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The Evolution of Mechanisms and Institutions for a European Foreign Policy:

Reflections on the Interaction of Law  
and Politics

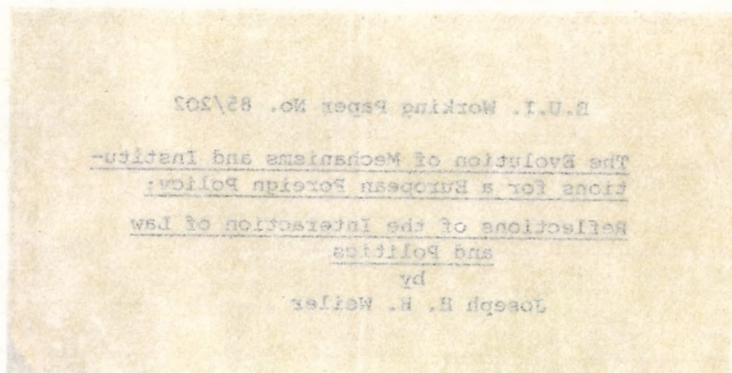
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# THE EVOLUTION OF MECHANISMS AND INSTITUTIONS FOR A EUROPEAN FOREIGN POLICY: REFLECTIONS ON THE INTERACTION OF LAW AND POLITICS

by

Joseph H.H. Weiler

## Introduction

The troublesome evolution of mechanisms and institutions for the formation and execution of a common European foreign posture represents a microcosm of the wider story of European integration within the EEC framework. For within this evolutionary tale are encapsulated all the principal ambiguities, conflicting forces and contradictions which have characterized the European Community from its inception.

If we look at the starting point of Post World War European integration we might have expected the field of foreign affairs to have a certain priority in the new transnational constructs being created. After all the external incentives for such an evolution -- the Cold War, the inherent logic of transforming eventual internal economic strength into external trading power, the nascent desire among some of the European partners (especially France) to create a third "bloc" in a increasingly dichotomous world order -- already existed in the early 50s. And yet all attempts to steer the evolution of European integration in these directions seemed to fail; within the Coal and Steel Community established at the beginning of the decade and the Economic Community established at the close of the decade, foreign affairs, even of a strictly economic character were relatively limited and the thrust of European Community growth in the early years was principally internal. It is only in later years, towards the end of the 60s and in the 70s and 80s that we find a veritable explosion in the external posture of the Community both in processes and structures designed for this area of activity as well as in substantive relations with third states.

How does one explain this trend which seems all the more strange when we remember that historically, the external environment and foreign affairs were the principal factors which were instrumental in bringing about closer unions among states?

I shall start our inquiry by examining, in a theoretical and comparative way, the peculiarities of evolving a common foreign posture in non-unitary actors. Against this background, I shall describe the principal phases in the evolution of European mechanisms and institutions and in particular the emergence of the Framework for Political Cooperation -- the main foreign policy instrument of the Member States of the European Community. Finally, I shall suggest, briefly, a few evaluative criteria to use when assessing the substantive operation of the Framework.



#### A. The Historical, Conceptual and Comparative Framework.

The European Community is not a federal state nor is it aspiring to become one. Like federal states, however, it is a non-unitary political and legal system. There is a constant tension between the central (general) power and the constituent units; a continuous interaction between centrifugal and centripetal forces. In order to understand better the European process it may be useful to contrast it with other non-unitary actors and in particular the federal state. Many of the problems which Europe faces in constructing mechanisms for a common foreign posture derive from her non-unitary character rather than, simply, disagreement among the partners about the possible content of a foreign policy. And since we are concerned with mechanisms and institutions rather than substance it is useful to concentrate on this essential structural characteristic of the Community. Through the differences (and occasional similarities) with these other non-unitary actors we may gain insight into the very special and unprecedented nature of the European Community foreign policy apparatus.

Typically, in the history of most federal states, the international environment provided one of the cardinal incentives for initial unification or for the movement from confederal arrangements to some form of federation.<sup>1/</sup> And although constitutions of federal states, normally based on a doctrine of enumeration of powers between central government and the constituent units, describe with greater or lesser detail the respective competences allocated to each level of government, "...it is usually assumed that the foreign relations of a federation will be controlled predominantly, if not exclusively, by the general government of the whole territory."<sup>2/</sup> (This as we shall see contrasts sharply with the European Community wherein foreign policy was precisely that area which the integrating Member States sought most jealously to exclude from the competences of the central Community organs).

A useful prism through which to illustrate the point is provided by the manner in which states contract international treaties. The treaty making experience is important since treaties remain to date the principal means through which the EC conducts its external relations.

Let us examine first the collective experience of federal states which in fact demonstrates strong converging trends. The first issue concerns the question of international personality and capacity of member units of a federation. Can the member

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1. This theme is discussed more fully in Weiler, The External Legal Relations of Non-Unitary Actors: Mixity and the Federal Principle, in D. O'Keefe and H.G. Schermers (eds.) Mixed Agreements (1983). See also Cappelletti, Seccombe, Weiler, Introduction, Integration Through Law, (1985) which I have used and on which I have built.

2. K.C.Wheare, Federal Government (1963) at 169.



states of a federal state conduct an independent foreign policy? In many federations this is denied constitutionally. Historically, even in federations such as the Federal Republic of Germany, Switzerland and to a certain measure the USA, where there is some constitutional provision for member state international capacity, the actual exercise of such capacity has been dying. In recent times member states have rarely concluded independent treaties and have preferred to rely on the federal government with, as in the FRG, certain constitutional guarantees.

For its part, the world order (as encapsulated in public international law) takes little cognizance of the internal structure of federations: "Federal clauses" (whereby other states took cognizance of the internal federal character of a state) were always an inconvenient disturbance, at best tolerated and for the most part resisted, and both international capacity and international responsibility (the hallmarks of statehood and sovereignty) were only grudgingly and to a limited and declining extent accorded to constituent units of federations. From the legal point of view the world order is composed of unitary actors.

Not surprisingly, the internal treaty-making power of the central government has been construed in most federal states in very wide terms. With a few theoretical exceptions the general trend is to recognize plenary treaty-making power limited by substantive constitutional provision but not by allocational ones. In other words, in all federal states, treaty-making power has not been limited to those areas over which the central government enjoys internal competences. And to cap it all, with the well known exception of Canada, and to a smaller extent the Federal Republic of Germany, federal (central) governments have been allowed by constitutional courts to implement treaties even if the implementing legislation crosses the internal demarcation of competences. Court after Court has ruled that the exigencies of the external environment may override the internal federal demarcation.

We see then, from the experience of federal states, that the conduct of foreign policy does not lend itself easily to non-unitary structures and that when one comes to this field the tendency -- both in internal political terms and in the external international environment -- is to opt for single actors. But how does this tendency square with the rationale behind federal arrangements -- deconcentration of power, participation, rational division of governmental powers among the participating units? Are foreign affairs to be excluded from this rationale and if not how does one explain the unitary tendency in federal states?

Even if federations have a unitary external posture, it is arguable that the federal principle may vindicate itself in the internal process of foreign policy-making. Thus, in schematic terms, although it will be, say, the US qua single state that concludes a treaty, Senate approval could mean that constituent state interests would have been represented before ratification. To be sure, the role of parliamentary organs at the central level in the foreign policy process, especially in the US (but not in the European Community) has increased dramatically in recent



years by imposing a measure of democratic control on the foreign policy field, historically regarded as a domaine reserve of the executive. But it could be argued that federal legislative organs even if designed to represent state interests have lost some of their mediatory function and have come to be regarded as part of the central authority -- displaying less sensitivity, or ability, in this sphere to vindicate their original constituencies. Indeed, the process of foreign policy making is for the most part not conceived as being a legitimate interest of the constituent units qua units of the federation.

We should note however that this unitarist image must be qualified, at least partially, by political fact. Across the board we find that even where federal governments were given the possibility to encroach on member state competences through the exercise of treaty-making power, they have been very reluctant to conclude treaties which would have that effect. Moreover, there is a growing trend of evolving structures of cooperative federalism to overcome some of the problems to which the unitary solution gives rise. It remains, however, true that in the strict constitutional/international legal sense, federal states face the world as unitary actors and their internal policy process is essentially centralized.

Our problem of trying to explain the fact that in the federal state, based on a notion of division of competences, such exclusive power is allowed to rest in the hands of central government remains unanswered. The answer, I believe must be found in the origins of the federal state.

Historically the rationale behind this exclusive concentration of foreign affairs powers in the hands of the central government rested on two premises.

The first premise was that in matters of external relations a united posture would maximize the power of the individual units. This was particularly felt in the areas of defense and security. One can go even further. The unified foreign posture and international personality emerged probably as the single most important factors in giving federations, in their formative years, the quality of Statehood as compared with all other types of federal arrangements such as confederations. This was certainly true in the formal relations among actors in the world order and recognized in public international law.<sup>3/</sup> But a unified foreign and defense posture did not have only an external and formal significance. The federation's flag, the "federal" army, the "national" Anthem and other such paraphernalia - all being, at least in part, expressions of the unified posture vis-a-vis "outsiders" imbued the formal distinction with internal social meaning. Thus even at the social and human level, whereas citizens of a federation could in internal matters regard themselves as being Texans or Tasmanians, vis-a-vis the outside world they would normally regard themselves as respectively Americans or Australians. To be a federal state was to have a

3. See Oliver, The Enforcement of Treaties by a Federal State, 141



### unified foreign posture.

But this premise alone would not explain the willingness of the member states of federations -- especially in formative periods where traditionally there was a much stronger insistence than today on preserving the rights and autonomy of the constituent units -- to vest the execution of virtually all foreign power in the hands of the central government.

It is here that the second premise comes into play. For there was a widespread belief that matters of foreign policy and contacts with foreign states would, ipso facto, interest the general government and would, by contrast, be of lesser relevance to the constituent states and the domestic powers usually 4/ vested in them. It seemed therefore that one could gain the benefits that a unified foreign posture was to yield without encroaching on the internal division of powers between the two levels of government as regards domestic policy.

It is this premise which accounts for the fact that until the advent of the European Community there was with few exceptions<sup>5/</sup> no such thing as a genuine "federal foreign policy". Federal states distinguished themselves by their unified, non-federal, external relations.

Finally, there was perhaps the belief, characteristic of early federal theory, that the representation of state interests within federal government, would give sufficient protection to state interests - if indeed these would exist.

Let us now examine critically these premises and their ramifications. The first premise whereby a united posture is more effective than individual foreign policies arguably retains much of its force till this day and constitutes the principal mobilizing drive for those pushing for further integration in the external posture of the EEC. By contrast, it is doubtful if the second premise was ever wholly correct 6/. And in today's interdependent world it is clear that there are few areas of so called domestic jurisdiction which do not have some international dimension and equally few areas of international activity which do not have internal ramifications.<sup>7/</sup>

We are now in a position to understand the evolutionary dialectics and conceptual framework of the foreign relations apparatus of the EEC. The emergence of European institutions and mechanisms for the formulation and conduct of a common external

4. Of course there was an interest in questions of foreign trade even by constituent units.

5. The Soviet Union claims some sort of federal foreign posture with the advent of Byelorussia and the Ukraine. See Weiler, note 1 *supra* at 35ff.

6. Note 4 *supra*.

7. See Case 22/70 [1971] ECR 263.



posture was not a result of a preconceived and rational design.

It was instead the outcome of a process conditioned by conflicting interests and forces.

On the one hand, the belief in the alleged benefits of having a unified foreign posture, of 'speaking with one voice', at least in some contexts, provided the Member States with integrative impetus. Moreover, the fact that internal matters tend to have an international dimension meant that even in areas where the Community was not vested with explicit external competences, there was pressure to create such competence so as to enable the EEC to pursue in an adequate manner its internal policies.<sup>8/</sup>

On the other hand it easy to understand the source of Member State ambivalence and resistance to a unified foreign policy: The very fact that historically a unitary external posture and single international personality emerged as the hallmarks of the federal State -distinguishing it from other non-unitary entities - was and remains a potent potion, maybe even poison, for the Member States. Even the most integration minded of these did not bargain for the creation of a European "super - state" under whatever federal nomenclature. The area of foreign relations acquired thus a sensitivity unparalleled in any other field.

Furthermore, the patent falsity of the abovementioned second premise, that one can delimit the interaction of internal and external powers, means that were the Member States to vest the exclusive conduct of foreign policy in Community institutions they would not only lose their much cherished international personality, but would also be impeded from autonomously conducting national policy in areas which at first sight might appear to be wholly within domestic jurisdiction. The history of all federal states has demonstrated clearly that implementation by federal government of federal foreign policy involves inevitable excursions into and encroachment of the areas reserved to states.<sup>9/</sup>

Given then these conflicting interests we should not be surprised to find that all activities of the Community in the international environment are imbued with a strong ambivalence on the part of the Member States. The alleged external utility of the joint posture is always weighed against the alleged individual statal loss of power. The Member States often want the substantive "benefits" but without paying the structural "costs".

I shall analyze first the initial pattern and evolution of the Community posture in the external economic relations field, and then develop more fully the structure and purpose of its political foreign posture through the Framework for Political Cooperation. Finally in this study I shall indicate the

8. See Pescatore, External Relations in the Case-Law of the Court of Justice of the European Communities, 16 CML Rev. 615 (1979).

9. See I. Bernier, International Legal Aspects of Federalism (1973) the best treatment of this subject.



breakdown between the two external activity areas and reflect on a conceptual and evaluative framework into which the external posture may be fitted.

## B. The Treaty Framework - The External Relations of the EEC

### a. The starting point.

The EEC was created in 1958 against the failure of the more ambitious proposals in the mid-50s for European political and Defense Communities. European integration was to evolve principally on the economic plane. The reluctance of the Member States to extend their joint venture to defense (outside the NATO framework) and to foreign policy was reflected in the Treaty of Rome in two ways.

First, an "iron curtain" was drawn between what later became known as 'high' and 'low' politics. The Community was to have inter-national competence only in respect of external (economic) relations (low politics). The Member States would retain in their individual capacity exclusive competence over foreign affairs (high politics). There could thus be a series of European commercial and trade agreements with many countries commencing already in the early 60s.<sup>10/</sup> There could not be -- until the creation of the Framework for Political Cooperation in the late 60s -- even the semblance of a joint European policy towards the political issues besetting the region. Here one would have to have a French policy, a Dutch policy and so forth.

Anticipating a theme to which I may return below, this very example serves to illustrate the untenability of a conceptual and operational distinction between high and low politics - between external relations and political cooperation. For one has to be singularly blind and dogmatic to believe that external economic relations operate in a political vacuum and that one can pursue a vigorous foreign policy without recourse to economic instruments.<sup>11/</sup> The Member States were to learn that lesson slowly and reluctantly. The theoretical division, so neatly drawn in the Treaties setting up the Community, was to become slowly an unworkable solution, despite its "ideological" attraction.

Second, even within external relations, the international capacity of the Community expressed in particular through its treaty making power was explicitly granted only in relation to the international trade policy of the Community. Thus the Treaty provides that

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10. Interestingly, the first Association Agreements were already then of the Mixed type.

11. This was evident in the debate over the participation of the EEC in the Commodity Agreements: Opinion 1/78 [1979] ECR 2871.

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 ...12/

The Treaty did provide for the conclusion by the Community of Association Agreements in fairly wide terms:

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....13/

But despite this wide language, when Association Agreements covered matters which could not be regarded as coming under the general subject matter of international trade, the Member States prevented the Community from concluding such agreements alone and insisted on joint participation. Here as well the untenability of the initial document is evident. Could the Community which had explicit competences, at times even exclusive, over matters such as fisheries and transport, operate as if the Europe of the Six (and later Nine and Ten) was a planet with no connections with third states and other international actors? Could there be a Community fisheries policy without Community agreements (treaties) with other fishing nations sharing the same high seas?

b. Mutation of the starting point.

For these and other reasons it was not long before the initial Treaty formulae were subjected to powerful mutations. The pattern of external relations today is a far cry from the initial blueprint. I may mention in particular the following developments in the context of external economic relations:

a. In quantity external contacts of the Community formalized through international agreements have grown and run into hundreds. The Community also has a network of international contacts through legations which is equally impressive.14/ Any expectation that the external relations of the Community could or would be contained was inevitably proved erroneous.

b. This growth was and is connected to two constitutional changes effected by decisions of the European Community Court of Justice. In a landmark decision of 1971 15/, the Court gave a much wider interpretation to the treaty making powers of the

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12. Article 113 EEC.

13. Art 238 EEC.

14. Most First and Third World countries have legations to the EC.

15. Note 7 supra.



Community and hence to its ability to engage in international affairs. The Court held first that:  
in its external relations the Community enjoys the capacity

to establish contractual links with third countries over the whole field of objectives defined in Part One of the Treaty....

It added that

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

Thus the treaty making power of the Community would extend

to all areas in relation to which the Community had internal power. The confinement of Community agreements to international commerce and trade was removed.

c. In a third development the Court, in the so-called ubber

Case gave an extremely wide interpretation to the reach of the Community Common Commercial Policy. This was significant since in relation to this policy the community was not only entitled to conclude agreements but had exclusive competence vis-a-vis the Member States.<sup>16/</sup>

Specifically the Court held that

[i]t is ... not possible to lay down, for Article 113 of the EEC Treaty, an interpretation the effect of which would be to restrict the common commercial policy to the use of instruments intended to have an effect only on the traditional aspects of external trade to the exclusion of more highly developed mechanisms ....

The same conclusion may be deduced from the fact that the enumeration in Article 113 of the subjects covered by commercial policy (changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalization, export policy and measures to protect trade) is conceived as a non-exhaustive enumeration which must not, as such, close the door to the application in a Community context of any other process intended to regulate external trade.

These developments could at first sight suggest a process not unlike that which occurred in most federal states -- a monopolization of external contacts by, and a concentration of treaty making power in the hands of, the central government. This conclusion could not be further than the truth for reasons inherent in the institutional structure of the Community amplified by its political process. In particular I can mention

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16. Note 11 supra.

the following two factors:

First, we must remember that the above process of expansion was confined to areas of external economic relations however widely defined. Explicit problems of, say, defense and other issues of foreign affairs in the classical sense remained entirely in the hands of the Member States.

Second, the Member States reacted to the increased margin of competence of the Community to engage in external relations by tightening their grip on the actual procedure of treaty making, negotiating and implementing process. It must never be forgotten that the central legislative/decisional body of the Community - the Council of Ministers and its sub-organs - consists of representatives of the State governments. As such it was able over the years to reduce the autonomous role of the Commission in the external relations process in all its phases.

Although Article 228 and Article 113 provide explicitly that negotiations of Community agreements would be in the hands of the (supranational) Commission, and only final conclusion of the agreement would fall to the (intergovernmental) Council of Ministers, the Member States were able to emasculate this provision. They did this by insisting that a seemingly innocuous sub-committee of the Council established by the Treaty to assist the Commission in negotiations would in fact hold the latter to a mere plenipotentiary status. In addition, by insisting all too often that prospective Community agreements be concluded on a mixed basis -- by the Community and the Member States together -- there would be automatic Member State representation at the negotiation phase.

Thus, although the external and internal environment forced the Community to an expanded external economic posture, the process of its execution moved away from a "supranational" centralized model, to a more classical intergovernmental one. As Community external relations grew so did the role of the Member States within this process. This, incidentally, has been a constant feature of almost all Community activity.

#### C. The Emergence of the Framework for Political Cooperation.<sup>17/</sup>

##### a. The Starting Point

Whereas Community activity in the field of external economic relations found its basis in the Treaties themselves, foreign policy proper (high politics) was as we have seen, excluded from the Community process. The creation of the Framework for Political Cooperation as a mechanism for joint European activity

<sup>17.</sup> For an up-to-date treatment on which I relied and a full

bibliography, see Stein, *European Political Cooperation as a Component of the European Foreign Affairs System*, 43 *ZaorV* 49 (1983).



in this area might therefore seem as a process distinct and even detached from the internal Community processes described above. Although this is the classical view taken in the literature, our view is that a closer look will reveal that the same forces which shaped the evolution of external relations mechanisms conditioned the development of Political Cooperation.

There was a multiple rationale for the creation of the Framework. The "objective" reason was of course rooted in the claim that given the actual state of internal European integration, the failure to operate in the field of foreign policy was a waste of a significant potential. In other words that a common European foreign policy would be able to project onto the world environment the joint power of the partners, a power that was greater than the sum of the individual units. A Europe which would act and react as a single actor to world events would by this vision be more effective than hitherto.

There was also an internal, "subjective", reason. In 1969, when the idea of the Framework was concretely launched, the Community was emerging from a period of sustained political stagnation associated with de Gaulle's long term in office and recovering from the most immediate after effects of the Luxembourg crisis.<sup>18/</sup>

and alongside the The Community was to be "relaunched" <sup>19/</sup> decision to accept the three new Member States, the principal concrete political initiative was the plan to set up the Framework for Political Cooperation. We may call this second reasoning the "reflexive" function of European Political Cooperation; the aim here was to find new areas in relation to which Europe could manifest her newly found (and short lived) "political will" as a sign of progress and hope.

Whereas both the objective and subjective rationale pointed towards a rosy future in terms of the Framework for Political Cooperation, we find in reality already at its inception powerful countervailing forces. Recalling our brief account of the evolution of external relations, it should come as no surprise that the first important steps in the evolution of Political Cooperation coincided with the institutionalized strengthening of the intergovernmental component in the European Community, namely the creation of the European Council of Heads of State and Government. This appears to be an almost constant factor in the mature phases of European integration. Substantive progress is bought at the price of decline in the unique decisional characteristics of the Community.<sup>20/</sup> In this case, the equation was at its extreme: the Framework for Political Cooperation was

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18. See Greilsammer, *Theorizing European Integration in Its Four Periods*, 2 *Jerusalem Journal of International Relations* 129 (1976).

19. *Id.*

20. See Weiler, *The Community System: The Dual Character of Supranationalism*, 1 *Yearbook of European Law* 267 (1981).



to be completely outside the Treaties. It was not sufficient that in the Community of the 70s, in which the Luxembourg Accord was an accepted way of life, the decisional process was dominated totally by the intergovernmental Council of Ministers, often at the constitutional expense of the Commission. For Political Cooperation, at least as initially conceived, any EEC contact was considered anathema. The European Political Cooperation institutions and procedures were thus to be insulated from any "contaminating" European Community contact. In a famous incident, typical of those early "watertight" days, the Foreign Ministers of the Community were forced to end a meeting in Copenhagen wearing one hat, and travel to Brussels to meet wearing their other hat.<sup>21/</sup> The Commission was emarginated from the Political Cooperation procedures or, at best, barely tolerated. It is telling that the only Community organ which had an official role in Political Cooperation was the European Parliament. But, not only was this an organ which had virtually no impact on the Community game, especially in the pre-direct election days, its role in Political Cooperation was extremely limited.<sup>22/</sup> This separation, symptomatic of the inherent contradiction of the process of European integration was reflected in the very definition of the objectives of the Framework.

b. The setting up and initial evolution of the Framework.

At the famous December 1969 Hague Summit, the Heads of Government and State launched the idea of the Framework for Political Cooperation by agreeing

to instruct the Ministers for Foreign Affairs to study the best way of achieving progress in the matter of political unification .... The Ministers would be expected to report before the end of July 1970.

The result was the October 1970 Luxembourg Report. Later we shall see the mechanisms of the Framework for Political Cooperation but we should note here the cautiousness in which the objectives are expressed. Thus the Ministers defined the objectives as follows:

to ensure, through regular exchanges of information and consultations, a better mutual understanding on the great international problems;

to strengthen [Member State] solidarity by promoting the harmonization of their views, the co-ordination of the positions, and where it appears possible and desirable, common actions.

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21. Recalled in Stein note 17 supra.

22. See J. Weiler, The European Parliament and its Foreign Affairs Committees. (1982).



The language is extremely cautious, the objectives limited, and the cleavage between the high aspirations of the Hague -- full economic and monetary European Union within a decade -- and the grim down-to-earth realism of the Ministers very marked. The operational details set up by the Luxembourg Report were not far reaching. The Framework for Political Cooperation was to be non-organic. It would depend on its activities on the co-ordinated apparatus of the Member States -- ministerial meetings and the like -- and was to be outside the EEC framework. Thus the Report provided drily that

Should the work of [the Framework for Political Cooperation] affect the activities of the European Communities, the Commission will invited to make known its views.

In the 1972 Paris Summit, the Heads of State and Government endorsed the creation of the Framework, indeed they sought its improvement by increasing the frequency of meetings among the Foreign Ministers and saw more clearly the linkage of the Framework to the EEC. In the language of the Final Communiqué

They considered that the aim of their co-operation was to deal with problems of current interest and, where possible, to formulate common medium and long-term positions, keeping in mind, *inter alia*, the international political implications for and effects of Community Policies under construction.

Interestingly, the idea of common action is played down; by contrast the relevance of the Community is spelt out more clearly in the past. The Framework for Political Cooperation was consolidated in the July 1973 second Ministerial Copenhagen Report. Beyond the self-congratulatory rhetoric of this Report the following points were of significance. Although the basic objective remained the same, the operational machinery was strengthened and in most important aspects was to become the foundation of the Framework to this day. Significantly, each Member States undertook

as a general rule not to take up final positions [on common European foreign policy problems - however these may be defined] without prior consultation with its partners within the framework of the political co-operation machinery.

The linkage to the Community was made more explicit even though the Report insisted on the principled distinction between the Framework and the Community. I can only mention in passing a point which illustrates this theme in a rather dramatic fashion: The test of the Framework for Political Cooperation as consolidated by the Copenhagen Report was to come more rapidly than the Minister envisaged with the outbreak of the Yom-Kippur War in October 1973. The Framework proved totally inadequate to deal with the situation and Europe displayed a shameful sight of disunity and individual Member State self-interest. As we shall analyze below, and return to in our evaluative conclusions, the Framework did provide a useful mechanism for an orderly capitulation to the Arab oil interest.



If we skip thirteen years ahead from the first Luxembourg Report to the most recent Solemn Declaration on European Union<sup>23</sup> signed in Stuttgart in June 1983, we shall find that in terms of the objectives there have been no dramatic changes in the conception of the Framework for Political Cooperation. The Member States acknowledge that "increasing problems of international politics [render] necessary [the] reinforcement of European Political Cooperation". And yet despite this acknowledgement the new formulation of the objectives of the framework underscores the inherent ambivalence and contradiction in the notion of a European foreign policy. It is worth citing the new formulation in extensu. The Solemn Declaration defines the following measures:

intensified consultations with a view to permitting timely joint action on all major foreign policy questions of interest to the Ten as a whole.  
prior consultation with the other Member States in

advance of the adoption of final positions ....The [Member States] underline their undertaking that each ... will take full account of the positions of its partners and give due weight to the adoption and implementation of common European positions when working out national positions and taking national action.

development and extension of the practice by which the views of the Ten are defined and consolidated in the form of common positions which then constitute a central point of reference for Member State policy.  
coordination of positions of Member States on the

political and economic aspects of security.  
increased contacts with third countries in order to

give the Ten greater weight as an interlocutor in the foreign policy field.  
closer cooperation in diplomatic and administrative

matters between the missions of the Ten in third countries.

the search for common positions at major international conferences attended by one or more of the Ten and covering questions dealt with in Political Cooperation.

It is clear thus that one is not speaking here of a single policy, with a single policy making apparatus and a single policy execution apparatus. The objectives of the Framework are in fact inherent in the name: Political Cooperation. The major actors remain the Member States. Where the interest exists joint action would be encouraged with the Framework mechanisms facilitating

<sup>23</sup>. Solemn Declaration ; Bull EC 6-1983, point 1.6.1.



this joint action. Even the formulation of a common position, the hall mark of the Framework, is to serve as a basis and reference point for national foreign policy. As if to underline this point one can cite the Greek "reservation" at the time of signing the Solemn Declaration in which it stated that:

in signing this declaration Greece states that nothing may restrain its right to determine its foreign policy in accordance with its national interests.

In many ways then, Political Cooperation as initially conceived was the story of the mountain which turned out to be a molehill. However, as in the case of external relations, the dynamics of the international environment as well as internal political pressures forced certain mutations on the original framework. The result is still a far cry from a veritable Europe speaking, let alone acting, with one voice. And even today, five years after it was written the sober conclusion of von den Gablentz retains its truth: the Framework for Political Cooperation constitutes "... the world's most advanced model of collective diplomacy ... [but]... neither the Community nor the [Ten] seem to have managed to perform the essential task of any foreign policy, namely to convert internal strength and resources into external influence on world affairs".<sup>24/</sup>

How the Framework for Political Cooperation Works.<sup>25/</sup>

For our purposes a detailed description of the Framework is

not necessary and sufficient for present purposes will be a brief resume. Since launching the concrete idea of the Framework in the Summit of 1969, the institutional aspects of political Cooperation have been revised several times leading to the following pattern of institutions and mechanisms.<sup>26/</sup>

At the apex of the institutional framework - formally, in fact, above it - stands the European Council of Heads of State and Government which represents since 1974 the formalization of hitherto irregular meetings which characterized Community life since the early 60s. The European Council, itself an organ, strictly speaking outside the Treaty framework,<sup>27/</sup> is thus the ultimate forum for coordination of, and pronouncements on, foreign policy issues. The European Council can be seized of

24. Von den Gablentz, Luxembourg Revisited or the Importance of

European Political Cooperation, 16 C.M.L.Rev. 685 (1979).

25. See Stein note 17 supra and references therein.

26. See text to note 23 supra. It contains improvements to the

27. Although outside the Treaty framework, the European Council is

very much part of the EC machinery a fact fully recognized in the Solemn Declaration, note 23 supra.



issues by its own motion and/or on the recommendation of the lower tiers of the Framework.

2. At the formal head of the Framework stand the Foreign Ministers who constitute the mainstay of the framework, with meetings taking place at least 4 times a year and in reality far more frequently. Their formal forum is the Conference of the Foreign Affairs Ministers meeting on European Political Cooperation matters. Their function is both constitutive - they may issue declarations in the name of the Framework - or preparatory for meetings of the Heads of State and Government.

3. A Political Committee (the Davignon Committee) consisting of the Directors of Political Affairs in the ten foreign ministries, meet regularly and serve as the main continuous preparatory forum for the political echelons of the Framework for Political Cooperation. A possible parallel within the Community bureaucracy would be the COREPER which prepares the Council of Ministers' meetings. Although the Political Committee provides a measure of continuity transcending, for example, political change of office in any one of the Member States, the Framework for Political Cooperation has no permanent secretariat despite the frequent calls to establish one. The Presidency of Political Cooperation moves with the Presidency of the Community at six month intervals and the only improvement to the disruption inherent in this modality has been the tripartite model whereby the actual presidency, the previous one and the future one meet in a coordinatory forum throughout the structure of the Framework.<sup>28/</sup>

4. Working Groups may be set up to study specific issues and they, in turn, may appoint groups of experts. The latter do not have an independent existence and they are strictly issue or region oriented.

5. A "Group of Correspondents" in the various foreign ministries has been set up. They are the Framework for Political Cooperation "Desk" in each capital and their task extends also to monitoring and following up Political Cooperation decisions and declarations.

6. Embassies of the Ten are associated within the Framework with a view to a two-way coordination with the European centre. Likewise, the Member State representations within international organizations, especially the UN, have the same association. The Ambassadorial contacts becomes important in times of crisis such as the Iranian affair. A special Telex system COREU is used to handle the communication traffic of the Framework. It is said to carry a significant amount of communications.

7. In the recent 1981 London Report, the Foreign Ministers "codified" their procedures. It contains improvements to the operational side of the Framework (such as better preparation of Ministerial Meetings) and a better defined role for the rotating presidency as the spokesman of the Ten. The most noticeable

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28. See 1981 London Report on EPC, Supp 3 to Bulletin EC, 1981.



improvement has been the establishment of Crisis Procedures:

The Political Committee or, if necessary, a ministerial meeting will convene within forty-eight hours at the request of three Member States.

The same procedure will apply in third countries at the level of Heads of Mission.

In order to improve the Capacity of the Ten to react in an emergency, working groups are encouraged to analyze areas of potential crisis and to prepare a range of possible reactions by the Ten.

In most other respects the London Report did not adopt any radical changes.

#### d. European Political Cooperation and the EEC.<sup>29/</sup>

In some sense the original rigid distinction between the Community and the Framework for Political Cooperation was not only counterproductive but also impossible. At its highest echelons the persons constituting the leadership of both structures were one and the same and artificial devices such as separate agendas and even separate meeting places could hardly create a de facto separation between the two. Now, not only do the Ministers meet in one session, albeit with different agendas, first as the EEC Council of Ministers and then as the Conference of Political Cooperation, but since 1974 in the informal Gymnich style meetings the agenda may include both Community and European Political Cooperation items.

This sense of reality asserted itself also as regards Commission participation in the Framework for Political Cooperation. The 1981 London Report finally affirmed:

Within the framework of the established rules and procedures the Ten attach importance to the Commission of the European Communities being fully associated with political cooperation, at all levels.

This does not mean that the Commission is a fully fledged participant. It is not privy to the full traffic of COREU nor is it a participant in the Group of Correspondents. On the other hand it participates, albeit without decisional power, in meetings of the European Council, the Conference of Foreign Ministers and the Political Committee of Political Cooperation. If there are problems of coordination, these will assert themselves at the operational level, say within various international organizations, where the division of competences

29. See Bonvicini, The Problem of Coordination between Political Cooperation and Community Activities, 12 Lo Spettatore Internazionale 55 (1977).

between the two setups is not clear, rather than at the central European level.

The stickiest point of all, however, is not the organizational cooperation and contact between European Community and the Framework for Political Cooperation. It is the substantive competences of the Community that are at issue. As we noted above the resistance of the Member States to incorporation of Political Cooperation within the Community derives from two interrelated factors:

- a. The Member States do not wish to submit themselves in matters of foreign policy to the Community decisional and normative discipline.
- b. They do not wish the Community, for its part, to increase its competences into fields considered outside the Treaties.

But as I have maintained all along, world affairs do not arrange themselves in a neat way respecting the division of competences between Community external relations and European Political Cooperation. Thus, for example, it is absurd to think that a decision to open trade negotiations with, say, Yugoslavia or even Israel -- matters coming within the exclusive external economic relations competence of the EEC -- would not be influenced by political considerations which under current definitions fall under the exclusive jurisdiction of the Member States within the Framework for Political Cooperation. The question may be asked in an even more dramatic form. May decisions on EEC trade and cooperation agreements be formally taken on political grounds. This may seem to be an unreal and hair-splitting problem, but it has far reaching constitutional repercussions. In reality, the answer is of course yes. But, if this *de facto* reply is translated into juridical forms, it would seem that an eventual merge between Community and Political Cooperation is inevitable.

The sensitivity of this issue and its political significance are easily demonstrated in the context of economic sanctions taken by the Community/Member States as a political measure. As will be recalled, immediately after the outbreak of the Falklands/Malvinas crisis, Britain imposed full economic sanctions on Argentina. This in itself is already problematic since economic sanctions, in dry legal language mean a breach of the Community's Common Commercial Policy with its export and import regimes. However the Treaty provides in Article 224 for the possibility of a Member State finding itself in war or departing from the normal regime albeit after consultations.

What then of the position of the other Member States who did not find themselves at war with Argentina. It is plausible that the language of Article 224 would allow in such a situation other Member States joining in the sanctions on an individual national basis. The Article speaks of

measures which a Member State may be called upon to take in

the event of ... war or serious international tension constituting the threat of war...



Be the legal argument as it may 30/, the Member States took another course of action. The Preamble to Council Regulation (EEC) 877/82 of April 16, 1982 -- a strict Community legal measure -- provided, inter alia, as follows:

#### The Council of the European Community

Whereas the serious situation resulting from the invasion of the Falkland Islands by Argentina ... has given rise to discussions in the context of European political cooperation which have led in particular to the decision that economic measures will be taken with regard to Argentina in accordance with the relevant provisions of the Community Treaties;

...

Whereas ...it has proved important to take urgent and uniform measures; whereas the Member States have therefore decided to adopt a Council Regulation pursuant to the Treaty;

Whereas ...the interests of the Community and the Member States demand the temporary suspension of imports of all products originating in Argentina;

...

has adopted this Regulation:

...

Imports of all products originating in Argentina ... are hereby suspended.

This remarkable document is interesting for in several senses: First, it illustrates most clearly the almost inevitable breakdown on the institutional level of the demarcation of EEC and EPC. Second, it illustrates that political will existing, the Ten within the Framework for Political Cooperation have at their disposal more than declarations as an instrument of foreign policy. Thirdly, the formal decision imposing sanctions was constituted on the basis of Article 113 of the Treaty of Rome, and was thus to be considered as a measure coming fully within the exclusive Common Commercial Policy of the EEC. Here then was a case whereby not only were the Member States within the Framework for Political Cooperation "borrowing" a Community

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30. For a full discussion see Kauper, Community Sanctions against Argentina: Lawfulness under Community and International Law in D.O'Keefe and H.G. Schermers (eds.) Essays in European Law and Integration (1982).

instrument to further their political goals, but a strict reading would suggest that henceforth such a decision to impose economic sanctions could legitimately be taken by the Community decisional process, that the decision would be binding on recalcitrant Member States and, most dramatically of all, that since the Common Commercial Policy was exclusive, such action could not be taken by the Member States outside the Community framework.<sup>31/</sup> We have here then in a nutshell both the utility -- in terms of efficacy -- of a Community foreign policy action and the danger -- in terms of loss of autonomy -- to the Member States of such a construction.

Needless to say the Member States did not remain aloof to the potential dangers. For example, Denmark, relying on a dubious interpretation of a safeguard measure in the Treaty, insisted on implementing the sanctions decision by an act of its own Parliament, reasserting Member State sovereignty and underlining the exceptional character of the particular sanction situation. Interestingly, not much later, the Community "froze" for a short period the negotiations for the financial instrument in the Israel - Community Cooperation Agreement, clearly another Community measure, or at least Mixed measure, prompted by European Political Cooperation considerations.

It is thus inevitable that in the future the artificial gap between the Community and the Framework for Political Cooperation will narrow even further even if a formal integration of the two is still far away.

e. Political Cooperation Policy Making: Active, Reactive and Reflexive.

The mechanisms which I have described above allow the Member States to coordinate their positions and, if the political will exists, to adopt a common position and even common action. Given this limited operational range, what are the realistic gains which may be obtained through the Framework? Let us consider the Framework for Political Cooperation in the context of the classical distinctions, borrowed from the analysis of economic policy, between aims/objectives and instruments/measures.<sup>32/</sup> It is here that our earlier allusion to active, reactive and reflexive policy may become fruitful.

It is important to remember that these notions are essentially didactic. In reality one will fuse into the other. But they may help us in evaluating the successes and failures of the Framework.

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31. Id.

32. See Daintith, Legal Analysis of Economic Policy, Working Paper no. 27 of EUI, Florence.



An active policy will seeks to influence events directly; to posit "Europe" as an initiator of policy and a veritable world actor. Active policy would typically be based on a notion that all events with an international implication are relevant to the actor.

A reactive policy will be one which is less concerned with direct influence, but rather with reacting to world events so as to minimize costs to the reactive actor.

Under various guises these two elements exist in most inter-statal foreign policy making.

European Political Cooperation ushers forth a third policy component, additional to the active and reactive ones, namely reflexive policy. Here the chief, though rarely exclusive, concern will be the actual formation of a common policy as an integrative value per se.

It should be noted, especially in the context of the Middle East conflict, that the transnational nature of the reflexive policy within the Political Cooperation Framework allows through the evolution of what has been called the Shield Effect of an external dimension as well. Member States may adopt a reactive position, for example critical of Israel, and attribute it to the discipline of the Common European policy established within Political Cooperation. The shield effect could, in principle, operate also on the internal political level whereby a government, in the face of, say, internal parliamentary or popular opposition to a course of foreign policy, could explain it as following the common European line. Reflexive policy could be given a less charitable interpretation: it might be regarded as substitute politics -- an empty gesture of European make-believe integration but in reality a cover up for a failure to deal with the more pressing internal problems of Europe.

The active-reactive-reflexive triangle may relate also to the instruments and measures adopted for the prosecution of the policy. What instruments are available to the Framework?

In one sense none at all - except the common declaration (at times a potent instrument in international affairs). In another sense, the Framework has at its disposal the entire array of instruments of the Member States as well as those "belonging" to the Community. The tendency to use the declaration as the most common output of the Framework might suggest a paucity of means which conditions a reactive/reflexive orientation. This in our view would be a mistake. Given the political will, the Member States have at their disposal not only the Community instruments which can be utilized by way of retortion or sanction but also every combination of national policy instrument. If the Framework has failed to assert itself actively the reason lies in the lack of political will or, indeed, substantive agreement among the partners and not in the absence of instruments.

I insist on the trichotomy -- active reactive reflexive -- because I believe it enables a better evaluation of the successes and failures of the Framework. Let us take for example



the famous 1980 Venice declaration -- at face value the European entry into active foreign policy making in the Middle East. Europe was putting forward to the chagrin of the United States, or so it seemed, an alternative to American peacemaking efforts. This was to be characterized as the European Initiative.

In active foreign policy terms -- the actual ability to influence events in the region and realize the declared objectives and methods contained in the Venice declaration -- the European Initiative was a failure.

By contrast, in reactive terms, the European Initiative is at least open to different interpretations. Faced with increasing Arab pressure that European states take a stronger pro-Arab stand in relation to the conflict, Europe managed, to appear to be doing something, while not changing the substance of her policy all that much. Relations with Israel became strained for a short time, but, for example, there was no economic spill over. All in all, on this reading of events Europe managed to maintain a precarious relational *status quo* without stirring the waters too much. If, thus, we hypothesise a goal of containment rather than active influence, we may consider the European initiative less than a failure.

In reflexive terms the Middle East has provided the real laboratory in which all mechanisms of the Framework were practiced. And on a declaratory level, it has in fact led, fully using the shield effect, to a convergence of European attitudes towards various issues connected with the conflict such as Palestinian self-determination and a possible role for the PLO. The analytical categories help us thus provide a differentiated evaluation to Political Cooperation output.

#### D. Towards a Revised Concept of a European Foreign Policy.

How then are we to assess these mechanisms developed for a European foreign policy? The tendency in the literature has often been to dismiss European foreign policy, and especially the Framework for Political Cooperation as a failure, as procedural substitutes for substantive accord, as entirely reflexive with no active or even reactive element. To the extent that one looks at substantive results we cannot but share in these pessimistic conclusions. At the same time one should not minimize the enormous task which the Member States face. For they are trying to achieve something which is completely novel and untried in the international arena. The basic premise of the foreign posture is, in the Language of the Hague Summit

a Europe composed of States which, while preserving their national characteristics, are united in their essential interests

The federal state experience, as we already noted, would suggest that the task of preserving national characteristics and statehood while operating a common foreign posture is impossible. And indeed much of the negative criticism of the Framework for Political Cooperation is typically rooted in a view which has



been conditioned by the foreign policy concept developed in other non-unitary entities and especially the federal state. The criticism is usually based on a criterion against which to judge the Framework which adopts an ideal type model "... in which common institutions are in a position to make and carry through all necessary foreign policy decisions for the Community and thereby replace the national foreign policy of the Member States." 33/

This ideal type model frequently and wrongly referred to as a federal model is not only alien to the original Political Cooperation concept which sought to separate the Framework from Community structures, but is also alien to the entire modern trend of European integration in the field of foreign policy which tends to suggest, both in external relations and in Political Cooperation, a new experiment of a non-unitary foreign policy process and foreign posture which may veritably be called the federal option of foreign affairs.

In order to justify what might appear to be a colossal terminological faux pas, two clarifications are necessary. The first concerns the concept of federalism. One often finds in the literature a persistent confusion between, and an erroneous identification of, two distinct concepts: federalism as an organizational principle and a federation (the federal state) as one specific manifestation of that principle. Elazar dispels the confusion by reference to the etymology of federalism the roots of which may be found

first in the biblical hebrew term brit [covenant], then the latin foedus (literally 'covenant') from which the modern "federal" is derived.... Elaborated by the Calvinists in their federal theology, the concept formed the basis for far more than a form of political organization.... The original use of the term deals with contractual linkages that involve power sharing -- among individuals, among groups, among states. This usage is more appropriate than the definition of modern federations, which represents only one aspect of the federal idea and one application of the federal principle. 34/

Pescatore reflects the same reasoning in the concrete context of the European community:

[T]he methods of federalism are not only a means of organizing states. It would rather seem that federalism is a political and legal philosophy which adapts itself to all political contexts on both the municipal and the international level, wherever and whenever two basic prerequisites are fulfilled: the search for unity,

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33. This view is explained in Allen, Rummel, Wessels (eds.) European Political Cooperation, (1982) who actually reject it.

34. D. Elazar, Self Rule - Shared Rule (1979) at 3.



combined with genuine respect for the autonomy and the legitimate interests of the participant entities. 35/

As we noted above the paradox is that federal states typically have a unitary non-federal foreign policy. By contrast it would seem that the Community and its Member State, clearly not a federation, are experimenting with a genuine federal foreign policy. In the legal world of external relations the key indicator of this development is found in the growing usage of the so called mixed agreement which involves participation in one and the same international treaty of the Community, its Member States and the third state. The first trade agreements of the Community where of a "pure" Community type. The more recent practice was to move to the mixed type. In the political world the expression of this federal rationale is the Framework for Political Cooperation which rejects a unitarist centrist model in favor of the far more complex cooperative model.

How does federal conception measure up against the objectives of the Framework for Political Cooperation? Measured against the Reflexive objectives it might seem that this federal conception is at odds with a vigorous notion of integration or at least a second best way of achieving integrational goals. I reject this conclusion as too simplistic. It rests on a crude, and perhaps outmoded centre-periphery model according to which

-- political systems always have a centre and

periphery;

-- it is what happens in the centre which is politically important;

-- integration consists of constructing a powerful centre to which the periphery will be tied.

This has not only been the "pontifical" dogma of Commission and Court. It is an open or tacit conception in most though not all of the literature on the European Community.

The alternative to this view expressed in modern federal theory 36/ rejects the centre-periphery model and regards federalism as a structure which embraces the body politic rather than providing a focus. On this basis integration is no longer measured in terms of centre-periphery relationships but in the cohesion of the framework as a whole. Integration means a strengthening of whole and parts together and interdependently. Mixed agreement in the legal world and Political Cooperation in the political world correspond perhaps to this Reflexive model. Certainly the Member States maintain their power and

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35. P. Pescatore in T. Sandalow and E. Stein, Courts and Free Markets (1982) Preface.

36. D. Elazar, Federalism and Political Integration (1979).



international profile - but they do enhance their capacity of acting out of a common position and on occasion even in concert.

Thinking along a federal conception necessitates a reevaluation also of the active and reactive objectives and instruments of the system. Perhaps the holiest cow of Political Cooperation phraseology has been the oft-repeated slogan which postulated the Framework as enabling Europe to speak with one voice. This was to become not merely a political mobilizing instrument but also received an intellectual underpinning by those who have asserted that through this unison of voice and action Europe would best be able to translate or realize in the international field the enormous power which is consonant with the Ten's importance. Standard critique has been that through Europe's inability to speak with one voice this potential has not in fact been realized.

At the risk of slaughtering this holy cow, could it be that even on the non-Reflexive level there might be advantages in abandoning, at least on occasion the One Voice concept? To be sure, in many situations it will be through concerted and unified action that Europe will best be able to make effective policy. At the same time there might be situations where the united concept will represent a loss: a loss of the potentialities inherent in a pluralistic foreign posture. One voice could represent a loss of subtlety, a need to choose single options and the risk of dichotomizing reaction to such a single European Policy. A pluralistic approach, perhaps more difficult to manage, gives Europe the potential to play a more subtle "game". It may use the special historical connections of the Member States to the objects of the policy. Consider in this context the different relationships which, say, Holland, Denmark, Britain and Germany have towards, and the perception of those states in, say, Israel. It may be through different positions adopted by the Member States which could put pressure on other actors while keeping communications open.

I do not propose to elaborate this point much further. If I were to translate it to a slogan I should say that the descriptive and prescriptive trend of European foreign policy is towards a Europe singing like a choir -- remembering of course that the choir concept is not meant to replace totally the one voice. Training several different voices to sing in harmony is at the best of times a most difficult task; one should not be surprised if for a long time yet the European choir will often sing out of tune. Even when successful, one should further not forget that a good choir sometimes sings in unison, other times in several voices and occasionally there is even scope for soloists.

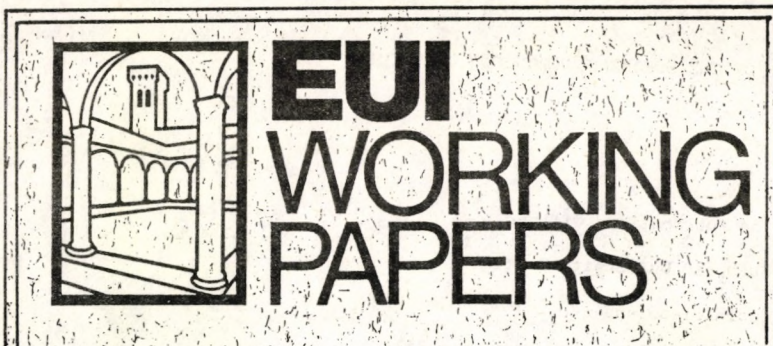
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