The Mediterranean's European Challenge

Editor: Prof. Peter G. Xuereb

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UNIVERSITY OF MALTA

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FOREWORD

It is with great pleasure that the EDRC now publishes the papers presented at the first meeting, held in Malta in April 1998, of participants from European Studies institutes and centres in the Mediterranean and in the European Union, and in some cases in both the Mediterranean and in the Union.

The purposes of the meeting were to establish the network, which is now set to grow; to agree a prioritised research agenda; and to receive a first group of (mainly agenda-setting) papers from the participants. These papers were agenda-setting and more and hence the decision to publish them in this way.

This publication has been made possible by the financial support of the European Commission and my undying gratitude goes to DGX and to Madame Jacqueline Lastenouse whose vision and support have brought into the world a new academic network of such promise. I also have to thank Mr. Luciano di Fonzo and the staff at the EDRC, especially Mrs. Monica Cauchi and Ms. Joanne Navarro, for their excellent work in relation to the network.

PETER G. XUEREB
MSIDA, MALTA
JULY 1998

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INTRODUCTORY CHAPTER

Peter G. Xuereb - Coordinator

It has long been seen as vital by isolated academics in the Mediterranean that a network be set up for the obvious academic purpose of co-ordinating comparatively meagre resources and together, in full and free exchange, addressing the issues raised by ever closer relations between our nations, our region and the European Union in the ever wider, global context.

The papers in this volume were presented at what was the seminal, agenda-setting, meeting held in Malta in April 1998. They, and further discussion, helped set the future agenda of the network, a summary of which is attached to the end of this introduction.

The participants agreed to speak generally of the main challenge facing Mediterranean States as being that of 'adjusting' to the 'acquis communautaire'. We are still in the realm of sovereignty and bilateral agreement, albeit some papers highlight the asymmetries in a relationship which is bound to be unequal.

Imed Frikha speaks of the 'extension' of the acquis to the Mediterranean and analyses, from the Tunisian perspective in particular, the nature, level and mechanism of 'rapprochment' of Tunisian to Community law, noting also how certain mechanisms operate such as some effectively leading to the direct effect of certain provisions of the Association Agreement. The reproduction of, or direct renvoi to, Community rules are other techniques. For him, the 1995 Agreement displays a special logic all its own and an inherent power, when extended across the Mediterranean, to 'unify' internal domestic laws in an irreversible process.

This same point of irreversibility is made by Jamila Houfaidi Settar who focuses on what the Commission has called the "partage progressif de l'acquis" through the sui generis process which is the Euro-Med Partnership. Like Frikha, the author seeks to define this "acquis" before giving examples of this process. The economic, financial advances made in Morocco in the last twelve years are listed and linked to the process; most of her questions relate to the social sphere and to the institutional and pragmatic political delivery - points on related on related objectives, seeing the challenge as that of creating a sui generis, effective juridico-political Euro-Med order capable of delivering on the high objectives of the Partnership. Financing is an issue strongly addressed.

Tal Sadeh and Mosche Hirsch emphasise that for Israel the economic challenge is more than mere "adjustment to the single market acquis". The focus is on "membership" of the Customs Union and the Common

Agricultural Policy, as means (the only apparent way) of taking further liberalisation of trade between Israel and the E.C. Many other areas are touched on including the free movement of persons, services and capital, and public procurement. The authors embark on a study which is of at least medium-term relevance to other Mediterranean third states as to the pros and cons of customs union, the implications of which are teased out. Several subjects for further study are identified. Of interest generally are the arguments for protecting the agricultural sector and the impact of "joining" the CAP, as are the lessons to be learned from "preference erosion"; self-sufficiency arguments will also strike a chord. Further agricultural trade liberalisation combined with targetted support programs are seen as a way forward. The paper further analyses the challenges facing the services sector (tourism, financial services, transport) and the free movement of workers. Much scope for increase in capital movements is perceived and the possible participation in EMU is canvassed. The conditions for complete liberalisation from an Israeli perspective are set out. An overview of Israeli public procurement and competition policies in the wider context rounds off the paper. While a number of issues are Israeli-specific, the several convergencies between the Israeli position and the current or next-stage situation in other MNCs on many issues make this wide- ranging paper a rich agenda-setter for future collaborative/ comparative research and discussion.

A contibution from an "EU partner", Attinà, offers a constructive critique of Italy's institutional ability to contribute pro-actively to the development of EU-Med relations. The author sees the Euro-Med Patnership as the answer, arguing cogently for the involvment of non-state, non-government, actors in the process, a theme picked up forcefully by Annette Jünemann.

Jünemann analyses the concept of civil society and the potential of the Euro-Med Partnership to support civil society and democritization. The dynamics of the post-Berlin Wall "support game" are analysed, as are the basis, history and evolution of the Med Programs and the Civil Forum. The author points to new research orientations, indicating the dilemmas facing the European Union, and the constraints within which the EU fashions its policies, while also seeking positively to chart the way forward.

The Turkish scenario is ably painted in an overarching review of Turkish-EU relations by Haluk Kabaalioglou. In a wide-ranging review spanning history, background (political, legal, economic); substantive law, regulation and obligations; institutional questions such as decision-making and dispute settlement (issues raised by Settar and by the paper by Xuereb et al), the author makes the case for Turkey in the context of a customs union agreement which Turkey has sought to implement amid

financing difficulties. Fayek Abillama traces the development of relations between the EC and Lebanon.

The Maltese contribution brings together in summary form the conclusions, proposals and insights of a team of experts whose full papers appear in a volume titled "Malta, the European Union and the Mediterranean; Closer Relations in a Wider Context" (P.G. Xuereb ed., EDRC 1998) and span substantive questions relating to the free movement of goods, persons, and services, competition law and policy, company law, intellectual property law, environmental issues and institutional issues raised by free trade agreements and the Euro-Med Partnership.

Focusing on one centrally important issue for many MNCs, Stephanou takes us through the Greek experience of adjusting monopolies to the acquis communitaire, his cross-sectoral study brimming with lessons both for third states and prospective member states.

The Project

The project was conceived against the background of ever closer relations between the EU and the Mediterranean non-member countries, leading to the future membership of some and the conclusion of free trade agreements or even customs union of others.

The focus is mainly on internal obstacles, of whatever nature, to approximation *sive* adjustment *sive* rapprochement to the acquis communautaire. It is anticipated that over the next few years the project members will have covered a whole range of issues-economic, social, cultural, institutional, legal, political and administrative-spanning trade liberalisation, privatisation, the legal/judicial system, human rights, consumer issues, human and other resource issues, civil society, financing, small and medium-sized enterprises policy, competition law and policy, company law and financial services, public services reform, public procurement, decision-making and decision-sharing among many more.

The emphasis is on building a network of researchers across the Mediterranean in conjunction with partners from centres, institutes, or universities within the Union. The task of the 'core group' meeting in Malta in April 1998 was to set a research agenda for the next two years and seek to pursue that agenda though the mobilisation of teams (or sub-groups) all interfacing with one another. This has already led to sizeable teams being formed, in Cyprus for example.

The agenda agreed in Malta in April is as follows:-

[A] The "Broader Context"

1. The WTO and other global regimes
2. The CEEC/EEA experiences
3. The typology of relations with the European Union: Membership - Application, Free Trade Agreement, Customs Union/the Euro-Mediterranean Partnership
4. The Institutional Dimension - whether at the (a) bilateral level (b) regional level (c) national and 'local' levels and (d) EU and EU-Med levels.

[B] With this broader context firmly in mind, it was then agreed that future research would focus initially on two "Main Areas", within which the participants identified certain specific issues. The two Main Areas are:

1. Trade-Related Issues
2. Domestic Strategies for Approximation/Adjustment

Among the Specific Areas/Issues identified were:

Establishment/Services (including financial services, Company law)
Movement of Persons/Immigration
Rules of Origin/Cumulation
Agriculture
Competition law, especially public sector monopolies
Public procurement
Intellectual Property
Participation in EU programmes
Assistance
Human Resources Development
Civil Society
Human Rights and Democracy
Management of the Social Impact of Adjustment

Since the April 1998 meeting, teams have been allocating work among themselves across this range of issues and in the broader contexts referred to above. The names, addresses and contact numbers of participants are given below and more information as to the activities of their groups can be obtained through them. Professor Attina's team will be focusing on the institutional dimension; the Tunisian team on the second 'main area'; the Israeli team on the first main area; the Lebanese team on 'enterprise-support systems/restructuring strategies (industrial development/incentive packages); Annette Jünemann will focus on civil society and human rights in the context of the Euro-Med Partnership, focusing on the

Maghreb countries; the Cypriot and Maltese teams will seek to carry forward their research across both main areas. Professor Gautron will be focusing on adjustment to the acquis in the Maghreb. The Turkish team will continue to tease out the implications of customs union. The Moroccan team will focus on human rights, financing, harmonisation of law, public administration, social law and immigration.

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L'ACQUIS COMMUNAUTAIRE ET LES P.T.M. ASSOCIÉS À L'UNION EUROPÉENNE, UNE FORMULE SUI GENERIS

Imed Frikha

"Considérant que la Communauté européenne, les Etats membres et la Tunisie souhaitent renforcer leurs liens et instaurer durablement des relations fondées sur la réciprocité, le partenariat et le co-développement"[1] la Tunisie a été le premier pays méditerranéen à conclure un Accord d'association de la nouvelle génération avec l'Union européenne.

Cet accord a émergé dans un contexte spécifique sur tous les niveaux. Il s'agit, d'un côté, d'un contexte international caractérisé par une poussée de la mondialisation et, en même temps, de l'évolution de la coopération régionalisée. Il représente le point de départ d'un processus marqué par un esprit de réciprocité, de partenariat dans un cadre régional qui se caractérise par l'accroissement des déséquilibres économiques et démographiques.

D'un autre côté, c'est un accord conclu à un moment où l'Union européenne entreprend une nouvelle mutation avec l'élargissement à l'Est, l'introduction de l'Euro et l'installation de la Banque Centrale Européenne. Cette mutation revêt une importance considérable pour la Tunisie comme tous les pays tiers méditerranéens qui effectuent la majorité de leur échanges économiques avec l'Union européenne et en reçoivent la majorité des investissements privés. En vue de retrouver la place privilégiée qui était la leurs auprès de l'Union européenne avant son ouverture au Pays d'Europe Centrale et Orientale, les pays tiers méditerranéens n'ont pu que répondre positivement aux propositions des instances européennes.[2]

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[1] Deuxième considérant du préambule de l'Accord d'association entre la Tunisie et l'Union européenne du 17 juillet 1995.

[2] Il importe de signaler que l'Union européenne a conclu également un Accord d'association avec le Maroc le 26 février 1996. Les négociations sont engagées avec l'Algérie depuis le 4 mars 1997. Parmi les pays du Moyen-Orient, on note qu'Israël a conclu un Accord d'association le 20 novembre 1995, et que la Turquie bénéficiant d'un Accord d'association depuis 1963 a conclu un accord créant une Union douanière le 6 mars 1995. Les négociations sont engagées avec l'Egypte depuis le 23 janvier 1995, avec le Liban depuis mars 1995, avec la Jordanie depuis 1995, avec la Syrie depuis juillet 1996. A part les accords avec Israël et la Turquie qui sont des accords sur mesure, les autres Accords d'association sont presque identiques.

Un "Arrangement intérimaire de commerce et de coopération avec l'Autorité palestinienne de Cisjordanie et la Bande de Gaza" est en négociation depuis

Faut-il signaler que la Tunisie a commencé par conclure avec la Communauté Economique Européenne un accord préférentiel d'association, en 1969, sur la base de l'article 113 du Traité de Rome qui porte sur la politique commerciale commune.

Ce premier accord autorisait, sans réciprocité, le libre accès des produits industriels tunisiens sur le marché communautaire ainsi que quelques concessions tarifaires aux importations agricoles provenant de la Tunisie. La signature d'un accord de coopération de durée illimitée, le 25 avril 1976, marquait le changement de l'approche de la C.E.E. vis-à-vis des pays tiers ; approche globale de conception mais qui s'est réduite, au cours d'une vingtaine d'années, à pérenniser les préférences commerciales et à institutionnaliser l'aide financière composée essentiellement de prêt de la Banque européenne d'investissement dans le cadre des fameux protocoles quinquennaux.

Face à un bilan économique et financier mitigé et marqué par l'insuffisance, l'Union européenne a proposé une approche globale visant la création d'un espace de paix, l'établissement d'une zone de libre échange et la réduction des écarts du soutien financier accordé aux pays tiers méditerranéens et aux pays d'Europe centrale et orientale. Il s'agit du "*partenariat euro-méditerranéen*" qui trouve son origine dans l'adoption d'un partenariat euro-maghrébin par le Conseil européen de Lisbonne en juin 1992. Par la suite, la Commission a tenté, par diverses communications, d'étendre le concept euro-maghrébin à l'ensemble de la Méditerranée. Cette idée a été approuvée par le Conseil européen lors de ses réunions d'Essen,[3] en décembre 1994, et de Cannes en juin 1995.

C'est dans ce contexte que la Tunisie a conclu, le 17 Juillet 1995, un Accord d'association avec l'Union européenne sur la base, cette fois-ci, des articles 238 et 228 du Traité sur l'Union européenne qui représentent le fondement juridique de la conclusion d'Accords d'association.[4]

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janvier 1996. V. Bichara KHADER, "La Conférence euro-méditerranéenne : un an après", *Etudes Internationales*, n°6, 1/1997, pp. 99 - 136.

[3]Le Conseil a approuvé également l'intention de la future présidence espagnole d'organiser, au second semestre de 1995, une conférence ministérielle euro-méditerranéenne réunissant tous les pays concernés. V. Conclusions de la présidence du Conseil européen d'Essen réuni les 9 et 10 décembre 1994, *Etudes internationales*, n°54, 1/1995, p. 182 et s.
La conférence à eu lieu à Barcelone les 27 et 28 novembre 1995 et a donné lieu à une déclaration commune.

[4] L'article 238 stipule que "La Communauté peut conclure avec un ou plusieurs Etats ou organisations internationales des accords créant une association caractérisée par des droits et obligations réciproques, des actions en commun et des procédures particulières".

Contrairement aux Accords d'association conclus avec les pays de l'Europe centrale et orientale, cet accord ne prévoit pas l'adhésion, à terme, de la Tunisie à l'Union européenne. Dans son préambule, il souligne l'interdépendance entre la Communauté, ses Etats membres et la Tunisie et la nécessité de renforcer ces liens traditionnels dans le respect des principes de la Charte des Nations Unies et des droits de l'homme. L'accord comporte 96 articles[5] qui prévoient les modalités d'instauration d'un dialogue politique régulier, l'établissement progressive d'une zone de libre-échange, le renforcement de la coopération dans divers domaines et surtout par l'ouverture de celle-ci à la société civile. L'accord fait référence également à un programme d'appuis à la transition économique et à l'ajustement structurel destinés notamment à pallier les éventuels effets sociaux négatifs, à accélérer la modernisation économique et à favoriser la réalisation d'un développement durable. C'est dans ce sens qu'une convention relative aux modalités d'application du règlement MEDA[6] a été ratifiée par la Tunisie en novembre 1997.

Dans son article 52, l'accord stipule que "la coopération vise à aider la Tunisie à rapprocher sa législation de celle de la communauté dans les domaines couverts par le présent accord". A ce niveau, on peut déceler une ressemblance entre la logique qu'instaure cet article et les dispositions liminaires des actes d'adhésion des Etats nouveaux à l'Union européenne[7] par le biais desquelles les Etats adhérants ont accepté les traités mais encore toute la masse du droit complémentaire et explicatif auquel on a pris l'habitude de donner le nom d'*acquis communautaire*.

N'étant pas un Etat membre de l'Union européenne, il est évident que la Tunisie n'est pas soumise au droit communautaire. Mais, ne peut-on pas, à travers cet article 52 et d'autres dispositions similaires de l'accord - qui trouvent leurs équivalents dans tous les accords d'association de la nouvelle génération - parler de l'extension de la notion d'acquis communautaire aux P.T.M. ; extension qui vise à instaurer une *mise au niveau communautaire des législations* dans la région ?

Avant de nous lancer dans cette analyse en partant de l'exemple tunisien, il s'avère opportun d'identifier la notion d'acquis communautaire.

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[5] A part les 96 articles qui représentent le corps de l'accord, on note l'existence de dix déclarations, cinq protocoles et sept annexes.

[6] Règlement n° 1488/96 du Conseil du 23 juillet 1996 relatif à des mesures d'accompagnement financières et techniques (Meda) à la réforme
des structures économiques et sociales dans le cadre du partenariat euro-méditerranéen.

[7] Il s'agit des articles 2 et 3 de l'acte d'adhésion du Danemark, l'Irlande et du Royaume-Uni, du 22 janvier 1972 et les articles 2 et 3 de l'acte d'adhésion de la Grèce du 28 mai 1979. Le dernier acte d'adhésion a perpétué la même démarche.

Fidèle à la théorie du "*spill over*", la logique du système communautaire est de ne pas essayer d'obtenir tout au même moment, mais de lier la réalisation de l'intégration européenne à un échelonnement de phases transitoires. Tout Etat adhérant doit dès lors admettre que toutes les étapes réalisées représentent une conquête définitive, qui ne pourrait être remise en question. C'est ainsi, comme le précise la Commission dans son avis du 17 janvier 1972 à l'occasion du premier élargissement, que "devenant membres des Communautés, les Etats demandeurs acceptent, sans réserve, les traités et leurs finalités politiques, les décisions de toute nature intervenues depuis l'entrée en vigueur des traités et les options prises dans le domaine du développement et du renforcement des communautés". Elle ajoute que "l'ordre juridique établi par les traités instituants les Communautés se caractérise essentiellement par l'applicabilité directe de certaines de leurs dispositions et de certains actes arrêtés par les institutions des Communautés, la primauté du droit communautaire sur des dispositions nationales qui lui seraient contraires et l'existence de procédures permettant d'assurer l'uniformité d'interprétation du droit communautaire ; que l'adhésion aux communautés implique la reconnaissance du caractère contraignant de ces règles dont le respect est indispensable pour garantir l'efficacité et l'unité du droit communautaire".

Les différents aspects de cet acquis communautaire ont été précisés, en partie, dans les dispositions des actes d'adhésion et ont été exprimés surtout dans la jurisprudence de la Cour de justice des CE. Il s'agit d'une notion composite qui comprend deux ensembles distincts à savoir l'*acquis formel* et l'*acquis substantiel.*[8]

Le premier ensemble de l'acquis concerne des aspects structurels et formels de l'ordre juridique communautaire. L'adhésion d'un Etat à la communauté est une adhésion à une organisation internationale mais qui touche aux bases constitutives de l'Etat et qui entraîne sa mutation juridique. A la différence du droit international classique, le droit communautaire est un ordre juridique concret et opérant qui se caractérise, à ce niveau, par quatre principes étroitement liés entre eux et affirmés par la jurisprudence de la cour. Il s'agit de l'irréversibilité des engagements assumés par les Etats membres,[9] le caractère contraignant du droit communautaire non seulement au niveau des rapports de droit

[8] Cette classification des aspects de l'acquis communautaire a été faite par le juge Pierre PESCATORE. V. " Aspects judiciaires de l'acquis communautaire", *Rev. europ*., 1981, pp. 617 - 651.

[9] *Costa C. ENEL* du 15 juillet 1964, *Rec.* 1964, p. 1141 ; *Simmenthal* du 9 mars 1978 , *Rec*. 1978, p. 629. Dans l'arrêt Simmenthal la cour évoque "le caractère effectif d'engagements inconditionnellement et irrévocablement assumés par les Etats membres, en vertu du traité".

public tels qu'il se nouent entre la communauté et les Etats membres, mais également à celui des rapports entre particuliers, la primauté du droit communautaire comme condition existentielle[10] et enfin, son applicabilité directe.[11]

Le deuxième ensemble de l'acquis comprend une masse impressionnante d'actes de droit ayant trait à la mise en oeuvre des objectifs économiques et sociaux des Communautés. A ce niveau, l'apport de la cour a été considérable. Elle a devancé les Etats en se prononçant sur la portée de certains articles du traité. On peut citer essentiellement trois secteurs à savoir l'élimination des obstacles à la libre circulation, l'égalité de traitement de tous les ressortissants des Etats membres et l'affirmation de la personnalité juridique internationale de la Communauté.

L'acquis communautaire est donc le résultat d'une lente maturation du processus d'intégration européenne dont la méconnaissance par un Etat membre menace les bases même de la Communauté. La cour n'a pas manqué de rappeler "que toute atteinte à l'acquis communautaire .... risquerait d'ailleurs de déclencher des mécanismes de désintégration, en violation des objectifs de rapprochement progressif".[12]

L'accord d'association entre les Communautés européennes, ses Etats membres et la Tunisie de juillet 1995 instaure une logique spéciale qui se rapproche, en quelque sorte, de la notion de l'acquis communautaire. En plus des répercutions économiques de l'accord, son effet le plus important serait *la mise au niveau communautaire de la législation tunisienne*. Le Ministre de la coopération internationale et de l'investissement extérieur a mentionné, dans ses réponses aux députés lors de la discussion relative à la ratification de l'accord "que dans la prochaine étape on assistera à une vaste entreprise d'adaptation de la législation nationale aux exigences de l'heure".[13] Plusieurs dispositions de l'accord dont essentiellement l'article 52 font référence à cette "harmonisation" qui nous rappelle l'harmonisation des législations d'un Etat adhérant aux Communautés européennes. Comme cette dernière, le rapprochement de la législation nationale doit se faire par rapport à un standard à savoir le droit communautaire.

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[10] V. L'attendu n° 21 de l'arrêt *Simmenthal*.

[11] *Van Gend et Loos* du 15 février 1963, *Rec.* 1963, p. 1.

[12] *Société Les Commissionnaires Réunis c Receveur des douanes* du 20 avril 1978, *Rec.*, 1978, attendu n° 36, p. 947 . V. également *Derrick Edmund Hurd et Kenneth Jones* du 15 janvier 1986, *Rec.* 1986, attendu n° 24, pp. 77 et s.

[13] *Journal des débats de la chambre des députés*, séance du 11 - 6 - 1996, n°40, p. 14 . Traduction faite par l'auteur.

On peut classer les dispositions qui font référence au droit matériel communautaire en deux catégories. Des dispositions qui instaurent une "harmonisation" dans le cadre d'un processus de coopération et d'autres dispositions qui reprennent des normes communautaires ou y font renvoi. Les dispositions de la seconde catégorie se classent plus aisément dans une logique de droit international du fait qu'elle s'applique en tant que normes internationales mentionnées par l'accord d'association même.

Dans le cadre de la première catégorie, on peut citer d'abord l'article 39 qui concerne l'harmonisation en matière de propriété intellectuelle, industrielle et commerciale. Cet article stipule dans son paragraphe premier que "les parties assureront une protection adéquate et effective des droits de propriété intellectuelle, industrielle et commerciale en conformité avec les plus hauts standards internationaux, y compris les moyens effectifs de faire valoir de tels droits". La référence au droit communautaire est, à ce niveau, indirecte du fait que l'obligation de conformité avec les standards internationaux en la matière pèse également sur la Communauté européenne conformément à la réglementation de l'organisation mondiale de commerce.

On note ensuite, les article 40 et 51 qui ont trait à la normalisation. L'article 40 dispose dans son premier paragraphe que "les parties mettent en oeuvre les moyens propres à promouvoir l'utilisation par la Tunisie des *règles techniques de la Communauté et des normes européennes* relatives à la qualité des produits industriels et agro-alimentaires, ainsi que les procédures de certification". L'article 51 ajoute que "les parties coopèrent en vue de développer : a- l'*utilisation des règles communautaires* dans le domaine de la normalisation, de la métrologie, de la gestion et l'assurance de la qualité, et de l'évaluation de la conformité".

Dans un autre domaine plus délicat car plus intimement lié à la souveraineté de l'Etat, l'article 53 fait allusion au rapprochement des règles communes et non pas communautaires. Il dispose que "la coopération vise au *rapprochement de règles et normes communes*, entre autre pour : a- le renforcement et la restructuration des secteurs financiers de la Tunisie; b- l'amélioration des systèmes de comptabilité, de vérification comptable, de surveillance, de réglementation des services financiers et de contrôle financier de la Tunisie".

Enfin, on rappelle l'article 52 qui développe le principe général de cette harmonisation de la législation en stipulant que "la coopération vise à aider la Tunisie à rapprocher sa législation de celle de la Communauté dans les domaines couverts par le présent accords". Il s'agit donc d'une harmonisation par coopération qui empreinte une logique propre à tout les accords euro-méditerranéens de la nouvelle génération. Concrètement, il semble que l'initiative législative à ce niveau doit émaner des instances de l'accord et sera transmise par le Président de la République à la

Chambre des députés tunisienne. Cette harmonisation n'a pas été opérante du fait que l'accord d'association n'est entré en vigueur que le premier mars 1998. La première réunion du Conseil de l'accord va avoir lieu au cours du mois de juillet.

Il importe, au préalable, d'éclaircir une ambiguïté qui concerne l'entrée en vigueur de l'accord d'association. En vertu de l'article 96, "l'accord est approuvé par les parties contractantes selon les procédures qui leurs sont propres. L'accord entre en vigueur le premier jour du deuxième mois suivant la date à laquelle les parties contractantes se notifient l'accomplissement des procédures visées au premier alinéa". La Tunisie a ratifié cet accord le 20 juin 1996[14] . En attendant son entrée en vigueur, la loi n° 96-113 du 30 décembre 1996 portant loi de finances pour la gestion 1997[15] a prévue une application anticipée de certaines dispositions de l'accord. L'article 21 de cette loi intitulé *démantèlement progressif des droits de douane pour la période 1996-2007* a stipulé que "les dispositions fiscales figurant dans l'accord ratifié par la loi 96-49 du 20 juin 1996 établissant une association entre la République Tunisienne d'une part et l'Union européenne et ses Etats membres d'autre part, entre en vigueur en considérant le 1er janvier 1997 comme étant le début de la deuxième année du calendrier d'application dudit accord".

Il s'agit en l'occurrence d'une application partielle, prématurée et faite de manière très singulière. L'article 21 de la loi de 1996 a entraîné une précipitation dans l'application du calendrier du démantèlement des tarifs douaniers pour les trois premières listes de l'accord. Concrètement, les droits de douanes et les taxes d'effet équivalent sont supprimés en totalité pour la liste de l'article 11 paragraphe premier de l'accord, et sont réduits de 30 % pour la liste du quatrième paragraphe de l'article 10 et du deuxième paragraphe de l'article 11 de l'accord. La réduction est de 16 % pour la troisième liste du paragraphe trois du même article 11 de l'accord.[16]
Cette application anticipée "est certainement due à des questions de fait, de choix politique et de stratégie économique, mais au delà de ces questions de fait la singularité de la réception [réception d'une partie de

[14] Loi n° 96-49 du 20 juin 1996, *J.O.R.T.*, n° 51 du 25 juin 1996, p. 1311.
[15] *J.O.R.T.* n° 105 du 31 décembre 1996, p. 2580.

[16] La précipitation consiste dans le fait de considérer l'année 1997 comme étant la deuxième année d'application du calendrier de démantèlement des tarifs douaniers. Ceci touche essentiellement la deuxième liste (réduction directe de 30 % au lieu de 15 % au titre de la première année) et la troisième liste (réduction directe de 16 % au lieu de 8 % au titre de la première année. Pour la première liste, le démantèlement prévu est de 100 % dès l'application de l'accord. La quatrième liste (article 11- 3 et article 10 - 4) n'a pas été concernée par l'article 21 de la loi de 1996 du fait que le démantèlement des tarifs douaniers commencera pour elle à partir de la quatrième année, c'est à dire à partir de janvier 1999.

l'accord par une norme interne à titre de renvoi] à, me semble-t-il, une signification juridique profonde. En effet, cette réception n'est certes pas contraire au droit international mais s'intègre assez mal dans sa logique. Elle n'est pas le produit de l'application de principes communautaires mais s'intègre assez bien dans sa logique puisque, somme toute, on peut considérer que cet article [article 21 de la loi 1996] reconnaît à l'accord d'association un effet direct en ce sens que ses dispositions fiscales sont directement appliquées sans transformation".[17]

On peut conclure, à propos de cette première catégorie de dispositions faisant référence au droit communautaire dans l'accord, qu'elles ne sont entrées en vigueur que le 1er mars dernier et n'ont pas encore eu l'occasion d'être appliquées. Par ailleurs, on constate que la législation tunisienne connaît depuis la fin des années quatre vingt une grande réforme dictée par la politique d'ajustement structurel et inspirée, en grande partie, de la législation française elle même harmonisée avec le droit communautaire. On peut citer, à titre d'exemple, les textes relatifs à la privatisation des entreprises publiques, l'incitation à l'investissement extérieur, la liberté des prix et la concurrence[18] et les multiples réformes fiscales dont la dernière, relative à la fiscalité locale, date du 3 février 1997 [19] . D'autre réformes législatives sont actuellement en cours suite à la ratification de la Tunisie des accords de l'Uruguay round le 23 janvier 1995[20] . Il suffit de donner pour exemples la réforme de 1994 relative à l'organisation des services de la douane, l'institution d'un système national d'accréditation des organismes d'évaluation de la conformité,[21] l'organisation du commerce extérieur, et la loi relative au système comptable des entreprises.[22]

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[17] Slim LAGHMANI, "La réception de l'accord d'association et des normes européennes auxquelles il renvoie : logique de droit international ou de droit communautaire?", in. *Les accords d'association euro-méditérranéens et leurs effets sur le droit des Etats associés*, Actes du colloque organisé à la faculté des sciences juridiques, politiques et sociales de Tunis les 26 et 27 Novembre 1997, en voie de publication.

[18] Loi n° 91 du 29 juillet 1991 relative à la concurrence et aux prix, *J.O.R.T.* n° 55 du 6 août 1991, pp. 1393 - 1398.

[19] Loi n° 97-11 du 3 février 1997, portant promulgation du code de la fiscalité locale, *J.O.R.T.* n° 11 du 7 février 1997, pp. 173 - 183.

[20] Loi n° 95-6 du 23 janvier 1995, portant ratification des accords de l'Uruguay round, *J.O.R.T.* n° 9 du 31 janvier 1995, p. 271.

[21] Loi n° 94-70 du 20 juin 1994, portant système national d'accréditation des organisme d'évaluation de la conformité, *J.O.R.T.* n° 49 du 24 juin 1994, pp. 1072 et s.

[22] loi n° 96-112 du 30 décembre 1996, *J.O.R.T.* n° 105 du 31 décembre 1996, pp. 2577 et s.

Concernant la deuxième catégorie des dispositions qui reprennent des normes communautaires ou y font renvoi ont peut citer essentiellement des dispositions du chapitre 2 intitulé "concurrence et autres dispositions économiques " du titre IV de l'accord. Certaines dispositions reprennent des normes communautaires tout en les adaptant . A titre d'exemple, l'article 36 déclare les ententes incompatible avec le fonctionnement de l'accord et reprend les trois conditions de l'article 85 du traité instituant la Communauté européenne définissant une entente réprimé. Le même article 36 reprend les trois conditions de l'article 86 du traité instituant la Communauté européenne permettant d'incriminer les abus de position dominante.

D'autres dispositions font référence directement à certains articles du traité instituant la Communauté européenne. Le deuxième paragraphe de l'article 36 de l'accord dispose que "toute pratique contraire au présent article est évaluée sur la base des critères découlant de l'application des règles prévues aux articles 85, 86 et 92 du traité instituant la Communauté européenne". Le cinquième paragraphe de ce même article renvoie même à un règlement du Conseil. Cette technique de référence rappelle la possibilité qu'ont les parties, en droit privé, de permettre l'interprétation de leur accord à la lumière des usages.

Il faut noter que cette catégorie de dispositions rentre dans la logique du droit international du fait que les règles du traité instituant la Communauté européenne n'ont pas d'effet direct même si l'accord d'association leur fait directement référence. Leur application reste subordonnée à l'adoption préalable des mesures prises par le Conseil d'association dans un délai de cinq ans conformément au troisième paragraphe de l'article 36.

Le rapprochement de la législation tunisienne du droit communautaire prévue par les dispositions de l'accord de juillet 1995, relève d'une logique spéciale. Du point de vue formel, cette "harmonisation" est prévue par un acte de droit international et rien n'empêche, en droit international, qu'un Etat réforme sa législation dans un sens ou dans un autre. Du point de vue matériel, cette "harmonisation" doit se faire en conformité avec un standard communautaire ce qui la rapproche de la notion de l'acquis communautaire par l'extension à la Tunisie, du droit matériel communautaire. Ce rapprochement ressemble, en quelque sorte du point de vue matériel, à l'harmonisation que doit effectuer un nouveau membre adhérant à l'Union européenne.

Une fois achevée, cette harmonisation de la législation entraînera l'adoption dans l'ordre juridique tunisien, en particulier et de ceux des P.T.M. d'une manière générale, des règles substantielles communautaires qui ont un caractère contraignant et une application directe et

probablement même irréversible. C'est seulement à ce moment que l'on pourra parler d'acquis communautaire élargi aux P.T.M. associés à l'Union européenne.

Cette extension relève d'une logique spécifique, logique d'un droit international qui tend à unifier les droit internes. "Il en est du droit comme de la langue : pour communiquer on doit convenir d'une langue et en attendant une hypothétique espéranto, c'est la langue de celui qui n'est pas obligé de communiquer qui est choisie".[23]

[23] Slim LAGHMANI, op. cit.

LE MAROC ET L'UE, DE L'ACQUIS COMMUNAUTAIRE A'L'ACQUIS COMMUN

Jamila Houfaidi Settar

Le Maroc a une économie toute entière tournée vers l'Europe: l'intégration croissante de l'économie marocaine à l'économie européenne se traduit par l'intensification des échanges commerciaux. Elle est également illustrée, périodiquement par des manifestations, parfois dramatisées, de la dépendance de l'économie marocaine à l'égard des ressources tirées des échanges avec l'Europe. La part des exportations marocaines destinées à l'UE est passée de 49 % en 1981 à 62 % en 1996. La part de l'UE dans les investissements étrangers privés au Maroc représente 60 à 70% selon les années

Le Maroc a signé un premier accord commercial avec l'UE en 1969. Cet accord essentiellement commercial, assurait au Maroc le libre accès au marché européen de ses produits industriels et un accès privilégié pour ses produits agricoles.

En 1976, un accord de coopération est signé. Il a pour objet de promouvoir une politique globale de développement économique et social. Dès son application, l'accord a permis d'améliorer les conditions d'accès au marché européen des produits marocains. Il prévoit des conditions tarifaires et contingentaires préférentielles pour les produits agricoles, un libre accès au marché communautaire pour les exportations marocaines des matières premières et des produits industriels.

L' accord a été révisé en mai 1988, par la signature d' un accord d'adaptation, après l'adhésion de la Grèce, de l'Espagne et du Portugal à l'Union.

Ces aménagements ont abouti, en mai 1988, à la signature de protocoles financiers d'une durée de six ans chacun, pour un montant total de 643 millions d'écus. Ces ressources furent mobilisées dans le cadre de programmes d'interventions associant le concours de la BEI et de la Commission.

Si ces différentes actions communautaires ont constitué un apport substantiel dont le Maroc a besoin, elles n'ont pas été à la hauteur des défis à relever. Les deux parties s'orientent alors, vers une forme de coopération plus élaborée.

Les négociations de l'accord d'association commencées en 1992, buttent sur le problème des importations des produits agricoles, et la préservation des ressources halieutiques. Le Maroc qui estime insuffisantes les concessions européennes en matière de produits agricoles, se préoccupe par ailleurs, de la nécessité d'instaurer une période de repos biologique en

matière de pêche. Un package-deal permet de mener des négociations avec l'UE, liant accord de pêche et accord d'association.

Finalement, l'UE décide d'accorder quelques concessions agricoles mesurées. Un compromis est également trouvé sur le problème de la pêche et l'accord est paraphé le 13 novembre 1995.

Il prévoit une rationalisation des zones de pêche, un repos biologique, une diminution progressive des captures et une réduction progressive des droits de pêche allant de 10 à 40% jusqu'au 30 novembre 1999 pour la plupart des espèces.

La contrepartie financière est de 500 millions d'écus payables en 4 tranches annuelles dégressives (335 millions sous forme de compensation financière directe, 121 millions en appui financier destiné au développement durable du secteur de pêche au Maroc, 16 millions destinés à la recherche halieutique et 8 millions destinés à la formation maritime).

Dans le domaine industriel, tous les obstacles aux échanges vis-à-vis des exportations industrielles de la Communauté, seront levés, sur une période n'excédant pas 12 ans. De plus, le Maroc obtient une aide financière destinée à soutenir les efforts de la réforme économique, de la modernisation de l'outil de production et du développement social en vue de la création d'une zone de libre échange (ZLE).

Un dialogue régulier est instauré dans les domaines culturel et social.

L'accord est signé le 26 février 1996. Ce nouveau cadre juridique entre le Maroc et l'UE s'inscrit, dans l'esprit du partenariat euro-méditerranéen défini lors de la Conférence de Barcelone. Il est ratifié par le parlement européen en juin 1996 et par le parlement marocain en juillet de la même année.

Le 27 et 28 novembre, quelques jours seulement après le paraphe de l'accord d'association entre le Maroc et l'Union, se réunissait la Conférence de Barcelone pour définir, conformément à une décision émise à Corfou en juin 1994, un schéma durable de relations avec les autres pays du bassin méditerranéen". La philosophie de cette ambitieuse entreprise est de créer dans un esprit de partenariat, une zone de paix, de stabilité et de sécurité en Méditerranée[1].

Ce projet n'est pas sans rappeler les termes du préambule du traité de Rome qui stipule que les Européens sont "résolus à affermir...les

[1] L'idée est émise par le Maroc en 1991, dans le but d'attirer l'attention sur les implications de l'ouverture des PECO, sur les rapports de l'Union avec ses partenaires sud méditerranéens.

sauvegardes de la paix et de la liberté, et (appellent) les autres peuples de l'Europe qui partagent leur idéal à se joindre à leur effort".

Assurément, l'association diffère substantiellement de la coopération définie dans les années 1970. Elle est assise sur le principe d'une adhésion à des règles claires à une discipline rigoureuse ainsi qu' à des valeurs communes.

Effectivement, l'avenir du projet régional euro-méditerranéen avait besoin d'une telle profession de foi. Sa construction, participe de la volonté des partenaires de définir, aussi bien sur le plan politique qu' économique leur propre conception des rapports qui s'établiront entre les nations dans une économie mondialisée et un système politique homogénéisé.

Désormais, la mondialisation impose entre autres réaménagements, à chacun des grands pôles de redessiner son espace régional. Dans sa communication au Conseil et au Parlement européen, en date du 1° juillet 1990, la Commission confirme "sa conviction que la proximité géographique et l'intensité des rapports de toute nature, font de la stabilité et de la prospérité des pays tiers méditerranéens, des éléments essentiels pour la Communauté elle même".

Si l' on s'en tient uniquement aux conclusions de la Commission "une aggravation du déséquilibre économique et social entre la Communauté et les PTM du fait de leurs évolutions respectives serait intolérable pour la Communauté elle-même. Au sens large que sa sécurité est en jeu".

Un repositionnement des rapports entre l'UE et tous ses voisins s'impose. Pour les uns on prépare l'adhésion, pour les autres, l'association. Si les PSEM sont exclus de l'adhésion à l'UE, ils ne sont pas exclus de l'idéal proclamé par le traité de Rome.

Dans le droit fil de cette vision, l'Union entend s'engager, par la déclaration de Barcelone, plus activement, dans le développement économique des PSEM, afin de réduire les risques d' insécurité en Méditerranée et de créer une zone de libre échange euro-méditerranéenne en 2010, susceptible d'offrir un cadre clair et sécurisant aux opérateurs économiques et aux responsables politiques. L'accord d'association est ainsi, proposé à tous ses partenaires.

Il est bien évidemment clair que la modernisation et l'amélioration de la croissance en Méditerranée ne pourraient être assurées par les seuls effets d'une démarche libre-échangiste; les ambitions du partenariat euro-méditerranéen vont bien au delà.

En fait, l'Europe "a besoin d'avoir à ses frontières des pays et des peuples qui partagent les mêmes valeurs démocratiques, ainsi qu'un niveau élevé de prospérité". C'est dans cette perspective qu'il devient "indispensable de renforcer la coopération dans le bassin méditerranéen.[2]

Par ailleurs, et concernant les PTM, la signature des accords d'association, rend manifestement plus crédibles leurs efforts de libéralisation, et constitue une assistance appréciable à leur insertion graduelle, dans la mondialisation.

Pour le Maroc, la région euro-méditerranéenne, "fondée sur l'histoire, la géographie, la culture, la langue et la religion, ... doit être la plate forme privilégiée pour une insertion réussie dans la compétition globale", déclare le prince héritier.[3]

Dès lors que les règles sont claires, l'Union, propose que les valeurs fondatrices, qui sont les siennes (principes démocratiques, respect des droits de l'homme, État de droit, pluralisme politique, libéralisme économique...), aient toute leur place, dans le dialogue qu'elle ouvre avec ses partenaires méditerranéens.

Cet engagement est régulièrement réitéré, ainsi, lors du 3° sommet économique et social euroméditerranéen tenu à Casablanca le 27 et 28 novembre 1997, les participants rappellent dans leur Déclaration finale que "la consolidation des liens économiques et le rapprochement entre les sociétés du bassin méditerranéen se déploient sur la base du respect d'un ensemble de valeurs et normes communes. De ce fait, "l'ancrage des processus démocratiques et le respect des droits de l'homme -en tenant compte des différences culturelles, historiques et civilisationnelles- devraient-ils constituer la trame de fond des futurs programmes de coopération et de partenariat".[4]

Plus récemment encore, lors de la conférence européenne à Londres, en mars 1998, l'UE ne demande pas plus aux onze pays candidats à l'adhésion. Elle rappelle que adhésion, à l'Union "requiert sur le plan politique, des institutions stables et démocratiques, le respect des droits de l'homme et la protection des minorités. Sur le plan économique, le pays candidat doit avoir une économie de marché viable, être capable de

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[2] Stratégie en Méditerranée. Assemblée Parlementaire. Strasbourg. Les Éditions du Conseil de l'Europe débats 1995 p 69-70.

[3] S.A.R. le Prince Sidi Mohamed Cérémonie commémorative du cinquantenaire du système commercial multilatérale et de la deuxième conférence ministériel de l'OMC Genève mai 1998.

[4] Publications du Conseil National de la Jeunesse et de l'Avenir pour le 3° Sommet Économique et Social Euro-Méditerranéen. Casablanca 27 et 28 novembre 1997.

résister à la pression concurrentielle du Marché unique et d'assumer les obligations découlant de l'adhésion".

Ainsi d'une manière ou d'une autre, l'Union s'oriente vers le partage progressif, de l'acquis communautaire des peuples européens avec toute sa zone de proximité (PECO et PSEM).

La communauté a en effet, posé pendant 50 ans par un arsenal juridico-institutionnel et un engineering politique, les règles du libéralisme économique et politique, de la démocratie, de la liberté, du développement et de la prospérité...Autant d'acquis pour les membres actuels et futurs de l'Union. Ce sont ces acquis que la Communauté entend désormais, par une procédure sui generis, partager avec ses partenaires de la Méditerranée.

Le processus d'intégration européenne, il faut le rappeler, "ne doit pas être conçu comme un phénomène statique, ni même comme une succession d'étapes décidées par une démarche volontariste des États membres". D'abord, parce que les traités eux mêmes intégraient cette dimension de progressivité dans la réalisation des objectifs,...ensuite, et surtout parce que la mécanique d' intégration comporte une tendance inhérente au dépassement, par un effet d'entraînement automatique imposant une progression constante.[5]

Ce sont ces "solidarités de fait" grandissantes, et cette pression vers une intégration sans cesse plus étroite qui font le propre de l'intégration européenne.

"Le dynamisme de l'intégration repose sur l'idée d'irréversibilité du processus. L'accroissement de l' interdépendance économique, mais aussi l'intensification de la coopération politique et le rapprochement des réglementations juridiques, ont pour conséquence de consolider les avancées de l'intégration et de rendre tout retour en arrière sinon impossible, du moins plus coûteux économiquement et socialement que le maintien du statu quo ou le passage à l'étape suivante. Ce mécanisme prend juridiquement la forme de ce qu' on appelle l'irréversibilité de l'acquis communautaire.[6]

Dans le même sens, le processus de partenariat engage les parties dans une entreprise commune où la coopération politique, le rapprochement des législations et l'interdépendance des économies leur imposent d'intensifier davantage leurs relations.

[5] Denys Simon Le système juridique communautaire puf 1997 p 30-31.

[6] Idem.

Un article est inséré dans les accords d'association par lequel l'UE s'engage à aider ses partenaires à rapprocher leurs législations de celle de la Communauté dans les domaines couverts par l' accord.

Chacune des parties, doit donc accomplir un certain parcours pour atteindre cet objectif.

I- Avancées du Maroc vers l'acquis communautaire

Si la vie politique marocaine est restée longtemps enfermée dans des règles contraignantes et pour l'économie et pour les droits de l'homme, elle a aussi été marquée par de formidables avancées.

Solder le passé et jeter le fondement d' un Maroc nouveau, partenaire de l'Europe, tel est le projet pour la dernière décennie du siècle.

A- arrimer le Maroc à l'Europe

Conséquence du choix stratégique du Maroc, un train de mesures a été pris depuis 1991, visant à corriger le passé et à préparer l'avenir.

Sur le plan politique et institutionnel

Les fondations d'un État de droit sont posées. Le 4 septembre 1992, une nouvelle constitution est proclamée dont le préambule affirme "l'attachement du Maroc aux droits de homme tels qu'ils sont universellement reconnus".

En 1993, le Maroc ratifie quatre conventions des Nations Unies. Celle, contre la torture et autres peines ou traitement cruels, inhumains ou dégradants; la deuxième relative à la protection de tous les travailleurs migrants et les membres de leur famille; une autre sur l'élimination de toutes les discriminations à l'égard des femmes; enfin, celle sur les droits de l'enfant.

On note de même, la création en 1990 du Conseil Consultatif des Droits de L'Homme. Puis la création, en novembre 1993, du ministère des droits de l'homme.

Enfin, la dernière réforme de la Constitution en 1996, a donné lieu à de nouvelles élections qui ont abouti tout récemment et pour la première fois dans l'histoire du Maroc, à l'alternance politique.

Sur le plan économique

Le programme d'ajustement structurel adopté en 1983, a atteint ses objectifs: rétablir les équilibres macro-économique et préparer le Maroc à la phase de transition.

La mise à niveau de l'économie exigeait un train de réformes pour libérer le jeu économique et assurer la marche vers la compétitivité. Aussi, la privatisation fut-elle la réforme majeure engagée par la loi de décembre 1989, elle permettait la cession d'actifs publics au secteur privé.

Sur le plan juridique

Une batterie de réformes des textes régissant l'activité économique est adoptée; on cite notamment:

Le nouveau code de commerce adopté en 1996, et qui libéralise le régime du commerce extérieur et établit la liberté des importations et des exportations; la loi sur les sociétés anonymes; la mise en place de la TVA en 1986; l'unification du régime des impôts sur les sociétés en 1988; la loi-cadre sur les investissements; la loi bancaire en 1993; réforme du marché financier en 1993-1994; l'introduction des tribunaux de commerce en 1998...

Dans leur ensemble, ces textes, qui s'inspirent des standards internationaux et des directives de l'UE visent à ajuster les structures économiques, financières et juridiques du Maroc à celles qui prévalent en Europe, et qualifient le pays pour un nouveau type de partenariat.

Dans son discours devant le Conseil Supérieur de la Magistrature le 13 avril 1998, Sa Majesté le Roi rappelle que "la législation marocaine, a connu...une évolution notoire, particulièrement en matière commerciale et financière, deux domaines importants où le Maroc a besoin de textes pour construire son avenir économique et, partant, sa dignité au plan social…et pour rassurer les investisseurs marocains et étrangers sur leurs capitaux et leurs biens... Les lois que nous avons élaborées en matière commerciale et financière... sont parmi les textes les plus avancés puisqu'elles prennent en compte même les dispositions de la législation actuellement en vigueur au sein de l'UE."

Si les résultats atteints font du Maroc un pays économiquement émergent, en termes d'indicateurs macro-économiques, ses indicateurs sociaux continuent à le classer comme un pays à développement humain faible.[7]

B- Les embûches.

En effet, les performances macro-économique en termes de stabilité et d'amélioration des agrégats enregistrés vers la fin des années 1980 grâce à l'adoption des PAS, n'ont pas eu de portée sur le plan social.

Bien au contraire, les stratégies de développement menées au cours des deux dernières décennies ont aggravé les disparités sociales et le

[7] Rapport mondial sur le Développement Humain 1997, PNUD.

déséquilibre régional et constituent donc de véritables blocages à la réalisation du partenariat.

La vulnérabilité et la pauvreté sont devenues les caractéristiques d'une grande partie de la population marocaine notamment en milieu rural et semi-urbain.

Selon le rapport d'octobre 1995, de la Banque Mondiale, "les indicateurs sociaux sont très inférieurs à ceux de pays comparables et trop faibles par rapport aux ressources affectées. Le capital en ressources humaines demeure inadapté aux besoins d' une stratégie de forte croissance. Les disparités en milieux ruraux et urbains augmentent elles aussi. Les indicateurs sociaux ruraux restent à des niveaux que l'on peut qualifier de "sub-saharien"…La promotion de la femme reste encore trop lente".

C'est sur cette réalité que vient se greffer le partenariat euro-méditerranéen. Or, "la question importante, du point de vue de la richesse nationale n'est pas ce que les citoyens de chaque nation possèdent, mais ce qu'ils ont appris à faire, dans quelle mesure cela les rend-ils capables d'ajouter de la valeur à l'économie mondiale, et donc accroît leur valeur potentielle."[8]

Le coût des différentes mises à niveau qu'il importe encore d'entreprendre pourrait être prohibitif et risque de fragiliser davantage la cohésion sociale et d' hypothéquer la marche vers le partenariat.

II- La politique de l'UE: une approche globale

La perspective euro-méditerranéenne s'imposait à l'Union par une double logique:

D'abord, il fallait équilibrer les frontières est et sud de l'Union, le cadre régissant les relations avec le sud durant les années 1970, devenait anachronique au moment où l'Union se préparait à admettre en son sein les PECO. Ensuite, la construction des grandes zones économiques, autour des États-Unis et du Japon, imposait à l'UE, d'élargir sa zone de proximité à la Méditerranée.

A- Les fondements

L'association entre le Maroc et l'Union Européenne trouve son ancrage dans les liens historiques et les valeurs communes aux partenaires. Son fondement même se trouve dans l'attachement au respect des principes de la Charte des Nations-Unies, des droits de l'Homme et des libertés politiques et économiques.

[8] Robert Reich L'économie mondialisée. Nouveaux Horizons. 1995 p 126

Elle prend en considération les progrès réalisés par le Maroc au regard de son objectif d'intégration à l'économie mondiale et à la communauté des États démocratiques.

D'emblée, l'accord d'association instaure un dialogue politique régulier entre les partenaires afin d'établir "des liens durables de solidarité qui contribueront à la prospérité, à la stabilité et à la sécurité de la région méditerranéenne et développeront un climat de compréhension et de tolérance entre les cultures" (art 3).

La coopération embrasse des domaines aussi larges que variés: la libre circulation des marchandises, les produits industriels, les produits agricoles et les produits de la pêche, le droit d'établissement et services, la concurrence, l'économie, l'éducation, la formation, l'environnement...La coopération vise aussi le rapprochement des législations, des règles et normes et l'utilisation des règles communautaires dans plusieurs domaines.

B- Le support financier

Le programme MEDA, instrument financier principal de l'UE pour la mise en oeuvre du partenariat euro-méditerranéen, vient soutenir cette coopération. Cette ligne budgétaire représente 4 685 millions d'écus pour la période 1995 1999. La BEI prévoit d'engager des prêts pour un montant équivalent pour la même période.

Le règlement MEDA a pour objet "de contribuer à des initiatives d'intérêt commun dans les trois volets du partenariat euro-méditerranéen: le renforcement de la stabilité politique et de la démocratie, la mise en place d'une zone de libre échange euro-méditerranéenne et le développement de la coopération économique et sociale avec une prise en compte de la dimension humaine et culturelle.

Ces mesures d'appui sont mises en oeuvre en tenant compte de l'objectif de stabilité et de prospérité à long terme, notamment dans les domaines de la transition économique, du développement économique et social durable, de la coopération régionale et transfrontalière".

Le programme indicatif MEDA a été signé en 1996 par la Commission Européenne et le Maroc pour la période 1996-1998. Il constitue un programme d'appui à la transition économique:

Il s'agit d'un ensemble de mesures destinées à accompagner le processus de transition économique. Le dispositif comprend d'une part la facilité à l'ajustement structurel et d'autre part un programme d'appui au secteur privé.

Par ailleurs, certaines mesures sont destinées à appuyer un meilleur équilibre socio-culturel grâce au développement rural, à une meilleure gestion de l'eau et de l'environnement, de la santé ainsi que l'éducation de base.[9]

C - L' adéquation

Les moyens sont-ils à la hauteur des ambitions proclamées?

Au regard des principes énoncés par l'article 2 du traité de Rome: le "rapprochement progressif des politiques économiques, la promotion d'un développement harmonieux des activités économiques, l'expansion continue et équilibrée, la stabilité accrue, et le relèvement accéléré des niveaux de vie", ces principes réitérés par le partenariat imposent des charges dont chacune des parties doit s'acquitter. Les initiatives prises de part et d'autre, si elles engagent les parties sur la voie du partenariat n'en suscitent pas moins certaines interrogations.

Si le libre échange apparaît comme la pièce maîtresse du dispositif euro-méditerranéen, il est le seul à être clairement défini. Cependant, "contrairement à ce que pourrait suggérer une vision idyllique de la ZLE, il n'existe aucune formule miracle permettant de diffuser le progrès et le bien être par une simple levée des barrières commerciales entre deux pays ou deux ensembles. A plus forte raison de dimensions, de niveau et de spécialisation inégalitaires. Le marché -abandonné à ses propres ressorts - peut être favorable pour les uns et pour les autres, comme il risque de permettre aux pays les plus puissants de le devenir encore davantage".[10] Par ailleurs, au regard des grands principes de liberté exprimés dans l'abolition des obstacles à la libre circulation des personnes, non seulement, les frontières se trouvent maintenues, mais renforcées, la libéralisation des échanges de services, des capitaux, du droit d'établissement est prévu mais leur entrée en vigueur n'est pas précisée.

Quant au volet financier, rien n'a été prévu pour juguler l'effet des fluctuations des cours des monnaies sur les transactions commerciales et financières dans un contexte de proximité, de forte dépendance et à l'aune de l'Euro.

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[9]Voir: Le Maroc et l'Union Européenne publication de la Délégation de la Commission de l'UE auprès du Royaume du Maroc. 1997

[10] Larbi Jaidi et Fouad Zaim L'UE et la Méditerranée, une nouvelle génération d'accord? L'annuaire de la Méditerranée GERM- Publisud 1996 p 96

D'autres interrogations concernent le rôle des entreprises des PTM, dans un contexte mondial d'ouverture et de compétition accrue. En effet, "dans un monde qui impose de plus en plus de contraintes au nom de la compétitivité, il est peu possible que le libre échange et les forces du marché puissent assurer un développement équilibré, et l'on risque alors d' assister à une détérioration ultérieure des positions comparatives des régions les plus pauvres". Cette constatation de la Commission de l'UE, à propos des régions européennes les plus défavorisées s'impose avec plus d'acuité pour les PSEM.[11]

Ainsi par exemple, pour le financement de la mise à niveau du secteur industriel au Maroc, l'enveloppe globale est estimée à 45 milliards de dirhams. Le montant alloué à cet effet au Maroc par l'UE dans le cadre MEDA s'élève à 440 millions d'écus (soit 4.8 milliards de dirhams), au titre de la période 1996-1999, ce qui représente 10,5% des besoins nécessaires et revêt un caractère plutôt symbolique.

De manière générale, les moyens financiers consacrés au projet global euro-méditerranéen sont 4 685 millions d'écus pour la période 1995 1999 et un montant équivalent de la part de la BEI restent en deçà des besoins et des ambitions. Comparés à ceux destinés aux PECO, ils représentent une proportion de 5 à 1 et de 3,7 à 1 pour la BEI.

Par ailleurs, et cela ressort des auditions des partenaires sociaux au Maroc, le partenariat euro-méditerranéen nécessite un recentrage au niveau de son approche. "Parce que ciblé sur le plan sectoriel, (seul le secteur industriel fait l'objet d'un programme) et parce que non assorti d'une coopération financière appropriée à la mesure des ambitions économiques qui lui sont assignées, l'approche actuelle ne met pas à la disposition de la stratégie nationale de mise à niveau, les moyens suffisants pour atteindre ses objectifs à l'horizon 2010".[12]

D'autres questions touchent au contours de la construction de la région méditerranéenne. Comment se définira la région au sein d' une économie mondiale où les préférences commerciales s'estompent et où l'idéal politique est unanimement partagé ?

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[11] A l'heure actuelle, la moitié environ de la population de la communauté bénéficie des "fonds structurels" instrument de financement de la politique régionale de la Communauté. En 1988, 17,5% du budget communautaire ont été consacrés aux initiatives régionales; celles-ci représentent actuellement plus d'un tiers du budget. Entre 1958 et 1966, 58 milliards d' écus ont été affectés aux fonds structurels, tandis que l'affectation s'est élevée à 64 milliards entre 1989 et 1993. Les crédits prévus pour la période allant de 1994 à1999 sont d' un montant de 141,5 milliards d'écus.

[12] Publications du Conseil National de la Jeunesse et de l'Avenir op. cit.

A côté de cela, l'ouverture méditerranéenne devrait être favorisée par le partenariat régional. Un espace économique plus intégré serait crée favorisant le co-développement, les échanges et l'investissement entre tous les méditerranéens. Quelques initiatives ont pu voir le jour entre la Turquie et Israël, entre le Maroc et la Tunisie, le Maroc et la Jordanie, mais là aussi, le processus n'a pas évolué. Le concept de partenariat régional a été forgé dans la foulée des espoirs suscités par les accords d'Oslo, mais, devant l'agonie du processus de paix, l'Europe est restée impuissante.

Tous ces éléments sont importants pour la construction de l'espace euro-méditerranéen, d'autant plus que la Communauté affirme sa volonté de coopérer avec les pays méditerranéens dans un vaste éventail de domaines englobant "la coopération industrielle, l'énergie, l'environnement, les technologies de l'information et des communications, les services, les capitaux, la science et la technologie, la coopération décentralisée, la lutte contre le trafic de drogue, contre l'immigration illégale, le tourisme".[13]
En fait, la question essentielle est de savoir d'abord qui fait quoi? Qui est habilité à remédier aux faiblesses des systèmes d'éducation, et de formation; à favoriser la diffusion de nouvelles techniques de production et de communication; à lever les pesanteurs de la bureaucratie, les lenteurs des procédures administratives; à préserver l'environnement, à juguler les déséquilibres démographiques à lutter contre le trafic de la drogue, contre l'immigration clandestine, contre le terrorisme et la criminalité internationale ...?

Bref, "devant un problème politique quel qu'il soit, il s'agit de savoir dans quel cadre géographique ou fonctionnel il se pose, et en conséquence, quel genre d'institution est capable de le résoudre au mieux. Puis l'institution doit être dotée de finances et de pouvoir adéquats dans la mesure où le problème en question engage des intérêts qui risquent d'être lésés et de se défendre" rappelle un auteur.[14]

Effectivement, on est tenté d'effectuer ici, une analogie à partir du principe de subsidiarité. Ce principe fondamental de l'ordre juridique communautaire, donc, de l'acquis communautaire pourrait éclairer les termes du partenariat euro-méditerranéen.

[13] Communication de la Commission au Conseil et au Parlement Européen. Renforcement de la politique méditerranéenne de l'Union Européenne. Établissement d'un Partenariat Euro-Méditerranéen. 19-10-1994

[14] Brugmans Le Fédéralisme Européen; la subsidiarité et ses limites A. W. Sythoff , Leyde, 1966 p 39

Le principe de subsidiarité n'ayant pas uniquement comme conséquence le transfert de l'exercice de compétence, autorise l'appui temporaire de la collectivité qui en est capable à la collectivité défaillante pour l'aider à exercer au mieux ses compétences.

C'est en répondant à ces interrogations, que l'Europe pourrait définir sa conception des rapports avec ses partenaires. Si le projet de partenariat avec les pays de l'Europe centrale et orientale semble l' "adhésion", cette notion disparaît en Méditerranée sud pour ne signifier qu'une zone de paix, de sécurité et de prospérité partagée.

Comme nous l'avons souligné, pour décrire la construction de l'Europe, le dynamisme de l'intégration repose sur l'idée d'irréversibilité du processus. Et, l'expérience engagée entre l'Europe et la Méditerranée, en accentuant l' interdépendance économique, l'intensification de la coopération politique et le rapprochement des réglementations juridiques a-t-elle désormais, engagé les partenaires dans ce processus sans retour.

Un consensus politique s'est dégagé à Barcelone pour mener la Méditerranée dans ce sens, s'il devait être sacrifié sur l'autel de la logique économique, cela se traduirait par la montée, non seulement de la pauvreté et de l'exclusion mais par une logique des conflits entre les peuples. Réhabiliter la politique, c'est donner "un projet de coopération qui redonne sens, espoir et dignité aux peuples, c'est veiller à la solidarité régionale". C'est pourquoi, comme l'écrit Romano Hilario, "il s'impose de réaliser une politique avec une éthique et une science avec une conscience". Car la globalisation se généralise, et paradoxalement, en même temps s'affirment les regroupements régionaux.[15]

Par un curieux hasard, la tenue de la Conférence de Barcelone, coïncidait presque avec la tenue à Amman de la Conférence pour le Proche-Orient et l'Afrique du Nord. Ces deux conférences cristallisent "le jeu de puissances (États-Unis et Union Européenne essentiellement) en Méditerranée, redessinant, de la Turquie au Maroc, les nouvelles aires d'influences économique et politique du siècle à venir".[16] L'enjeu n'est pas purement matériel, il est de nature culturelle et civilisationnelle.

Dès lors, ce n'est pas parce que l'espace euro-méditerranéen est à la périphérie de l' ordre juridique et économique de l'Union, que l'on doit toujours le penser en termes déclaratoires et dans des cadres informels. Il y aurait lieu, de structurer cet espace de partenariat, de l'institutionnaliser, d'une certaine manière, et, de le doter d'organes permanents, habilités à conduire les différents chantier de coopération.

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[15] Romano Hilario Réflexion sur la mondialisation. Pour quelle civilisation et pour quelle Europe" Revue de Droit International de Sciences Diplomatiques et Politiques n° 1 1998

[16] Larbi Jaidi op cit.

L'une des implications de la généralisation de l'acquis communautaire, ne serait-elle pas ici de favoriser, pourquoi pas ? l'émergence d'un ordre juridico-politique (sui generis), celui de l'espace euro-méditerranéen.

Et, comme le déclarait Schuman, dans son discours d'avril 1951, à propos de l'Europe, l'Euro-Méditerranée, "ne se fera pas d'un seul coup ni dans une construction d'ensemble; elle se fera par des réalisations concrètes créant d'abord des solidarités de fait".

INTERNAL OBSTACLES TO APPROXIMATION TO THE ACQUIS COMMUNAUTAIRE: THE TURKISH EXPERIENCE

Haluk Kabaalioglu

The stated purpose of the research project is "to identify those sectors of activity, legal/economic infrastructure, governmental, administrative, cultural and other 'environmental' factors which are particularly sensitive to qualitative change which approximation to the Acquis Communautaire would involve." This paper is devoted to the case of Turkey and adoption of EU legislation by the Turkish legislator within the framework of the customs union. In this tentative draft, portions of some earlier research concerning the customs union will be included. However, the approximation and indeed the adoption or even reception of the acquis communautaire by Turkey was completed at the end of 1995 to the extent that was necessary for the implementation of the customs union.

The Legal System and the Judiciary

As far as the approximation of legislation is concerned, the Turkish legal system does not constitute a big problem. One of the most comprehensive receptions in legal history is certainly that of Turkish Law. When the leaders of the Christian Democrat Parties of Europe declared that Turkey could not join the EU as it was a Moslem country, they were reflecting centuries' old bias and prejudices. Some comments by these leaders focused on difference of religion and argued that the EU is a community of Christian countries which is "incompatible for a country with Islamic Law". This of course indicates total ignorance of the Turkish legal system and the constitutional principle of secularism. Whether or not the EU is a club of Christian countries is a matter which Member States and the EU institutions must decide. Some commentators and intellectuals in France, Germany and other Member States, describe the attitude of present leaders as "Christian fundamentalism totally rejecting basic principles on which European ideals were based". Be that as it may, we should take a brief look at the Turkish legal system and the adoption of the acquis communautaire.

Turkey has completed a very comprehensive programme of adoption of EU legislation in many fields leading up to the completion of the customs union as of l January 1996, in accordance with the Association Agreement of 1963. Thus the Turkish Parliament and the executive, the Council of Ministers, adopted thousands of pages of Community legislation in many different fields, as will be explained below. Whereas on the one hand, a series of Laws (Acts of Parliament) were adopted, on the other hand many aspects of the acquis communautaire were adopted by Governmental Decrees which have the force of law, as a result of special delegation of power to the Council of Ministers by the Grand

National Assembly. Indeed, in many fields Turkey has already adopted the acquis communataire in its entirety. However, this is not the first time Turkey has made extensive changes in her legislation in her efforts at modernisation.

Turkish legal history goes way back to the nineteenth century when extensive codes and legislation based on European Legal systems were adopted.

A brief look at Turkish legal history indicates that starting from the fourteenth century up to 1879, Turkish law was based on religious essentials i.e. the Koran. The period which began with the "Charter of Guihanee" in 1839 was an era of dualism in which Islamic law co-existed with laws and institutions of European origin. A series of codes were adopted by the Ottoman Empire based on European legislation, such as the Code de Commerce of France, and this period saw the establishment of a Council of State, *Surayl Devlet,* based on the French Conseil d'Etat and French administrative law. With the declaration of the Republic in 1923 a series of revolutionary changes were adopted by the Grand National Assembly of Turkey under the reform movement of Mustafa Kemal Atatürk. Thus, with the establishment of a secular state, religious law had no effect and basic codes patterned after various European prototypes provided the keystone of Turkey's jurisprudence.[1]

The Turkish courts, for example, are modelled after the French, as illustrated by their Court of Cassation and Council of State. The Turkish Penal Code of March 1, 1926, was taken almost bodily from another European legal system, the penal Law of Italy of 1899. The Turkish Penal Procedure Code of April 4, 1929, on the other hand, is based on the

[1] For a general analysis of the “reception" of European Law in Turkey in the first half of this century see:

Lipstin, K. : "The Reception of Western Law in Turkey-Working paper p.ll-27; "The Reception of Western Law in Turkey-The purpose and the results of the meeting of the International Association of Legal Science held in Istanbul"; Hamson, C.J. : "The Istanbul Conference-Preliminary Report", Rheinstein, Max: “Types of Reception"; Kuball, H.N.:"Les Facteurs Détérminants, de la Réception en Turquie et Leur Portée Réspective", Neumayer/Dopffel :"Ein Jahrhundert Tiirkischer Rezeptionsgeschichte", Postacloglu, I: "Quelques Observations sur la Téchnique des Codes Étrangers a la Lumière de L'Expérience Turque" ; Timur, Hifzi : “Views on the Transition in Turkey from Islamic Law to a Western Legal Set-up-The reasons of this transition, and the relations between Islamic law and religion" "The Place of lslamic Law in Turkish Law Reform" David, Rene: “Réflexions sur le Coloque D'Istanbul", Annales de la Faculté de Droit D’lstanbul, No. 6, 1956.

German Code of 1877. Swiss law was the source of most of the Turkish laws :

-Turkish Civil Code of April 14, 1926 was adopted from the Federal Civil Code of Switzerland of 1907.

-Turkish Code of Obligations of May 8, 1926 from the Federal Obligation Code of Switzerland of 1881.

-Turkish Code of Civil Procedure of June 1 8, 1927 from the Civil Procedure Code of the Canton of Neuchatel of 1925.

- Turkish Law of Bankruptcy and Supplementary Proceedings of June 9, 1912, from the Federal Bankruptcy Code of Switzerland of 1889.

The most elaborate of all these Turkish laws received from the Continent is the Commercial Code of Turkey which came into effect on January 1, 1957. Like the previous Commercial Code of Turkey dating back to 1929, this Code was taken largely from the German Commercial Code. The part on Negotiable Instruments was adopted from the relevant Hague Treaties. The new Commercial Code also contains provisions of the Brussels Convention and Antwerp Convention on Admiralty (or Maritime Law dealing with various aspects of carriage of goods by sea, salvage, general average etc.) The German Law on Joint Stock Companies was also adopted in the Code.

The Capital Markets Law of 1981 and the Regulations adopted by the Capital Markets Board were all based on EC legislation on Company Law and Stock Exchange Regulation. Indeed, as pointed out below, in many fields laws, such as the Customs Regulations, Common Commercial Policy, Intellectual and Industrial Property, Competition Laws and regulations, were adopted verbatim from EU legislation. Furthermore, in many other areas, the first thing the legislator takes into consideration is EU legislation.

There may be some constitutional issues concerning transfer of some sovereign powers to EU institutions in case of full membership and constitutional amendments may be necessary for this purpose. Furthermore, all the political parties represented in the Parliament agree that some constitutional amendments will be required for various reform proposals. In fact, a series of constitutional amendments were made by the Parliament during the summer months of 1995[2].

[2] For a detailed analysis see. Rumpf, Christian: “Verfassungsanderungen in der Turkei : Ein Schritt nach Europa", XXXI Annales de la Faculté de Droit d'lstanbul 189-224 (1991)

In the relevant chapter of this study in its final form an economic analysis of the customs union will be made. The World Bank Policy Research Paper (1599) by Harrison/Rutherford/Tarr entitled "Economic Implications for Turkey of a Customs Union with the European Union" together with the latest trade figures will be discussed. The fact that the structural funds available to member states are not available to Turkey should be taken into consideration.

Completion of the Customs Union between Turkey and the European Union

On January 1, 1996 the Customs Union between the European Community and Turkey came into effect, thereby creating the closest economic and political relationship between the EU and any non-member country.

Turkey's relations with the Community date back almost to the latter's foundation. In fact, in 1957 before the entry into force of the Rome Treaty, the Government Programme of the late Prime Minister Adnan Menderes underlined the importance of the establishment of "the common market" and "economic initiatives in Europe" declaring that the "Turkish Government wanted to participate in these organizations actively"[3] . It is interesting to note that this important policy statement was made in the Turkish Parliament on November 11, 1957, seven months after the signing of the Treaty Establishing European Economic Community, and some two months prior to its entry into force. Furthermore, the Prime Minister of Turkey in his statement observed that this economic integration was going to lead to a "Political Union". Thus, Turkey wanted to take part in this venture not because it was an economic project but because it was going to lead to a political union.

As early as July 31, 1959 Turkey requested an Association Agreement. This request from the Government of Turkey represented a political choice, that of being associated with the building of Europe. This application was in line with Turkey's traditional European vocation and looked forward to eventual Turkish membership in the Community. The Community for its part accepted this choice with pleasure as two other European countries, Greece and Turkey wanted to join this new venture in European integration.[4]

[3] Turkiye Cumhuriyeti Hukumet Programlari, Ak Yayinlari, Istanbul 1967.
[4] Saraçoglu, T. : Türkiye Avrupa Ekonomik Toplulugu Ortakligi-Anlasmalar, Istanbul 1992, p. 9.

The welcome given to the Turkish application for an association could be observed in the speed of the Brussels institutions in opening negotiations with the two applicant countries: the Turkish request was transmitted on July 31 and the negotiations with the Turkish delegation started on September 28, 1959.

The Agreement Establishing an Association between the European Economic Community and Turkey[5] was signed at Ankara on 12 September 1963. The President of the Council Mr. Joseph Luns in his speech stated that this Agreement was not a "result" but only a beginning. According to Mr. Waiter Hallstein, the first President of the European Commission, "with this Agreement Turkey has tied her destiny and future with the European Communities"[6] .

The establishment of a customs union between Turkey and the EC was agreed in 1963 and constituted the third phase of the Association Agreement. Therefore, it may be useful to analyze the general framework of this Agreement and the Additional Protocol which was signed in 1970, before going into the details of the Decision of the Association Council[7] concerning the customs union.

The Association Agreement has been characterized as "an association prior to accession" as well as "an association for the purposes of development".[8] According to the Agreement "Association shall comprise: a) a preparatory stage; b) a transitional stage; c) a final stage." (Art. 2/3).

At the present time the association is in its "final stage" which was foreseen in 1963 as the last phase before actual accession. Indeed, Article 5 stipulates that "the final stage shall be based on the customs union and shall entail closer coordination of the economic policies of the Contracting Parties".

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[5] O.J. No. 217, 29.12.1964. English version appeared in O.J. No. C. 113, 24.12.1973; Collection of the Agreements concluded by the European Communities vol. 3, Bilateral Agreements, Brussels 1978, p. 541.

[6] Avrupa Toplulugu Yayinlari: Turkiye-AET Ili skileri, Ankara 1977, p. 235

[7] The Association Council is the highest organ of the Turkey-EC Association which will be analyzed below.

[8] Turkey-EEC Relations 1963-1977, Ankara, 1977, “produced under the auspices of the EC Commission Office in Ankara” according to Gian Paolo Papa, Head of the EC Office in Ankara as stated in his “Introduction” of the book. Indeed, the Association has been defined as a “permanent, general and institutionalized bond for cooperation representing a participation by the third country in the objectives of the Communities” (p. 3).

A Commission publication entitled "Turkey-EEC Relations 1963-1967" which was published both in English and Turkish[9] , defined the association as "a permanent, general and institutionalized bond for cooperation representing a participation by the third country in the objectives of the Communities". According to the same book "this association formula is totally different from other association agreements the Community has entered into. In the case of Turkey, as for Greece, the association formula of Article 238 was used as a form of pre-accession. Article 28 of Turkey's Association Agreement provides that the Contracting Parties will examine the possibility of Turkey's accession to the Community. Or to put it differently, association is considered as a preliminary to an eventual accession".

Article 28 which was referred to above, indeed provided that "the Contracting Parties shall examine the possibility of accession of Turkey to the Community". The possibility of accession will be examined "as soon as the operation of this Agreement has advanced far enough to justify envisaging full acceptance by Turkey of the obligations arising out of the Treaty establishing the Community".

There is no automatic transition from the status of association to membership even if the Association Agreement expressly provides for accession. However, it was an express intention of the Contracting Parties to use the Association Agreement as a stepping stone to accession.[10]

Preparatory and Transitional Stages

With the entry into force of the Association Agreement in December 1964, after being ratified by the parliaments of all of the Member States and that of Turkey, the preparatory stage commenced. During this period, the Community introduced some trade advantages for Turkish exports to the European Community together with a Financial Protocol "desiring to promote the accelerated development of the Turkish economy in furtherance of the objectives of the Agreement of Association". [11]

During the preparatory stage Turkey did not assume any obligation towards the EC. It was a phase during which Turkey was to strengthen her economy with the assistance of the Community, in order to carry out the obligations that she would assume in the following stages.

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[9] Ibid.

[10] Lasok, D. : "Turkey and the European Community: Report on the Relations between the Republic of Turkey and the European Community arising from the Ankara Agreement and the Application for Membership", Marmara Journal of European Studies, vol. 2:1, 1992, p. 14.

[11] O.J. No. 217, 29.12.1964

The passage to the transitional stage was not automatic. According to Article 1 of the Provisional Protocol, "four years after the entry into force of this Agreement, the Council of Association shall consider whether, taking into account the economic situation of Turkey, it is able to lay down, in the form of an Additional Protocol, the provisions relating to the conditions, detailed rules and timetables for implementing the transitional stage".[12] It was the earliest time provided in the Agreement when the Council of Association decided to start negotiations for the passage to the transitional stage on December 9th, 1968.

In taking the important decision on concluding the preparatory stage and entering the transitional stage, the Council of Association stated that it had considered not only progress achieved in the Turkish economy following the entry into force of the Agreement; but also "projections about the future, whether these would permit Turkey to sustain the burden she would face in the Transitional Stage". The operation of the Ankara Agreement during the first four years of the Preparatory phase was considered "a success" both from the point of view of the operation of the commercial and financial provisions, and from the point of view of the mutual cooperation and understanding shown by both sides". It was also felt that the passage to the Transitional Stage would provide the Turkish economy with a new framework which would stimulate economic activity during this period".

Following the decision in December 1968 to start the negotiations for the transitional stage, extensive discussions took place in the Council meetings and in Turkish public opinion and among industrialists. On November 23, 1970, the "Additional Protocol"[13] was signed and annexed to the Agreement Establishing an Association Between the European Community and Turkey. On the same day, the second Financial Protocol was also signed.

The Additional Protocol of 1970 was intended to regulate the conditions, detailed rules and timetables for implementing the transitional stage. Thus, in accordance with the principles set out in the Association Agreement, the Additional Protocol fixed the time-table for the establishment of a customs union and of closer economic cooperation between Turkey and the EC over a transitional period of 22 years prior to the final period which should witness the accession of Turkey with the

[12] No similar provision is included for the passage from Transitional stage to Final stage.

[13] Additional Protocol and Financial Protocol, signed on 23 November 1970, annexed to the Agreement Establishing an Association Between the European Economic Community and Turkey - Council Regulation No. 2760/72 of 19 December 1972, 0. J. No. L 293, 29.12.1972. English version appears in O. J. No. C 113, 24.12.1973.

status of a full member. The Additional Protocol fully entered into force on January 1, 1973 after being ratified by the Parliaments of the Member States and Turkey.

Why a Customs Union?

In setting the objective of a Customs Union both Turkey and the Community were much influenced by the success of the customs union then being realized between the six original members of the Community. Both Turkey and the Community looked for similar benefits from the establishment of a customs union between themselves. In fact if the final aim is Turkey's accession then it was natural that the foundation of this link was going to be the acceptance of all the basic freedoms of movement. Free movement of goods was going to be established by the customs union. An additional Protocol also contained a number of detailed provisions for the implementation of the free movement of workers, services and capital in accordance with the Association Agreement.

The Association Agreement clearly outlined that "in order to attain the objectives set out -in the Agreement- a customs union shall be progressively established". What were the objectives referred to in the Agreement? The answer to this question can be found in Article 2: "The aim of this Agreement is to promote the continuous and balanced strengthening of trade and economic relations between the parties, while taking full account of the need to ensure an accelerated development of the Turkish economy and to improve the level of employment and living conditions of the Turkish people".

It was realized by the drafters of these Agreements that the liberalization of trade would entail sometimes painful adaptations. In order to counterbalance the negative effects of such adaptations, Financial Protocols were devised together with the introduction of provisions concerning free movement of workers, services and capital.

The discussions of the last few months gave the impression that establishment of a customs union was being agreed in 1995. In fact, this was not the case. Whilst the commitment to establish a customs union was provided in the Association Agreement, its programme, timetables and rules were established in the Additional Protocol. Thus it was all agreed in 1963 and 1970. Some even argued that Turkey's implementation of this programme and adoption of the Common Customs Tariff would be sufficient for the completion of the second stage, as the timetable for the completion of the customs union was determined in the Additional Protocol of 1970.

How the Customs Union was to be achieved?

Whilst the commitment to establish a Customs Union was provided in the Association Agreement, it was the Additional Protocol of 1970 which specified the programme for bringing it into being. The 1970 protocol contained timetables for removing barriers on trade between the partners and the timetables whereby Turkey would adopt the EC's Common Customs Tariff on its trade with third countries.

Movement towards a Customs Union by the EC started even before the entry into force of the Additional Protocol which required ratification by the Parliaments of Member States and Turkey. An Interim Agreement was signed on 27th July 1971 which allowed the commercial provisions of the Additional Protocol to be implemented in advance, on September 1, of 1971. Indeed, the tariff provisions of the Additional Protocol, which will be analyzed below, began to be applied as of September 1, 1971 for the implementation of the Customs Union.

Article 9 of the Additional Protocol provided that, on the entry into force of this Protocol, the Community would abolish customs duties and charges having equivalent effect on Turkish industrial exports to the EC.[14]

In addition to the removal of customs duties, all quantative restrictions on industrial imports into the Community from Turkey were to be abolished by Article 24: "The Community shall on the entry into force of this protocol, abolish all quantitative restrictions on imports from Turkey. Thus liberalization shall be consolidated in respect of Turkey". The consolidation of this liberalization meant that the Community undertook not to re-introduce any of these restrictions."[15]

The abolition of all tariff restrictions on Turkish industrial exports to the Community took effect immediately when the Interim Agreement entered into force on September 1st 1971. With this move, the Community moved almost all the way to achieving a Customs Union for industrial products in one step in the beginning of the second stage being the transitional period.

[14] Annexes 1 and 2 allowed four exceptions: some petroleum products, cotton yam, machine made carpets of wool, woven fabrics of cotton.

[15] The sole exception to this consolidation was in Art. 2 of Annex 2 covering silk-warms cottons and raw silk.

Turkey' s Implementation of Customs Union

To establish a Customs Union both Turkey and the EC had to eliminate tariffs and quantitative restrictions on their trade with one another and adopt a common tariff on imports from third countries. The Additional Protocol provided that both Turkey and the EC should refrain from introducing new import duties on their trade with each other.

The Additional Protocol provided a timetable for Turkey to abolish the existing Turkish tariffs on industrial imports from the EC. Articles 10 and 11 established two different lists of goods. For industrial sectors in which Turkey was more competetive, tariffs were to be eliminated over 12 years. For other goods the tariff reductions were to be spread over 22 years.

Charges having equivalent effect to customs duties were also to be reduced according to the same timetables. Within 22 years, Turkey was to abolish progressively all quantitative restrictions and measures having equivalent effect on imports from the Community (Art. 25).

The adoption by Turkey of the Common Customs Tariff of the EC was provided for in Articles 17 and 18 which laid down the timetables by which Turkey was to move towards the CT of the Community. This alignment was to be completed within 12 and 22 years for goods appearing in respective lists.

The goal of the Association Agreement is a Customs Union both for industrial and agricultural trade. According to Article II, "The Association shall likewise extend to agriculture and trade in agricultural products" taking into account the CAP of the Community. It was realized that to implement a customs union for agricultural products without first aligning the pricing policies of the EC would cause distortion in agricultural trade. Hence in the Additional Protocol Turkey committed herself to adapt her agricultural policy to the CAP during the transitional period to prepare the way for the free movement of agricultural products (Art. 34).

Final Stage in Pre-accession Period: Customs Union

Decision No 1/95 of the Association Council on March 6, 1996, refers to the final aim of the Agreement as being "the accession of Turkey to the Community" (Art. 28) as provided in the preamble "determined to establish ever closer bonds between the Turkish people and the peoples brought together in the EEC", noted the following in its preamble: "Considering that the objectives set out by the Ankara Agreement and in particular by its Article 28, which established the Association between Turkey and the Community, maintain their significance at this time of

great political and economic transformation on the European scene;...", further, "considering that the Customs Union represents an important qualitative step, in political and economic terms, in the Association relations between the Parties".

The Association Council decided that the third and final phase of the Association which is based on a Customs Union was to commence as of 1 January 1996 in accordance with the Association Agreement and the Additional Protocol. Since this was an Association Council Decision for the implementation of the Association Agreement (1963) and Additional Protocol (1970) both of which were duly ratified by the Parliaments of all the Member States and entered into force, thereby being "an integral part of the Community legal system", it was believed that the assent procedure of the European Parliament was not required as this was not a new international agreement but simply an implementation measure of an already in force Association Agreement. In any case the Association Council Decision of March 6, 1995 1/95 received the assent of the European Parliament with an overwhelming majority when it was decided that the Association Council Decision should be submitted under the assent procedure.

The Association Council Decision 1/95 "lays down the rules for implementing the final phase of the Customs Union" which was foreseen in the Ankara Agreement.

Goods in Free Circulation

The first and second sub-paragraphs of Article 3 of the Council Decision 1/95 is actually taken from Article 2 (1) and (2) of the Additional Protocol of 1970 which was based on Article 10 (1) of the Treaty of Rome. This must be considered only normal as "the Community" is "based upon a customs union" (Art. 9 of the Treaty of Rome). Thereby, the third stage of the Turkish Association which is also "based upon a customs union" adapted the same provisions.

Accordingly the customs union shall apply to the following goods:

- goods produced in the Community or Turkey (including those wholly or partially obtained or produced from products coming from third countries which are in free circulation in the Community or in Turkey);

- goods coming from third countries and in free circulation in the Community or in Turkey.

Since a customs union is formed, Article 10 (1) of the Treaty of Rome which was implanted in Article 2 (1) of the Additional Protocol is also reproduced in Article 3 (2) of the Association Council Decision: "Products from third countries shall be considered to be in free circulation in the Community or in Turkey if the import formalities have been complied with and any customs duties or charges having equivalent effect which are payable have been levied in the Community or in Turkey, and if they have not benefited from a total or partial reimbursement of such duties or charges".

The "customs territory" of the customs union comprises the customs territory of the Community and the customs territory of Turkey (Art. 3 (3)).

Article 4 on the "Elimination of customs duties and charges having equivalent effect" provides that "Import or export customs duties and charges having equivalent effect shall be wholly abolished between the Community and Turkey on the date of entry into force of this Decision" (1.1.1996).

Some other Articles in the Decision are simply the repetition of the corresponding ones in the Additional Protocol which were copied from the Treaty of Rome. Article 12 of the Treaty of Rome which was transplanted into Article 7 of the Additional Protocol of 1970 was again repeated in the Association Council Decision Article 4 second sentence which provides: "The Community and Turkey shall refrain from introducing any new customs duties on imports or exports or any charges having equivalent effect from that date".

Article 30 of the Treaty of Rome entitled "Elimination of Quantitative Restrictions Between Member States" is Article 21 of the Additional Protocol and Article 5 of the Council Decision: "Quantitative restrictions on imports and other measures having equivalent effect shall be prohibited between the contracting Parties".

Article 7 of the Council Decision is another verbatim adoption of a Treaty of Rome provision, that is to say Article 36 on derogations on the grounds of "public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value..." which was already adopted in Article 29 of the Additional Protocol in 1970 and simply was reproduced in the Decision. Turkey also undertook to incorporate into its internal legal order the Community instruments relating to the removal of technical barriers to trade within five years from the date of entry into force of this decision (Art. 8).

Commercial Policy and CCT

In 1995, Turkey's Official Journal (Resmi Gazete) published thousands of pages of Turkish legislation based on EC texts. Among others, Turkey adopted the following Community Regulations on Commercial Policy:

- Council Regulation (EC) No 518/94 on common rules for imports;

- Council Regulation (EC) No 519/94 on common rules for imports from certain third countries;

- Council Regulation (EC) No 520/94 establishing a Community procedure for administering quantitative quotas (implementing provisions: Commission Regulation (EC) No 738/94);

- Council Regulations (EEC) No 2423/88, (EC) No 521/94 and (EC) No 522/94 on protection against dumped or subsidised Imports;

- Council Regulations (EEC) No 2641/84 and (EC) No 522/94 on the New Commercial Policy instrument;

- Council Regulation (EEC) No 2603/68 establishing common rules for exports;

- Council Decision 93/112/EEC on officially supported export credits;

- Council Regulation (EEC) No 636/82 and Commission Regulation (EEC) No 1828/83 (outward processmg arrangements for textiles and clothing);

- Council regulation (EEC) No 3030/93, as last amended by Commission Regulation (EC) No 195/94 (textile imports under common rules);

- Council Regulation (EC) No 517/94 (textile imports under autonomous arrangements);

- Council Regulation (EEC) No 3951/92 as last amended by Council Regulation (EC) No 217/94 (textile imports from Taiwan).

Furthermore, Turkey aligned her Customs Tariff with the Common Customs Tariff in relation to countries which are not members of the Community (Art. 13).

Adopting the Common customs tariff and all the relevant customs legislation is not sufficient for the completion of the Customs Union.[16] The Commercial Policy of Turkey will also have to be harmonised with the Common Commercial Policy of the Community. This involves both the autonomous regimes and preferential agreements with third countries. In order to harmonise Turkish commercial policy with that of the EC, Turkey will negotiate agreements on a "mutually advantageous basis" with the countries concerned. Since this will naturally take some time, Article 16 of Decision 1/95 stipulates that Turkey will align itself "progressively with the preferential customs regime of the Community" within five years as from 1 January 1996.

The autonomous regimes referred to in that article covers the GSP (the General System of Preferences), the regime for goods originating in the Occupied Territories, Ceuta or Melilla, Republics of Bosnia-Herzegovina, Croatia and Slovenia and Macedonia.

The preferential agreements include the Europe Agreements (with Bulgaria, Hungary, Poland, Romania, Slovakia, the Czech Republic), Free Trade Agreements with Switzerland, Liechtenstein, Estonia, Latvia, Lithuania, Faroe Islands, Agreements with Egypt, Jordan, Lebanon, Syria, Algeria, Morocco, Tunisia, Israel and the Association Agreement with Malta. Since the Greek Cypriot Administration in Southern Cyprus is not recognized by Turkey, as the said regime is deemed unconstitutional under the 1960 Constitution and Treaties of Guarantee which brought independence to Cyprus, until a settlement is reached on the island there will not be an Agreement with the said entity."[17]

Today, Turkey applies substantially the same commercial policy as the Community in the textile sector (including the agreement or arrangements on trade in textile and clothing) and has done so since 1 January 1996 (Art. 12 (2)).

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[16] Although Turkey has adopted the Common Customs Tariff of the Community as of 1 January 1996, for a limited number of products (like motor gasoline, petroleum ether, gas oils, diesel, fuel oil, trunks, suitcases, bags, sacks, kraft paper, footwear, porcelain china, midibus, minibus, motor vehicles, motor cars, lorries) she has retained customs duties higher than the CCT until 1 January 2001, in respect of third countries. Decision 2/95, 6 March 1996.

[17] The EU decision to open negotiations with the Greek Cypriot Administration six months after the completion of the Intergovernmental Conference is an unfortunate move which encouraged the Greek Cypriot side to leave the inter-communal talks. The international treaties forming the Republic and the Constitution of 1960 prevent such a membership.

Turkey and the Community made arrangements in order to prevent the circumvention of the Japan-EC Motor Vehicles Agreement relating to trade in motor vehicles mentioned in the annex of the Agreement on safeguards attached to the Agreement setting up the World Trade Organization.

Customs Provisions

As the customs union meant not only the elimination of customs duties, quantitative restrictions and measures having equivalent effect but also the alignment of the Turkish Customs Tariffs to the Common Customs Tariff of the Community, it was only natural that Turkey had to adopt legislation in line with the Community Customs Code in the following fields:

- origin of goods;

- customs value for goods;

- introduction of goods into the territory of the customs union;

- customs declaration;

- release for free circulation;

- suspensive arrangements and customs procedures with economic impact;

- movement of goods;

- customs debt;

- right of appeal. (Art. 26)

The Turkish Customs legislation already in force, mainly the Customs Law (Gümrük Kanunu) of 1970 (No. 1615) and all the regulations and bylaws adopted thereunder were to a great extent based on the same international customs agreements and furthermore amended over the years in conformity with the EC requirements. Therefore, the legislation in force was very similar to the Community Customs Code. Although a new Law was drafted with over 250 articles which was going to cover all the subjects already regulated in various different texts in one Code in a systematic order, due to a heavy Parliamentary schedule it has not been adopted so far. For this reason, a series of Regulations, Decrees and Bylaws were published in order to complete the existing legislation. The customs legislation will, of course, be clarified with the adoption of the Draft Law.

In addition to the above mentioned fields and Community Customs Code (based on Council Regulation (EEC) No. 2913/92 of 12 October 1992) and a Commission Regulation laying down the implementing provisions (no. 2454 of 2 July 1993), Turkey has adopted a series of texts to implement the following Community legislation:

- Council Regulation (EEC) No. 3842/86 laying down measures to prohibit the release for free circulation of counterfeit goods and Commission Regulation laying down the implementing measures;

- Council Regulation (EEC) No. 9189/83 setting up a Community system of reliefs from customs duties and a number of Commission Regulations laying down the implementing measures;

- Council Regulation (EEC) No. 616/78 on proof of origin for certain textile products and on conditions for the acceptance of such proof.

As provided in Article 29 of the Decision 1/95, mutual assistance on customs matters between administrative authorities of the Contracting Parties will be governed by a fifteen article text which is annexed to the Decision (Annex no. 7). Needless to say, mutual assistance and cooperation of the administrative authorities both in Turkey and in the Community will be extremely important for the successful implementation of the customs union. Indeed, the parties shall assist each other "... in ensuring that customs legislation is correctly applied, in particular by the prevention, detection and investigation of operations in breach of that legislation" (Art. 2 (1) of Annex No. 7 on Mutual Assistance). At the request of the applicant authority, the requested authority shall ... take all necessary measures in order to deliver all documents, notify all decisions to an addressee residing or established in its territory (Art. 5).

Although close cooperation and mutual assistance between administrative authorities in customs matters is an extremely important element, the Contracting Parties may refuse to give assistance where to do so would:

- be likely to prejudice the sovereignity of Turkey or a Member State of the Community which has been asked for assistance; or

- be likely to prejudice public policy, security or other essential interests; or

involve currency or tax regulations other than regulations concerning customs duties; or

- violate an industrial, commercial or professional secret. (Art. 9).

Whenever the Common Customs Tariff is changed, Turkey shall adjust its customs tariff to these changes. Below, the institutional framework of the association and the procedure for consultation and decision-making will be analyzed in detail. Suffice it to say that Turkey will be informed about the following decisions in sufficient time in order to make the necessary amendments:

- Decisions taken by the Community to amend the Common Customs Tariff, and

- Decisions to suspend or reintroduce duties and any decision concerning tariff quotas or ceilings.

Agriculture

The Association Agreement provided that "the Association shall likewise extend to agriculture and trade in agricultural products, in accordance with special rules which shall take into account the common agricultural policy of the Community". Furthermore, "agricultural products" meant the products listed in Annex II of the Rome Treaty (Art. 11).

The additional Protocol stipulated that, in twenty-two years after its entry into force (1995), agricultural products should be able to move freely between Turkey and the EC once the Council of Association had ascertained that Turkey had adapted to the common agricultural policy (Art. 34 (1). However, the Council may alter the date by which such free movement should be achieved.

Given the differences in the agricultural policies of both sides, the Parties did not see fit to embark along the free movement of agricultural products. Thus, the customs union covers only industrial products.

Decision 1/95 affirmed "the Parties' common objective to move towards the free movement of agricultural products" but noted that "an additional period is required" to put in place the conditions necessary to achieve this free movement (Art. 24). Thus, Turkey and the Community shall progressively improve the preferential arrangements which they grant each other for their trade in agricultural products. The Council of Association Decision 1/95 contained a requirement to negotiate reciprocal concessions that are mutually advantageous.

Processed Agricultural Products

The customs union covers "products other than agricultural products" (Art. 2). Therefore, agricultural products are excluded and only industrial goods may benefit from the customs union.

What about processed agricultural products? They are not completely industrial products but contain an important "agricultural component".

Although customs duties and measures having equivalent effect have been abolished, Turkey and the EC may apply "agricultural components" established in accordance with the Decision 1/95.

How can we determine the so called "agricultural component"? According to Article 19, agricultural component may be obtained by "adding together the quantities of basic agricultural products considered to have been used for the manufacture of the goods in question", multiplied by the "basic amount" corresponding to each of these basic agricultural products. Annex Number 5 lists the "basic amounts" for basic agricultural products (ecu/100 kg) applicable to imports originating from third countries: common wheat (7.44), durum wheat (6.39), rye (2.33), barley (2.95), maize (2.91), white sugar (36.68), skimmed milk powder (140.9), whole milk powder (142.31), molasses (15.14), butter (172.17), rice (25.41), isoglucose (23.51).

The Community shall apply to Turkey the same specific duties that represent the "agricultural component" applicable to third countries. Turkey, too, shall apply the "agricultural component" to imports from the Community. There are a number of annexes to Decision 1/95 explaining the procedure concerning processed agricultural goods.

Approximation of Laws

As pointed out above, the Republican Period of Turkey is indeed an extraordinary example of approximation or in fact reception of European Law. The final phase of the association is based on a customs union and required adoption of most of the acquis communautaire by Turkey. This was completed as of January 1st, 1996.

The Association Agreement of 1963, in article 16, refers to Title I of Part III of the Treaty of Rome which contains the provisions on competition, taxation and the approximation of laws. Thus, it was pointed out that, “the Contracting Parties recognize that the principles laid down in the provisions on competition, taxation and the approximation of laws contained.....in the Treaty must be made applicable in their relations within the Association".

The Additional Protocol of 1970 devotes a special chapter to "Competition, Taxation and Approximation of Laws" under Title I on "Closer Alignment of Economic Policies". After dealing with the competition, internal taxation and dumping issues, article 48 authorizes the Council of Association "to recommed the Contracting Parties to take

measures to approximate the laws, regulations or administrative provisions in respect of fields which are not covered by this Protocol but have a direct bearing on the functioning of the Association". Also the Council of Association may make recommendations in "fields covered in the Protocol but for which no specific procedure is laid down therein."

Competition

With the 1963 Association Agreement, Turkey and the EC recognized that Rome Treaty provisions on competition, taxation and the approximation of laws "must be made applicable in their relations within the Association" (Art. 15).

According to the Additional Protocol of 1970 the provisions of the Treaty of Rome on competition (Articles 85, 86, 90, 92) were to be applied. In order to do so, the Council of Association was to adopt the conditions and rules for the application of the competition principles laid down in those articles by 1979. But such a Decision was not taken.

Decision 1/95 of the Council of Association provided the "competition rules for the Customs Union" in Articles 32-38.

Article 32 of Decision 1/95, is a verbatim copy of Article 85 of the Treaty of Rome. The only change is in the first sentence, where it is stated that "the following shall be prohibited as incompatible with the proper functioning of the Customs Union ...", whereas in the original text (Art. 85) this appears as "The following shall be prohibited as incompatible with the common market ...".

Article 33 of Decision 1/95, on the other hand is a copy of Article 86 of the Treaty of Rome where the phrase "common market" is replaced with "customs union".

Article 34 of the Decision corresponds to Article 92 of the Treaty, where it is provided that "any aid granted by EC Member States or Turkey through State resources" is incompatible with the proper functioning of the Customs Union.

Since these provisions are copied from the relevant articles of the Treaty, Article 35 of Decision 1/95 provided that "any practices contrary to Articles 32, 33, and 34 shall be assessed on the basis of criteria arising from the application of the rules of Articles 85, 86 and 92 of the Treaty establishing the European Community and its secondary legislation".

There is another duty imposed on the Association Council. By 1998, the Council shall adopt by decision, the necessary rules for the

implementation of these articles concerning competition (Art. 37). Until these rules are adopted, the authorities of both sides shall rule on the "admissibility" of agreements, decisions and concerted practices and on the abuse of a dominant position in accordance with Articles 32 and 33.

If the Community or Turkey considers that a particular practice is incompatible with the Competition rules but is not adequately dealt with under the implementing rules (which will be adopted by the Association Council) it may take "appropriate measures" after consulting the Customs Union Joint Committee (Art. 36).

As explained above, the Association Council Decision included articles on competition which are the same as Treaty provisions on this subject. Further it required implementing measures to be made by a Decision of the Council on the same lines as EC measures. Each Party was authorized to take unilateral action after consulting the Joint Committee. This was not enough and it was provided that Turkey would have a Competition Law (Art. 37 (2)-a). Thus, before the entry into force of the Customs Union, Turkey was to adopt a law which would prohibit certain behaviour of undertakings under conditions laid down in Articles 85 and 86 of the Treaty. Turkey would also ensure that the principles contained in block exemption regulations in force in the Community and its case law shall be applied in Turkey. The Law on the Protection of Competition was adopted by the Turkish Parliament on 7 December 1994 (No. 4054) and appeared in the Official Journal (RG) on 13 December 1994 (No. 22140). This law is also based on Articles 85, 86 and the relevant Community legislation.

According to Article 37 (1), "With a view to achieving the economic integration sought by the Customs Union, Turkey shall ensure that its legislation in the field of competition rules is made compatible with that of the EC, and is applied effectively". As explained above such a legislation has been adopted some months before the 6 March 1995 Decision (1/95). It was also required that before 1996 Turkey should "establish a competition authority which shall apply these rules and principles effectively".

Decision 1/95 imposes a lot of requirements on Turkey which may be argued to fall outside the basic customs union structure. As the customs union arrangement is considered only a transitional or temporary measure, which should be leading to full membership, requiring a national law at this stage may be understandable. However, we would like to note that requiring Turkey to have a national competition law is rather far fetched, as Italy, being a full Member-not just having a customs union- did not have a national competiton law until 1990. If a Member State did not have a national competition law for more than 30 years, then isn't it too much to ask from Turkey to have national legislation on

competition when it was only completing a customs union - not being a member state ? Furthermore, the national laws on competition in the Member States varied greatly both in structure and in detail. Besides, if an agreement having a prohibited effect in the Community is caught, even if the agreement be made outside the EC (by foreigners who carry on no activities in the Community) it has been long held that the Commission will have extraterritorial competence. Therefore, even if there were no national legislation, Community competition laws could be applied. In any case these provisions were included in Decision 1/95.

Turkey, as said above, passed a Law on Competition in December 1994 which is also based on the competition articles of the Treaty of Rome. After some delays in the appointment of the members of the Board, the Competition Board is now in full operation and has published a number of Regulations concerning notifications, mergers, exclusive ditribution, exclusive purchasing agreements. With a small group of experts the Board has also ready rocked many boats in Turkey and started a number of investigations in various sectors, such as cement, food industries, distribution channels among others.

Anti-dumping and Other Trade Defence Instruments

In a customs union allegations of dumping are inconceivable. It was expected that with the completion of the customs union the Community allegations of dumping would be eliminated. Decision 1/95 has four articles in a special section entitled "Trade defence instruments".

Application of "trade defence instruments" will be subject to review by the Association Council. When the Council determines that Turkey has implemented competition provisions, controls on State aids and other parts of the "acquis communaitaire" which are related to the internal market and ensured efective enforcement, the Council of Association may decide to suspend the application of these instruments (Art. 44). The aim is to provide a guarantee against unfair competition comparable to that existing inside the internal market.

The Additional Protocol of 1970 in its Article 47 envisaged a very active role for the Council of Association in dumping cases. Indeed, during the transitional period, the Council of Association was to address "recommendations" to the person with whom such practices (dumping) originate for the purpose of putting an end to them, if it finds that dumping is actually being practiced. Therefore, any allegations of dumping must be made to the Association Council by one of the Contracting Parties. If the Council establishes that there is a dumping, it will address recommendations to the persons involved.

When the Council issue recommendations concerning the dumping practices, but the practice continues, then the injured Party may take "suitable protective measures", after notifying the Council of Association.

If the interests of the injured party call for immediate action, then that Party may introduce "interim measures of protection"; i.e. provisional anti-dumping duties after informing the Council. These "interim" measures may remain in force for up to three months. The Council may, at any time, decide that such protective measures shall be suspended pending the issue of Council recommendations.

The only Rome Treaty provision is Article 91 which specifically deals with anti-dumping procedure. Article 91 of the Treaty of Rome is limited in scope and time. It could be applied by the Member States only during the transitional period when the customs union was still not complete. This was appropriate since dumping procedures are not possible in a unified market, in which there are no customs and quantitative barriers. In the case of Turkey as all the customs duties and quantitative restrictions are removed there should be no dumping allegation.

During the transitional period the Community has not implemented the Article 47 procedure in cases of dumping allegations whereby the matter was to be discussed in the Council of Association and recommendations were to be made. Instead of using this method, the Commission started investigations and, without Council of Association involvement, imposed anti-dumping duties during the transitional period totally disregarding Article 47 of the Additional Protocol. Now, Decision 1/95 which marks the establishment of a Customs Union, refers back to Article 47 of the Association Agreement and stipulates that "the modalities of implementation of anti-dumping measures" explained in Art. 47 (which was applicable only during the transitional period) "remain in force" when the customs union is achieved. This is of course contradictory and we expect that the Association Council will, in one of its future meetings, suspend the application of these instruments.

It is also contradictory for the following reasons: Whereas Decision 1/95 "concerning the rules for implementing the final phase of the Customs Union", refers to Art. 47 of the Additional Protocol which clearly had a limited period of application ("during the period of twenty-two years", 1973-1995) but now as far as the modalities of implementation of antidumping measures set out in the Article 47 of the Additional Protocol is concerned, declared to "remain in force", the same Decision stipulates that "the consultation and decision-making procedures" (provided in

Section II of Chapter V) shall not apply to trade defence measures taken by either party."[18]

The aim of Art. 47 of the additional Protocol was of course to settle disputes concerning dumping allegations in the Council of Association through consultations, and has been totally disregarded by the community authorities during the period which it was specifically designed to regulate. Now, after the completion of the customs union (where allegations of dumping should not be entertained) Decision 1/95 Article 46 declares that "modalities of implementation of anti-dumping measures of Art. 47" remain in force but goes one step further and excludes the "consultation and decision making procedures" referred to in Section II of Chapter V of Decision 1/95.

Through a series of laws, regulations and decrees for adapting the Turkish legal system to the European Community, Turkey has already aligned her rules on state aids, incentives, competition and the like and therefore in principle it should be expected that the Council take a Decision for suspension of provisions on trade defence instruments. However, safeguard clauses will remain in force.

Taxation

The Treaty of Rome aims to prevent the Member States from applying protectionist measures indirectly by discriminatory taxation, after elimination of customs duties and quantitative restrictions has made resort to these protective devices impossible. Indeed, Article 95 prohibits the imposition of higher economic charges upon goods from other Member States than are imposed, directly or indirectly, upon similar domestic products.

[18] Probably the Community felt the need to make a statement in order to avoid this contradiction. Indeed in a declaration by the Community, it was stated that "the Commission, without prejudice to the position of the Council, in the exercise of its responsibilities for anti-dumping and safeguard measures, will offer information to Turkey before initiation of proceedings". According to this stament attached to the Decision 1/95, "appropriate modalities of application of Article 47 will be set out jointly before the entry into force of this Decision" i.e. 1.1.1996 but we have no information which would indicate that such modalities were set up. In fact the Community has been so generous (?) by declaring the following: "Furthermore, the Community will give on a case by case basis, where appropriate, a clear preference to price undertakings rather than duties in order to conclude anti-dumping cases where injury is found". We believe that in a customs union application of anti-dumping provisions is totally unjustified and it should be abondoned.

In line with the Association Agreement Art. 16 (which recognizes that, among others, taxation provisions contained in the Rome Treaty must be made applicable in the relations between Turkey and the EC), the Additional Protocol in its Art. 44 took the relevant provisions of the Rome Treaty (Art. 95) with a slight change whereby the words "No Member State shall impose ..." has been changed to "Neither Contracting Party shall impose ...".

Decision 1/95 of the Association Council repeats these provisions on indirect taxation (Art. 52). In terms of direct taxation the following principles are stipulated: No provision of Decision 1/95 shall have the effect of extending the fiscal advantages granted by either Party in any international agreement or arrangement by which it is bound. Both Turkey and the EC will be able to take any measure aimed at preventing the avoidance or evasion of taxes. Furthermore, both Turkey and the EC could apply the relevant provisions of their tax legislation to taxpayers whose position as regards place or residence is not identical.

Government Procurement

As a number of important “foundation pillars” of the association (like free movement of services, labour) have not been implemented yet, the public procurement markets have been left outside the scope of the Decision 1/95 of 6 March 1996. Only implementing the provisions of customs union - free movement of goods - but totally disregarding the other main pillars of the association (the remaining basic freedoms) - leave the present situation as a limping animal. It is clear that if the association can be regarded as a horse, only one leg of this horse is healthy and operational, whereas the remaining legs are paralysed. The legs are there - provisions of the Association Agreement and Additional Protocol, which are considered as "an integral part of European Law" and in certain cases may have direct effect- but require Decisions of the Council of Association to function. The Decisions to be taken by the Council may be likened to special injections to be administered to the horse in order to end the paralysis.

"As soon as possible", the Association Council will set a date for the "initiation of negotiations aimed at the mutual opening of the Contracting Parties' respective government procurement markets" (Art. 48).

Intellectual, Industrial and Commercial Property Rights

In its efforts to prepare the country for full Membership, Turkey has made extensive changes in her legislation. In order to complete the customs union which has been the main core of the final phase of the Association before accession, the Turkish Parliament (The Grand National Assembly or TBMM), the Council of Ministers, almost all the

Ministeries and public institutions passed many laws, regulations, decrees, bylaws and other types of legislative and administrative acts bringing the Turkish legislation into line with that of the Community acquis communautaire. Another area of regulation where voluminous legislation was adopted and International Conventions, Protocols and Agreements ratified by the Parliament, is Intellectual, Industrial and Commercial Property rights.

The only reference to this area of law may be deduced from Art. 16 of the Association Agreement whereby both Turkey and the Community recognized that principles laid down in the provisions on competition, taxation and the approximation of laws contained in Title I of Part III of the Treaty of Rome "must be made applicable in their relations within the Association" .

Title I of Part III contains "Common Rules" in three different chapters: 1. Rules on competition (rules applying to undertakings, dumping, and aids granted by States); 2. Tax provisions; and 3. Approximation of laws. Here, Art. 100 of the Treaty provided "the approximation of such provisions ... as directly affect the establishment or functioning of the common market" .

In a similar provision to the above-mentioned Art. 100, the Additional Protocol, in its Art. 48, authorized the Council of Association "to recommend the Contracting Parties to take measures to approximate the laws, ... in respect of fields which are not covered by this Protocol, but have a direct bearing on the functioning of the Association ...".

Art. 33 of the Association Council Decision 1/95 was devoted to this subject. Both the Community and Turkey confirmed the importance they attached "to ensuring adequate and effective protection and enforcement of intellectual, industrial and commercial property rights". According to this opinion, the Customs Union could function properly only if "equivalent levels of effective protection of intellectual property rights" were provided in both constituent parts of the Customs Union. Accordingly, the Parties undertook to meet the obligations set out in the Annex 8 of the Decision 1/95 (Art. 33/2). Naturally, although the reference was made to both of the Parties, it was Turkey which was going to implement all these provisions as the Community and Member States had already adopted these texts. However many countries which may be referred to as Turkey's competitors in international markets consistently refused to adopt such legislation or conventions, which would further hamper the competitivity of Turkish industry.

Again, it was Turkey, which undertook to change the legal system in this area in an overwhelmingly extensive manner, in order to complete the process of the customs union. Annex No. 8 "On Protection of Intellectual,

Industrial and Commercial Policy", consisting of four full pages, nine articles but listing many international conventions and agreements (all of which contain extensive provisions) which Turkey had to subscribe to, in addition to extensive national laws to be adopted, shows the dimension of the undertaking that Turkey has entered into.

Under Art. 1 of the Annex (No. 8) on protection of intellectual, industrial and commercial property"[19], Turkey undertook to implement the TRIPS Agreement no later than three years after the entry into force of Decision 1/95. Both sides confirm the importance they attach to the obligations arising from the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) concluded in the Uruguay Round of Multilateral Trade Negotiations.

Turkey also undertook "to continue to improve the effective protection of intellectual, industrial and commercial property rights in order to secure a level of protection equivalent to that existing in the EC". In order to ensure that these rights are respected, Turkey shall "take appropriate measures". Before 1.1.1996 Turkey was required to take a number of measures, pass laws and accede to international conventions on intellectual, industrial and commercial property rights.

Article 3 of the Annex listed the following conventions to which Turkey was to subscribe:

- Paris Act (1971) of the Bern Convention for the protection of literary and artistic works;

-Rome Convention (1961) for the protection of performers, producers of phonograms and broadcasting organisations;

- Stockholm Act (1967) of the Paris Convention for the protection of industrial property (as amended in 1979);

[19] Article 9 of Annex 8 gives a very wide definition of "intellectual, industrial and commercial property". Accordingly, these include copyright (copyright in computer programmes) and neighbouring rights, patents, industrial designs, geographical indications including appellations of origin, trade marks and service marks, topographies of integrated circuits as well as protection against unfair competition as referred to in Article 10 bis of the Paris Convention for the Protection of Industrial Property and protection of undisclosed information on know- how". After listing all the above, Art. 9(2) goes on to say that "this decision does not imply exhaustion of intellectual. industrial and commercial property rights applied in trade relations between the two Parties under this decision".

- Nice Agreement concerning the internal classification of goods and services for the purposes of registration marks (Geneva Act, 1977 as amended in 1979); and

- Patent Cooperation Treaty (PCT, 1970, as amended in 1979 and modified in 1984).

The Turkish Parliament passed Laws for the ratification of these Conventions. For the first two Conventions mentioned above see Turkish Official Journal (Resmi Gazete) 12 July 1995, No. 22341. The third Convention and Stockholm Act was ratified on 1 February 1995. The Nice Agreement concerning international classification of goods and services for the purposes of the registration of marks was also adopted by the Turkish Parliament (see Official Journal-Resmi Gazete, 13 August 1995, No. 22373). The Law for accession to the Patent Cooperation Treaty appeared in Official Joumal-Resmi Gazete on 12 July 1995; No. 22341.

A long list of Community legislation was given in Art. 4, whereby Turkey was to adopt domestic legislation in these areas. Thus, Turkey has adopted domestic legislation in these areas which is equivalent to the legislation adopted in the EC or its Member States.

Turkey has also undertaken to pass legislation in line with the four Council Directives related to copyright and neighbouring rights:

- The terms of protection in line with Council Directive 93/98/EEC (OJ L 290 of 24.1 1.93);

- Protection of neighbouring rights in line with Council Directive 92/100/EEC (OJ L 346 of 27.1 1.92);

- Rental and lending rights in line with Council Directive 92/100/EEC (OJ L 346 of 27.1 1.92);

The protection of computer programs as literary works in line with Council Directive 91/250/EEC (OJ L 122 of 17.05.1991).

In accordance with this undertaking, the Parliament of Turkey passed a law for a series of amendments to the Law for the Protection of lntellectual and Artistic Rights of 1951 whereby the legislation in force has been extensively reformed. This new Law (No. 4110) was published in Turkish Official Journal-Resmi Gazete on 12 June 1995, No. 22311 well ahead of the 1.1.1996 deadline by which the Decision 1/95 was to enter into force.

It was also clear that Turkey had to modernize her patent legislation and its implementing decrees. Ankara was requested to pass patent legislation which would provide rules on compulsory licensing meeting at least the TRIPS standards, patentability of all inventions (other than pharmaceutical products and processes for human and animal health but including agrochemical products and processes) and a patent term of 20 years from the filing date.

A Government Decree on the Protection of Patent Rights which has the force of Law, was published in the OJ (Resmi Gazete) on 27 June 1995 (No. 22326), in accordance with the Association Council Decision. The new modern law which substantially changes the previous Patent Law of 1879 contains fourteen chapters and a total of 176 articles. Subsequently, a regulation was published which carried detailed Provisions for the implementation of the Patent Rights Decree (OJ-Resmi Gazete, 5 November 1995, No. 22454).

Another important law in this area is the Decree-Law No. 554 concerning the establishment of the Turkish Patent Institute, published in the OJ-Resmi Gazete, 24 June 1995, No. 21970. This Institute will consider the applications, registrations and appeals concerning patents, trade marks, geographical indications, industrial designs and many other related matters.

Another Decree-Law for the Protection of Industrial Designs was published in OJ-Resmi Gazete on 27 June 1995, No 22326 and a Regulation for the implementation of this decree appeared in the OJ on 5 November 1995; No. 22454.

Turkey also accepted to adopt domestic legislation in the trade and service marks area in line with Council Directive 89/104/EEC (OJ L40 of 1102.89), industrial designs legislation, including the protection of designs in textile products, taking into account a Proposal for a Council Directive on Community Designs, Protection of geographical indications, including applications of origin in line with EC legislation and legislation on border enforcement against intellectual Property right infringements including trademark, copyright and neighbouring rights and design rights in line with Council Regulation (EEC) 3842/86 (OJ L 357 of 18.12.86).

In line with these Community Regulations and Directives, Turkey has prepared a new Law on the Protection of Trade Marks replacing the 1965 Law on Trade Marks, with a Decree having the effect of a Law adopted by the Council of Ministers on 24.6.1995 and published in the Official Joumal-Resmi Gazete on 27 June 1995, No, 22326, pp. 87-113 with eleven chapters and 87 articles.

On 24 June 1995, the Council of Ministers adopted another Decree which has the force of Law entitled " ..... Decree on the Protection of Geographical Indications" which appeared in Official Journal-Kesmi Gazete No. 22326. Regulations for the Implementation of this Decree-Law was published on 5 November 1995, RG No. 22454 and 7 November 1995, RG No 22456.

We do not intend to cover all the legislation adopted in Turkey during the whole of 1994 and 1995 (before the entry into force of the Customs Union) which would be requiring a very extensive study as the Turkish Official Journal appeared many times in thick book volume format, sometimes carrying several hundreds of pages with texts adopting Community legislation.

Article 6 of the annex 8 of the Council decision 1/95 requires that Turkey accede to a number of conventions on intellectual, industrial and commercial property. Although a list of such conventions is provided, there is a stipulation to the effect that Turkey will acceed to these Conventions, "provided that the EC or all its Member States are parties to them":

- Protocol to the Madrid Agreement concerning the international registration of marks (1989);

- Budapest Treaty on the international recognition of the deposit of micro-organisms for the purposes of Patent Procedure (1977 and amended in 1980); and

- International Convention for the protection of new varieties of plants (UPOV, Geneva, 1991 Act).

Decision 1/95 of the Association Council is so comprehensive that with the completion of the customs union and the implementation of the legislation, Turkey has already adopted a very important part of the acquis communautaire. In fact, as pointed out above, draft texts in terms of Commission Proposals to the Council are cited before their adoption by the Community institutions and requirements are underlined for Turkey to adopt domestic legislation in order to reach alignment with draft EC regulations. For example a proposal for a Council Directive on the legal protection of databases (OJ C 156 of 23.06.92) is cited together with another proposal for a Council Regulation (EEC) on Community plant variety rights (OJC 113 of 23.04 93). In some cases where there is no Community legislation, reference is made to Member States legislation. For example Turkey shall adopt domestic legislation for "protection of know-how information and trade secrets legislation in line with Member States' legislation". In this area Turkish legislators will

examine the laws of Member States and prepare a text which should cover the main principles of Member States' laws.

In the copyright and neighbouring rights applicable to works transmitted by cable or satellite, Turkey has to adopt legislation in line with Council Directive 93/83/EEC (OJ L 248 of 6.10.93) and on protection of topographies of semiconductors in line with Council Directive 87/54/EEC (OJ L 24 of 27.01.87)

"Comitology" under the Association Council shows an inclination to widen. The Joint Customs Union Committee (which was established by Decision 1/95) shall monitor the implementation and application of the IPR provisions of this Decision and perform other tasks which the Association Council may assign to it, This Joint Customs Union Committee "shall make recommendations to the Association Council which may include the establishment of a Sub-Committee on IPR".

Institutions of the Association

The Ankara Agreement provides a machinery for the decision- making process and a procedure for the resolution of disputes. The main decision-making institution of the Association is the Council of Association.

Recent judgements of the Court of Justice of the EC underlined the importance of this institution. Indeed, according to the Court, the decisions of the Association Council under the Association Agreement between Turkey and the EC constitute "an integral part of the Community legal system". In the Sevince Case[20] ", the European Court of Justice held that "acts (decisions) adopted by the Association Council can be directly effective in the Community if they comply with the same requirements as apply to the Association Agreement".

The Council of Association consists of members of the Governments of the Member States and members of the Council and of the Commission of the Community on one side and of members of the Turkish Government, on the other (Art. 23). However to redress the balance of numbers, it was agreed that the decisions must be taken unanimously. This rule reflects the bilateral and equal character of the Association.

A Commission publication on Turkey-EC Association published in 1977[21] sheds some light on the institutional structure: "in studying the general nature of Association, we indicated that this included, inter alia, the extension -albeit partial - of the institutional methods applicable within the Community to the relationship between it and the associated

[20] Sevince v. Staatssecretaris von Justitie, Case c. 192/89, 1992, CMLR 57.
[21] See fn. 6.

country".The whole thrust of the Treaty of Rome was precisely to break with the traditional character of a multilateral treaty. For the performance of the multilateral treaties usually suffer from a lack of executive or judicial machinery[22] : "In order to attain the objectives of this Agreement, the Council of Association, shall have the power to take decisions in the cases provided for therein". Both Turkey and the Community shall take the measures necessary to implement the decisions taken. In addition to the decisions, which are binding on the parties, "the Council of Association may also make appropriate recommendations".

Article 22 (1) of the Ankara Agreement empowers the Council of Association to take decisions "in order to attain the objectives of this Agreement", "in the cases provided for therein", i.e. the Agreement. Therefore, one may assume that the Council of Association may take decisions only in the cases provided for in the Agreement. Thus both the Association Agreement and the Additional Protocol contain many articles which impose a duty on the Council to take necessary measures for the implementation of the Agreement covering a range of areas from customs arrangements to agriculture. (These include measures concerning the free movement of agricultural products, social questions like free movement of workers, social policies, the freedom of establishment, free movement of services, extension of the Community transport policy to Turkey, the alignment of economic policies etc.).

However, the powers of the Council of Association are not limited only to those issues which are specifically mentioned in the Agreement or the Protocol. In the course of implementation of the Association arrangement, "attainment of an objective of this Agreement" may call for a "joint action by the Contracting Parties" but the requisite powers were not granted in the Association Agreement. Even in such cases where the Agreement does not authorize the Association Council to take action, but the attainment of an objective of the Association requires such a measure, then the Council of Association, according to Article 22 (3) "shall adopt appropriate decisions". It is clear that the Contracting Parties by adopting this provision were specifically "guided by" Article 235 of the Treaty of Rome which authorizes the Council to take the "appropriate measures", according to the Community decision making procedure, even if "the Treaty has not provided the necessary powers", "if action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community".

[22] Article 145, of the EC Treaty, at the time, read as follows: “To ensure that the objectives set out in this Treaty are attained, the Council shall, in accordance with the provisions of this Treaty .... have power to take decisions”.

It must be emphasized that the Council of Association constitutes a body for negotiation and for the implementation of the principal decision to be taken for the development of the Association. There are many provisions of the Association Agreement and the Additional Protocol which await the decisions of the Council for their implementation.

Its character as an effective decision-making body has been accentuated by the practice, for which the Turkish partner has particularly pressed, of not letting "the Council meet for nothing" or in the words of a Foreign Minister of Turkey who served in the 60s and 70s, of not letting the Council meet only "to make declarations of goodwill, promises of a general nature and minor adaptations which only serve to maintain appearances".[23]

The Council of Association is the place where agreement between the Community and its associate, Turkey are arrived at. "Therefore each meeting of the Council must lead to strengthening of EC-Turkey relations in conformity with the objectives of the Association", according to the Commission publication referred to above.

Unfortunately, there have been periods during which the Council could not meet. It is highly regrettable that one Member State could, from time to time, paralyze the functioning of the association institutions, raising objections on matters which have nothing to do with the Association relationship.

Committee of Association

According to Article 24 (3) of the Agreement, "the Council of Association may decide to set up committees to assist in the performance of its tasks, and in particular a committee to ensure the continuing cooperation necessary for the proper functioning of the agreement". In order to ensure the necessary co-operation between sessions of the Council, an Association Committee was established by a Decision of the Council ofAssociation (Decision No. 3/64).

The Association Committee assists the Council in the fulfilment of its tasks; prepares for its proceedings and examines all the questions which are referred to it for this purpose. Based in Brussels, the Committee meets at ministerial level "at least once every six months unless there is a decision to the contrary".

Moreover, the Council of Association can decide on the creation of any other committee able to assist it in its tasks. As the Council is authorized to set up committees especially "to ensure the continuing cooperation

[23] Turkey-EEC Relations, op cit., p. 31.

necessary for the proper functioning of the Agreement", Decision 1/95 of 6 March 1995 established the EC-Turkey Customs Union Joint Committee which "shall carry out exchanges of views and information, formulate recommendations to the Association Council and deliver opinions with a view to ensuring the proper functioning of the Customs Union" (Art. 52). This Joint Committee shall meet at least once a month. However, it may be called for a special meeting when a need arises.

The institutional structure and the committees established under the Association Council need an in-depth study. Participation of Turkish experts "in the work of a number of technical committees which assist the European Commission in the exercise of its executive powers in areas of direct relevance to the functioning of the customs union" (Art. 60) is also an important matter which must be put into the focus of analysis.

Consultation and Decision Procedures

The "institutional void", referred to by Gilsdorf,[24] "creates, indeed, enormous problems for a fully comprehensive association agreement, because a third country would be bound to apply Community policies and legislation without taking part in the decision-making as such". Furthermore, the question of legal control and protection of individuals "would raise great difficulties because it is hardly conceivable that the associated country would submit to the jurisdiction of the EC Court". In order to guarantee the uniformity of interpretation and application of the established rules between the associated partners, Gilsdorf proposes full membership "even at the price of a long transitional period".

The present situation has been heavily criticized by leading political parties in Turkey, arguing that Turkey is bound to apply Community policies and legislation without taking part in the decision making institutions. The only argument put forward in reply to these critics has been the "temporary" nature of the present arrangements and a promise to the effect that the final phase of the association will lead to accession to the Union which should be the natural conclusion of this process.

It is clear that Turkey is not only establishing a customs union with the European Community but also adopting many of the Common Policies enforced by the Member States. Indeed, this situation may be qualified as "taking all the obligations" and "responsibilities" of a Member State without enjoying the benefits of Membership, the most important one

[24] Gilsdorf P. : *Legal Aspects in relation to the Turkish Application for Accession to the EC,* Revised version of a lecture given at the Seminar in Istanbul, 14-16 May 1987, organized by the TOBB Union of Turkish Chambers of Commerce.

being that of taking part in the institutions taking all the important decisions.

The Decision of the Association Council of 6 March 1996 (No. 1/95) contains seven long articles concerning "consultation and decision procedures". In areas of direct relevance to the operation of the Customs Union, Turkish legislation "shall be harmonised as far as possible with Community legislation" (Art. 54). "Areas of direct relevance to the operation of the customs Union" has been defined in a very wide and comprehensive manner, including the following:

- commercial policy and agreements with third countries comprising a commercial dimension for industrial products;
- legislation on the abolition of technical barriers to trade in industrial products;
-competition;
- industrial and intellectual property law
-customs legislation.

Wherever new legislation is drafted by the European Commmission in any of these areas which "have direct relevance to the operation of the Customs Union", the Commission shall "informally consult Turkish experts", together with experts from the Member States of the EC (Art. 55).

It remains to be seen how effective an "informal consultation" will be during the months to come. After formal consultations with the Member States' experts and "informal consultations" with Turkish experts, the Commission will transmit its proposal to the Council of the European Communities where all the Member States are represented from working groups to COREPER and the Council of Ministers. As Turkey is not a member, the Commission "shall send copies thereof to Turkey", presumably for information purposes. However, before the actual decision of the Council of Ministers, the Community and Turkey may consult each other, upon the request of each other, within the Customs Union Joint Committee (Art. 55). The drafters of this provision can not be satisfied with the consultation procedure described above as they included this following paragraph to the article concerned: The European Community and Turkey "shall cooperate in good faith during the information and consultation phase with a view to facilitating, at the end of the process, the decision most appropriate for the proper functioning of the Customs Union".

When the Community adopts legislation in those areas which has "direct relevance to the functioning of the Customs Union", Turkey will be immediately informed within the Customs Union Joint Committee, to

allow Turkey to adopt corresponding legislation which will ensure the proper functioning of the Customs Union". (Art. 56)

Where there may be problems for Turkey in adopting the corresponding legislation, the Customs Union Joint Committee "shall make every effort to find a mutually acceptable solution" in order to maintain a properly functioning Customs Union (Art 56/2).

Another contradictory provision is in Article 57 of Decision 1/95 concerning the Customs Union implementation. The said provision mentions two opposing principles adopted in the Decision: On the one hand it talks about the "principle of harmonisation" which provides that Turkish legislation shall be harmonised with Community legislation -as far as possible. On the other hand, the same article mentions "Turkey's right ... to amend legislation in areas of direct relevance to the functioning of the Customs Union". While Turkey has a right to amend legislation concerning customs union -presumably the legislation adopted by the Community will be amended by Turkey before it is implemented or introduced into Turkish internal law - such a right to differ from the Community legislation depends on the approval of the Customs Union Joint Committee. This Committee has to conclude that "the amended legislation does not effect the proper functioning of the Customs Union".

It is clear that an effective customs union needs complete harmonisation of customs legislation which requires the participation of all the members of the customs union to take part in actual decision-making institutions. However a member of the customs union which is not a Member State of the EC is not represented in the Institutions (Council; Commission, Parliament, Court of Justice and others). Therefore her chance to influence decisions is minimal. Since that country is not a full member, there is no direct effect or direct application of these texts in the country involved. Therefore, the legislation adopted by the Community has to be adopted by Turkey in order to introduce these texts into Turkish internal law. On the one hand the Decision recognizes "Turkey's right ... to amend legislation in areas of direct relevance to the functioning of the CU", on the other hand it puts a limit to this right to the effect that such "amended legislation does not affect the proper functioning ofthe CU".

If, on the other hand, Turkey is contemplating new legislation in an area "of direct relevance to the functioning of the Customs Union", the Turkish Government shall "informally" seek the views of the Commission on the proposed legislation in question.

Furthermore, the wording of Article 55 (2) is not in conformity with regular diplomatic terminology: Turkey "shall informally seek the views of the Commission on the proposed legislation in question so that the

Turkish legislator may take his decision in full knowledge of the consequences for the functioning of the Customs Union".

Once the proposed legislation has reached a sufficiently advanced stage of drafting, consultations will be held within the Customs Union Joint Committee. If such legislation is likely to disrupt the proper functioning of the Customs Union "the Customs Union Joint Committee" shall try to find a mutually acceptable solution.

If discrepancies between Community and Turkish legislation cause or threaten to cause impairment of the free movement of goods or deflections of trade, the affected Party may take necessary protection measures and notify the Customs Union Joint Committee. Priority should be given to measures which least disturb the functioning of the Customs Union. The Customs Union Joint Committee may decide whether to amend or abolish these measures.

As to the judicial procedure for the settlement of disputes between parties, the Council of Association Decision 1/95 provided an arbitration method which will be discussed below. At this juncture it is sufficient to note that the "protection measures" taken by the affected Party against such discrepancies in Customs Union legislation is included within the limited competence of the arbitration tribunal.

Settlement of Disputes

Whereas the legal disputes between Member States and Community institutions may be referred to the Court of Justice of the European Communities, there is no provision in the Association Agreement whereby the Court would have automatic jurisdiction.

In case a dispute arises between Turkey and the EC relating to the application or interpretation of the Association Agreement (Additional Protocol or the Decisions of the Association Council), the Contracting Parties may bring the case to the Council of Association for a settlement (Art. 25). Complaints by private parties or other organizations are implicitly excluded. Only Turkey, the Community and Member States of the Community may bring their complaints to the Council. Naturally, individuals or legal entities may bring their case to their respective Governments of the Member State or of Turkey. It is interesting to note that a third State may not bring an action in the Association Council.

The Council may resolve the dispute by a Decision which shall be binding upon the parties concerned since each party is required to take the measures necessary to comply with such decisions. (Art. 25/3).

In cases where the Association Council cannot resolve the dispute (due to the fact that the decisions can be taken unanimously where both Turkey and the Community have one vote each) the Council may decide to submit the dispute to the Court of Justice of the EC or to any other existing court or tribunal. Naturally, the decision to submit a case to the European Court can only be taken unanimously. Therefore, when one of the Contracting Parties (the Community or Turkey) do not wish to bring the dispute to the Luxembourg Court or to any other judicial authority, the conflict will remain unresolved. This is another facet of the "institutional void" or deficiency in the association which is so comprehensive and complex that a judicial mechanism will be required for an efficient interpretation and implementation of the customs union. It may be argued that the customs union is not in itself an end to this relationship and is introduced only as a pre-accession stage which should lead to full membership in due course; therefore the present anomaly is only temporary.

The Agreement provides another possibility for the settlement of disputes where the Council of Association cannot resolve the problem. Article 25 (4) empowers the Council of Association to determine the detailed rules for "arbitration" or for "any other judicial procedure" to which the Contracting Parties may resort during the transitional and final stages of the Association. This is a special mechanism, as the associated country cannot be involved with the European Court before accession.

The Council of Association in its Decision 1/95 (Customs Union) provided a special arbitration procedure with a very limited jurisdiction in terms of the types of the conflicts which may be referred to for arbitration (Art. 61). The arbitration is only open in the following matters:

1. If discrepancies between Community and Turkish legislation or differences m their implementation in an area of direct relevance to the functioning of the Customs Union, cause or threaten to cause impairment of the free movement of goods or deflections of trade and the affected Party considers that "immediate action" is required, it may itself take the necessary "protective measures". This measure taken by one of the Contracting Parties may be challenged by the other in the arbitration panel.
2. Safeguard measures taken in accordance with the Agreement may also be brought to the Arbitration Panel."[25]

[25] Article 60 of the Additional Protocol provides that if serious disturbances" occur in a sector of the Turkish economy (or of the Community), or prejudice the external stability or adversely effect the economic situation in a region of Turkey (or the Community), Contracting Parties may take the "necessary protective measures" (Art. 60 (1) for Turkey, Art. 61 (2) for the Community).

3. Rebalancing measures taken by either Party may also be referred to arbitration."[26]

Where the disputes relate only to one of the above three cases, a Contracting Party may bring the dispute to arbitration within six months of the date on which this procedure was initiated. Therefore, each Party must bring an action to the Arbitration Panel within six months.

The Arbitration Tribunal consists of three arbitrators. The two parties to the dispute shall each appoint one arbitrator within 30 days. In such a procedure both Turkey and the Community will appoint one arbitrator each. The two arbitrators so designated shall nominate by joint agreement the third arbitrator who is referred to as the "umpire". The umpire may not be a national of either Turkey or the Community (or Member State).

If arbitrators appointed by both parties cannot agree within two months of their appointment, the umpire shall be chosen by them from seven persons on a list established by the Association Council.

The arbitration tribunal shall sit in Brussels and take its decisions by majority.

Financial Cooperation

Whereas the establishment of a customs union between Turkey and the European Community has been achieved, the necessary support mechanism in terms of financial cooperation is still in a limbo.

In fact, Turkey has not received any financial support from the Community since 1980 when the fourth Financial Protocol was adopted between the two parties. From the beginning, the Association Agreement was regarded as "an association for the purposes of development" and "an association prior to accession". The preamble to the Ankara Agreement underlined this fact with the following statements:
- Determined to establish ever closer bonds between the Turkish people and the peoples brought together in the European Economic Community;
- Resolved to ensure a continuous improvement in living conditions in Turkey,... through accelerated economic progress and the harmonious expansion of trade, and to reduce the disparity between the Turkish economy and the economies of the Member States of the Community;

[26] According to Article 64 of the Decision 1/95, "if a safeguard or protection measure taken by a Contracting Party creates an imbalance between the rights and obligations under the -customs union- decision", the other Contracting Party may take "rebalancing measures in respect of that Party".

- Mindful both of the special problems presented by the development of the Turkish economy and of the need to grant economic aid to Turkey during a given period;
- Recognizing that the support given by the European Economic Community to the efforts of the Turkish people to improve their standard of living will facilitate the accession of Turkey to the Community at a later date;
... have decided to conclude an Agreement establishing an Association ..." (O.J. No. 217, 29.12.1964).

In order to attain the objectives of the Association Agreement, Financial Protocols were entered into. The first Financial Protocol (1964) was for an amount of ECU 175 million for the financing of investment projects. Although this may seem to be a negligible amount today, at the time it played an important role. It should be noted that in 1964 Turkey's annual export figure was around 400 million dollars. Similarly, second and third Financial Protocols were signed and implemented until 1980 when the fourth Financial Protocol was agreed. The total amount of Community funds to be allocated to Turkey within the framework of the fourth Financial Protocol was ECU 600 million for a period of five years. Again, this figure may not impress the reader today but if we recall that in 1980 the yearly exports of Turkey were around the two billion dollar level, it appears that the fourth Financial Protocol provided considerable amount of funds to Turkey. However, this Protocol has never been implemented and since 1980 Turkey has not benefited from any EC fund or credit. It must be added that after the fourth Financial Protocol, which was concluded for a period of five years, fifth and sixth Financial Protocols should have been in progress covering the period up to 1996.

Indeed, whereas Turkey was reducing her customs walls towards Community products, the required Community support for the industrial restructuring in Turkey never materialized. Indeed, for a period of 15 years the Community failed to fulfill its obligations towards Turkey.

Another important provision of the Association Agreement and Additional Protocol was the implementation of the free movement of workers in accordance with articles 48, 49 and 50 of the Treaty of Rome. Indeed, free movement of workers were to be achieved gradually between 1976 and 1986. The logic behind this arrangement was the following: Whilst Turkey was opening up her markets to Community industrial products over a 22 year period, she was going to have some structural problems. Some industries were going to have difficulties and thus the process would result in unemployment.

However, the loss of these jobs resulting from Community competition could be compensated by providing jobs for Turkish workers in Member States. Unfortunately, the provision for free movement of workers were

not implemented and the balance of rights and obligations of the two Contracting Parties in the Association Agreement was further disturbed against Turkey. Not only were the financial protocols neglected, but also the free movement of workers could not be implemented. In spite of these negative influences Turkey continued to open up her markets to Community industrial products and by 1996 a customs union was established.

Although the Commission in its opinion on Turkey' s Request for Accession underlined “the importance of financial support to Turkey" in 1989, by stating that "Financial Cooperation should be revitalized by releasing the resources of the Fourth Financial Protocol" and adding that "the Community should further reflect on the possibility of unilaterally granting loans ... for the financing of infrastructure projects of interest to both Turkey and the Community", no progress was made.

A close observer of Turkey-EC relations, in a lengthy analysis of the balance of rights and obligations of the two parties, after underlining the importance of the release of the Fourth Financial Protocol, pointed out that there was a need to make “an offer to a direct follow-up by a new Financial Protocol or another measure which would contribute to the compensation for the negative economic consequences caused by the denial of freedom of movement" for workers.[27]

Regional and Economic Effects of Customs Union

Economists tell us that the liberalisation of factor movements may entail the gravitation of productive factors from slow-growth areas to fast-growth areas, and this may in the short term cause economic imbalances and inequality which would naturally be unacceptable to Member States. Accordingly, the creation of a Customs Union profoundly affects the labour and capital markets in the countries concerned, and the integration of production factor markets affects the production of goods and thus trade.

As far as standard neo-classical economic theory is concerned, it is of no real consequence why regional disparities emerge, since there are mechanisms in an economy which will ensure that they will prove to be only a temporary phenomenon. Tomkins and Twomey argue that "cumulative causation theories" provide a strong theoretical rationale for widening regional prosperity. The basis of these theories lies in the recognition of the fact that because of the impact of differing levels of productivity or the existence of internal and external economies of scale, it is perfectly feasible that economic benefits begin to accumulate in

[27] Kramer, op cit, p. 572.

particular regions of an economy and become self-perpetuating. In such circumstances, market forces may actually come to reinforce this development and contribute to unbalanced regional growth".[28]

It is clear that once the process of economic integration is in progress, it is likely that already existing problems of regional disparities will intensify. The productivity differentials will continue to exist and they will favour the technologically advanced firms of developed areas within the economic union.

Another important factor to be taken into consideration is this: Economic integration may encourage concentration of new industry and relocation of existing industry in certain areas of the union which give superior infrastructure, lower transport costs and availability of skilled labour. Thus, with the enlargement of the market and enhanced competition, the most efficient enterprises will expand by the integration process, while the less efficient will be driven out of the market. Consequently, the economic activity at the periphery of the economic union will be affected negatively and disproportionately from the effects of integration as the entreprises at the periphery are on the whole less efficient, with lower productivity than those at the developed centre. Hitiris, in his book on European Community Economics, submits that "in addition to these problems, there is always the possibility that common policies undertaken for the realisation of integration objectives, may have profound and sometimes unforeseen regional effects".[29] Therefore, it is clear that as a consequence the rates of growth in the developed centres will be higher than those in the less developed regions of the union.

On the one hand, the economic theories point out the advantages of primary forms of integration, namely of the goods markets and markets of production factors and argue that all partners may profit from the establishment of a customs union. Furthermore, the economic theories also underline that "the profit of integrated product markets is enhanced if the internal movement of the production factors, that is to say movement of labour and capital is liberalised. To let markets function properly, a certain level of positive integration is needed".

Economists and politicians act upon the following assumption: Competitive markets (efficiency) generates considerable inequality.

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[28] Tomkins, J. and Twomey, P. : Regional Policy, European Economic Integration, McDonald and Dearden (eds), London 1992, p. 100.

[29] Hitiris, T. : European Community Economics, 2nd. Ed., Harvester 1991, p. 233.

Government and other institutions are then required to reduce this inequality by redistribution, even if it means some loss of efficiency. [30]

The European Community was created as a common market. The objective was to step up efficiency and stimulate economic growth by integrating the markets of goods and economic factors the Turkey-EC Association Agreement also provided for the integration of the markets of goods and productive factors). That the ensuing structural changes in the EC implied some unacceptable consequences for certain sectors of the society was expected (like relocation of economic activities, changing composition of sectoral activity). The most vulnerable groups were concentrated in particular regions of the customs union. In short, regional problems are the disparities in the levels of income, in rates of economic growth of output and employment, and in general in the levels of economic inequality between the geographic regions. Free competition does not tend to equalise factor returns across regions and therefore regional differences in economic development remain an important problem. Thus, market forces cannot be relied upon to produce the necessary degrees of inter-regional balance in economic growth. Hence, areas that were considered relatively prosperous before integration may turn into backward regions of the union. Therefore, the costs and benefits of integration must be properly shared between the member countries and the regions of the economic union as a whole. To this end the EC developed a number of instruments and policies which should be extended to Turkey being part of the same customs union. Indeed, the Community recognised that the problem of regional disparities between the richest and the poorest areas threatened to disrupt the convergence of economic performance inside the EC and to delay the progress towards integration. Various Community funds and common policies had been designed to function with regional problems among their objectives. These funds finance regional projects for modernisation of industry, investment for job creation, and training and retraining schemes in problem areas.[31]

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[30] According to Okun there is a trade-off between efficiency and equality. Okun, A. : Equality and Efficiency: The Big Trade-Off; Brookings, Washington 1975.

[31] For a detailed analysis of Community regional policies and related questions see, Molle, W. : The Economics of European Integration -Theory, Practice, Policy, Dartmouth, 1990; McDonald F. and Dearden, S. (eds) : European Economic Integration, Longman, 1990; El-Agraa, A. M. : The Economics of the European Community, 4111 Ed., Harvester Wheatsheaf, 1994; Nielsen, J., Heinrich, H. and Hansen. J. : An Economic Analysis of the EC, McGraw Hill, 1992; Artis, M. J. and Lee, N.: The Economics of the EU, Oxford, 1994; Hitiris. T. : op cit.

The Community decided that assistance will be provided where the GDP is below the national average or where there is dependence on agricultural or on a declining industry. Community regional funds are used in areas where there is a high rate of unemployment or net migration. Where Community policies, in particular free trade, has an adverse effect the Community funds will enter the picture.

"Completion of the single internal market", according to a Commission paper, "renders inevitable that resources both of people and materials, and capital and investment, flow into areas of greatest economic advantage". Increasing openness of product and factor markets will generate gains, but it is not certain that they will be distributed equally among the regions of the Community. Therefore, it was admitted that the integration process may have adverse sectoral and regional effects on the problem regions. As a result, the Single European Act provided important increases in the funds allocated for regional development with particular emphasis on concentrating resources in the regions with per capita GDP of less than 75 percent of the Community average. These funds included the ERDF, ESF, Guidance Section of EAGGF, among others.

Thus, all of Portugal, Ireland and Greece, parts of Spain, Italy and Eastern Germany, and the French overseas departments were listed as "first priority areas" because of their structural backwardness. This entitled them to funding of up to 75 per cent from Community funds which were doubled by 1992, increasing their share of the overall Community budget from 18 to 28 percent. Indeed, in February 1988 a decision was taken for the doubling in real terms of the resources of the three funds over the next five years.

The link established between the internal market and the doubling of resources[32] through structural funds also meant an implicit recognition of the danger that the weaker regions of the Community could end up as net losers from further market integration.

For the five year period 1989-1993, a total of 60.3 billion ECUs (in 1989 prices) was committed to be spent through the three Structural Funds.

[32] De Witte, B. : "The Reform of the European Regional Development Fund", Common Market Law Review, 23: 419 - 440 (1986); Lowe, P. : "The Reform of the Community's Structural Funds", Common Market Law Review, 25: 503-521(1988).

It may be of interest to students of Turkey-EC relations that by 1992, annual transfers through structural funds represented 3.5, 2. 9, and 2.3 of GDP for Portugal, Greece and Ireland. [33]

It must also be noted that the Commission called for a further substantial increase in the overall resources of the Structural Funds, which should raise expenditure to approximately 33.5 percent of the EC budget in 1977, compared to 27 percent in 1992.

On this matter, the Agreement on the European Economic Area constitutes an important model. It will be remembered that one of the demands of the less-developed EC Member States in the EEA negotiations was that EFTA should assist in the development and structural adjustment of the poorest Community regions. (This was partly achieved through improved market access for certain agricultural products particularly important to the economies of these countries. Parallel to the EEA Agreement a number of EFTA countries concluded bilateral agreements with the EC granting tariff and other concessions in the field of agriculture). The main solution was, however, a system of financial assistance provided by EFTA States. The financial mechanism was based on two different elements: grants and interest subsidies provided in connection with loans granted by the European Investment Bank. Among projects submitted by undertakings special consideration was to be given to small and medium sized enterprises. It was an interesting model as these EFTA countries were not becoming part of the customs union but were going to benefit from the free trade agreement. The less developed Member States of the EC requested these grants as a price for the opening of their markets to EFTA countries (Art. 115-117 and Protocol 38).[34]

With the customs union Turkey completely opened her markets to a much larger group of countries than small EFTA states. The EU constitutes at least twenty times larger economic power compared to relevant EFTA countries at the time.

The Commission Opinion on Turkey's application for membership observed as follows: "Progressive completion of the customs union will give the Community the opportunity to associate Turkey more closely

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[33] Tsoukalis, L. : The New European Economy, Oxford University Press, 1993, p. 245.

[34] Piipponen, B. R. and Westman-Clement, M. : The Agreement on the European Economic Area (EEA), A Guide to the Free Movement of Goods and Competition Rules, Oxford, 198, p. 18, 19.

within the operation of the single market, while taking into account the constraints imposed by the economic disparities between Turkey and the Community. This requires a strengthening of the machinery for agreeing concerted economic and social policies between the Turkish Government and the Community institutions".[35]

Customs Union Must Progress Continuously Towards Further Integration

As pointed out elsewhere in this paper, the establishment of a customs union between Turkey and the European Community was not in itself the final target of the Treaty. All of the four basic freedoms of movement of the Treaty of Rome were included in the Association Agreement. It was not only the establishment of a customs union (where both sides eliminate tariffs among themselves and establish a common tariff schedule on goods from third countries) but completing a real common market, thereby removing of all barriers to factor movements between Turkey and the EC. So far, only one of the free movements has been achieved with the customs union. The association Council is expected to start the implementation of other provisions of the Agreement where both Turkey and the EC agreed to be guided by the principles of the Treaty of Rome "for the purpose of abolishing restrictions on the freedom of establishment between them" (Art. 13) and "for the purpose of abolishing restrictions on the freedom to provide services" between Turkey and the EC. In fact Article 41(2) of Additional Protocol (1970) directs the Association Council to take necessary decisions to this effect: "The Council of Association shall, in accordance with ... the Agreement of Association, determine the timetable and rules for the progressive abolition ... of restrictions on freedom for establishment and on freedom to provide services".

Although the provision for the achievement of free movement of workers as provided in the Agreement and the Protocol could not be implemented because of unemployment and various social problems existing in some of the Member States, the suggestion put forward by Kramer[36] for a "measure which would contribute to the compensation for the negative economic consequences caused by the denial of freedom of movement" for workers should also be taken into account in future Association Council meetings in order to reestablish the equilibrium between the Community and Turkey.

[35] SEC (89) 2290 Final, 18 December 1989, p. 9
[36] Kramer. loc cit.

One argument for progressive integration according to William Molle "... springs from political rather than economic theory".[37] Molle explains why progressive integration is based on political theory in the following statement: "It is based principally on an analysis of the factors underlying the dynamics of integration, the outcome of which is that under the conditions prevailing in Western Europe, a free trade area and a customs union are unstable forms of cooperation, which can function only if progressing continously towards further integration. When the progress stagnates, forces opposed to the union's 'rules of the game' may gain weight and combine with others to become a serious threat to the freedoms achieved. Disintegration could then be prevented only by further integration".

Therefore, in the areas referred to above, the Association Council should take the required Decisions for the implementation of the already agreed principles. Indeed, Article 6 of the Association Agreement directs the Association Council in the following terms: "To ensure the implementation of the progressive development of the Association, the Contracting Parties shall meet in a Council of Association which shall act within powers conferred upon it by this Agreement".

Furthermore, according to Article 7, “the Contracting Parties shall take all appropriate measures, whether general or particular, to ensure the fulfilment of the obligations arising from this Agreement". Both the Community and Turkey "shall refrain from any measures liable to jeopardize the attainment of the objectives of the Agreement". This "solidarity principle" is enshrined in Article 7 of the Association Agreement, which, in identical terms to Article 5 of the EC Treaty, imposes a double duty upon the parties, i.e. to take appropriate measures to ensure the fulfilment of the obligations arising from the Agreement and to refrain from taking any measures liable to jeopardize the attainment of the objectives of the Agreement.

In this context, it must be stressed that the Association Agreement in Article 4 underlined the importance of "mutual and balanced obligations" of the Contracting Parties: "... the Contracting Parties shall, on the basis of mutual and balanced obligations: ... align the economic policies of Turkey and the Community more closely in order to ensure the proper functioning of the Association and the progress of the joint measures which this requires".

Without the full implementation of financial cooperation provisions which would be needed for a successful implementation of a customs Union between the Community and Turkey (in line with similar support

[37] Molle, W. : op cit. p. 30.

systems available to Member States which were devised to correct the regional inbalances) and without the full implementation of the other free movement of factors (free movement of services, right of establishment, free movement of workers or a compensation system for the negative economic consequences caused by the denial of freedom of movement), it cannot be argued that the present state of affairs is based on mutual and balanced obligations.

The Association Council must take appropriate measures "in order to ensure the proper functioning of the Association and the progress of the joint measures which this requires", on the basis of mutual and balanced obligations.

Community Declaration Concerning Financial Cooperation

Whilst the Association Council adopted Decision No. 1/95 on Customs Union on March 6, 1995, it also made a "Community Declaration Concerning Financial Cooperation" which was entered into the minutes of the EC-Turkey Association Council.

This declaration made by the Community clearly stated that "Turkey will need substantial financial resources, in particular long-term loans and technical assistance" in the new phase of the Association.

According to the Community Declaration, which was duly entered into the minutes of the Council, Turkey needed these "substantial financial resources" for the following purposes:

- to adapt its industrial sector to the new competitive situation created by the Customs Union;
- to improve its infrastructure linkage with the European Union (road transport, ports, airports, railways, telecommunications and electricity);
- to reduce the difference between its economy and that of the Community.

In line with these statements, the Community entered into the following undertaking: "To this end, the Community will resume its financial cooperation with Turkey before the entry into force of the Customs Union". Furthermore, the Community was going "to decide in the first half of 1995 on detailed arrangements for it".

Based on this clear undertaking the Customs Union provisions were applied and Turkey abolished all barriers to Community industrial goods, removing all customs duties and quantitative restrictions and measures having equivalent effect. Unfortunately, the European Community has been unable to perform yet another obligation it undertook towards

Turkey, an associate country, which expects to become a full member in accordance with the Treaty provisions.

It will be appropriate to analyse the elements of financial cooperation as foreseen by the Community in their Declaration of 6 March 1995 which may lead to a discussion whether or not such measures were sufficient for a successful implementation of the customs union with Turkey.

The Community declared that "substantial budgetary resources made available for cooperation with Turkey over a five-year period starting in 1996" was the first element of the financial cooperation. It was clear to everyone that the successful implementation of this customs union would indeed require a "substantial budgetary resource" to be made available to Turkey starting immediately in 1996. However, it was not clear what this "substantial resource" would actually be. In a footnote, the Community announced "for the record" that this substantial resource was a mere 375 million ECU for a five year period. One might question whether this amount would be an annual allocation of 375 million ECU for a five year period, considering the magnitude of the customs union. But the footnote was clear: the total sum involved is ECU 375 million.

Other elements of financial cooperation were listed. The second item is also very important: "continued access to funds (EIB loans) available under the 1992-1996 new Mediterranean policy". These funds would be used for the "financing of infrastructure projects in the fields of environment, energy, transport and telecommunication". The expected amount to be allocated under the new Mediterranean Policy for the 1992-1996 period was declared as "ECU 300 to 400 million, depending on the quality of the projects presented by Turkey. This amount should be allocated by the end of this year provided that Turkey submits suitable projects for this purpose. We do not want to discuss the use of the term "continued access to funds" as it would be debatable whether Turkey has indeed benefited from a *continued* access to EIB loans.

The Community also declared that Turkey would need "additional EIB loans ... in order to improve the effectiveness of the Turkish economy following the entry into force of the Customs Union". This facility will be available "over a five-year period starting in 1996".

Funding facilities which the Community will make available, as from 1996, "for all Mediterranean countries will also be open to Turkey". It may be asked why the Community felt a need to indicate that Turkey will be benefiting from these "budgetary resources as well as EIB loans" which were going to be available to "all the Mediterranean countries". Needless to say, although Turkey is indeed a Mediterranean country, she has also been the only country in the world which did not receive any financial cooperation from the European Community since 1980 -over a

period of fifteen years, in spite of the fact that she is the only associate country which has an Agreement specially designed as a "development" and "pre-accession" association. Therefore, the Community must have felt the need to underline that funding facilities to be made to "all the Mediterranean countries" will indeed be available for Turkey too.

Exceptional Additional Medium-term Macro-economic Financial Assistance

The final element of financial cooperation reflects the importance of the establishment of the customs union and foresees that there will be special circumstances whereby "exceptional additional medium-term macro-economic financial assistance" will be required. Therefore, it is provided in the Community Declaration that "at Turkey's request" and "in cases of special need", the Community will consider the possibility of granting additional financial assistance for medium-term macroeconomic purposes. Although, this assistance is linked "to the execution of IMF-approved programmes", "in coordination with international financial institutions", it has been presented as an important aspect of Community financial cooperation.

In addition to difficulties to be faced by Turkish industry in competition on industrial products, it has been calculated that Turkey will lose more than 1.5 billion US dollars from customs duties per year as a result of the customs union.

A former French Ambassador to Ankara observed the following[38] : "Meanwhile, Ankara will be opening its borders to thousands of European products on which customs duties will no longer be paid, resulting in an estimated loss of $ 2 to 3 billion a year in revenues. This deficit is far more than the compensatory assistance provided for in the Agreement, which reaches about $ 3 billion in grants and loans over five years. Competition will be stiff. To survive, Turkish enterprises will have to modernize, increase their investments and reduce their production costs. Few are capable of standing up to giants of European industry".

M. Eric Rouleau notes that it was beyond question that joining the Customs Union, "will entail hardships for Turkey". According to Rouleau: "Reservations and criticisms have been voiced in Turkish political and business circles on the particulars, not the principles of the Customs Union. Even those defending the agreement concede that it will be far less advantagous for the Turks than for their European partners, at least for the next few years. In practice, benefits of the Customs Union

[38] Rouleau, M. E. : "Turkey: Beyond Atatürk". Foreign Policy, 103: 70, 81 Summer 1996.

for Turkey would be limited. Turkey's trade deficit with the EU will likely widen in the near future. In 1995, European exports to Turkey were nearly 50 percent higher than imports from Turkey".[39]

It is highly debatable whether or not the financial cooperation package provided by the Community (in their Declaration which was entered into the minutes of the EC-Turkey Association Council) is sufficient for the successful implementation of the Customs Union. Just like a Member State, Turkey will be facing the same difficulties in terms of regional and economic implications of a Customs Union. Therefore, funds and programmes made available to Member States in order to cope with these problems should be extended to Turkey as well. Although this financial cooperation package is far from satisfactory, it has not been implemented because of the capricious attitudes of a certain Member State.

[39] Ibid.

L'ADAPTATION DU SECTEUR PUBLIC GREC AUX IMPERATIFS DU DROIT COMMUNAUTAIRE

Constantin Stephanou

1. MONOPOLES COMMERCIAUX

1.1. Obligations d'aménagement des monopoles commerciaux decoulant du traité CEE et de l'acte d'adhesion de la Grece

Il résulte de l'article 37 que les monopoles commerciaux existant peuvent subsister et de nouveaux peuvent être créés à condition que "soit assurée, dans les conditions d'approvisionnement et des débouchés, l'exclusion de toute discrimination entre les ressortissants des États membres".

Sont en principe visées les discriminations découlant des droits exclusifs suivants :
- droit exclusif d'importation
- droit exclusif d'exportation
- droit exclusif de commercialisation

En revanche le droit exclusif de production n'est pas visé. Par ailleurs, l'article 37 faisant partie des dispositions sur la libre circulation des marchandises, il n'affecte pas les discriminations qui résultent des monopoles de services.

Pour les Etats membres fondateurs de la CEE la période d'aménagement a pris fin le 1.1.1970. Cependant certains monopoles ont été aménagés après l'expiration de cette date. Par ailleurs, les nouveaux adhérants ont assumé des obligations d'aménagement de leurs monopoles commerciaux. Ainsi l'article 40 de l'acte d'adhésion de la Grèce lui faisait obligation de supprimer, dès le 1 janvier 1981 (date de l'adhésion), la totalité des droits exclusifs d'exportation, ainsi que les droits exclusifs d'importation sur le sulfate de cuivre, la saccharine et le papier mince, et d'aménager ses monopoles commerciaux de facon à ce que soit assurée avant le 31 décembre 1985 l’exclusion de toute discrimination entre les ressortissants des Etats membres. Suite à la recommandation de la Commission du 29 juillet 1983 demandant la suppression jusqu'au 31 decembre 1985 des droits exclusifs d'importation de certains produits minéraux, des allumettes et des cartes à jouer en provenance des Etats membres, la Grece a préféré supprimer totalement les monopoles y afférents. A la différence des monopoles sus-mentionnés qui relevaient du traité d'adhésion, les mesures législatives prises par la Grèce après son adhésion dans le domaine des hydrocarbures et des produits pharmaceutiques ont été jugées par la Commission comme étant incompatibles avec l'interdiction de l'article 37 § 2 du traité CEE.

1.2. L'aménagement du secteur pharmaceutique

En vertu de la loi 1316/83 les compétences de l'Etat dans le domaine de la réglementation pharmaceutique ont été déléguées à un établissement public dénomme Organisme national des médicaments (E.O.F.). Ce meme organisme a ete charge d'etablir une liste de medicaments remboursables par la sécurité sociale. Outre ses fonctions de régulateur du marché des médicaments, cet organisme a recu pour mission de développer la production pharmaceutique nationale, à l'aide de sa filiale de production (E.F.) dont il était l'unique actionnaire.

Dans son avis motivé du 2 août 1984 la Commission soulignait que bienqu'il ne bénéficie pas de droits exclusifs d'importation, d'exportation ou de commercialisation, l'E.O.F était en mesure d'influencer sensiblement l'importation et la commercialisation des médicaments, ce qui permettait de le considérer comme un monopole "de facto", au sens de l'article 37 du traité CEE. Dans la mesure où, par ailleurs, l'E.O.F. avait pour mission de développer l'industrie pharmaceutique nationale par le biais de sa filiale de production, il pourrait en résulter des discriminations entre les ressortissants des Etats membres au sens de l'article 37 § 1. Conformément par ailleurs à une jurisprudence établie, il aurait violation de l'article 95 dans la mesure où les taxes des médicaments percues par l'E.O.F. pouvaient servir à aider la production nationale au detriment des produits importés.

La Grèce rétorquait qu'un organisme de régulation comme l' E.O.F. ne pouvait constituer un monopole commercial au sens de l'article 37 et que l'obligation faite à l'E.O.F. de verser en cinq tranches annuelles le capital social de l'entreprise industrielle E.F. relevait de l'article 222 du traité CEE qui permet aux Etats membres de créer librement des entreprises publiques.

Pour résoudre le litige la Commission a d'abord proposé que l'Etat se substitue à l'E.O.F. en tant qu'actionnaire unique de l'entreprise industrielle E.F., de facon à ce que l'E.O.F. ne puisse plus favoriser cette entreprise. Devant le refus de la Grèce de dissoudre le lien entre l'E.O.F. et l'E.F., la Commission a néanmoins décidé de ne pas introduire un recours en manquement d'Etat, suite aux engagements pris par la Grèce d'introduire dans le statut regissant l'E.O.F. l'interdiction de tout subside de l'E.O.F. à l'E.F. à partir du 1 janvier 1988 et l'interdiction de toute garantie par l'E.O.F. des prêts contractés par l'E.F. (6. article 36 de la loi 1759/88). Cependant dans une lettre du 22 février 1991 notifiée un an après aux autres Etats membres, en vertu de l'article 93 § 2 du traité (JOCE C 48/6 du 22.02.92), la Commission soulignait que d'après les informations qu'elle possédait la filiale industrielle E.F. et la filiale commerciale K.F. (agence d'achat de medicaments) recevaient des aides publiques qui provenaient de toute évidence des recettes fiscales de

l'E.O.F. La Commission se réservait le droit de demander le remboursement des aides en question.

A noter qu'après l'avènement au pouvoir du gouvernement conservateur, l'entreprise industrielle E.F. et l'entreprise commerciale K.F. furent dissoutes (article 7 de la loi 1965/91). Mais la Commission n'a pas renoncé a la procedure qu'elle avait entamé.

1.3. L'aménagement du secteur pétrolier

Jusqu'en 1985 les entreprises de distribution étaient obligées de s'approvisionner en produits pétroliers finis auprès des deux raffineries de l'Etat dans la mesure où les importations de ces produits étaient soumises à un régime d'autorisation préalable, destiné à assurer la viabilité de l'industrie nationale. Par ailleurs, les deux raffineries privées ne pouvaient écouler leur production sur le marché national en vertu de clauses des accords d'investissement conclues entre l'Etat et les investisseurs privés.

Suite aux pressions exercées par la Commission, la Gréce décida d'aménager progressivement le monopole en question dont l'existence avait été passée sous silence dans l'acte d'adhésion. La loi 1571/85 adoptée à cet effet n'a pas toutefois satisfait la Commission qui a introduit contre la Grèce un recours en manquement d'Etat. Dans son arrêt du 13 decembre 1990 dans I'affaire C-347/88 la Cour de Justice se prononca entre autres à propos de l'article 1 § 2 de la loi prévoyant que "L'Etat a le droit exclusif de raffiner et par conséquent d'importer le pétrole brut destiné au raffinage".

La Cour constata que "le fait que ces importations soient effectuées exclusivement par l'Etat, ou sous son contrôle est inherent à l'existence du monopole national de raffinage...Dans ces conditions, la légalité, au regard du droit communautaire du droit exclusif de l'Etat hellénique en matière de pétrole brut ne saurait être mise en cause que si la légalité du monopole de raffinage au regard du droit communautaire était elle-même contestée. Or, la Commission a expressement indiqué qu'elle ne mettait pas en cause le monopole national de raffinage" (considerants 35-36).

La Cour constata par ailleurs qu'un monopole commercial existait dans le domaine des produits pétroliers finis puisque l'Etat hellénique avait (en 1988) le droit exclusif d'importer et de commercialiser une quantité de produits pétroliers correspondant à 65% des besoins du marché national. Dans la mesure où les distributeurs étaient tenus de s'approvisionner auprès des raffineries d' Etat à concurrence du pourcentage des besoins du marché national correspondant à la partie non aménagée du monopole de commercialisation il en résultait une discrimination au sens de l'article 37 § 1 à l'encontre des exportateurs établis dans d'autres Etats membres (cf. considérant 44). La Cour rejeta par ailleurs l'argument de la sécurité

d'approvisionnement tiré de l'article 36 du traité, argument qui avait été admis par la Cour dans l'affaire de la raffinerie irlandaise (arrêt du 10 juillet 1984 dans l'affaire 72/84, Campus Oil e.a. c. Ministère irlandais de l'Energie), Recueil 1984 p. 2727).

La Grèce, après le dépôt du recours par la Commission, procéda à des adaptations ponctuelles de sa législation (loi 1769/88 etc.) Mais à la suite de l'avenement au pouvoir du gouvernement conservateur la loi 2008/92 a été adoptée prévoyant l'élimination des droits exclusifs et autres restrictions destinées à assurer la viabilité des raffineries de l'Etat. Celles-ci n'étaient pas en fin de compte dans une trôp mauvaise posture, dans la mesure où ils avaient été modernisés (sans aide publique) au cours de la période d'aménagement du monopole et possédaient en outre des installations de stockage qui faisaient défaut chez les distributeurs.

2. MONOPOLES DANS LE DOMAINE DES SERVICES

Les règles du traité CEE et en particulier les dispositions sur la libre prestation des services (art. 59 ss.) et les règles sur la concurrence (art. 85 ss.) s'appliquent directement aux entreprises publiques, avec une possibilité d'exemption pour les entreprises qui assurent des services d'intérêt économique général (art. 90 § 2). En outre, I'article 90 § 1 interdit aux Etats membres d'édicter ou de maintenir en vigueur toute mesure susceptible de créer des discriminations entre entreprises publiques et entreprises privées. II en sera maintenant question des principales affaires d'aménagement des monopoles de services.

2.1. Services d'assurance : décision de la Commission du 24 avril 1985 (JOCE L 152/25 du 11.6.85) relative à l'assurance en Grèce des biens publics et des crédits accordés par des banques publiques helléniques.

Dans cette première decision d'application de l'article 90 § 1 par la Commission, en vertu des pouvoirs qu'elle tient du § 3 dudit article, il fut constaté entre autres que les dispositions légales grecques établissant "l'obligation que tous les biens publics, y compris ceux des entreprises publiques helléniques, doivent être assurés exclusivement par des compagnies helléniques du secteur public..." sont incompatibles avec les dispositions de l'article 90 § 1 du traité CEE en liaison avec celles des articles 52, 53, 5 a1.2 et 3 lettre f) dudit traité. Un recours de la Grèce contre cette décision fut rejeté.

2.2. Services audiovisuels : arrêt de la Cour de Justice du 18 juin 1991, aff. C-260/89 (S.A. de radiotélévision hellénique-ERT c/ Compagnie municipale d'information-DEP e.a.) non publiée à ce jour

Dans cette affaire la S.A. de radiotélévision hellénique-ERT a engagé une procédure en référé devant le tribunal de première instance de Salonique

contre la Compagnie municipale d'information-DEP e.a. estimant que les activités de cette dernière portaient atteinte à ses droits exclusifs découlant de la loi 1730/1987. Devant le tribunal grec les défendeurs ont invoqué l'incompatibilité de la dite loi avec le droit communautaire et l'affaire fut portée devant la Cour de Justice, dans le cadre d'un renvoi préjudiciel. La Cour a dit pour droit, inter alia, que :

- "Le droit communautaire ne s'oppose pas à l'attribution d'un monopole de television, pour des considérations d'intérêt public, de nature non économiques. Toutefois les modalités d'organisation et l'exercice d'un tel monopole ne doivent pas porter atteinte aux dispositions du traité en matière de libre circulation de marchandises et des services ainsi qu'aux règles de la concurrence".

- "L'article 90 § 1 du traitè s'oppose à l'octroi d'un droit exclusif de diffusion et d'un droit exclusif de retransmission d'émissions de télévision à une seule entreprise, lorsque ces droits sont susceptibles de créer une situation dans laquelle cette entreprise est amenée à enfreindre l'article 86 par une politique d'émission discriminatoire en faveur de ses propres programmes, sauf si l'application de l'article 86 fait echec à la mission particulière qui lui est impartie" (la Cour se réfère implicitement à l'article 90 § 2).

Dans l'affaire précédente la Cour a encore précisé que :

- "L'article 59 du traité s'oppose à une réglementation nationale qui crée un monopole des droits exclusifs de diffusion d'émissions propres et de retransmission d'émissions en provenance d'autres états membres, lorsqu'un tel monopole entraine des effets discriminatoires au détriment des émissions en provenance d'autres Etats membres, à moins que cette réglementation ne soit justifiée par l'une des raisons indiquées à l'article 56 auquel renvoie l'article 66 du traité".

2.3. Services de télécommunication

L'idée de la nécessaire séparation des rôles de régulateur et d'opérateur énoncée par la Commission dans l'affaire de l'0rganisme national des médicaments par rapport à l'application de l'article 37, a été subséquemment reprise par la Commission dans le contexte de la dérégulation des télécommunications, cette fois ci par rapport à l'application de l'article 90. La Commission, après avoir ignoré la libération des télécommunications dans son Livre Blanc sur le marché intérieur de 1985, elle définit sa politique à leur égard dans son Livre Vert du 30 juin 1987 [COM (87) 290 final]. La Commission notait que les organismes de télécommunications étaient des entreprises publiques, voire même privées, bénéficiant de droits spéciaux ou exclusifs, ainsi que d'un vaste droit de régulation (par le biais d'actes administratifs

fonctionnels). La plupart des droits spéciaux et exclusifs étaient jugés incompatibles avec les dispositions des articles 37, 59 et 86 du traité en liaison avec l'article 90 § 1. Suite à ces considérations une série de directives furent adoptées, parmi lesquelles il faut citer :

- Directive 88/301/CEE de la Commission du 16 mai 1988 relative à la concurrence dans les marchés de terminaux de télécommunications (JOCE L 131/73 du 27.5.88). Cette directive vise à assurer l'application des articles 37 et 90 § 1 dans les marchés des terminaux des télécommunications. Du point de vue institutionnel la directive est fondée sur l'article 90 § 3 du traité CEE.

- Directive 90/387/CEE du Conseil du 28 juin 1990 relative à l'etablissement du marché intérieur des services de télécommunications par la mise en oeuvre de la fourniture d'un réseau ouvert de télécommunications (JOCE L 192/1 du 24.07.90). Cette directive est connue comme Open Network Provision Directive. Elle vise à assurer la libre prestation des services (art. 59 ss.). Du point de vue institutionnel la directive est fondée sur l'article 100 A du traité CEE.

- Directive 90/388/CEE de la Commission du 28 juin 1990 relative à la concurrence dans les marchés des services des télécommunications (JOCE L 192/10 du 24.07.90). Cette directive précise les conditions d'application de l'article 90 apr.2 dans le domaine des télécommunications. Elle vise à assurer la séparation entre le régulateur" et l'"opérateur", dans la mesure où la confusion des deux fonctions au sein du même organisme est jugée incompatible avec l'article 86 du traité CEE qui interdit l'abus de position dominante. Elle réglemente par ailleurs les droits spéciaux attribués aux entreprises publiques de télécommunication. Elle prévoit enfin la possibilité de maintien de certains droits lorsque ceux-ci sont nécessaires pour la mise en oeuvre (financement) d'adaptations structurelles. Du point de vue institutionnel la directive est fondée sur l'article 90 § 3 du traité CEE.

Les directives sus-mentionnées n'avaient pas été mises en oeuvre par la Grèce jusqu'à la fin de 1991. Ainsi, le 19.12.91 la Commission lui a adressé un avis motivé, suivi le 12.02.92 d'une nouvelle menace de recours en manquement d'Etat. Un avant-projet de loi a été transmis à la Commission en mars 1992 mais la loi définitive n'a été adoptée qu'en juillet 1992 (Loi 2075/92). Cette loi portant sur l'organisation et le fonctionnement des télécommunications, a institué une Commission nationale des télécommunications, autorité publique indépendante (la première d'ailleurs en Grèce). Cette autorité competénte en matière de licences, devenait l'organe régulateur. Quant a l'Organisme Public des Télécommunications (OTE), il se voyait déchu non seulement de ses fonctions régulatrices, mais aussi de ses droits exclusifs, à l'exception du droit afférent e la téléphonie vocale qui devait lui etre attribué par

concession. La même loi prévoyait l'octroi de deux concessions à des entreprises privées pour le développement du téléphone mobile. Mais le gouvernement conservateur a voulu aller plus loin en procédant à une privatisation partielle de l'organisme par l'octroi du management et d'une part minoritaire du capital social à des intérêts privés. Une confusion a pu en résulter dans l'esprit des syndicats etc., ceux-ci soutenant que la privatisation en question résulte des exigences communautaires, ce qui n'était pas évidemment le cas.

L'aspect communautaire susceptible d'affecter la privatisation était la proposition d'acte du Conseil qui prévoyait la fin des droits exclusifs en matière de téléphonie vocale en 1998. Une telle perspective éliminait un attrait principal pour l'investisseur intéressé à acquérir le management et des actions representant 35% du capital social. Suite à ces considerations la Grèce a demandé une période transitoire de dix ans à partir de 1998, au lieu de la période des cinq ans qui lui était offerte. La libéralisation a été bloquée au sein du Conseil par cinq Etats membres, dont la Grèce. Entre temps le gouvernement socialiste au pouvoir depuis octobre 1993 a arrété le processus de privatisation et a remplacé la loi précitée par la loi 2246/94 Cette loi, ne s'éloigne pas de la philosophie de la loi précédente en matière de réglementation, tout en étant plus euro-compatible. Sur la base de cette loi la Commission nationale des télécommunications s'est prononcée sur les demandes de licences et en particulier celle de l'Organisme Public des Télécommunications (Decrêt Présidentiel 424/95).

La Grèce a demandé le 25 juin 1996 des périodes transitoires supplémentaires concernant l'application de la Directive 90/388 de la Commission, telle qu'elle a été modifiée par la Directive 96/19. Par sa décision du 18 juin 1997 la Commission a approuvé le report au 31 décembre 2000 de la suppression des droits exclusifs attribués à l'Organisme Public des Télécommunications (OTE) dans le domaine de la téléphonie vocale (mise à disposition et installation des réseaux). La Grèce devra respecter certaines conditions destinees a préparer la transition vers la libération.

Entre temps le régime de propriété de l'Organisme Public des Télécommunications (OTE) a subi des modifications. Le processus de privatisation entamé au moyen d'émissions publiques d'actions par le gouvernement socialiste de M. Simitis, élu en septembre 1996, pourrait aux dires des dernières déclarations ministérielles aboutir à la vente de 49% du capital social et à l'octroi de management à un investisseur dit "stratégique".

En conclusion il convient de retenir que, en dépit de la réserve de l'article 222 du traité de Rome, le régime de propriété est affecté par les dispositions du même traité sur la concurrence. Les entreprises publiques ne peuvent en effet survivre sans certains droits exclusifs. La Grèce a réussi à proroger ces droits exclusifs de façon à ce qu'elle puisse au moyen des rentes monopolistiques - financer les investissements dans le domaine des télécommunications.

DEMOCRATIZATION - REFLECTIONS ON THE POLITICAL DIMENSION OF THE EURO-MEDITERRANEAN PARTNERSHIP

Annette Jünemann

Preface

One of the most significant innovations of the Euro-Mediterranean Partnership (EMP) is the inclusion of a political dimension into the European Union's (EU) relations with the Mediterranean Third Countries (MTC).[2] Until recently, the interregional relations were based on a multitude of bilateral agreements between the EU and single MTCs, concerning predominantly the sphere of commerce and trade. It is only since the Euro-Mediterranean Conference of Barcelona in November 1995 that a new approach was launched, aiming at the establishment of a comprehensive political, economic and cultural partnership between the two regions.

My paper will not analyse this new approach of interregional relations as such; this has been done in detail elsewhere.[3] Instead, I shall concentrate on a neglected aspect of the EMP, that is the political goal of democratization.[4] Although a lot has been written and said about democratization in the context of the EMP, the political ranking of this goal is totally unclear. This is especially due to the fact that the interest in democratization may conflict - under certain circumstances - with economic and security interests. Economic and security interests dominate not only Europe's policy in the region, but also the academic research agenda concerning the EMP.

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2 The Euro-Mediterranean Partnership was launched at the Euro-Mediterranean Conference of Barcelona in November 1995. Europe's Partners in the EMP are: Algeria, Cyprus, Egypt, Israel, Jordania, Lebanon, Malta, Morocco, the Palestinian Authority, Tunisia, Turkey and Syria.

3 See Khader, Bichara: Le Partenariat Euro-Méditerranéen après la conference de Barcelone. Paris 1997; Jünemann, Annette: Europe's interrelations with North Africa in the new framework of the Euro-Mediterranean Partnership - A provisional assessment of the 'Barcelona concept'. In: European Commission DG X (Hrsg.): Third ECSA-World Conference: The European Union in a changing world, Brüssel 19-20 September 1996. A Selection of Conference Papers. Brüssel 1998, S. 365-384.

4 This paper is written from a European perspective, focusing on the activities and interests of the EU and its member states. The MTCs are on no account less important, yet they should be analysed by regional experts.

The first part of the paper will briefly put the concept of the EMP into the broader context of a new trend in Western foreign relations that can be labelled with the formula of "democracy and market economy." The second part will take a closer look at the Barcelona Declaration, precisely at the Preamble and the first two Baskets, concerning their impact on the question of democratization. As the concept of civil society is very important in the context of Basket III, the third part will be dedicated to an excursus on varying theoretical models of civil society. Part four will continue with the analysis of the Barcelona Declaration, examining the practical instruments of Basket III to support civil society. Last but not least, part five will summarize the results and give a brief outlook into the future.

1. Democratization and Human Rights in International Relations

During the cold war, international relations were totally dominated by the global conflict. The decisive criterion applied by both Super Powers in deciding whether to support or not support another country was whether this country belonged to the Eastern or to the Western block. Normative criteria, such as the degree of democratization or respect for human rights, were secondary compared to block-solidarity. Authoritarian regimes in Latin America, in Asia, in Africa, and in the Mediterranean region could rely on this simple zero-sum game that even allowed them to play one Super Power off against the other. It is only since the end of the Cold War that they have lost this strategic role. Today, if they seek support and cooperation, they have to adapt to a new set of strategic, economic and political interests of the remaining Super Power, the USA, but, especially in the Mediterranean, also of the EU. While the USA is the dominant political actor from outside in the region, the EU has become the most important economic partner of most of the MTCs. Of course Euro-Mediterranean relations are interdependent, yet, the interdependence is unbalanced in favour of the EU, allowing the Europeans to set preconditions.

The new criterion for international support that has emerged is "democracy and market economy".[5] The demand for democracy in Europe's relations with Third Countries was for the first time made explicit in the Lomé IV agreements (ACP-countries) signed in 1989. Since 1991 it was integrated into the preambles of all treaties with the Central and Eastern European Countries (CEEC). In 1993 it was fixed in

5 See for the USA: Robinson, William I.: Promoting Polyarchy - Globalization, US Intervention, and Hegemony. Cambridge 1996.

the EU Treaty, Art. J.1 (Goals of the CFSP) and in 1995 it was declared to be one of the central goals of the EMP.[6] In contrast to that, the demand for market economy is seldom found in preambles or declarations of principles, but rather in the articles regulating the details of international agreements. What is behind the demand for democracy and market economy in the EMP, beside normative considerations?

Democracy has turned out to be the best political system for the people living in it, as it offers a maximum of individual freedom and political participation. But it is also the best political system for the neighbouring countries because democracies are - compared to the potential aggressiveness of authoritarian regimes - more likely to resolve conflicts by peaceful means. Thus, the extension of democracy is conducive to the extension of stability. For Europe's relations with its southern neighbours this is an important point, because Europe feels threatened by the increasing destabilization of the Mediterranean region. The expansion of democracy lies therefore in Europe's *security* interest.

Yet, stability can not be attained by political means alone. As many regional conflicts are rooted in socio-economic problems, the economic development of the MTCs is just as important. After the breakdown of communism, the market economy has been proved to be the most successful economic system. The EU puts pressure on its Mediterranean Partners to adopt this model because the economic stabilization of the region lies also in Europe's *security* interests.[7]

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6 The importance of Human Rights in Europe's relations with Third Countries was already mentioned in the Preamble of the Single European Act (1986) and stressed again in a Declaration on Human Rights at the Luxembourg Council in 1991. Cf. Mitteilung der Europäischen Kommission: Über die Berücksichtigung der Wahrung der Grundsätze der Demokratie und der Achtung der Menschenrechte in den Abkommen zwischen der Gemeinschaft und Drittländern. In: Bulletin der Europäischen Union, Beilage 3/95, S. 7-21; Mitteilung der Europäischen Kommission an das Europäische Parlament: Die Menschenrechte in den Außenbeziehungen der Europäischen Union - Von Rom zu Maastricht und danach. In: Bulletin der Europäischen Union, Beilage 3/95, S.23-43. Die Veröffentlichung stützt sich auf die Dokumente KOM(95)216 endg. und KOM(95) 567 endg.

7 Migration is one of the most important factors in Europe's non-military threat perception of the South. Sustainable development is seen as a means to diminish the migration pressure especially from North Africa. Cf. Jünemann, Annette: Europas Migrationspolitik im Mittelmeerraum - Strategien im Spannungsfeld zwischen Festungsmentalität und neuem Partnerschaftsgeist. 20. Kongreß der Deutschen Vereinigung für Politische Wissenschaft (DVPW): Demokratie - Eine

But this is only one aspect. The other aspect concerns Europe's *economic* interests in the Mediterranean. Europe is seeking to build a region of economic influence comparable to the USA and NAFTA. To improve its competitiveness on the globalizing market, Europe wants to expand its markets in the East and in the South. While the CEECs are potential member states of the EU, a Euro-Mediterranean Free Trade Area (FTA) is foreseen in the south. One of the necessities of a FTA is the compatibility of the economic systems of all participating countries, that is market economy. Yet, to establish a free market economy, one of the preconditions is democracy - at least if we follow the history of Europe (individual rights etc.). Thus, the demands for market economy and for democracy can not really be separated from one another and both lie in Europe's *economic* interest as well.

To sum up, the formula "democracy and market economy" meets Europe's security interests as much as its economic interests. Yet, it seems as though democratization is less a goal in itself, but rather a means to reach prior security and economic goals. This impression grows stronger when we look at those cases in which the goal of democratization comes into conflict with prior security or economic interests.

Thesis 1

Democratization and stabilization can become, for certain periods of transition, conflicting goals. In most of the MTCs the process of democratization would lead to an extremely unstable period of transition, bearing the risk of violent upheavals or even civil war. Furthermore, democratization can bring islamist parties to power. The EU has a prior interest in stabilization and therefore it wants neither revolutionary developments nor the coming into power of anti-Western islamist parties in the MTCs. Thus, the EU promotes democratization only to a limited degree.

Thesis 2

In European history, the development of market economy was strongly interrelated with the development of democracy. Nonetheless, it is well known that the market economy works also under very limited democratic conditions that are below today's standards in Europe. The

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Kultur des Westens? Bamberg 13.-17.10.1997. Publikation des Arbeitskreises Migration der DVPW (in print).

EU seems to follow a liberal approach, expecting political change to be an automatic by-product of economic liberalization. The attempt to compel democratization by political interference is considered to be counterproductive. The EU's demand for democratization is therefore restricted to rather low standards of "market-compatible" democracies.

2. Democratization and Human Rights in the EMP

The Barcelona Declaration[8] dedicates various articles to the principles of democracy and human rights. The Preamble and all three Baskets[9] have - although to different degrees - an impact on the enforcement of these principles. While the Preamble and Basket I, the Political and Security Partnership, have only declaratory value, Basket II, the Economic and Financial Partnership, contains specific instruments to push the MTCs towards democratization. Basket III, the Partnership in Social, Cultural and Human Affairs, is the most important one in the context of democratization as it foresees a bottom - up approach, supporting decentralization and civil society.

Before coming to the analysis of the Barcelona Declaration it should be noted that the document is the outcome of a long and complicated negotiation process. The first stage of this process took place within the EU and took over a year. Only after having reached a package deal between the multitude of different (sometimes even conflicting) European interests,[10] was the package presented to the MTCs and

8 Cf Barcelona Declaration adopted at the Euro-Mediterranean Conference (27 and 28 November 1995), Final Version. In: Agence Europe, 6.12.1996.

9 The terminology was taken from the Conference for Security and Cooperation in Europe (CSCE), resp. the Conference for Security and Cooperation in the Mediterranean (CSCM), the Spanish/ Italian initiative of 1989/1990. Another analogy is the linkage-policy between the three Baskets. See Ghebaldi, Victor-Ives: Toward a Mediterranean Helsinki-Type Process. In: Mediterranean Quarterly, Vol. 4, 1993, No. 1, S. 92-101.

10 The Southern European countries demand financial assistance for the MTCs, whereas the North European countries favour open markets and free trade. The reasons for these opposing positions are quite obvious: The South European countries produce and export almost the same agricultural products as many of the MTCs, therefore they want to avoid competition. The North European countries have little to fear from Mediterranean exports, but as some of them are net-payers, they are unwilling to carry the whole burden of financial assistance. Against this background it was a respectable political achievement of the EU to have agreed on a common Mediterranean Policy.

rediscussed in a - much shorter - second stage.[11] In consequence, the Barcelona Declaration is clearly dominated by European interests. Nonetheless, some articles, especially those concerning the goal of democratization, reflect the influence of those MTCs that are rather reluctant toward political reform.

2.1. Preamble and Basket I, the Political and Security Partnership

The goal of democratization is first mentioned at the end of the Preamble, as one political goal among many others. Generally speaking it is said that "... stability and prosperity requires a strengthening of democracy and respect for human rights ..."[12] Thus, democratization and respect for human rights are not presented as normative goals in themselves, but as preconditions for reaching the ultimate goals of stability and prosperity. Yet, there is more to democracy and human rights than stability and prosperity. What about freedom? Remarkable also is the diplomatic formula of "strengthening" democracy. Of course, in many of the MTCs it is not a question of "strengthening" democracy, but a question of "introducing" it. Pretending that all participants in the EMP are already more or less democratic was perhaps the only way to get the EMP started. A negative side effect of this formula is that it lessens the pressure on the non-democratic MTCs and leaves some room for manoeuvre for the EU to pursue goals of higher importance.

Basket I becomes explicit concerning the definition of democracy and especially human rights.[13] With reference to the United Nations Charter

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11 Algerian Foreign Minister Salah Dembri, known as an extremely experienced diplomat, achieved unexpected success in coordinating the heterogeneous positions of the MTCs. Algeria was never officially nominated to speak on behalf of the MTCs, but as Algeria held the presidency of both the Arab Maghreb-Union (AMU) and the Arab League, at that time, its activities were accepted at least by the Arabs. Of course many of them added a multitude of national positions. Nevertheless, the relatively high degree of homogenization among the MTCs was acknowledged by all participants of the Barcelona Conference.

12 Cf. Footnote 7, p. 1.

13 The discussion of human rights within the EMP cannot be separated from the broader discussion concerning the universality of human rights. The definition of human rights in the Declaration of Barcelona reflects a Western especially Northern perception, neglecting social rights and the right of development. An initiative to overcome this deficit is being discussed in the European Parliament (EP). Furthermore, under the auspices of the International Institute of Human Rights of Strasbourg, an expert meeting was held to discuss UN standards of

and the Universal Declaration of Human Rights, individual freedoms like freedom of expression, freedom of association for peaceful purposes and freedom of thought, conscience and religion are listed in length. Discrimination on grounds of race, nationality, language, religion or sex are to be combatted as much as racism and xenophobia.[14] Yet, the emphasis that is given to "the rule of law and democracy, to human rights and fundamental freedoms" is balanced by "the right of each of them to choose and freely develop its own political, socio-cultural, economic and judical system."[15]

Taken together, Basket I seems to be little more than a declaration of good intentions. This impression is confirmed by the fact that the Follow Up of Basket I concentrates as good as exclusively on the Security Partnership (confidence-building measures etc.). Little has been done or said with reference to the Political Partnership i.e. the progress of democratization and respect for human rights in the region.[16] Nevertheless, the indirect effect of a "declaration of good intentions" should not be underestimated. We know from the CSCE-process that the declaratory acknowledgement of democracy and human rights was the first step for their future enforcement.[17]

Similar to the Helsinki Declaration the Barcelona Declaration has set new standards that cannot be ignored. Since November 1995, criticism on a lack of democracy or respect for human rights cannot be rejected as "intervention in internal affairs" anymore. Everybody in the EMP can refer to the official declaration: The EU and its member-states, the MTCs and democratic Non-Governmental Organisations (NGO's). The Helsinki

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Human rights and those of a regional nature (the African and Arab charters and the Islamic declaration). Cf. MEDA-Democracy. Euro-Mediterranean Partnership, Information note no 2, European Commission, Unit. IB/A.1, September 1997. For the complex discussion concerning a comprehensive definition of human rights see Bredimas, Antonis: Les droits de l'homme dans la cooperation Euro-Méditerranéenne. Réunion: Perspectives d'adhesion en Méditerranée et évolution des accords de coopérations. ECSA-MED, Nizza 2.-3.2.1996. Unpublished manuscript.

14 Cf. Footnote 7.

15 Cf. Footnote 7.

16 For the Follow Up of the Barcelona conference see Jünemann, Annette: Die Euro-Mediterrane Partnerschaft vor der Zerreißprobe? Eine Bilanz der zweiten Mittelmeerkonferenz von Malta. In: Orient, 38(Dezember 1997)3, p. 465-475.

17 For the effect of the CSCE human-rights-regime on the reform of the international order see Rhode-Liebenau, Sylvia: Menschenrechte und internationaler Wandel. Baden-Baden 1996.

Declaration developed a momentum of its own especially because it was taken up by NGOs.[18] Yet, these would have been less successful if they had not been supported by the Western countries. Can we expect a similar development in the EMP?

We should not overdo the comparison between the CSCE and the EMP, as the international circumstances of the EMP are completely different. In the case of the CSCE the West was interested in destabilizing the East, because it felt threatened by its strength. In contrast to that, Europe has no intention of destabilizing the MTCs. On the contrary, Europe does not feel threatened by the strength, but by the weakness of the MTCs and puts much effort into stabilizing them. Europe wants reforms and no uncontrolled upheavals in the region. Thus, the EU will not put as much pressure on the MTCs concerning political reform as it could. (The amount of support given to democratic NGOs in the framework of the EMP will be analysed in the context of Basket III.)

2.2. Basket II, Economic and Financial Partnership

The core of Basket II is the establishment of a FTA between the EU and all MTCs but also between the MTCs themselves. This comprehensive multilateral project[19] is to be realized within a remarkably short period, that is by the year 2010. Although the FTA is the core of Basket II (and perhaps of the whole EMP), this paper will not concentrate on it, as it has little impact on the process of democratization in the region. In this context, another aspect of Basket II seems to be more important, and that is the replacement of the former financial protocols by the new MEDA Programme.[20] The main feature of it is that MEDA commitments will no

18 For the role of transnational human-rights networks see: Gränzer, Sieglind/ Jetschke, Anja/ Schmitz, Hans Peter: Transnationale Menschenrechtsnetzwerke in der internationalen Politik. 20. Kongreß der Deutschen Vereinigung für Politische Wissenschaft (DVPW): Demokratie - Eine Kultur des Westens? Bamberg 13.-17.10.1997. Unpublished manuscript.

19 Apart from the expected economic advantages it is hoped that interregional trade will have spill-over effects on political relations, thus curbing the radical elements in the region.This does not mean that the Barcelona concept replaces bilateralism with multilateralism. With the Barcelona agreement multilateralism has merely been added to the existing bilateral concept. The future Euro-Mediterranean relations are to develop on two tracks, a bilateral and a multilateral one.

20 MEDA was created in 1994 and joined into one single budget line (B7-410) three budget lines, namely B7-480 (horizontal cooperation), B7-438 (employment creation in the Maghreb) and B7-481 (Euro-Arab dialogue). The

longer stem from the EU's international legal commitments. MEDA, like PHARE and TACIS,[21] is a financially autonomous form of cooperation. The compulsory nature of the former financial protocols meant that funds were not made available on a standard yearly basis but for the full five-year term of the protocols, whether they were used effectively or not. In contrast, the distribution of MEDA funds will take place on a yearly basis and will be linked to certain preconditions[22], among them

- Economic liberalization
- Successful use of previous funds
- Progressive democratization
- Full respect for human rights

The essential point of this approach is that the amount of European support will no longer be influenced through negotiations but through successful economic and political reform. There is no doubt that this is a remarkable improvement upon the inflexible agreements of the past, yet it entails some contradictions not easy of resolution.

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new MEDA line replaced (progressivly) the existing financial protocols with the MTCs. It was adopted by the Commission on 7.6.1995. See European Commission DG I: Co-operation with Mediterranean Countries - The New Financial Framework, Brussels 11.7.1995, p. 2. The Council adopted the MEDA regulation only in July 1996. See Council Regulation (EC) No 1488/96 of 23 July 1996 on financial and technical measures to accompany (MEDA) the reform of economic and social structures in the framework of the Euro-Mediterranean partnership.

21 Those are the programmes for economic and commercial cooperation with Central and Eastern Europe (PHARE) and with the New Independent States of the former USSR (TACIS).

22 Cf. European Commission, DG IB: MEDA Programme Implementation procedures, 01B/56/96 EN, 20.11.1995.

On the one hand, *political*[23] conditionality allows the EU to suspend its commitments in cases of failure concerning democracy or respect for human rights, offering an apparently effective instrument with which to influence the process of democratization.[24] But, on the other hand, it exposes the MTCs to the good will of the European Union, thus offending their demand for equal partnership. Furthermore, being also part of the bilateral association agreements, it contradicts the idea of multilateralization.[25] There is no common forum or institution that gives one MTC the opportunity to comment on democracy-deficits in another MTC, not to speak of deficits inside the EU, for example regarding the civil rights of migrants.[26] Given that it is not at all clear if such a heterogeneous forum would have been able to come to mutual agreements, it might have been helpful for the promotion of a *discourse* on human rights, which - as we know from the experience of the CSCE - is important to strengthen the acceptance of democratic standards in non-democratic states.

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23 The *economic* conditionality, which is passed over here as it has no impact on democratization, stimulates the MTCs to increase their efforts in the field of economic reforms, and it offers them incentives for effective fund management. Thus, it can be hoped that the badly needed improvements in conditions for foreign investment will be achieved. Yet, as economic conditionality rewards only the successful countries, it contradicts the above-mentioned aim of multilateralization: Intensified competition surely promotes economic development, but not necessarily horizontal trade and - even less - political cooperation between the MTCs. As the total sum of the funds cannot be enhanced, some countries will have to be the losers of the game, and it is only natural that the poorest countries in the region will suffer.

24 Cf. Art. 2.8., Proposition de réglement (CE) du Conseil relatif à des mesures financières et techniques visant à soutenir la réforme des structures économiques et sociales des territoires et des pays tiers méditerranées (95/C 232/05) 6.9.1995.

25 The EMP is based on bilateral association agreements between the EU and each of the MTCs. These agreements all follow the same structure, thus standardizing the varying agreements of the past. Association Agreements have been signed with Tunisia (July 1995), Israel (November 1995), Morocco (February 1996), the PLO (February 1997) and Jordan (November 1997). Negotiations with Egypt, Lebanon and Algeria are in progress and those with Syria about to begin at the time of writing. Cf. Euro-Mediterranean Partnership, Information note no 10, European Commission, Unit. IB/A.1, March 1998.

26 This proposal stems from Jannis Sakellariou, German Social Democrat, member of the European Parliament, participant in the Committee on Foreign Affairs, Security and Defence Policy and rapporteur on Mediterranean policy. Cf. Interview with Jannis Sakellariou, Brussels 28.3.1996.

The core of the problem is that the political conditionality element enhances the political character of the EMP, contradicting the liberal approach of the Commission which is shared by many of the member states. According to this approach, preference is given to economic incentives rather than political interference. Thus it can be expected that the suspension of financial cooperation will be imposed only in cases of extreme failure. The fears of some of the MTCs that the Europeans might exploit the political conditionality of the new agreement in order to interfere in their internal affairs seems therefore little founded.[27] On the contrary, the rather unpolitical approach of the EU meets especially the interests of those countries which shun a serious dialogue on democracy and human rights. Their hopes that they can balance political shortcomings by economic achievements is perhaps not completely unrealistic.

Last but not least, a third - informal - 'condition' has to be mentioned: to have or not to have a protective power within the EU. It is quite probable that this third criterion will bypass the other two, again not necessarily to the disadvantage of those MTCs with authoritarian regimes. It is interesting to note that France, for example, was able to prevent the cutting of EU funds assigned for Algeria, although Algeria met all four criteria necessary for a suspension.[28] All the more it seems to be important that the influence of "protective powers" within the EU will be diminished in future. In April 1998 it was decided that the EU Council could take decisions to suspend the MEDA-funds allocated to a MTC by qualified majority only.[29] Before that, such a decision had to be taken unanimously, with the effect that almost all MTCs could count on the veto of the European country with which they had special relations.[30] The decision of April 1998 was a step in the right direction, confirming a growing political will of the EU to promote democratization. Yet we have to ask why the European Parliament (EP), the most sensitive EU

27 According to Tahar Sioud, Ambassadeur de Tunisie à Bruxelles, such worries are widespread among the MTCs. Interview in Brussels, 28.3.1996.

28 Cf. Jünemann, Annette: Demokratischer Beistand oder Angst vor dem islamistischen Nachbarn? Europa und Algerien, in, Hafez, K. (Ed.): Der Islam und der Westen - Anstiftung zum Dialog, Frankfurt a.M. 1997, pp. 125-138.

29 Cf. Agence Europe, 10.4.1998, p. 3.

30 In 1995/ 1996 Great Britain had insisted on the principle of unanimity. The EU had to wait for the change of government in the UK in 1997 to change and finally adopt the suspension clause of the MEDA regulation. Cf. Agence Europe, 28.3.1996, p.8.

institution with respect to human rights - is still excluded from this decision-making process.[31]

2.3. Basket III, Partnership in Social, Cultural and Human Affairs

Inter-regional partnership cannot be achieved through dialogue between the political elites alone; it has to integrate the people. This is even more true if the partnership aims at the promotion of democracy in a region where civil society structures are underdeveloped and/or suppressed. That is why the Barcelona Declaration emphasizes in Basket III the importance of civil society. Before going into the specific programmes within Basket III (see chapter 4), a short excursus will give a general idea of the varying concepts of civil society.

3. Excursus: Definitions and concepts of civil society

Civil society is a European model that refers to Enlightenment concepts of reason and rationality, presuming basic tensions between (civil) society, economy and the state. Even in the Western World there is no generally accepted definition of the term 'civil society', yet there is consensus about certain criteria that have to be met.[32] An organization that claims to be part of civil society

- has to be tolerant
- has to be non-violent
- aims at independent participation in the political and social development of the country, thus promoting democratization.

Within the framework of these consensual criteria, there is a wide range of different forms of civil activity, depending on the historical, cultural and religious background of a society but also - and particularly - on the political system.[33] Consequently, there are other criteria besides the four consensual ones mentioned above that are highly controversial:

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31 The demand of Luigi Colajanni (SPE/I), that the Council should decide by qualified majority on the proposal of the Commission and the opinion of the EP, was rejected by the Council. Cf. Agence Europe, 6.3.1998, p. 5.

32 For an in-depth theoretical discussion of civil society see: Cohen, Jean L./ Arato, Andrew: Civil Society and Political Theory. Cambridge, Massachusetts 1995.

33 For the contemporary discussion of civil society in the Arab world see: Ibrahim Ferhad/ Wedel, Heidi (Ed.): Probleme der Zivilgesellschaft im Vorderen

- independence from the state
- incompatibility with primordial structures
- incompatibility with private business
- internal democracy.

3.1. Independence from the state

The Western concept of civil society can be traced back to John Locke and to Charles Montesquieu, representing the two main approaches. Locke stands for what Emanuel Richter calls the *dichotom* concept, and Montesquieu for what Richter calls the *integrative* concept of civil society.[34]

According to the *dichotom* concept, civil society is completely independent of the state. Its primary function is to control the state. The relationship between society and the state can thus be described as contrastive or polarized. This concept implies the legitimation of civil society to overthrow an authoritarian regime.

According to the *integral* concept, civil society is part of the - democratic - political system. There are no clear-cut division lines between the state and society. The function of civil society is to control the state, but also to contribute to its legitimation through civic participation (*corps intermédiaires*).

The dichotom and the integral concept both root in the history of European thought. Yet, there is another differentiation deriving from islamist thought that is also important in the context of the EMP.

Orient. Opladen 1995; Norton, Augustus Richard (Ed.): Civil Society in the Middle East. Leiden, Netherlands 1995; Schwedler, Jillan (Ed.): Towards Civil Society in the Middle East? London 1995; Heinz, Wolfgang (Ed.): La Société Civile aux Pays du Maghreb - Réalités et Perspectives. Conférence à Bruxelles du 12 au 16 février, Friedrich-Naumann-Stiftung Brüssel, Brüssel 1995.

34 Cf. Richter, Emanuel: Die europäische Zivilgesellschaft, in: Klaus Dieter Wolf (Ed.): Projekt Europa im Übergang? Baden Baden 1997, p. 38f. For an in-depth reflection on civil society in European thought see: Taylor, Charles: Die Beschwörung der Civil-Society. In: Von Krzysztof, Michalski (Ed.): Europa und die Civil Society. Castelgandolfo-Gespräche 1998, Stuttgart 1991.

3.2. Incompatibility with primordial structures

Islamist thinkers reject the concept of civil society (al-mutjama al-madani) because of its Western roots. They argue that the acceptance of the term already implies the acceptance of a Western model of society. So they developed the alternative concept of 'citizen society' (al-mutjama al-ahli), meaning primordial structures of society such as family, clan and especially the religious institutions. These are not seen as (second best) equivalents to civil society, but as authentic structures in the context of a muslim state.[35]

Secular representatives of civil society in the Arab world insist that primordial institutions should not be accepted as parts of civil society, as they are not based on the free and rational will of their participants. Furthermore they reject the idea that political islamism is tolerant and committed to democratic goals. For many of the secular representatives of civil society, especially in Algeria, the decisive conflict line is not between society and the state, but between secularism and islamism.[36] Yet, even though some islamists try to monopolize all structures of muslim society for their political goals, there are noteworthy attempts to redefine muslim society in new terms. To give an example, a growing number of muslim feminists legitimate their emancipatory demands with a new interpretation of the Koran, ignoring the narrow classifications of both concepts, the islamist and the secular.[37]

3.3. Incompatibility with private business

In the theoretical discussion concerning the relationship between civil society and private business there is no consensus as to whether free enterprises are part of civil society or if they stand *beside* the state and

35 Cf. Ibrahim, Ferhad: Die arabische Debatte über Zivilgesellschaft. In: Ibrahim Ferhad/ Wedel, Heidi (Ed.): Probleme der Zivilgesellschaft im Vorderen Orient. Opladen 1995; p. 39.

36 Cf. Ibrahim, Ferhad: Die arabische Debatte über Zivilgesellschaft. In: Ibrahim Ferhad/ Wedel, Heidi (Ed.): Probleme der Zivilgesellschaft im Vorderen Orient. Opladen 1995, p. 28. For the islamist discourse on civil society see also: Moussali, Ahmad S.: Modern Islamic Fundamentalist Discourses on Civil Society, Pluralism and Democracy. In: Norton, Augustus Richard (Ed.): Civil Society in the Middle East. Leiden, Netherlands 1995, pp 79-119.

37 For the complex question of women's role in Islam resp. in "muslim" countries see: Schöning-Kalender, Claudia/ Neusel, Ayla/ Jansen, Mchtild (Ed.): Feminismus, Islam, Nation. Frankfurt a.M., New York 1997.

civil society.[38] Yet, this very complex discussion shall not be taken up here. In the context of the EMP it is sufficient to note that the support of private business, especially small and medium-sized enterprises (SMEs), does make sense in the context of decentralized cooperation, as it diminishes the dominant role of the state sector in authoritarian countries. Economic independence is not a sufficient, but a necessary condition for free political engagement.

3.4. Internal democracy

Civil society should not only claim democratic goals, it should be organized accordingly. Yet, experience shows that civic engagement in non-democratic regimes requires especially strict and efficient structures of its organizations to enable them to resist repression and persecution. The internal organization of NGOs therefore often reflects the authoritarian structures of the regime they oppose; European standards of internal democracy can thus not simply be transferred to the MTCs.[39]

4. Civil society: theory and practice of European support in Basket III

The Politics of the EU is not guided by theoretical reflections as summarized above but by pragmatism, taking into consideration European interests on one side and its given room for manoeuvre on the other. Nonetheless, the EU's support of civil society in the MTCs has its theoretical implications, as it is implicitly based on the *integral* concept of civil society. This approach is so far problematic, as most of the MTCs do not meet the democratic requirements for this concept yet. As the EU wants to promote a controlled democratization process through gradual reform, it is restrained towards NGOs representing the *dichotom* concept, even if they are activists for democracy and human rights.

38 Cf. Schwedler, Jillan: Introduction - Civil Society and the Study of Middle East Politics, in: Schwedler, Jillan (Ed.): Toward Civil Society in the Middle East? London 1995, pp. 1-32.

39 For the sometimes problematic internal structure of Civil Society associations see: Merkel, Wolfgang/ Lauth, Hans-Joachim: Systemwechesl und Zivilgesellschaft - Welche Zivilgesellschaft braucht die Demokratie? In: Aus Politik und Zeitgeschichte, 30. Januar 1998, pp. 3-12.

Primordial groups (tribes and clans) are denied the status of civil society, but religion as such is not regarded as an excluding criterion.[40] Political islam and democracy are not see as necessarily incompatible and not all islamists are viewed as intolerant and violent. Yet, it remains difficult and risky for the EU to identify suitable partners in the very heterogenous spectrum of political islam so that the EU has to be very careful in its support of religious dialogue.[41]

The decisive instruments of the EMP to support civil society are the MED-Programmes, MEDA-Democracy, the Forum Civil Euromed and Euro-Mediterranean conferences.

4.1. The Med-Programmes

The MED-Programmes have existed since 1992. They were integrated in 1995 into the EMP to promote a Euro-Mediterranean dialogue also on the level of civil society. This includes trade unions,[42] universities, professional associations, youth organizations, the media-sector and local communities. The essential MED-Programmes are MED-Urbs, MED-Campus, MED-Media and MED-Association.[43] The special quality of the MED-Programmes is due mainly to two aspects:

40 In the CEEC for example, the church and religious associations had a decisive role in the process of political transformation. Therefore they were regarded by the EU as part of civil society.

41 To give a concrete example, experts on Algeria find no common answer to the question concerning the relations between the "moderate" FIS and the "radical" GIA, not to speak of all the splinter groups that emerged after the FIS had been prohibited in 1992.

42 See ETUC/ ICFTU/ WCL: Statement by the European and International Trade Union Movement to the Euro-Mediterranean Conference, 15.11.1995; Union syndicale des travailleurs du Maghreb Arabe: Déclaration de l'USTMA à la conférence inter-ministerielle Euro-Méditerrannéenne de Barcelone; WSA/Mittelmeer: Institutionalisierung der Beziehungen zwischen den Wirtschafts- und Sozialeinrichtungen der EU und der Mittelmeerländer. In: Agence Europe, 3./4.1.1996, p. 14.

43 See European Commission, DG I: Manuel des Programmes MED. Votre Guide pour le Partenariat Euro-Méditerranéen, 1996.

- The Europeans can choose their partners without consulting the national government of the country concerned, thus strengthening the development of civil society structures.

- All MED-programmes build a network, including participants from both shores of the Mediterranean, thus building horizontal networks on a grassroot level. [44]

The MED-Programmes were taken up very positively by various associations in the MTCs. A lot of noteworthy projects were initiated, so many that they even overstreched the capabilities of the Commission's administration which had not expected such a broad interest. For the first year of the EMP it seemed therefore as though the MED-Programmes were a full success. Unfortunately, an inspection of the MED-programmes by the Court of Auditors in 1996 revealed enormous fund-abuses in the period between 1992 and 1994.[45] Without going into technical details of the extensive report it can be stated that the core of the problem was the entanglement of interests between givers, takers and controllers of the funds. In practice many projects turned out to be much more in the interest of the European participants than of their Mediterranean partners. Other projects were criticized because they bypassed the obligatory cofinancing. When confronted with the accusation of the Court of Auditors, the Commission admitted the mismanagement of the MED-programmes in the period between 1992-1994, when the programmes had just started. But it did not accept the assumption that nothing had changed since then. Furthermore, it argued that the Court had overstretched its competences, evaluating not only the management of funds, but also the political content of the programmes.[46] Indeed, the Court has no means to evaluate more than financial administration procedures. Thus, it was not able to judge the positive effects the MED-programmes undoubtedly had. Many of the projects had contributed to the development of civil society structures and most of them contributed to the dismantling of mutual prejudices and stereotypes.

44 Some of them demand two, others up to three, countries from *each* side.

45 See Court of Auditors: Special Report, Brussels 1996.

46 Personal interviews of the author in DG IB, Brussels in September 1996.

Nonetheless, the well-founded accusations of the Court of Auditors could not be ignored and led to the suspension of all MED-programmes in September 1996.

The suspension of the MED-programmes was unavoidable, yet it led to irritation and disappointment in the MTCs. Many projects which had relied on the payment of European funds had to be cancelled. This created economic losses especially for the southern partners, and a tremendous loss of political credibility for the northern partners. Only a few of the southern partners are familiar with the complex procedures of EU-decision making. Most of them perceive the EU as an homogeneous actor, so that they cannot understand what it means that the "Court" has stopped the "Commission." In their perception, "Europe" as a whole has lost interest in Euro-Mediterranean cooperation. Their disappointment is understandable in face of the fact that many projects were set up under great difficulties which simply do not arise in Europe. Fortunately, the programmes were relaunched in April 1998.[46]

In theoretical terms it can be stated that the partners in the MED-Programmes represent the *integrative* concept of civil society, because all projects are more or less interwoven with the public sphere. For example, university teachers are only to a certain degree independent of governmental control, as most of them teach at public universities. The same counts for mayors of local communities and, in most MTCs, for the Media sector. Yet, being (partly) dependent upon the state does not diminish the democratic activities of these associations.

Concerning the relationship of civil society and private business, the MED-Invest Programme should be mentioned, although it belongs to Basket II and although it is organized - in contrast to the other MED-

Programmes - in cooperation with the governments concerned.[47] MED-Invest supports the private sector, especially SME, through the transfer of technical know-how, the arrangement of Euro-Mediterranean business-

46 Cf Agence Europe, 24 April 1998, p. 8.

47 See: MED-Invest, Euro-Mediterranean Decentralized Cooperation Programme for Small and Medium Sized Enterprises, European Commission, DG for External Economic Relations (I-H.2), Brussels. Within MED-Invest the Programmes of MED-Partenariat and MED-Interprise are noteworthy, as they help to get entrepreneurs from both shores together. Cf. Interview of the author with Anne-Charlotte Bournoville, responsible for MED-Partenariat and MED-Interprise, European Commission, DG XXIII, Brussels, 21.3.1996.

contacts and the support of joint ventures.[48] As the economy in most of the MTCs is widely state-controlled, MED-Invest is a useful means to back - and to cushion - structural adjustment. But the support of SMEs also has a political dimension. The EU considers SMEs to be part of the civil society because they diminish the dominant role of the state sector. As said before, economic independence is not a sufficient, but a necessary condition for free political engagement. As SMEs have an existential interest in stability themselves, their civic activities will presumably never go beyond a reformist approach, which is in accordance with European interests.[49]

4.2. MEDA-Democracy

Unsatisfied with the limited approach of the MED-Programmes, the European Parliament pushed for an additional instrument to support democratization at the level of civil society. Threatening the Commission and the Council that it would refuse the approval of the financial programme of the EMP (MEDA), the European Parliament achieved the establishment of MEDA-Democracy.[50] MEDA-Democracy is organized on a bilateral level and

> "grants subsidies to non-profit-making associations, universities, centres of research and to public bodies to implement projects which aim to promote democracy, the rule of law, freedom of expression, of meeting and of association, to protect target groups (women, youth, minorities) and to increase the awareness of socio-economic rights."[51]

The delegations of the Commission in the MTCs choose adequate partner-associations which must not be prohibited in their country and must not have external donors. The governments of the MTCs are not consulted or involved in the projects.

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48 See Marks, Jon: Europe and its Southern Neighbours - EC Support for Joint Ventures and Investments in the Mediterranean. Bonn 1993.

49 However, the political effects of MED-Invest should not be overestimated, as all projects - in contrast to the other MED-programmes - need governmental approval. Especially in countries with highly state-controlled economies, the money from Brussels gets diverted mainly into governmental projects.

50 See MEDA-Democracy Programme, Budget Line B7-705N. Criteria and Conditions of Eligibility. DG IB/A2, Brussels, 25.4.1996.

51 Cf. MEDA-Democracy. Euro-Mediterranean Partnership, Information note no 2, European Commission, Unit. IB/A.1, September 1997.

The introduction of MEDA-Democracy can be regarded as a political success of the European Parliament, but it is nevertheless controversial. Some critics claim that many democratic NGOs will still not be reached, because even when they are not prohibited, they can hardly exist without external financing. Furthermore, the budget is considered far too small to put up convincing projects.[52] These critics want MEDA-Democracy to be expanded, in quality and quantity. Taking an opposing view, others argue that the title "MEDA-Democracy" already reveals a Eurocentric approach, demonstrating a lack of political sensitivity which could provoke counterproductive effects. This argument has to be taken seriously, because it points to one of the principal problems of the EMP: the inequality between the EU on one side and the MTCs on the other. Yet I think that the approval of MEDA-Democracy by many democratic NGOs in the MTCs legitimates the approach of this programme.

According to an evaluation by the sub-committee for human rights of the EP, MEDA-Democracy has undoubtedly been a success. In 1996 a total of 62 projects were financed.[53] 32% of the budget was allocated to civic rights projects, 15% to projects relating to women[54] and another 15% to projects relating to children and youths. Projects on trade unions obtained 8% of the funds and those for coexistence between Israelis and Palestinians 5%.[55] In contrast to the MED-Programmes, no irregularities in the administration of the programme are known, so that an increase of projects can be expected in the coming years.

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52 The budget of MEDA-Democracy was ECU 9 million for 1996. This is equivalent to 1% of the whole MEDA-budget.

53 Almost all subsidized projects are financed by MEDA-Democracy up to 80% of the budget, the remainder being contributed by the candidate organization or by other non-Community sources of financing.

54 The promotion of women's rights is seen by some governments of the MTCs as a useful means to diminish islamic fundamentalism. It is in this context that women's issues have a relativly high priority - at least at the declaratory level. Women's rights organizations make use of this political trend trying to take the governments at their - rhetoric - word, and the Commission supports them in this strategy. Yet, it must not be overlooked that in practice there is a worrying tendency in many MTCs to compromise with the Islamists on the question of women's rights. It is more than doubtful that the EU would interfere to prevent such an internal arrangement of power sharing.

55 Cf. MEDA-Democracy. Euro-Mediterranean Partnership, Information note no 2, European Commission, Unit. IB/A.1, September 1997. For details see Bilan MEDA-Democracy pour l'année 1996. Europäisches Parlament, Ausschuß für Auswärtige Angelegenheiten, Sicherheit und Verteidigungspolitik, Unterausschuß Menschenrechte, 12.3.1997. (DOC-DE/CM/319/319776).

MEDA-Democracy is more challenging for the governments of the MTCs, as it covers - at least in theory - also groups representing the dichotom concept of civil society. So far, political conflict between the governments of the MTCs and the EU in the framework of MEDA-Democracy has been avoided, due to the voluntary and pragmatic political restraint of the Commission. NGOs promoting the interests of ethnic minorities (for example the Kurds in Turkey) were as much rejected as NGOs belonging to the islamist spectrum. Religious dialogue projects convened only official representatives of the three religions in the region that can hardly be equated with the islamist concept of citizen society.

4.3. The Forum Civil Euromed

The Forum Civil Euromed is a non-governmental conference complementing the official summits of the EMP.[56] According to the Barcelona Declaration, civil society is to be incorporated as an intermediary into the EMP. Although it is undoubtedly a positive signal that the EMP opens itself to the demands of civil society, the *incorporation* of the Forum also has ambivalent effects. Being co-financed by the Commission and organized at least in agreement with the country hosting the official Euro-Mediterranean summit, the Forum can not at all be equated with the big alternative conferences that accompanied the international conferences in Rio, Cairo, or Peking.[57] To fulfill a critical "watch-dog-function", the Forum is too close to the EMP; to influence it from within it is too far away.

Experience shows that the Forum tries to make its voice heard without creating too much embarrassment at the official conferences. NGOs that

56 The first Forum took place in Barcelona, 29-30 November 1995, the second one in Malta, 11-13 April 1997.

57 During the preparations for the first Euro-Mediterranean conference in Barcelona, the Spanish presidency was anxious that an alternative summit of NGOs might overshadow the main event, as had happened before at the big international conferences in Rio, Cairo, and Peking. To prevent this from happening, Spain decided to organize a non-governmental conference itself, thus being able to select the participants, to influence the agenda and, last but not least, to gain the international reputation of having an exceptionally active policy in the Mediterranean. In terms of credibility, this task was transferred to the *Generalitat de Catalunja* and the *Institut Català Mediterrània*, a formula that corresponded with the national interests of Spain as well as with the regional interests of the Catalans.

belong to the *dichotom* concept of civil society, thus being in direct opposition to their governments, were excluded from both meetings and the agendas avoided topics that are politically too sensitive. The first Forum Civil Euromed in Barcelona gained a lot of international attention, yet it must be said that for many of the participating NGOs it was rather disappointing.[58] This was also due to the ambivalent stance taken by the Commission: Being aware that the realization of a non-governmental conference would contribute to the positive image of the EU's political profile, the Commission co-financed the project in the beginning, but pulled out as soon as it was over. Consequently many of the measures that were decided on during the Forum Civil Euromed were never implemented because of lack of funds. Although some of those measures were admittedly not well-founded,[59] the core of the problem is another one: Having abandoned the project of the Forum Civil Euromed, the Commission made clear that the development of civil society is not as much of a political priority for the EU as the declarations in Basket III of the Barcelona Declaration first led one to believe.
The second Euro-Mediterranean conference of Malta in April 1997 was also combined with a Forum Civil Euromed. This time the Forum was reduced to not more than one hundred NGOs, working on a limited agenda.[60] Despite the quantitative reduction, two aspects can be seen as progress for the integration of civil society:[61]

- In Malta the Forum Civil Euromed met before and not after the official governmental conference, thus improving the chances of making its voice heard.
- In contrast to the Barcelona meeting it was agreed that the work of the Forum should from now on be integrated in the Follow Up to Basket III. Thus, the Commission seems to have changed its negative attitude towards the Forum.

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58 The results of the Forum Civil are summarized in the "Civil Declaration of Barcelona", Brussels 1996.

59 The Catalans, who had organized the Forum, pushed for an institutionalization of the Forum Civil, which runs counter to the philosophy adopted at the Barcelona summit to keep the administration of Euro-Mediterranean cooperation light.

60 Cf. Agence Europe, 17.4.1997, S.14

61 For the results of the second Forum Civil Euromed see: Final Declaration by the participants of the Civil Forum Euromed. Malta, Valletta 13. April 1997.

4.4. Conferences/seminars at expert level

Many projects were launched independently of the MED-Programmes or MEDA-Democracy but still within the framework of Basket III. To give an example, Spain organized a Conference on the "Euro-Mediterranean Audio-Visual and Cinematographic Heritage" to create the conditions for the development of a network of contacts between the professionals concerned. The Netherlands are responsible for a "Euro-Mediterranean conference on mutual perceptions in the field of education"; according to the conclusions of the Malta Conference one of the priority fields of action.[62] These and similar projects are noteworthy, not only because of the useful work they carry out, but also because they contribute step by step to the decentralization of Euro-Mediterranean relations and thus to the establishment of civil society structures. Yet, these conferences and meetings are increasingly criticized because in practice they are often without any long term consequences, promoting what can be termed "conference-tourism". Therefore many critics claim that the scarce resources should rather be shifted to the MED-Programmes or MEDA-Democracy.

Obviously, the participants of the many seminars and conferences held in the context of Basket III are representatives of the integral concept of civil society. As said before, the political impact of these conferences is modest, yet it should not be underestimated that they also contribute in a step by step approach to the development of transnational networks of civil society - provided that these conferences have a medium or long-term approach.

4.5. Objections to the support of civil society

The MTCs

For the MTCs, all programmes in the framework of Basket III are very sensitive, because they allow uncontrolled participation in the political process. The MTCs have been especially reluctant in regard to *religious* dialogue. Against the background of civil war in Algeria some of them fear that radical islamists might gain international recognition in the

62 For the information concerning the initiatives of Spain and the Netherlands see http://www.diplomacy.edu

framework of religious-dialogue projects initiated by the Europeans.[63] This suspicion is not completely unfounded, as some EU-Member States pursue a rather liberal policy towards Algerian islamists.[64] But this is of course only one reason why some MTCs insisted on a formula that decentralized cooperation must be "within the framework of national law."[65] The main reason is their fear of uncontrolled civil activity that could challenge the political power and the economic privileges of their political classes.

To deepen and to differentiate this argument, a thorough analysis of each political system in the heterogenous group of the MTCs would be necessary. Yet, the presentation of this analysis would go beyond the limited approach of this paper. Therefore it shall be summarized with a quotation from Mehran Kamrava: "Despite significant historical and structural differences that separate them, Middle Eastern states have almost uniformly been able to withstand popular pressures for political liberalization."[66] With the exception of Cyprus and Malta, as well as (with reservation) Israel and Turkey,[67] the MTCs can thus be called "non-democratic", irrespective of the gradations in their political systems. All non-democratic regimes are well aware of the risks they take if they

63 Tahar Sioud, Ambassadeur de Tunisie à Bruxelles, warns the Europeans not to exploit the agreement in this sense. Interview with the author in Brussels, 28.3.1996.

64 To give an example: FIS-leader Kebir, who has been given political asylum in Germany, is relatively free in his political activities. The liberal policy towards Algerian islamists is heavily criticized by most of the MTCs but also within the EU, especially by France. Yet, as long as Islamists are persecuted and even tortured in countries like Algeria, Germany is bound by law to give them political asylum.

65 Cf. Footnote 7, p. 5.

66 Cf. Kamrava, Mehran: Non-democratic states and political liberalization in the Middle East - a structural analysis. In: Third World Quaterllly, 19(1998)1, p. 63. Kamrava distinguishes five ideal state-types in the Middle East that shall be quoted here although the author does not totally agree with the classification of the Lebanon and the Palestinian Authorities: Military (Algeria, Sudan), Mukhaberat (Egypt, Syria, Tunisia), Oil monarchies (Bahrain, Kuwait, Oman, Saudi Arabia, UAE), Civic myth (Jordan, Morocco), Inclusionary (Iran, Iraq, Libya), Proto-democratic (Israel, Lebanon, Turkey, Yemen, the PA). cf. ib. p. 65. For a fuller discussion see: Brynen, Rex/ Korany, Bahgat/ Noble, Paul (Ed.): Political liberalization and Democratization in the Arab World. Vol. 1, Theoretical Perspectives. London 1995.

67 Although the political systems of these countries correspond to democratic standards, Israel and Turkey are accused of repressing their Palestinian and Kurdish populations respectively.

permit the development of a democratic civil society. It is not by accident that they put so much effort into the repression of human rights activists and other NGOs working for democratization.[68] There is a widespread Western perception that Arab governments like Algeria or Egypt are defending Western values against radical islamism and that this fight even justifies authoritarian methods. In reality, the non-democratic regimes in the region are fighting on two fronts: against islamism but also against the small democratic elites in their countries. Their fight against the democrats, the representatives of civil society the EU has finally decided to support, receives too little attention in the Western mass media.

The EU and its Member States

Yet, it is not only the MTCs which have problems with civil society. The EU itself is rather unfamiliar with this sociological concept. The term "civil society" appears neither in the Maastricht Treaty, nor in the new Treaty of Amsterdam.[69] Noteworthy in this context is only Union Citizenship (Art. 8) and the Principle of Subsidiarity (Art. 3b) in the Maastricht Treaty. But, as Union Citizenship was more or less installed by the political class, it already shows the EU's meagre understanding of the *procedural* character of civil society. No wonder that Union Citizenship has not been internalized by the European people. The Europeans still have no homogeneous identity, which would be the precondition for real citizenship.[70] The lack of interest in civil society

68 The working conditions of the civil societies differ from one country to the other. Because of the growing significance of human rights in international relations, there is a general trend to use more subtle means of repression. Cf. Interview with Bettina Peters, International Federation of Journalists, Deputy General Secretary, Brussels 20.3.1996. For an overview see the Country-Reports of Amnesty International. For Algeria, one of the most problematic countries in the region, see Comité algerien des militants libres de la dignité humaine et des droits de l'homme (Ed.): Livre Blanc sue la repression en Algérie (1991-1995). Pla-les-Quates, Suisse 1996.

69 Cf. Richter, Emanuel: Die europäische Zivilgesellschaft, in: Klaus Dieter Wolf (Ed.): Projekt Europa im Übergang? Baden Baden 1997, p. 37.

70 The other innovation of the Maastricht treaty, the Principle of Subsidiarity, has turned out to be a magic formula used by everyone, thus being instrumentalized for contrasting political goals - centralization and decentralization. Even though the sub-national level (regions and communities) has prevailed quite successfully against the interests of the national and the supra-national level, it has never sought to include NGOs in the process of policy making. The clarified definition of the Principle of Subsidiarity in the new

structures has its roots in the evolution of the EU out of an economic community. The construction of a political community has been - and still is - of secondary importance. In other words, decentralized cooperation is affected by the fact that the EU "thinks" in economic categories, to which civil society structures are rather irrelevant.

Yet, there are also more specific reasons why the EU is not too enthusiastic in its support of civil society in the Mediterranean region, above all the fear that a strengthened democratic civil society might lead to uncontrolled developments in the MTCs.[71] Even though the EU would not regret the overthrow of any of the non-democratic regimes in the region, it fears the period of transition that would follow such an overthrow. In all non-democratic MTCs the democratic elite is small and weak so that it can be presumed that the democrats would not have the strength to replace the old regimes immediately. Chaos, civil war or takeover by radical Islamists - these are the threats as perceived by the EU.

To sum up, it can be stated that the activities of civil society in non-democratic systems are very likely to have destabilizing effects, because civil society can topple the old regime without necessarily beeing able to replace it immediately. Thus, with reference to the MTCs, the EU has to choose between two conflicting goals: stabilization and democratization. This conflict is structural in regard to cooperation with all non-democratic countries, where partnership on the governmental level contradicts partnership on the level of civil society.[72] The EU,

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Amsterdam Treaty (strengthening the interests of the national and sub-national level) has no influence on the neglected role of civil society. Thus, the Economic and Social Committee remains the only institution through which civil society is slightly integrated into European decision-making. Last but not least there is a growing tendency among NGOs to establish offices in Brussels and to intersperse their interests through direct lobbying. Yet, their influence is informal and rather marginal.

71 A minor reason for the EU's reluctance lies in the lack of objective criteria to measure the success or failure of the projects. This entails the risk of fund-abuses, which indeed have happened in the case of the MED-Programmes. Furthermore, some countries, among them Germany, are anxious that France will use Basket III to consolidate and extend its political influence in the region. Facing the fact that Basket III was formulated predominantly under French direction, this suspicion is not completely unfounded.

72 See Jünemann, Annette**:** Die Mittelmeerpolitik der Europäischen Union - Demokratisierungsprogramme zwischen normativer Zielsetzung und

predominantly interested in stability, cooperates with the governments of the MTCs and considers the interests of civil society only in so far as it does not disturb official relations. In other words, the EU exercises a voluntary political restraint, supporting preferably groups belonging to the integral concept of civil society.

5. Conclusion and Outlook

Summarizing the results of this article it can be concluded that the two theses advanced in the first section have been confirmed: Europe's security and economic interests dominate the EMP, whereas the political interest in democratization is only of secondary importance. Having to choose between democratization and stabilization, the EU gives higher priority to stabilization and promotes democratization only to a limited degree. Consequently, and in accordance with its economic interests, the EU's demands for democratization are restricted to rather low standards of 'market-compatible' democracies.

This seems to be a poor result, compared to the high expectations raised by the Declaration of Barcelona. Yet, we have to keep in mind that Europe's policy in the region is not only determined by European interests, but also by the given *room for maneouvre*. As the EMP is based on agreements at governmental level, the EU cannot neglect the interests of its official partners, i.e. the (mostly) non-democratic governments of the MTCs. This explains the EU's cautious behaviour toward NGOs belonging to the dichtotom spectrum of civil society. Supporting the anti-system opposition of the official partner is unacceptable for the latter. It could even be counterproductive because it could lead to the breakup of the whole agreement, thus withdrawing all possibilities of political influence from the EU.

Secondly, the EMP is based on a new spirit of equal partnership, replacing at least in theory the outdated spirit of 'neo-imperialism'. Although Euro-Mediterranean interdependence is in reality balanced in favour of the EU, the spirit of an equal partnership is a normative goal in itself that demands respect. Europe's relations with the MTCs are strained by the burden of a colonial past that is still vivid in the collective memory of the people in many MTCs. Thus, rejection of European domination comes not only from the political classes, but also from large parts of the population. The more or less latent rejection of Western dominance can

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realpolitischem Pragmatismus, in: Deutsch-Französisches Institut (Ed.): Deutsch-Französisches Jahrbuch 1997, Leverkusen 1997, pp. 93-116.

be easily instrumentalized; a psychological factor the decision-makers in the EU cannot ignore.[73]

Taking these two factors into consideration eases the harsh criticism relating to Europe's half-hearted support of democratization. The European authorship of the Barcelona concept implies a dilemma yet to be solved. On the one hand, the EU offers partnership, based on mutual tolerance and unconditional dialogue. On the other hand it wants to generate economic and political adjustment to European standards. To solve this dilemma, much will depend on the political sensitivity of the Europeans. They must show sufficient respect for the interests of their (official) partners, without denying their own standards concerning human rights and democracy. This will be a tightrope walk that needs pragmatism, a lot of patience, but especially a strong political will.

One worrying observation made in this article relates to the seeming lack of political will within the EU and its member states to promote democratization and to safeguard respect for human rights. Europe's call for political reform in the MTCs would be more credible if this political goal were to be upgraded on the priority-list of European interests. In practice, this would imply the upgrading of decentralization and civil society-support within the EMP.[74] So far, Basket III is regarded by too many actors within the EU as a sort of appendix of lesser importance, supplementing the first two Baskets dealing with 'high politics'.[75] This perception is, by the way, often adopted at academic conferences concerning the EMP.[76] An approach that would intensify the pressure on the MTCs for political reform could be compensated by showing greater respect for the justified interests of the Mediterranean Partners in the first two Baskets. If the security perception of the MTCs, which feel

73 The latest example involving an Arab country - although not belonging to the EMP - is supplied by Iraq. Western sanctions against Iraq turned out to be counterproductive because they were instrumentalized by the Iraqi government to strengthen anti-Western feelings in the population.

74 Only 10% of the MEDA-budget is dedicated to decentralization and civil society support.

75 To be precise, this concerns only the so called positive part of Basket III, dealing with decentralization and civil society support. The Follow Up of the so called negative part of Basket III, dealing with the fights against drug-trafficking, organized crime etc. is in practice integrated into Basket I.

76 To give an example, a lecture of the author concerning the role of civil society in the EMP was anounced at an international conference as 'sweet dessert'.

threatened by European activities in the Mediterranean,[77] and the worries of some of them that they might become the losers of the FTA,[78] would gain more attention in the EU, Europe's policy in the region would gain a lot of credibility.

Yet, there is also a positive result that can be drawn from this article. Having analysed the Follow up of Basket III it seems as though at least a process has been started that might become comparable to the Helsinki-process of the 1970s. The new trend in Western foreign politics to link financial support to political and economic reform has set new standards that cannot be ignored any longer and that have already gained a momentum of their own. Despite the many deficits described in this article, the EMP is also based on this new spirit. The decision taken in April 1998, to decide on the suspension of MEDA-funds by qualified majority, is an important step towards strengthening this democratic spirit. The value of the Barcelona concept lies especially in the fact that it complements the demand for institutional democratization by a new bottom-up approach on the level of civil society.

In particular the Commission gives the impression that it is gradually opening itself up to the needs of civil society. Convincing were the strong efforts to reinstal the MED-Programmes and the new attitude towards the Forum Civil Euromed. This positive impression is confirmed by the observation that the Commission increasingly uses the mediation of European NGOs to get in touch with NGOs from the MTCs. The task of supporting Euro-Mediterranean relations on the level of civil society is not restricted to DG IB, but to all Directorates General in their respective spheres of work.[79] Thus, at least in the long run there is some hope that

77 In 1996 the WEU set up a Rapid Intervention Force called EUROFOR, supplemented by a naval force called EUROMAFOR. Both are subordinated to the WEU and to NATO for peace keeping operations in the Mediterranean. The MTCs complained that they had not been consulted. Especially the Arab countries suspect that they are not really perceived as Europe's partners, but as potential adversaries.

78 As long as the EU sticks to its protective agricultural policy, the FTA has little attraction for those MTCs who rely on the export of agricultural products. Furthermore it is well known that structural adjustment - a precondition for the FTA - has negative side effects on the labour market, thus increasing the already worrying socio-economic problems of many of the MTCs.

79 DG X (Information, Communication, Culture, Audiovisual) supports for example ECSA-MED, an inderdisciplinary Euro-Mediterranean network accompanying the EMP.

the marginal role of decentralized cooperation will be upgraded in the concept of the EMP.

Last but not least it should be self-evident that European credibility concerning respect for human rights depends also on the performance of each member state at home. Repeated criticism by the MTCs but also by NGOs like Amnesty International concerning the treatment of asylum seekers and migrants in Europe have to be taken seriously. The innovations of the Amsterdam Treaty concerning a common European asylum and migration policy are based on Europe's interest to keep migrants out and not on the Geneva refugee convention. Thus, decision-making procedures concerning migrant and asylum politics lack democratic control and neglect the legitimate rights of asylum seekers to be protected from persecution.[80] As long as these deficits are not removed, Europe's demand for political reform in the MTCs is diminished by an undeniable credibility gap.

80 See the new Title III a, Free movement of persons, asylum and immigration, Treaty of Amsterdam and the Protocol integrating the Schengen acquis into the framework of the European Union, Art. B. para.1(3), Treaty of Amsterdam. For a detailed evaluation of Europe's asylum and migration policy in general and in the Mediterranean see Footnote 6.

ITALY, THE EUROPEAN UNION AND THE MEDITERRANEAN

Fulvio Attinà

The symbols of the European Union (the red passport, the twelve stars flag and the European anthem) have always been fully accepted by Italians. In the early times of the integration process, the left and certain right political sectors considered it advantageous to themselves and the country to emphasise their dissociation from supranational Europe. They were in favour of bringing Italy out either of the capitalistic market or of the condition of restricted national sovereignty in which, according to them, EC membership had put the country. But, with the passing of time, Italians have acknowledged the advantage of staying in the European Union without reservation. Opinion surveys exclude that national identity precludes the existence of different identity feelings in Italian people. On the contrary, they imply that, in the mind of the Italians, affection to national symbols goes well with affection to Union symbols. However, it is better not to count only on general, aggregated opinions. Better insights are derived from the examination of separate sectors of the public such as interest groups, professional associations, the media and, of course, the political class.

The civil society and European integration in Italy

Three types of economic interest organisations take part in EC policy-making: trade associations, agricultural associations and trade unions. They are members of organisation at the Union level (the Eurogroup); in a few cases, they have their own bureau of representation in Brussels to collect information and lobby. Eurogroups produce official positions on EC norms and policies with procedures involving all the members; but, when one or a few strong national delegations exist, they take the responsibility for formulating the official position of the Group. Usually, Italian delegations in large Eurogroups do not have the power to direct the position of the Group. To overcome their weakness, Italian interest organisations do what the less strong members in Eurogroups usually do: they put pressure on their own government (that is at the national level) rather than on the Commission (that is at the Union level). In such a case, if a national group wants to bloc or change a Commission proposal it has to persuade its government to influence the decision of the Council on that proposal, i.e. to intervene in the final stage of the EC decision-making process, even by threatening to reject the proposal by a “veto". This strategy, however, is not always possible and successful. Regarding the common agricultural policy, for instance, conditioning the negotiations has been rarely within the reach of the Italian government. However, the Italian ministry does not bear all the responsibility for failure; agricultural associations are also blamed for acting

inappropriately in the preparatory phase of the decision and for not having adequate contacts with the competent government authorities.

The limited ability of collecting and processing relevant information and making prospective analysis has strongly conditioned the action of the Italian interest groups. They have preferred to use the traditional instruments of exchanging assistance and support with the national bureaucracy and the government parties, though such instruments are not good in the political-institutional structure of the Union.

The situation is very much the same in the case of professional associations such as professional associations of lawyers, nurses, etc.. In most cases, professional associations are not interested in Europe. They react to EU initiatives rather than being pro-active. The Annual Programme of the Commission, White and Green papers are rarely the object of appraisal and study by these associations. However, there are some signs of positive change in this field.

For a long time, education and research institutions paid little attention to the process of European integration. The national imprint of school programmes can not be modified easily and quickly. Attention given to European integration in the form of celebrating "Europe day", instead, is easy but superficial: primary and secondary education authorities have promoted knowledge on European integration among the young generation mainly through such activities. Italian universities (as all European universities in these times) have great opportunities to further their “European dimension” in teaching and research. Certain opportunities are exploited; others are not. The inertia and conservatism of the academic world are partly responsible for that situation; but there are also legislative and administrative constraints that must be removed by the national government.

The mass-media have given increasing attention to European integration. In the last ten years, news about the Union has got more space than in previous years. However, newspapers have always considered European integration as an increasingly unfortunate attempt to create a European federal state, uncertainly projected after World War Two. Only in recent times have the mass media appeared to approach the idea that the European Union is a political system to be defined and appraised in itself and not in reference to a federal goal expressed fifty years ago.

The Italian political class and European integration

Generally speaking, Italian political parties are prone to keep party competition at the national level strongly separated from party action at the Union level; but there are exceptions. The Greens have always

exhibited a strong “European look”. They focus their political programmes on “new politics” issues both at the European and national level and spend in national politics this “unitary attitude” as proof of their modernity. On the contrary, the party of the traditional right (the late Social Movement and today the National Alliance), though accepting European integration, has been constantly inclined to keep politics at the national level separated from that at the Union level. The remaining parties fall between these two cases, but in recent years both inclination to discontinuity of the state level from the Union level of political competition and criticism on common policies (especially on economic and monetary union) seem on the rise in certain Italian parties, especially those of the right. This change of opinions (from an unconditioned to a conditioned support of integration) may be explained by two factors.

One factor operates at the state level. Following the transformation of the Italian party system caused by political and institutional change (crisis of the "first republic" and new electoral law) from 1992 to 1994, the major members of the right coalition (*Forza Italia* and, to a lesser extent, *Alleanza Nazionale*) started to use integration as an area for competition, a use never made before. They seemed to believe that they could widen their constituency by exhibiting a *Thatcherite* approach to the European Union.

The second factor, operating at the Union level, is the form of party organisation in the European Union. Europarties have a peculiar “twin organisations” form made by the federation and the parliamentary group. The twin organisations do not have the same goals and procedures or the same distribution of organisational power among the member parties. The federation aims at expanding party membership by adjusting the different positions of the members; the parliamentary group, on the other hand, has the aim of reaching unitary voting on parliamentary resolutions. For that reason group leaders are ready to mediate, but they do so only to a certain extent. When a member party is small and not required to achieve a parliamentary majority, Group leaders pay little attention to it. National parties with few members in the European Parliament react to such situation with a politics of separation between the state and the Union. From this point of view, in recent years the situation has worsened for Italian parties.

With the exception of *Forza Italia*, whose members recently merged with deputies of the French right party *MPR* to create the Union for Europe (UPE) Group, and *Alleanza Nazionale*, whose deputies have not adhered to any Group of the European Parliament, major Italian political parties are members of Europarties with a federal and parliamentary organisation: the Party of the European Socialists (PES), the European People Party (EPP), the Liberal, Democratic and Reformist Parties (LDR)

and the federation of the Greens (G). These four federative-parliamentary Europarties have two different types of power distribution. The PES and EPP Groups have a centralised-power organisation; the remaining groups (LDR and G) have a diffused-power organisation. In the PES Group, power is concentrated in the hands of the British Labour and the German Social Democratic Party. Italian Euro-deputies had a certain power only in a short period after the adhesion of PDS (the *Partito Democratico della Sinistra*) to the PES Group. This was in 1993; but in elections in the following year, that power disappeared with the collapse of the Italian Socialist Party. Today, Italian deputies are not numerically decisive in the PES Group. The Italian delegation in the EPP Group, instead, was numerically strong in the past, but not as strong as the German delegation. Today, the Italian delegation in the EPP Group is made of representatives of different small parties and makes up only 7% of the Group. Briefly, Italian parties are not able to condition the position of their Party Group because they are not the principal members of the Group.

In the formative years of the formation of the European Communities, the Italian political class was at the stature of its assignment. Statists like Alcide De Gasperi and, for a shorter period of time, Gaetano Martino exercised a true European leadership and were able to find solutions to obstacles on the road to integration. Certainly, those men have not been the only Italian politicians to make an important impact on EC politics. The problem is that Italy does not have a "European class"; it does not dispose of an appropriate number of politicians, public administrators, scientists, business men and media operators constantly committed to handling Italy’s participation in the European political system. This lack of a "European class" has roots mainly in the scarce attention given to Europe by higher and advanced education.

Moreover, Italy does not have a public administration worthy of the level of its stature. The more common policies deepen, the more state administration must be efficient. Italy, instead, is not well equipped with instruments and procedures for co-ordinating the actions of different administration branches involved in EU affairs. In the past, a ministerial agency for co-ordinating ministerial actions in the EU did not exist. When it was constituted in the form of the Department for Community Affairs (in 1987), it was not equipped with good instruments to co-ordinate the position of the Italian ministers in Brussels. The autonomy given by the law to Italian ministries and the coalition form of the Italian governments, which reinforces the autonomy of the ministries, have been responsible for this situation in the past. With a more stable and homogenous government, this situation has been tempered.

Finally, the Italian parliament addresses Community affairs when a parliamentary vote is needed to ratify new treaties or to revise existing treaties, and when a parliamentary law is required to implement Directives. Apart from ratification and legislation, the parliament either addresses the government position on EU policies - if there is agreement among parliamentarians - or is consulted on provisions under preparation in the Union - if the government wants it. To make these actions, a parliament must have specific requisites such as a good number of deputies deeply engaged in Union matters, have a permanent committee specialising in EU affairs and be in possession of relevant and updated information. The Italian parliament is not well placed on any of these points. It gives little attention to Union problems; it does not have a specialised permanent committee (the special committees of the Chamber and the Senate do not have the powers of an ordinary committee); it is not furnished with adequate information and documentation.

Italy and the Mediterranean

Italy's relations with the Mediterranean have been always considered contradictory relations. Italian politicians have always pledged to conduct an assertive and high profile policy in the Mediterranean basin but critics say that Italy's Mediterranean policy has always been a low profile, erratic and negligible policy.

Italian governments have constantly declared that Italy's strong role in the Mediterranean is a priority of the country's foreign policy. Indeed, in the last thirty years Italy has been present and active in the international politics of the Mediterranean region. To be precise, one should distinguish Italy's action in the eastern part from Italy's action in the western and mid-western parts of the Mediterranean. In the eastern part, Italy's governments have joined the actions and negotiations of the allies; they have never acted alone. It is well to remember that Italy has been present in that part of the Mediterranean (for example, in Lebanon under the United Nations flag) to work for the peaceful settlement of local conflicts.

In the western part of the Mediterranean, on the other hand, Italy's action has been much larger and stronger. In this part, Italy has conducted both collective and individual actions. It has been among the members of collective diplomatic actions and processes. Sometimes, it has been among the promoters of such initiatives (as, for example, in the case of the "5+5 initiative"). Italy can also ascribe to herself the design of the conference on security and co-operation in the Mediterranean in the early 1970s, a design that has never been turned into action but has always been considered as an important working hypothesis.

Italy's bilateral relations with non-EU countries of the mid-western Mediterranean are important and amicable relations. They are based on the sincere acceptance of the principles of peace and mutual respect among states which are the fundamental principles of the society of states. In addition, they are driven by the principle of trade and exchange which has been the very foundation of co-operation and peace in the Mediterranean whenever co-operation and peace have been present in the area.

However, the critics of Italy's Mediterranean policy want more from the country's Mediterranean policy. Many Italians blame their government for not having *prestige* in the Mediterranean - indeed, they blame the government for not being able to gain for Italy as much *prestige* as other countries - France, for example. Others blame the Italian government for not exploiting all the chances the country could exploit in business and trade with the Mediterranean partners. Finally, some critics accuse the Italian government of being unaware of the fact that the Mediterranean poses the most serious threat to Italian security; today's resurgence of geopolitical and geo-strategic studies has raised the debate on such aspects of Mediterranean politics and brought to the attention of the public the theories of analysts favourable to a stronger and assertive Italian military posture in the Mediterranean basin. On the other hand, the Italian political culture has always been characterised by the presence of quite a strong "Third World wing" (the *terzomondismo*) which has counter-balanced the movement for a "hard stance" toward the perceived "threat from the South".

I am not convinced that there is much to criticise in Italy's Mediterranean policy. All national policies towards the Mediterranean - not just the Italian - have been conditioned by the enormous problems and objective constraints of the area. The legacies of the colonial past and the rules of the cold war of the last decades have imposed restraints on the policies of all the countries in the Mediterranean. If the rules of competition between the great powers do not hold any more, the legacies of the colonial relations of the past - that is the uneven economic development of the area - have not been overcome. In addition, they have been aggravated by the new conditions the globalisation process has brought into existence in our time. Indeed, the distances between the states and societies of the Mediterranean created by the post-colonial and cold-war factors in the post-world-war-two period have now been filled by the de-bordering effects of the globalisation process, that is to say by the fact that any problem instantly *deborders* (or spills over) national frontiers. It is on such a scenario that, today, Italy's and all national policies must be evaluated and re-constructed.

At the beginning of the 1990s the question of giving a new configuration to the international relations of the Mediterranean was raised having in mind the new international order created by the fall of the Soviet Union. As a matter of fact, the new international order is a big question not because of the end of the great powers rivalry but mainly because a "de-bordered" world has come into existence. In such a world, states and societies have been called to face new problems, and to do so together. Indeed, to face such problems, the right answer is regional co-operation. In the Mediterranean, the answer is the Euro-Mediterranean Partnership.

The Euro-Mediterranean Partnership Challenge

How aware of such a change and how prepared to meet such a change is Italy? Italian society is much more Europe-oriented than Mediterranean-oriented. Italy's culture and economy have strong ties with the North; few with the South. Italy's business community has always advocated the need to develop links with Europe. Such links have been considered necessary to sustain the industrialisation of the country, in the early stages, and to strengthen economic growth, later. The importance of such links cannot be underestimated. At the same time, the opportunities of Euro-Mediterranean regional co-operation are not minor ones but they have not yet been discovered by Italian firms. Then again, the cultural links of Italy with the rest of the Mediterranean world are long-standing and strong but they are "under the surface", so to say, and not acknowledged across the country or all the Italian regions. Indeed, such contrasting factors in Italy's society account for Italy's so-called contradictory Mediterranean policy and for Italy's low level of preparedness to play its role in today's Mediterranean relations.

How to rid Italy of such constraints and ready it for the Euro-Mediterranean Partnership? The answer can be found in the multi-dimensional and de-centralized strategy of the Euro-Mediterranean Partnership. States and national governments have the responsibility for the Partnership, but not only them. Also local governments and communities, civil associations and education agencies (the universities, for example) are responsible for achieving the Partnership goals. Our meeting is a case in point. Linking universities across the Mediterranean will not be without important consequences because such links produce effects on several levels. Joint initiatives in research and teaching will bring the Mediterranean societies ever closer to one another. Research will make known new fields of political and economic co-operation; teaching and education will make ground for a new culture of co-operation.

Italy's universities are more aware of the "Mediterranean opportunities" today than they were in the past. The Italian university system very much neglected "area studies". Italy's academic community has always preferred discipline aggregation rather than geographical area specialisation. Italy can count on a very small number of institutes and departments of area studies. A couple of Oriental studies schools exist in Italy, but not one in Mediterranean studies. The possibility of creating relations with universities across the Mediterranean in the frame of the Euro-Mediterranean Partnership can stimulate the opening of new centres of studies on the Mediterranean societies and cultures.

ADJUSTING TO THE EUROPEAN COMMUNITY: A BRIEF ANALYSIS OF THE ECONOMIC GAINS AND PROBLEMS FOR ISRAEL

Tal Sadeh and Moshe Hirsch

1. INTRODUCTION

Adjusting to the European Community's (EC) Single Market (SM), will represent a major change for Israel, both politically and economically. The following analysis focuses on the economic implications of such a step, briefly surveying the effects in each of the main areas of EC economic integration. Sections 2 and 3 deal with the freedom of movement of goods by analyzing the effects of Israel's joining the EC's Customs Union (CU) and its Common Agricultural Policy (CAP). This, admittedly, goes beyond a mere adjustment to the SM and an approximation of laws. However, joining the CU and the CAP seems to be the only way to further liberalize trade in goods between the EC and Israel. Section 4 deals with the freedom of movement of services, including the freedom of movement of persons, and section 5 to the freedom of movement of capital with or without Israel's joining the European Monetary Union (EMU). Section 6 analyzes the important issue of public procurement, over which significant controversies arose between the EC and Israel during the negotiations that led to the 1995 EC-Israel Euro-Mediterranean association agreement. Section 7 deals with the gains of greater competition within Israel as a result of adjusting to the SM and section 8 concludes.

This paper is based mostly on: Hirsch, M., E. Inbar and T. Sadeh (1996) *The Future Relations Between Israel and the European Communities - Some Alternatives* (Bursi:Tel-Aviv). The research, carried out in 1995, is based on 1993 data - the latest available at that time. Nevertheless, the main arguments of the book are still valid. Sections 3, 4 and 6 are also based on: Hirsch, M. (1996) 'The 1995 Trade Agreement Between the European Communities and Israel: Three Unresolved Issues', *European Foreign Affairs Review*, 1, 1, 87-123.

2. FREEDOM OF MOVEMENT OF INDUSTRIAL GOODS - JOINING THE EC'S CUSTOMS UNION

Hirsch, Inbar and Sadeh (1996) investigated the economic desirability to Israel of a CU with the EC, that does not include agricultural products, and that has the EC's Common Customs Tariff (CCT) as it's external

tariff. These features of the CU follow the model of the Euro-Turkish CU that entered into force at the beginning of 1996. According to the Ankara agreement this CU should cover all trade in goods, including agricultural goods, but not "...products within the province of the European Coal and Steal Community."[1] However, the Euro-Turkish association council decision 1/95 that establishes the new CU stops short of incorporating agricultural products in the new CU at this stage.[2] There seems no reason to believe that a Euro-Israeli CU will adopt a different external tariff, or that it will include agricultural products.

Since an FTA agreement already exists between Israel and the EC in industrial goods, two effects are expected on the Israeli part following the move to a CU. The first will be the adoption by Israel of the EC trade rules. This means that Israel will accept the EU's pyramid of trade preferences: Israel will replace the existing FTA it shares with EFTA with the one embedded in the EEA (excluding Switzerland). It will also have to adopt the Lomè 4 convention with the ACP countries and the GSP with the rest of the developing world. It will have to adopt the Europe agreements with the eastern European countries and the EU's Mediterranean trade policy. Israel will also have to abandon it's unilateral exposure policy. But most important, since there is no FTA between the EC and the US, Israel will have to forgo the FTA it has with the latter which includes industrial as well as agricultural products. The importance of the trade with the US to the Israeli economy is clear: In the period 1990-1994 it's share of Israeli imports was stable around 18% and it's share of Israeli exports was stable around 30% (indeed excluding diamonds this share is even greater).[3] Therefore abolishing the FTA with the US is hypothesized to have an important effect on Israel's trade and economy. This of course, on top of the political repercussions such a move would have (these will not be analyzed here).

The second effect on the Israeli part following a CU will be the final removal of all tariffs between it and the EC. Under the FTA not all the products shipped from Israel enter the EC free of customs. Those that do not comply with the rules of origin are not exempt from customs duty. The formation of a Euro-Israeli CU will exempt all Israeli products from custom (and of course all European products entering Israel).

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1 (1964) 'Agreement Establishing an Association between the European Economic Community and Turkey', *Official Journal*, 217, Article 26.

2 The Euro-Turkish Association Council, (1995), *Decision 1/95 (Customs Union)* (Brussels) Article 22.

3 Israel's Central Bureau of Statistics, Tables 12-13, *Quarterly Statistics of Foreign Trade*, IV-93, IV-94.

Hirsch, Inbar and Sadeh (1996) argue that the FTAs Israel has with the EC, the US and EFTA make it hard for Israeli producers to take on their foreign competitors. Israeli producers tend to rely more heavily on foreign sub-contractors than producers in a large country for reasons of economies of scale, and a more limited national variety of relative advantages. Israel's FTA partners either have bigger economies, or their producers have better access to European sub-contractors, and are, therefore, exempted from the Israeli tariff. On the other hand, Israeli producers who use non-European sub-contractors in goods exported to the EC, or use non-American sub-contractors in goods exported to the US, are not exempted from the foreign tariff.

Israeli producers are at a relative disadvantage vis à vis their European competitors as a result of the SM program, and the European Economic Area. The FTAs Israel has, therefore, tend to expand its imports more than its exports. While on the imports side Israel is affected by some balance of trade creations and trade diversions, on the exports side the positive welfare effect is weak. On the other hand, Israel's FTA partners are weakly affected by the balance of trade creations and trade diversions on their imports side, but the positive welfare effect on their exports to Israel is complete. In other words, ***prima facie*** the asymmetry in the ability to comply with the FTA's rules of origin causes asymmetry in the FTA's welfare effects too, in favor of Israel's partners.

Hirsch, Inbar and Sadeh (1996, 137-42) identify four cases of change in the wake of a European-Israeli CU. In all four cases, the European industry is less competitive than the rest of the world's, and the difference between them lies in the relationship between the European price, the Israeli tariff and the European tariff. Wherever the European tariff is higher than the Israeli tariff, a CU will divert the trade in favor of the EC at Israel's and the rest of the world's expense. On the other hand, wherever the European tariff is lower than the Israeli tariff, a CU will create trade by substituting expensive European goods with cheaper imports from the rest of the world. However, wherever Israel imports American goods, it will be hurt by a CU with the EC.

The Israeli and the EC's industries will be negatively affected by a Euro-Israeli CU, but the rest of the world's industries will gain. The American industry will not gain from trade creations, and can only lose from such a CU. A sectorial analysis found that around one half of the Israeli industrial imports will not be affected by a customs union with the EC. In another fifth, positive welfare gains will be felt, and the rest of the sectors are equivocal. In the bottom line, therefore, a CU with the EC may be more economically efficient to Israel then the current FTA.

These conclusions are subject to qualification. It is important to remember that as Israel adopts the EC's trade policy towards third parties in the wake of a CU, so do the third parties apply their EC policy on Israeli exports. This would spell the end to the Arab boycott on all of its levels. On the other hand, that part of Israeli exports to the US which under the current Israeli-American FTA does comply with the rules of

origin (and is exempt of tariff), will be hurt by a Euro-Israeli CU. The Israeli balance of exports effects vis à vis third parties should be studied further.

3. FREEDOM OF MOVEMENT OF AGRICULTURAL GOODS - JOINING THE CAP

Agricultural exports form 3.69% of Israel's total export. The EC markets absorb 78% of this. 13.8% of the domestic agricultural product is intended for the EC, especially flowers, cotton and avocado.[4] Like the EC, Israel supports its agricultural sector through different means, including subsidizing factors of production such as water and capital. Israel restricts agricultural imports through import quotas, licensing requirements, variable levies, and different import prohibitions. Almost all agricultural fresh and processed products must have a license to be imported into Israel. A number of agricultural products receive unlimited protection against imports, as licenses to import them are not usually granted (GATT, 1995, 117-26; Halevi, 1994).

Agriculture constituted one of the most difficult issues in the negotiations between Israel and the EC, and the disagreement in this sphere was one of the last obstacles to delay the conclusion of the 1995 agreement. In spite of the small share of agriculture in the GDP and labor force of Israel and of the EC, both parties consider it an important sector.

The 1975 agreement applies to industrial products and not to agricultural ones. The terms of trade in agricultural products were set by the first and second protocols to the 1975 agreement. Each party granted some preferential treatment to specific products. The list of preferential exports from Israel to the EC was significantly smaller than that of the preferential exports from the EC to Israel. Most of Israel's agricultural exports to the EC enjoyed some customs concessions, but the majority of the exports were still subject to various restrictions.

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[4] Israel's Central Bureau of Statistics (1994) *Statistical Abstract of Israel*, 45, 201, 202, 208, 448, 451.

After the conclusion of the 1975 agreement, the basic circumstances of EC-Israel agricultural trade were significantly changed, damaging the Israeli agricultural exporters. Israel developed new agricultural products (mostly flowers), the European consumer's demand for traditional Israeli exports (such as oranges) declined, and the EC gave new concessions to other non-members and was enlarged to the south. The EC-Israel agricultural regime was too rigid and could not adapt to these changes.

In 1987 the parties signed a fourth protocol to the 1975 agreement, intended to account for these changes. Most of the Israeli agricultural exports to the EC was gradually to be exempted from tariffs, but was still to be subject to other restrictions, such as "tariff quotas" and "reference quantities."

However, these preferences eroded further due to parallel concessions given to eastern European states, the establishment of the European Economic Area (EEA), the EC's 1995 enlargement to the north, and the 1994 Israeli-Palestinian Cairo agreement. Israel's agricultural trade deficit with the EC widened. The principal Israeli demands were to increase the existing quotas of flowers, to lower minimum prices of oranges, and to expand the seasonal periods allowed for the export of grapefruits. The EC representatives raised their own demands (such as in concentrated apple juice and butter).

The strenuous disputes between the parties on these issues involved internal disputes within each party's delegation and delayed the conclusion of the agreement. Finally, in the 1995 agreement the EC yielded in oranges, flowers and grapefruits, while Israel increased the quotas for several European products (such as apples and frozen beef).

What are the consequences of Israeli membership in the CAP? From Israel's point of view, since the list of products in the 1995 agreement is fixed again, a repetition of the process of preference erosion is almost inevitable. Specifically, the EC's anticipated enlargement to the east, will further weaken the relative position of Israeli exporters. The enlargement and the WTO process of liberalization in agricultural trade will probably stiffen the EC's position, and the EC's agricultural sector will increase its pressure against import concessions to non-members, such as Israel. The option of joining the CAP seems the only way to ensure a better access to the EC's market. From the EC's point of view this should not be a significant development, since the EC-Israeli agricultural trade accounts for only 1% of the EC's total agricultural external trade. The EC has

already agreed to the accession of CEEC countries, which have a much greater agricultural sector.

On the import side, upon joining the CAP, Israel's agricultural sector will enjoy the massive support given to the EC's agricultural sector. EC subsidies will lower the prices of many agricultural products in the Israeli market, and Israeli consumers (both industrial and individual) will be able to save significant resources. And all this will be financed from Brussels. Thus, economically, the overall balance of joining the CAP for the Israeli agriculture can be positive. Some adjustments, however, may very well be imperative, as some agricultural sectors decay and others expand. Israel, for example, has a comparative advantage in technology-intensive products (such as in bio-technology).

Politically, though, the CAP policies might not always suit Israel's needs. The protection of the domestic agricultural sector is frequently justified by reasons of food security and the need to support rural communities. Israel's political situation intensifies the concern for self-sufficiency as a safeguard against a future economic embargo. However, this rationale is not completely convincing. First, the crucial commodities at times of such a crisis are energy and arms, and not fresh agricultural products. Most of the processed food can be stored in preparation for such an embargo. It is unclear whether a food boycott can be effective altogether (Kol, 1994). Second, even in the agricultural sphere, the most strategic product for the Israeli economy - grain - is already largely imported.

As for the need to support rural communities, perhaps this support should not be in the form of protection from agricultural imports. Better support programs should channel resources to the target populations, without distorting the price system of the entire economy. The existing system channels the protection not only to settlers in border areas, but also to other farmers in other regions. There are many possibilities of directing appropriate protection to the target population more accurately (such as income tax concessions or direct financial grants), without imposing unreasonable restrictions on external trade.

4. FREEDOM OF MOVEMENT OF SERVICES

The external trade of the EC in services reaches about one-third of the value of import and export goods. Though governments do not generally impose customs charges on services that cross borders, liberalizing trade in services is frequently more difficult than liberalizing merchandise trade, because services are highly regulated. Even when regulation is not

intended to protect domestic industry, it often has an NTB (non-tariff barrier) effect.

The principal interests in the sphere of trade in insurance services, for example, are the protection of investors on one hand, and trade liberalization on the other. The need to protect investors requires the state to closely monitor the activities of the insurance undertakings in their territory. Insurers must fulfill a minimum solvency margin, and foreigners are required to hold some of their financial assets in the state's territory.

The General Agreement on Trade in Services (GATS) defines "services" through four modes of supply: (1) cross-border supply; (2) consumption abroad; (3) commercial presence; and (4) the presence of natural persons. The definition excludes services supplied in the exercise of governmental authority. The contracting states commit to particular obligations concerning market access and national treatment. The agreement adopts the MFN principle but allows special derogations.

Like GATT, Article V of GATS requires the parties to such an agreement to fulfill four central conditions: (1) substantial sectorial coverage; (2) the absence or elimination of substantially all discrimination between the parties; (3) no rise in the overall level of barriers to trade in services within the respective sectors; (4) notification of any such agreement to the Council, which may establish a working group to examine the agreement.

Intra-EC trade in services is regulated in the Treaty of Rome. Discrimination based on nationality or place of residence is forbidden, and national legislation affecting trade in services is harmonized (Kapteyn and Van Themaat, 1990; Mathijsen, 1995; Ehlermann and Camogrande, 1991, 481-500). In some sectors, however, the member states are permitted to restrict the movement of services, but only in order to protect the consumer.

The EC regulates trade in services sector by sector. Across-the-board policies were adopted only with regard to the liberalization of payments, the right of entry and residence, and measures justified on grounds of public policy, public security or public health (Ehlermann and Camogrande, 1991, 481-500).

In financial services, the EC applies the principle of mutual recognition: According to the principle of "home country control" the state in which the financial institution is established is responsible for supervising its

operations, and the duplication of supervision is avoided. Thus, financial institutions need only a single license in order to market their services all over the EC (Anderson, 1989, 208-211; Eeckhout, 1994; Usher, 1994; Molle, 1994).

In the tourism sector there are four domains of EC policy: Improvement of tourism services (including transport deregulation), stimulation of demand for tourism services (including abolishing cross boarder formalities), regulation of private sector business environment in which tourism enterprises operate (including competition policy), and reconciliation of environmental and tourism requirements (Hirsch, Inbar and Sadeh, 1998, 114).

The EC has not developed comprehensive rules concerning trade in services with third states. It has only one services agreement with a non-member - the 1989 insurance services agreement with Switzerland. The 1995 Euro-Israeli association agreement does not include any new, concrete obligations to liberalize trade in services between the parties. In banking services, member states are to decide whether to allow or reject foreign competition. The EC institutions may intervene only if the EC's financial institutions abroad do not receive comparable or national treatment (Eeckhout, 1994; Usher, 1994).

Similarly, the establishment in EC territory of branches of foreign insurance undertakings is left to the member states. The admission of a branch by one member, however, does not grant the branch market access to the rest of the members (contrary to the principle of "home control").[5] The EC requires its members to consider a foreign undertaking separately from its head office. The solvency margin of the foreign branch is calculated according to the volume of its own activity, and those assets which it keeps in the EC (Paul and Croly, 1991; Levi, 1994).

There are four roughly equal branches of services in Israel's trade: transportation; tourism (which should not be significantly affected by the SM); capital services; and trade in labor. Israel's immigration policy resulted in the significant limitation of the fourth GATS mode of services (the presence of natural persons). Israel stated in GATS that it will permit only the temporary entry of executives and managers.

[5] Levi, 1994; Paul and Croly, 1991. See in detail in the EC Directives on this issue: (1973) Directive 73/239, *Official Journal of the European Communities*, L 228/3; (1988) Directive 88/357, *Official Journal of the European Communities*, L 172/1; (1992) Directive 92/96, *Official Journal of the European Communities*, L 360/1.

The 1975 agreement with the EC does not include any provisions on services, and the 1985 agreement with the US vaguely recognized the need to minimize restrictions on trade in services.

Banking and insurance attracted extensive attention in the negotiations for GATS, and with the EC, since the Israeli insurance industry apparently can not compete with foreign prices (Sassoon, 1990, 236). Israel is quite restrictive in insurance, particularly in the profitable life insurance, in which Israel undertook no obligations. This was excused by exchange controls. Israel did, however, accept the commercial presence of foreign undertakings. For other types of insurance, Israel accepted the possibility of cross-border supply and commercial presence, but rejected the possibility of consumption abroad. Foreign commercial presence is conditional upon a license and keeping certain sums of money in Israel.

Currently, foreign insurance companies control around 2% of the non-life Israeli insurance market. The main reasons for the low activity of EC insurers in the Israeli direct insurance market are: (1) the obligation to keep a significant part of the income in Israel and to be exposed to its inflation; (2) the Arab boycott; (3) the relatively small size of the Israeli market. However, about 75% of the total Israeli reinsurance is transacted with European firms, most of them from EC members (Levi, 1994).

The Israeli law reflects the principle of "local control" (except for reinsurance and direct insurance from abroad): Foreign insurers are required to hold an Israeli license, which is granted if their financial means and plans of operation are appropriate, but their expected contribution to the insurance industry, and to the economic policy of the government, is also considered (Sassoon, 1990, 236).

Adjusting to the SM will greatly benefit the Israeli consumer, as the principle of local control will be replaced with the principle of home control. This will cause major adjustments in the Israeli insurance sector, which will lose its mediation position between the Israeli market and the foreign reinsurance industry. The weakening of both inflationary trends in Israel in recent years and the Arab boycott make it easier for foreigners to establish a presence in Israel. Thus, Israeli banking will face greater competition, but on the other hand, it is expected to do well in European markets.

Another Israeli sector which can be expected to face fiercer competition is air and sea transport. The Israeli Ministry of Transportation is wary of adopting the EC's Common Transport Policy because it might endanger

the Israeli national airline El-Al. Officials in the Ministry of Tourism, however, are encouraging such a step. The Ministry of Tourism stresses that increased competition and efficiency in this sector would lead to an increase in the number of European tourists visiting Israel. The possibility of major transformations in the European airline industry, i.e., large scale cooperation schemes between major European airlines that might lead to airline mergers, creating 3-4 "mega-airlines," supports the wariness of the Ministry of Transportation. However, adjusting to the SM would enable El-Al to join existing strategic cooperation schemes in the European airline industry (Hirsch, Inbar and Sadeh, 1998, 114-5).

As for labor trade, foreign workers are not allowed to work in Israel except for special cases or in specific sectors. In agriculture and construction, which are labor-intensive sectors, the Israeli economy is heavily dependent on foreign workers. In recent years, mainly due to security problems, Israel has been in the process of replacing the Palestinian workers in these sectors with workers from other cheap labor countries. However, any progress in the peace process can greatly reduce the demand for non-Palestinian workers. Politically, Israel strives to preserve its Jewish character, and is concerned that this will be endangered by free movement of persons. Israel's special problems with terrorism will make it hard to join the Schenegen accord.

As for unrestricted movement of Israelis to work in EC member states, Israeli officials fear an outward immigration wave of skilled workers in search of better wages. Though a certain trend in this direction might develop, this fear may be exaggerated, and in fact, it is possible that the EC will be more concerned by the possibility of Palestinian immigration into Europe, even if the PA (Palestinian Authority) is left out of the SM, because of the difficulties of controlling the Israeli-Palestinian border.

5. FREEDOM OF MOVEMENT OF CAPITAL AND THE POSSIBILITY OF EMU MEMBERSHIP

Since 1989, Israel has been in an ongoing process of liberalization in its capital market. There has been a gradual removal of limitations on Israeli private investments abroad. Interest rate ceilings on foreign exchange deposits were lifted, as well. The liberalization in the Israeli capital market reduced the limitations on speculative purchases of foreign exchange by the private sector. The liberalization process also increased the investments and the activities of Israeli companies abroad. The EC as a target draws only a little more than one-fifth of total Israeli direct investments, while it receives an amount 2.7 times smaller than the amount invested in the US (Hirsch, Inbar and Sadeh, 1996, 165-6). All in

all, Israeli foreign direct investments are very small compared with its GDP. Figures of foreign direct investment in Israel are very hard to obtain, so it is difficult to assess the European volume of investment in Israel. Estimation attempts lead to a low figure. All of this means that there is plenty of scope to increase the capital movement between Israel and the EC.

On the capital-import side, Israel does not impose restrictions. It is, rather, the capital-export side that needs more liberalization. However, monetary considerations should be taken into account as well as real economy considerations. It is true that in spite of the liberalization process described above, and the growth in Israeli capital exports, taxation of Israeli foreign financial investments still distorts the balance of capital. In addition, trust funds of foreign investments are limited to a certain portion of their portfolio (50% in 1994). This policy not only limits their investment decisions, but ironically enough it also forces them to sell foreign assets whenever they gain high returns, because their portfolio's weight increases at the same time.

Restrictions on capital exports cause inefficiency and greater volatility in the Israeli capital market as a result of denied foreign competition. Such restrictions used to ensure cheap borrowing sources to cover government deficits. They benefit Israeli borrowers at the expense of savers. However, these restrictions support the Bank of Israel's (BOI) strong Shekel policy, by limiting the scope for speculative capital flows. This is because high Israeli interest rates that tackle inflation attract foreign capital (i.e., increase capital imports). In order to avoid a revaluation of the Shekel, the BOI is forced to purchase the excess foreign exchange against sales of Shekels. In order to avoid a consequent increase in the Israeli money supply, the BOI is forced to reduce its tender loans and thus reduces the effectiveness of its own monetary policy.

Nevertheless, complete liberalization will cause Israel to lose the remainder of its monetary independence, if there is any exchange rate commitment. Monetary independence in a truly open and free capital market is possible only if there is a flexible exchange rate policy. Free movement of capital between Israel and Europe will force Israel to choose between the two policies. Indeed, the BOI has been contemplating for some time now the possibility of floating the Shekel and making it completely convertible. This represents a certain loss of economic sovereignty, but Israel will gain efficiency in its capital allocation, and global economic trends in recent decades have anyway limited the sovereignty of the nation-state (Cohen, 1996, 280-281). Thus, the economic independence of Israel is limited already.

It is important to bear in mind that in spite of the recent political and economic developments, Israel is still considered to be a relative risk for foreign investors. Foreign investors still demand a risk premium on their investments in Israel. Therefore, if Israel chooses to commit itself to a certain exchange rate target, it might cause its real interest rates to rise more than it desires (assuming that the exchange rate is targeted vis à vis low risk currencies). Alternatively, if it chooses monetary autonomy (i.e., managing the interest rate without foreign constraints), then its currency might be devalued more than it desires (Andrews, 1994, 203-209). The exchange rate may deviate significantly from its purchasing power parity vis à vis trading partners' currencies, and further devaluation expectations may develop among investors, affecting monetary stability. One way to tackle this problem is to reduce public deficits that are a source for external deficits. Excessive public spending can open a big gap between local expenditures (consumption and investment) and local resources. This gap, in turn, is reflected in a trade (goods and services) deficit, which creates structural devaluation pressures.

Allowing for floating exchange rates, therefore, requires greater political stability, a more or less "European" level of inflation, and a relatively balanced public sector. It is fair to say that Israel does more or less comply with the last two conditions. But complete convertibility without a viable peace process in the Middle-East can spell a financial crisis.

Joining the EMU, would affect Israel in a few ways. First, if Israel wishes to peg its currency to the European currencies, then this can be achieved with a much lower interest rate if the Euro replaces the Shekel as a legal tender in Israel. Israel will share its money with the EC, and the interest rate will be determined in Frankfurt. Speculative foreign capital will no longer flow into Israel looking for arbitrage opportunities.

Along with speculative capital flows, however, gone too will be monetary independence, since in the EMU the European Central Bank (ECB) determines the monetary policy for all the members. If one is to use the theory of Optimal Currency Areas (OCAs) to examine the economic desirability of Israeli membership of EMU, then it is quite possible that the EC and Israel are not an OCA (Tavlas, 1993, 666-8; Kawai, 1987, 740-2). Israel's trade with the EC amounts to some 40% of its trade, or around 15% of its GDP. While these figures may be enough to qualify for a common currency on the openness criteria, the chances for an asymmetric shock are high. Being a small country, Israel can be expected to intensify its specialization in the wake of EMU membership, and to increase its concentration of production in a few products.

It is possible that senior BOI and ECB officials share similar views regarding the aims and roles of monetary policy. These focus less on OCA theory, and more on a perception that monetary policy cannot achieve real targets such as growth and jobs and should, therefore, concentrate on lowering inflation. Such a shared understanding can perhaps form a basis for Israeli EMU membership.

Structural changes (such as an end to wage and price indexation, and more competition) will have to take place for the Israeli inflation rate to achieve the European levels. If Israel joins the EMU before this happens, its industrial competitiveness will be eroded, widening further the current account deficit and leaving fewer jobs, with no possibility for an offsetting devaluation.

However, the issue of Israeli membership of EMU is really a political question. This is because money is not just a means of exchange or a store of value, it is also an emergency taxing device, by which the government can quickly extract resources from the population in times of need. Without a peace process in the Middle East, there is yet a risk that Israel will be involved in hostilities, and will need to resort to monetary financing. In such a situation it will not be able to let the ECB determine its liquidity, and will, therefore, have to quit the EMU.

Domestic politics in Israel must strongly support EMU membership, or the irrevocability of Israel's membership will be lacking in credibility. It is true that Europe itself is plagued by doubts regarding the EMU, but the Israeli case is much more sensitive. The Pound Sterling will be a stable currency with or without EMU, but investors in Israel might see their carriage turn overnight into a pumpkin if Israel were to leave the Euro.

This situation will cast a shadow over the irrevocability of Israel's commitment. If investors are unsure, and suspect an Israeli withdrawal at some point, capital will flee Israel, with no way to stop it. Israeli membership in the Euro, therefore, depends on political stability, at least between it and its immediate neighbors.

6. PUBLIC PROCUREMENT

Governments are inclined to prefer domestic products - even when foreign products are cheaper or better. Both in Israel and in the EC, governments and their agencies are large purchasers of goods and services, and in some sectors, such as telecommunications, governments

even have a dominant purchasing power. However, all this is left out by conventional trade agreements.

The 1994 WTO agreement on government procurement (the Code) covers specific goods and services and certain public utilities, but it applies only to specific public entities listed in its annexes, only to the extent of each state's commitments, and only to contracts over a certain value threshold.

According to the principle of national treatment, governments are to treat producers of the contracting parties no less favorably than domestic ones, including in tendering procedures. The contract must be awarded to the tenderer whose offer is either the cheapest or the most advantageous in terms of the specific evaluation criteria.

The Code prohibits offset requirements (which frequently take the form of minimum local content), but developing countries (including Israel) may use offsets under certain conditions, and only as a qualification for participation in the tender (not as a criterion for awarding contracts).

EC law includes several directives with numerous rules regulating the subject of government procurement in the internal market. The EC's obligations under the WTO Code are generally incorporated into EC law under the Treaty of Rome (Article 228(7)). Regarding non-members, the 1993 EC 'Utilities Directive' dealing with water, energy, transport and telecommunications (not included by the EC in the Code) authorizes EC members to give preference to EC suppliers. The foreign tenderer is identified, not on the basis of the place of incorporation, but rather in accordance with the origin of the goods included in the tender.

EC suppliers of water, energy, transport and telecommunications are protected by the principles of rejection and preference. Under the rule of rejection, any tender may be rejected when the proportion of the products originating from third countries exceeds 50% of the total value of the products. Under the preference rule, when two or more tenders are equivalent in light of the award criteria, the prices will be considered equivalent if the price difference does not exceed 3%. The application of the rules of rejection and preference towards American suppliers of water, energy and transport products was waived, however, following a 1993 EC-US agreement which did not cover telecommunications (Schott and Buurmann, 1994; Trepte, 1993; Eeckhout, 1994).

Similarly to the EC's policy, Israel also does not apply the WTO Code to contracts for the purchase of water and energy. In telecommunications,

Israel applies the Code only to American suppliers. Israel employs the rule of preference (but not that of rejection), and considers the prices of domestic and foreign suppliers to be equivalent if the price difference does not exceed 15% (Dorot (Polishuk) and Rothschild, 1994, 311-326). Israeli law, however, prohibits this preference whenever it is inconsistent with the state's international obligations. Contracts exceeding 1.5 million NIS (roughly 400,000$) oblige the foreign supplier to offsets of at least 35% of the value of the contract.

Public procurement was one of the important subjects discussed in the negotiations between Israel and the EC which led to the 1995 association agreement. In the first stages of the negotiations, Israel suggested that the telecommunications sector (where it believed its industry has an advantage) be open for public procurement between the parties on a reciprocal basis. The EC responded with a proposal to open completely governmental procurement between the two parties.

Israel was not interested in opening the entire sphere of government procurement, so the negotiations subsequently focused on the opening of specific sectors. The EC wanted the new agreement to include the sectors of public transport, energy and medical instruments, where it felt its industries have an advantage. Israel was prepared to include the sectors of energy and medical instruments, but refused the inclusion of public transport. The reason for this position was the practice of offsets conducted by Israel in the purchase of buses from the EC states. Israel has made its purchase of buses from abroad conditional on the assembly of their parts in Israel (by the Merkavim and Ha'argaz corporations). The EC request to open the public transportation market was apparently initiated by Spain, which wanted its industry to have a greater share of the Israeli bus market, the majority of which is currently in the hands of the German bus industry.

Two agreements were reached in the end in December 1995. In the first, Israel agreed to apply the WTO Code to a variety of services. Urban transport products were added too (with the exception of buses) but only towards EC suppliers. The EC too extended its commitments to include the urban transport sector. In the second agreement, specifically listed operators of telecommunications are forbidden to discriminate against suppliers of the other party in any way (including offsets, price preferences, local content requirements). Israel was still left a few loopholes until January 2001. In addition, the 1995 association agreement forebade additional discriminatory measures, beyond those agreed in the WTO Code, in the fields of heavy electrical and medical equipment.

The EC employs both the rules of rejection and preference with regard to public utilities, but the "spearhead" of its policy is unquestionably that of rejection - the rules of preference play only a marginal role. Israel, on the other hand, adopted the sole technique of preference, but to a larger extent than that of the EC. The major weakness of the method of rejection is that the extent of protection granted to the domestic industry is unpredictable - at times it could constitute a preference of 100% or more. Thus, under this technique, the cost to the public of protecting the local industry is unknown. In addition, the method of rejection does not press the domestic industry to economize.

Thus, theoretically, allowing Israel into the SM may expose European industries (previously protected from Israeli industries by the rule of rejection) to Israeli competition more than Israeli industries to European competition. Judging from the recent negotiations, Israel's bus-assembly industry will be hurt, while its telecommunication sector will benefit.

Sadeh (1998) estimated government bias in the period 1983-95 in Israel's trade with five major EC members: Germany, France, the UK, Italy and the Netherlands. He found that over the long run, the German government seems to discriminate against Israeli goods while the Dutch government seems to greatly favor them. Taking the size of the two countries into account, these effects seem to cancel out. The rest of the governments were found to have no effect on Israeli exports. The Israeli government, on the other hand, tends to discriminate against German and Dutch goods but its treatment of French goods is unclear.

Over the short term, the British government is the only one having a (favorable) bias towards Israeli goods. On the other hand, the Israeli government was found to have no bias regarding European goods in the short run.

Thus, considering the overall balance of affected sectors, in the long term it is expected that the EC will benefit from the abolition of Israeli government bias, if Israel joins the SM. Israel, on the other hand, will gain only in the short term.

7. COMPETITION

A competitive market structure exists where there are many small producers and consumers, none of whom has any real power to influence the price prevailing in the market. The opposite extreme is the monopolistic structure (when only one producer controls the market) but many market structures are possible between the two extremes.

There are two major reasons for the formation of uncompetitive market structures. One is the existence of economies of scale, which does not allow profits under conditions of competition unless a minimal scale of production is achieved. Thus, only the most competitive firm survives in the market. The other is government involvement that encourages such structures. Such government practices are typical of non-market oriented policies and are generally irrelevant today to Israel and the EC economies (although in some specific sub-branches these policies may still persist).

The completion of the SM was designed to enable, among other things, a more competitive market structure in the EC. If this large union could, indeed, be regarded as one market, then it would definitely reach a size too big to permit any producer to manipulate prices. Wherever economies of scale exist, the AM may be big enough to sustain more than one producer. Competition rules were harmonized to avoid cartel formations. Israel, on the other hand, is very small and is plagued with uncompetitive practices. Many of these practices are the outcome of past government policies, which were formed as a shield of protection against foreign competition, in order to encourage self sufficiency.

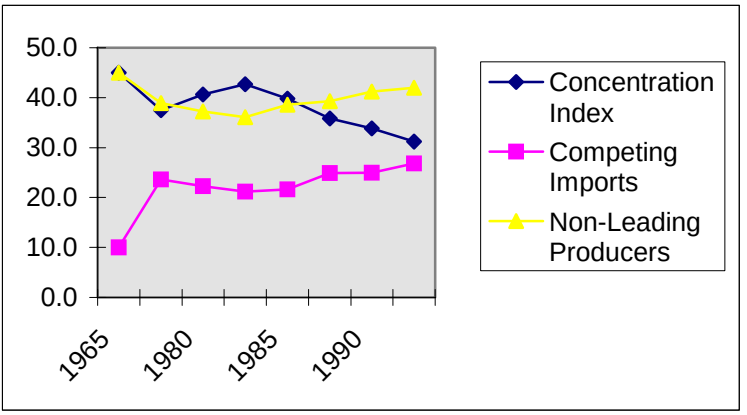

Table 1

It is difficult to measure accurately how competitive a certain market is. One of the measurements of competitive structures is the concentration index (Table 1). This index is equal to the percentage of sales of the three biggest producers out of the total sales in the market. If the index exceeds 80%, then the market structure is considered to be monopolistic. The index's main deficiency is its failure in detecting a cartel comprised of many small and legally independent producers, and yet it is a simple means of giving a rough estimation. Table 2 summarizes part of the results of some interesting research that was conducted by the Israeli

Bureau of Statistics (Regev and Bar-Eliezer, 1994). Imports were defined as competing imports if their share of the market did not exceed 80%, and/or a high tariff rate was imposed. The figures in the table are the weighted averages of 94 industrial averages. The period 1965-1977 is characterized by an increase in foreign competition at the expense of both leading and non-leading producers, thus increasing competition within Israeli industry, in general. Then, from 1977 to 1982, there is an increase in the concentration measured, and from 1982 on, there is a process of increased competition again.

The research has also found that Israeli monopolies tend to concentrate around small industrial branches - mostly mining, food industries and base metals. This should not come as a surprise - the smaller the branch, the more probable it is that production levels are within the range of economies of scale. Foreign competition is especially low in these branches but strong in the fields of rubber goods, machinery and precision equipment. The research also found that Israeli monopolies are uncompetitive on an international level. Imports penetrate less into those branches with public involvement or high concentration. Imports tend to lower prices and increase productivity in the Israeli industry. Monopolistic branches suffer from low productivity. This means that although there are FTAs between Israel and its major trading partners, some uncompetitive monopolies still exist in Israel. Adjusting to the SM will bring an end to them. This will be achieved even if foreign market share will not increase. The mere threat of foreign competition is enough, in many cases, to change market structures. It is noteworthy, however, that some researchers have found that national market concentration tended to increase in the member states of the European Economic Community after its formation, though Community-wide concentration became more important in determining price-cost margins (Sleuwaegen and Yamawaki, 1988, 1451-75).

Based on this diagram, it is worth noting that the FTA agreements that Israel signed do not seem to have affected the efficiency of the overall Israeli market structure (also termed x-efficiency) in the desired direction. After the EC-Israel free trade Agreement was signed in 1975, the market concentration in Israel increased at the expense of small business and competing imports. This trend was seemingly reversed around 1982, with no apparent connection to the US-Israel FTA that was signed in 1985.

Table 2: Israeli market structure 1965-1992

Year	Concentration Index	Competing Imports	Non-Leading Producers
1965	45.0	10.0	45.0
1977	37.5	23.6	38.9
1980	40.6	22.3	37.2
1982	42.7	21.2	36.1
1985	39.8	21.6	38.6
1988	35.8	24.9	39.3
1990	33.8	25.0	41.2
1992	31.2	26.8	42.0

8. CONCLUSIONS

Overall, Israel stands to gain economically from joining the CAP, and from achieving greater competition within it by adjusting to the SM. Overall Israel may even gain from going further and adopting the CCT in industrial goods, and from liberalizing trade in services (though the insurance industry and El-Al may have to go through considerable adjustments). Regarding the harmonization of government procurement rules, in the long term it is expected that the EC will benefit from the abolition of Israeli government bias, if Israel joins the SM. Israel, on the other hand, will gain only in the short term, and its car assembly industry will suffer.

Liberalizing capital movements between the EC and Israel, however, will be difficult without either floating the Shekel, or alternatively, joining the EMU. Joining the EMU, in turn, will be almost impossible without greater political stability in the Middle-East. However, the greatest difficulty for Israel's adjusting to the EC is probably in the domain of the freedom of movement of persons, and it seems that the EC and Israel will wish to avoid implementing this freedom between them.

All this said, it is important to remember that the political aspects were left out of this analysis. Adjusting to the EC will enhance the patron-client aspect of Euro-Israeli relations, perhaps at the expense of third parties such as the US. It, therefore, can signal a shift in Israel's foreign policy. It is not certain that this is in the Israeli national interest.

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MALTA-EU RELATIONS AND THE ACQUIS COMMUNAUTAIRE IN THE WIDER CONTEXT

Peter G. Xuereb (co-ordinator)

INTRODUCTION

This paper is an amalgam of the work carried out by a number of scholars and others, whose names are listed at the end of this paper, and whose full studies on the issues raised are published as the proceedings of the fifth annual conference organised by the University of Malta's European Documentation and Research Centre.[1] This paper is limited to the issues of relevance to the Malta meeting of the research network in April 1998 and is intended to feed into the programming of future collaborative research between the Universities, Institutes and Centres represented at this meeting. It reproduces synopses of the main papers referred to.

While on course for full membership of the European Union, Malta had embarked on an ambitious programme of reforms. Since the change of government in October 1996, Malta has been seeking closer relations falling short of membership. In a Communication from the Commission published in February 1998, it is clear that the future relations between Malta and the EU will involve the move to a free trade area by the end of a three to seven year period with eventual completion of a customs union. All this will take place through the current association agreement, concluded in 1970, which had envisaged these steps being taken, but whose objectives had been shelved in favour of Union membership at the earliest possible opportunity. Furthermore, the development of Maltese-EU relations will be shaped by the Euro -Med Partnership and its development, and the macro picture is completed by adding the two scenarios of the development of the European Union and its policies, especially in view of enlargement, and the World trade Organisation and the development of its policies and rules.

Against this background, the Maltese team has identified a number of ongoing areas of study, focusing on particular issues but in the context of (a) the development of the Maltese and other Mediterranean economies and social and other development, (b) the development of the acquis itself, (c) the EC's external relations policy, especially its stance in concluding Euro-Med Agreements, and the detailed provisions of such agreements, (d) the WTO scenario. In connection with (a) it should be said that a major industrial restructuring process is under way in Malta, involving all sectors, public and private, with a view to increasing competitiveness and efficiency in all sectors.

[1] P.G. Xuereb (ed.), "Malta, the European Union and the Mediterranean: Closer Relations in the Wider Context" (EDRC, 1998)

The Free Movement of Goods

A crucial aspect is the free movement of goods. There are significant differences in the regimes under the EEA Agreement on the one hand and the Euro-Med Agreements on the other. Turkey and Cyprus have their own positions then again. One issue which seems to emerge clearly is the asymmetry inherent in the Euro-Med Agreements.The Israeli Agreement (like the EEA Agreement) envisages an immediate reciprocal abolition of all customs duties and charges. Symmetry and asymmetry, and a comparison of approaches would appear to be one vitally important issue. The enquiry could extend in this manner to other crucial parts of the relative agreements, including trade defence mechanisms, safeguard measures, anti-dumping, and the very important infant industry clauses which appeared in the Europe Agreements. The issue of the range of coverage, especially with regard to agriculture, is yet another important issue. (Marise Cremona)

A big issue relates to the rules of origin. A comparison between the Euro-Med agreements and the Europe Agreements shows significant differences on this score. Also, similar rules may well apply differently according to the size of the domestic market and the resources available locally, and due to the impact of rules on the cumulation of origin. The question of cumulation of origin is an important one to study in this connection, especially in the context of the Mediterranean block and the avowed aim of promoting Med-Med trade and economic and industrial cooperation. (Helga Zahra)

Indeed, a member of the Malta team raised serious questions as to whether existing rules of origin do not "subvert" Article 24 of the GATT. A study of the trade deflection and trade diversion of such rules as currently devised would appear to be of great relevance. The question is whether the EC can or cannot afford to relax these rules in relation to the Mediterranean region, possibly thereby offering a kick-start to the generation of prosperity in the region, always against the WTO backdrop. The argument is that the rules of origin may in some cases either inhibit the development of the Mediterranean countries' trade or lock them even more closely than at present into an asymmetrical trading relationship with the European Union. The search would be for a more balanced compromise between the EU's economic interest (possibly redefined) in the region and those of the multilateral trading system. (Mario Brincat).

Free Movement of Persons (Individuals, Firms)

This is not currently prospected as part of Malta's negotiations. However, a case may be made in the light of the current restructuring process for some negotiation on this issue. The Euro-Med Agreements will to a large extent reflect the individual histories of the different Mediterranean States and their respective historical economic, social and cultural links with various EU Member States. Again, the wider WTO picture will need to be kept in mind. GATS obligations become a core in the EU's relations with third countries, also in the Mediterranean. Clearly, as far as the movement of persons is concerned, the issues revolve around migration and illegal immigration, and there are as a rule no provisions in the Euro-Med Agreeements for extending freedom of movement of persons, even as an ultimate objective. Yet, as was hinted at above, the Agreements with the Maghreb states contain provisions similar to those in the previous Cooperation Agreements relating to working conditions, remuneration, dismissal, and social security for legally-employed workers. The Agreement with Israel is much more limited in its coverage. It does not contain any provision on equal treatment, and simply provides for aggregation of periods of insurance, employment and residence, for tansfer of pensions and benefits and family allowances. Provisions therefore fall far short of those in the EEA.

As far as the right of establishment and the provision of services are concerned, the same is of course true. Euro-Med provisions are limited and defined largely in terms of the GATS. There are two essential commitments. The first is a reaffirmation of the parties' reciprocal obligations under the GATS, and in particular the most favoured nation obligation.The second is the commitment to "widen the scope of the Agreement to cover the right of one party's firms on the territory of the other and liberalisation of the provision of services by one party's firms to the consumers of services in the other". However, the Association Council envisaged in the Agreements will not have decision-making powers in these areas, but only powers of recommendation. This would mean that progress would seem to require separate bilateral agreements between the parties or further reciprocal negotiations within the GATS multi-lateral framework (Marise Cremona).

A related issue begging further study is the question of the eligibility criteria for participation in European Union transnational corporate vehicles, for which the eligibility criteria are tightly drawn so as to exclude participation by persons or firms which have their closest connection with a third country. While acknowledging that the Euro-centricity of such Community rules is rooted in internal market objectives, it seemes counter-productive to exclude a flexible approach to this issue, the flexible adaptation of the position having the potential to unlock opportunities for both EU and third country enterprises and

entrepreneurs. While company law harmonisation has been a feature of the Europe Agreements, in which the CEECs showed great interest for the capacity which this offered from the perspective of the attraction of foreign direct investment, and while accepting that the ultimate aim of those agreements is economic integration and full membership of the Union (an ultimate aim not currently common in the Mediterranean) it is surely undeniable that a negotiated protocol on establishment and participation in EU enterprises (and vice-versa) would speed up the process of EU-Med cooperation. (Peter G. Xuereb)

The field of financial services is an increasingly important one for Malta. Nor is Malta alone. Cyprus has an important stake in this field, as do several other Mediterranean States. Emerging Mediterranean capital markets should be encouraged and supported, and the framework for this would be a most opportune object of study, particularly in the light of Commissioner Marin's recent lament that things are not moving fast enough on this front. Evolving financial services centres should also be encouraged. They pose no real challenge to the dominance of centres in the European Union and have a crucial role to play in the economic development of the region. Access for such products and services is an issue meriting study by this group.

Human Resources

The need for human resources development in the Mediterranean area is unquestionably a pressing issue. Training, retraining (especially in the context of liberalisation and restructuring), lifelong learning and heightening the European and Mediterranean dimensions in national education, in a reciprocal process of mutual education, are vital for the deepening of EU-Med and Med-Med relations. Malta will in many respects seek to emulate processes under way in the rest of Europe. The promotion of entrepreneurship, the fostering of innovation and flexibility, equal opportunities, life-long learning are common goals. The February Communication on Malta spoke of participation in Community programmes for Malta on a third country basis. It would be well to consider what this basis might be across the whole range of programmes applicable in this area, in the mutual interest of the EU and Malta. Moreover, there is a case for cross-Med programmes of the same nature. All Mediterranean States share the same needs.

Small and Medium-Sized Enterprises - Growth and Employment

Growth and Employment are at the heart of the Union’s Agenda 2000. A parallel effort must be undertaken in the Mediterranean, and this in the interests of the European Union as much as in those of the Mediterranean States themselves. In Malta, the main responsibility for the restructuring process lies, in institutional terms, with the Malta Development

Corporation, and in particular with its Institute for The Promotion of Small Enterprise (IPSE), now reformed in order better to cope with the demands to be placed on it as a "one-stop" assistance centre. The Maltese experience sits side by side with the experiences, plans, strategies of our fellow Mediterranean countries, and we surely have much to gain from an exchange of experience in this field. Comparing strategies, legislative incentives and other legislative provision, and results could be the object of a fruitful collaborative study if it could be undertaken. The Maltese Industrial Development Act and other related legislation, set side by side with equivalent legislation in other Mediterranean States, would provide a good barometer of the speed with which we can expect industrial progress to materialise.

The Economic and Industrial Environment in General

Priority areas under this heading include competition law, industrial relations legislation, and tax structures. Malta has been asked to bring its tax and competition law into line with the Association Agreement and the acquis. In truth, the government already has a strategy to comply on the tax side, although we must await the Commission's reaction to those proposals.

On the competition law side, Malta introduced a law modelled on the EC Treaty provisions in 1994, but with some noteworthy omissions and idiosyncrasies intended to reflect the local scene and tradition, for example the exclusion of all government-controlled enterprises from the reach of the law, the incorporation of wide price control powers in the law itself, and a number of other "local" features. It may well be that this law will need to be revisited by the legislator in the near future. Nevertheless, the Maltese experience with its introduction is arguably a valuable object of study. (Joanna Drake)

Industrial relations law and employment legislation, although not far removed from European standards, is the object of a current review and is likely to be substantially amended. It remains to be seen how one of the avowed goals, that of rendering the labour market more flexible, will translate into legislation.

The Maltese team also identified further company law reform as an indispensable part of the restructuring process, linking it to the development of cross-border, even region-wide, vehicles for the conduct of transnational business cooperation. EU models would be useful, but equally important would be cross-participation for EU and Mediterranean enterprises. A Euro-Med Company law is what is here being proposed, no less.(Peter G. Xuereb)

Also identified as crucial in the light of EU and WTO developments is the upgrading of intellectual property law and generally the law on industrial and commercial property (Richard Camilleri, Emily Camilleri)

Institutional Relations

Because the Euro-Med Partnership process is a variegated one in the sense that it is promoted on the basis of a series of parallel bilateral agreements between the EU on the one hand and each Mediterranean State on the other, the process does not contemplate, at least at this stage, the creation of instutions on the EEA model. This is also no doubt a function of the different objectives involved, with the EEA aimed at a far higher level of economic and political integration, at least in the short to medium term.

Nevertheless, some institutional provision is made in the form of the Association Councils. It is proposed that a fruitful area of study would be the terms of reference of the Association Councils and their powers and responsibilities, as well as other forms of institutional cooperation, such as at parliamentary level. Furthermore, it could well be asked whether the dispute resolution techniques incorporated in the Agreements will suffice to bring about the desired effects, particularly in terms of the expected interpretation of the Agreements themselves. Homogeneity of interpretation may or may not be an immediate desideratum but must surely be such if integration is truly on the Euro-Med partnership agenda. In Malta's case, since Association implies institutional involvement to some degree, and indeed since the concept of institutional participation can be said to be inherent in the very concept of association, it is a useful question to pose as to what degree of institutional participation would be optimal in the context of the objectives of the Agreeement as it is to be developed. The same issues must be of concern to the other Mediterranean States. (Roderick Pace, Simon Busuttil)

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What follows are summaries of the detailed papers presented by the above authors at the EDRC annual conference. These summaries are published here as our contribution to this research project and its agenda.

A. TRADING WITH THE EU: ASSOCIATION AGREEMENTS, EURO-MED AGREEMENTS AND THE EEA

Helga J. Zahra

(Synopsis of a paper published in the EDRC's latest publication - Malta, the EU and the Mediterranean)

The European Union has availed itself widely of the exception from the application of the Most Favoured Nation treatment granted by Article XXIV of the General Agreement on Tariffs and Trade to customs unions and free trade areas. As a result of the number of preferential trade agreements which it has concluded, it applies the MFN tariff to few countries.

A number of these agreements were concluded under the umbrella of Article 238 of the EC Treaty which regulates the negotiation and conclusion of Association Agreements by the Community and its member states with third countries. Association Agreements are therefore bilateral international agreements between the EC and its member states on the one hand and a sovereign state on the other. They are the result of negotiation and can therefore vary widely between themselves. However, the EC has lately adopted a policy of offering "model" Association Agreement to groups of countries. Thus, we have the Europe Agreements which are the Association Agreements tailored for the needs of the Central and Eastern European countries and which have come to serve as pre-accession instruments and the Euro-Med Agreements which are the Association Agreements for the EU's Mediterranean neighbours.

The European Economic Area Agreement[2] is not a classic Association Agreement. It is much more than that. It is a multilateral agreement whereby the European Free Trade Area countries have adopted the greater part of the acquis communautaire relating to the four freedoms and have assumed a number of the obligations which membership entails.

[2] Signed in Portugal on the 2 May 1992.

The Agreement also gave rise to a Free Trade Area between the Contracting Parties.

The Maltese Association Agreement is one of the oldest of the Association Agreements concluded by the Community. It was concluded in 1970[3] and was undoubtedly a major attraction for foreign direct investment to the Maltese Islands in the seventies and eighties. It was tailored to the needs of a developing economy which had a very small industrial base and it resulted in the establishment of a number of factories which tailored their product for the EC market. The rules of origin which define the amount of working and processing which a product must undergo in order to qualify for duty free entrance into the Community played an important role in determining the type of industry which was established on the island. The Association Agreement however applies only to industrial products - it generally does not apply to agricultural and processed agricultural goods. Nor does it apply to services.

The Europe Agreements and the Euro-Med Agreements are a more modern type of Association Agreement. However the tests relating to the working and processing required in order to confer origin are uncannily similar to those found in the Maltese agreement although the working and processing requirements in the Tunisian Agreement can be stricter for certain products[4] .

The Tunisian Agreement also offers the possibility of alternative working and processing tests more often than the Maltese and Polish agreements. The latter can be both an advantage and a disadvantage given that the rules will often be stricter than the ones found in either of the other two agreements and will generally require that more value be added to the product with the working and processing which takes place in Tunisia. The latter may be a tough hurdle to cross as rules regarding value added generally favour countries with a highly paid workforce.

It must be pointed out that the similar processing requirements of the Maltese and the Polish Agreements do not mean that Maltese and Polish exporters face the same hurdles when tailoring their product to the EU market. One must always keep in mind:

[3] 5 December 1970.

[4] Please see the Table for a comparison of a number of working and processing tests found in the Maltese, the Polish and the Tunisian Agreements

a. The size of the domestic market and the natural resources available
b. The possibility of cumulation of origin envisaged in the Polish Agreement.

In fact, even though some processing requirements in the Tunisian Agreement are more stringent than those in the Maltese Agreement, Tunisian exporters will still probably find it easier to satisfy them given the fact that even this Agreement allows for the possibility of cumulation of origin.

The following table is a comparison of the rules of origin found in the European Economic Area Agreement, the European Free Trade Area Agreements and the Maltese, Polish and Tunisian Agreements.

EC Preferential Origin Rules - A Comparison

Trade Regime	**Origin Rule Elements**
EEA	- Sufficient work or processing in accordance with the CTH test, technical test or import content test with a number of improvements (including a general tolerance rule) - **Full cumulation** - Direct consignment rule (with an allowance for temporary export outside the FTZ if the value added is of not more than 10% of the ex-works price of the final product)
EFTA	- Sufficient work or processing in accordance with the CTH test, technical test or import content test - **Diagonal cumulation** - Direct consignment rule
Malta	- Sufficient work or processing in accordance with the CTH test, technical test or import content test - **Bilateral cumulation** Direct consignment rule
Tunisia	- Sufficient work or processing in accordance with the CTH test, technical test or import content test - **Regional (diagonal) cumulation** - Direct consignment rule

Poland - Sufficient work or processing in accordance with the CTH test, technical test or import content test - **Regional (diagonal) cumulation** Direct consignment rule

The possibility of Malta being granted cumulative rules of origin appears to depend on two conditions:

1. The Maltese Govemment would have to enter into a bilateral free-trade agreement with each country with which it wants to cumulate rules of origin;

2. Malta would have to adopt the same rules of origin as the countries with which it desires to cumulate origin.

The possibility of negotiating cumulative rules of origin through a partnership with our North African neighbours should be seriously considered by the Maltese Government. This of course implies free-trade arrangements with these countries and a consequent removal of tariff barriers. Thus, this option implies industrial restructuring with particularly labour intensive industries becoming even more endangered. It also implies a diversion of investment towards North African countries.

One must always however keep in mind that the EU is never under an obligation to grant the possibility of cumulating origin. This would always be subject to further negotiation.

B. FREE MOVEMENT OF PERSONS AND SERVICES IN THE WIDER EUROPE

Marise Cremona

Rights of Entry, Residence and Access to the Labour Market

(a) The European Economic Area Agreement

(Arts. 28-30). The European Economic Area Agreement (EEA) is striking as the only Community agreement which extends rights of free movement generally to EEA nationals. The most interesting issues arise out of the possibility of further integration within the European Union as a result of the amendments introduced by the Treaty of Amsterdam, in particular in the direction of removing internal border controls and establishing a common policy on immigration..

(b) The Euro-Med Agreements

There is concern with migration and illegal immigration. There are no provisions in the Euro-Med Agreements for extending freedom of movement to persons, even as an ultimate objective.

Legally Resident Migrant Workers

The 1994 Commission Communication to the Council and European Parliament on Immigration and Asylum Policies (COM(94)23 final 23.2.94) is founded on three policies:

- action on the causes of migration pressure in third countries (including trade and development policies);
- action to control immigration (especially illegal immigration and employment);
- action to strengthen the integration of legal immigrants (including assimilating their rights with those of Member State citizens).

Another measure is Council resolution under Title VI TEU of 4 March 1996 on the status of third country nationals residing on a long-term basis in the territory of the Member States OJ 1996 C 80/2.

The Cooperation Agreements concluded in the 1970's with the Maghreb states, although not granting any rights of residence or access to employment, contained equal treatment provisions. Case C-18/90 ONEM v. Kziber [1991] ECR 199. Case C-103/94 Krid CNAVTS [1995] ECR 1-719.

The Euro-Med Agreements with the Maghreb states contain provisions similar to those in the Cooperation Agreements relating to working conditions, remuneration and dismissal and social security for legally employed workers (illegal migrants are expressly excluded).

The Agreement with Israel in contrast is much more limited in its coverage of workers' rights. It does not contain any provision on equal treatment, either in relation to Working conditions or in relation to social Security. It merely provides for aggregation of periods of insurance, employment and residence, for transfer of pensions and benefits and for family allowances.

Establishment Rights and the Provision of Services

(i) The General Framework
(ii) The European Economic Area Agreement

EEA nationals, companies and firms will be entitled to the same rights in relation to establishment and services and mutual recognition of qualitications as Community nationals. The EEA states have all accepted the minimum standards set by the internal market directives on establishment and services, mutual recognition of standards and regulatory systems applies throughout the EEA; the 'Community passport' or single licence for credit institutions (banks), insurance undertakings and investment services will thus extend throughout the EEA.

(iii) The Euro-Med Agreements

The Euro-Med provisions on establishment and services are limited and defined largely in terms of GATS. There are two essential commitments. The first is a reaffirmation of the parties' reciprocal obligations under the GATS and in particular the most favoured nation obligation. The second is a commitment to widen the scope of the agreement to cover the right of establishment of one Party's firms on the territory of the other and liberalisation of the provision of services by one Party's firms to consumers of services in the other. However, the Association Council does not have decision-making powers under this provision, but only powers of recommendation. Any real progress is therefore likely to require separate bilateral agreements between the parties or further reciprocal negotiations within the GATS multi-lateral framework. Case C-l 13/89 Rush Portuguesa [1991]2 CMLR 818. Case C-43/93 Van der Elst v OMI [1994] ECR I-3803. Directive 96/71/EC on posted workers OJ 1997 L18/1.

C. THE MEDITERRANEAN BANK NETWORK AS AN EXAMPLE OF REGIONAL CO-OPERATION

Marie Therese Camilleri Gilson

Networking provides an ideal vehicle for decentralised collaboration so as to address the potential and maximise opportunities in the emerging market of the Euro-Mediterranean region. By adopting a proactive and supportive stance vis a vis economic operators, networks, in partnership with the major international organisations present in the region, are a vital link to strengthening private entrepreneurship, which by imparting creativity and a certain degree of risk taking, is promoting development from within.

Leading local banks with an international vision, grouped together in the Mediterranean Bank Network have taken it upon themselves to set such a process in motion striving for effective solutions to operating difficulties faced in the region's financial infrastructure, thereby enhancing trade and investment flows throughout the Euro-Mediterranean region. While preserving the intrinsic value of individual initiatives on a bi-lateral basis, such a network prouidcts a reference point for business development within the framework of existing institutions and ongoing regional projects.

The Mediterranean Bank Network has grown from the recognition that wealth creation and the reversal of conflict and strife is possible provided that the prevailing socio-economic and legal environments are conducive to certainty and stability, without which investment cannot be sustained.

The Network provides its members with a cost effective means of projecting a presence outside one's country without bearing the overheads of setting up branches or representative offices. The parties to this strategic alliance learn from each other's experience by sharing information on their policies and operating procedures; most importantly, however, the banks have a unique opportunity to act as catalysts in the economic development of their region thereby instilling a climate of mutual trust without which partnership cannot flourish.

The Mediterranean Bank Network is a completely private initiative that the Bank of Valletta, together with three other founder members, Nova Ljubljanska banka of Slovenia Turkiye Garanti Bankasi of Turkey and Banque Internationale Arabe de Tunisie of Tunisia, provided with vision to stimulate and put into action. By launching the Network in November 1996, the partners to this venture would create a point of contact and the necessary confidence building that would reduce risk and make co-operation and synergy possible. The founders were soon after joined by Israel Discount Bank and Credito Emiliano of ltaly, and, subsequently, by Banco de Fomento Exterior of Portugal representing the BPI Group. and, Banco Sabadell of Spain. With the recent addition of a French bank, Lyonnaise de Banque, the Network has more than doubled in size in just over a year of operation. The Network is also gaining in visibility as it has featured at various instances of the debate on the progress of Euro-Mediterranean relations and, also, by virtue of its representation at business events on a regional level.

The Network consists of three main bodies: whilst the General Assembly is responsible for the drawing up of a general strategy and policy, implementation is in the hands of the Executive Board, assisted by the Secretariat in its day-to-day management and any specially set up sub-committees. The Chairmanship of the Executive Board, corresponding to

the Presidency of the Network, is awarded to member institutions on a rotating basis, by election from the Board for a period of three years. Four technical sub-committees have been set up to address matters related to banking activities and the facilitation of inter-bank trade and treasury related payments, business development and opportunities, economic information and data exchange and benchmarking.

The Network provides an ideal forum for dialogue as well as a central point of reference for exchange and co-operation where thinking is translated into action and opportunities transformed into actual business. In addition to the socio-economic benefits derived by the region as a whole, participating banks will have gained in terms of internationalisation access to markets and business development. Ultimately though, the greatest benefits will continue to accrue to member bank's customers as these are given the opportunity to participate in cross-border ventures which will shape the very future of our region.

D. COMPANY LAW AND FINANCIAL SERVICES IN THE EURO-MED AREA
COMPANY LAW IN EUROPE AND THE MED

Peter G. Xuereb

Agenda 2000 speaks of stimulating new forms of co-operation between small and medium-sized as well as large companies. It is fundamental to the Euro-Med Partnership that EU-Med and Med-Med co-operation also address the issue of cross-border co-operation, and therefore the vehicles available for such co-operation. Contractual models, such as the partnership or the consortium have their limitations.

In the context therefore of EU-Med co-operation and the fostering of Med-Med co-operation, it is argued that the benefits of the EC company law harmonisation programme should be "extended" into the Euro-Med area. In particular, new European vehicles such as the European Economic Interest Grouping, and the European Company should be accessible to third country firms, possibly on a negotiated basis, to the benefit of EU firms and third country firms. Commissioner Marin recently lamented the lack of success in attracting capital investment to the Mediterranean region on the part of the Mediterranean States, despite success in establishing fledgling capital markets in some Mediterranean States. It is argued that some extension of freedom of establishment, particularly via the revision of the eligibility criteria for participation of Mediterranean third country firms in European vehicles for cross-border business enterprise, would go a long way to facilitating cross-border investment in the Euro-Med area.

Furthermore, progress on some stalled European Company law proposals, such as the Fifth Directive on the organisation of public companies, on the preliminary draft Ninth Directive on a harmonised law of groups of companies, the European Company Statute, and the draft Tenth Directive on cross-border mergers, together with the draft Thirteenth Directive on take-overs, would have a significant impact on the Euro-Med area and would be a most important development, as long as , again, the eventual measures took proper account of the needs of EU firms and Mediterranean firms in the context of the Euro-Med Free Trade Area.

A special area of importance to a number of Mediterranean States is that of financial services. Aside from the development of their fledgling financial markets, and possible assistance to that initiative, there is the question of access to the EU market of services and products developed in the emerging Mediterranean markets. Issues here relate to the question of establishment and services. Again this is an area which comes increasingly within the ambit of the WTO, and the WTO context needs to be related directly to the Euro-Med area and the content of Euro-Med Agreements.

E. THE NEW MEDITERRANEAN REGIONALISM IN A WTO PERSPECTIVE

Mario Brincat

The Mediterranean countries' commitments to their WTO partners and to the EU are major influences on the region's integration into the international system.

The conclusion of the Uruguay Round in December 1993 and the signing of the Final Act in Marrakesh in April 1994 were quickly followed by the launching of the Barcelona process in November 1994. The EU subsequently negotiated free trade agreements with Tunisia, Morocco, Jordan, Israel and the Palestinian Authority. Other agreements are in the pipeline. The Commission of the EU intends to consolidate these into a Euro-Mediterranean Free Trade Area by 2010.

Regional trading arrangements are both allowed and regulated by the WTO system. However, the EU's extensive and complex system of preferential trade has sometimes given rise to misgivings. A major area of study concerns the extent to which the establishment of the Euro-Mediterranean Free Trade sponsored by the EU would coincide with individual countries' obligations as WTO members. Areas of potential conflict could be highlighted.

Particular attention needs to be paid to the. economic effects of the rules of origin incorporated into the new free trade agreements, including their impact on the Mediterranean countries' trade and investment relations with partners in the region and beyond. It can be argued that the EU's free trade agreements with its Mediterranean partners are a positive development in WTO terms to the extent that they will anchor these countries commitments to the multilateral system. However, the rules of origin may in some cases either inhibit the development of the Mediterranean countries' trade or lock them even more closely than at present into an asymmetrical trading relationship with the EU. The EU's model for the Euro-Mediterranean Free Trade Area contains features that would reduce these dangers, but there are strong arguments for a more open approach. A number of suggestions can be made which could lead to a more balanced compromise between the EU's economic interests in the region and those of the multilateral trading system.

F. RESTRUCTURING FOR PROSPERITY IN THE EU-MED AREA - HUMAN RESOURCE IMPLICATIONS

Helga Ellul

Malta has to accept its realities. It is a European island in the centre of the Mediterranean. Malta is also and perhaps more importantly struggling to meet the challenges of global competitiveness. This stark reality is within our reach if the correct strategies and plans are put into place and auctioned. If Malta, and the Euro-Med area face the challenges of free trade as the best way of upgrading present systems of operation, of confronting the status quo, then the prospects for prosperity will open up. Yet this challenge has many implications -- none more so perhaps than in relation to the workforce of these countries and their management.

This writer puts forward the following arguments:

1. The issue of competitiveness underlies the very need for restructuring for prosperity. Therefore is it sufficient to consider restructuring within the confines of the EU-Med Area or should we realistically be looking further afield into the global scenario before acting locally?

2. The challenge to compete within the global economy to meet global standards requires a different employee - an employee who is capable of adapting to continuous rapid changes. This implication requires consideration from a:

- macro perspective, that is on the national level

- and from a micro perspective, that is on the organisation or even industry level, identifying main areas for consideration in view of this restructuring for prosperity whether looking to the confines of the EU-Med area or further afield to thinking globally but acting locally.

3. The response to these tough realities of competition requires not only an integrated approach in the way the workforce is managed but will mean looking into a "new organisation of work". This can be achieved through true partnership among the social partners and through the learning experiences of other countries and organisations, which may have already gone through this daunting process.

The trends are shifting away from the complex and specialised forms of organisation and simple jobs to simplified organisations with more complex jobs. The trends are there, Malta and its enterprises have to ensure that they are quick enough to take advantage of the new opportunities that are being created whether within the EU-Med. area or even globally.

Therefore, we need to focus on the need to thrive locally in the global eceonomy. Success will come to those countries that can meet global standards and tap into global networks. The core of competitiveness however does not lie with countries but with companies. The more successful enterprises do not compete in the long run on price or cost advantages. That can be easily croded. The winners seek a stategic advantage through some unique feature, which could be translated into response to customers' needs, consistency or innovation. All have implications on the way the organisation operates and its workforce is managed. This is obviously affected by the foreign policies and agreements entered into by various countries. Whilst, out of necessity, companies need to look at this issue globally, we also need to look into the implications arising out of the EU-Med. Area restructuring.

More specifically, the human resources implications of restructuring need to be discussed within the macro perspective (nationally) and the micro-perspective (enterprise level). Pertinent issues, which arise, are felt to be the following:

The Macro Perspective

Developing a clear national human resources strategy, which is integrated within all sectors of the economy.

Reduction of state intervention to encourage a cost-effective labour market to operate.

Encouraging the development of the individual as a whole from early years.

Developing the understanding of education as a lifelong process. Improving adult education opportunities.

Introducing national vocational and occupational training policies and programmes at work.

Ensuring that basic up-to-date skills are developed during the formal schooling process.

Developing effective alternatives for getting more young people into work.

Developing new employment opportunities.

Developing a positive work ethic.

Bringing national labour legislation to a par with that of competing countries. Removing rigidities and setting a basic framework.
Modernisation of the public sector.

The Micro Perspective

Undoubtedly, the general effects of the increased competition and opportunities offered by the liberalisation of movement of goods, services, capital and labour impact on all aspects of human resource management. This may result in a complete overhaul of structure for some companies, bringing change management and human resources planning and resourcing issues to the forefront. The issue of employee enablement is also critical in this regard. This will mean consideration of:

Recruitment policies: opportunities and competition, mobility and skills availability.

Pay and conditions : remuneration policies, collective bargaining and the role of industrial relations.

Training and development: an emphasis on skills, languages and standards.

Other issues include health and safety, emplyee communications policies, employee involvement.

In this environment, it is likely that employers and employees will need to look at many aspects of the way work is organised. All social partners will increasingly become involved in the already present debate to understand and improve the new working life.

The new flexible firm is a reality that we need to face. It is a demanding form of organisation of work that not only seeks a new organisation, new skills and competencies but the development of industrial relations into new spheres. Flexibility and security must be given due weight as must continuous improvement and the need to measure results. The need to benchmark to encourage further growth and employment locally, within the EU-Med. Area and even globally must be emphasized.

G. TOWARDS A MORE EFFECTIVE MALTESE COMPETTION REGIME IN THE CONTEXT OF ECONOMIC LIBERALISATION IN THE REGION

Joanna Drake

Preliminary remarks

Economic restructuring is still relevant in Malta today as it was a decade ago when the first steps towards a liberalised economy were made. The prospect of EU membership had a catalytic effect on the restructuring process in Malta but its real underlying motive was the welfare of the Maltese economy - the transformation of the Maltese economy into a competitive one through a gradual liberalisation process in all sectors.

It is unthinkable, though, to discuss economic restructuring in Malta and ignore Malta-EU relations - the very life-blood of the Maltese economy. In this context, restructuring becomes a yardstick to measure the extent that Malta is enabled to take advantage of the opportunities provided in those very relations, whatever form they are set to take in the near future. In fact, it is argued that there is a direct proportionality between the level of restructuring in Malta and its success in its relationship with the European Union. This was also endorsed by the Commission's avis on Malta's application for EU membership and re-iterated in the Commission's recent Communication to the Council on future relations between Malta and the EU.

If liberalisation is the way forward for the restructuring process in Malta, then an effective competition regime is its cornerstone, based as it is on the philosophy of the survival of the fittest. Competition enhances economic performance and as such competition regimes have become the economic constitutions of an ever-growing list of countries which have denounced monopolistic environments as remnants of the past. Malta too introduced its own competition regime in 1994. However, competition law is and should be only part of a broader reality - the reality of a pre-established direction of where a country's economy should be heading. Thus, in the EU, competition law and policy is one of the main instruments for the creation of a single integrated market. The effectiveness or otherwise of a competition regime largely depends on other "supporting" features in a country's economy.

One might assesses the effectiveness of Malta's competition regime against the backdrop of two impending realities, (or aspirations!), namely

a. internal economic restructuring and

b. liberalisation in the region and Malta's participation therein.

In this one might depart from two assumptions:

1. three years on, Malta's competition regime has not been as effective as desirable, and

2. economic liberalisation in the region is a reality to be reckoned with.

Concentrating mostly on the first assumption one could seek to substantiate the expressed fear by analysing why the competition regime in Malta was not as effective as expected, while suggesting reforms that might enhance its effectiveness.

The discussion can be two-pronged:

Firstly, several factors on the macro-economic level and which are therefore extraneous to the law itself can be identified as being part of the cause for the regime's weakness.

Secondly, the salient intrinsic deficiencies of the law can be identified and discussed. Concrete proposals can be made along the way.

Competition law in Malta: some positive aspects

The introduction of the competition regime in Malta was in itself a commendable step. Other positive aspects may be identified too, including:

a. stronger foundations for the national economy
b. a better connection for Malta to the transnational and global economy network
c. a level playing-field for economic operators in Malta. Thus abusive behaviour is outlawed and the honest operator is given a fair chance to succeed
d. more opportunities for business to enter markets which were previously inaccessible due to cartels or monopolistic behaviour
e. consumer welfare, in terms of better prices, choice and quality, and
f. local industry is made into a better competitor on export markets.

But how has the regime worked in practice?

External forces that dampen the effect of the Competition Act

Competition law and policy will only work when they are part of a larger programme of reforms promoting efficiency. The surroundings in which the competition law operates should complement it rather than question it. The factors which, in my view have precluded Malta's competition regime from achieving maximum effect are:

a. Malta's large public sector
b. "Natural" monopolies are very extensive and are not regulated
c. the trade liberalisation process is still incomplete
d. competition law is largely a stand-alone law, and is not supported by other legal structures that should complement it
e. price control regimes are pervasive
f. the layman's apprehension of competition

The intrinsic deficiencies of the law

a. the objectives that our law seeks to protect are not transparent and sometimes the indications are inconsistent
b. the law has no bite where it matters owing mainly to the cumulative effect of the provisional validity of "new" agreements and the fact that the law imposes no penalty for first offence.
c. blanket exemption from the application of the competition rules to bodies where the government has a "controlling interest"
d. Price orders provisions are part and parcel of the law
e. Absence of rules controlling mergers, concentrative joint Ventures and take-over bids

f. the law is silent about its territorial scope
g. publicity element of the law remained missing
h. absence of private actions
I. the criminal law element in the law
j. the Office for Fair Competition should be reconstituted as an independent authority
k. the law gives the impression that it is more concerned with establishing rules of thumb (thresholds, percentages etc) rather that the impact of an agreement/abuse on the competitive structure of the market

Conclusion

Reforms of the Competition Act are in the pipeline and this is to be warmly welcomed. It is a step in the right direction, albeit a limited one. The extraneous forces which dilute the effect of the Competition Act should also be tackled. This is important from two perspectives:

1) internal perspective - the process of economic restructuring in Malta should not risk being derailed
2) external perspective - Malta should continue to feature in the process of economic liberalisation in the region, which is steadily taking shape.

H. THE EUROPEAN COMMUNITY'S ROLE IN THE INTERNATIONALISATION AND CONVERGENCE OF COMPETITION LAW AND POLICY

Eugene Buttigieg

The World Trade Organisation continuing the work of its predecessor, the GATT, has brought a gradual demolition of all existing governmental trade barriers, liberalising trade and economy in general. But these barriers could easily be replaced by barriers erected privately by undertakings which through their anti-competitive practices would be able to foreclose access to markets for other firms - thereby re-erecting new barriers to market access and thus frustrating the positive results of hard fought international trade negotiations. This can only be averted if there is an effective and coherent competition policy applied internationally and uniformly.

Unfortunately, there is no one prototype system of competition policy. It is good that the number of countries with no national systems to protect competition is fast declining but this has lead to a myriad of potentially conflicting domestic competition policy regimes differing both in the substantive rules as well as in their enforcement mechanisms with most

of them being very much less effective than others, at times deliberately so in order to create national champions on foreign markets. This of course could easily lead to trade disputes undermining the positive results of efforts deployed in the WTO to open up international trade.

Furthermore the existence of more than 50 national competition law regimes means that firms which today are increasingly involved in cross-border trade and co-operation have to ensure compliance with several national and regional competition law regimes and unless there is a degree of international harmonisation in the substantive rules and a co-ordinated review and enforcement process between the various competition law authorities involved this would create for industry a lot of legal uncertainty and expense, having to notify various national competition authorities which might view the legality of their transactions differently or prescribe different remedies, procedures and time limits.

All this has triggered a reaction that globalised trade should be accompanied by a globalised competition policy, that national competition policies which are inherently inward looking, interested only in protecting the local market, should be internationalised. Thus, it has been mooted for some time that there needs to be a concerted effort by all countries to introduce competition laws with effective enforcement provisions, that there should be gradual convergence of the national substantive competition rules and increased co-operation between the national competition authorities in the enforcement of their domestic legislation in transnational cases and eventually a legally binding international antitrust code at the multilateral level superimposed on national laws with a single world antitrust authority responsible for its implementation to cater for the anti-competitive practices whose effect transcends national boundaries.

On the multilateral level the European Union has served directly as a promoter for international efforts in the forging of an international uniform code of competition law and a global system of co-operation between national enforcement authorities by being a strong advocate of international action in this sphere primarily at the level of the World Trade Organisation where it drove the internationalisation of competition policy further up the agenda of this world organisation. In fact, it was on its insistence that in 1996 a Working Party was set up by WTO to explore whether such issues should be considered in the WTO framework.

The European Community has managed not only to infuse and diffuse its competition law model within its territory across national boundaries on a regional level but it has also managed to export it outside its shores to its trading partners with which it has varying degrees of commercial ties. In this way it is bringing about a convergence of competition laws both

within the Community itself as well as extending this convergence to neighbouring regions. Furthermore, it is also gradually weaving a network of regional enforcement co-operation between all the national competition authorities involved and transforming this regional co-operation into international co-operation by means of specific bilateral agreements with major competition enforcement authorities in the world such as those of the US and Canada.

One way of ensuring that its trading partners do not allow their firms to distort trade via anti-competitive practices is for the European Community to apply its own competition rules extraterritorially as is done frequently by the US authorities especially to protect American exporting companies.

However although the Commission has asserted this extraterritorial jurisdiction with the qualified approval of the European Court of Justice, it has exercised this jurisdiction only very sparingly as it tends to give rise to controversial questions of sovereignty and comity and unless the third country cooperates, in practice enforcement would be impossible. Where the firm has no presence in the EU and refuses to cooperate, it will be extremely difficult without the assistance of the authorities of the third country concerned to obtain the necessary information and evidence to investigate and adjudicate the case and eventually if an infringement is found to impose sanctions.

Consequently, the European Community has recently embarked on a series of negotiations with competition enforcement authorities in third countries to conclude bilateral agreements which on the basis of the traditional and positive comity principles regulate when they would seek extraterritorial application of their rules in each other's territory and what form mutual assistance and cooperation would take in such transnational cases.

The European Union has several trade agreements with third countries but the nature and level of detail of the competition provisions included in these agreements varies and will depend upon the degree of economic integration which these agreements seek to achieve and upon the objectives of the agreement.

Thus, some of the early association agreements contained competition rules but these were rather embryonic in nature as they were neither as detailed as the competition rules in the EC Treaty so that they did not bring about close approximation to EC law nor did they contain the necessary means for ensuring their effective implementation and enforcement.

An important step forward was taken in the 1972-1973 series of bilateral free-trade agreements concluded with the EFTA countries which besides containing provisions which refer to the EC competition principles to curb anti-competitive practices affecting trade between the Community and the EFTA country concerned also provided some enforcement provisions. Nevertheless these were rather rudimentary and the effect was not very satisfactory.

As the European Community edged towards the establishment of the single market the EFTA States requested a higher degree of market integration with the Community short of full membership to be able to partake of the economic benefits of this single market. Agreement was reached on the setting up of a European Economic Area comprising the territory of the Community and that of the EFTA countries. This area is much more than a free trade area and constitutes the highest form of market integration which the Community has managed to attain with a third country. Consequently the multilateral agreement setting up this EEA had to be different from the previous international agreements concluded by the Community as the objective was far more ambitious. Thus, the agreement provides not just a reference to the principles contained in the EC competition rules as in the previous EFTA Free Trade Agreements but a comprehensive and detailed set of rules virtually identical to EC competition law including all the secondary legislation and the ECJ case law to date which are directly applicable to individuals in the territory of the EFTA countries concerned (without the need of implementation or harmonisation) and enjoying supremacy over national law together with an effective mechanism for their enforcement incorporated into the agreement itself.

The enforcement mechanism envisaged in the agreement is based on two fundamental principles - the “two pillar system” and the one stop shop principle. The “two pillar system” means that that there are two enforcement authorities - the Commission and the EFTA Surveillance Authority set up by the same agreement - both with equal powers, with the decisions of the EFTA Surveillance Authority subject to review by an independent court, the EFTA Court and the decisions of the Commission, as always, subject to the review of the Court of First Instance and the European Court of Justice. However, this does not mean that every case is decided by both of them with the risk of a resulting conflict. For then the other principle - the one stop shop principle - ensures that in every case it is only one of these authorities which will be competent to adjudicate and its decision would be effective for the entire territory of the Community and of these EFTA countries (that is, throughout the whole EEA).

One can observe that the situation here is very similar to that pertaining in the European Community - there is a directly effective supranational body of competition law, the EEA law which is identical to the EC law but there is no obligation to harmonize the domestic competition law with this EEA or EC law. Yet as in the case of the EU Member States this situation will probably exert a pressure on the EFTA States to voluntarily align their domestic competition law to the EEA or EC competition law regime.

The effect of the EEA Agreement has thus been to extend convergence of competition law further across Europe and to extend further afield the network of enforcement co-operation between competition authorities which the Commission is building in this region.

A less ambitious degree of association with the Community is envisaged in another set of agreements - the Europe Agreements. But even here although not as institutionally structured as under the EEA agreement - in the sense that they do not lay down a supranational body of competition rules and supranational bodies for their enforcement - these agreements just the same provide not just for close convergence of substantive rules through harmonisation of national laws but also for a degree of regulated enforcement cooperation. These agreements are more than just Free Trade Agreements as they seek to prepare these countries for their eventual accession to the European Union. Thus the agreements require the States concerned to generally approximate their legislation to that of the Community and with each other in order to set up a uniform legal environment in these countries and thus facilitate the integration of their economies with that of the Community.

Thus in the field of competition law, the agreements not only commit these countries to develop an effective competition policy modelled on the EC competition rules, but they also provide for co-operation between the Commission and the newly set up national competition authorities in these countries in the enforcement of their new competition rules in cases where the anti-competitive practices affect not just the internal trade of one of the countries but the trade existing between that country and the European Union. Thus implementing rules which were subsequently adopted by the respective Association Council under each agreement with the consensus of both parties establish the circumstances where such cases will be assessed either by the Commission alone or by the national competition authorities or by both jointly and they regulate in detail the manner in which these national authorities and the Commission will mutually assist each other. Hence, the applicable laws will be both the EC competition law and the domestic competition law of the State concerned but each competition authority, that is DGIV and the national competition authority, will apply its own law but they are linked through a cooperation procedure.

These agreements and their implementing rules are of particular interest to countries in the Mediterranean region because the Euro-Med Partnership agreements which the Community has concluded with various Mediterranean countries and is still negotiating with others within the framework of the Euro-Mediterranean Partnership seem to be structured in the same way as far as the competition provisions are concerned and so although as yet no implementing rules have been adopted by the Association Councils under those agreements they could well be identical to the ones which were issued under the Europe Agreements.

In the implementing rules it was felt that the one-stop-shop principle used in the EEA agreement between the Commission and the EFTA Surveillance Authority would not be workable in this particular context because the Europe Agreement unlike the EEA Agreement does not foresee the existence of a supranational authority like the EFTA Surveillance Authority and an independent Court like the EFTA Court to ensure its control since this is not a multilateral agreement. Therefore, the rules allow both authorities to exercise their jurisdiction in such a case but then require them to cooperate closely in the process and following on the lines of the EC/US agreement the rules lay down in detail the way both authorities should cooperate with each other on the basis of the comity principles. This means that either authority can request the other to exercise restraint in the application of its laws or even to take positive action with respect to certain practices affecting important interests of the Community or the State concerned, as the case may be.

This is something which, as we have seen, was not found in any of the earlier trade agreements including the free trade agreements which the Community used to negotiate with third countries which limited themselves to mere harmonisation of the substantive rules without interfering in the enforcement of them. This is the Commission's new approach which puts emphasis not only on the establishment of common competition rules in an international context but also just as strongly on their enforcement. At the same time the Europe Agreements and the Euro-Med Partnership agreements go even beyond the EEA agreement in one important respect - that because they do not create a supra national body of competition law they specifically oblige the third countries concerned to harmonize their domestic competition law as closely as possible to the EC competition rules and with each other. Harmonization will not be voluntary as for the EFTA and EU Member States but obligatory.

Apart from these agreements the Community has concluded other international agreements with third countries which though not containing competition provisions as advanced as the above, also to some

extent bring a convergence or approximation of competition laws such as the Partnership and Cooperation Agreements with the Commonwealth of Independent States which also require the adoption of competition rules modelled on EC competition law and an effective enforcement mechanism but the commitment towards harmonisation is not as stringent as under the Europe agreements nor is there any mechanism for enforcement cooperation and the customs union agreement with Turkey which requires Turkey to establish a competition law which is fully compatible with the EC competition regime and an independent competition authority which effectively enforces such law.

Conclusion

In this way through these various international agreements the European Union has managed to extend the convergence and network of enforcement co-operation it managed to achieve within the Community to a larger part of Europe and now even further down towards the Mediterranean region. But convergence of competition laws does not automatically mean convergence of competition policies. In the application of the rules the particular needs and traditions of the economy have to be taken into account. This was recognised by the Commission in regard to the Central and East European countries when it acknowledged that in exporting its competition policy to these countries it must make adjustments to take into account that the emerging Eastern economies cannot be treated in the same way as the developed Western economies. Thus while these countries are required to adopt competition rules which are similar to the EC competition rules, in the application of these rules to concrete cases account can be taken of the different economic environment of these countries, to the substantial differences in economic development between the East and the West. Possibly even in relation to Mediterranean developing countries the Commission will take the same flexible approach to the application of these competition rules. As within the European Community itself even here convergence of competition policy as opposed to convergence of competition law will take longer to achieve.

I. WASTE MANAGEMENT POLICY IN THE E.U. AND THE EURO-MED PROCESS: SOME REFLECTIONS ON THE WAY FORWARD FOR MALTA

Marie Briguglio and Kevin Mercieca

A paper presented by the authors at the fifth EDRC annual conference focuses on policy related to the management of solid waste in the Maltese Islands, the European Union and the Euro-Mediterranean process. (P.G. Xuereb, op.cit. at p. 275).

The paper started by assessing current waste management practice and regulation in the Maltese Islands. The situation in Malta is characterised by a high generation of per capita waste, minimal separation and recycling activities, landfilling and illegal dumping, which generate a negative environmental impact. Although some legislation and policy exists to regulate waste in the Maltese Islands, there is no comprehensive waste management framework. What exists is at best fragmented and often outdated. The paper provides a brief description of relevant sections of the Litter Act of 1968, certain parts of the Development Planning Act of 1992 and the Environment Protection Act of 1991, the Factories (Health, Safety and Welfare) Regulations of 1986 and the Legal Notice on the Deposit of Wastes and Rubble (Fees) Regulations, 1997, as well as highlighting a number of relevant policies incorporated in the Structure Plan for the Maltese Islands of 1990, the Environmental Impact Assessment Guidelines of 1994, and more recently those outlined in the Draft Solid Waste Management Policy of Government issued by the Ministry of Foreign Affairs and the Environment (November 1997). An list of relevant conventions to which Malta is party is also provided.

The paper then moves on to give an overview of existing and proposed regulations and directives in the European Union. A summary of the E.U.'s objectives relating to the environment is given, together with a brief description of the principles established by the Single European Act. On the topic of waste management, an outline of the E.U.'s strategy and waste management action programmes is provided, together with a list and description of the main relevant directives. These include the Framework Directive, The European Waste Catalogue, the Draft Directive on Landfilling of Waste, Directives related to the Incineration of Waste, Regulations and Directives about Transboundary Movement of Waste, Directives about specific types of waste, notably Hazardous Waste, and Packaging Waste among others. Further to legislation which has been specifically designed for the control of waste management, there are also a number of directives and proposals which are indirectly related to waste management, such as those relating to Environmental Impact

Assessments, Eco-Labels, Eco-Management and Audit Schemes, and Civil Liability for Environmental Damage. This section of the paper also gives an overview of relevant funding programmes and sources enjoyed by member countries.

The paper then focuses on environmental issues at a Mediterranean level, and explains how these have emerged as the focus of several efforts for co-operation among Mediterranean countries. With regard to the Euro-Mediterranean Partnership, an outline is provided of the Short and Medium Term Action Programme on the Environment (SMAP), together with a summary of objectives which partners have agreed to address in relation to waste management.

The last part of the paper is dedicated to a discussion regarding the extent of relevance of E.U. and Euro-Med.'s policy objectives regarding waste management for the Maltese Islands. The basic rationale for waste management regulation is outlined at the outset. It is argued that the purpose of legislation is to ensure that the volumes and environmental impacts of waste are controlled.

Before jumping on any legislative bandwagon, it is important to consider the fact that Malta is an island with certain special environmental, social and economic considerations. These considerations raise the question whether adoption of E.U. policy would be the optimum strategy for our situation. There are also certain aspects of the Maltese problem (particularly minimisation, and management of construction and demolition waste) which may require more guidance than what is proposed by E.U. directives. This is not surprising given that E.U. regulations are mainly aimed at harmonisation.

On the other hand, the fact that the E.U.'s framework has been developed as a baseline, should encourage Maltese policy makers to at least aspire to that level of regulation, more so in view of the fact that E.U. regulation shows flexibility for national differences. It is argued that although optimal regulation of waste in the Maltese Islands may require a more fine-tuned approach than comprehensive adoption of the E.U. model, "free-riding" on the E.U.'s experience would constitute a considerable short-cut for national policy makers.

It could be asked what the advantages to member states of having a *joint* policy for waste management are, and whether these have any implications for Malta as a non-member state. It is argued that the advantages of conforming to E.U. policy are weakened for a non-member state, but this does not exclude the benefit of conforming to E.U. policy for the policy's own merits.

The debate on joint environmental policy making also sheds some light as to the benefits Malta stands to gain, in terms of waste management, as a partner in the Euro-Med process.

It is recommended that Malta should at least attempt to achieve what is being proposed for the Euro-Med partners, but it cannot and should not be too far removed from what has been established as a baseline by the E.U. For particular elements of waste optimal regulation in Malta should go beyond what is being proposed by the E.U.

J. MALTESE COPYRIGHT LAW IN THE LIGHT OF EC LAW

Richard Camilleri & Emily Camilleri

Intellectual property rights play a very important role in trans-border trade, a fact recognised by the inclusion of the TRIPs Agreement to the Agreement setting up the World Trade Organization. In fact, traditionally, there is and has been a tension between the stance taken by developed countries which insist on increased protection for intellectual property and effective enforcement of intellectual property rights, especially with a view to restricting piracy, in countries that they trade with, and the stance taken by developing countries which have striven to secure the international acceptability of derogations from unfettered intellectual property rights[5].

Malta adheres to the Berne Copyright Convention but only up to the Rome Revision of 1928. It also adheres to the Universal Copyright Convention but is not bound by any of its protocols or revisions.

The works that are eligible for copyright protection under the Copyright Act - the principal legislative instrument on copyright in Malta - are literary works which include dramatic works and computer software, musical works, artistic works which include photographs, cinematograph films, sound recordings and broadcasts. The rights which are controlled and restricted by copyright are the reproduction right, the communication to the public right and the broadcasting right. The law does not protect performances and performers such as actors, singers, musicians and dancers nor does it specifically contemplate rental and lending rights and distribution rights.

Malta's obligation to comply with the minimum standards of copyright protection set out in the TRIPs Agreement, which in turn oblige it to *inter alia* comply with the substantive provisions of the Berne Convention

[5] See W.R. Cornish, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights*, 2nd Ed., 1989, Sweet & Maxwell, p.13-14

(Paris Revision 1971), means that by 1999 several of the issues outlined above which are not at present covered by our copyright law, will have to be addressed. Thus Malta will have to introduce performers' right[6], rental rights at least in respect of computer programs, cinematographic works[7] and for rightholders in phonograms[8], protect compilations of data or other material[9], increase the term of copyright protection, clarify the reproduction right with regard to temporary acts of reproduction[10], confine limitations or exceptions to the "three step test"[11] and provide, with regard to performers' rights, phonogram producers' rights and broadcasting organizations rights', for conditions, limitations, exceptions and reservations to the extent permitted by the Rome Convention. Such amendments would do much to bring several aspects of Maltese copyright law into line with the main EU Directives on copyright and allied rights. Nevertheless, there will still be areas in Community law which find no counterpart in Maltese law such as the absence of a distribution right and of clearly-worded clauses which detail the situations when decompilation of a computer program is permitted.

The Communication from the Commission to the Council on future relations between the EU and Malta issued early last February 1998 states[12] that Malta has reaffirmed its long-standing commitment to move towards the establishment of a free trade area with the European Community, with a view to the establishment of a customs union with the Community. The Communication mentions that the subject of intellectual property rights should be one of the topics covered in the field of the internal market and financial services[13] but it does not elaborate

[6] Article 14(1) of the TRIPs Agreement
[7] Article 11 of the TRIPs Agreement
[8] Article 14(4) of the TRIPs Agreement
[9] Article 10(2) of the TRIPs Agreement
[10] Article 9(2) of the Berne Convention (Paris Revision 1971)
[11] Article 13 of the TRIPs Agreement

[12] paragraphs 1 and 7 of the Communication
[13] paragraph 20 of the Communication

further on this point. It is likely that in any future agreement on the establishment of a free trade area with Malta, the Community will require that, as a minimum level of protection, Malta should accede to the Berne Convention (Paris Revision 1971) and the Rome Convention. Similar provisions were made, for example, in the Euro-Med Agreement with Tunisia and in the Europe Agreements respectively, with the Czech Republic and with Lithuania.[14] Under the TRIPs Agreement, Malta already has an obligation to comply with the substantive articles of the Berne Convention (Paris Revision 1971) and to provide for certain neighbouring rights also found in the Rome Convention and thus, by 1999, at least with regard to copyright, Malta will practically have reached the standard required by the Community from countries with which it has a free trade area.

If Malta then moves for the establishment of a Customs Union with the Community, it is likely that, with regard to copyright, it be made to comply with even further obligations and, most probably, to adopt domestic legislation in line with all the current EU Directives relating to copyright and neighbouring rights - obligations which were in fact undertaken by Turkey with a view to implementing the final phase of a customs union with the Community[15].

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[14] The provisions on copyright protection in the Euro-Med Agreement with Tunisia, which Agreement had as one of its aims "to establish the conditions for the gradual liberalization of trade in goods, services and capital", stipulate an obligation on Tunisia to accede to the Rome Convention and the Contracting Parties also expressed their attachment to observing the obligations flowing from the Berne Convention (Paris Revision 1971) (to which Tunisia is already a signatory) - see COM(95) 235 final. Similarly, according to the Europe Agreement with Lithuania which has as one of its objectives "to establish gradually a free trade area between the Community and Lithuania", the latter country has an obligation to accede to the Rome Convention and the Parties reaffirmed the importance they attach to the obligations arising from the Berne Convention (Paris Revision 1971) (to which Lithuania is already a signatory) - see OJL 51/1 of 20.02.1998. In the Europe Agreement with the Czech Republic, again with regard to copyright, since the Czech Republic is already a signatory to both the Berne Convention (Paris Revision 1971) and the Rome Convention, the Contracting Parties confirmed the importance they attach to such agreements - see OJL 360/1 of 31.12.1994.

[15] Turkey has practically to adopt domestic legislation in line with all the current EU Directives relating to copyright and neighbouring rights. In the Decision of the EC-Turkey Association Council on implementing the final phase of the Customs Union between the Community and Turkey, the latter was bound, besides having to accede to the Berne Convention (Paris Revision 1971) and the Rome Convention, to adopt before the entry into force of the Decision domestic legislation equivalent to the Term of Protection Directive, the Rental Right Directive and the Computer Programs Directive. Moreover, Turkey was also bound not later than three years after the entry into force of the Decision, to adopt domestic legislation in order to reach alignment with legislation in the EC

K. THE EURO-MEDITERRANEAN FREE TRADE AREA

Roderick Pace

The launching of the Euro-Mediterranean Partnership in Barcelona in 1995, placed special emphasis on the word "Partnership".

A paper presented at the EDRC 1998 annual Conference[16] argues that the "partnership" does not exist primarily because there is an institutional vacuum which means that the Mediterranean non-member countries (MNCs) do not fully participate in the decision-making that goes on in the Euro-Mediterranean area.

In fact, so far the decisions have been taken in a two-level "game", in which the Mediterranean policy was first formulated at the EU level and later when it had gained the approval of the EU member states, the Commission was charged with the task of negotiating the agreements with each of the MNCs on a bilateral level. Thus the EU and the MNCs engaged in negotiations in which the asymmetry of power was quite obvious.

This explains why the MNCs have not been able to secure important concessions from the EU such as in the agricultural sector and in textiles and clothing. The "weak" position of the MNCs vis-a-vis the EU is a prime reason why institutions have to be set in place for the Euro-Mediterranean Partnership.

Pressure also comes from the need to ensure uniformity in the application of the norms that govern the free trade area and to ensure compliance. These together with dispute settlement and the application of EU rules, raise a number of issues related to state sovereignty in the case of the MNCs.

Both the EU and the MNCs have a vital interest in the Euro-Mediterranean free trade area. The agreements that have been concluded so far ensure that the MNCs maintain their position in the Union's market. The Commission has played a pivotal role and has mobilised networks of expertise, government ministers and national officials from all the countries of the Mediterranean Basin. This leads to a functionalist style of co-operation while at the same time it enhances its position as an

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in the field of copyright and neighbouring rights applicable to works transmitted by cable or satellite and with regard to the protection of databases. See OJL 35/1 of 13.02.1996

[16] Peter G. Xuereb, op.cit., p. 340.

information gatherer and an 'agency' for putting the free trade area into practice. But it still remains an'agency' of the EU and not of the Mediterranean states.

These insufficiencies mean that if the Euro-Mediterranean Partnership is going to be transformed into a real Partnership in the future, then the participants must take a hard look at the EFTA institutions created in relation to the European Economic Area as a potential point of departure for the Mediterranean region. The paper does not analyse the EFTA/EEA institutional setup, but provides the reasons for which the Mediterranean countries should aim to change the structure of the Barcelona process by giving it the institutional framework it lacks.

L. LEVELS OF INSTITUTIONAL RELATIONSHIPS WITH THE EUROPEAN UNION

Simon Busuttil

Introduction

What is the institutional dimension of the different types of relationships that a country may have with the European Union? What is the degree of participation that a country seeking to enter into a relationship with the European Union may expect through the institutional provisions envisaged in its agreement with the Union?

Why the institutional perspective? It gives a deeper insight into the kind of relationship (or the degree of integration) that the countries that are party to a given agreement or a given treaty are out to achieve. It tells you about the extent to which one party to the agreement is likely to be able to influence the decisions made by the other party and on limits of bargaining power. In essence, knowing the institutions that provide the structure to a relationship with the European Union, helps one obtain a better understanding of the reasons behind the success, or even failures, of that relationship.

The following two types of non-membership relationships are discussed by the author (in a paper published in Peter G. Xuereb, op.cit., p. 362) against the backdrop of the institutional provisions prevailing in the institutional framework of the EU.

A. The Association Agreements and
B. The EEA Agreement

Preliminary considerations are that:

(i) Institutional provisions reflect the level of integration intended
(ii) Inversely, different obiectives of an agreement is reflected in the institutional provisions

(iii) Institutional provisions envisaged in multilateral treaties are likely to be more pronounced than those envisaged in bilateral treaties

In his paper (above cited) the author first deals with the Association Agreements, including that with Malta, comparing it to other association agreements and focusing on the parliamentary dimension, dispute resolution and judicial control. He then turns to the European Economic Area structure and analyses its institutional provisions. Matters treated include the parliamentary dimension and social dialogue, decision-shaping in the EEA, dispute resolution and judicial control. His conclusion is that from an institutional perspective, what matters is the degree to which a given country may aspire to influence those EU decisions which are still likely to dictate its own internal position, in any case.

LES ACCORDS DE COOPÉRATION ENTRE LA COMMUNAUTÉ EUROPÉENNE ET LE LIBAN

Fayek Abillama

1. L'Etat des liens entre le Liban et la CE

A. Le premier accord de coopération entre la CEE et la République Libanaise du 27/09/78.

B. Les protocoles établis dans le cadre de l'accord de coopération de 1978.

II. Le développement des relations CE - Liban après 1978
III. Vers un nouvel accord de coopération avec le Liban

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1. L'état des liens entre le Liban et la CE.

A. Le premier accord de coopération entre la Communauté Economique Européenne et la République Libanaise du 27/09/78.
(Règlement CEE no 2214/78)

Le premier article fixe le cadre général de l'accord: " Promouvoir une coopération globale en vue de contribuer au développement économique et social du Liban et favoriser le renforcement de leurs relations."

Il est clair que l'accent est mis sur le développement économique du Liban en développant plus encore les relations avec l'Europe des neufs à cette date.

Le deuxième article reprend les objectifs du premier en y ajoutant " au bénéfice mutuel des parties", cela est logique dans une perspective de libéralisation des échanges par un élargissement des marchés.

Avec ce premier accord de 1978 le Liban, à l'instar d'autres pays méditerranéens, a bénéficié d'une attention particuliére pour une coopération lui apportant, entre autres, une assistance financiére susceptible de l'aider dans une perspective d'intégration économique méditerranéo-européenne .

L'article 4 précise la nature de cette coopération dans sa première partie: "Une participation de la Communauté aux efforts entrepris par le Liban pour développer la production et l'infrastructure économique en vue de la diversification de la structure de son économie. Cette participation devra

s'inscrire en particulier dans le cadre de l'industrialisation du Liban et de la modernisation du secteur agricole de ce pays".

Dans cette partie, la fragilité de l'économie libanaise ressort clairement : la faiblesse des deux secteurs primaire et secondaire. Le Liban étant particulièrement un pays de services, il est assez délicat de négliger les secteurs industriel et agricole si l'on recherche un certain équilibre entre les différentes activités économiques, génératrices du PIB.

Par ailleurs, l'article 4 stipule entre autres, " favoriser notamment":

- "la commercialisation et la promotion des ventes des produits exploités par le Liban".
- "une coopération industrielle ayant pour objectif le développement de la production industrielle du Liban au moyen notamment de mesures propres à:"

* "encourager une participation de la Communauté à la réalisation des programmes de développement industriel du Liban".
* "favoriser l'organisation de contrats et des rencontres entre responsables des politiques industrielles, promoteurs et opérateurs économiques du Liban et de la Communauté..." pour établir des relations nouvelles dans le domaine industriel.
* "faciliter l'acquisition à des conditions favorables des brevets et d'autres propriétés industrielles par voie de financement, conformément aux dispositions du protocole no. 1 (protocole relatif à la coopération technique et financière)..."

Nous remarquons que l'accord de coopération insiste de manière particulière sur 'industrialisation du Liban. A cet effet il envisage aussi la coopération dans le domaine scientifique et technologique. Il n'omet pas non plus la protection de l'environnement.

Par ailleurs, cet accord par son article 6, prévoit la participation au financement de cette mutation. Il stipule: "La Communauté participe au financement de mesures propres à promouvoir le développement du Liban, dans les conditions indiquées au protocole No 1 relatif à la coopération technique et financière en tenant compte des potentialités d'une coopération triangulaire".

Aussi dans son article 8, l'accord insiste sur un meilleur équilibre dans les échanges commerciaux entre les parties concernées.

En complément de ce qui précède, l'article 9, à part quelques réserves et exceptions, supprime les droits de douane et taxes d'effet équivalent, applicables à l'importation dans la Communauté des produits originaires du Liban.

Pour les produits agricoles originaires de ce pays, les droits de douane à l'importation dans la Communauté sont réduits dans des proportions indiqués pour chacun d'eux sur l'une des annexes.

Des mesures de sauvegarde pourraient être prises en cas de difficultés sérieuses ou de menaces graves de difficultés dans la balance des paiements de l'une ou l'autre des parties concernées. A cet effet, il a été institué un Conseil de coopération pour la réalisation des objectifs fixés par l'accord qui, dans les cas prévus, dispose d'un pouvoir de décision.

B. Les protocoles établis dans le cadre de l'accord de coopération de 1978

Dans le cadre de cet accord, deux protocoles avaient été établis:

- Le protocole No.1 relatif à la coopération technique et financière.
- Le protocole No.2 relatif à la définition de la notion de produits originaires et aux méthodes de coopération administrative.

Ces deux protocoles représentent les compléments nécessaires pour la mise en place et l'application de l'accord de coopération.

Le premier protocole aborde la question du financement par la Communauté d'actions prévues dans l'accord de coopération et des montants affectés à cet effet. Ce sont principalement :

- Les projets d'investissements dans les domaines de la production et de l'infrastructure économique.
- La coopération technique préparatoire ou complémentaire aux projets d'investissements élaborés par le Liban.
- La coopération technique dans le domaine de la formation.

Le deuxième protocole est relatif à la définition de la notion de produits originaires et aux méthodes de coopération administrative.

A cet effet trois listes des ouvraisons et des produits ont été établies: A, B et C. La liste C étant celle relative aux produits exclus de l'application du présent protocole.

II. Le développement des relations CE-Liban après 1978

Depuis cet accord plusieurs événements se sont succédés au Liban et dans la région:

- En 1978, le Liban Ctait depuis trois ans en pleine guerre et cette situation a duré jusqu'en 1991.

- Déjà en 1976 la "Force arabe de dissuasion" était présente au Liban sans avoir réussi à atteindre ses objectifs.
- En 1982, invasion du Liban par l'armée israélienne avec toutes les conséquences qui ont suivi.
- Par la suite, la Force multinationale qui, après quelques mois de présence, a du repartir en catastrophe.

Il suffit de rappeler les innombrables résolutions prises par la CE au sujet du Liban pour comprendre que la priorité durant cette période n'était pas l'application et l'évolution de l'accord de coopération en question, mais surtout, arrêter les massacres qui se succédaient sur l'ensemble du territoire libanais.

Entre temps, la Communauté Européenne poursuivait son intégration économique et politique et s'élargissait par de nouvelles adhésions. La vision des rapports euro-méditerranéens avait évolué pour la CE.

L'intérêt de l'Europe communautaire pour la région méditerranéenne s'est renforcé depuis une dizaine d'années. L'instabilité croissante de cette région préoccupe toujours l'Europe: La division de Chypre, la guerre du golfe, les événements d'Algérie, la situation de la Libye, l'impasse des négociations entre palestiniens et israéliens, la montée du terrorisme d'origine religieuse en Israël, constituent autant de sujets de préoccupation et d'inquiétude pour la CE.

Par ailleurs, l'acquis des relations euro-méditerranéennes était assez important lorsque s'est ouverte la Conférence de Barcelone en Novembre 1995. Des accords avaient été signés avec presque tous les Etats riverains de la Méditerranée.

A Barcelone, le partenariat proposé aux 12 pays de la Méditerranée comportait trois volets: Un volet politique et de sécurité, un volet économique et financier et un volet social, culturel et humain. Il fallait promouvoir le développement de ces pays par l'ouverture et la modernisation de leurs économies, réduire les inégalités socio-économiques et favoriser l'intégration et la coopération régionale par l'ouverture et la libéralisation des marchés et ce, pour aboutir à une zone de libre-échange en l'an 2010. Des transferts de capitaux et de technologies devraient préparer les pays méditerranéens à cette échéance. Concrètement l'Europe cherche à aller plus loin avec ces pays.

Des accords d'association dits "de la nouvelle génération" ont déjà été signés avec la Tunisie et Israël en 1995, le Maroc en 1996 et l'Autorité palestinienne en 1997. Un accord d'union douanière a été conclu en 1995 avec la Turquie, qui a abouti à une coopération économique étroite et à un dialogue politique. Chypre et Malte entretiennent depuis longtemps des relations privilégiés avec les Quinze.

III. Vers un nouvel accord de coopération avec le Liban.

Pour le Liban, les présentes négociations semblent trainer sur le dossier assez complexe des rapports économiques et commerciaux.

La levée des barrières douanières pose un sérieux problème au Liban dans la mesure où les recettes douanières représentent au stade actuel près de 60% des revenus du Trésor. Les autorités libanaises doivent trouver un substitut à ces recettes douanières, surtout que le secteur industriel est presque inexistant dans ce pays. C'est pour cette raison que les négociateurs européens ont suggéré que la levée des barrières douanières n'intervienne, dans le cas précis du Liban, qu'à la fin de la période transitoire de 12 ans.

Autre problème soulevé par les autorités libanaises: le sort de la production agricole locale qui risque de subir un grave préjudice du fait du déferlement des produits agricoles européens, après la mise en place de la zone de libre-échange. Cette question pourrait cependant être quelque peu éludée lors des négociations sur l'accord d'association comme ce fut le cas avec la Tunisie et le Maroc.

Les accords conclus et déjà signés entre la CE et ces deux pays ont exclus temporairement la production agricole du cadre général de l'association. Un tel schéma pourrait être appliqué au Liban.

Reste le dossier de l'aide financière destinée à compenser, dans une certaine mesure, les retombées de la levée des barrières douanières sur l'économie libanaise. Le Liban réclame un accroissement substantiel de l'aide financière que la CE lui accorde, ou est disposée à lui accorder selon le nouvel accord de coopération. Les négociateurs libanais insistent sur le fait que cette aide financière est sans commune mesure avec le volume des exportations européennes vers le Liban.

En effet, il semble que les principaux paramètres pris en compte par la CE pour fixer l'aide financière sont: le revenu par habitant et le nombre d'habitants du pays. Or ces deux données ne sont pas exactement définis pour le moment, car difficiles à déterminer dans les circonstances présentes. En réalité, l'absence de statistiques nationales fiables après les événements du Liban, ne permettent pas de déterminer ces paramètres avec précision.

Il existe des chiffres établis par certains organismes mais contestés par l'administration libanaise.

Par contre, les négociateurs libanais demandent à ce que la balance commerciale soit prise comme base de référence pour la fixation de l'aide financière.

En fait, ce sont ces deux points en rapport avec l'aide financière et la levée des barrières douanières qui retardent la conclusion de l'accord d'association entre la CE et le Liban.

Lors de son dernier passage au Liban, en février dernier, monsieur Jacques Santer président de la CE a souligné que les pourparlers bilatéraux étaient axés sur les deux volets déjà cités. Il a indiqué que les autres aspects de l'accord d'association, c'est-à-dire la coopération politique et de sécurité, culturelle, sociale et humaine, ne posaient aucun problème.

Tout en insistant sur l'importance du développement du secteur industriel à moyen terme, l'objectif à court terme des responsables libanais est le retour aux spécialisations qui ont fait la prospérité du Liban d'avant les événements de 1975. Cet objectif comprend en premier lieu la réhabilitation du système bancaire et une place financière d'importance internationale.

En second lieu, l'objectif vise le retour comme auparavant, d'un secteur touristique de lure. La politique de livre libanaise forte appuyée par des taux d'intérêt élevés, serait compatible avec l'objectif fixé, au prix d'un développement restreint du secteur productif. Les ressources dégagées par l'activité financière et touristique, ainsi que les reflux (retour) des capitaux vers le Liban, pourraient être suffisants pour financer le déficit chronique des balances commerciale et des paiements comme par le passé. Ce mode de développement, à lui seul, rendrait l'économie libanaise très dépendante de la stabilité intérieure et extérieure du pays.

Ayant longtemps subi les conséquences de cette dépendance durant les périodes de troubles, les responsables libanais sont convaincus qu'à moyen terme, ils devraient favoriser l'industrialisation du pays, c'est pourquoi ils attachent une grande importance à l'aboutissement des négociations avec la CE, qui le mettraient sur une nouvelle voie, complémentaire de celles qu'il maîtrise déjà.

A cet effet, un vaste plan d'industrialisation du pays est en gestation auprès de la Chambre de commerce, d'industrie et d'agriculture de Beyrouth, en coopération avec l’Association des industriels du Liban, afin d'établir une stratégie capable de faire face aux opportunités offertes par l'accord de coopération en voie de négociation entre la CE et le Liban.

Les autorités libanaises ont déjà pris conscience de l'intérêt d’avoir une économie diversifée et équilibrée entre les trois secteurs d'activité. Ils

doivent s'y préparer sérieusement. Cela est-il possible dans cette phase de reconstruction? Tout à fait possible dans la mesure où l'initiative privée est encouragée par des mesures concrètes garantissant les investissements et assurant une vraie stabilité politique.

Le moment présent n'est pas tout à fait propice tant qu'une paix réelle n'est pas établie, pour que les forces armées étrangères quittent le territoire national.

N'avons nous pas retenu certaines conclusions du colloque tenu l'an dernier à Malte et suivi par la réunion des ministres des affaires étrangères des pays concernés?

La paix est incontournable pour la réalisation des objectifs de la Conférence de Barcelone. Les Quinze, comme les douze, en sont convaincus.

Nous savons aussi que gagner la paix est souvent plus difficile que gagner une guerre.

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