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RENAUD DEHOUSSE
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JOSEPH H.H. WEILER

European University Institute, Florence

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I. Introduction

Has the Single Act really changed European political cooperation?

Words, when skillfully used, can mean a lot in the world of lawyers. Thus, the fairly general heading of Title III of the Single Act - "Treaty Provisions on European Cooperation in the Sphere of Foreign Policy" - may be seen as encapsulating both the importance and the limits of the changes introduced by that part of the Act. The reference to "Treaty provisions" suggests that the "High Contracting Parties" - as, significantly, the Member States of the European Community are called in that part of the Act - intended to give legal value to the commitments therein contained. At the same time, the use of an expression like "cooperation in the sphere of foreign policy", which was preferred to the more integrated (and Community-like) "common foreign policy", clearly indicates that their intention was not to alter radically the set of procedures which have characterized European Political Cooperation from its inception. One could therefore argue that we find in the very heading of Title III the essence of the changes contained in that part of the Act: A formal "legalization" of a process which was not hitherto regarded as legally binding, but no substantive transformation of its functioning, if one excludes the long awaited creation of a Secretariat.

And, indeed, most of the comments dedicated to the Single Act and its impact on political cooperation are variations on this very theme. With few exceptions, they conclude – more or less explicitly – that the new treaty fell short of the hopes for structural consolidation of the cooperation mechanisms developed in the 1970s. Significantly, in the torrents of literature generated by the Single Act, comments on its EPC part occupy a very modest place[1]. Even those who have scrutinized the provisions of Title III stress how meager the

[1] See for instance the works of Bosco, "Commentaire de l'Acte unique européen des 17-28 février 1987 (sic)", *CDE* (1987) 355-82; Glaesner, "l'Acte unique européen", *RMC* (1986), 307-321 at 310, Jacqué, "L'Acte unique européen", *RTDE* (1986), 575-612 at 609-612, and Pescatore, "Observations critiques sur l'Acte Unique européen", in *L'Acte unique européen,* Bruxelles: Institut d'études européennes, 1986, 39-66 at 53-54.

substantive changes were[2]. In reading those accounts, one might well think that the best way to describe the achievements of the intergovernmental conference in the field of political cooperation is probably to list what the Single Act did *not* do: it did not substantially alter the intergovernmental character of EPC or its functioning; nor did it achieve its integration in the Community framework. The only innovation, so the literature argued, was that EPC was made part of a binding treaty, but who – except perhaps lawyers – could get excited by a formal legalization which left the substance untouched?

The classical analysis thus emphasizes the dual character of a reform which can be regarded both as significant because of its form[3] and as disappointing because of its substance. According to this line of thinking, the failure to establish a true common foreign policy – modelled, say, on the common commercial policy of the Community – can seen as reflecting a "honoured" tradition of EPC, in which procedural and rhetorical elements have often seemed to have priority over substantive questions. At the same time, the contrast between those two dimensions – form and substance – can also give rise to a number of questions: Is the legal matrix "merely" form? What can be the sense, if any, of the bare legalization of EPC operated by the Single Act ? Did it involve some significant change in the quality of the relationships between all actors involved? One can argue that no serious answer can be given to these questions without addressing first a crucial preliminary question, namely the status of political cooperation *before* the 1986-87 reform,

[2] See for instance Jean De Ruyt, *L'Acte unique européen,* Bruxelles: Institut d'études européennes, 1987, 219-251; Horst G. Krenzler, "Die Einheitliche Europäische Akte als Schritt auf dem Wege zu einer Gemeinsamen Europäische Außenpolitik", 21 *Europarecht* (1986) 384-391; Giovanni Jannuzzi, "La politica estera dell'Europa Comunitaria", 43 *La Comunità internazionale* (1988) 192-227; Diego Linan Nogueras, "Cooperacion Politica y Acta Unica Europea", 13 *Revista de Instituciones Europeas* (1986) 45)-74; Simon Nuttall, "European Political Cooperation and the Single European Act", 5 *Yearbook of European Law* (1985), 203-232; Eric Stein, "European Foreign Affairs and the Single Act of 1986", 23 *International Lawyer* (1989) 977-994; Wolfgang Wessels, "Die Einheitliche Europäische Akte: Die Europäische Zusammenarbeit in der Außenpolitik", 9 *Integration* (1986) 127-133.

[3] Interestingly, this point is stressed in the comments of two insiders. See Giovanni Jannuzzi, "La Cooperazione Politica Europea", *Affari esteri,* N°75, 1987, 320-329, and Simon Nuttall, *supra* note 2.

for it is only against this background that any changes can be properly evaluated. Is it really the case that prior to the Single Act EPC operated in a legal vacuum?

These will be some of the issues we intend to tackle in this paper. They are rooted in the belief that by focusing on these kind of questions, it is possible to cast some new light on the impact of the Single Act. Our intention is not to shatter the classical analysis, which we regard as essentially correct. Our purpose is far more modest: we would like to examine to what extent legal analysis can finesse or render more subtle, and hence more accurate, our understanding of Title III and its place in the evolution of EPC.

II. EPC before the Single Act

Although at its inception European integration was to a large extent driven by security concerns and by underlying conceptions of global balance, cooperation in the field of foreign policy has always been a most difficult exercise. Major crises like the rejection of the European Defense Community and, later, the failure of the Fouchet plan, led to a strong emphasis on economic integration. Widespread functionalists schemes rested on the hope that a level of economic cohesion would naturally bring the Member States, one day, to cooperate increasingly closely in the sphere of high politics. However, when EPC started to develop in the early 1970s, special care was taken to organize it on the fringes of the Community, for if Member States were keen to coordinate their foreign policies, they were not prepared to relinquish their sovereign powers in that field. Thus, EPC was established and later reinforced on the basis of a series of pragmatic arrangements worked out by national governments. The different stages of this process – from the Luxembourg Report to the Solemn Declaration on European Union – are well known and need not be recalled here. Lacking a firm treaty basis, working according to its own rules, without direct involvement of the Community

institutions (especially in the early years), EPC developped as a system of its own, legally as well as physically distinct from the steadily growing Community apparatus.

Theorically at least, the entire system essentially rested on the good-will of the Member States, since in strict legal terms, they were not even bound to consult each other. As early as 1975, the Tindemans Report tried to consolidate this somewhat loose system by inviting the Member States to give legal value to EPC voluntary procedures. But the suggestion was not immediately followed: both the London Report and the Stuttgart Declaration, which further tied Member State's links in the foreign policy area, carefully avoided any *quantum leap* of that kind[4]. Later on, during the course of the discussions on external relations in the Dooge Committee, the Danish and the Greek delegates made it clear that they could not accept limiting their sovereignty by formal commitments. Both expressly rejected the idea of a codification of EPC rules and practices[5].

Yet, to some people at least, the elaborate cooperation network set up by the Member States in the 1970s and the intricate web of relationships to which it gave rise appeared sufficiently constraining to suggest that the basic EPC agreements might be regarded as legally binding[6]. This thesis had the great value of reminding us that international legal commitments can arise without a formal treaty. Consent can be given through words or through behaviour giving rise to expectations on which reliance is placed, and the steadiness of EPC might well be seen as coming within this concept. At the same time, there were as we saw many counter-indications which pointed to the fact that states

4 Point 4.3. of the Stuttgart Declaration only envisaged the conclusion of a treaty at the time when the text of the Declaration would be revise.

5 Report of the Ad Hoc Committee for Institutional Affairs, presented to the European Council in March 1985. The report has been published as an annex to R. Bieber, J.-P. Jacqué and J. Weiler (eds.), *An Ever Closer Union - A Critical Analysis of the Draft Treaty Establishing the European Union,* Luxembourg: Office for Official Publications of the EC, 1985, at 330-342.

6 See for instance Jochen A. Frowein, "European Political Cooperation", in R. Bernhardt (ed.), *Encyclopedia of Public International Law,* vol. 6, Amsterdam: North-Holland, 1983, 199-201.

were not regarding themselves as legally bound by the process, and were not prepared to accept a formalization of EPC. To speak of binding commitments therefore ran counter to one of the cardinal axioms of international law, according to which the creation of legal obligation rests on the consent of subjects of international law, and no State can as a rule be legally bound against its will. Yet such a bold thesis had the merit of stressing the odd side of a situation where the actual autonomy enjoyed by the Member States of the Community appeared as somehow limited by their participation in EPC, without this limitation being reflected in their legal position.

Ambiguous as such a situation may seem, it is worth stressing that it is not without equivalent on the international scene. Resolutions adopted by international organizations, codes of conduct, documents of a clear programmatic nature like, say, the Helsinki Final Act are good examples in point. Although they clearly aim at shaping States' behaviour, those texts are generally not regarded as establishing legal rights and obligations, for such was not their authors' intention. This, however, does not exclude their wielding some indirect legal effects. Indeed, during the last twenty years or so, international law doctrine has tried to carve a concept which could provide a description of the actual impact of such non-binding agreements on the legal sphere[7]. Such "soft law" instruments can serve as a basis for the enactment of national legislation; they can also transform to "matters of international concern" issues which States could hitherto regard as part of their domestic jurisdiction: notwithstanding the fact that it did not create legal obligations, the Helsinki Final Act prevented the Soviet Union and its then satellites from claiming that human rights problems were internal matters which could not be raised internationally. Moreover, by legitimizing certain types of behaviour, this kind of instrument may represent an important stage in the process that leads

7 See for instance Michel Virally, "La distinction entre textes internationaux ayant une portée juridique dans les relations mutuelles entre leurs auteurs et textes internationaux qui en sont dépourvus - Rapport définitif", *Annuaire de l'Institut de droit international,* vol. 60-I, 1983, 328-357.

to the elaboration of customary international law[8].

It is not our intention to engage here in a lengthy discussion of the complex relationships which may exist between facts and law in the international legal order. All we want to suggest here is that although its precise scope remains unclear, the "soft law" construct can be regarded as a useful instrument for understanding the radiating effect which basic EPC documents undoubtedly had in the pre-Single Act years. Their "soft" legal value can, at least in part, account for the influence political cooperation exerted on the Member States and for the sense of comity which developed between the European partners. Could one really argue that in the face of EPC the latter felt as free as before in the elaboration and the conduct of their foreign policy? Whether the constraint under which they operated was legal or otherwise is an interesting philosophical question, but it could be also be posed in relation to many other sources of international law[9]. Likewise, from a historical viewpoint this time, the "soft law" concept may be useful in understanding how pragmatic arrangements have slowly crystallized into binding rules of law; we shall come back later to this issue.

There is, however, one additional legal dimension – with nothing "soft" about it – which predates the Single European Act.

Being essentially a science based on categories, law sometimes makes things look more diverse than they actually are. Although, as stated above, the Member States sought to retain their sovereignty in fields of foreign policy, the very existence of the European Communities, with their legally binding

[8] Hence the elegant distinction suggested by René-Jean Dupuy between "droit mou" and "droit vert" as sub-categories of soft law. See Dupuy, "Droit déclamatoire et droit proclamatoire: de la coutume sauvage à la 'soft law' ", in Société française de droit international, *L'Elaboration du droit international public,* Paris: Pédone, 1975, 132-148 at 140.

[9] It is interesting to note in this respect the wording of the decision adopted by the Foreign ministers to implement the basic provisions of Title III. The ministers *inter alia* "confirm that the *customary procedures* which have been set up to ensure the practical working of European political cooperation, in particular the Luxembourg (1970), Copenhagen (1973) and London (1980) reports and the Solemn Declaration on European Union (1983), and which are summarized in the *`Coutumier', remain into force.*" See *EPC Bulletin,* Doc. 86/090 (our underlining).

framework and their elaborated rules, vitiated that goal. In an interdependent world, the much-touted sphere of "pure" foreign policy is at best limited in scope, for high politics must constantly overlap with economic and trade issues. The pervasive Community presence in the commercial field can therefore not be ignored.

Indeed, by the mid-70s, the Court of Justice had held in two landmark rulings that all matters of international trade had been taken away from the Member States and transferred to the sphere of exclusive Community competence[10]. Moreover, the ambit of the common commercial policy was held to be extremely wide, covering matters such as cooperation and development policy.

The impact of this legal situation is immediately apparent. On the one hand it turned the Community into a real foreign policy player. There are few areas of international trade which can be regarded as devoid of political considerations. Whether to have a trade agreement with an Eastern Europe country, to take one example of great topicality, was a decision charged with political ramifications long before the more recent events in that part of the world. But more significant for our purposes was (and still is) the obverse of the same coin: not only are an increasing number of matters of Community competence to be considered by the EPC partners but, more importantly, some areas of Member State competence and, of course, decisions adopted in the EPC framework, if they are to go beyond the level of declaratory diplomacy, must often be implemented through Community instruments. The most remarkable example of this kind of political use of Commmunity competences were of course some of the decisions on sanctions against third States[11]. Thus, because international reality does not bend to the division of

[10] Opinion 1/75 of 11 November 1975, (1975) ECR 1355, and Opinion 1/78 of 4 October 1979, (1979) ECR 2871.

[11] For a full account, see P.-J. Kuyper, "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,* Deventer: Kluwer, 1982, 141-166, and Simon Nuttall,

competences between the Community and the Member States, EPC found itself not infrequently embedded in the legal matrix imposed by the Community regime.

III. The Codification of EPC Procedures

A mere glance at Title III of the SEA is enough to show that its principal aim is to codify the various procedures which have been slowly elaborated and refined since 1970[12]. It is stated at the outset[13] that the general objective assigned to European political cooperation is "to endeavour jointly to formulate and implement a European foreign policy". Here again words matter a lot: if the concept of a European foreign policy emerges for the first time in an EPC document, there is no mention of the necessity (or the desire) of establishing a *common* policy, as envisaged in the negotiations mandate, drafted in the wake of the Milan European Council. And the rest of the sentence makes it clear that, in EPC as in most schemes of intergovernmental cooperation, Member States are to remain the central - if not exclusive - actors, both at the decision-making and at the implementation levels.

The ensuing provisions confirm this first impression. The mechanisms mentioned - prior consultations, common positions, joint action - are part of the classical paraphernalia of political cooperation. They can at best give accrued efficiency to the joint foreign policy of the Twelve, provided of course that the latter are actually able to reach a consensus, but in theory they do not imply any restriction of their ultimate freedom to act unilaterally. Similarly, the

"Interaction between European Political Cooperation and the European Community", 7 *Yearbook of European Law* (1988) 211-249.

12 Article 1 explicitly refers to the basic EPC documents (Luxembourg, Copenhagen and London reports and Solemn Declaration on European Union) as well as to "the practices gradually established among the Member States".

13 Article 30(1).

various collective organs involved in the EPC process - European Council, Foreign Ministers, Political Committee, European Correspondants' Group - see their role formally sanctioned, but none of them is endowed with an autonomous capacity to act, since all decisions have to be made by consensus. True, the Commission's "association" to EPC discussions is acknowledged[14], but in a way which does not confer upon it any power of initiative similar to the one it holds in the Community context. The only innovation at this level is that the Commission, together with the Presidency, is given the responsibility to ensure consistency between the external policies pursued in EPC and within the Community[15] – in other words between the two main branches, political and economic, of external relations – a point to which we shall return below.

The main structural change lies in the creation of a Secretariat, placed under the authority of the Presidency, which it must assist in preparing and implementing EPC activities. Important as this step may appear, its immediate impact has been limited. Although the Secretariat was the first structure created in the EPC sphere which could be seen as going beyond a strict intergovernmental logic[16], it has not been put in a position to play a dynamic role of its own. The Foreign Ministers have spelled out in greater detail its size, status and duties in a decision adopted at the time of signing the Single Act[17], and in which they made it clear that they did not intend to grant any substantial autonomy to the new body. Functionally speaking, its main tasks are of an organizational and administrative nature; structurally speaking, its diplomatic staff is limited in numbers - five officials, which cannot be seen as a real

14 Article 30(3)(a) and (b).

15 Article 30(5), which specifies, however, that the Presidency and the Commission each act "within their sphere of competence".

16 See Jannuzzi, *supra* note 2, who speaks in this respect of "a-national" (as opposed to supranational) integration (at p. 199).

17 Decision of 28 February 1986, *EPC Bulletin*, Doc. 86/090.

departure from the classical *troika* system - and all of them remain attached to the various Member States' diplomatic missions in Brussels[18].

Those resources appear even more meagre when confronted with the ambitious proposals contained in a Franco-German draft presented at the eve of the Milan European Council[19]. The most striking suggestion made in that document was the creation of a secretariat with at its head a figure - baptised in a somewhat pompous way as "Secretary General of the European Union" - appointed for four years by the Heads of State and Government and with a staff assimilated in status to European civil servants. In other words, what was envisaged was a body somewhat similar in its powers and functions to the European Commission, and which would be called upon to play an autonomous *political* role. This highly political profile however combined two sorts of threats of a radically different nature: to some Member States, a proposal of that kind unavoidably appeared as a Fouchet-type initiative, capable of weakening the position of the Commission in the Community setting; for others, it simply went too far towards usrping the functions of national foreign ministries.

The Single Act's failure to achieve a shift to a more "Community-like" form of cooperation is equally clear as far as EPC working methods are concerned. The only reference to the weight to be given to a majority opinion appears in Article 30(3)(c), where the Member States are invited to refrain "as far as possible ... from impeding the formation of a consensus and the joint actions this might produce". Needless to say there is no mention of the possibility of a vote. This, however, can hardly be seen as a surprise[20]: after all, no one really

[18] They therefore enjoy the same privileges and immunities as members of their countries' diplomatic missions in Brussels. See Article 30(11) of the Single Act and Decision of 28 February 1986, Title III, Article 3.

[19] This draft is reproduced as an annex to Nuttall, *supra* note 2 at 220-223.

[20] It is true that the Dooge report had gone further in recommending to seek "a consensus in keeping with the majority opinion". But the very strategy followed in the Dooge committee – to seek a broad consensus, but not necessarily a unanimous agreement – made it easier to reach

expected that the Member States would be willing to loosen their control over foreign policy. What this provision actually means is that a consensus does not necessarily amount to a unanimous *approval* by all partners of the measures proposed: those who do not support them can, out of respect for the majority feeling, decide not to oppose them. This was already a standard EPC practice before the Single Act in fields where no vital interest was at stake. As Nuttall points out, the difference between EPC and Community decision-making is not necessarily as big as one might think[21] for, in the Community context, voting tends to remain the exception, rather than the rule, even after the extension of majority voting provided for by the Single Act. In this respect, EPC is probably at the same level as the Community ... before the Single Act, which, as is known, has rendered less threatening the ghost of the so-called "Luxembourg compromise".

Generally speaking, it is therefore difficult to escape the impression that the system outlined in Title III is little more than a codification of the procedures previously agreed upon by the Twelve. Whether one must regard this result as disappointing actually depends on one's hopes and expectations.

So far, we have used the term "codification" in a loose, non-legal way, as an indicator of the fact that if one leaves aside the few exceptions mentioned, Title III did little to innovate or renovate basic working practices of EPC. In a legal context, be it in domestic (State) law or in international law, codification has a slightly different, and to lawyers an obvious meaning. It assumes the existence of fragments of law (represented, for example, by various pieces of legislation or in international law by various customary norms) which through the codification process are put in a coherent form. Frequently, too, codification is "progressive": lacunae are filled in and updating takes place, so

an agreement on a stricter wording. The price to be paid for that strategy consisted of course in the great number of reservations entered by representatives of one or the other governments. As far as EPC was concerned, both the Danish and the Greek representatives insisted on the necessity of sticking to the existing practices.

21 *supra* note 3 at 211.

that the final "code" does not simply appear as an ordered mirror image of the fragments.

It is clear that in Title III the process has been somewhat different. Whereas progressive codification has been kept to a minimum, commitments which at best could be described as "soft law" in the pre-Single Act era have been hardened into legally binding obligations. So here codification did not simply mean congregating a range of disparate practices, together in coherent form, but also elevating them to real legal status.

IV. The Binding Character of Title III

From a legal viewpoint, Title III contains two types of provisions. The first type consists of provisions defining the institutional framework in which cooperation is to be developed. As we have just seen, that part of the Act does not include radical departures from past arrangements. Nor do the provisions involved add to the obligations accepted by the parties in themselves: at best, they lay the institutional basis on which precise obligations will rest in the future, assuming the EPC partners agree on joint actions.

The second type of provisions contain a series of commitments accepted by the Member States of the Community in their quality of EPC partners. Several commentators have noted the extremely vague character of most of these commitments. Actually, it is easy to caricature Title III. It is replete with conditionals and grammatical reservations: The High Contracting Parties must "endeavour" to coordinate their action and "to avoid any action which might impair their effectiveness as a cohesive force in international relations"[22]; they

[22] Article 30, para. (1) and (2) (d). The wording of this latter provision can usefuly be compared with the, more stringent Article 5 of the EEC Treaty, which provides that "Member States ... shall abstain from any measure which could jeopardize the attainment of the objectives of this Treaty."

shall "as far as possible" try to coordinate their action and to refrain from impeding the formation of a consensus[23]; it is also stressed that cooperation on questions of security "would contribute in an essential way to the development of a European identity"[24]. Other declarations are of a clear programmatic nature, like the provision on security where the parties declare themselves "ready to coordinate their positions more closely on the political and economic aspects of security"[25].

More generally speaking, one cannot but be struck by the fairly loose commitments assumed by the parties. There is no shortage of commitments to consult and inform each other, to "take full account of the positions of the other partners"[26], to "ensure that common principles and objectives are gradually developed and defined"[27] and to regard those common positions as "a point of reference for the policies of the parties"[28]. In contrast, one finds in Title III no provision establishing clearly an obligation to reach a common position or to implement it. One is therefore tempted to conlude like Pescatore that the commitments contained in that part of the Single Act are not of a legal nature:

> "La consécration (of EPC) dans la forme d'un traité international n'a pas pour effet de créer une obligation quelconque à ceux que l'on appelle ici "Hautes Parties Contractantes". Le texte de l'Article 30 ne dépasse en aucun de ses points le niveau de déclarations d'intention..."[29].

Yet we do not share this view. Our divergent opinion is rooted in the traditional lawyer's respect for the text, coupled with a less traditional and

[23] Article 30 (2) (a) and (3) (a).

[24] Article 30 (6) (a).

[25] Article 30 (6) (a).

[26] Article 30 (2) (c).

[27] *Ibid.*

[28] *Ibid.*

[29] Pescatore, *supra* note 1 at 52. The same doubts have been voiced by Glaesner, *supra* note 1 at 309.

more sociological view of the interaction between law and politics.

Weak as commitments of the kind mentioned above may appear to an observer familiar with Community procedures, they are not without equivalent on the international scene. Many international treaties, be they agreements on economic, military or cultural cooperation, contain clauses as general as the ones envisaged in Title III. Both the North Atlantic Treaty and the Warsaw Pact are good examples in this respect[30]. One can of course discard provisions of that kind as too general to create legal obligations. Even if correct, this analysis often leads to distortions of the reality. Lawyers are naturally inclined to minimize the importance of international agreements deprived of binding force. Yet agreements of that kind can have a crucial importance. Both the North Atlantic Treaty and the Warsaw Pact have shaped international relations in the post-World War II era, in spite of the dubious legal value of some of their provisions. The Helsinki Final Act, which was deliberately framed as a non-binding document, also played a major role in the 1970s and 1980s.

Moreover, the fact that States decide to include basic rules of behaviour in an international agreement, concluded and ratified with the solemnity normally attached to that kind of exercise, must *a priori* be understood as meaning that they intended to bind themselves in international law[31] – much more so when this solution only prevailed after many years of hesitation. If the change was merely symbolic and formal, why would it have been opposed for so long? True, to be binding, the clauses of an agreement must create obligations, i.e. limit the freedom of action of the signatories. They must, in other words, be precise enough for an external observer to be in a position to assess whether

[30] According to Article 5 of the North Atlantic Treaty, for instance, parties are commited to take "any action (they) deem necessary" in case of armed attack against one or more members of the Alliance.

[31] This reasoning is at the basis of the interpretation rule known as the "effet utile" theory. See Virally, *supra* note 7 at 351.

and to what extent the parties have fulfilled their obligations in a given case[32]; provisions which would leave them a complete discretion could not be regarded as legally binding.

Those general remarks can be useful to understand the scope of the provisions contained in Title III. Thus, for instance, the various provisions establishing an obligation to consult or to inform the other EPC partners do limit, at least formally, the freedom of action of the parties. They place a definite burden on the Member States, even if they entail no limitation of their right to act unilaterally once those formal requirements have been met. True, commitments to "cooperate" or to "pay due attention" to the position of EPC partners leave an even greater margin of discretion to the parties. However, the latter do not enjoy an absolute freedom, and their behaviour may sometimes indicate whether they have had due regard to their obligations; the legal value of such provisions can therefore not be ruled out. Likewise, to state that parties "shall endeavour" to formulate a European foreign policy may seem an oxymoron, but in reality it creates an obligation to act in good faith, which is a recognized concept of international law. It thus prevents the Member States from protesting against the putting of an issue on the EPC agenda, and may be construed as creating an obligation to fund the basic coordination mechanisms needed for the realization of this endeavour.

To be fair, the exact limits of such obligations are sometimes difficult to discern. A commitment to inform or consult each other "on matters of general interest"[33] is problematic: A state could escape its duties on the basis that the matter at hand was not of general interest. There is of course no "bright line" test to define this term, but as the EPC agenda grows, it will become consolidated. If a matter has been discussed in the past, it will be difficult for a Member State to argue that it was not of general interest. In any event,

[32] As Virally indicates, this is probably the criterion which can indicate the existence of a legal obligation (*supra*, note 7 at 325).

[33] Article 30 (2) (a).

uncertainties do not reduce the sharpness of the undertaking in *all* cases. Not too much should be made either from the *mélange* of facultative and imperative language in various provisions of Title III. Even the Court of Justice, when it approaches the loose ends of the positive law to be found in the Treaty, occasionally resorts to such devices[34].

Analysed in this light, many provisions of Title III can be regarded as legally binding. This view was shared by the Irish Supreme Court, which ruled that those provisions were incompatible with the neutrality provisions of the Irish constitution and that, accordingly, the Single Act could not be ratified without a constitutional amendment. A majority of the Court found irrelevant the argument that Title III merely firmalizes existing practices. In the words of Henchy, J.:

> "... there does not appear to be any constitutional bar to a non-binding arrangement by the State to consult with other states in the conduct of its foreign policy. It is quite a different matter when, as here, it is proposed that the State be bound by an international treaty which requires the State to act in the sphere of foreign relations in a manner which would be inconsistent with constitutional requirements[35]."

What is probably troubling the critics of Title III is not so much the absence of legal obligations as such, but rather the absence of effective enforcement mechanisms. Failure to consult the European Parliament where this is required by the EEC Treaty will result in annulment of the measure adopted. In contrast, if a Member State decides to thwart, disregard or obstruct European political cooperation, no judicial redress will be possible, for it has deliberately

[34] See for instance the *Hauer* case, in which the Court consolidated its jurisprudence on human rights: "[I]n safeguarding those rights, the Court is bound [imperative] to draw inspiration [facultative] from the constitutional traditions of the Member States ... similarly, international treaties ... can supply guidelines [facultative] which should be followed [imperative] within the framework of Community law" (case 44/79, *Hauer v. Land Rheinland-Pfalz,* (1979) ECR 3727, at recital 15).

[35] *Crotty v. An Taoiseach and others*, 49 CMLR (1987) 666. See the comments in J. Paul McCutcheon, "The Irish Supreme Court, European Political Cooperation and the Single European Act", *LIEI* (1988-I) 93-100, J. Temple-Lang, "The Irish Court which delayed the Single European Act: Crotty v. An Taoiseach and others", 24 *CMLRev* (1987).

been decided not to expand the jurisdiction of the European Court of Justice to cover provisions of Title III of the Single Act[36]. We do not of course deny the importance of this factor. Still, international legal commitments are frequently deprived of enforcement mechanisms other than reciprocity and counter-measures. The interesting thing is precisely that in spite of this weakness, most states generally observe their international legal obligations.

V. Legalization as a Political Exercize

The real question to be asked in order to understand the scope of Title III is therefore what effect, if any, the legalization of EPC commitments is likely to have on the relations among the Twelve. Obviously, to such a broad question, answers of different types are possible.

The first is the most simple. By inserting EPC procedures in an international agreement, the Member States have given legal value to commitments which were previously of a mere political nature. Such is, as we saw, the common wisdom. Even if one accepts our suggestion that before the Single Act, EPC rules had some international law effect, although they were not themselves legally binding, it is clear that their transformation into legal rules may imply a significant qualitative change. Legal rules assume by definition a greater imperative character; if a violation is established, the State reponsible for the violation will see its international responsibility engaged, and the aggrieved parties will be entitled to resort to all measures envisaged in international law, including of course counter-measures.

But lawyers' traditional emphasis on possible sanctions as the criterion *par excellence* of the existence of legal obligations may be misleading, for it is doubtful that possible sanctions were the exclusive, or even the principal concern of the Member States. It is widely acknowledged that since 1970, European Political Cooperation has gained credibility owing essentially to its

[36] Article 31 of the Single Act. On this provision, see also below, section 6.

efficiency as a socialization process. Member States have got used to consulting each other on major international issues, to profiting from each other's advice and to paying due attention to each other's concerns. Such a collegial spirit would not have been possible had they not had reasonable hopes to see their partners follow the mutually agreed code of conduct. Yet it seems clear that the ultimate possibility of sanctions, whether legal or not, played at best a minimal role in this context. It is doubtful that the Single Act changed anything at this level. This is of course something of a paradox for lawyers; hence, probably, their scepticism as to the meaning of such a reform.

What we would like to suggest in this respect is that the actual importance of Title III must be assessed taking as a starting point the nature of EPC as a socialization exercise. The legalization of EPC procedures must then be seen in a different, more positive light, as a means of an essentially symbolic nature to consolidate the "acquis" of the first years. Odd as it may seem, its most important effects are likely to be of a political, rather than legal, nature.

No doubt, confidence may as a rule be increased by the existence of clear legal commitments. But the consolidation process did not involve facade changes only; its actual impact may be greater than a *prima facie* analysis would suggest. Enhanced stability, certainty and greater acceptability are among the side-effects which ought to be mentioned. Enhanced stability: In consensus-based systems, procedures are frequently the object of much debate; by providing both a clear set of guidelines and some hope of comformity to them, legal rules may render decisions easier to achieve, thereby increasing the overall efficiency of the system. The existence of legal commitments may also result in greater acceptability of the decisions achieved in EPC framework. This is true for each of the EPC actors, of course, but also for national public opinions, which such commitments might help to convince of the necessity to accept compromises if the Twelve are to "speak with one voice". A decision which would have been the object of strong criticism can be more easily accepted if it is somehow perceived as a result of a commitment to act together. Those are of course elements which do not pertain to the legal sphere, but which are likely to be directly affected by the legalization of EPC

procedures.

The price to be paid for this greater stability may of course be a loss of flexibility, since legal obligations imply by definition an increased rigidity of the system[37]. Whereas a general consensus was previously sufficient to change the rules governing political cooperation, it will now be necessary to go through the cumbersome procedure of treaty provision to amend the provisions of Title III, and the difficulties that have surrounded the ratification of the Single Act have proved that this was no meager achievement. In this specific case, however, the risk remains fairly theoretical, for the Single Act contains as we saw only provisions of a general nature: questions of detail have been handled in the ministerial decision of 28 February 1986[38], which can be modified by consensus. Furthermore, a specific clause provides for the possibility of a revision of Title III "five years after the entry into force" of the Act[39]. Last but not least, EPC has always evolved in a flexible manner when there was a consensus to do so; it is doubtful that the Single Act will be construed as preventing informal changes – except of course regressive changes. Even if it would be consonant with the letter of the Single Act, such an interpretation would certainly run against the spirit of political cooperation.

Still, these technical remarks show to what extent legalization may change the quality of relationships between the EPC partners. Before the Single Act, political cooperation was a quick, simple, informal, unbureaucratic exercize. Undoubtedly, the formalization of EPC procedures may alter this situation. So far, it has not proved detrimental to the overall efficiency of the system, but one should be aware in the future that a further institutionalization entails the risk of a loss of flexibility.

37 As suggested by Jacqué, *supra* note 1, at p. 609.

38 *supra,* note 16.

39 Article 30 (12).

VI. A World Apart?

European political cooperation was initially established as a world apart, physically and legally distinct from the Community. The overcited example of the Foreign ministers meeting on the same day in Copenhagen within the EPC framework and in Brussels *qua* Council of Ministers shows that in the early at least, some of the Member States had strong feelings in this respect. As observed above, this rigid dichotomy did not last for long. As time went by, both the Commission and the European Parliament became increasingly associated with EPC procedures. By the late 1970s, if not earlier, the mechanisms for feeding information and advice in both directions between the EPC and Community hierarchies had been developed to a high degree of speed and sophistication. Likewise, Member States made use of the possibility of resorting to Community instruments to achieve EPC goals. Yet those contacts between the two worlds were not frequent enough to override the general rule of separation. In spite of their basic complementarity, EPC and the Community remained governed by different timetables, working methods and, one might add, by a different spirit and style.

Apparently, the Single Act has not decisively altered this separation. On the contrary, it bases itself on the idea, advanced for the first time in the Tindemans Report, that EPC and the Community are two distinct pillars on which European Union will one day be constructed[40]. Outlined in the Preamble of the Act, this idea is repeated and developed in the ensuing provisions. Thus, Article 1 makes clear that the Community and EPC each have their own legal basis: on the one hand, the Treaties establishing the European Communities, and on the other, the various reports in which EPC aims and methods have been defined, supplemented by "the practices

[40] Ph. De Schoutheete, "Le rapport Tindemans dix ans après", *Politique étrangère,* (1986) 527-538.

gradually established among the Member States" and now codified by Title III[41]. In each system, the powers and jurisdiction of the institutions are governed by different rules, as stressed in a somewhat redundant manner by Article 3.

Yet institutional logic does not follow the rules of Euclidian geometry, where parallels never meet. If from a formal viewpoint EPC and the Community largely remain distinct worlds, several institutional bridges have been established or have seen their existence confirmed in the Single Act; the same rotation of Presidencies, the possibility of discussing EPC questions at Council meetings, confirmation of the presence of Commission representatives at EPC meetings, concentration of such meetings in Brussels instead of in the country of Presidency capital, establishment of the EPC secretariat in Brussels, etc.[42] It has also been stressed that the policies agreed upon in those two fora must be consistent[43]. Here again, the importance of legalization is probably greater than one generally believes. The formal recognition of the Commission's participation in EPC certainly reinforces its legitimacy to act in a more autonomous manner than in the past. Helped by propitious circumstances, it may in some cases end up playing a role of policy initiator not totally different from the one it holds – with a much firmer legal basis – in the Community sphere.

In a way, Article 31 of the Single Act well illustrates the limits inherent in any attempt at drawing a clear line between EPC and the Community. As

41 "The European Communities and European Political Cooperation shall have as their objective to contribute together to making concrete progress towards European unity.

The European Communities shall be founded on the Treaties establishing the European Coal and Steel community, the European Economic Community, the European Atomic Energy Community and on the subsequent Treaties and Acts modifying or supplementing them.

Political Cooperation shall be governed by Title III. The provisions of that Title shall confirm and supplemnt the procedures agrees in the reports of Luxembourg (1970), Copenhagen (1973), London (1981), the Solemn Declaration on European Union (1983) and the practices gradually established among the Member States."

42 See De Ruyt, *supra* note 2 at 104.

43 Article 30(5).

indicated above, this provision rules out any intervention of the Court in the legal controversies which might arise as a result of the enshrining of EPC in a treaty instrument. It is possible, as some authors have suggested, that the active pro-integration stance adopted by the Court in many of its rulings – not least as regards the external relations of the Community – played an important role in this decision[44]. As Stein suggested, Article 31 offers further evidence of governements' aversion to "judicialization" of the diplomatic processes[45]. But it did not only result from a desire on the Member States' side to stay immune from any judicial interference in the sphere of foreign policy: As indicated above, in our view, sanctions were not their main concern. The exclusion of the Court can also be viewed as a means to stress that the formal legalization of EPC did not amount to its integration in the Community sphere. In a parallel way, Article 32 makes it clear that the codification of EPC procedures was not to be understood as a hidden attempt to instil new elements of intergovernmentalism into the Community[46].

Be the motivations behind this choice as they may, it is doubtful whether a clearcut separation between the two legal spheres is at all possible from a juridical point of view. To be sure, a violation of any of the legal obligations contained in Title III will not give rise to an action before the European Court of Justice on the basis, say, of Article 169 of the EEC Treaty. But there are some issues where the language of Article 31 cannot exclude a judicial intervention, whether the Member States wish it or not. An encroachment on Community competences decided upon within EPC could be brought before the Court of Justice. The matter is not entirely fanciful: one could imagine a case in which the Member States would agree to impose by joint State action economic

44 David Freestone and Scott Davidson, "Community Competence and Part III of the Single European Act", 23 *CMLRev* (1986) 793-801 at p. 799.

45 Stein, *supra* note 2, at p. 987.

46 "Subject to Article 3(1), to Title II and to Article 31, nothing in this Act shall affect the Treaties establishing the European Communities or any subsequent Treaties and Acts modifying or supplementing them."

sanctions against a third State, thereby invading the sphere of exclusive Community competence in the field of common commercial policy. Even if, by virtue of Article 31, the Commission is precluded from requesting a review of the legality of such a decision on the basis of Article 173, it could sue the Member States jointly under Article 169, for failure to fulfil an obligation under the Treaty[47]. In other words, what we are arguing is that questions concerning the division of competences between EPC and the Community are of equal relevance to both legal orders and that, consequently, any attempt to exclude judicial scrutiny *in toto* is doomed to failure.

This is of course a positivist lawyers' view; we would be the first ones to admit that similar disputes are unlikely to be resolved judicially. It would however be wrong to believe that merely for this reason the above legal analysis is of academic interest only. The very insertion in Title III of a provision like Article 3O(5), which establishes an obligation of cohesion between EPC and Community action can be seen as a recognition of the need to provide legal signposts in a landscape of ever moving boundaries. In the way we view law, the tension between Article 31 and Article 30(5) is not a contradiction, but rather the reflection of an untenable reality, which is that total separation between the two systems is simply unavoidable: Because of the progress they have achieved in the Community, Member States have abdicated part of their autonomy as EPC partners.

The more important indicator of the links which exist between these two worlds is probably the fact that for the first time, even if not without

47 A somewhat similar situation was at the basis of the celebrated ERTA case. The representatives of the Member States, meeting in the Council of Ministers, took a decision concerning the conclusion of an international treaty by the Member States. Officially, the decision was presented as a resolution, and was therefore not part of the nomenclature of Community acts. The Commission sued the Council, though in theory the Member States had not been acting *qua* Council. The Court held that since that act in question had legal effects on the Community it could review its legality. See case 22/70, Commission v. Council, (1971) ECR 263.

hesitations[48], provisions governing the functioning of EPC and of the Community have been included in one single document. The symbolic significance of this fact ought not to be neglected. It has confirmed in a solemn way the obvious: political cooperation makes sense, historically speaking, only if it is directly connected to the Member States' membership in the Community. True, the principle was an implicit part of the "acquis"; but with the inclusion of EPC provisions into the Single Act it has - still implicitly - acquired a different value. Differentiated participation in the Community and in EPC is now excluded: not only have all Member States accepted the principle of submission to EPC mechanisms, but those mechanisms cannot be opened to third States. The reverse is of course equally true: all new applications for membership in the Community must be considered not only with a view to maintainance of Community balance, institutionally as well as economically, but also in the light of the necessity for the applicant State to accept EPC mechanisms and the "acquis" of political cooperation. The reactions elicited by the Austrian application have made plain that for some States this second condition may present more difficulties than the first. Needless to say that this problem might one day stand in the way of an eventual adhesion of Eastern countries to the Community, even assuming that such an enlargement would be viable from an economic viewpoint.

[48] The principle of a single treaty was agreed upon only very late in the negotiations, after separate treaty drafts proposed by some of the Member States had been discussed.

VII. Conclusion

The achievements of the Single Act have generally been viewed as extremely modest. At first sight, our analysis might appear as confirming the dominant scepticism. Formally speaking, the Single Act has simply raised political commitments to the status of legal rules. Moreover, the differences between the two phases should not be exaggerated: not only did the "political" rules of the pre-Single Act period have indirect legal effects, but the obligations created by Title III are so general that doubts have arisen as to their binding character. The change – a shift from "soft" to hard law – was therefore far from drastic.

If one accepts this minimalist interpretation of the Single Act, the question we asked in starting can now be reformulated in a more precise way: What purpose did it serve to give hard law form to commitments which could already be regarded as having at least soft law value, without at the same time trying to realize some substantive step forward? Here again, several explanations are possible, and can to some extent complement each other.

The first one, by far the most negative, is that the Member States, although wishing to express in a symbolic way their commitment to a European foreign policy, were not prepared to go beyond façade changes. Their reaction would then be somewhat reminiscent of Tancredi's remark in Tomasi di Lampedusa's novel *Il Gattopardo*: "Se vogliamo che tutto rimanga come è, bisogna che tutto cambi[49]". Not being able to agree on substantive changes, the Member States found in the legalization of EPC procedures an elegant way to get round the difficulty. One should however resist the temptation of excessive rationalization for, with collective actors, the outcome of a negotiation reflects more often a common denominator on which compromise

[49] "If we want things to remain as they stand, everything must change".

was possible rather than a deliberate strategy. Thus, the limits of the Single Act must probably be seen as resulting more from the Member States' failure to agree on possible improvements of EPC mechanisms than from any machiavellian attempt to hide their lack of political determination.

Another explanation, more positive this time, is to be found in the nature of the political cooperation process. EPC history, from the Davignon Report to the Single Act, has been characterized by incrementalism: small steps ahead, bringing each time the various partners closer, and reinforcing their cohesion. The basic principles of such collaboration have remained extremely general; by their nature at least, they do not differ significantly from the cooperative mechanisms established at the level of the Atlantic Alliance after the Three Wise Men's Report in 1956, for instance. The difference rather lies in the density of the relationships between the partners, which is itself a product of an ever wider and more intricate web of contacts. It is precisely at this level that the codification of EPC procedures may be of some importance. Because of the greater stability and greater acceptability it entails, it is susceptible to improving the quality of cooperation among the Twelve. Seen against this background, Title III of the Single Act, precisely because of its limits, appears perfectly in line with earlier developments.

True, this slow consolidation process is fairly a-typical at the European level. Students of the Community system are more familiar with a radically different pattern, consisting in the creation of institutions to which fairly precise objectives, together with some means of action of their own, are assigned. Law in this context is very much an agent of change, shaping the relationships between States and their respective societies. As we saw, the situation has been quite different as far as EPC is concerned. Cooperative mechanisms have developed on an informal basis, outside of any legal framework, and it is only after fifteen years that the need to acknowledge their existence formally has led to the adoption of an treaty. Intervening *ex post facto,* law has come to play a different role, more of consolidation than of innovation. A-typical as this evolution may be on the Community scene, it is far from exceptional at the international level, where legal rules are very often the product of evolving

State practice. This diachronic approach thus confirms, if necessary, that the spirit which runs trough the EPC provisions of the Single Act is more consonant to classical international law patterns than to the Community universe.

One may ask however whether such a minimalist approach really does justice to the actual importance of the Single Act. The legalization of EPC procedures must mean something if it was opposed for so many years. After all, no matter how weak it appeared to some, the Single Act was judged meaningful enough for Ireland to have to modify its constitution before being able to ratify it, given its potential implications for Irish security. Somehow, there was among the Member States, in some circles at least, a diffuse feeling that by casting their relationships into a legal mould, they ran a risk of being dragged into an evolution they might not entirely be able to master[50]. This feeling was perhaps more accurate than many thought. There is ample evidence in the history of European integration that the "passage to law" may have implications which nobody really foresaw[51]. We have tried to indicate a number of side-effects which ought not to be neglected, but the future might reveal additional ones.

[50] This fear was apparent throughout the *Crotty* case, cited above: the majority referred more to what Title III could lead to than to what it actually said.

[51] This point has been developped in Dehousse & Weiler, "The Law of Integration – An Essay on Legal and Institutional Patterns of Integration in Western Europe", in W. Wallace (ed.), *The Dynamics of European Integration*, London: Pinter, 1990 (forthcoming).

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