a purely intergovernmental body not subject to Community law can influence the decision-making process in Community external relations, show that the role of the European Council in the EC system of foreign affairs is rather problematic from a constitutional point of view. As long as the European Council prefers not to act as the Council of the EC, it actually continues to be a "corpus alienum" in the EC system and this to a certain extent endangers the "acquis" of integrated Community decision-making. One may also ask whether programme statements and decisions on external relations issues adopted by the European Council acting "outside" the EC framework on matters falling "inside" of this framework serve best a clear image of Community decision-making on the international stage. As a consequence, the judgment of Pierre Pescatore that the European Council could only play a really constructive role in EC framework if it would act as Council of the EC may be regarded as valid also in respect to the European Council's role in Community external relations (31).

### 7.3. The role of the European Council in the EPC system of foreign affairs

Although the general political competence of the European Council covers the domains of both the EPC and EC structures (see above), the course of European integration in practice obliges the European Council to spend most of its time on the solution of EC problems. The Heads of State or Government have played a fundamental role in the development of the bases of EPC by adopting the constitutive texts of EPC and taking important decisions like that of initiating EPC cooperation in the judicial sphere and of putting EPC on a treaty basis (32). Apart from that, however, the European Council has actually only very rarely played an important role in EPC matters, the only notable exception being the Venice Declaration of 1980 in which the Heads of State or Government presented basic principles towards the solution of the Arab-Israeli conflict which continue to be valid until now (33). The last time the European Council has been called upon to exercise its supreme political leadership in EPC it completely failed to do so: When in 1986 the diverging views of the Twelve on measures to be adopted against South Africa found their way up to the European Council meeting in The Hague on 26 and 27 June 1986, the Heads of State or Government could basically agree on no more than taking note of the Twelve's incapacity to arrive at a common approach. This clearly showed that the European Council is in no way less vulnerable to divergencies among the Twelve than any of the EPC bodies (34). It was only at a meeting of Foreign Ministers on 15/16 September 1986 that the Twelve could agree on a new package of restrictive measures against South Africa (35).

The rather limited role the European Council usually plays in EPC affairs becomes particularly obvious when looking at the EPC preparation of its meetings and the handling of EPC issues during the meetings:

About one month before the European Council meeting, the EPC issues on which the Heads of State or Government should adopt a

common position are selected by the Political Committee, with assistance of the appropriate EPC Working Groups. It usually also makes certain recommendations as regards the content of declarations to be adopted by the European Council or even prepares detailed provisional texts. If Foreign Ministers deem it necessary, they discuss the subjects selected by the Political Committee at their last meeting (in the EC or EPC frameworks) before the European Council (36). The Presidency, with the help of the EPC Secretariat and the European Correspondents, then prepares drafts of the texts - in most cases declarations to be included in the "Conclusions" of the European Council - to be submitted to the Heads of State or Government (37). The final wording of the EPC declarations to be adopted by the European Council and any other EPC questions are usually discussed separately by the Foreign Ministers during and after dinner the first evening of European Council meetings, while the Heads of State or Government hold their conference dinner and "fireside chats" (38). There have been a few cases in which the Heads of State or Government preferred to have a simple exchange of views on foreign policy issues rather than adopt common declarations (39). The normal course of events, however, is that the EPC declarations finalized by the Foreign Ministers are adopted by the Heads of State or Government - in most cases without any discussion - at the end of the plenary session of the second day of the European Council in which both the Heads of State or Government and the Foreign Ministers participate (40). The declarations (or "Statements"), which usually cover various issues, are then published by the Presidency in annex to the "Conclusions" of European Council (41).

Officials being in charge of EPC matters are included in the national delegations to European Council meetings, but due to the preparatory work effectuated beforehand in the EPC bodies they usually do not have much to do on these occasions and are normally not confronted with unforeseen demands or initiatives of the Heads of State or Government. The same is true with regard to the presence of the Head of the Secretariat at the plenary session of the second conference day, a practice which has been established after the creation of the EPC Secretariat in order to secure a certain

equilibrium of EC and EPC representation in European Council meetings (42).

The practices described above clearly show that EPC statements issued by the European Council are normally more or less completely predetermined by the preparatory work of the EPC bodies, with the Heads of State or Government merely acting as a kind of supreme declaratory instance. Like in the case of European Council statements on matters of Community external relations, EPC declarations issued on the level of the Heads of State or Government may in the eyes of the outside world give more political weight to certain common positions adopted by the Twelve. The brief statement issued by the European Council of Strasbourg (8/9 December 1989) on the Euro-Arab Conference scheduled for 21 and 22 December 1989, for instance, was very well timed in order to stress on the highest political level the Twelve's interest in giving a new impetus to the Euro-Arab dialogue (43). However, in most cases the course of international events and the long intervals between meetings do not allow the European Council to issue such timely declarations, and usually the substance of the statements has anyway already been agreed on at the levels of Political Directors and Foreign Ministers in the EPC framework.





**Part IV**

**COHERENCE AND INTERACTION  
BETWEEN THE EC AND EPC SYSTEMS**



## Part IV: COHERENCE AND INTERACTION BETWEEN THE EC AND EPC SYSTEMS

### Chapter 8: Coherence between the EC and EPC systems

The coherence between the EC and EPC systems rests on a series of general legal and political bases and on the particular possibility of the use of EC instruments for political aims agreed on in EPC. Each of these bases will be dealt with in turn:

#### 8.1. The legal bases of coherence

In enshrining both the provisions amending the EC Treaties contained in Title II and the principles and procedures of EPC contained in Title III in a single legal instrument, the SEA has for the first time established a common legal framework for both the EC and the EPC system. This has put an end to the in legal terms completely separate development of the two systems which had existed since the founding of EPC in 1970 (1). To establish such a common legal framework for both systems, had not been the original intention of the Member States, most of which had initially preferred to put EPC on a legal basis by a separate Treaty. It was the Commission which successfully argued during the negotiations of the SEA that economic integration and cooperation in the sphere of foreign policy formed an indivisible whole, which in view of progress towards European Union should be formally recognized by incorporating the new provisions envisaged for both the EC and the EPC structures in one single legal instrument (2).

It has already been mentioned (see General Introduction) that the incorporation of EC and EPC provisions in the SEA has in no way resulted in a merger of both structures. Due to persisting intergovernmentalist preferences of several Member States, attempts to bring the two structures institutionally closer together failed during the negotiations on the SEA (3). As a result, the SEA does

not provide for organic or functional links between the EC and EPC: The Preamble and Articles 1 and 3 of the SEA formally recognize that the two structures are governed by different rules and that they exercise their powers under different conditions and for different purposes (4). In addition, Article 31 SEA excludes EPC from review by the ECJ, and Article 32 SEA affirms that EPC provisions do not affect the EC Treaties (5).

Although determined to keep the EC and EPC structures institutionally rather separate, the Member States, when negotiating the SEA, were also aware of the need to make the two structures more coherent in order to avoid problems of coordination and to secure a coherent external image of the Community (6). Ensuring consistency between the EC and EPC policies has actually been a continuous concern of Member States from the very beginnings of EPC (7). As early as 1973, the Foreign Ministers had stressed in the Copenhagen Report the need of EPC taking into account Community policies under construction and to maintain close contacts with the institutions of the Community whenever EPC matters had an incidence on Community activities (8). However, it was only with the SEA that the Member States gave a legal basis to coherence between the EC and EPC, firstly, by providing explicitly for a common objective for both structures and, secondly, by formally establishing the principle of consistency between EC and EPC policies:

In the Preamble, setting out the general objectives of the SEA, the High Contracting Parties affirm in paragraph 2 their resolution to implement "European Union" on the basis of both the EC and the EPC structures (9). Article 1, paragraph 1 of the SEA stipulates that "the European Communities and European Political Cooperation shall have as their objective to contribute together to making concrete progress towards European unity". These provisions clearly establish a common objective for both the EC and the EPC structure. True, the binding force of this common objective is attenuated by the absence of any further definition of "European unity" and of the way in which the EC and EPC shall "contribute together to making concrete progress" towards their common objective (10). Yet, the fact remains that both structures now dispose

of a treaty based common point of reference for their activities which may well considerably gain in substance during the ongoing negotiations on Political Union.

The problem of coherence is dealt with more explicitly in Title III of the SEA: Article 30(5) SEA explicitly provides that "external policies of the European Community and the policies agreed in European Political Cooperation must be consistent" (paragraph 1), and it further stipulates that the Presidency and the Commission, "each within its own sphere of competence, shall have special responsibility for ensuring that such consistency is sought and maintained" (paragraph 2). In contrast to the common objective defined in Article 1 SEA, the principle of "consistency" of EC and EPC policies which is thereby formally established represents a strong legal obligation: The term "consistency" ["cohérence" in the French text] is a rather comprehensive one, which does not only include the obligation of avoiding inconsistencies between EC and EPC policies, but also that of ensuring a maximum of coordination and harmonization of actions taken in the framework of both the EC and the EPC systems (11). The obligation laid down in Article 30(5) SEA is further strengthened by the fact that the same Article confers special responsibilities for ensuring "consistency" upon the Commission and the Presidency. Although by virtue of Article 32 SEA this obligation has no binding effect under Community law, it clearly places both the Commission and the Presidency under a treaty obligation under public international law to ensure coherence between the EC and EPC systems (12).

It should be noted that the wording of Article 30(5) leaves no doubt about that the responsibility of ensuring "consistency" between EC and EPC policies does not give to the Commission any competence in EPC. The phrase "each within its own sphere of competence" was actually added to Article 30(5) by national delegations in order to limit the Commission's authority to its competences under the EC Treaties (13). However, it also follows from this limitation of the Commission's responsibility to the sphere of EC competences that the Commission has no legal obligation to seek the approval of the Twelve in the framework of EPC for proposals for EC actions having foreign policy implications. Such an obli-

gation is, in addition, ruled out by Article 32 SEA pursuant to which nothing in Title III SEA can affect the Community legal order (14). On the same grounds, the responsibility of the Presidency for ensuring "consistency" is confined to the EPC structure.

Although in legal terms the spheres of responsibilities for ensuring coherence have therefore been clearly separated, the High Contracting Parties of the SEA have also taken into account the need of securing some kind of 'presence' of the Commission inside the EPC structure in order to make "consistency" work in practice: Confirming an already existing practice, Article 30(3)(b) SEA formally establishes the full "association" of the Commission with the proceedings of EPC (15).

A further institutional link between the EC and EPC structures is established by Article 30(4) SEA: It stipulates that the Member States shall ensure that the EP is "closely associated" with EPC and it lays down two principles for this association: information of the EP and due consideration of its views. The responsibility for ensuring the EP's association with EPC lies with the Presidency. Although this is not explicitly provided, one may think that the double responsibility of the Presidency to ensure "consistency" between the EC and EPC inside of the EPC and to ensure the information and due consideration of the EP's views also results in a certain responsibility of the Presidency towards the EP for ensuring coherence between the EC and EPC (16). The EP has already inserted a corresponding provision in its Rules of Procedure: Rule 57(2) explicitly provides that the Presidency and the Commission shall ensure consistency of EC and EPC policies and that Parliament shall be informed "of all contradictions which arise". Until now, however, such informations have never been given to the EP.

The association of the Commission and of the EP with EPC actually constitute 'bridges' of considerable practical importance between the EC and EPC systems. They will be dealt with in detail below (see sub-chapters 9.3. and 9.4.).

Although the SEA has clearly established a legal basis for the coherence between the systems of the EC and EPC, the practical im-

plications of the respective obligations is difficult to assess. True, the "consistency" obligation laid down in Article 30(5) SEA is binding under international law and must be respected as much by both systems. However, for at least two reasons it is rather unlikely that in case of an infringement of this obligation the Commission or the Presidency, which are both responsible for ensuring "consistency", may have recourse to the sanctions provided for by public international law:

α Firstly, such a recourse would be tantamount to a major breakdown of foreign policy decision-making which would question the functioning of both the EC and the EPC systems and seriously damage the external image of the Community and of its Member States. This would clearly not be in the interest of either the Commission or the Presidency and the Member States.

β Secondly, it would be difficult to formally establish an infringement of Article 30(5) SEA by either the Commission or the Presidency. Policies agreed on in EPC are usually defined rather vaguely and, as a result, an infringement could probably be convincingly established only if there would be a complete contradiction between EC and EPC policies. And even in that case it would be a major problem to establish whether Article 30(5) SEA was being infringed by the Commission or by the Presidency, each of the institutions in principle having the same right to claim that the other had failed to secure "consistency" between EC and EPC policies. One policy opposing the other, the question would then be a political, rather than a legal one.

However, in practice open contradictions between EC and EPC policies are usually excluded because of the political bases of coherence between the EC and EPC to which we will come now.

## 8.2. The political bases of coherence

Although "consistency" between EC and EPC policies has become a legal obligation only since the entry into force of the SEA, coherence between the foreign affairs systems of EC and EPC has al-

ways been rather strong. It is true that in the beginning the two structures were to some extent competitive and that there have been considerable frictions, mainly for political and symbolic reasons, in the relations between the Commission and EPC (17). As will be shown below (see sub-chapter 9.3.), even after the SEA such frictions are not excluded. However, there have been only very few cases of obvious inconsistency between EC and EPC policies, and even these have been of a rather unspectacular nature.

In 1985 and 1986, for instance, the Member States - due to the stubborn resistance of two of the partners - repeatedly failed to reach an agreement in EPC on issuing a common declaration on financial assistance to Polish private agriculture in connection with the plan of the Polish Episcopate to establish a private Agricultural Foundation, although the EP had already inserted 2 Million ECU for that purpose in the 1985 budget. The opposition of only two of the Member States was however not sufficient to block financial assistance by the Community, because in the framework of the EC Council the question, being a budgetary one, could be resolved by qualified majority voting. In 1987, finally, the Commission was therefore able to spend the Community funds on individual agricultural projects of the Polish Church, the plan of an Agricultural Foundation having failed in the meantime (18). The inconsistency of EC and EPC policies was obvious in this case, but it never became a glaring case because in the absence of consensus, EPC is simply condemned to remain silent.

The reason for which such cases of inconsistency have remained extremely rare even before the principle of "consistency" was formally established by the SEA is to be found in the mere fact that the Member States of the EC are identical with the "Twelve" of EPC. This identity provides rather strong, albeit not always sufficient, political bases, firstly, for a coherence between EC and EPC policies and, secondly, for a coherent external image of both systems:

<sup>1</sup> In respect to coherence in policies, it is evident that the political aims pursued by the Member States are not changing depending on whether they act in the EC or the EPC framework. As a re-



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 sult, it is in practice excluded that the Twelve agree in EPC on a common declaration or a joint action which is in complete contradiction to decisions they have taken or will take in the framework of the EC Council, or vice versa, unless in the meantime major changes affecting their decisions have occurred. The above-mentioned case of financial assistance to Polish agriculture shows that the EC may take an action with foreign policy implications which cannot receive any backing by EPC because EPC decisions require consensus whereas in the EC framework qualified majority voting may be sufficient. However, even in that case there do not exist two policies which contradict, but there is only one policy, that of the EC, which receives no backing from EPC. Although this case clearly represents a failure to realize the combined potential of both structures, it does not in any way result in the opposition of the EC and EPC systems.

The identity of the EC Member States and the Twelve of EPC also comes to bear in case of divergencies between the common positions agreed on in EPC and the attitude taken by the Commission. In principle, such divergencies can arise whenever EPC wants to make use of Community instruments for the political ends agreed on in EPC, because it depends on the Commission whether in the EC framework the necessary proposals are made or the necessary executive decisions are taken (see details in next sub-chapter). Although the Commission in such conditions usually shares the consensus which exists among Member States on the use of EC instruments, particularly in cases of persistent human rights violations, divergencies are not purely hypothetical. It has actually happened several times that tensions have arisen between the Commission and EPC when the Member States in EPC, for political reasons, were in favour of restricting or suspending Community aid given to a particular third State because of internal political or human rights problems, whereas the Commission, for reasons of development policy, disagreed at least partially with the measures envisaged in the EPC framework (19). However, until now the Commission has never blocked the implementation of a decision reached in EPC about using Community instruments for political aims, although its responsibility under the EC Treaties for proposing

and executing Community policies as an independent institution would allow it to do so. This shows that - consensus in EPC being equivalent to consensus among the EC Member States - it is in practice politically extremely difficult for the Commission to resist pressure from EPC and to substantially dissociate itself and Community policy from a policy agreed on in the EPC framework. In this sense, coherence normally goes somewhat to the detriment of the independent institutional status the Commission enjoys within the constitutional framework of the EC Treaties. However, this does not exclude - as will be shown below - that divergencies between the Commission and EPC leak out via public statements.

2 As regards the external image of the EC and EPC systems, the identity of the Twelve and the EC Member States does much to melt the two structures together in front of third countries, so much so, that it sometimes even creates problems for diplomats acting in the EPC framework. According to Sir Julian Bullard, former Political Director of the UK Foreign Office, EPC representatives are very often seen, especially in third world countries, as "carrying the Community luggage", i.e. the full economic and financial potential of the EC, and it is very difficult to make these partners really understand that EPC is not, or at least not directly, carrying that luggage. Third countries, in fact, are often puzzled when representatives of EPC or of the Community insist on distinguishing between EC and EPC affairs (20).

How artificial the distinction may appear to the outside world becomes evident if one looks at the rather tortuous wording used by EC and EPC representatives in international conferences (e.g., in the UN or CSCE frameworks) precisely in order to maintain this distinction:

- if a representative of the Commission makes a statement on matters related to EC competence, he usually says: "I am speaking on behalf of the European Community";
- if a representative of the Presidency makes a statement on matters related to EC competence, he usually says: "I am speaking on behalf of the Community and its Member States";

- (-) if a representative of the Presidency makes a statement on matters related to EPC, he usually says: "I am speaking on behalf of the twelve Member States of the European Community" (21).

Since, in addition, the decisions taken by the Community in the sphere of external economic relations are frequently at least as political as those taken in the EPC framework, it is not surprising that third countries do not always really know whether the EC or the EPC structure is the right address for a given problem they would like to discuss with Western Europe (22).

The identity of the Twelve and the Member States of the Community usually secures a more or less coherent external image of the EC and EPC systems. However, the confusion in third countries and the risk of inconsistencies increases whenever representatives of the Commission or of EPC verbally transgress - as they often do - the boundaries of their respective domains. One example for each direction of "transgression" may illustrate this:

On 16 December 1987 the Danish Foreign Minister Ellemann-Jensen in his function as EPC President-in-Office answered an oral Parliamentary question on the procedure and the prospects for EEC-COMECON relations by saying that "the next important point in this development and our cooperation" would be "the conclusion of a cooperation agreement between the COMECON and the European Community". He went on speaking about "us" and "we" as negotiating partner of the COMECON without distinguishing between the EC and EPC (23). No doubt the problem of EEC-COMECON relations was a highly political one, but in substance it clearly was a matter of external trade policy falling entirely under exclusive Community competence. In addition, the answer given by Ellemann-Jensen was not consistent with the aims pursued by the Community, since it had always been the Community's policy to seek direct relations with the individual COMECON countries and to negotiate agreements with them, as the authorities having control over commercial policy instruments and on all trade matters, rather than with the COMECON itself. The latter, in fact, lacks the capacity to enter into international agreements, and the Community was not

ready to accept that the COMECON could usurp the competence of the Eastern European countries in the field of external economic relations and thus enhance further economic centralization in Eastern Europe. The EEC-COMECON relations were actually put on a formal basis by the EEC-COMECON "Joint Declaration on the establishment of official relations" of 25 June 1988, and not by a co-operation agreement (24).

On 14 April 1989 the Commission published two press releases related to Community external relations: In the first it was said that Commissioner Marin had a meeting with the Prime Minister of the Republic of Burundi, Adrien Sibomana, on official visit to the Commission. According to the statement, the talks focussed on the problems of "national unity", i.e. the internal political situation of Burundi, and Marin assured his guest of the support of the Commission for the efforts made in view of "national reconciliation". In the second release the press was told that in view of the EPC Ministerial Meeting with the "Rio Group" (group of seven Latin American countries) to be held the next day in Grenada, Commissioner Matutes had declared to be very satisfied about the substantial development of the "political dialogue between the Community and the Latin American countries" and that the time had arrived to "materialize" this dialogue in concrete economic realities (25). It goes without saying that even the broadest interpretation of the Community's implied external competences would not be sufficient to declare the "national unity" of Burundi and EPC "political dialogue" with the "Rio Group" to be matters falling within Community competence. In addition, consistency with EPC policies was not fully ensured, since the first press release (and apparently also Commissioner Marin during the meeting) did not take into account, other than vaguely referring to the "tragic events of August 1988", the fact that the Twelve had repeatedly expressed their concern about the human rights situation in Burundi after the bloody troubles of August 1988 (26).

Such verbal transgressions of the boundaries between the EC and EPC domains may not only render the efforts made to insist on the distinction between the Community and EPC somewhat hypocritical in the eyes of third countries, but they also reveal the existence of

differences in political evaluation between the Commission and EPC. Needless to say that, depending on circumstances, this can be extremely detrimental to the external image of the Community and the Twelve, even if the inconsistency remains a purely verbal one.

Putting together the various political aspects of EC/EPC coherence set out above, it is possible to conclude that the identity of the EC Member States and the "Twelve" normally ensures that EC and EPC policies are consistent in substance. However, this political factor puts the Commission, as the executive of the EC, sometimes under considerable pressure, and divergencies between the Commission and EPC sometimes leak out in public statements.

### 8.3. The use of EC instruments by EPC

Although the use of EC instruments by EPC is not a matter of day-to-day EC and EPC business, it constitutes not only a particular link between the two systems, but also in a certain sense the touchstone of their coherence: Apart from the usual diplomatic means of action, EPC has no "teeth" with which to exercise pressure on third countries for the political aims the Twelve have agreed on. In contrast to EPC, the EC system disposes - in many cases even exclusively - of trade and development policy instruments which clearly constitute the strongest, albeit not necessarily efficient instruments of foreign policy action, if one excludes the extremely problematical use of military means. Therefore it is often expedient for EPC to have recourse to Community instruments for achieving political objectives the Twelve have defined. The credibility of EPC policies and of EC/EPC coherence then depends on the good functioning of interaction between the two systems.

In regard to the use of EC instruments for political aims agreed on in EPC, one may distinguish between positive and negative measures: Positive measures usually consist of specific trade conces-

sions and/or aid programmes the Community grants to third countries, negative measures of suspension of aid programmes, suspension of current negotiations and/or the imposition of trade sanctions.

α Prominent examples of positive measures are the cooperation agreement with the six Central American countries which was signed at the San José II Conference in November 1985, the trade and financial assistance measures in favour of the Occupied Territories adopted by the EC Council in October 1986, and the financial assistance measures in favour of the countries most directly affected by the Gulf crises adopted by the Council in December 1990: The trade concessions and the financial aid provided for by the cooperation agreement with the Central American countries were destined to complement the political support of EPC for the Contadora process. The measures decided in favour of the Occupied Territories were in line with the EPC approach for supporting the peace process in the Middle East. The financial assistance decided in to favour of the countries most directly affected by the Gulf crisis (Egypt, Jordan and Turkey) followed to an undertaking of the Twelve to support the Middle East countries respecting the embargo imposed on Iraq (27).

β Prominent examples for negative measures are the trade embargoes which the Community imposed in 1982 on Argentina (because of the invasion of the Falkland Islands) and in 1990 on Iraq (because of the invasion of Kuwait): Both embargoes were decided and implemented in accordance with previous EPC decisions (28).

As regards positive measures and as regards those negative measures which consist of the mere suspension of aid programmes, it has never been contested that these can only be decided and implemented by the Community: Due to the Community's exclusive competence for matters of trade policy, trade concessions to third countries can only be granted by the Community. It may also be evident that a Community aid programme or negotiations conducted by the Community can be suspended by the Community only.

The situation is less clear in respect to the imposition of trade sanctions, which obviously constitute the most powerful of the measures mentioned above. It has already been pointed out that the

Community's competence under Article 113 EEC Treaty (Common Commercial Policy), to which trade sanctions evidently pertain, are exclusive in nature (see sub-chapter 1.3.). However, Article 224 EEC Treaty provides for an exception: It stipulates that Member States "shall consult each other with a view to taking together the steps needed to prevent the functioning of the common market being affected by measures which a Member State may be called upon to take

- (a) "in the event of serious internal disturbances affecting the maintenance of law and order,"
- (b) "the event of war,"
- (c) "serious international tension constituting a threat of war," and
- (d) "in order to carry out obligations (...) accepted for the purpose of maintaining peace and international security".

It would follow from Article 224 EEC Treaty that in the emergency cases described in that provision, Article 113 EEC Treaty is not an exclusive power of the Community and that, as a result, Member States can autonomously enact trade sanctions (29).

In accordance with the "doctrine of the ultimate aim" (see sub-chapter 1.1.), the Council and most of the Member States for a long time took the view that, although making use of commercial policy instruments, trade sanctions taken for one of the emergency purposes described in Article 224 EEC Treaty do not fall within the scope of Article 113 EEC Treaty and should consequently be taken by the Member States only (30). In the use of such an important foreign policy instrument as trade sanctions are, the Member States clearly did not wish to submit themselves to the decisional and normative discipline of the EC framework. As a result, the sanctions imposed in 1968 by the UN Security Council against Rhodesia were implemented by the Member States individually on the basis of Article 224 EEC Treaty without involving the Community structure (31). Also on the basis of Article 224 the Member States in 1980 decided in the EPC framework to impose sanctions on Iran during the hostage crisis. The decision-making process was almost

completely intergovernmental, the Commission only being kept informed about the sanctions and their implementation (32).

Although still anxious to keep the instrument of trade sanctions under intergovernmental control, the Member States then began to appreciate Community sanctions as a means to give a stronger sign of political reprobation than would be possible through separate national measures. The trade restrictions which in March 1982 were imposed on the Soviet Union because of Soviet pressure on Poland were adopted and implemented by the Community (with full involvement of the Commission) on the basis of Article 113 EEC Treaty after a political discussion of the issue in the EPC framework. True, the measure was not a perfect one, since Greece took a more favourable attitude towards the Soviet Union and had to be exempted by a Council Regulation from the application of the trade restrictions. But nevertheless it was the first time that Community instruments were actually used for a political aim agreed on in EPC (33).

The new practice was reconfirmed immediately afterwards during the Falkland crisis: In April 1982, the Council, after a corresponding decision in EPC and a proposal of the Commission, suspended for one month on the basis of Article 113 imports of all products originating in Argentina (34). This measure being a much stronger one than that taken previously against the Soviet Union, the Community system came under stress - and revealed several weaknesses: Firstly, a separate "Decision of the Representatives of the Governments of the Member States of the ECSC, meeting within the Council", had to be taken in order to suspend imports of all products covered by the ECSC and originating in Argentina (35). The formal splitting of the measure was necessary because - as it has already been mentioned - Member States are of the opinion that pursuant to Article 71 ECSC Treaty they have retained their competence in the sphere of commercial policy regarding ECSC products (see sub-chapter 1.1.). Secondly, when it came to a second prolongation of the trade sanctions in May 1982, both Italy and Ireland, invoking the possibility of national measures under Article 224 EEC Treaty, decided to abstain from further applying the sanctions. In the case of Ireland the abstention was



motivated by the sinking of the Argentine cruiser "Belgrano" outside of the blockading line the UK had imposed around the Falkland Islands, and in the case of Italy, by the opposition of the Socialist coalition partner to a prolongation of sanctions. Thirdly, raising objections against Article 113 EEC Treaty as legal basis for sanctions, Denmark as well invoked Article 224 EEC and it applied the Community measures only until it had introduced corresponding measures on a national legal basis (36).

Things were even more complicated in the case of the sanctions imposed against South Africa in 1986: After Commission proposals for restrictive measures had failed to be adopted by the Council in 1985, it took the Twelve until September 1986 before the Foreign Ministers meeting in EPC could finally agree to proceed to the adoption of restrictive measures. However, even after that agreement, several Member States were opposed to the use of EC instruments, while others took the position that they could only agree to the measures if these were implemented by the Community (37). As a result of all these divergencies, the measures ultimately adopted in September and October 1986 were formally adopted inside the Community framework, but as far as possible maintained an intergovernmental appearance: The ban on the import of certain iron and steel products was imposed in form of a Decision of the Representatives of the Governments of the Member States of the ECSC similar to that already taken in the case of the ECSC sanctions against the Soviet Union (38). The ban on the import of gold coins took the form of a Council Regulation which - despite the fact that the corresponding Commission proposal had been based on Article 113 EEC Treaty - did not contain any reference to a particular Article of the Treaty (39). The ban on new investments was introduced in form of a "Decision of the Representatives of the Governments of the Member States, meeting within the Council", which - in contrast to the Commission proposal which was based on Article 235 EEC Treaty - did not refer to a particular Article of the Treaty and even not to the Treaty itself (40). All three acts mentioned the previous discussions in EPC, thereby underlining the intergovernmental origin of the sanctions.

The issue of trade restrictions to be imposed by the Community

arose again in 1989 in connection with the prevention of the proliferation of chemical weapons: In May 1984 the EC Council had failed to adopt a Regulation proposed by the Commission governing the export of precursors of chemical weapons. As a result, the problem had been left entirely to the responsibility of Member States. In January 1989, however, the issue came on the agenda of EPC because of the conflict between the United States and Libya over the Libyan factory at Rabta which was suspected of manufacturing chemical weapons. Being under pressure because of charges that German firms had furnished certain installations for the factory, Germany built up consensus in EPC in favour of a resuscitation of the long-interred proposal for a Council Regulation on precursors of chemical weapons. The Commission agreed to this and prepared a revised proposal, based on Article 113 EEC Treaty which provided for immediate prohibitive measures. This time, the substance of the proposal did not raise any particular problem, but unwilling to leave the political prestige for this initiative to the Commission, several Member States insisted that the proposed Council Regulation should bring out the leading role of EPC in this affair. It was only after a hard bargaining in both the EC and EPC structures, and after the Commission had agreed to the inclusion of a clear reference to the role of EPC, that the Council finally adopted the Regulation on 20 February 1989 (41). The trade restrictions were this time explicitly based on Article 113, but the second recital of the Regulation stated that consensus in EPC on urgent measures for the control of export of precursors of chemical weapons had been achieved on 14 February. It thereby indicated that the EPC decision had preceded the EC decision. Referring explicitly to Article 30(5) SEA, the fourth recital underlined that the Regulation was also adopted in view of ensuring consistency between EC and EPC policies (42).

In the case of the trade sanctions imposed against Iraq in August 1990, the Twelve agreed on the imposition of sanctions against Iraq already on 4 August - two days after the invasion of Kuwait - in an extraordinary meeting of the Political Directors in Rome. This agreement was reached on the basis of a dossier prepared by the Commission, on the impact and the repercussions of

possible economic measures which was submitted to the Political Directors by a personal representative of Commission President Delors (43). The Commission then on 6 August adopted several Proposals for Council Regulations suspending all imports of raw oil and oil products from Iraq and suspending the generalized tariff preferences for certain products originating in Iraq. However, these proposals became obsolete after the adoption of the UN Security Council Resolution 661(90), which called for a total embargo (44). On 8 August 1990, the Commission therefore forwarded new Proposals providing for a total embargo against Iraq and Kuwait which were adopted the same day (45). Like in the case of the embargo against Argentina, the sanctions were imposed in form of a Council Regulation covering EEC products as well as in form of a separate "Decision of the Representatives of the Governments of the Member States of the ECSC, meeting within the Council", covering the ECSC products. The first recital of both legal acts explicitly states that there had been a decision in the framework of EPC to take economic measures against Iraq (46).

On the basis of the previous account, four conclusions can be drawn with respect to the use of EC instruments by EPC:

Firstly: If there is a consensus in EPC on the use of EC instruments for political aims agreed on in EPC, the corresponding EC measures normally can be taken rather smoothly, without giving rise to any problems of coherence. However, this consensus is not always easily achieved, since some Member States are still quite reticent to consider the powerful means of trade sanctions as an instrument which falls within Community competence and which is to be handled by the Community only. Even in case they agree on Community sanctions, Member States therefore try to give sanctions an intergovernmental appearance.

Secondly: Article 224 EEC Treaty in practice constitutes a kind of escape clause to Community sanctions which allows the Member States not only to drop out individually when sanctions are imposed by the Community, but also to jointly impose trade sanctions

outside the Community framework. Since the implementation of sanctions by the Community has the double advantage of giving stronger political signals and of ensuring uniformity of coverage and application because of their definition at EC level, the existence of this escape clause clearly weakens the combined political potential of the EC and EPC systems. In addition, the use of Article 224 EEC Treaty for the imposition of trade sanctions in pursuance of political aims entails the risk that trade issues are declared to be highly political in order to extricate them from the discipline of Community decision-making (47). The only positive aspect of Article 224 in this regard is the fact that it provides a kind of safety-valve in case one or several Member States totally disagree with the Community line of action, and, as a result, that the Community may be spared a major political and constitutional crisis. However, this advantage does not in any way match the fundamental disadvantages mentioned above (48).

Thirdly: In the absence of any legal rule governing the use of EC instruments by EPC, the practice has emerged that EC measures taken in accordance with EPC decisions are often formally presented as being a result of the consensus reached within the EPC framework. This bears a certain risk that the voting rule of Article 113 EEC Treaty (qualified majority) is de facto replaced by the rule of consensus applicable in EPC (49). This practice also creates the impression that Community measures in the sphere of external relations may depend on intergovernmental consensus in EPC, which is contrary to the EC Treaties and may constitute a dangerous precedent for integrated Community decision-making.

Fourthly: Since the EPC decisions on the use of EC instruments normally precede and orientate the corresponding EC decisions, the Community is more often than not reduced to a mere executive of EPC which only formalizes and implements EPC decisions. This tendency carries the risk of encroaching - not in legal but in political terms - upon the Commission's independence and right of initiative under the EC Treaties (see also sub-chapter 9.3.). In this context again, the absence of any legal rule governing the

use of EC instruments by EPC can entail a very embarrassing situation if one day - despite political pressure from EPC - the Commission in order to defend an established Community policy would feel obliged not to comply with an EPC consensus on using Community instruments for a specific political aim.

## Chapter 9: Interaction procedures between the EC and EPC systems

The degree of coherence between the EC and EPC systems depends in practice largely on the efficiency and intensity of interaction procedures between the two structures. Since these procedures are mainly operated within or between the major institutions of the EC and EPC systems, our analysis will deal in turn with interaction procedures (1) on the level of the European Council, (2) on the level of the EC Council and EPC Ministerial Meetings, (3) between the Commission and the EPC system and (4) between the EP and the EPC system. It should be recalled here that pursuant to Article 31 SEA, the jurisdiction of the ECJ does not extend to EPC (see sub-chapter 8.1.). As a result, the ECJ is excluded from interaction between the EC and EPC systems.

### 9.1. Interaction procedures on the level of the European Council

Because it has political authority over both the EC and EPC systems (see sub-chapter 7.1.), the European Council constitutes the highest authority of interaction between the two systems. Pursuant to the Solemn Declaration of Stuttgart, the European Council has not only the function to issue "general political guidelines" for both the EC and the EPC structures, but also to deliberate "upon matters concerning European Union in its different aspects with due regard to consistency among them" (50). This leaves no doubt that the general political competence of the European Council extends also to political orientations for the coordination of EC and EPC policies.

In practice, EC/EPC interaction in the framework of the European Council takes two forms: the mixing-up of EC and EPC issues in discussions among the Heads of States or Government during the meetings and the inclusion of both EC and EPC issues in official statements of the European Council:

It is evident that the distinction between EC and EPC issues in discussions of the European is rendered particularly artificial by the fact that it is the same people (the Heads of State or Government) who have to deal with both. Not being subject to any formal rule regarding discussion procedures and subjects, the Heads of State or Government have always felt free to mix up EC and EPC issues in their discussions. Traditionally, the mix-up tends to be complete during the informal discussions on international issues in the context of the "fireside chats", which are normally held in the evening of the first day of European Council meetings and in which only the Heads of State or Government and the President of the Commission participate. Interaction, there, encounters no problem. However, the "fireside chats" primarily serve for an informal exchange of views and the Heads of State or Government do not mandate EC or EPC action in light of their informal talks. As a result, the impact of these discussions on lower levels of EC/EPC interaction is at best indirect and usually rather limited (51).

As concerns the plenary sessions, in which also the Foreign Ministers and the Commissioner responsible for External Relations take part, they are usually almost entirely devoted to the discussion of Community problems. Normally EPC issues figure on the agenda only in connection with such EPC declarations as the Foreign Ministers have prepared for adoption by the Heads of State or Government. As we have mentioned before (see sub-chapter 7.2.), in most cases these declarations are adopted without any discussion. As a result, the plenary sessions only rarely provide an occasion for substantial EC/EPC interaction.

It has already been shown that the texts which are submitted to the Heads of State or Government in order to be formally adopted, are prepared separately in the EC and the EPC structures: The EC texts normally pass through the COREPER and the General Affairs Council before being placed on the agenda of the European Council, whereas the EPC texts usually are prepared by the Political Committee for finalization by the Foreign Ministers on the first evening of the European Council meeting (see details given in sub-

chapters 7.2. and 7.3.). This excludes any direct interaction between the EC and EPC structures during the preparatory phase, and coherence can only be ensured through the presence of the Commission and of the Presidency in the appropriate bodies of both structures (52).

However, there has been at least one occasion on which the unwritten rule of the separate preparation of texts was broken: In 1988, the extremely rapid changes taking place in Eastern Europe and the concerns third countries had repeatedly expressed about the possible emerging of a "fortress Europe" in 1992 clearly affected both the policies of the EC and of EPC. The Member States and the Commission therefore agreed to issue a common declaration at the Council of Rhodes (2/3 December 1988) solemnly reaffirming the position of the Community and the Member States on these and other major foreign affairs issues. This declaration, entitled "Statement on the International Role of the European Community", covered without distinction EC and EPC matters (53). It was actually finalized by a joint drafting group in Rhodes consisting of Community officials and EPC representatives. Apart from minor frictions between the Commission and the EPC Secretariat in the preparatory stage, interaction in this case functioned perfectly well and those who took part in the joint drafting found it a positive experience. The resulting text was adopted by the Heads of State or Government without any difficulty (54). This shows that the separate preparation of EC and EPC texts for the European Council is the result of the parallel existence of two distinct and well entrenched decision-making structures, rather than of material necessities.

As regards the formal presentation of EC and EPC texts adopted by the European Council, coherence between the two systems has recently been slightly increased: The Irish Presidency of the first half of 1990 has introduced the practice of publishing the EPC declarations no more under a separate section of the "Conclusions of the Presidency" entitled "European Political Cooperation" as this was done previously, but to publish them without any EPC hallmark, among the Annexes to the "Conclusions" which frequently also deal with Community matters. As a result, the EC and EPC texts



adopted by the European Council now form a more coherent whole and may only be distinguished because by their different content (55). The usual practice of separate preparation of the texts, however, has not been changed.

EC/EPC interaction procedures at the European Council level being normally limited to 'mixed' discussions in "fireside chats" and 'mixed' publication of EC and EPC texts, it is evident that the European Council does not really have a substantial impact on the coherence between the EC and EPC systems. In this respect, it performs the function of symbolic political authority covering both structures res, rather than being coordination and orientation body at the highest political level as provided for by the Solemn Declaration on European Union.

## 9.2. Interaction procedures on the level of the EC Council and EPC Ministerial Meetings

In contrast to the Heads of State or Government meeting in the European Council, the Foreign Ministers of the Member States are not entitled from an institutional point of view to discuss issues of EC external relations and of EPC in the same body and at the same time: Pursuant to the EC Treaties and the constitutive texts of EPC, they have to deal with EC issues at the EC General Affairs Council meetings and with EPC issues at EPC Ministerial Meetings. Neither the EC Treaties, nor the constitutive texts of EPC provide for any direct interaction between the EC and EPC structures at the ministerial level, apart from the presence of a Member of the Commission at EPC ministerial meetings (see sub-chapter 9.3.).

In the preparation of dossiers and texts for the Foreign Ministers meetings the strict institutional division of EC and EPC responsibilities is normally fully observed: The dossiers and texts for the EC General Affairs Council are prepared by the COREPER with the help of the appropriate EC Council Working Groups and of the General Secretariat of EC Council, whereas those for the EPC

Ministerial Meetings are prepared by the Political Committee with the help of the appropriate EPC Working Groups and the EPC Secretariat (see details given in sub-chapters 2.2. and 5.2.). This institutional division of responsibilities is so rigid that there even does not exist a regular interaction procedure between the EPC Secretariat, which is lodged in the "Charlemagne" building of the General Secretariat of the EC Council and the Council Secretariat itself: The exchange of information between both Secretariats is extremely scarce, and cooperation is limited to the use of the Council Secretariat's translation services by the EPC Secretariat (56).

As a result of the strict formal and institutional separation of EC and EPC matters on the Foreign Ministers' agenda, EC/EPC interaction at the ministerial level would indeed have been very limited, if there had not been developed in practice at least three informal procedures of interaction: The discussion of both EC and EPC issues at the occasion of EC General Affairs Council meetings, the total mix-up of EC and EPC items at Gymnich-type meetings and the recently introduced possibility of holding meetings in which both the COREPER and of the Political Committee members participate:

{ In the case of the meetings of the Member States' Foreign Ministers, the distinction between EC and EPC affairs is even more artificial than it is in respect to the Heads of State or Government meeting within the European Council: In contrast to the Heads of State or Government who will only occasionally discuss EPC issues, the Foreign Ministers regularly have to deal with EC and EPC issues alike. It is not surprising that under these circumstances the Foreign Ministers have been less and less willing to respect the formal division of EC and EPC matters which some of the Member States so strictly had wanted to maintain in the early years of EPC (57). Since the mid-seventies, it has become a firmly established practice that when the Foreign Ministers get together on the occasion of EC General Affairs Council meetings they regularly discuss EPC issues as well (58).

Until 1989 the agenda of the EC General Affairs Council was

kept strictly separate from that of the formal EPC discussions which normally took place in the same room after the last EC item had been dealt with. It was only within the informal talks during lunch that EC and EPC issues were discussed without formally separating them. In the first half of 1990 the Irish Presidency then introduced the practice of merging the agendas of EC General Affairs Council meetings and of EPC Ministerial Meetings. As a result, it has now become a standard feature that the Foreign Ministers have only one agenda on which EC and EPC items follow each other without formal distinction: The only indication of whether a point comes from the EC or the EPC side now is the substance of the item. During the negotiations on the SEA, this reform had still been rejected by several Member States (59).

2 The mix-up of EC and EPC affairs is still more complete in the case of the EPC Gymnich-type meetings: As has already been pointed out (see sub-chapter 5.2.), the highly informal character of this type of EPC Ministerial Meeting allows the Foreign Ministers to have a comprehensive exchange of views on all foreign affairs issues of common interest without the organizational constraints imposed by regular Ministerial Meetings. In the absence of a pre-fixed EPC agenda and of the numerous specialized officials which attend the regular meetings, the Foreign Ministers and one Member of the Commission - usually the President or the Commissioner in charge of external relations - on these occasions normally discuss foreign affairs issues without any distinction between EC and EPC aspects. Although no formal decisions are taken during these weekend get-togethers, the Foreign Ministers often arrive at common views which can have a considerable impact on EC/EPC coherence and may later be formalized in both structures (60).

It has already been pointed out that the EC and EPC items on the agenda of the Foreign Ministers' formal meetings are prepared in strict separation from each other because EC and EPC structures divide at the level immediately below the Foreign Ministers, the EC side being represented by the COREPER and the EPC side by the

Political Committee. Yet, after the entry into force of the SEA have been made isolated attempts to surmount this rather rigid institutional division. At the occasion of the Madrid European Council of June 1989, the Spanish Presidency for the first time convoked a joint COREPER/EPC Political Committee meeting in order to prepare a document synthesizing all aspects of EC/EPC relations with the Eastern European countries (61). The Irish Presidency of the first half of 1990 went even further: In order to prevent inconsistencies between EC and EPC policies in respect to the changes in Eastern Europe, the ongoing CSCE negotiations and the problem of German reunification, the Irish Presidency in January and February 1990 convoked two EPC Ministerial Meetings in Dublin and specifically requested that these were attended not only by the Political Directors - as usual -, but also by the Permanent Representatives. As a result these meetings, although being formally EPC Ministerial Meetings, constituted a kind of joint COREPER/Political Committee meeting as well. It was for the first time that Foreign Ministers, Permanent Representatives and Political Directors, each group being, of course, completed by a representative of the Commission at the appropriate level, could discuss together foreign affairs issues on the agenda, and the distinction between EC and EPC aspects of these issues was almost completely dropped during the meetings. The meetings resulted, inter alia, in the decision to grant emergency Community food aid to Romania and Poland, the refusal by several Member States to agree to the Commission's proposal of according preferential treatment to an eventual application for EC membership by the German Democratic Republic and in an undertaking of the German Government to involve EC partners in its ongoing consultations with the German Democratic Republic on German reunification (62). All these issues had previously given rise to frictions not only among the Member States, but also between the Commission and several Member States, and the joint meetings of January and February 1990 helped to ensure EC/EPC coherence in this respect.

*As a result* The pragmatic interaction procedures described above clearly have a considerable impact on bringing the EC and EPC structures

closer together, particularly because they take place on the ministerial level, i.e. the highest decision-making level inside of the two structures. As Sir David Hannay puts it quite picturesque, interaction on this level in practice requires no more than "the Foreign Ministers, wearing their two hats, to take one hat off and put the other hat on" as they deem necessary (63).

However, it nevertheless seems to be quite difficult to surmount the rigid separation of EC and EPC issues in the preparation of the Foreign Ministers' dossiers and of the official texts to be adopted by them. The experiments of the Spanish and Irish Presidencies with holding joint COREPER/Political Committee meetings have not been repeated since February 1990, and EC and EPC texts continue to be prepared in complete isolation of each other by the COREPER and the Political Committee respectively (64). It is true that the attitude taken by the members of these bodies as regards the distinction of EC and EPC affairs is more pragmatic than it used to be in the past. With regard to the distinction of EC external relations issues and EPC matters in the discussions in the COREPER, Sir David Hannay frankly admits that "if you try to do it all the time you will make a fool of yourself" (65). Yet, it nevertheless happens that one or several Permanent Representative block the discussion of a certain external relations issue in the COREPER by arguing that the item is of particular political importance and should be dealt with first in the framework of EPC (66).

The reasons why the traditionally very rigid distinction between EC and EPC affairs is scarcely overcome in the streams leading up to the Foreign Ministers are not merely of a formal nature: Not only in the EC and EPC frameworks, but also in the national Ministries EC and EPC issues respectively are dealt with in different administrative units (e.g. the economic or the political section of a Foreign Ministry), and therefore by officials with different specialization and different responsibilities. In practice, this constitutes a formidable obstacle to every attempt to merge EC and EPC aspects below the ministerial level, since the respective sets of officials are not only structurally separated from each other, but also jealously defend their proper domain of competence and established working practices (67).

### 9.3. Interaction procedures between the Commission and the EPC system

From our earlier analysis of the Commission's role in the EC system of foreign affairs (see sub-chapter 2.1.) it has clearly resulted that due to its powers under the EC Treaties and to the role it has acquired in practice the Commission is the leading actor in Community external relations. The interaction between the Commission and EPC, therefore, constitutes both the most important and the most delicate hinge of EC/EPC interaction. This was already recognized by the London Report of 1970, which explicitly provided that the Commission should be consulted whenever the work of EPC should affect Community activities (68). However, for many years the Member States excluded the Commission from various areas and activities of EPC and they hardly missed an occasion to underline that the Commission was only on sufferance in the intergovernmental structure of EPC (69). It was only after several frictions and after the experiences made during the Helsinki Conference had shown the utility and even the necessity of a closer involvement of the Commission, that the Member States' attitude began to change (70): The London Report of 1981 established, though still rather vaguely, the principle of the full "association" of the Commission with EPC; this gradually entailed a closer involvement of the Commission at all levels of EPC, later confirmed in the Solemn Declaration on European Union (71). By stipulating in clearer terms than ever used before that "the Commission shall be fully associated with the proceedings of Political Cooperation", Article 30(3)(b) SEA has formally even more strengthened the "association" of the Commission with EPC which now also rests on a legal basis.

The term "association" does not imply that the Commission has any legal competence in matters of EPC or any institutional role within its structure. In practice, the "association" of the Commission consists of five different forms of interaction by which

the Commission is linked to the EPC structure:

4 "Association" means, firstly, full information of the Commission on all EPC matters: The Commission is directly linked to the COREU network through a terminal in its cypher office in the Berlaymont, and it receives all confidential EPC documents which are distributed by the Twelve's Foreign Ministries through this network or at meetings. Like the Member States, it is also kept fully informed about the EPC activities of the Presidency and receives the drafts of all meeting records and of all official EPC texts prepared by the Presidency or the EPC Secretariat before these are formally adopted (72).

2 "Association" means, secondly, presence of the Commission at all meetings of EPC bodies: Article 30(3)(a) SEA specifically mentions Commission presence only at Ministerial Meetings, but the Commission is actually represented in all EPC bodies: In the European Council and in EPC Ministerial Meetings by its President and/or the Commissioner responsible for External Relations, in the Political Committee by the Director responsible in the Secretariat General for questions related to the intergovernmental cooperation between the Member States (the "Political Director" of the Commission), in the Group of Correspondents by a Head of Division responsible in the Secretariat General for the management of the COREU network (the "European Correspondent" of the Commission), in the various EPC Working Groups by senior officials whose responsibilities are most directly concerned by the subject-matters dealt with by the respective Working Group and, finally, also in the meetings of the Twelve's Ambassadors in third countries by the Head of the respective Commission delegation (if there is a Commission Delegation in that country).

Because of its mainly commercial and economic sphere of action, the Commission in many cases does not dispose of administrative units which correspond to those of the national Foreign Ministries, particularly as regards the political sections of the national ministries. As a result, it is not always easy for the Commission to ensure an appropriate representation in EPC bodies. The

problem, that for long years Commission representation in the Political Committee had to be ensured by the overburdened Deputy Secretary General, has been solved at the end of 1987 by the creation of a small new Directorate inside of the Secretariat General responsible for relations with EPC (Directorate F) whose head since then in practice acts as the Commission's "Political Director". In respect to the EPC Working Groups, however, the Commission in many cases must have recourse to subsidiary solutions. Disposing of no foreign policy planning staff properly speaking, the Commission is represented, for instance, in the Group of the Heads of Planning Staffs by the "Conseiller principal" of the "Cellule de prospective" working under the direct responsibility of the President of the Commission, although this unit for most of the time has to focus on questions of Economic and Monetary Union (73).

3 "Association" means, thirdly, presence of the Commission at many of the EPC meetings with third countries: The Commission is represented in all dialogue meetings with third countries when the formula of all of the Twelve or of the Troika is used. Representation is ensured by the Commissioner responsible for external relations and/or the Commissioner responsible for development in the case of meetings on ministerial level (e.g., in the dialogues with the ASEAN and Central American States), and by the Commission's "Political Director" in the case of meetings on the directorial level (e.g., in the dialogues with Turkey and with Japan) (74). If the Troika formula is used, the Commission finds itself even in a privileged position because - due to the rotation of the Presidency on the side of Member States' representation - it is the only permanent member of the Troika and, as a result, also the only permanent dialogue partner within the European delegation. This has actually caused some concern for Member States being anxious to reduce the Commission's role in EPC as far as possible (75). However, it should be noted that the Commission is until now normally excluded from all dialogues and 'ad hoc' contacts with third countries which are conducted by the Presidency alone. There can be no doubt that this restriction, which is obviously the result of persisting national susceptibilities in respect to the Commission's



role in foreign affairs, constitutes a major deficit in EC/EPC interaction as regards contacts with third countries. This is all the more serious since many third countries do not really distinguish between EC and EPC issues (see sub-chapter 8.2.) and the Commission in these cases may be prevented from playing its normal institutional role in respect to economic and commercial questions.

4

"Association" means, fourthly, that the Commission has the right to make known its views in EPC: Because of its particular role in the EC system, the Commission has actually always been more than a mere observer in EPC. As has already been mentioned, consultation of the Commission in case the work of EPC affects Community activities, was already provided for by the Luxembourg Report of 1970 (76). Over the years, the information provided by the Commission on Community activities and its views regarding the development of Community external relations have proved to be not only extremely useful for EPC decision-making, but also indispensable for ensuring consistency between EC and EPC policies. In addition, Commission interventions in EPC meetings frequently also help to overcome information gaps which still exist between the political and the economic sections of the Member States Foreign Ministries (77).

Taking into account national susceptibilities, the Commission for a long time followed a rather restrictive line of conduct in respect to the presentation of its views, limiting its interventions in EPC meetings to cases in which there was danger of EPC interfering in matters of Community competence or in which it was expressly asked to present its views (78). Profiting from the general political impetus gained under President Delors, and encouraged by the formal strengthening of its "association" status in EPC by Article 30(3)(b) SEA, the Commission has during the last years changed its line of conduct: It now constantly and systematically tries to bring out its views in EPC, not only in meetings of EPC bodies, but also in EPC contacts with third countries. In the Troika contacts with third countries, for instance, the Commission representatives are playing more and more the role of an

active interlocutor, and less and less - as was the case in earlier years - that of a passive observer, merely suffered by the representatives of the Member States (79). It seems that this new line of conduct enjoys the full support of Mr. Delors which considers relations with EPC as part of the particular responsibilities of the President of the Commission (80).

This more active role of the Commission is not always readily accepted by the Member States, and sometimes frictions arise. Yet, the Twelve's attitude towards the Commission has also become somewhat more flexible: It is no more contested by the Twelve, for example, that the Commission - although still having no formal right of initiative in EPC - can suggest topics for discussion in EPC meetings (81).

5 "Association" means, fifthly, that the Commission may act as a bridge between the EPC and EC systems in case the Twelve agree on the use of Community instruments for political aims: It has already been shown that it is the EPC system which plays the leading role in this form of interaction (see sub-chapter 8.3.). As regards trade sanctions, the Commission has adopted the pragmatic position to contribute as far as possible to the building-up of consensus in EPC and to refrain from making proposals to the Council for sanctions before such consensus being reached. This approach obviously takes into account that the Twelve retain competence for all political aspects of foreign affairs and that there is a need for a coherent attitude of the Community and of the Member States. The Commission's position was made clear by Commissioner Willy De Clercq in a statement before the EP on 11 September 1985: The Commission having been asked by the EP to consider measures against South Africa which went further than those agreed on in EPC, De Clercq said that the Commission did not exclude any kind of measure, but he also pointed out that the matter fell within the domain of EPC and that this imposed "certain constraints" on the margin of manoeuvre" of the Commission. He stressed that "the Commission does not enjoy here the right of initiative in this area, as it does in the areas covered by the Treaty of Rome" and affirmed that a decision could not "be taken without

prior consensus of all of the Member States" which according to De Clercq the Commission was anxious to bring about (82).

In practice, the Commission usually seeks to contribute to the search of consensus by suggesting possible ways and means for the implementation of EPC policies by Community instruments. The EPC decision of 4 August 1990 to impose sanctions on Iraq after the invasion of Kuwait, for example, was reached on the basis of a dossier prepared by the Commission on the impact and the repercussions of possible economic measures (83).

This pragmatic approach does not mean, however, that the Commission renounces its institutional independence vis-à-vis the EPC system: Through its active contribution to the search of consensus in EPC on the use of Community instruments, the Commission ensures at least a certain degree of Community participation in EPC decision-making and it watches over the respect of Community procedures. The Commission has also constantly resisted tendencies on the part of EPC and Council Working Groups to transform themselves in Management Committees for the administration of politically sensitive aid programmes of the Community: In line with the EP's insistence on the Commission's independence in executing Community policies, the Commission has until now always claimed sole responsibility for the execution of Community aid programmes (84).

It results from the "association" practices described above that interaction between the Commission and EPC has reached a very high level and resides on firmly established procedures. However, the Commission's status in EPC still very much falls short of that of a full participant: The Commission has no right of initiative, its voice does not formally count when it comes to take decisions by consensus, and it is excluded from certain contacts with third countries.

It is evident that these restrictions of its role inside of EPC are rather frustrating for the Commission, particularly since it is nevertheless expected by the Twelve to act as a stable bridge between the EPC and EC systems. In addition, the Commission has always regarded with a certain mistrust this purely intergovernmental structure outside of the Community framework that is EPC.

As a result, the Commission's attitude towards EPC is still marked by a certain rivalry.

In most cases, this rivalry finds its expression in a restrictive information policy of the Commission vis-à-vis EPC: Sometimes an MEP addresses a Parliamentary question to both the Commission and the EPC Presidency. Whereas the EPC Secretariat normally sends a copy of the draft of the answer of the EPC Presidency to the Commission, the Commission does not inform the EPC structure of the answer it intends to give, which carries a certain risk of inconsistencies between the answers given by both institutions. Not only in this regard, but also more in general members of the EPC Secretariat often feel themselves rather badly informed by the Commission (85). The same was true of the Twelve's Ambassadors in Moscow during the period of 1987-1988 which was of crucial importance for the development of the relations between the Community and the Soviet Union (86). On the other hand, it also has to be acknowledged that it is not the Commission's task to compensate information deficits of the Twelve's diplomats as these might result from the rather frequent lack of coordination between the political and economic sections of their national administration (87).

It should also be noted that the Commission is not always willing to give precedence to EPC as regards the reaction to international events. A glaring example of this form of rivaling EPC was the extremely quick reaction of the Commission to the bloody repression in China in June 1989: Although it was a Sunday, intense consultations inside of the Commission already took place on the day of the massacre in Peking (4 June 1989). These consultations, in which successively several senior officials, as well as Vice-President Andriessen and President Delors were involved, resulted in the autonomous decision by the Commission to cancel the meeting of the EC-China Joint-Committee which was to be held in Brussels the next day and also the High-Level Consultations with the Chinese Minister for external economic relations, Mr. Zheng Tuo-bin, scheduled for 6 June. In addition, the Commission already on 5 June issued a declaration which firmly condemned the repression and underlined that the cooperation between the EC and China could

be "permanently affected" by it. The Commission, this time, did not wait for a reaction of the Twelve and merely informed the Spanish Presidency about its line of action (88). Under these circumstances the Twelve could only follow the Commission: They actually issued a declaration on 6 June which was quite similar to that of the Commission of 5 June (89).

Another indicator for the Commission's unwillingness to leave the political aspects of European Affairs totally in the hands of EPC is the fact already mentioned that Commissioners in official statements often interfere in the domain of EPC and sometimes even express diverging views on political issues (see also sub-chapter 8.2.)

#### 9.4. Interaction procedures between the EP and the EPC system

When establishing EPC, the Member States were quite aware of the need to add some democratic elements with a European flavour to the purely intergovernmental structure they were going to set up. The Luxembourg Report of 1970, therefore, vaguely referred to the need of ensuring that the construction of Political Union "is a democratic process" and provided for six-monthly meetings between the Foreign Ministers and the Political Affairs Committee of the European Parliament (90). However, in the same measure as, on the one hand, the EP's functions in Community legislation and in Community external relations were successively strengthened, and, on the other hand, EPC more and more extended the scope of its activities, it became increasingly difficult for the Member States to reject the EP's repeatedly stated wish of a closer association with EPC (91). As a result, the Member States successively agreed on a series of additional procedures for ensuring information of the EP on EPC matters. These procedures were formally laid down in the Copenhagen Report (1973), the London Report (1981) and the Solemn Declaration on European Union (1983) (92). Yet, it was not until Article 30(4) of the SEA that the principle of "association" of the EP with EPC was formally established.

Pursuant to Article 30(4) SEA, "association" of the EP consists, firstly, of the Presidency "regularly" informing the EP on foreign policy issues examined within EPC by the Presidency, and, secondly, of the Presidency ensuring "that the views of the European Parliament are duly taken into consideration" (93). We will deal somewhat more in detail with both elements of "association" of the EP in order to reach a substantial assessment of the EP's role in EC/EPC interaction:

The existing procedures for information of the EP on EPC matters have been slightly enlarged and formally laid down in Title I of the Ministerial Decision of 28 February 1986 on the application of Title III SEA. It provides for six different procedures (94):

- (1) "The Presidency shall address the European Parliament at the start of its period in office and present its programme. At the end of this period, it shall present a report to the European Parliament on progress made." (95).

It has become a firmly established practice that the Presidency includes its statements on the EPC programme of its term in its general "Programme Speech" held before the EP at the beginning of the term, and that it includes the statements on the progress made in EPC in the general "Balance Speech" at the issue of its term. Both speeches cover EPC as well as EC issues without formal distinction. The President-in-Office usually focusses in a part of the speech on EPC aspects, but EC and EPC aspects are often also mixed up. The information value of the speeches for the EP is very low: They normally only reaffirm well-known official positions of the Twelve and indicate in very broad lines the corresponding programmes or progress made (96). Surprises are excluded by the fact that the text of the statements has to be approved previously by all of the Twelve. The Presidency absolutely has to avoid any reference to eventual divergencies among the partners and can, at most, tactfully indicate certain of its priorities (97).

- (2) "Once a year, the Presidency shall send a written communication to the European Parliament on progress in the field of European political cooperation and take part at ministerial level in the general European Parliament debate on foreign policy" (98).

In practice, the annual report on progress made in EPC forms part of the annual "Report on European Union" presented to the EP at the end of each year. The statements on EPC are inserted under a separate heading devoted to EPC. In most cases they only represent a summary of the official EPC texts issued during the last twelve months to which the Presidency sometimes adds very general informations on "démarches" made and on the frequency of EPC meetings and the like (99). The information value for the EP does not exceed that of the "Programme" and "Balance" speeches. Until now, there is no annual "general European Parliament debate on foreign policy". However, the Presidency is represented at ministerial level in the debates of the EP which follow on the "Programme" and "Balance" speeches and during Question Time held each part-session. This does not necessarily improve the level of information: In the debates, Ministers are quite aware of partners susceptibilities and are normally seconded by several officials (at least one of them coming from the EPC Secretariat) which, whenever necessary, remind Ministers of the political "acquis" of EPC. As a result, their interventions are usually extremely cautious and often deprived of any substance which goes beyond well-known positions of the Twelve.

- (3) "The Presidency-in-Office of European political cooperation and the members of the Political Affairs Committee of the European Parliament shall hold an informal colloquy four times a year to discuss the most important recent developments in European political cooperation." (100).

These colloquies are normally held quarterly. In practice, the Political Affairs Committee proposes beforehand three or four

topics of current interest to be dealt with during the colloquy which are normally accepted by the Presidency. During the colloquy the Foreign Minister of the Presidency (who is only rarely replaced by a Junior Minister or a Political Director) makes a more or less lengthy statement on each of these topics, whereupon the members of the Committee can then pose additional questions (101). The atmosphere is less formal than in the plenary debates and often takes the character of informal and rather frank exchange of views. The information given on these occasions by the President-in-Office are usually much more substantial than that which the MEPs receive through the other information procedures established by EPC. The extent to which this is the case, however, depends largely on the general attitude taken by the Presidency-in-Office as regards information of the EP and as well on the personality of the Presidency's Foreign Ministers. It still happens though, that the statements of the President-in-Office amount to no more than a summary of well known political events which have taken place during the last quarter (102). During the Spanish Presidency of the first half of 1989, the Colloquies were preceded by a lunch the President-in-Office had before the meeting together with the Chairman of the Political Affairs Committee, the Head of the EPC Secretariat and the Head of the Committee Secretariat, and followed by an additional gathering of the members of the Committee with a Secretary of State of the Presidency after the meeting. These new procedures have not been taken over by the succeeding Presidencies (103).

- (4) "By joint agreement, special information sessions at ministerial level on specific European political cooperation topics may be organized as required." (104).

This procedure has been newly introduced by the Ministerial Decision of 28 February 1986. The first meeting of this kind was held only on 14 March 1989 to discuss the Afghanistan question (105). Shortly before, the Spanish Presidency had declared its willingness to improve the relations between EPC



and the Parliament, inter alia by holding such special meetings with the Political Affairs Committee (106). In practice, it has proved to be extremely difficult to arrange these additional meetings because of the Foreign Ministers' heavily charged agenda (107).

- (5) "The Presidency shall reply to parliamentary questions on European political cooperation activities and take part in European Parliament question time according to the approved customary procedures." (108).

The EP can address questions to the Presidency on EPC matters under all four of the procedures provided for by Rules 58 to 62 of the RPEP, i.e. questions for oral answer with debate, questions for oral answer without debate, questions for Question Time (held at each part-time session) and questions for written answer. Since Parliamentary Questions constitute not only a source of information, but also a means for exercising a certain moral pressure on the Twelve and for reaffirming in public certain political convictions, the MEPs largely make use of this instrument: From 1987 to 1990, the number of Oral and Written Parliamentary Questions the EPC Presidency had to answer annually fluctuated between 300 and 400 (109). Most Parliamentary Questions relate to human rights problems in third countries and political aspects of international problems (e.g. disarmament or the situation in the Middle East) or of relations with third certain third countries (e.g. relations with the Eastern European countries). Written answers, which are given to Written Questions and to those Oral Questions which could not be dealt with orally because of lack of time or absence of the questioner during Question Time, rarely contain more than a brief summary of previous official statements of EPC: The first draft of all these answers is established by the EPC Secretariat on the basis of previous EPC statements, whereafter through the COREU network the Twelve take care of purging the text of any element which seems to go beyond their previous declarations. If a question touches on

particularly sensitive issues such as, for example, certain national positions or divergencies among the Member States, the answer in most cases merely consists of a standard formula, such as "the problem of ... has not been the subject of specific discussions by the Ministers" or "the matter raised ... does not fall within the sphere of European political cooperation" (110). It is only in the oral answers to Parliamentary Questions by the representative of the Presidency that the reply sometimes is less cautious, despite the already mentioned presence of officials which can remind him at all times of the "acquis" of EPC (111). One has to acknowledge, however, that Parliamentary Questions addressed to EPC are often highly polemic and ideologic, which does not very much incite the Presidency to give substantial answers.

- (6) "The Presidency shall transmit to the European Parliament as soon as possible declarations adopted within the framework of European political cooperation." (112).

Since its establishment in 1987, the EPC Secretariat takes care of forwarding the official statements of EPC to the EP immediately after their adoption by the Twelve. The members of the Political Affairs Committee can, in addition, address requests for supplementary information to the member of the EPC Secretariat which regularly attends the Committee's meetings (113).

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In 1989, the Spanish Presidency tried to introduce an additional information procedure according to which the Political Director of the Presidency, in his capacity as Chairman of the EPC Political Committee, should inform the Bureau of the Political Affairs Committee of the EP of "the most important topics" being discussed in EPC (114). Such an information meeting with the Spanish Political Director took actually place on 23 May 1989, during the May part-session of the EP (115). Yet, this procedure was not taken over by the succeeding Presidencies (116).

It should also be noted in this context that since 1982 the Head

of State or Government of the Member State holding the Presidency regularly presents an oral "Report" to the EP in Plenary on the results of the preceding meeting of the European Council and includes a brief statement on the EPC issues discussed. These statements are very general, however, and only summarize the positions taken in the "Conclusions" of the European Council (117).

The Twelve have never further defined the second element of the EP's "association" with EPC, i.e. their undertaking to "duly take into consideration" the EP's "views" (Article 30(4) SEA). They have only made clear that from their point of view "due consideration" does not mean that the EP's "views", which find their formal expression in the Resolutions adopted by the EP (see sub-chapter 2.3.), have any binding effect on EPC: In an answer to an Oral Parliamentary Question on 16 September 1987, the Danish President-in-Office Ellemann-Jensen left no doubt on this point by formally stating that "the Foreign Ministers meeting in European political cooperation are not obliged to take up a position on resolutions adopted by the European Parliament and (...) such decisions are not binding on the Member States" (118).

The only more concrete undertaking of the Twelve in respect to "due consideration" of the EP's views is to be found in point I.7. of the Ministerial Decision of 28 February 1986: The first paragraph of this provision simply repeats the obligation of the Presidency to ensure such "consideration", but the second is somewhat more precise by stipulating that the Presidency "shall reply to resolutions on matters of major importance and general concern on which the European Parliament requests its comments" (119). It took the EP until 1988 to 'discover' that this provision actually constitutes a means of obtaining at least an official reaction of EPC to Parliamentary Resolutions by inserting a formal request for comments of the Presidency in the respective Resolutions. After the EP had started to do so, the Spanish Presidency of the first half of 1989 established the practice that the Presidency, in form of a letter of the President-in-Office to the President of the EP, forwards "Observations" on those EP Resolutions which contain a formal request for comments of the Presidency (120). However, like

all other written statements made by the Presidency to the EP, these "Observations" (which, as usual, have to be agreed on by all of the Twelve) normally only contain a cautiously drafted summary of well-known official declarations and positions of the Twelve and elude any direct positive or negative comment on the corresponding EP Resolution (121). Not surprisingly, this kind of official EPC reaction to EP Resolution is regarded as highly unsatisfactory by the MEPs (122).

It is extremely difficult to find other signs of "due consideration" of the EP's views by the EPC system. The cases in which in EPC texts reference is made to Parliament's position are so rare that one can hardly escape the impression that the Twelve deliberately avoid mentioning the EP in order to underline that they are not at all bound by its views, which more often than not may appear to them lacking any political realism. And even if the EP is mentioned, it is by no means evident that its position has had a real impact on the common position adopted by the Twelve. When the Twelve in February 1989 decided to impose restrictions on the export of precursors of chemical weapons, for instance, a reference to the EP Resolution on the proliferation of chemical weapons of 19 January 1989 was well made in the third recital of the corresponding Council Regulation (123). However, as we have already shown (see sub-chapter 8.3.), the main impetus in this case came from particular German preoccupations and not from the EP. It is not easier to prove a direct impact of the EP in a more recent case: On 9 February 1990, the Commission in accordance with the positions taken in EPC decided to postpone the spring meeting of the joint EEC-Israel Scientific Cooperation Management Committee and Commissioner Matutes' official visit to Israel because of Israel's intentions to settle Russian Jewish immigrants in the Occupied Territories. Officially, the Commission motivated its decision in the first place by reference to an EP Resolution of 18 January 1990 which had requested the suspension of scientific cooperation with Israel. Yet, the corresponding EPC declarations did not make any reference to the EP Resolution (124).

It follows from the above that the principle of the "due consideration" of the EP's views laid down in the SEA has not led to

any substantial increase of the EP's impact on EPC. This element of the EP's "association" with EPC clearly ensures neither a closer interaction between the EP and EPC nor a certain democratic control of EPC.

Before concluding the analysis of interaction procedures between the EP and EPC, it should also be noted that the EP has certain structural problems in dealing with EPC issues. The Committee in charge of matters related to EPC, the Political Affairs Committee, has the broadest range of responsibilities of all EP Committees (125). These are reflected in a great variety of Reports established by its members: In 1988, for instance, the Committee adopted Reports on such varying issues as the date of the 1989 European elections, the political situation in South America, the European flag, the EEC-COMECON Joint Declaration, progress towards European Union in 1987, the seat of the institutions, human rights in the world, and (rather exceptional) the naming of the Channel Tunnel (126). As a result, the Committee is not able to focus on EPC in a similar indepth way as the REX Committee can focus on Community external relations or the Development Committee can focus on Community development policy (see sub-chapter 2.3.). There are clear limits of capacity to deal more intensely with particular EPC issues, not only as concerns the time available during the meetings, but also as concerns the supporting capacity of the Committee's Secretariat which is only slightly larger than that of the other Committees (127).

Another problem is related to the delimitation of responsibilities: In many cases the Reports of the Committee which deal with foreign policy issues have also to take into account matters of Community external (economic) relations or development policy. In these cases the Political Affairs Committee not only often suffers from a lack of information, since its relations with the appropriate Commission services are far less developed than those of the REX and Development Committees, but it also frequently comes into conflict with these Committees as regards responsibilities which does not serve best cooperation among the three Committees dealing more particularly with foreign affairs matters.

For this reason there have already been discussions in the Committee on the opportunity of creating one 'big' Committee responsible for all aspects of foreign affairs (128). The Political Affairs Committee has the advantage, however, that due to its large sphere of political responsibilities, its contacts with diplomatic representatives of third countries are more developed than those of the other Committees (129).

Putting together the various aspects of the interaction between the EP and the EPC system described above, it becomes evident that this interaction is still largely underdeveloped: The existing interaction procedures ensure a certain degree of information of the EP on EPC matters which is quite burdensome for the Presidency without being fully satisfying for the Parliament. They totally fail, however, to ensure any form of direct impact of the EP on EPC policies (130). In contrast to the EC structure, in which the EP disposes of certain powers of co-decision, the EP's role in the EPC framework is in practice limited to that of mere observer whose regular information by the Twelve serves as a convenient alibi for the absence of democratic control of EPC at the European level. It is true, that in the context of EPC, the EP enjoys a maximum of autonomy, being absolutely free to set its priorities, to establish its principles and to choose its topics for debate, and the EP has actually frequently adopted positions partly or totally differing from the official positions of the Twelve (131). However, this is an autonomy resulting from a total lack of competence and responsibilities which not only constitutes a democratic deficit, but also promotes visionary and ideological, rather than realistic and constructive political tendencies inside of the EP. Finally, it should also be noted that the extremely weak position of the EP in EPC does not serve best the effectiveness of EPC policies, because, today, democratic legitimacy clearly increases the authority of positions adopted on the international stage.

**Part V**

**CONCLUSIONS**





## Chapter 10: Conclusions

### 10.1. Main characteristics of the EC/EPC dual system of foreign affairs

#### First characteristic:

The EC/EPC dual system of foreign affairs rests on an incomplete basis of foreign affairs powers, differing both from an international organization and from a nation state: By contrast to an international organization, the system is (on the EC side) vested with 'real' foreign affairs powers which the Member States no longer exercise. By contrast to a nation state its foreign affairs powers are limited, because confined to the ambit of the EC Treaties, and they are partly controversial. The Member States continue to exercise their remaining foreign affairs powers in complete sovereignty either jointly within the system or individually outside the system (see chapters 1, 2, 4 and 5).

#### Second characteristic:

Due to its incomplete basis of foreign affairs powers, the EC/EPC dual system escapes the classic distinction between unitary and non-unitary actors on the international stage: It acts as a unitary actor in the domain covered by its real powers under the EC Treaties, it acts as a mixed unitary/non-unitary actor in all cases in which a matter of foreign affairs falls partly within the sphere of exclusive EC competence and partly within that of the Member States (e.g., "mixed" negotiation of agreements, "bicephalous" representation in international organizations), and it acts as a non-unitary actor the EPC framework (see chapters 3, 6 and 9).

### Third characteristic:

The EC/EPC dual system of foreign affairs is heavily dualistic because it consists of two foreign affairs systems with different legal bases, different responsibilities, different natures and procedures of the decision-making process and different institutional settings. These systems are linked to each other by several legal obligations, political factors and well established interaction procedures, but they continue to develop policies parallelly, rather than jointly, and they formally act as different entities on the international stage (see chapters 8 and 9).

### Fourth characteristic:

The EC/EPC dual system of foreign affairs is in several respects heavily asymmetric:

- (a) It is asymmetric in respect to powers: Whereas the EC system has been vested with certain real foreign affairs powers by the Member States, the EPC system - as a purely intergovernmental cooperation structure - enjoys no foreign affairs power whatsoever (see chapters 1 and 4).
- (b) It is asymmetric in respect to the binding force of decisions taken: Whereas acts of the EC in the sphere of external relations are legally binding for all the Member States and if appropriate for the individuals living within their territory, the binding force of EPC decisions is essentially political and not supported by any legal enforcement mechanisms (see sub-chapter 4.2.).
- (c) It is asymmetric in respect to its decision-making capacity: Whereas in the EC system certain decisions can be taken by majority voting, decisions in the framework of EPC require consensus of all Member States. As a result, the EC system is in certain cases capable of reaching a majority decision on a gi-

ven foreign affairs issue within the sphere of EC competences, whereas a parallel ("political") decision of the EPC sometimes cannot be taken because of the failure to reach consensus (see the case of financial assistance for Polish private agriculture mentioned in sub-chapter 8.2.).

- (d) It is asymmetric with respect to its development: Whereas the EC system has become more and more integrated and has extended more and more the scope of its common policies, the EPC system, despite all the increase in cooperation procedures, has remained a intergovernmental cooperation structure which can produce coordinated national policies, but cannot generate common policies (see chapter 4).
- e) It is asymmetric with respect to democratic control at the European level: Whereas the European Parliament enjoys certain (though still limited) powers of control in the sphere of EC competence, it totally lacks efficient means of control in the framework of EPC (see sub-chapters 2.3. and 9.4.).

#### Fifth characteristic:

The EC/EPC dual system of foreign affairs has only a limited capacity to realize the combined potential of the foreign affairs powers of the EC system and the foreign affairs powers of the Member States cooperating in the EPC framework: This capacity is primarily limited by (a) the necessity of consensus in EPC, (b) the exclusion of the military aspects of security and (c) the exclusion of certain national "domaines réservés" from the scope of EPC (see sub-chapters 4.2. and 4.3.).

#### Sixth characteristic:

The EC/EPC dual system of foreign affairs carries a permanent risk of developing inconsistent political positions because it is com-

posed of institutional actors which on the basis of different political legitimacies are more or less independent from each other: The Commission can establish its own political principles and priorities in foreign affairs on the basis of its Treaty-based legitimacy as independent defensor of the Community's interest; the Member States, deliberating in Council or of in EPC bodies, can do so on the basis of their legitimacy as defensors of the interests of sovereign democratic nations; and the EP can do so even with the most direct democratic legitimacy since it is the directly elected representative of the Community's citizens. The bonds and constraints which in democratic systems usually exist between a political majority in Parliament and the government do not or only to a very limited extent exist between the EP and the Commission, the Council or EPC respectively. As a result, divergencies on foreign affairs issues can arise between all these institutional actors and the solidarity imposed by common aims can not always prevent these divergencies from becoming apparent on the international stage.

Seventh characteristic:

The EC/EPC dual system of foreign affairs is an incrementalistic system: Even in the absence of appropriate new Treaty provisions, it has increased and continues to increase gradually

- (a) its exclusive foreign affairs competences, which according to the doctrine of implied competences of the ECJ grow parallelly to its internal competences in the EC framework,
- (b) the scope of its foreign affairs activity, which grows both through the progressive enlargement of EC external relations activity and through the progressive enlargement of coordination of Member States' foreign policies in the EPC framework,
- (c) the number and intensity of its established procedures for

reaching and implementing decisions in the sphere of foreign affairs (see chapters 3, 6 and 9).

#### 10.2. The effect of SEA reforms on the EC/EPC dual system of foreign affairs

In respect to the EC part of the dual system, the only major change brought up by the SEA has been the introduction of the assent procedure under Article 238 EEC Treaty. This reform has not only conferred upon the EP a role of co-decision in respect to association agreements, but has also generally strengthened the EP's position in its struggle for a greater influence on Community decision-making in the sphere of external relations. This is shown, in particular, by the new engagements the other institutions have entered since 1987 concerning the EP's information and consultation on the negotiation of agreements (see sub-chapter 2.3.). Moreover, the assent procedure under Article 238 has created a powerful precedent as regards Parliamentary control over conventional external relations of the Community. It is difficult to imagine that this precedent will not entail in the nearby future an extension of the EP's right to give its assent also to other international treaties, particularly in the field of conventional commercial policy, where agreements concluded by the Community in many cases do not substantially differ from formal association agreements.

The other Treaty amendments introduced by the SEA directly relating to EC external relations (Articles 28, 130g, 130n and 130r EEC Treaty) have within the limits of their scope consolidated, rather than changed certain competences and practices of the EC. The introduction of the awkward cooperation procedure in the sphere of Community external relations (applicable to agreements on research, technological development and demonstration pursuant to new Articles 130n and 130q(2) EEC Treaty) has proved to be an unpractical and inefficient innovation.

It should be noted, however, that in accordance with the doc-

trine of "implied powers", also the other reforms introduced by the SEA (realization of the internal market and new internal legislative competences) have an effect on the EC foreign affairs system by gradually enlarging in parallel with its internal competences also its external ones (see sub-chapters 1.1. and 1.2.).

In respect to the EPC part of the dual system, the most important innovation introduced by the SEA has clearly been the establishment of the EPC Secretariat. This first permanent institution of the EPC system has proved its utility by considerably alleviating the Presidency's workload, by introducing of an element of stability in the chain of rotating Presidencies and an by contributing in general to the smooth functioning of the EPC system. The EPC Secretariat has, however, not been able to develop an independent role in the EPC system (see sub-chapter 5.6.)

The formal establishment by the SEA (Article 30(3)) of the Commission's full "association" with EPC proceedings has in practice somewhat strengthened the position of the Commission inside of the EPC system. In addition Article 30(9) SEA, by explicitly providing for an intensification of cooperation among Member States' Embassies and Commission Delegations in third countries, has somewhat strengthened the Commission's position in frictions with Member States on the role of Commission Delegations (see sub-chapter 2.2.). The Commission now generally plays a more active role in EPC than previously, but this is also due to factors unrelated to the SEA (see sub-chapter 9.3).

The only practical consequences of the formal establishment of the "close association" of the EP with EPC (Article 30(4) SEA) have consisted of a slight extension of the existing information procedures and the issuing of formal "observations" by the Presidency on certain EP resolutions (see sub-chapter 9.4.). Both innovations have not increased the EP's role in EPC in any way.

The principle of consistency of EC and EPC policies formally established by Article 30(5) SEA has only led to minor procedural innovations such as the merger of the EC/EPC agenda items at EC General Affairs Council meetings and a more coherent presentation of EC and EPC texts in the "Conclusions" of the European Council.

Other, more important innovations like the preparation of declarations by joint EC/EPC drafting groups or the organization of joint meetings of the COREPER and the EPC Political Committee have remained isolated experiments which have not become part of the "acquis" of EPC (see sub-chapters 9.1. and 9.2.). The consistency obligation under Article 30(5) SEA and the common legal framework created by the SEA have obviously failed in practice to bring the two distinct and well entrenched decision-making structures of EC and EPC closer together.

The other SEA provisions relating to EPC have merely confirmed already existing EPC practices, and there is no evidence for a changed performance of the EPC system resulting from the legal codification of its basic principles and procedures.

### 10.3. The basic principles of a reform in view of the objective of a common European foreign and security policy

The SEA has not only been the most recent reform of the EC/EPC dual system of foreign affairs, but it has also formally established the principal objective of any further reform of the system: In Article 30(1) SEA the Member States have undertaken to "endeavour jointly to formulate and implement a European foreign policy". Under the label of a "common foreign and security policy", the same objective has become part of the mandate the Rome European Council of 14/15 December has issued to the Intergovernmental Conference on Political Union (1). These terms have never been further defined by the Community and its Member States, and it is actually one of the major tasks of the Intergovernmental Conference on Political Union to fill them with substance. Yet, even without further definition it is possible to deduce from the general aim of a "common European foreign and security policy" at least five basic principles for the reform of the dual system:

- (1) It follows from the term "policy" that the system must have the capacity to develop a coherent foreign policy whose diffe-

rent aspects and related policies in other fields are perfectly consistent with each other. This also implies the removal of any contradictions inherent in present EC/EPC procedures.

- (2) It follows from the term "foreign policy" that the system must have the capacity to deal with all aspects of foreign affairs without the exclusion of any field or any instrument of foreign affairs activity.
- (3) It follows from the term "common" foreign policy that this foreign policy must be formulated and implemented jointly by the Community and the Member States.
- (4) It follows from the term "foreign and security policy" that this foreign policy must also cover all aspects of security policy.
- (5) Moreover, it follows not from the above terms but from the democratic nature of the Community and of its Member States which have formulated the objective of a common foreign and security policy that this policy must be subject to democratic control.

Having regard to these basic principles and to the results of our analysis, we will in the following sub-chapter suggest a series of more specific reforms of the EC/EPC dual system in view of the objective of a common foreign and security policy.

It is evident that the present co-existence of two different foreign affairs systems with incomplete foreign affairs competences, several unresolved interaction problems and insufficient democratic legitimacy is in contradiction to each of the above mentioned principles. However, any suggestion for reform has to take into account that for at least two reasons it seems to be neither possible nor reasonable in the nearby future to abolish completely the dualism of 'integrated' EC foreign affairs and 'intergovernmental' EPC foreign affairs completely:



- Firstly, the Member States are only willing to 'communitarize' their foreign policies in an evolutive process: At least initially, they want to retain the capacity to follow national policies in areas of foreign policy where they have essential interests for historical and geographical reasons. They have also made clear that they consider the inclusion of the military aspects of security in a "common foreign foreign and security policy" a matter for the longer term. These positions have already become clear during the preparatory phase of the Intergovernmental Conference and have not been contradicted during the first months of the Conference (2).
  
- Secondly, the EC system still lacks not only the constitutional and political bases for formulating and implementing a common foreign policy, but also - and this regards in particular the Commission with its primarily economic and administrative background - the necessary staff resources and political expertise to cope efficiently with the challenges of all aspects of foreign affairs (3). It has to be acknowledged that at present the EC system has not yet the capacity to fully replace EPC which despite all weaknesses certainly constitutes the most sophisticated form of collective diplomacy in the world.

As a result, the only realistic approach seems to be a gradual merger of the EC and EPC structures: This gradual merger should leave the intergovernmental features of EPC system at least partly intact, but progressively increase the 'communitarization' of the whole sphere of foreign affairs in order to arrive, in the end, at the capacity of the system, to formulate and effectively implement a common European foreign and security policy with only a few escape clauses left for essential national interests.

In the following we will therefore divide our following suggestions for reforms in three groups of reforms to be implemented in three successive phases. The passage from one phase to the other could either be obligatory in accordance with a fixed time schedule, or subject to a respective decision of the European

Council after assessment of the results obtained with the previous group of reforms. Most of these reforms would require substantial treaty amendments on the basis of a new treaty to be concluded by the Member States. A few of them could also be implemented through changes in current practice.

#### 10.4. Suggestions for specific reforms

N.B.: Although the labels applied to the EC and EPC are likely to change in the framework of a Treaty establishing "European Union", we will for convenience continue to refer to these structures as "EC" (or "Community") and "EPC" respectively.

#### FIRST GROUP OF REFORMS (PHASE A)

(Reforms more specifically related to EC/EPC coherence)

- A.1. The aim of a "common foreign and security policy" should be formally established as one of the general objectives of the Treaties. A separate Title of the new Treaty should provide for the gradual 'communitarization' of decision-making procedures of EPC, the gradual increase of the role of the Commission and of the EP in the sphere of EPC and the gradual extension of the scope of EPC (see the corresponding reform suggestions below).
- A.2. The Commission should be granted a formal non-exclusive right of initiative in EPC in order to increase its weight in EPC decision-making (4).
- A.3. It should be formally laid down that a Commission representative participates in all EPC contacts with third countries, i.e. also in the one-to-one contacts of the Presidency from which the Commission is until now excluded (see sub-chapter 9.3.).

- A.4. In order to enable the Commission to cope with its increasing responsibilities in EPC, it should be granted the necessary resources to build up a political section dealing with foreign affairs matters in general. For the same reason, the Member States should upon request temporarily second national diplomats to Commission services (5).
- A.5. In order to ensure EC/EPC consistency below the ministerial level, it should be provided for joint COREPER/EPC Political Committee meetings at least once a month (see precedents mentioned in sub-chapter 9.2.) and for the possibility to establish joint EC/EPC Working Groups (6).
- A.6. It should be formally established that EC instruments may be used for purposes agreed on in EPC without prejudice to the rules and prerogatives of the EC institutions. The possibility of imposing trade sanctions should be explicitly laid down in Article 113 EEC Treaty. The EP should be informed by the Presidency and the Commission on trade sanctions resulting from an EPC decision and of the reasons which led to this decision. If the EP, by a majority of its component member, rejects the measures taken, these should be abrogated.
- A.7. At the end of its term, each Presidency should submit a written report to the EP on the action taken by the Member States in EPC on the resolutions and opinions adopted by the EP on EPC issues. This report should be the subject of a debate with the participation of the President-in-Office. At the issue of the debate, the report should be subject to a formal vote. In case of a negative vote, the EP should address a resolution to the national Parliaments in which the reasons for this negative vote are stated (7).
- A.8. The EPC programme and the EPC progress report presented half-yearly by the Presidency to the EP should be subject to a formal vote. In case of a negative vote, the EP should address a resolution to the national Parliaments in which the reasons for this negative vote are stated. In addition, the EP should also examine the possibility of holding joint meetings between the Bureau of the Political Affairs Commit-

tee and the Bureaus of the appropriate Committees of national Parliaments after each programme speech and progress report in order allow for an exchange of views on policies agreed on in EPC and on coordination of democratic control of these policies.

(Reforms more specifically related to the EC system)

- A.9. A new Treaty provision should formally establish the parallelism of the Community's internal and external competences in accordance with the implied powers doctrine of the ECJ. The same provision should formally acknowledge the exclusive nature of the Community's external competences (8).
- A.10. The Community should be granted an explicit competence in the sphere of development policy in order to support its substantial activity in this sphere. Because of the still rather strong national interests in this area, Community competence in matters of development policy should initially non-exclusive as is the practice now.
- A.11. Community external competence should explicitly be extended to ECSC products (9).
- A.12. A single procedure for the negotiation and conclusion of agreements whose subject-matters fall partly or totally within the provisions of the EEC, ECSC and EAEC Treaties should be established in order to reduce the complexity and heaviness of Community procedures in this field (10). In addition to or in amendment of the rules laid down in Article 228 EEC Treaty, this procedure should contain the following elements:
- Commission recommendations on the negotiation of agreements (opening of negotiations and draft negotiating directives) having the status of formal proposals in the sense of Article 149(1) EEC Treaty (11).
  - Introduction of a single negotiating technique and conclusion procedure for all types of "mixed" negotiations, which should be established by the Council, acting by qualified majority, on a proposal of the Commission. The

Commission may beforehand obtain the opinion of the ECJ on the compatibility of the respective technique and procedure with the provisions of the Treaty (12).

- Obligatory information of the appropriate Committees of the EP by the Commission on envisaged negotiations (before adoption of the draft negotiating directives), on the negotiating directives and on the progress of the negotiations (13).
- Obligatory consultation of the EP by the Council before signature of agreements in all cases in which the EP's assent is required for the conclusion (see A.13.) and before the conclusion of agreements in all other cases (14).
- The right of the EP to apply to the ECJ for an opinion on the compatibility of an intended international agreement with the Treaty provisions (15).

A.13. The EP's right to give its assent should be extended to all agreements concluded on the double basis of Articles 113 and 235 EEC Treaty, to agreements entailing modifications of Community law as well as to agreements having an impact on the budget (16).

A.14. The Council should decide by qualified majority on all international agreements, with the exception of association agreements.

A.15. It should be formally laid down that the representation of the Community in third countries and international fora in respect to all matters falling within exclusive Community competence is ensured by the Commission (17). In all cases in which for reasons of the statute of an international organization the Commission can still not ensure an adequate representation in international fora, this function should be exercised by the Presidency in close cooperation with the Commission.

A.16. The Commission should be granted the necessary resources (a) to fill its quantitative and qualitative staff deficits in the sphere of Community external relations and (b) to establish external Delegations in all third countries the Community maintains diplomatic relations with (18).

(Reforms more specifically related to the EPC system)

- A.17. In the sphere of foreign affairs falling outside the scope of the EC Treaties, the European Council, acting unanimously on a proposal of the Presidency, a Member State or the Commission and after consultation of the EP, should progressively define areas of political cooperation in which the Community and the Member States shall develop "common EPC policies" (19). In these areas the Community and the Member States should be obliged to systematically develop common positions and to abstain from any individual political action unless a common position is reached which they can then support (20). Outside of obligatory "common EPC policy" areas, the establishing of common positions should continue to be facultative.
- A.18. The rule should be established that Member States have to abstain from any foreign and security policy action which conflicts with common positions agreed on inside or outside of "common EPC policy" areas. In this context, it should be laid down, in particular, that those of the Twelve which in international organization cannot vote in line with a common position agreed on in EPC have the obligation to abstain (21).
- A.19. The rule of consensus in EPC should be replaced by that of generalized voting. The Foreign Ministers or the European Council should determine the "common EPC policy" areas in which majority voting (two-thirds majority) may be applied. In all other areas unanimity should be required (22).
- A.20. The scope of EPC should be extended explicitly so as to include military aspects of security (23).
- A.21. The possibility of holding EPC Ministerial Meetings regrouping the Ministers of Defence (alone or together with Foreign Ministers) should be introduced.
- A.22. The EPC Secretariat should be formally integrated into the General Secretariat of the Council, without prejudice to its direct subordination to the Presidency and to its specific functions in the EPC system (24).

- A.23. The EPC Secretariat should be enlarged from five to twelve desk officers (one desk officer delegated by each of the Twelve) so to be able to cope with its steadily increasing organizational tasks. It should also be enlarged with one desk-officer appointed by the Commission whose task would be, to ensure permanent liaison between the Secretariat and the Commission (25).
- A.24. The functional costs of the EPC Secretariat and of EPC meetings and contacts with third states should be integrated into the Community budget in form of a separate budget line (26).

## SECOND GROUP OF REFORMS

(Reforms more specifically related to EC/EPC coherence)

- B.1. The obligation of the Commission and of the Presidency to ensure consistency of EC and EPC policies should come within the realm of jurisdiction of the ECJ (27).
- B.2. In case the EP, acting by an absolute majority of its component members, adopts a resolution on a specific issue falling within the sphere of foreign and security affairs, the Commission should have the obligation to introduce proposals in EPC which correspond to the views expressed by the EP. The Commission should report to the EP on the content and on the effect given to these proposals. This obligation should complement the obligation of the Presidency introduced by reform A.7.
- B.3. The EPC Colloquies with the EP's Political Affairs Committees should be attended not only by the President-in-Office of EPC, but also by the Member of the Commission responsible for external relations (28).

(Reforms more specifically related to the EC system)

- B.4. The development policies of the Community and of the Member States should be coordinated in common action programmes. The scope of these common action programmes and the form of their implementation should be decided by the Council acting by qualified majority on a proposal of the Commission (29).
- B.5. The Community should take the place of Member States in all multilateral negotiations and international fora whose subject-matters fall predominantly within the sphere of exclusive Community competence. The Member States should be obliged to ensure this on request by the Commission. The Council or a Member State may obtain beforehand the opinion of the ECJ as to whether the request of the Commission is compatible with the scope of Community competences. Where the opinion of the ECJ is adverse, the Commission's request should have no legal effect (30).
- B.6. In case the EP, acting by an absolute majority of its component members, adopts a resolution on envisaged negotiations with third countries or international organizations before these negotiations have started, the Commission should be obliged to take this resolution into account during in the draft negotiating directives. At the issue of negotiations before formal consultation of the EP, the Commission should report to the appropriate Committees of the EP on how it has complied with this obligation (31).

(Reforms more specifically related to the EPC system)

- B.7. In the sphere of foreign affairs falling outside the scope of the EC Treaties, the European Council, now acting by two-thirds majority on a proposal of the Presidency, a Member State or the Commission, should continue to progressively define areas of "common EPC policies" (see previous phase, A.18.).
- B.8. Majority voting in EPC (two-thirds majority) should be extended to all issues of foreign affairs, with the exception



- of military aspects of security (see previous phase, A.19.).
- B.9. EPC Ministerial Meetings regrouping the Ministers of Defence should become regular (see previous phase, A.21.).

### THIRD GROUP OF REFORMS (PHASE C)

(Reforms more specifically related to EC/EPC coherence)

- C.1. The Commission should be granted a right of veto in EPC in order to enable it to block decisions of the Member States it judges to be contrary to the Community's interest (32).
- C.2. The Commission should be obliged to make use of its right of veto in EPC (see C.1.) if a position taken by the Member States in EPC contradicts a resolution adopted by the EP by an absolute majority of its component members (33).
- C.3. The diplomatic representation of common EPC positions in third countries and within the framework of international organizations should be ensured jointly by the Presidency and the Commission ("bicephalous representation") without prejudice to the Commission's exclusive right to represent the EC in respect of all matters falling within exclusive EC competence (see reform suggestion A.15.). In international organizations in which common EPC positions can be represented neither by the Commission nor by the Member State holding the Presidency, one of the Member State(s) participating should be mandated by the Council to represent common EPC positions (34).
- C.4. The Treaty provisions relating to EPC should come entirely within the jurisdiction of the ECJ. Article 31 SEA should be amended accordingly.
- C.5. Any distinction between Council and EPC Ministerial Meetings should be abolished. Regular "Foreign Affairs Councils" (regrouping the Foreign Ministers) and "Security Affairs Councils" (regrouping the Defense Ministers) should

be established.

- C.6. The external policies of the EC and the "common EPC policies" should officially become part of the "common foreign and security policy". In official declarations any distinction between EC and EPC policies should be abolished.
- C.7. The half-yearly EPC programme and EPC progress report to the EP should be extended to "common foreign and security policy" in general and presented jointly by the Commission and the Presidency. The same should apply to the half-yearly report on the action taken on EP resolutions (see A.7.). Each of these reports should be subject of a vote of the EP. In case of a negative vote, the EP should adopt a resolution stating the reasons for its vote. This resolution should be forwarded to the national Parliaments. If the resolution is adopted by an absolute majority of the component members of the EP, it should give rise to the Commission's obligation mentioned under C.2. The EP should be consulted before signature on all international agreements relating to "common foreign and security policy" without prejudice to its specific powers of ratification in the EC system (see C.11.).
- C.8. It should be laid down that in cases in which essential national interests are involved, Member States may take national measures in areas of "common foreign and security policy" only after having received the approval of a two-thirds majority of the members of the Council. Articles 223 and 224 EEC Treaty should be amended accordingly (35).
- C.9. The EPC Secretariat should be transformed into a "Common Foreign and Security Policy Secretariat" inside the General Secretariat of the Council. It should be enlarged by a number of Commission officials specialized on EC external relations. Its main functions should be to prepare the first drafts of all declarations on "common foreign and security policy" and to ensure organizational coordination between the Commission and the national Foreign and Defence Ministries.

(Reforms more specifically related to the EC system)

- C.10. By amendment of the EC Treaties, the Community should be granted exclusive competence in the sphere of development policy (compare previous phases, A.2. and B.4.).
- C.11. The EP's right to give its assent should be extended to all international agreements the EP judges to be 'significant' and to the basic rules of autonomous Community measures in the sphere of external relations (compare first phase, A.13.).
- C.12. If within a period of one month after the submission of a Commission proposal relating to negotiations with third countries or international organizations the Council has not rejected these directives, acting by qualified majority, the Commission should be authorized to open these negotiations on the basis of the draft negotiating directives it has submitted to the Council. The same rule should apply in case the Commission submits a proposal on new negotiating directives during the negotiations (36).
- C.13. The Commission should be granted the right to conclude agreements after approval by the EP (assent), if the Council within one month after the EP's assent has not unanimously rejected a Commission proposal to conclude the agreement.

(Reforms more specifically related to the EPC system)

- C.14. In the sphere of foreign affairs falling outside the scope of the EC Treaties the European Council, acting unanimously on a proposal of the Presidency, or any Member State or the Commission, shall define the areas of foreign and security policy which still fall outside of the sphere of "common EPC policies". In all other areas the rules of "common EPC policies" (see A.17.) should apply.
- C.15. Majority voting in EPC (two-thirds majority) should also be extended to military aspects of security, with the exception of the use of military instruments, which would constitute

the last reserve of national foreign affairs power exempted from the discipline of "common foreign and security policy".

**NOTES**



The full references concerning the cited works are given in the Bibliography.

#### GENERAL INTRODUCTION

- (1) See Schoutheete, *La coopération politique*, pp. 14-31, and the valuable analytical summary in Moreau Defarges, *La diplomatie concertée*, pp. 1-13.
- (2) See points 1.4. and 1.4.2. of the Solemn Declaration on European Union.
- (3) Compare Buhl, *The European Community's participation*, pp. 32-49.
- (4) See Bonvicini, *The dual structure*, p. 37, and Nuttall, *Where the European Commission comes in*, pp. 104-105.
- (5) See Schoutheete, *La coopération politique*, p. 30 and 63, and Bonvicini, *European Political Cooperation*, p. 22.
- (6) See De Ruyt, *L'Acte Unique*, pp. 223-224, and Schoutheete, *La coopération politique*, pp. 49-53.
- (7) Compare Articles 63 to 69 of the Draft Treaty on European Union, OJ No C 77, 19/03/1984.
- (8) Sir David Hannay, then Permanent Representative of the United Kingdom to the EC, in an interview given to the author on 8 May 1989 (Florence).
- (9) For details on these negotiations see De Ruyt, *L'Acte unique*, pp. 48-91, and Nuttall, *European Political Cooperation*, pp. 204-208 (centered on the external relations part of the negotiations).
- (10) *Irish Law Report Monthly*, 1987, p. 461.
- (11) Title I, Article 12.
- (12) See point 2 of the Presidency Conclusions of the European Council in *Agence Europe*, No. 5393 (16 December 1990), pp. 6-7.
- (13) Already at the second meeting of the Intergovernmental Conference at the level of Permanent Representatives on 16 January 1991 the Luxembourg Presidency submitted a paper on the subject of a common foreign and security policy. See *Agence Europe*, No. 5412 (18 January 1991), p. 4bis.
- (14) See De Ruyt, *L'Acte unique*, pp. 97-98.
- (15) Compare comments in Murphy, *European Political Cooperation*, pp. 349-351, Glaesner, *The Single European Act*, p. 287-288, De Ruyt, *L'Acte unique*, pp. 103-104, Jacqué, *L'Acte unique*, p. 583, and Bosco, *Commentaire*, p. 358-359.
- (16) See Capotorti, *Le statut juridique*, pp. 83-88, and Glaesner, *The Single European Act*, p. 287.

## PART I

- (1) The term 'competence(s)' is used here in the same sense as the corresponding words in French, German and Italian, since it is the term normally used in Community law. In more conventional English 'powers' would be more usual.
- (2) See Krück, *Völkerrechtliche Verträge*, pp. 27-28, Simmonds, *Encyclopedia of European Community Law*, B2-160/161/162, and Beutler/Bieber/Pipkorn/Streil, *Die Europäische Gemeinschaft*, pp. 520-521.
- (3) See Krück, *Völkerrechtliche Verträge*, pp. 28-29, and Buhl, *The European Community's Participation*, pp. 15-17.
- (4) See Groeben/Thiesing/Ehlermann, *Handbuch*, Art. 210 (Schwarze), alinea 5, and Louis/Brückner, *Relations extérieures*, pp. 1-2.
- (5) See Schwarze, *Towards a European foreign policy*, pp. 70-71. Compare also the differentiation between "foreign affairs powers" of states and the limited powers of international organizations in Stein, *Towards a European Foreign Policy*, pp. 2-3.
- (6) See Louis/Brückner, *Relations extérieures*, p. 2-5, Krück, *Völkerrechtliche Verträge*, pp. 18-21, and Schwarze, *Die EWG in ihren völkerrechtlichen Beziehungen*, pp. 457-458.
- (7) On the former non-recognition of the Community's legal personality by the COMECON and its member states and the problems this entailed for the Community, see Groux/Manin, *Les Communautés européennes*, pp. 20-25, and Wellenstein, *The Relations of the European Communities*, pp. 198-202.
- (8) See on these two doctrines Dewost, *Les compétences explicites*, pp. 4-6, and Schwarze, *Towards a European Foreign Policy*, pp. 73-74. Contrary to the Dewost, who has been Legal Advisor to the Council of the EC at the time he wrote this article, we think that one of the main reasons for the Council to choose the "doctrine of the ultimate aim" was precisely its more restrictive interpretation of the scope of common commercial policy, falling under exclusive Community competence.
- (9) The Community system of generalized preferences is a specific application of the non-binding scheme of generalized preferences developed by the UNCTAD, which assigns a major role to development objectives. It consists of the suspension, on an unilateral basis without any requirement of reciprocity, of the customs duties set out in the Common Customs Tariff with the aim of facilitating the importation of certain products from specific developing countries.
- (10) See the report for the hearing delivered in Case 45/86, *Generalized tariff preferences (1987)*, ECR 1496-1499.
- (11) Case 45/86, *Generalized tariff preferences (1987)*, ECR 1520 and 1522.
- (12) Opinion 1/78, *Draft Agreement on Natural Rubber (1979)*, ECR 2913.
- (13) See Mégret et al., *Politique économique*, pp. 374-376.
- (14) See Louis/Brückner, *Relations extérieures*, pp. 84-86. This



problem of delimitation is of considerable importance for the role of the EP in the sphere of external relations. See sub-chapter 2.3.

- (15) Dewost, *Les compétences explicites*, pp. 9-10.
- (16) Bull. EC 3-1966, p. 9 (point (a) 5 of the agreement).
- (17) See Groeben/Thiesing/Ehlermann, *Handbuch*, Art. 229 (Schröder), alinea 1.
- (18) See Constantinesco, *Les compétences internationales*, pp. 69-72, Glaesner, *The Single European Act*, p. 300-303, Hilf, *The Single European Act*, p. 93 (does not mention new Article 130n), Jacqué, *L'Acte unique*, pp. 604-607, and Temple Lang, *The ERTA judgment and the Court's case-law*, p. 211.
- (19) According to Claus-Dieter Ehlermann, who was involved in the negotiations, the Intergovernmental Conference was "une négociation dans laquelle les relations extérieures n'ont jamais été évoquées expressément"; Ehlermann, *L'Acte unique*, p. 88.
- (20) Schwarze, *The Role of the European Court of Justice*, p. 25.
- (21) Even the well-known Pierre Pescatore, former judge of the ECJ, has admitted that in the early days of the Community, he had adhered to the "principe d'attribution" and that - "errare humanum est" - he had to change his mind. See Pescatore, *External Relations*, p. 618 (note 5).
- (22) See the report for the hearing delivered in Case 22/70, *Commission v. Council* (1971), ECR 265-272.
- (23) Case 22/70, *Commission v. Council* (1971), ECR 274.
- (24) The pioneer character of the judgment with regard to the "doctrine of implied powers" being generally acknowledged, it has nevertheless given rise to different interpretations. These are, however, of no importance for our general survey of external Community competences. For more details, see Barav, *The Division of External Relations Power*, pp. 33-35, and Temple Lang, *The ERTA judgment and the Court's case-law*, pp. 194-203.
- (25) Opinion 1/75, *Understanding on a Local Cost Standard* (1975), ECR 1362-1363.
- (26) See the comments in Pescatore, *External Relations*, pp. 620-621, and Maas, *The External Powers of the EEC*, pp. 383-385.
- (27) Joined cases 3, 4 and 6/76, *Cornelis Kramer and others* (1976), ECR 1281.
- (28) Joined cases 3, 4 and 6/76, *Cornelis Kramer and others* (1976), ECR 1308.
- (29) Joined cases 3, 4 and 6/76, *Cornelis Kramer and others* (1976), ECR 1309.
- (30) See Kovar, *Les compétences implicites*, p. 21, and Pescatore, *External Relations*, p. 620.
- (31) Opinion 1/76, *Draft Agreement establishing a European Laying-up Fund for Inland Waterway Vessels* (1977), ECR 755.
- (32) See Pescatore, *External Relations*, p. 621, Barav, *The Division of External Relations Power*, pp. 35-36, Philip, *A propos de l'avis 1/76*, pp. 57-60, and Kovar, *Les compétences implicites*, p. 21-22 and 27-28.
- (33) Joined cases 3, 4 and 6/76, *Cornelis Kramer and others* (1976), ECR 1311.
- (34) Opinion 1/76, *Draft Agreement establishing a European Lay-*

- ing-up Fund for Inland Waterway Vessels (1977), ECR 755-756.
- (35) Opinion 1/76, Draft Agreement establishing a European Laying-up Fund for Inland Waterway Vessels (1977), ECR 758.
- (36) Case 22/70, Commission v. Council (1971), ECR 283.
- (37) All cooperation agreements with third countries, for instance, are based on the double basis of Articles 113 and 235 EEC Treaty. On the scope of the application of Article 235 in the sphere of Community external relations see Raux, pp. 422-439.
- (38) See Barav, *The Division of External Relations Power*, p. 38, and Flaesch-Mougin, *Les accords externes*, pp. 132-136.
- (39) See Kovar, *Les compétences implicites*, p. 22, Louis/Brückner, *Relations extérieures*, p. 102, and Raux, *Le recours à l'Article 235*, pp. 420-422.
- (40) Case 8/73, Hauptzollamt Bremen v. Massey Ferguson GmbH (1973), ECR 913.
- (41) Case 22/70, Commission v. Council (1971), ECR 274.
- (42) Case 22/70, Commission v. Council (1971), ECR 276.
- (43) Opinion 1/75, Understanding on a Local Cost Standard (1975), ECR 1364.
- (44) See Louis/Brückner, *Relations extérieures*, p. 114, and compare Krück, *Völkerrechtliche Verträge*, p. 106.
- (45) Case 22/70, Commission v. Council (1971), ECR 282.
- (46) Joined Cases 3, 4 and 6/76, Cornelis Kramer and others (1976), ECR 1310.
- (47) Case 61/77, Commission v. Ireland (1978), ECR 449.
- (48) Lenaerts, *La répercussion des compétences*, p. 45.
- (49) Case 41/76, Donckerwolcke v. Procureur de la République (1976), ECR 1937.
- (50) See Usher, *European Community Law*, pp. 59-60. Usher was, of course, not yet able to indicate the Tezi judgments (Case 59/84 Tezi Textiel BV v. Commission of the European Communities (1986), ECR 887; Case 242/84 Tezi Textiel BV v. Minister for Economic Affairs (1986), ECR 933) as further confirmations of the reasoning advanced by the Court in the Donckerwolcke judgment.
- (51) Case 804/79, Commission v. United Kingdom (1981), ECR 1073.
- (52) Case 804/79, Commission v. United Kingdom (1981), ECR 1075-1076.
- (53) See Lenaerts, *La répercussion des compétences*, pp. 46-47.
- (54) Case 174/84, Bulk Oil (Zug) AG v. Sun International Limited and Sun Oil Trading Company (1986), ECR 587-588.
- (55) See the criticism of the Bulk Oil judgment in Lenaerts, *La répercussion des compétences*, pp. 49-52.
- (56) The first mixed agreement concluded by the Community and its Member States was the Convention of Association of Greece and the EEC which was signed on 9 July 1961; Stein, *Der gemischte Vertrag*, p. 24.
- (57) See, for example, Freestone/Davidson, *Community competence*, p. 799, Jacot-Guillarmod, *Droit communautaire*, pp. 162 and 165, and Costonis, *The Treaty-Making Power*, pp. 452-453. - It has also been criticized that mixed agreements often do not give a clear idea to third States of whose jurisdiction - the Community's or the Member States' - is involved. See Frowein, *The competences*, p. 32.

- (58) Opinion 1/76, Draft Agreement establishing a European Laying-up Fund for Inland Waterway Vessels (1977), ECR 756.
- (59) Opinion 1/78, Draft Agreement on Natural Rubber (1979), ECR 2917-2918.
- (60) Ruling 1/78, Draft Convention of the International Atomic Energy Agency on the Physical Protection of Nuclear Materials, Facilities and Transports (1978), ECR 2178.
- (61) Ruling 1/78, Draft Convention of the International Atomic Energy Agency on the Physical Protection of Nuclear Materials, Facilities and Transports (1978), ECR 2180-2181.
- (62) Neuwahl, Mixed Agreements, p. 17.- Two examples in this regard are mentioned in Hilf, Maßnahmen zur Erweiterung des Wirkungsbereichs, pp. 257-258.
- (63) Krück, Die auswärtige Gewalt, pp. 159-162 and 169.
- (64) See in this context the convincing reasoning on the concept of "inner sovereignty" and its applicability on the Community system in Bleckmann, Nationales und europäisches Souveränitätsverständnis, pp. 41-51.
- (65) See Usher, European Community Law, p. 83.
- (66) The opinions about the legal nature and, in general, the character of the Community system largely differ, and the literature on this topic is very rich. The most systematical work with regard to the position of the Community system in international relations is still Riklins, Die Europäische Gemeinschaft im System der Staatenverbindungen (see the conclusions on pp. 357-387). For a short summary of the main theories and of the key aspects of the question compare, Dagtoglou, The legal nature, pp. 33-41, Harbrecht, Die Europäische Gemeinschaft, pp. 67-71, and Beutler/Bieber/Pipkorn/Streil, Die Europäische Gemeinschaft, pp. 56-61.
- (67) Schrans, The Community and its institutions, p. 17.
- (68) It has been argued that Article 130n has put an end to the Commission's possibility to conclude research contracts with research establishments in third states. This reasoning is convincingly refuted in Glaesner, The Single European Act, pp. 301-302.
- (69) Commission of the European Communities, Relations, p. 17.
- (70) Commission of the European Communities, Relations, p. 19.- In GATT the Commission now exercises almost all the rights of the Member States on behalf of the EEC or the EC. Yet, an exception is made for the budgetary affairs, since GATT is still financed by national contributions only. See PETERSMANN, Die EWG als GATT-Mitglied, p. 127.
- (71) For the text of the protocol see Commission of the European Communities, Relations, p. 261.
- (72) See Manin, The European Communities and the Vienna Convention, p. 479.
- (73) Bull. EC 1/1989, point 2.2.34.
- (74) See Groux/Manin, Les Communautés européennes, pp. 32-33.
- (75) Brinkhorst, Permanent Missions of the EC, p. 27. Number of foreign missions accredited to the EC according to Bull. EC 11-1990, point 1.4.72.
- (76) The "Press and Information Offices" are not mentioned here, since they do not have the status of diplomatic missions.
- (77) Informations given by Maria Beccarelli, Commission of the

EC (DG I), in an interview on 20 April 1989 in Brussels. The figures are based on Commission des Communautés européennes: Répertoire des délégations de la Commission des Communautés européennes (document interne), No 1, 1988, and additional informations collected at DG I.

- (78) Simon Nuttall, Commission of the EC (DG I), in an interview given to the author on 8 December 1988 in Brussels.
- (79) Informations collected at DG I of the Commission of the EC. The respective officials wanted to keep their anonymity.
- (80) Article 30(9) reads as follows: "The High Contracting Parties and the Commission, through mutual assistance and information, shall intensify cooperation between their representations accredited to third countries and to international organizations."
- (81) See Brinkhorst, Permanent Missions of the EC, pp. 30-31.
- (82) Commission des Communautés européennes, Service du Porte-parole: Calendrier de la semaine du 17 au 21 avril 1989 (document interne).
- (83) See Froment-Meurice/Ludlow, Towards a European Foreign Policy, p. 11, and Ehlermann, Commission Lacks Power in 1992 Process, pp. 69-70.
- (84) Informations compiled at the Secretariat General and DG I.
- (85) Organigramme de la Commission des Communautés européennes, June 1990, and additional informations of DG I.
- (86) Valuation based on the author's experiences during a traineeship in the Secretariat General in 1987 and talks with officials of DG I.
- (87) See Froment-Meurice/Ludlow, Towards a European Foreign Policy, pp. 17-18.
- (88) Assertions based on personal attendance of meetings of the REX-Committee in May and June 1990 and an interview with Ms. Viola Groebner, Assistant to the Director General of DG I, on 19 April 1989 in Brussels.
- (89) Interviews with Klaus Ebermann, DG I of the Commission, on 6 December 1989, and with Didier Herbert and Annie Laporte, DG I of the Commission, on 14 February 1991 (Brussels).- A striking example on the Commission's shortage of staff (anti-dumping measures: 30 officials in the Commission, 400 in US administration) is also given in Mallet, Le développement des relations économiques extérieures, p. 57.
- (90) See Froment-Meurice/Ludlow, Towards a European Foreign Policy, p. 18.
- (91) Matters of development policy are dealt with in the "Development Council", which is composed by the Ministers responsible for development affairs.
- (92) The following description of the role and functioning of the COREPER and the "Committee 113" is based upon personal attendance of some 20 meetings of both committees in 1987.
- (93) When the Lomé Convention is in the process of being re-negotiated, the Committee meets more often.
- (94) See Article 346 of the Lomé IV Convention, The ACP-EEC Courier No. 120 (March-April 1990), pp. 84-85.
- (95) "The Commission shall conduct these negotiations in consultation with a special committee appointed by the Council to assist the Commission in this task (...)."

- (96) See Bassompierre, *Changing the Guard in Brussels*, pp. 23-25.
- (97) In the case of Germany, this is the "Staatsminister im Auswärtigen Amt" responsible for European affairs.
- (98) See Articles 4 and 5(3) of the "Rules of Procedure" of the Council, OJ (1979) L 268/2, and OJ (1987) L 291/27.
- (99) Assertions based on personal attendance of two meetings of the General Affairs Council in 1987 and additional informations collected within the Secretariat General of the Commission.
- (100) Bassompierre, *Changing the Guard in Brussels*, p. 30, and additional informations collected during personal attendance of two meetings of the General Affairs Council in 1987.
- (101) Bassompierre, *Changing the Guard in Brussels*, pp. 28-29, and additional informations collected at the General Secretariat of the Commission.
- (102) During periods of re-negotiation of the Lomé Convention, meetings of the ACP/EEC Council are better attended.
- (103) See Commission of the European Communities, *Relations*, pp. 19-21, and Rosenbach, *Status und Vertretung*, pp. 76-87.
- (104) This is expressly provided for by the "PROBA 20" formula, an arrangement between the Council and the Commission concerning mixed Community participation in international negotiations on commodities. See Völker/Steenbergen, *Leading Cases*, p. 49, point C.b.II..
- (105) See Sauvignon, *Les Communautés européennes et le droit de légation actif*, pp. 179-180.
- (106) Groux/Manin, *Les Communautés européennes*, p. 35.
- (107) The cooperation procedure, introduced under the Single European Act (new Article 149(2) EEC Treaty), provides for a second reading which enables the EP's position to prevail whenever it has the support of the Commission and a qualified majority in the Council. We will come back to this rather complicate procedure in sub-chapter 3.1..
- (108) See Bieber, *Democratic Control*, pp. 161-162.
- (109) OJ (1988) C 13/28 (first vote; 15 December 1987) and OJ (1988) C 49/52 (second vote; 20 January 1988).
- (110) Eric Stein, Legal Adviser, Council of the EC, in an interview given to the author on 5 December 1989 in Brussels. See also Planas Puchades, *Le Parlement européen*, p. 62.
- (111) OJ (1988) C 94/47-48 (two of the protocols were rejected, one failed to get the necessary majority; 8 March 1988); OJ (1988) C 290/35-36 (assent; 14 October 1988).
- (112) According to the the Consitution of the United States, treaties are concluded by the President. But they require "advice and consent" of two-thirds of the Senators present (US Constitution, Art. II, Paragraph 2 cl. 2).
- (113) See Elles, *Conflicts concerning the legal bases*, p. 39.
- (114) See Case 45/86, *Generalized tariff preferences (1987)*, ECR 1520-1522.
- (115) "...Article 238 must necessarily empower the Community to guarantee commitments towards non-member countries in all the fields covered by the Treaty"; Case 12/86, *Meryem Demirel v. Stadt Schwäbisch Gmünd (1987)*, ECR 3751.
- (116) It should be noted, however, that these agreements do not provide for measures of financial and technical cooperati-

on, which, by contrast, are among the key features of the agreements with the Mediterranean and ACP countries. Most agreements concluded on the basis of Article 238 also provide for joint bodies with substantial decision-making powers as regards the implementation of the agreement. - On the problem of the delimitation of Article 238 see Louis/Brückner, *Relations extérieures*, pp. 84-91, and Groeben/Thiesing/Ehlermann, *Handbuch*, Art. 238 (Meng), alinéas 21 and 23.

- (117) See, for instance, point 13 of the Opinion of the EP's Committee on Legal Affairs in annex to the Planas Puchades Report, PE Doc. A 2-86/88/Annex (7 June 1988), p. 6.
- (118) Interview with Roland Bieber, Legal advisor to the EP, on 28 June 1990 in Luxembourg. See also Agence Europe, No. 5192 (12/13 February 1990), p. 14.
- (119) Interview with Roland Bieber (note 118). See also Elles, *Conflicts concerning the legal bases*, p. 40.
- (120) Interview with Roland Bieber (note 118) and Elles, *Conflicts concerning the legal bases*, p. 40.
- (121) Interview with Roland Bieber (note 118). See also text of the declaration of Delors in OJ Annex 3-386/30, 13 February 1990.
- (122) Elles, *Conflicts concerning the legal bases*, p. 41.
- (123) See Opinion of the EP's Committee on Legal Affairs in annex to the Planas Puchades Report, PE Doc. A 2-86/88/Annex (7 June 1988), p. 4.
- (124) See Bieber, *Democratic Control*, p. 163. - We will come back to this point in sub-chapter 2.3..
- (125) Minutes of the Council of 24 and 25 February 1964, p. 26 S/861/63 (ASS 5), p. 7 (not published).
- (126) Council Note of 16 October 1973, R/2641/73 (not published). A brief description of these procedures is also given in Nicoll, *Les procédures Luns-Westerterp*, pp. 475-476.
- (127) Letter of the President of the Council to the President of the Parliament of 10 February 1977 (not published).
- (128) Blumenfeld Report, OJ (1982) C 66/67.
- (129) Solemn Declaration on European Union, Paragraph 2.3.7.
- (130) So, by example, in the case of Regulation 2423/88 on Protection against Dumping, OJ (1988) L 209/1. Interview with Gijs M. de Vries, MEP and Member of the REX Committee, on 30 May 1990 in Brussels. - See also Bieber, *Democratic Control*, p. 166.
- (131) Letter of H. D. Genscher, President-in-office of the Council, to the President of the EP dated 26 May 1988 (not published).
- (132) Letter of E. Baron Crespo, President of the EP, to the President-in-office of the Council dated 21 November 1989 (not published).
- (133) Letter of E. Cresson, President-in-office of the Council, to the President of the EP dated 21 December 1989 (not published).
- (134) Letter of P. Flynn, President-in-office of the Council, to the President of the EP dated 26 February 1990 (not published).
- (135) Letter of J. Delors, President of the Commission, to the

- President of the EP dated 21 March 1990 (not published).
- (136) The following assertions are based on personal attendance of two REX-Committee meetings in May and June 1990 and on interviews with Christian Augustin, DG for Committees and Delegations of the Secretariat General of the EP (Luxembourg, 25 May 1990), Gijs M. de Vries, MEP (Brussels, 30 May 1990), Giorgio Rossetti, MEP (Brussels, 19 June 1990) and Willy de Clercq, MEP and Chairman of the REX Committee (Brussels, 28 June 1990).
- (137) At the beginning of the REX Committee meetings, the Commission representative regularly also makes a statement on the Commission's future work programme which includes information on planned negotiations.
- (138) The REX Committee, however, sometimes receives the text of the draft mandates through unofficial channels.
- (139) Letter of C. Cheysson, President-in-office of the Council, to the President of the EP dated 13 March 1984 (not published).
- (140) Under Rule 63 a motion for a resolution, which may be tabled by one or several MEPs, is referred to the appropriate committee after having been printed and distributed in all official languages. The committee then considers the motion, decides whether or not to draw up a report on the subject and informs the President of the EP of its decision. During the Parliament of 1984-1989, reports drawn up under Rule 63 dealt with, e.g., protectionism in trade relations between the EEC and the USA, the renewal of the Multifibre Arrangement and the relations between the EEC and the countries of Eastern Europe. - Under Rule 121 a committee can ask the enlarged Bureau of the EP for authorization to draw up a report on a particular subject even if a request for consultation or a motion for a resolution has not been referred to it. The not always easily to reach decision of the enlarged Bureau providing for authorization to draw up the report must be put to the vote in Parliament in accordance with a complex procedure. During 1984-1989, reports drawn up under this Rule dealt with, e.g., international trade in services, relations between EEC and EFTA and relations between the EEC and the Mediterranean countries.
- (141) Letter of W. de Clercq, Chairman of the REX Committee, to E. Baron Crespo, President of the EP, dated 23 January 1990 (not published).
- (142) See the statement by President Delors during the debate on the Commission's annual legislative programme, OJ Annex 3-386/30, 13 February 1990. See also the statement by Commissioner Andriessen, OJ Annex 3-389/163, 4 April 1990. - Already in March 1987, the Council had adopted a guideline on the participation of MEPs as observers in delegations to international organizations. In 1988, the Commission had for the first time stated that it was prepared to include five MEPs as observers in the Community delegation to the GATT Conference of Ministers held from 5-7 December 1988 in Montreal. See Bieber, Democratic Control, p. 167.
- (143) See Bieber, Democratic Control, p. 164-165.
- (144) This is even true with regard to the politically most impor-

- tant "Joint Assembly", that of the Lomé Convention. See the functions of the Joint Assembly provided for by Article 350 of the Lomé IV Convention of 1990, *The ACP-EEC Courier* No. 120 (March-April 1990), p. 85.
- (145) Bieber, *Democratic Control*, p. 165.
- (146) From time to time other committees are involved in external relations as well. The Agriculture, Transport and Environment Committees, for example, are responsible for fishery, international transport and environmental agreements.
- (147) Compare in detail the powers and responsibilities of the three committees laid down in the "Amendment to the Rules of Procedure of the European Parliament adopted on 26 July 1989", Luxembourg 1989, pp. 3, 8 and 14.
- (148) Informations collected at the DG for Committees and Delegations of the Secretariat General of the EP. - Under Rule 112(2) of the RPEP, competence conflicts between Committees can even be placed on the EP's agenda on a proposal from the Bureau.
- (149) Interviews with Christian Augustin, DG for Committees and Delegations of the Secretariat General of the EP on 25 May 1990 in Luxembourg.
- (150) See the still valid description of the role of Rapporteurs in the EP's "Foreign Affairs Committees" in Weiler, *The European Parliament*, pp. 63-66.
- (151) REX Committee meeting in Brussels of 30 and 31 May 1990, attended by the author.
- (152) Interview with Christian Augustin (see note 146). Numbers of reports produced according to the activities reports of the two Committees (PE 130.082 and PE 132.429).
- (153) Interview with Christian Augustin (see note 146).
- (154) "Draft implementing provisions governing the organisation of interparliamentary delegations" of 1 February 1990, PE 134.196, p. 3.
- (155) Minutes of the 30th meeting of the delegation from the European Parliament and the delegation from the United States Congress (Düsseldorf/Bonn, 10-13 January 1988), PE 123.039, pp. 1-2 and 9.
- (156) View taken by Giorgio Rossetti, MEP and Member of the Delegation for Relations with the countries of Central America and Mexico, in an interview given to the author on 19 June 1990 (Brussels).
- (157) On the double function of the ECJ as a constitutional and an administrative court see Kutscher, *Über den Gerichtshof*, pp. 396-399, and Schwarze, *The Role of the European Court of Justice*, p. 13. - The constitutional role in general is thoroughly dealt with in Ipsen, *Die Verfassungsrolle des Europäischen Gerichtshofs*.
- (158) Case 22/70, *Commission v. Council* (1971), ECR 277.
- (159) See Lasok, *The European Court of Justice*, pp. 324-325.
- (160) Case 45/86, *Generalized tariff preferences* (1987), ECR 1493. The effects of annulled regulations, however, were declared definitive.
- (161) The procedure is quite different under the ECSC Treaty. See Lasok, *The European Court of Justice*, p. 326.
- (162) Case 804/79, *Commission v. United Kingdom* (1981), ECR 1045.



- (163) The procedure is, again, quite different under the ECSC Treaty. See Lasok, *The European Court of Justice*, pp. 325-326.
- (164) The ECSC Treaty does not provide for a similar procedure.
- (165) See Lasok, *The European Court of Justice*, pp. 330-331 and note 17.
- (166) See Kutscher, *Über den Gerichtshof*, pp. 407-408, and Ipsen, *Die Verfassungsrolle des Europäischen Gerichtshofs*, p. 42.
- (167) See Schwarze, *The Role of the European Court of Justice*, p. 23.
- (168) See Rasmussen, *The Court of Justice*, p. 179.
- (169) E.g., the judgments in Joint Cases 3, 4 and 6/76, Kramer, and Case 174/84, *Bulk Oil*. See the details given in subchapter 1.3.
- (170) OJ (1982) C 39/27.
- (171) Opinion 1/78, *Draft Agreement on Natural Rubber* (1979), ECR 2871.
- (172) Article 228(1) EEC Treaty.
- (173) See explanations of the Court in Opinion 1/75, *Understanding on a Local Cost Standard* (1975), ECR 1360-1361.
- (174) See Rasmussen, *On Law and Policy*, pp. 76-77, and Groux, *Convergences et conflits*, pp. 155-157.
- (175) Burrows, *The Effects of the Main Cases*, p. 120.
- (176) On the close connection between the political impact of the Court's jurisdiction and the acceptability it meets see Glaesner, *Einige spezifische Aspekte*, pp. 185-186.
- (177) Case 45/86, *Generalized tariff preferences* (1987), ECR 1493.
- (178) Case 302/87, *European Parliament v. Council* (1988), ECR 5615.
- (179) Case 70/88, *European Parliament v. Council* (1990), not yet reported in the ECR. See *European Court of Justice: Judgment of the Court, 22 May 1990, Case C-70/88*, in particular considerations 20-28, and *Proceedings of the Court of Justice and the Court of First Instance of the European Communities, 13/90*, pp. 2-4. In the famous *Isoglucose* cases, the ECJ had already in 1980 acknowledged on the basis of a similar reasoning the EP's right to intervene in proceedings before the Court in accordance with Article 37 of its Statute. See Bradley, *Maintaining the Balance*, pp. 42-44.
- (180) See Louis/Brückner, *Relations extérieures*, p. 26, and Hermann, *Das Abschlußverfahren*, p. 38.
- (181) Interview with Eric Stein, Legal Adviser, Council of the EC, on 5 December 1989 in Brussels, and Groeben/Thiesing/Ehlermann, *Handbuch, Art. 113 (Ernst/Beseler)*, alinea 15.
- (182) See Hermann, *Das Abschlußverfahren*, pp. 39-40, and Louis/Brückner, *Relations extérieures*, pp. 28-29. - Pursuant to Article 113 EEC Treaty, the Commission can only make "recommendations" to the Council as regards agreements related to common commercial policy. In the case of international agreements related to the common fisheries policy (Article 43 EEC Treaty) or to the common transport policy (Article 75 EEC Treaty), for instance, the Treaty provides for a Commission "proposal" to the Council. The same applies to agreements with third countries or international organizations in

the fields of (I) reasearch, technological development and demonstration, and (II) environment (Articles 130n, 130q(2), 130r(5) and 130s EEC Treaty, introduced by the SEA). - Under the EAEC Treaty, international agreements are also concluded by the Commision with the approval of the Council (Article 101 EAEC Treaty).

- (183) Article 113(3) EEC Treaty: "Where agreements with third countries need to be negotiated, the Commission shall make recommendations to the Council, which shall authorize the Commission to open the necessary negotiations".
- (184) See Louis/Brückner, Relations extérieures, pp. 26-28.
- (185) It has been argued that the Council could try to do so on the basis of Article 152 EEC Treaty (requesting the Commission to submit any appropriate proposals) and, in the case of non-compliance by the Commission, of Article 175 EEC (action for failure to act against the Commission). However, an obligation of the Commission to conduct negotiations which it considers to be contrary to the Community's interest seems also hardly compatible with two of the main roles the Commission has under the Treaties, the role of the defender of the Community's interest and that of the Community's chief negotiator.
- (186) Article 15 Merger Treaty: "The Council and the Commission shall consult each other and shall settle by common accord their methods of cooperation".
- (187) However, the Commission negotiates actually as a mandatory in all cases in which it is authorized by the Member States to negotiate also on matters which still belong to Member States' competences, for instance, in case of the negotiation of a mixed agreement. See Louis/Brückner, Relations extérieures, p. 30.
- (188) See Louis/Brückner, Relations extérieures, p. 29, Hermann, Das Abschlußverfahren, pp. 75-77, and Grabitz, Kommentar, Artikel 228 (Vedder), alinea 32.
- (189) These texts being confidential, the author was asked not to indicate his source.
- (190) See Groeben/Thiesing/Ehlermann, Handbuch, Art. 228 (Schröder), alinea 12.
- (191) Wohlfahrt/Everling/Glaesner/Sprung, Die Europäische Wirtschaftsgemeinschaft, Art. 228, alinea 14.
- (192) See Groux, Mixed Negotiations, p. 92, Groeben/Thiesing/Ehlermann, Handbuch, Art. 113 (Ernst/Beseler), alinea 14, and Smit/Herzog, The Law, Article 228 (Reuter), p. 8-243.
- (193) Only rarely it has occurred that the Community has participated in negotiations without previous decision by the Council as to whether the negotiations had a mixed character. See Groux, Mixed Negotiations, p. 88.
- (194) On the Community side, the Council of Ministers of the Lomé Convention is in principle composed of all the members of the Council and members of the Commission. Practice is somewhat different (see sub-chapter 2.2.).
- (195) See Groux, Mixed Negotiations, pp. 89-90.
- (196) Opinion 1/78, Draft Agreement on Natural Rubber (1979), ECR 2871. We have dealt more in detail with that case in sub-chapter 1.3.

- (197) The following assertions on the formulas used for "mixed negotiations" are based on Groux, *Mixed Negotiations*, pp. 92-95, Groux/Manin, *Les Communautés européennes*, pp. 39-40, Grabitz, *Kommentar, Artikel 228 (Vedder)*, alinea 28-29, and complementary informations provided by Eric Stein, Legal Adviser, Council of the EC, in an interview given on 5 December 1989 in Brussels.
- (198) For the text of the arrangement see Völker/Steenbergen, *Leading Cases*, pp. 48-51.
- (199) See point A of PROBA 20 and point 1 of the related Statement in the minutes of the Council-meeting, Völker/Steenbergen, p. 48 and p. 50 respectively.
- (200) In the above mentioned case of the negotiations on the United Nations Convention on the Law of the Sea of 1982, for instance, the Commission tried in vain to prevent Member States from taking different positions. Although the Member States held regular consultations, they were usually not able to agree on a common position on law of the sea issues, a fact which considerably weakened the negotiating position of the Community in general and that of the Commission in particular. See Ederer, *Die Europäische Wirtschaftsgemeinschaft*, pp. 83-89.
- (201) See Groux, *Mixed negotiations*, p. 94, and Groux/Manin, *Les Communautés européennes*, p. 51.
- (202) Interview with Eric Stein (see note 197).
- (203) Assertions based on personal attendance to several meetings of the Article 113 Committee (see note 92). For the "ad referendum" procedure see Groeben/Thiesing/Ehlermann, *Handbuch, Art. 113 (Ernst/Beseler)*, alinea 15.
- (204) See Hermann, *Das Abschlußverfahren*, pp. 86-90, and Louis/Brückner, *Relations extérieures*, p. 34.
- (205) Under the EAEC Treaty, the Commission not only negotiates, but also concludes international agreements "with the approval of the Council" (see Article 101 EAEC Treaty).
- (206) See Groeben/Thiesing/Ehlermann, *Handbuch, Art. 228 (Schröder)*, alinea 18, and Louis/Brückner, *Relations extérieures*, p. 38.
- (207) Interview with Eric Stein, Legal Adviser, Council of the EC, on 5 December 1989 (Brussels). Compare Hermann, *Das Abschlußverfahren*, pp. 92-93.
- (208) Louis/Brückner, *Relations extérieures*, p. 44. Since 1969 agreements are usually concluded by virtue of a Council regulation. See Schweitzer/Hummer, *Europarecht*, p. 180.
- (209) In March 1988 and April 1989 the Commission opened infringement procedures against France and Italy respectively because they had ratified the International Cocoa Agreement individually despite a Commission proposal providing for a simultaneous conclusion and ratification of this "mixed" agreement by the Community and the Member States. See *Agence Europe*, No. 5000 (21 April 1989), p. 7. - On the 'normal' conclusion procedure for mixed agreements see Ehlermann, *Mixed Agreements*, pp. 16-17.
- (210) See Louis/Brückner, *Relations extérieures*, p. 34.
- (211) Expression used by Willy de Clercq in the letter mentioned in note 141.

- (212) This often also irritates the members of the REX Committee since Council and Commission have always refused to forward because of its "confidentiality" the text of the negotiating mandate to the EP. Interview with Willy de Clercq, Chairman of the REX Committee, on 28 June 1990 (Brussels).
- (213) See the details given on this case in sub-chapter 2.3..
- (214) Such a clause was included, for instance, after difficult negotiations, in the UN Convention on the Law of the SEA of 1982 which was signed by the Community on 7 December 1984. On this clause and the related negotiations see Ederer, *Die Europäische Wirtschaftsgemeinschaft*, pp. 89-170.
- (215) See the report on the Commission's recent negotiations with the Member States regarding the inclusion of the "EEC clause" in international conventions in *Agence Europe*, No. 4955 (15 February 1989), p. 14.
- (216) *Commission of the European Communities, Relations*, p. 17.
- (217) Bull. EC 3-1966, p. 9 (point (a) 5 of the agreement).
- (218) See Grabitz, *Kommentar*, Art. 229 (Vedder), alinea 2.
- (219) *Commission of the European Communities, Relations*, pp. 300-301.
- (220) *Commission of the European Communities, Relations*, pp. 302.
- (221) For the text of the letters see *Commission of the European Communities, Relations*, pp. 255-258 (16 June 1987).
- (222) See Groeben/Thiesing/Ehlermann, *Handbuch*, Art. 229-231 (Schröder), alineas 11-12, Grabitz, *Kommentar*, Art. 228 (Vedder), alinea 28, and Louis/Brückner, *Relations extérieures*, p. 137-138.
- (223) On these aspects of Community representation in the UNGA see Brückner, *The European Community*, pp. 176-177, and Louis/Brückner, *Relations extérieures*, p. 139.
- (224) Brückner, *The European Community*, pp. 186.- It was only in 1977 that, for the first time a Member of the Commission, Claude Cheysson, addressed a Committee of the UNGA, the Economic and Financial Committee. See Taylor, *The Limits of European Integration*, p. 131.
- (225) See Groux/Manin, *Les Communautés européennes*, p. 53, Schermers, *The Community's relations*, p. 225, and Groeben/Thiesing/Ehlermann, *Handbuch*, Art. 229 (Schröder), alinea 6.
- (226) See Petersmann, *Die EWG als GATT-Mitglied*, p. 127.
- (227) Assertions based on personal attendance of several meetings of the Article 113 Committee (see note 92). Compare Nafilyan, *La coordination communautaire*, pp. 45-47.
- (228) This was done by a Protocol to the OECD Convention of 14 December 1980. See text of the Protocol in *Commission of the European Communities, Relations*, p. 261.
- (229) See Louis/Brückner, *Relations extérieures*, p. 75, and Grabitz, *Kommentar*, Art. 231 (Vedder), alinea 1-3.
- (230) Compare the evaluation in Groux/Manin, *Les Communautés européennes*, pp. 54-55.
- (231) See Groeben/Thiesing/Ehlermann, *Handbuch*, Art. 116 (Ernst/Beseler), alineas 2-3, Grabitz, *Kommentar*, Art. 116 (Vedder), alinea 7, Smit/Herzog, *The Law*, Art. 116 (Sciolla-La-grange/Herzog), pp. 3-710/711, and Mégret et al., *Politique économique*, pp. 389-390.
- (232) See Raux, *L'action commune des Etats membres*, pp. 27-29.

- (233) See Grabitz, Kommentar, Art. 116 (Vedder), alinea 12. - In his reply to Written Question No. 127/83 by Mr. Ercini, MEP, given on 4 August 1983 (OJ (1983) C 266/13) Karl-Heinz Narjes, Vice-President of the Commission, stressed the "Community" nature of the decision on common action by underlining that this decision is not one for the Member States as such to take, but for the Council acting on a proposal of the Commission.
- (234) An exception has to be made for the cases in which Article 116 EEC Treaty is used as the legal basis for the precise aim to coordinate the signing and the notification of provisional application of a "mixed" agreement negotiated in the framework of international organizations. See, for instance, the Council decision to sign the International Agreement on Jute and Jute Products (1982) of 26 May 1983, OJ (1983), L 185/2.
- (235) See Groux, Mixed Negotiations, p. 95.
- (236) See Bull. EC 1-1987, point 2.2.25, Bull. EC 2-1987, point 2.2.23, Bull. EC 6-1987, point 2.2.32, COM(87) 37 final and COM(87) 37/2 final. It happened to the author to be present in the COREPER when the final discussion on the "Community position" took place.
- (237) See Rosenbach, Status und Vertretung, pp. 66-67, and Raux, L'action commune des Etats membres, pp. 33-34.
- (238) See Bull. EC 6-1987, point 1.2.1. At the Western Economic Summits, the Community is usually represented by both the President of the Commission and the President of the Council. See, e.g., Bull. EC 6-1987, point 1.2.1. (Venice), and Bull. EC 6-1988, point 1.6.1. (Toronto).
- (239) See sub-chapters 2.1. (delegations of the Commission) and 2.2. (representation of the Presidency).
- (240) See Brinkhorst, Permanent Missions of the EC, p. 28.
- (241) Interview with Maria Beccarelli, DG I of the Commission, on 20 April 1989 (Brussels). Compare Schermers, The Community's relations, p. 223.
- (242) Interviews with Simon Nuttall, DG I of the Commission, on 8 December 1988 (Brussels) and with Maria Beccarelli (see note 241).
- (243) See Froment-Meurice/Ludlow, Towards a European Foreign Policy, p. 18.
- (244) See Sauvignon, Les Communautés européennes et le droit de légation actif, pp. 179-180.
- (245) See the exchange of letters between Gaston E. Thorn, President of the Commission, and Chedli Klibi, Secretary General of the League of Arab States, dated 8 October and 3 December 1984 respectively, published in Commission of the European Communities, Relations, pp. 324-325.
- (246) Article 17 stipulates that "the Member State in whose territory the Communities have their seat shall accord the customary diplomatic immunities and privileges to missions of third countries accredited to the Communities". On the problem of the legal status concerning the diplomats accredited to the Community see Schermers, The Community's relations, p. 221.
- (247) In case of the ECSC, credentials are only presented to the

President of the Commission (see 2.2.). On the entire procedure see Groux/Manin, *Les Communautés européennes*, pp. 32-33.

- (248) Informations compiled at the Secretariat General of the Commission in 1987 (see note 86).

## Part II

- (1) Part Two, point I ("Objectives"), of the Luxembourg Report, Bull. EC 11-1970, p. 11. On the historical background of this early (and rather modest) definition of the objectives of EPC see Wallace, Intergovernmental Cooperation, pp. 376-377.
- (2) See Part I of the Copenhagen Report, Bull. EC 9-1973, p. 14.
- (3) See Bull. EC Suppl. 3-1981, p. 14.
- (4) Solemn Declaration on European Union, paragraph 1.4.2..
- (5) See Nuttall, European Political Co-operation and the Single European Act, p. 209.
- (6) Interview with Wilhelm Späth, Auswärtiges Amt, then desk officer of the EPC Secretariat, on 12 May 1987 (Brussels).
- (7) See Ifestos, European Political Cooperation, pp. 241-243, and Rummel, Zusammengesetzte Außenpolitik, pp. 64-65.
- (8) See Schoutheete, La coopération politique, pp. 173-183. The problem of the scope of EPC will be dealt with in detail in sub-chapter 4.3..
- (9) Bull. EC Suppl. 3-1981, p. 16 (point 6). The characteristic of the confidentiality of EPC procedures is also stressed by Wallace, Intergovernmental Cooperation, pp. 382-383.
- (10) Interviews with Simon Nuttall, then European Correspondent, Commission of the EC, on 28 April 1987 (Brussels), and with Wilhelm Späth (see note 6).
- (11) Figures based on several interviews with members of the EPC Secretariat during 1987-1991.
- (12) See on this generally acknowledged sozialization effect Schoutheete, La coopération politique, pp. 160-161, and Pijpers/Regelsberger/Wessels, A Common Foreign Policy, pp. 261-262.
- (13) See Part One, point 8, of the Luxembourg Report, Bull. EC 11-1970, p. 10.
- (14) Interview with Sir Julian Bullard, former Political Director of the UK Foreign Office, on 11 October 1989 (Florence).
- (15) See Gablentz, Luxembourg revisited, p. 697.
- (16) Solemn Declaration on European Union, paragraph 3.2.
- (17) See De Ruyt, L'Acte unique, p. 229, Jacqué, L'Acte unique, and Nuttall, European Political Co-operation and the Single European Act, pp. 209-210.
- (18) On the impact of the political commitments of Member States on the development of EPC before the SEA see Rummel, Zusammengesetzte Außenpolitik, pp. 62-66.
- (19) OJ Annex 223/43, 15 November 1977.
- (20) This has been acknowledged by most of the commentators of the SEA. See, for instance, Glaesner, The Single European Act, p. 288, Nuttall, European Political Cooperation and the Single European Act, pp. 209-211, Jacqué, L'Acte unique, p. 610, and Murphy, European Political Cooperation, pp. 347-349.
- (21) Pescatore, Observations critiques, p. 51, and Pescatore, Some Critical Remarks, p. 16.
- (22) Glaesner, The Single European Act, p. 288.
- (23) Dehousse/Weiler, EPC and the Single Act, pp. 14-15. See also Pijpers, The Vicissitudes of European Political Cooperation, p. 8, and Stein, European Foreign Affairs System, p. 982.

- (24) The strong character of this commitment is emphasized in Nuttall, *European Political Cooperation and the Single Act*, p. 209, and De Ruyt, *L'Acte unique*, p. 229.
- (25) See Rummel, *Speaking with one voice*, pp. 121-122 and 124.
- (26) See the examples given in Serre, *The scope of national adaptation to EPC*, pp. 200-202.
- (27) Advantage stressed by Sir Julian Bullard, former Political Director of the UK Foreign Office, in an interview on 11 October 1989 (Florence), and as well by Ambassador Vicomte Luc de la Barre de Nanteuil, Ministère des Affaires Étrangères (France), in an interview on 30 May 1989 (Florence). See also Morgan, *Political Cooperation*, pp. 237-238.
- (28) The Presidency conclusions of the European Council in Rome of 14 and 15 December 1990 formally acknowledged the development of a "Common foreign and security policy" as one of the topical subjects of the Intergovernmental Conference on European Union. See point 2 of the Presidency Conclusions in *Agence Europe*, No. 5393 (16 December 1990), pp. 6-7. Already at the second meeting of the Intergovernmental Conference at the level of Permanent Representatives on 16 January 1991 the Luxembourg Presidency submitted a paper on the subject of a common foreign and security policy. See *Agence Europe*, No. 5412 (18 January 1991), p. 4bis.
- (29) Interview with Wilhelm Späth, Auswärtiges Amt, former desk officer of the EPC Secretariat, on 12 May 1987 (Brussels).
- (30) See on this incident Hill, *European preoccupations*, pp. 181-183.
- (31) See Ifestos, *European Political Cooperation*, p. 242.
- (32) See generally Rummel, *EPZ*, pp. 24-30. A lot of examples for the failure to agree on substantial common positions in EPC can be found in the survey by Regelsberger, *EPC in the 1980s*, pp. 14-36.
- (33) On the "concertation reflex" in EPC see Schoutheete, *La coopération politique*, pp. 159-161, and Ifestos, *European Political Cooperation*, p. 241. The already quoted Belgian Foreign Minister Simonet stated in this regard before the EP on 15 November 1977: "not only do we seek a common approach to specific problems, but very often we manage to find one. (...) There is now a fair amount of pressure on our diplomatic representatives to act together, to speak with one voice and to avoid divergent views." OJ Annex 223/43, 15 November 1977.
- (34) See the comments in De Ruyt, *L'Acte unique*, pp. 230-232.
- (35) United Nations (Press Release): *Resolutions and Decisions adopted by the General Assembly during the first part of its forty-fourth Session*, New York 1990, pp. 94-96 (Resolution 44/105).
- (36) The figures include votes on Resolutions, Sub-Resolutions and Decisions. They are based on the UN Press Release indicated in note 35.
- (37) See *Agence Europe*, Nos. 5404-5410 (7/8-16 January 1991).
- (38) See Bull. EC 11-1970, pp. 9-10.
- (39) See De Ruyt, *L'Acte unique*, p. 103, Glaesner, *The Single European Act*, p. 288, and Murphy, *European Political Cooperation*, p. 350.



- (40) Compare the comment in Nuttall, *European Political Co-operation and the Single European Act*, p. 213.
- (41) Sir David Hannay, Permanent Representative of the United Kingdom, in an interview on 8 May 1989 (Florence).
- (42) We will come back in detail to the problems of EC/EPC interaction in Part IV.
- (43) On this complex issue see Fitzgerald, *Irish Neutrality*, pp. 23-27.
- (44) For a brief summary of the diverging positions of the Twelve in EPC see Ifestos, *European Political Cooperation*, pp. 575-580, and Serre, *The scope of national adaption to EPC*, pp. 202-207. A lot of still valid points in respect to this problem can be found in the national contributions to Hill, *National Foreign Policies and European Political Cooperation*.
- (45) This distinction for the first time was made officially in point 3.2. of the Solemn Declaration on European Union of 1983. On the historical and political background of this distinction see Bingel, *Die Europäische Politische Zusammenarbeit*, pp. 282-288.
- (46) See Nuttall, *European Political Co-operation and the Single European Act*, p. 212, and Fitzgerald, *Irish Neutrality*, p. 28.
- (47) EPC Bulletin, Doc. 87/472 (p. 260).
- (48) See, e.g., the answer of the German Presidency to the oral Parliamentary Question of MEP Ephremidis on 13 April 1988, EPC Bulletin, Doc. 88/086, and the answer of the Greek President-in-Office Pangalos to the oral Parliamentary Question of MEP Poettering on 15 November 1988, EPC Bulletin, Doc. 88/420 (pp. 256-257). It has rightly been pointed out that in the strict sense of the term 'security', EPC has been concerned with security issues ever since it started. See Wallace, *European Political Co-operation*, p. 12.
- (49) EPC Bulletin, Doc. 88/027 (p. 63). At the Plenary of the CSCE Follow-up Meeting, the German Presidency on 25 March 1988 expressed the regret of the Twelve "that the work of Drafting Group S - Military Security - has stagnated since October (1987)" and spoke of "our efforts in the field of military security". EPC Bulletin, Doc. 88/072 (p. 103).
- (50) OJ Annex 3-384/89, 12 December 1989.
- (51) See Serre, *The scope of national adaption to EPC*, p. 206.
- (52) Assertion based on several interviews with members of the EPC Secretariat during 1987-1991.
- (53) A somewhat narrow view taken by Regelsberger, *EPC in the 1980s*, p. 36.
- (54) See Pijpers, *The Twelve out-of-area*, p. 157.
- (55) See Schoutheete, *La coopération politique*, pp. 173-181, and Hill, *European preoccupations*, pp. 169-174.
- (56) See the comment in Nuttall, *European Political Co-operation and the Single European Act*, p. 214.
- (57) Interviews with Simon Nuttall, then European Correspondent of the Commission of the EC, on 28 April 1987 and on 14 July 1987 (Brussels), and with Wilhelm Späth, Auswärtiges Amt, then desk officer of the EPC Secretariat, on 12 May 1987 (Brussels).
- (58) See Schoutheete, *The Presidency*, p. 77 and 79.

- (59) Assertions based on several interviews with members of the EPC Secretariat during 1987-1991.
- (60) See Report on European Union of 6 December 1988 (Greek Presidency), EPC Bulletin, Doc. 88/499 (p. 327).
- (61) This was already recognized Part II, point 8 of the Copenhagen Report of 1973, Bull. EC 9-1973, p. 17.
- (62) See Schoutheete, *La coopération politique*, p. 46.
- (63) The Troika system was formally recognized in point 7 of the London Report of 1981, Bull. EC Suppl. 3-1981, p. 16.
- (64) See Schoutheete, *The Presidency*, pp. 80-81, and Schoutheete, *La coopération politique*, pp. 43-45.
- (65) See Froment-Meurice/Ludlow, *Towards a European Foreign Policy*, p. 16.
- (66) See sub-chapter 4.2. on the Twelve's failure to adopt a common position during the last two weeks before the outbreak of the Gulf war and sub-chapter 5.2. on the frequency of Ministerial Meetings in January 1991.
- (67) The following assertions are based on several interviews with members of the EPC Secretariat during 1987-1991 and on interviews with Simon Nuttall, then European Correspondent of the Commission of the EC, on 28 April and 14 July 1987 (Brussels).
- (68) See Froment-Meurice/Ludlow, *Towards a European Foreign Policy*, p. 16.
- (69) Interview with Ambassador Sergio Romano, Ministero degli Affari Esteri, on 30 January 1990 (Florence).
- (70) See Schoutheete, *The Presidency*, p. 78.
- (71) 4/5, 11, 14 and 17 January; see Agence Europe, No. 5403, 5408, 5409 and 5413.
- (72) See Bassompierre, *Changing the Guard in Brussels*, p. 56.
- (73) These rules for Gymnich-type meetings were formalized in point 1 of the London Report of 1981, Bull. EC Suppl. 3-1981, p. 15. See also Schoutheete, *La coopération politique*, pp. 39-40, and Bonvicini, *Mechanisms and procedures*, p. 56.
- (74) See Bassompierre, *Changing the Guard in Brussels*, p. 56, and Nuttall, *Where the European Commission comes in*, p. 106.
- (75) Point 2 of the London Report, Bull. EC Suppl. 3-1981, p. 15.
- (76) Assertions based on interviews with Günter Burghardt, "Political Director" of the EC Commission (8 December 1988 and 5 December 1989, Brussels), Sir Julian Bullard (11 October 1989, Florence), former Political Director of the Foreign Office, Berndt von Staden (18 May 1989, Florence), former Political Director of the Auswärtiges Amt, Simon Nuttall (see note 67), former European Correspondent of the EC Commission, and members of the EPC Secretariat (1987-1991).
- (77) See Bassompierre, *Changing the Guard in Brussels*, p. 55, Schoutheete, *La coopération politique*, p. 40, and the Memorandum on EPC and Human Rights issued by the Dutch Presidency on 7 May 1986, EPC Bulletin, Doc. 86/137 (p. 158).
- (78) This does not include such extraordinary meetings as the "permanent session" held by the Luxembourg Presidency during the Gulf crisis on 15/18 January 1991 (see Agence Europe, No. 5410 (18 January 1991), p. 3).
- (79) Bassompierre, *Changing the Guard in Brussels*, p. 55.
- (80) Interview with Simon Nuttall, then European Correspondent of

- the EC Commission, on 18 April 1987 (Brussels).
- (81) See Bassompierre, *Changing the Guard in Brussels*, p. 54, Morgan, *Political Cooperation*, pp. 232-233, Schoutete, *La coopération politique*, p. 42, and Bonvicini, *Mechanisms and procedures*, p. 56.
- (82) Assertions based on interviews with Wilhelm Späth, *Auswärtiges Amt*, then desk officer of the EPC Secretariat, on 12 May 1987, 9 September 1987 and 8 December 1988 (Brussels).
- (83) This was already provided for in Part Two, point III.3, of the Luxembourg Report of 1970; see Bull. EC 11-1970, p. 12.
- (84) See EPC Bulletin, Docs. 86/137 (p. 158), 87/025 (p. 46), 88/025 (p. 57), 88/039 (p. 74), 88/144 (p. 155) and 88/510 (p. 348). Additional informations obtained in interviews with Wilhelm Späth, *Auswärtiges Amt*, then desk officer of the EPC Secretariat, on 12 May 1987, and with René Leray, *Secretariat General of the Commission*, on 9 December 1988 (Brussels).
- (85) Letter of Jérôme Vignon, Head of the "Cellule de Prospective" of the Commission, dated 2 June 1989 (reply to written questions of the author).
- (86) Figure given by the Greek Presidency on 6 December 1988, EPC Bulletin, Doc. 88/499 (p. 326).
- (87) Interview with Wilhelm Späth, *Auswärtiges Amt*, then desk officer of the EPC Secretariat, on 18 April 1989 (Brussels).
- (88) This practice has been formalized in point 4 of the London Report of 1981, Bull. EC Suppl. 3-1981, p. 15.
- (89) Interview with Wilhelm Späth, *Auswärtiges Amt*, then desk officer of the EPC Secretariat, on 12 May 1987 and 9 September 1987 (Brussels).
- (90) See Bonvicini, *Mechanisms and Procedures*, p. 57.
- (91) For a brief history of the idea see De Ruyt, *L'Acte unique*, pp. 245-246. Already in the early seventies heated debates had taken place on the establishment and the location of an EPC Secretariat. See Morgan, *High Politics*, pp. 18-19.
- (92) See Point III.4. of the Decision, EPC Bulletin, Doc. 86/090 (p. 110).
- (93) In this context it is quite significant that a Franco-German suggestion according to which the members of the Secretariat would have been granted the status of European officials was rejected during the negotiations on the SEA. See Nuttall, *European Political Co-operation and the Single European Act*, p. 214.
- (94) Interviews with Wilhelm Späth, *Auswärtiges Amt*, then desk officer of the EPC Secretariat, on 12 May 1987, 9 September 1987, 8 December 1988 and 18 April 1989 (Brussels), and with Philip Mc Donagh, Irish Ministry of Foreign Affairs, desk officer of the EPC Secretariat, on 4 December 1989 and 19 June 1990 (Brussels).
- (95) See Point III.4. of the Decision, EPC Bulletin, Doc. 86/090 (p. 110).
- (96) See EPC Bulletin, Doc. 87/108 (answer to oral Parliamentary question of MEP Bonde).
- (97) See Costa Pereira, *The use of a Secretariat*, p. 87.
- (98) In his Foreign Ministry, Ambassador Jannuzzi has the grade of a Deputy Political Director.
- (99) On the Franco-German idea of a high-profile Secretary General

see Nuttall, European Political Co-operation and the Single European Act, p. 215 and 223.

- (100) See Points III.1. and III.2. of the Decision, EPC Bulletin, Doc. 86/090 (pp. 109-110).
- (101) Assertion based on informations obtained in the EPC Secretariat and in the Secretariat General of the Commission.
- (102) "If he knows that something is sensitive he will ring me up!", Lynda Chalker, in an interview given to the author on 16 May 1989 (Florence).
- (103) Interviews with Wilhelm Späth, Auswärtiges Amt, then desk officer of the EPC Secretariat, on 12 May 1987, 9 September 1987, 8 December 1988 and 18 April 1989 (Brussels), and with Philip Mc Donagh, Irish Ministry of Foreign Affairs, desk officer of the EPC Secretariat, on 4 December 1989 and 19 June 1990 (Brussels).
- (104) Interviews with Philip Mc Donagh, Ministry of Foreign Affairs (Ireland), desk officer of the EPC Secretariat, on 4 December 1989 and 19 June 1990 (Brussels).
- (105) The EPC part of the conclusions of the European Council meeting in Rhodes (1-2 December 1988), for instance, was largely based on a first draft established by the EPC Secretariat. Interview with Wilhelm Späth (see note 102) on 8 December 1988 (Brussels). See also Späth, Die Arbeit des EPZ-Sekretariats, p. 215.
- (106) See Späth, Die Arbeit des EPZ-Sekretariats, pp. 216-217.
- (107) Informations obtained in the EPC Secretariat.
- (108) Since the procedures for EPC relations with the EP fall within the sphere of EPC/EC interaction, they will be dealt with in detail in sub-chapter 9.4.
- (109) For examples of these different types of declarations consult the cumulative index of the EPC Bulletin.
- (110) See, for instance, Nicoll/Salmon, Understanding the European Communities, p. 124, where the "highly declaratory nature of EPC" is emphasized. For earlier criticisms in this regard Wallace, Een gemeenschappelijke Europese buitenlandse politiek, and Wallace/Allen, Political Cooperation.
- (111) Fact stressed by Wilhelm Späth, Auswärtiges Amt, then desk officer of the EPC Secretariat, in interviews on 12 May 1987, 9 September 1987, 8 December 1988 and 18 April 1989 (Brussels).
- (112) See Rummel, Speaking with one voice, pp. 120-121, and Januzzi, La Coopération politique, p. 14.
- (113) According to the French senior diplomat Guy de Bassompierre "the meeting became so heated that several foreign ministers were restrained from leaving Athens prematurely with the greatest difficulties. One bulky minister appeared to want to get up and strike his presiding colleague, who was the stubborn one. He eventually refrained from doing so, not without uttering several choice expletives."; Bassompierre, Changing the Guard in Brussels, p. 141 note 54).- In the end, the Twelve agreed despite strong Greek resistance on a common position: They expressed their distress at the loss of human life but did not make any reference to the Soviet Union.
- (114) On this 'hierarchical' decision-making process see generally

- Jannuzzi, *La Coopération politique*, p. 12.
- (115) Rule established by Part II, point 1, of the London Report of 1981; see Bull. EC Suppl. 3-1981, p. 15.
- (116) See Bonvicini, *Mechanisms and procedures*, p. 61.
- (117) Interview with Wilhelm Späth, Auswärtiges Amt, then desk officer of the EPC Secretariat, on 9 September 1987 (Brussels).
- (118) See Späth, *Die Arbeit des EPZ-Sekretariats*, p. 214.
- (119) See Bassompierre, *Changing the Guard in Brussels*, p. 58.
- (120) These procedures have been formalized in Part II, point 7, of the London Report of 1981; see Bull. EC Suppl. 3-1981, p. 16.
- (121) Interview with Tjeerd De Zwaan, Ministerie van Buitenlandse Zaken (The Netherlands), desk officer of the EPC Secretariat, on 14 February 1991 (Brussels).
- (122) See Regelsberger, *EPC in the 1980s*, pp. 21-22.
- (123) See Bassompierre, *Changing the Guard in Brussels*, p. 142.
- (124) Interviews with Günter Burghardt, "Political Director" of the EC Commission, on 18 April 1989 (Brussels) and with Ambassador Sergio Romano, Ministero degli Affari Esteri, on 30 January 1990 (Florence).
- (125) See Rummel, *Speaking with one voice*, p. 124.
- (126) Examples based on interviews with Simon Nuttall, then European Correspondent of the Commission of the EC, on 14 July 1987 (Brussels) and with Tjeerd De Zwaan, Ministerie van Buitenlandse Zaken (The Netherlands), desk officer of the EPC Secretariat, on 14 February 1991 (Brussels).
- (127) Interviews with Simon Nuttall and Tjeerd De Zwaan (see note 125).
- (128) See Rummel, *Speaking with one voice*, p. 126.
- (129) EPC Bulletin, Doc. 88/114 (pp. 135-137).
- (130) See "Droits de l'homme: Communication sur l'activité de la Communauté et des États membres en 1990", Agence Europe, Documents, No. 1673, 18 December 1990.
- (131) Memorandum on EPC and Human Rights issued by the Dutch Presidency on 7 May 1986, EPC Bulletin, Doc. 86/137 (p. 159).
- (132) See the answer of the German Presidency to the oral Parliamentary question of MEP Bru Puron of 13 April 1988, EPC Bulletin, Doc. 88/089 (p. 117).
- (133) Memorandum on EPC and Human Rights issued by the Dutch Presidency on 7 May 1986, EPC Bulletin, Doc. 86/137 (pp. 158-159).
- (134) Interview with Ambassador Sergio Romano, Ministero degli Affari Esteri, on 30 January 1990 (Florence).
- (135) See Part II, point 8, of the London Report of 1981, Bull. EC Suppl. 3-1981, p. 16.
- (136) See the answer of the German Presidency to the oral Parliamentary question of MEP Herman of 24 June 1988, EPC Bulletin, Doc. 88/175, Office for Official Publications of the European Communities: *European Political Cooperation*, Luxembourg 1988, pp. 8-9, and Part II of the Copenhagen Report, Bull. EC 9-1973, p. 16.
- (137) See Part II, point 8, of the London Report of 1981, Bull. EC Suppl. 3-1981, p. 16.
- (138) Memorandum on EPC and Human Rights issued by the Dutch Pre-

- sidency on 7 May 1986, EPC Bulletin, Doc. 86/137 (p. 159).
- (139) See Tomkys, European Political Cooperation, p. 435.
- (140) Interview with Ambassador Sergio Romano, Ministero degli Affari Esteri, on 30 January 1990 (Florence).
- (141) Tomkys, European Political Cooperation, p. 435. Tomkys even asserted that due to EPC "day by day, the principal political club to which I felt I belonged in Damsacus was that of the European Community" (p. 426).
- (142) See Part II, point 1, of the Ministerial Decision, EPC Bulletin, Doc. 86/090 (p. 109).
- (143) Assertions based on several interviews with members of the EPC Secretariat during 1987-1991.
- (144) See Part I of the Copenhagen Report, Bull. EC 9-1973, p. 15.
- (145) See, for instance, EPC Bulletin, Doc. 86/137 (p. 159), Doc. 87/296 (p. 87) and Doc. 88/499 (p. 327).
- (146) Assertions based on several interviews with members of the EPC Secretariat during 1987-1991.
- (147) See, for example, the comprehensive statement made on 22 January 1988 at the opening of the Fifth Session of the Vienna CSCE Follow-up Meeting, EPC Bulletin, Doc. 88/027 (pp. 61-64).
- (148) See EPC Bulletin, Doc. 88/499 (p. 327).
- (149) Interview with Tjeerd De Zwaan, Ministerie van Buitenlandse Zaken (Netherlands), desk officer of the EPC Secretariat, on 14 February 1991 (Brussels). A lot of details on the coordination process among the Twelve in New York are given in Brückner, The European Community, pp. 183-186.
- (150) See, for instance, the speech held by the Greek Presidency on 27 September 1988, EPC Bulletin, Doc. 88/298.
- (151) An explanation of vote of 5 December 1988, for instance, was used to express the Twelve's disapproval of the United States' refusal to grant a visa for an intended visit of PLO chairman Yasser Arafat to the UNGA. See EPC Bulletin, Doc. 88/492.
- (152) See Agence Europe, No. 5413 (19 January 1991), p. 3.

## Part III

- (1) Point 3 of the Conclusions of the Summit Conference, Bull. EC 12-1974, p. 7.
- (2) On these arrangements see Wessels, *Der Europäische Rat*, pp. 125-126.
- (3) See De Ruyt, *L'Acte unique*, p. 109. - For the same reason the European Council cannot be regarded as a special form of the Council of the European Communities as is argued in Lauwaars, *The European Council*, p. 28, and in Schrans, *The Community and its institutions*, p. 31.
- (4) See Glaesner, *The Single European Act*, p. 287.
- (5) See De Ruyt, *L'Acte unique*, p. 110.
- (6) See Capotorti, *Le statut juridique du Conseil européen*, p. 80, and De Ruyt, *L'Acte unique*, p. 104.
- (7) Point 2.1.2 of the Solemn Declaration on European Union.
- (8) See Gutiérrez Espada, *El Sistema Institucional*, p. 168, and Freestone/Davidson, *The institutional framework*, p. 57. - When acting outside the sphere of competence of the European Community, however, the European Council enjoys the powers of an intergovernmental conference, and as such it may take binding decisions on an informal basis that can give rise to legal obligations on the part of the participating Member States. See Capotorti, *Le statut juridique du Conseil européen*, p. 86, and Grabitz, *Kommentar, Artikel 146 (Schweitzer)*, alinea 20.
- (9) See Bonvicini/Regelsberger, *The Organizational and Political Implications*, pp. 174-175.
- (10) See Bulmer/Wessels, *The European Council*, pp. 50-54.
- (11) See in detail Bassompierre, *Changing the Guard in Brussels*, pp. 31-33, Bulmer/Wessels, *The European Council*, pp. 51-57, and Bonvicini/Regelsberger, *The Organizational and Political Implications*, pp. 167-174 and 178-179.
- (12) See Grabitz, *Kommentar, Artikel 146 (Schweitzer)*, alinea 19, and Lauwaars, *The European Council*, p. 28.
- (13) Grabitz, *Kommentar, Artikel 146 (Schweitzer)*, alinea 19.
- (14) Assertions are based on personal attendance of COREPER meetings and coordination meetings inside the Secretariat General of the Commission during the preparation of the European Council in Brussels in June 1987.
- (15) Point 1.1.13. of the Conclusions, Bull. EC 6-1989, p. 12.
- (16) Bull. EC 6-1989, p. 12.
- (17) See *Europa-Archiv*, 1990, Z 8.
- (18) Bull. EC 4-1990, point 1.8..
- (19) See *The European Community and its Eastern Neighbours*, European Documentation, 8/1990, pp. 16-17. The Action plan is contained in Doc. SEC (90) 843 final.
- (20) Bull. EC 7/8-1990, point 1.4.5..
- (21) See *Europa-Archiv*, 1990, Z 210.
- (22) See Bulmer/Wessels, *The European Council*, p. 53.
- (23) Assertions based on personal attendance of COREPER meetings and coordination meetings inside the Secretariat General of the Commission during the preparation of the European Council in Brussels in June 1987.

- (24) Bulmer/Wessels, *The European Council*, p. 53.
- (25) See Bull. EC 4-1990, point 1.8..
- (26) See Bonvicini/Regelsberger, *The Organizational and Political Implications*, pp. 172-173.
- (27) See Bull. EC 12-1989, point 1.1.14..
- (28) Informations obtained in DG I of the Commission. See also Krenzler, *Die Europäische Gemeinschaft und der Wandel*, p. 91.
- (29) OJ (1990) C 175/161-162.
- (30) See Bull. EC 6-1990, point 1.38..
- (31) See Pescatore, *L'exécutif communautaire*, p. 401.
- (32) See Schoutheete, *La coopération politique*, pp. 38-39.
- (33) On the Venice Declaration see, inter alia, Ifestos, *European Political Cooperation*, pp. 458-470.
- (34) Moreau Defarges, *Twelve Years*, pp. 54-55.
- (35) See EPC Bulletin, Doc. 86/407 (pp. 244-245).
- (36) See Bonvicini/Regelsberger, *The Organizational and Political Implications*, p. 165, and Bulmer/Wessels, *The European Council*, p. 54.
- (37) Interviews with Wilhelm Späth, *Auswärtiges Amt*, then desk officer of the EPC Secretariat, on 9 September 1987 and 8 December 1988 (Brussels).
- (38) See Bonvicini/Regelsberger, *The Organizational and Political Implications*, pp. 167-168.
- (39) See Bonvicini, *Mechanisms and Procedures*, p. 54.
- (40) See Bonvicini/Regelsberger, *The Organizational and Political Implications*, pp. 168.
- (41) The Dublin European Council of 25 and 26 June 1990, for instance, issued declarations on such different issues as the changes taking place in Southern Africa, the situation in the Middle East, nuclear non-proliferation and the Cyprus question; Bull. EC 6-1990, points 1.38.-1.42.
- (42) Interviews with with Simon Nuttall, *Commission of the EC*, then *European Correspondent*, on 28 April 1987 (Brussels), and with Wilhelm Späth, *Auswärtiges Amt*, then desk officer of the EPC Secretariat, on 8 December 1988 (Brussels).
- (43) See Bull. EC 12-1989, point 1.1.23..



## Part IV

- (1) See Krenzler, *Die Einheitliche Europäische Akte*, p. 384.
- (2) See Nuttall, *European Political Co-operation and the Single European Act*, p. 207, and Krenzler, *Die Einheitliche Europäische Akte*, p. 387.
- (3) See Nuttall, *Interaction I*, p. 213.
- (4) Paragraph 2 of the Preamble: "Resolved to implement this European Union on the basis, firstly, of the Communities operating in accordance with their own rules and, secondly, of European Cooperation among the Signatory States in the sphere of foreign policy...".  
 Article 1, paragraph 2: "The European Communities shall be founded on the Treaties establishing [the ECSC, the EEC and the EAEC]...".  
 Article 1, paragraph 3: "Political Cooperation shall be governed by Title III...".  
 Article 3(1): "The institutions of the European Communities, (...) shall exercise their powers and jurisdiction under the conditions and for the purposes provided for by the Treaties establishing [the ECSC, the EEC and the EAEC]...".  
 Article 3(2): "The institutions and bodies responsible for European Political Cooperation shall exercise their powers and jurisdiction under the conditions and for the purposes laid down in Title III...".
- (5) See Murphy, *European Political Cooperation*, pp. 349-351, Glaesner, *The Single European Act*, p. 287-288, De Ruyt, *L'Acte unique*, pp. 103-104 and Jacqué, *L'Acte unique*, p. 583. Bosco, *Commentaire*, p. 381, defends the rather isolated view that Title III SEA has integrated EPC into the Community system and forms part of Community law. On the exclusion of EPC from the jurisdiction of the ECJ see Stein, *European Foreign Affairs System*, pp. 986-987.
- (6) Interview with Sir David Hannay, then Permanent Representative of the United Kingdom to the EC, on 8 May 1989 (Florence).
- (7) See Nuttall, *Interaction I*, pp. 213-214.
- (8) See Part II, point 12.b, of the Copenhagen Report, Bull. EC 9-1973, p. 18.
- (9) Paragraph 2 of the Preamble. See quotation in note 4.
- (10) It has rightly been pointed out in this context that even if one would accept that Article 1, paragraph 1, has added a further objective to the EC Treaties on the same lines as Article 235 EEC Treaty, the competence attributed to the Community under Article 235 would be insufficient to create substantial elements of "European unity". See Glaesner, *The Single European Act*, p. 286. A more positive view on the significance of this "finalité commune" of EC and EPC is taken by Ehlermann, *L'Acte unique*, p. 81.
- (11) See Frowein, *Die vertragliche Grundlage*, p. 254.
- (12) It has been argued (Frowein, *Die vertragliche Grundlage*, p. 254) that the obligation under Article 30(5) SEA may also have an effect on Community law since the ECJ has - in other contexts - already acknowledged legal effects of treaties concluded by the EC Member States on Community law. This ar-

- gument is not convincing because, firstly, pursuant to Article 31 SEA the jurisdiction of the ECJ does not extend to EPC and, secondly, Article 32 SEA excludes the EPC provisions contained in Title III from affecting the EC legal framework.
- (13) See Krenzler, *Die Einheitliche Europäische Akte*, p. 389, and Murphy, *European Political Cooperation*, p. 353.
  - (14) See Nuttall, *Interaction I*, p. 214.
  - (15) Article 30(3)(b) SEA: "The Commission shall be fully associated with the proceedings of EPC."
  - (16) A similar view is taken in Frowein, *Die vertragliche Grundlage*, pp. 254-255.
  - (17) Interview with Ambassador Vicomte Luc de la Barre de Nanteuil, Ministère des Affaires Étrangères (France), on 30 May 1989 (Florence). See also Bonvicini, *European Political Cooperation*, p. 22, and Bonvicini, *The dual structure*, pp. 37 and 42-43.
  - (18) Information provided by John Maslen, DG I of the Commission, in May 1987.
  - (19) See Nuttall, *Interaction I*, pp. 238-239. The existence of such tensions was confirmed in some of the interviews with officials of Commission and of the EPC Secretariat from 1987 to 1991. For obvious reasons both the EC and the EPC structures are not interested in making public such divergencies. It is therefore not possible to give further details here.
  - (20) Interview with Sir Julian Bullard on 11 October 1989 (Florence). - See also Pijpers, *The Vicissitudes of European Political Cooperation*, p. 13, and Wallace, *European Political Cooperation*, p. 10.
  - (21) Kaufmann, *Conference Diplomacy*, pp. 149-150.
  - (22) Interview with Willy de Clercq, MEP and Chairman of the REX Committee, on 28 June 1990 (Brussels).
  - (23) EPC Bulletin, Doc. 87/519 (p. 303).
  - (24) See Bull. EC 6-1988, points 1.5.1-3., and OJ (1988) L 157/35.
  - (25) Commission of the European Communities, Spokesman's Service, IP(89)247 and IP(89)249.
  - (26) See the answer of the Greek Presidency to the oral Parliamentary Question of MEP Mizzau on 14 December 1988, EPC Bulletin, Doc. 88/518.
  - (27) See on these examples Nuttall, *Interaction I*, pp. 234 and 240-244, EPC Bulletin, Docs. 85/318 (p. 235) and 86/407 (p. 243), and XXIVth General Report on the Activities of the European Communities 1990, points 734 and 881.
  - (28) On the trade embargo against Argentina see Kuyper, *Community sanctions against Argentina*, pp. 147-151. On the trade embargo against Iraq see Bull. EC 7/8 1990, points 1.4.20.-1.4.23. Further details on these embargoes are given in sub-chapter 8.3.
  - (29) See Meng, *Die Kompetenz der EWG*, pp. 797-799, Ehlermann, *The Scope of Article 113*, p. 160, and Grabitz, *Kommentar, Artikel 224 (Hummer)*, alinea 6.
  - (30) This position found its clearest expression in the answer given by the Council to written Parliamentary Question No. 526/75 of MEP Patijn regarding the sanctions imposed on Rhodesia. The Council held that because the measures had been

- decided by the UN Security Council for the purpose of maintaining peace and international security, the application of these decisions pursuant to Article 224 EEC Treaty did not fall within the responsibility of the Community, but in that of the Member States (OJ (1976), C 89/6). See on this earlier position of the Council and the Member States Grabitz, Kommentar, Artikel 113 (Vedder), alíneas 56-58.
- (31) See Kuyper, Community Sanctions against Argentina, pp. 143-144, and Stein, European Political Cooperation, p. 65.
- (32) See Kuyper, Community Sanctions against Argentina, pp. 144-145, Nuttall, Interaction I, pp. 223-225, and Stein, European Political Cooperation, p. 65-66.
- (33) See Meng, Die Kompetenz der EWG, pp. 784-786, and Nuttall, Interaction I, pp. 225-226. Text of the Regulation: OJ (1982), L 72/15.
- (34) OJ (1982), L 102/1.
- (35) OJ (1982), L 102/3.
- (36) On the positions taken by Denmark, Italy and Ireland see Kuyper, Community Sanctions against Argentina, pp. 147-151, and Meng, Die Kompetenz der EWG, pp. 786-789. See also Stein, European Political Cooperation, p. 67-68.
- (37) See Nuttall, Interaction I, pp. 228-229.
- (38) Bull. EC 9-1986, point 2.4.2.
- (39) Bull. EC 10-1986, point 2.1.5., and OJ (1986) L 305/11.
- (40) Bull. EC 10-1986, point 2.1.5., and OJ (1986) L 305/45.
- (41) Nuttall, Interaction II, pp. 171-172, and interview with Simon Nuttall, Director in DG I of the Commission, on 5 December 1989 (Brussels).
- (42) OJ (1989), L 50/1.
- (43) See Agence Europe, No. 5310 (4 August 1990), p. 2, and Bull. EC 7/8-1990, point 1.5.11 (EPC declaration of 4 August 1990).
- (44) Bull. EC 7/8-1990, point 1.4.20.
- (45) Bull. EC 7/8-1990, points 1.4.21-22.
- (46) OJ (1990), L 213/1, and OJ (1990), L 213/3.
- (47) This problem is rightly emphasized in Wellenstein, The Relations of the European Communities, pp. 204-205.
- (48) For a different opinion see Weiler, The Evolution of Mechanisms, pp. 17-25. The author seems to be enchanted at the "potentialities of a pluralistic foreign posture" of European policy and thinks that such a pluralistic approach "gives Europe the potential to play a more subtle game". He obviously fails to perceive that international politics are not the appropriate sphere for subtle pluralistic games when it comes to take substantive measures for implementing political aims. Weiler himself admits that he is rather short of arguments in this regard when he declares that he does not "propose to elaborate this point much further" (see p. 25).
- (49) This risk is also stressed in Kuyper, Community Sanctions against Argentina, p. 150.
- (50) Point 2.1.2 of the Solemn Declaration on European Union.
- (51) See Bulmer/Wessels, The European Council, p. 56 and 124.
- (52) Assertions based on several interviews with Members of the EPC Secretariat from 1987 to 1991.
- (53) EPC Bulletin, Doc. 88/490.
- (54) Interviews with Günter Burghardt, Director, Secretariat Gene-

ral of the Commission, and with Wilhelm Späth, Auswärtiges Amt, then desk officer of the EPC Secretariat, both on 8 December 1988 (Brussels).

- (55) The EPC declarations of the Madrid European Council of June 1989 (Bull. EC 6-1989, points 1.1.16-24.) and of the Strasbourg European Council of December 1989 (Bull. EC 12-1989, points 1.1.17-28.) may in this regard be fruitfully compared with those of the Dublin European Council of June 1990 (Bull. EC 6-1990, points 1.36., 1.38. and 1.39-42.) and of the Rome European Council of October 1990 (Bull. EC 10-1990, points I.15-17).
- (56) Assertions based on several interviews with Members of the EPC Secretariat from 1987 to 1991.
- (57) A well known example for the rigid division during the early years, is the fact that on 23 July 1973 the Foreign Ministers of the Nine met in the morning in Copenhagen to discuss EPC items and in the afternoon in Brussels to discuss questions of Community external relations related to the Nixon Round. See Bonvicini, The dual structure, p. 36 and note 8.
- (58) The possibility of Foreign Ministers discussing EPC matters on the occasion of Council meetings has even been formally laid down in Article 30(3)(a) SEA.
- (59) Interviews with Philip Mc Donagh, Irish Ministry of Foreign Affairs, desk officer of the EPC Secretariat, on 19 June 1990 (Brussels), with Simon Nuttall, Director in DG I of the Commission, on 14 February 1990 (Brussels). and with Tjeerd De Zwaan, Ministerie van Buitenlandse Zaken (The Netherlands), desk officer of the EPC Secretariat, on 14 February 1991 (Brussels).
- (60) Interviews with Simon Nuttall, then European Correspondent of the Commission, on 28 April 1987 (Brussels), and with Sir Julian Bullard, former Political Director of the UK Foreign Office, on 11 October 1989 (Florence).
- (61) See the declaration of, Mr. Solbes-Mira, President-in-Office, before the EP on 26 July 1989, OJ Annex 2-379/24.
- (62) Interview with Philip Mc Donagh, Irish Ministry of Foreign Affairs, desk officer of the EPC Secretariat, on 19 June 1990 (Brussels). On the results of these joint meetings see Bull. EC 1/2-1990, point 1.2.3., Agence Europe, No. 5177 (22/23 January 1990, p. 3, Agence Europe, No. 5198 (21 February 1990), pp. 3-4, and Europa-Archiv, 1990, Z 38 and Z 60.
- (63) Interview with Sir David Hannay, then Permanent Representative of the United Kingdom to the EC, on 8 May 1989 (Florence).
- (64) Interview with Tjeerd De Zwaan, Ministerie van Buitenlandse Zaken (The Netherlands), desk officer of the EPC Secretariat, on 14 February 1991 (Brussels).
- (65) Interview with Sir David Hannay, then Permanent Representative of the United Kingdom to the EC, on 8 May 1989 (Florence).
- (66) Assertion based on personal attendance at 14 COREPER meetings in 1987 and interviews with officials of the Secretariat General of the Commission in 1987 and 1988.
- (67) A fact which was particularly stressed by Sir Julian Bullard, former Political Director of the UK Foreign Office, in an interview on 11 October 1989 (Florence). See on this problem also Morgan, Political Cooperation, p. 232, and Schermers,

- The main issues, pp. 68-69.
- (68) See Part II, point V, of the Luxembourg Report, Bull. EC 11-1970, p. 12.
  - (69) See Nuttall, Where the European Commission comes in, pp. 104-105.
  - (70) See Bonvicini, The dual structure, pp. 36-37.
  - (71) See point 12 of the London Report (Bull. EC Suppl. 3-1981, p. 17) and point 2.4. of the Solemn Declaration on European Union.
  - (72) This has not always been the case: Until 1982, the Commission was not linked to the COREU network and only received very few EPC documents (most in form of photocopies) which were pre-selected for this purpose by the Presidency. Interview with Simon Nuttall, then European Correspondent of the Commission, on 28 April 1987 (Brussels). See also Stein, European Political Cooperation, p. 58.
  - (73) Interview with René Leray, then official in Directorate F of the Secretariat General of the Commission, on 9 December 1988 (Brussels).
  - (74) Interviews with Simon Nuttall, then European Correspondent of the Commission, on 14 July 1987 (Brussels), and with Tjeerd De Zwaan, Ministerie van Buitenlandse Zaken (The Netherlands), desk officer of the EPC Secretariat, on 14 February 1991 (Brussels).
  - (75) See Nuttall, Where the European Commission comes in, p. 110.
  - (76) Part II, point V, of the Luxembourg Report, Bull. EC 11-1970, p. 12.
  - (77) A point particularly stressed by Nuttall, Where the European Commission comes in, p. 108.
  - (78) Interview with Sir David Hannay, Permanent Representative of the United Kingdom, on 8 May 1989 (Florence).
  - (79) Interviews with Günter Burghardt, Director, Secretariat General of the Commission, on 18 April and 5 December 1989 (Brussels). The more and more active role the Commission plays in EPC was also underlined by the members of the EPC Secretariat interviewed from 1987 to 1990.
  - (80) Interview with Karl-Heinz Narjes, former Member of the Commission, on 14 February 1989 (Florence), and with Lord Arthur Cockfield, former Member of the Commission, on 13 October 1989 (Florence). - It is not without interest in this context that the Director who in the Secretariat General is in charge since 1987 of relations with EPC, Günter Burghardt, is a former Deputy Head of the private office ("Cabinet") of President Delors.
  - (81) Interview with Carlo Trojan, Deputy Secretary General of the Commission, on 18 January 1991 (Florence).
  - (82) OJ Annex 2-329/138, 11 September 1985.
  - (83) See Agence Europe, No. 5310 (4 August 1990), p. 2, and Bull. EC 7/8-1990, point 1.5.11 (EPC declaration of 4 August 1990).
  - (84) See Nuttall, Where the European Commission comes in, p. 108, and Nuttall, Interaction I, p. 243.
  - (85) Assertions based on several interviews with Members of the EPC Secretariat from 1987 to 1991.
  - (86) Interview with Ambassador Sergio Romano, Ministero degli Affari Esteri, on 30 January 1990 (Florence).

- (87) Interview with Günter Burghardt, Director, Secretariat General of the Commission, on 5 December 1989 (Brussels).
- (88) Agence Europe, Nr. 5029 (5/6 June 1989), pp. 3-4, Bull. EC 6-1989, point 2.2.27., and additional information given by Simon Nuttall, Director in DG I of the Commission, on 5 December 1989 (Brussels).
- (89) See Bull. EC 6-1989, point 2.3.2., and EPC Bulletin, Doc. 89/171.
- (90) Part II, point VI, of the Luxembourg Report, Bull. EC 11-1970, p. 12.
- (91) The EP's demands for a closer involvement in EPC have found their clearest expression in the Lady Elles Report on Political Cooperation of 1981 (EP Doc. 1-335/81). On the attitude taken by the EP towards EPC see Reich, La contribution du Parlement européen, pp. 463-465.
- (92) See Part II, point 10, of the Copenhagen Report (Bull. EC 9-1973, p. 20), point 11 of the London Report (Bull. EC Suppl. 3-1981, pp. 16-17) and points 2.3.1.-4. of the Solemn Declaration on European Union.
- (93) Article 30(4) SEA: "The High Contracting Parties shall ensure that the European Parliament is closely associated with European Political Cooperation. To that end the Presidency shall regularly inform the European Parliament of the foreign policy issues which are being examined within the framework of Political Cooperation and shall ensure that the views of the European Parliament are duly taken into account."
- (94) EPC Bulletin, Doc. 86/090 (pp. 108-109).
- (95) Point I.2. of the Ministerial Decision (see note 94).
- (96) See, for example, EPC Bulletin, Doc. 88/025 (Programme Speech of the German Presidency of 1988), EPC Bulletin, Doc. 88/168 (Balance Speech of the German Presidency of 1988), and EPC Bulletin 89/012 (Programme Speech of the Spanish Presidency of 1989).
- (97) Interview with Wilhelm Späth, Auswärtiges Amt, then desk officer of the EPC Secretariat, on 9 September 1987 (Brussels).
- (98) Point I.3. of the Ministerial Decision (see note 94).
- (99) See, for instance, EPC Bulletin, Doc. 87/498 (Report of 1987), and Doc. 88/499 (Report of 1988).
- (100) Point I.4. of the Ministerial Decision (see note 94).
- (101) At the Colloquy of 22 February 1990, for instance, the President-in-Office, Irish Foreign Minister Collins, made statements on the following topics:
- the political situation in the countries of Central and Eastern Europe and their development prospects, with particular reference to trends in relations between these countries and the Community,
  - the position of the Twelve regarding the principle of not resorting to armed intervention in international affairs, with particular reference to the action taken by the Government of the United States in Panama,
  - the political situation in Cambodia.
- (Minutes of the Political Affairs Committee meeting of 21-23 February 1990, PE 139.388 (unpublished), p.5.)
- (102) Interviews, with Luis Planas Puchades, MEP, former Vice-President of the Political Affairs Committee, on 30 May 1990

- (Brussels), and with Thomas Grunert, General Secretariat of the European Parliament, on 20 June 1990 (Luxembourg). See also the critical comments on the Colloquies in the Planas Puchades Report on the role of the EP in the field of foreign policy in the context of the SEA, PE Doc. A 2-86/88 (25 May 1988), p. 15.
- (103) Interview with Philippe Ventujol, Deputy Head of the Secretariat of the Political Affairs Committee, on 25 June 1990 (Luxembourg).
- (104) Point I.5. of the Ministerial Decision (see note 94).
- (105) PE 132.223, p. 3 (unpublished).
- (106) Letter from Mr. Fernandez Ordonez, President-in-Office of EPC, to Mr. Ercini, Chairman of the Political Affairs Committee, of 2 February 1989 (PE 130.224, unpublished).
- (107) Interview with Luis Planas Puchades, MEP, former Vice-President of the Political Affairs Committee, on 30 May 1990 (Brussels).
- (108) Point I.6. of the Ministerial Decision (see note 94).
- (109) Interviews with several members of the EPC Secretariat from 1987 to 1991.
- (110) In 1976, the then President-in-Office, Mr. Thorn, has made clear in a letter to the President of the EP that certain questions (commonly called "unfriendly questions") would not be answered by the Presidency. See Grauls, *Die Beziehungen zwischen der Europäischen Politischen Zusammenarbeit*, pp. 110-111.
- (111) In an oral answer to an Oral Parliamentary Question of MEP Ephremidis, for instance, Ms. Adam-Schwaetzer, German President-in-Office, on 14 June 1988 admitted that there were "differences of opinion" among the Twelve on the adoption of measures against South Africa. See EPC Bulletin, Doc. 88/152 (p. 164).
- (112) Point I.8. of the Ministerial Decision (see note 94).
- (113) Interviews with Wilhelm Späth, Auswärtiges Amt, then desk officer in the EPC Secretariat, on 8 December 1988 (Brussels), and with Thomas Grunert, General Secretariat of the European Parliament, on 20 June 1990 (Luxembourg).
- (114) Letter from Mr. Fernandez Ordonez, President-in-Office, to Mr. Ercini, Chairman of the Political Affairs Committee, of 2 February 1989 (PE 130.224, unpublished).
- (115) PE 132.223, p. 3 (unpublished).
- (116) Interview with Luis Planas Puchades, MEP, former Vice-President of the Political Affairs Committee, on 30 May 1990 (Brussels).
- (117) See, for instance, EPC Bulletin, Docs. 87/517, 88/214 and 88/522.
- (118) EPC Bulletin, Doc. 87/321 (p. 103). See also the answer to the Oral Question of MEP Vandemeulenbroucke of 28 October 1987, EPC Bulletin, Doc. 87/425 (p. 205).
- (119) EPC Bulletin, Doc. 86/090 (p. 109).
- (120) Interview with Philippe Ventujol, Deputy Head of the Secretariat of the Political Affairs Committee, on 25 June 1990 (Luxembourg).
- (121) See, for instance, the "Observations" of the Presidency on the Resolution on the security of Western Europe forward-

ded on 25 April 1989 (PE 132.224) and those on the Resolution on European arms export forwarded on 21 June 1989 (PE 132.473). Both Resolutions were adopted by the EP on 14 March 1989.

- (122) Interview with Luis Planas Puchades, MEP, former Vice-President of the Political Affairs Committee, on 30 May 1990 (Brussels).
- (123) OJ (1989), L 50/1.
- (124) See Agence Europe, No. 5191 (10 February 1990), p. 8, and the EPC declarations of 20 and 31 January 1990 on the Israeli settlement plans in the Occupied Territories (Bull. EC 1/2-1990, points 1.3.13. and 1.3.3.).
- (125) See the list of its responsibilities in Annex VI, part I, of the RPEP.
- (126) Schematic Compendium of Political Affairs Committee Activity from July 1984 to June 1989, PE 130.457/fin. (unpublished), pp. 13-14.
- (127) Interview with Thomas Grunert, General Secretariat of the European Parliament, on 20 June 1990 (Luxembourg).
- (128) Interviews, with Luis Planas Puchades, MEP, former Vice-President of the Political Affairs Committee, on 30 May 1990 (Brussels), and with Thomas Grunert, General Secretariat of the European Parliament, on 20 June 1990 (Luxembourg).
- (129) In November 1989, for instance, the Chairman of the Committee, Mr. Gorla, or the Committee in Plenary had talks with the Ambassadors of the Arab League, Indonesia, Libya, Norway, Tunisia, the United Arab Emirates, the United States and the PLO representative Armali (PE 136.495 (unpublished), p. 4). In the following month, the Chairman had meetings the Ambassadors of Israel, the Soviet Union and Yugoslavia and, on 19 December, with Soviet Foreign Minister Shevardnadze (PE 137.196 (unpublished, p. 3). - It should be noted that members of the Committee are also regularly appointed to interparliamentary delegations (see sub-chapter 2.3.).
- (130) A similar conclusion was reached in a study of the DG Research of the General Secretariat of the EP established in 1988. See Parlement Européen, L'impact du Parlement, p. 33. See also Pöttering, Perspektiven für eine gemeinschaftliche Außen- und Sicherheitspolitik der EG, pp. 342-343.
- (131) This is seen as an advantage in Bieber, Democratic control, p. 169.



## Part V

- (1) See point 2 of the Presidency Conclusions of the European Council in Agence Europe, No. 5393 (16 December 1990), pp. 6-7.
- (2) See Annex I of the Conclusions of the Dublin European Council of June 1990 (Bull. EC 6-1990, point 1.35, pp. 16-17) and the "Outcome of the Proceedings of the Personal Representatives of the Ministers for Foreign Affairs on the Subject of Political Union", Council Doc. 10356/90, pp. 14-18. The latter document was adopted on 4 December 1990 by the Foreign Ministers as their Report to the European Council on the subject of Political Union (see Bull. EC 12-1990, point 1.1.2. and Agence Europe, No. 5384 (5 December 1990), pp. 3-4). Hereinafter this document will therefore be referred to as "Report of Foreign Ministers".
- (3) The latter deficit is particularly stressed in Froment-Meurice/Ludlow, *Towards a European Foreign Policy*, p. 18. See also sub-chapter 2.3.
- (4) The Commission has been realistic enough not to claim an exclusive right of initiative in the sphere of a future common foreign policy. See "Commission Opinion of 21 October 1990 on the Proposal for Amendment of the Treaty Establishing the European Economic Community with a View to Political Union", COM(90)600 final, p. 5.
- (5) The Commission would probably accept such temporary secondments as an intermediary solution. Interview with Carlo Trojan, Deputy Secretary General of the Commission, on 18 January 1991 (Florence).
- (6) The Commission has suggested to reorganize the COREPER so that it could be apprised of foreign policy matters before the Ministers take a decision. See Commission Opinion of 21 October 1990 (COM(90)600 final), p. 6. We think that a mere information of the COREPER about EPC matters would be insufficient.
- (7) The need of some kind of report to the EP on action taken by EPC on EP resolutions and opinions has been particularly emphasized in the Planas Puchades Report on the role of the EP in the field of foreign policy, PE Doc. A 2-86/88 (25 May 1988), p. 16. The present practices are clearly insufficient in this regard (see sub-chapter 9.4.).
- (8) In March 1991, the Commission has proposed, though still in rather careful terms, to include a corresponding provision in the new Treaty. See Agence Europe, Documents, No. 1697/98 (7 March 1991), p. 7 (Article Y 26(1)) and p. 18 (comment on Article Y 26(1)).
- (9) It may be recalled that Member States until now have constantly taken the position that they have retained their competences in the field of commercial policy for ECSC products (see sub-chapter 1.1.). This is clearly not consistent with the principle of a "common commercial policy".
- (10) This procedure should, above all, replace the use of the cooperation procedure under Articles 130n and 130q(2) because this awkward procedure is clearly not fit for international

- agreements (see sub-chapter 3.1.).
- (11) It may be recalled that until now Commission recommendations on negotiations with third countries and international organizations do not have the legal status of formal "proposals" (see sub-chapter 3.1.).
  - (12) This should put an end to the diversity of negotiating techniques, ensure an adequate representation of the Community by the Commission and allow a coordination of the conclusion procedures of the Community and of the Member States.
  - (13) In its draft amendments to the EEC Treaty proposed in view of the Intergovernmental Conferences, the EP has requested that the draft negotiating directives should be submitted to it for approval (PE 146.824, p. 58 (Article 228)). A similar reform is suggested in Bieber, *Democratic Control*, p. 171. Taking into account the necessity to treat the negotiating directives as highly confidential in order not to weaken the Community's negotiating position, and having regard to the fact that a similar procedure is also not usual in other Parliamentary systems, we are not convinced of the need for such a reform. In any case, however, Commission and Council should make more efforts to ensure strict confidentiality of "negotiating mandates". Otherwise it would not be justified to conceal the mandates from the EP.
  - (14) This would increase Parliamentary control over Community external relations and help to avoid a rejection of agreements by the EP after their signature (on this problem see sub-chapter 3.1.).
  - (15) This would remove the inconsistency existing within the Treaties as regards the EP's access to the ECJ under Article 228 EEC Treaty and help the EP to safeguard its prerogatives in respect to the use of the assent procedure (see sub-chapters 2.3. and 2.4.).
  - (16) This would take into account, in particular, that cooperation agreements often do not very much differ in substance from association agreements (see sub-chapters 1.1. and 2.3.).
  - (17) This would, in particular, strengthen the status of the Commission's external Delegations and contribute to a more coherent external image of the Community (on the present situation see sub-chapters 2.1., 3.2. and 3.4.).
  - (18) On the Commission's serious lack of resources in this regard see sub-chapter 2.1.
  - (19) Similar proposals have been made by both the Commission and the majority of Member States. See Commission Opinion of 21 October 1990 (COM(90)600 final), p. 6, Report of Foreign Ministers (see note 2), p. 15, and Agence Europe, Documents, No. 1697/98 (7 March 1991), p. 2 and 5 (Article V 3(1)). They actually seem to be the best solution in view of a gradual 'communitarization' of EPC.
  - (20) This obligation would replace the vague commitments of the Member States laid down in Title III SEA (see sub-chapter 4.2.).
  - (21) This obligation, again, would replace the vague commitments of the Member States laid down in Title III SEA (see sub-chapter 4.2.).
  - (22) This reform would remove the various inconveniences of the

- rule of consensus mentioned in chapter 4.
- (23) On the present limitation of the scope in this regard see sub-chapter 4.3.
  - (24) Similar proposals have been made by both the Commission and the majority of Member States. See Commission Opinion of 21 October 1990 (COM(90)600 final), p. 6, Report of Foreign Ministers (see note 2), p. 14. A transformation of the Secretariat in a simple administrative unit, composed of Council officials, inside of the General Secretariat of the Council would certainly entail a considerable loss of diplomatic flexibility and expertise.
  - (25) This would probably improve the interaction between the Commission and the Secretariat (on the present deficits of this interaction see sub-chapters 5.6. and 9.3.).
  - (26) This would represent a significant step ahead towards the 'communitarization' of EPC and remedy certain administrative and financial difficulties of the EPC Secretariat.
  - (27) This would strengthen the obligation already laid down in Article 30(5) SEA. Article 31 SEA should be amended accordingly.
  - (28) This would take into account the Commission's increased role in EPC and contribute to a more differentiated information of the EP on EPC matters.
  - (29) This would represent an intermediary stage on the way of full 'communitarization' of development policy. The Commission has proposed a similar reform insisting on the complementary character of the development policies of the Community and of the Member States. See Agence Europe, Documents, No. 1697/98 (7 March 1991), p. 7 (Article Y 21) and p. 14 (comment on Article Y 21).
  - (30) This reform would put an end to the incertainties as regards Community representation in international fora, remove frictions between the Commission and the Member States on this point and contribute to a more coherent external image of the Community.
  - (31) This would probably increase the EP's impact on negotiations, particularly in case of agreements which need the EP's assent.
  - (32) This would respond to the steadily increasing role of the Commission in the sphere of foreign affairs, considerably strengthen the Commission's impact on EPC and ensure a maximum of coherence between EC and EPC policies
  - (33) This would increase the impact of the EP on EPC policies and contribute to a more coherent external image of the "Union".
  - (34) This should in particular ensure an adequate representation of common policy positions in the UN Security Council and in military the alliances in which not all of the Member States participate. A similar suggestion has been made by the Commission. See Agence Europe, Documents, No. 1697/98 (7 March 1991), p. 5 (Article Y 7(1)) and p. 11 (comment on Article Y 7).
  - (35) This would put an end to the large possibilities to escape Community discipline provided for, in particular, by the present wording of Article 224 EEC Treaty.
  - (36) This reform and the following one should increase the Commis-

sion's margin of manoeuvre and speed up the internal decision-making process.

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