



EURO-MEDITERRANEAN INTEGRATION

The Mediterranean's European Challenge

Volume III

Edited by
Peter G. Xuereb

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**EUROPEAN DOCUMENTATION AND RESEARCH CENTRE
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FOREWORD

In one form and configuration or another a research network, co-ordinated by the EDRC, has been in existence since 1998. The Commission's support has during that time been constant, even when the Commission itself had only limited possibilities to assist academic research networks in the Mediterranean area. Instrumental were some key persons, prime among whom in our case were Madame Jacqueline Lastenouse and her team, Mr. Luciano di Fonzo, now Jean Monnet Project Manager, and successive heads of the Commission Delegation in Malta, among whom I must mention Mr. Gunther Weiss, Dr. Giorgio Boggio and the current Head, Mr. Ron Gallimore. Equally key to our projects have been successive Rectors of the University of Malta, and I mention the current rector, Professor Roger Ellul-Micallef, and his predecessor, the Rev. Professor Peter Serracino Inglott.

This is the third volume of papers published by the network, now called the EU-Med Transnational and Regional Research Network. The first two volumes were published in 1998 and in 2000 respectively under the titles: *The Mediterranean's European Challenge*, and *The Mediterranean's European Challenge Volume II*. This current volume is titled *Euro-Mediterranean Integration* and sub-titled *The Mediterranean's European Challenge Volume III*. The change in title reflects the true spirit of the Euro-Med Partnership as well as the co-operation that has led to the possibility of EU membership for a number of Mediterranean states. The integration of Europe and the Mediterranean is indeed the joint challenge of the Member States of the Union (some of whom are Mediterranean) and of the Mediterranean states which are not (some of them, not yet) Members of the Union.

As co-ordinator of the network and the projects, it has been my privilege to work with some of the finest academics, including some of the most promising young researchers, in the Mediterranean, both in the current grouping of the network and in previous groupings. It has been a rewarding and often uplifting experience to work with people who have won the battle with their own minds, overcoming their personal prejudices perhaps, and

dedicating themselves now to the eradication of misunderstanding and prejudice in others. As the President of Malta, His Excellency Professor Dr. Guido De Marco, wrote in his foreword to the second volume, “(T)he fundamental change to be effected is that within the states of our mind”. It is surprising and exhilarating to see how quickly everything else then follows.

It is therefore with a deep sense of gratitude to the members of the network whose work features in this volume; to all previous participants, who I hope will form part of the next grouping also; to all those mentioned above, to whom I renew my thanks; and to the excellent staff of the European Documentation and Research Centre of the University of Malta, that I have pleasure in presenting this book, and the CD version of it, which will be circulated widely to European Community Studies Associations, and further afield.

Peter G. Xuereb
University of Malta
November 2002

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EURO-MEDITERRANEAN INTEGRATION

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We are used to hearing, about the Mediterranean, that the infrastructure is undeveloped, economies are weak, populations are booming, the pressure is for emigration, legal or illegal, justice and the observance of human rights are not always of the required standard, much trade which could happen horizontally does not. Yet we also know that the Mediterranean gave Europe much of its culture. Europe is remembering. The Mediterranean is remembering. Slowly perhaps, the Mediterranean can take its place again as the cross-roads and the melting-pot of cultures, and the cradle of universal values. In the meantime, the economic disparities in particular continue to overshadow this Mediterranean vocation.

Mediterranean states must upgrade their own infrastructures-especially in telecommunications, energy, very importantly transport-, but it is vital that the entire Pan-Mediterranean infrastructure be upgraded. They need to improve their production capacity, especially by upgrading skills to attract high value-added industry, but it is vital that the entire region do this. They need to develop and maintain suitable regimes for the attraction of foreign direct investment, whether from the EU or further afield, and what is or is not possible will depend in each case on whether the particular state is or is not a Member State of the EU, but it is vital that there be co-ordination and synergy of regimes and maximum coherence in the regimes at play, so that a level playing field be matched by co-operation, and mutual and joint benefit (in this context a vital part is played by cumulation of origin rules).

Each must dedicate appropriate financing instruments to the various challenges described. Each must dedicate adequate planning resources to them. Each must dedicate skilled human resources to them. Can they do it alone? Should they do it alone? They are not being asked to. It is now clear that the European Union and its Member States are assisting in no small way.

The Euro-Mediterranean Partnership has emerged in recent years, as the papers in this volume testify, as one significant response, if not (yet?) the complete answer, to the challenge of securing peace, prosperity, justice and the rule of law in the Mediterranean region.

Indeed training, skills transfer and professional development of the region's human resources are a large part of the answer to the challenges I mentioned: reducing the pressures for emigration; increasing productivity and efficiency and competitiveness to acceptable levels; achieving social progress and eradicating poverty and social disparities; upgrading infrastructures.

On the financing side, the news that the more ambitious plan to create a Mediterranean Investment Bank was shelved in favour of a less 'ambitious' and less 'symbolic' plan to create a Euro-Mediterranean investment facility to further boost the financing armoury beyond existing Association Agreement measures and MEDA was, if disappointing for some, in any event a welcome development in itself.

Indeed, one main enemy of progress in the Mediterranean is, in my view, a culture of dependency; dependency at individual, group, enterprise, industry, commerce, and even government level. Several of the papers in this volume emphasise the need for a true Partnership to evolve.

Where does co-operation begin and where does it end? Where does competition begin and end? Which 'sectors' should be prioritised as areas of co-operation and what form should that take? Does the epithet 'partnership' fit the current institutional and programmatic content of the Euro-Med Process? These are some of the key questions addressed in this volume.

Democracy and justice must feature very high on the list. It is clear that one can expect the Union to continue to co-operate with the Mediterranean non-Member Countries in the establishment of democracy, human rights, sound administration, and the rule of law. There is no end to the measures which can be taken in a spirit

of partnership to advance these values, from education and training to inter-institutional dialogue.

Security in the broad sense requires ever closer co-operation. It is necessary to set up an Immigration Monitoring Centre, but it is more important to address the emigration/ immigration issue at root. Collaboration is needed to address the problems of poverty, social exclusion and unemployment. Then, yes, co-operation in dealing with the pressures of illegal immigration and the different problems posed by refugees must increase. Again a whole raft of measures are needed here. But the emphasis must be on finding solutions and recipes for co-operation which address the economic, social and cultural realities.

Defence and security in the EU must be fully recognised as having a vital Mediterranean dimension. Successive Maltese governments (if I may be permitted to say so) have repeated that there cannot be lasting peace and security in Europe without peace in the Mediterranean. Increasingly in practice, as the EU finds its role, it intervenes in the cause of peace, as recently in the Middle East. But the EU needs a security policy for the Mediterranean, and it needs to fashion its defence and security policy for the area in dialogue and partnership with the Mediterranean States. If new institutional arrangements are needed to make this a reality then they must be created.

Perhaps of all the economic sectors which are at play one of the most sensitive is agriculture. The recently-concluded Association Agreements with Lebanon and Algeria indicate the EU's approach to agricultural trade with MNMCs. Yet some, of whom one is Fiori, have called for something more with a view to increasing production as needed by demographic trends allied to improved quality and safety. This takes investment and training in modern techniques and methods. And the call is for the EU to promote initiatives and contacts with a view to establishing active co-operation in the agricultural sector. "In fact", wrote Fiori¹, "we must move from the concept of confrontation towards partnership,

¹ Fiori, in 2001, Our Vision of Europe, (EPP-ED, Garant, 2001) at p. 214.

identifying joint strategies through comparison and experience. An integrated analysis of production, processing, research and training using joint methods of working for improvement is the route to take in order to get rid of competition as an end in itself in the agricultural field, as in others, he says..... a common vision of the market is needed so that Mediterranean producers can be protected in a transparent fashion..... The success of a Mediterranean free trade area also depends on the willingness of all the partners, including the EU Member States, to reform their trade policies in order to avoid imbalances which penalise the weaker parties.. "

Again if institutional changes or even the creation of new institutions to institutionalise dialogue are needed in this area as in others then they must be designed and implemented.

The idea of replacing competition, the paradigm of the last century, even under the mantle of free trade with co-operation rather than dependency or aid, is a vital one in my view. There are strong and weak states, but the experience of the last century has shown us that exploiting weakness is not the road either to peace or to prosperity. Solidarity is.

The Commission Communication to the Council and the EP of 13 February 2002² to prepare the meeting of the Euro-Med Foreign Ministers in Valencia on 22-23 April last set out Commission thinking on taking Euro-Med 'integration to new levels'. There is no doubting the Commission's willingness to develop the regional programmes. The cultural aspects are deriving support, not least with ideas such as the creation of a Euro-Mediterranean Foundation. So are the economic and the political. The challenges as stated are daunting. Take for example the need to create 45 million new jobs in the next decade! Where would we have been without the Euro-Med Partnership, the trade creation effects of the Association Agreements, and the Agadir process? Yet 'regional integration' must begin to refer increasingly to North-South as well as to South-South economic integration. The participation of the Med partners in the pan-European system of cumulation would

² SEC (2002) 159 final.

indeed 'be a major step to enhance trade and industry co-operation between European (including EFTA and Eastern European) and Mediterranean partners' and provide a clear impetus to attracting European and other foreign investment to the Mediterranean. The agreement of all current participating countries to extend this system to the Med partners is a true demonstration of solidarity. The liberalisation of trade in services will be another breakthrough, as will further steps on agriculture. If the Commission's proposals on facilitating infrastructure investment, interconnection and developing the regulatory environment succeed in linking Mediterranean infrastructures to each other and to the European networks within the near future a major step forward will have been made. In this connection especially, the EIB role is central. And I call particular attention to the Commission's call on the Conference of Ministers of Industry to put forward proposals with a view to introducing the appropriate reforms for the 'gradual' development of a Euro-Med internal market. It is a call that a number of the papers in this volume seek to highlight: moving from a free trade area (albeit as yet not completed) to an internal market. A strong, and strengthened Euro-Med Committee as the steering committee for the partnership is certainly one way of pushing these reforms through. The recommendation that as the partnership develops further in the association process, the Committee should focus its work more closely on *acquis*-related business and that the agenda should begin to be drawn up by the partners jointly made much sense. Some papers in this volume emphasise the need for institutional development both on the bilateral and the multi-lateral 'levels'. We look forward generally to the implementation of the Valencia Action Plan.

Some Mediterranean States are EU Members, of course. Others, among them Malta, Cyprus and Turkey aspire to membership. A number of the papers argue the case for Turkey's membership. Others will not become Members of the EU. The concrete expression of EU solidarity cannot be the same in all cases, but it must exist in all cases if peace and security in the Mediterranean are the perennial goals. Concrete mechanisms, criteria and implementing measures for the expression of solidarity - meant as the redressing of disparities and inequalities, as joint welfare and

the pursuit of the common good - must come to feature as a reality in EU policy-making, both internal and external, and in joint EU-MNMC policy-making. This means free trade, even extensive or total free trade, but it also means contemplating maximised integration. The European experience is that economic integration leads to intercultural dialogue, to mutual understanding, to real prosperity, to equality and justice and thus to security and peace. So again I say that solidarity requires more than aid, and more than trade. Prosperity and peace are the fruit of integration, of common policies. However far-fetched the creation of a Pan-Euro-Med area of peace, security, prosperity and justice may appear today, the fact that true solidarity is what lies at the root of peace is the lesson of the European Project. Much of the Mediterranean is European. Certainly, Southern Europe is Mediterranean.

I have not emphasised the particular case of Malta that, like Cyprus, is seeking Membership of the EU. Negotiations are far advanced, as the Regular reports indicate. Problems of human resources and upgrading, not least of the administrative and judicial capacity, exist but are being addressed and are not as huge as in some other applicant states. Rather than rehearse the actual state of negotiations with Malta and the particular Maltese position, I have chosen to indicate the direction that I would hope and trust that EU-Med relations will take in the near future. I think that there are strong signs that this is happening and will happen. The papers in this volume bear testimony to the progress that has been made, and is being made, on many fronts and in this direction. This is, I think, what Malta would like to see happen in the Mediterranean region and Malta would wish to be a catalyst and prime mover in this process. This, I think, is what is meant when Malta is spoken of as 'a bridge', or as 'a hub'. Cyprus can play such a role in the East, while Malta can play this role in the central and western Mediterranean. In this sense, Malta and Cyprus have very similar roles to play as Members of the European Union, should they both become Members, and they can play these roles as a team, together with their particular or 'special' partners in the Union.

To play slightly on Fiori's words³, then, much of the Mediterranean is European; and of course the South of Europe is Mediterranean. 'Europeanisation' proceeds. It remains to be seen what impact the Mediterranean can have on Europe today. The object of the research project that has led to the papers published in this volume is precisely that of showing just how dynamic is the process of partnership and integration, and to analyse the dynamics of that process.

The first set of papers explores the general dynamics of EU-MED partnership and integration, sometimes looking back in order to look forward. They address the future also in the context of an enlarged European Union and the phenomenon of globalisation.

Escribano and Lorca see North-South integration as characterised by a "deep integration". Emphasising geo-economic and geopolitical factors, their wide-ranging analysis takes in a gamut of considerations from institutional questions, political structures and cultural differences to agriculture, with the authors pointing out as they proceed that the "westernisation of law does not necessarily imply a rupture with local traditions". Poignantly they reflect on the loss to the Mediterranean states of their policy of competing negatively among themselves, a point also made by Limam. They do show that there is no model for "EU-South" integration, seen also as a mechanism for coping with globalization, in the sense that other experiences (e.g. the EU's enlargement policy *vis à vis* the East, the US/Latin America experience or the Asian experience) do not apply to the Mediterranean as a region. From the perspective of international political economy, they seek to answer questions such as: what place does the Mediterranean have in the globalization process? What role does the Euro-Mediterranean Partnership play in the efforts of MNMCs wishing to integrate in the world economy? What role do borders play? One of their main conclusions is that the easier way to adapt to the requirements that globalization imposes on developing countries is to adopt the *acquis communautaire* in the economic sphere.

³ Fiori said: " Europe, take heart. The Mediterranean is European".

Frikha focuses in his paper on the background to the proposal for an EU-MED single market, tracing the logic of moving from the instrumentality of the Free trade Area to the concept of the EU-Med Internal Market. He too sees adoption of the *Acquis* as a strategy for coping (and more) with globalization. For him approximation or harmonisation in fact means gradual alignment of national law with the *Acquis*. What has been created is a “Euro-Mediterranean *acquis*”, and Frikha explores, taking the Tunisian Agreement as the point of reference, the manner in which the *Acquis Communautaire* has been ‘projected’ via the Association Agreements concluded in the context of the Euro-Med partnership and where this projection will lead. For him while the Partnership does not aim to make Union Members of the MNMCs, this ‘projection’ of the *Acquis* inserts them into the globalization process and gives rise to a Euro-Med *Acquis* (a concept utilised by the Commission in its discussions with Libya) which takes its reference from the *Acquis Communautaire* and itself inspires sub-regional integration but which remains the son of the father and separated by the generation-gap that that relationship implies.

Pace examines the Union’s policies to enhance security and stability in the region, approaching the issue from the perspective of human rights and fundamental freedoms. He argues that, having raised expectations, the EU appears to have back-pedalled, preferring a softly-softly approach. In his view, human rights and freedoms have fallen victim to a trade-off between securing them and other EU “priorities” such as that of contracting the co-operation of the Southern littoral States in the fight against illegal immigration, illicit drug and arms trafficking and the war against terrorism. This, he argues, is short-sighted. He calls for linkage between human rights clauses in Association Agreements and sanctions. At the same time he appears to accept that such political reform as there has been has not been in response to any policy of sanction. He asks also whether the European Institutions are “pulling the same rope” and he calls for the Valencia Action Plan to be put into action, for the EU to “negotiate” human rights into play, and for the EU to spell out a sanctions policy. In this way, he hopes, a practical programme for human rights and democratisation can be put in the place of what he calls “the EU’s ambivalence and

oscillations in its declared policy on human rights and fundamental freedoms in the Mediterranean region”.

Limam evaluates the institutional framework established by the Euro-Med Partnership against a test of inclusion/exclusion in policy-making. The intergovernmental aspect prevails in the Association Agreements as such, and Limam argues that the insertion of other actors in the process needs to be considered. As far as the multi-lateral dimension of the Partnership is concerned, this is where most of the reform must come, for the current framework is embryonic and heavily dependent on the Union in its conception, financing and organization. A certain ‘minimalism’ pervades the institutional framework. To Limam the Valencia Conference held out hope for progress on this front, with the prospect of a better- structured and more ‘egalitarian’ institutional framework emerging. However, she is short of surrendering entirely to optimism, for the Partnership remains torn between the logic of governmentalism and that of the citizen, between the logic of assistance and that of a true zone of shared prosperity, between the demands of co-development and those of security. Her idea is that the experience of the EU itself with its own institutional development can serve as a reference model for reflection on the future of the institutions of the Partnership.

Izci is positive about the opportunities for co-operation in the sphere of the environment consequent on the forthcoming enlargement of the Union. Certainly, there will be many more States participating in the relevant processes of policy-making and implementation. While environmental issues posed one of the greatest challenges in the enlargement process currently under way, it is also in this sphere that some of the greatest benefits stand to be reaped. Izci seeks to trace the potential impact of the environmental *acquis* as combined with the impact of enlargement in setting up the EU as a global actor in the environmental sphere. The EU environmental agenda will be reformulated as a result. The opportunities for sustainable development also as affecting the Mediterranean are set out, as also are the difficulties and obstacles which may still need to be overcome by reference to the region, from the alleged “Mediterranean syndrome” to particular

Mediterranean environmental concerns such as soil erosion and water scarcity. In particular, Izci calls for further work in integrating the environment into other policy areas so that Mediterranean states can be more successful in raising their environmental concerns at European level. Co-operation remains a necessary condition to tackle the trans-boundary effects of environmental degradation in the Mediterranean.

The second set of papers, while written against the backdrop of enlargement of the Union, examine particular policy sectors using the country case-study approach. The focus is the impact of the *Acquis*, as projected through the Partnership in particular. Even if country-based, these papers also draw the wider canvas from the perspective of the general interest.

In this latter sense, *Cebeci* writes on the CESDP and Turkey. Among the key questions that she seeks to answer are: What were the rights that Turkey acquired through WEU Associate Member status and that it lost on the demise of WEU? What are Turkey's stakes in the projected development of the CESDP? More generally, she asks what is the significance of the CESDP as a European security project? And then, Why should Turkey be accommodated within such a project?

Tal Sadeh, while taking the often special case of Israel as the focus, projects an analysis of the concept of the Euro-Med Internal Market. His paper is a wide-ranging, across-the-board analysis of the obstacles and the possible remedies. He seeks in this way to estimate the level of integration between the Israeli economy and the EC in the sectors and fields of co-operation that the Commission and the Euro-Mediterranean ministerial conferences have identified as important to the formation of a Euro-Mediterranean internal market. The EC-Israel bilateral agenda is not distinguished from the regional agenda for the reason that the two are interrelated, and both determine the practice of EC-Israel integration. The sum provides lessons both for other Mediterranean states and to the Union.

The third set of papers are specific sectoral country studies. **Hugelin** takes Tunisia as the focus for a study of the contribution made by the Euro-Med Partnership to the development of the pharmaceutical products sector. **Karray** details for us the new Tunisian legislation in the customs field. In two papers **Baatour** details the new trade mark legislation in Tunisia. Taken together, the papers provide a snapshot of real progress achieved in Tunisia in terms both of the internal and external trade *Acquis*. **Abillama** and **Bairamian** detail the efforts of Lebanon, with a focus on the challenges as faced by the public administration in the management of change. They call in particular for the reform of the aid process, and for fundamental change in three major EU policy areas, namely the Common Agricultural Policy, the Union's immigration policy, and trade policy, such as to also to give the Mediterranean states the opportunity to fully exploit their comparative advantages, notably in the agricultural sector.

The final set of papers offer some general lessons also. However, they are essentially about Turkey's efforts to adopt the *Acquis*, and demonstrate the level of effort and success achieved. They are grouped here as they seek in one way or another to project the case of Turkey for membership of the Union while focusing on the above.

Cakir's paper is indeed a plea for acknowledgment that Turkey has made great efforts to adopt the *Acquis Communautaire*, and he sets out to demonstrate indeed Turkey's ability to adopt the *Acquis*, while accepting that it has not proved as successful in what he calls "other areas". So his point is that the process of adoption of "the *acquis*", taken in isolation, as he says, appears not to have had the appreciation it deserves. The other papers can be taken as illustrations of the argument.

Attention has been on Turkey for a long time in relation to its record in the field of broadcasting and freedom of expression in general. **Pekman** seeks objectively to present the developments that have been pushed through in Turkey in the field of audiovisual policy, to celebrate with us some marked success in the area, both

for Turkish determination and for EU policy, and to chart what still needs to be done.

Continuing the focus on Turkey, *Ilgaz* charts the progress of her country in moving to full harmonisation with the *Acquis* in the field of intellectual property. It emerges clearly that the process is one of internationalisation via the *Acquis*.

Saglam's focus is on the SME sector in Turkey, and he presents the findings of a survey covering the Eskesihir region with a view to generating priorities in terms of action, principally on the part of Turkey, to put SMEs on a competitive footing.

Taking the papers in sum, I feel that they cast much light on the general impact of the Euro-Mediterranean Partnership, and more generally of pan-Euro-Mediterranean regional integration, in some key areas of co-operation. The general "mood" of the expert writers is, I think, one of cautious optimism allied to modest satisfaction at the efforts of the participating Mediterranean States to fulfil their side of the Partnership in key sectors. The mood is positive, even though the realisation that much remains to be done is almost palpable as one absorbs the messages being given in the papers.

**ADAPTING TO GLOBALISATION:
THE EURO-MEDITERRANEAN PARTNERSHIP
FROM A SOUTHERN EUROPEAN PERSPECTIVE**

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Introduction

Globalization characterizes the world economy at the beginning of the 21st century. International flows of capital, goods and services, and information have reached a level unprecedented in history. To some extent, this process has a technological origin in the evolution of transport: according to Harvey, in 1960 the world had already shrunk to a fraction of 15 in terms of transport speed. Furthermore, the development of telecommunications technology has avoided many obstacles to international economic transactions. Internet allows for an almost unrestricted flow of information and the media brings us close to distant realities. All of us now live in the McLuhan's "global village".

All of us? At this point we should introduce two qualifications. First, many areas in the developing world are not being fully incorporated into this process, as can be seen by some statistical figures. In the 90s, almost 50% of OECD direct foreign investment to non-OECD countries went to just 10 countries, all of them in Asia and Latin America (Fortanier and Maher, 2001). Concerning trade, despite the tariff reductions agreed in the Uruguay Round, industrial countries still maintain tariff peaks affecting more than 10% of their tariffs. Such peaks apply mainly to agricultural and agro-industry related products, and to light manufacture of low technological content, where developing countries enjoy comparative advantages and, consequently, substantial export potential. Tariff peaks are concentrated in the agricultural sector in the EU, and in the industrial sector in the US (UNCTAD, 1999). A similar picture can be drawn concerning information flows: whilst connectivity rates in OECD countries reached 37.86 per 1.000 inhabitants in 1998, as a whole it was just 0.26 in developing countries (UNPD, 2001; see also table 8).

The second qualification refers to the surge of regional integration. Globalization comes along with regionalisation, in the sense that

many countries conceive the latter as a means of integration into the world economy. As we will see, trade and direct foreign investment data suggests that the world economy tends to be structured around three cores: the EU, the US and Japan, that we will call hereafter ‘Triones’. For both geopolitical and geo-economic reasons, each of them try to integrate their surrounding territories into their production system: their borders constitute what is commonly called the “near abroad”. The US has a well-defined southern border, Latin America. The Japanese developing frontier is Asia. The EU has both a southern and an eastern border, the developing Mediterranean and the area of former soviet influence. However, there are several differences between the strategies and approaches deployed by the three cores in their relations with their borders: the US has developed the “maquila (assembly) model” and Japan the “flying goose model”. While the EU model for the eastern border is enlargement, whose specifics exceed the purpose of this article, there is no well-defined model for the Mediterranean, and much less so for Sub-Saharan Africa.

The implications of today’s North-South regional integration are further-reaching than previous preferential agreements. “Deep integration”, based upon the standardization of economic regulation, and political dialogue, which includes political dimensions, are both present in the Euro-Mediterranean Partnership. Moreover, geography makes Euro-Mediterranean countries “natural trade partners”, following the well-known Krugman (1992) case for regional integration, whose rationale lies mainly in reduced transport costs. However, transport costs make up only a part of transaction costs, and political and institutional differences, if not tackled directly, can dilute the advantages of geographic proximity. But this is not the only way in which we have to refer to geography. The EU’s southern border is a complex regional entity, where geography largely determines political, cultural and economic variables. That is the reason why we think it important to refer to the geo-economics and geopolitics of the Mediterranean (Lorca and Escribano, 1998a).

Complexity can be easily observed in the economic dimension. There are countries whose economic structure is almost entirely

based upon energy revenue (Algeria, Libya, Iran, Iraq and the Gulf Cooperation Council -GCC- countries). Countries like Jordan, Morocco, Tunisia, Turkey or Israel have more diversified economies, combining agricultural exports, industry and tourism. Some other countries, like Syria and Egypt share both characteristics. The economic asymmetries are present both at the horizontal (South-South) and vertical (South-North) levels: the Mediterranean EU member states represent more than 85% of Euro-Mediterranean GDP, Turkey almost 5%, and Israel, the Maghreb and the Mashrek countries, 3% each. Furthermore, the differences in per capita GDP between Arab Mediterranean states and EU Mediterranean states (or Israel) are tenfold.

From a geopolitical perspective, the EU southern border is one of the most conflictual regions in the world: the Arab-Israeli conflict, the Algerian situation, the Cyprus issue between Greece and Turkey, the Western Sahara issue, and the presence of several so-called “rogue states” according to the US Department of State, such as Libya, Iran, Iraq and Syria, among others, give strategic relevance to the Mediterranean on a global level. Mediterranean affairs are not just regional, but global, and despite EU concerns, the US is still the leading power in the region. This relevance has considerably increased following the September 11 2001 terrorist attacks and the subsequent engagement of the US and its allies in a far-reaching war against terrorism, even if the extent to which this commitment will include the causes of the anti-Western animosity remain to be seen. This being said, it is difficult to foresee a Marshall Plan-like approach jointly implemented by the EU and the US directed towards the socio-economic roots of the Mediterranean problems.

From such a perspective, what place does the Mediterranean have in the globalization process? What role does the Euro-Mediterranean Partnership play in the efforts by Third Mediterranean Countries wishing to integrate in the world economy? This article tackles the issue by adopting an international political economy perspective. In doing so, we first compare the economic and political characteristics of the EU’s southern frontier with the influence areas of Japan and the US. Then, we analyze the

participation of the “frontiers” in the world economy and compare their relations with their respective cores. The last section presents some final comments drawing from the results gained from the previous sections of the article. In so far as we consider the eastern border of the EU subject to the logic of enlargement and therefore being a temporary “frontier”, it will not be included in our analysis. Neither will we include Sub-Saharan Africa, which unfortunately does not seem to be considered by the EU as a territory which is developable through regional integration. One of our main conclusions, and an important one for the aim of this volume, is that the easier way to adapt to the requirements that globalization imposes on developing countries is the adoption of the *acquis communautaire* in the economic arena.

The Economic and Political Structures of the “Borders”

The aim of this section is to draw the differential characteristics of the EU southern border in social, economic, political and cultural terms and to see how it compares with Asia and Latin America. Table 1 presents some social indicators selected by region. For comparability purposes, we can identify the EU’s southern border with the Arab World, even if that implies some kind of distortion due to the inclusion of rich and relatively unpopulated GCC countries. The first point we would like to refer to is the relatively low levels of human development, with the Arab world as a whole lagging well behind Latin America and East Asia. Only South Asia and Sub-Saharan Africa have worse human development indicators. The Arab countries allocate a significant amount of resources to education in terms of GDP, but in part this reflects a low level of GDP and in any case compares poorly with military expenditure. Illiteracy affects 40% of the adult population, closer to ‘Less Developed Countries’ than to ‘Developing Countries’ levels. Population increase ranks among the highest in the world, only surpassed by Sub-Saharan Africa, but a general decrease in fertility rates is taking place, reducing demographic pressure. These data are in line with the influential work done by the UNDP’s *Arab Human Development Report 2002*.

Table 1: Developing Countries: selected social indicators

| | Human Development Index | Population with a life expectancy of less than 40 years (%) | Illiteracy rate (% over 15 years old) | Children suffering malnutrition (under 5 years old, %) | Education spending (% of GNP) | | Military spending (% of GNP) | Fertility rate | |
|---------------------------------|-------------------------|---|---------------------------------------|--|-------------------------------|------------|------------------------------|----------------|------------|
| | 1998 | 1998 | 1998 | 1990-1998 | 1990 | 1995-1997 | 1990 | 1970-1975 | 1995-2000 |
| DC's | 0.642 | 14.3 | 27.6 | 31 | 3.5 | 3.8 | .. | 5.4 | 3.0 |
| LDC's | 0.435 | 30.3 | 49.0 | 40 | .. | .. | .. | 6.7 | 4.9 |
| Arab World | 0.635 | 12.2 | 40.3 | 19 | 4.8 | 5.4 | 7.3 | 6.6 | 4.1 |
| East Asia | 0.716 | 7.5 | 16.6 | .. | 2.8 | 2.9 | 3.2 | 4.8 | 1.8 |
| East Asia (excl. China) | 0.849 | 4.6 | 3.1 | .. | 3.3 | 3.5 | 3.7 | 4.2 | 1.7 |
| Latin America-Caribbean | 0.758 | 9.7 | 12.3 | 10 | 3.4 | 4.5 | .. | 5.1 | 2.7 |
| South Asia | 0.560 | 15.7 | 45.7 | 49 | 3.7 | 3.2 | 3.1 | 5.7 | 3.3 |
| South Asia (excl. India) | 0.550 | 15.6 | 49.5 | 41 | 3.4 | 3.2 | 3.4 | 6.7 | 3.8 |
| South East Asia-Pacific | 0.691 | 12.0 | 11.3 | .. | .. | 3.3 | .. | 5.3 | 2.7 |
| Sub-Saharan Africa | 0.464 | 34.6 | 40.6 | 31 | 4.9 | 6.1 | .. | 6.7 | 5.5 |
| East Europe and CIS | 0.777 | 8.1 | .. | .. | .. | 4.9 | .. | 2.4 | 1.6 |
| OECD | .. | 3.9 | .. | .. | 5.2 | 5.0 | .. | 2.5 | 1.8 |
| World | .. | 12.3 | 24.8 | 30 | 4.9 | 4.8 | .. | .. | .. |

Source: UNDP, *Human Development Report, 2001*.

Note: geographic areas according to UNDP.

**Table 2: Developing Countries: extreme poverty
(percentage of population living under \$1 a day), 1998**

| | millions | % of population |
|---------------------------------|----------|-----------------|
| South East Asia-Pacific | 278,3 | 15,3 |
| Europe and Central Asia | 24 | 5,1 |
| Latin America-Caribbean | 78,2 | 15,6 |
| Middle East and North Africa | 5,5 | 1,9 |
| South Asia | 522 | 40 |
| Sub-Saharan Africa | 290 | 46,3 |

Source: World Bank, *World Development Indicators*

Note: geographic areas according to WDI.

However, poverty is not as severe as in other developing countries. Extreme poverty (percentage of population living under \$1 a day) affects 2% of population, the lower figure for developing countries and well ahead of richer regions like Latin America or South East Asia and the Pacific (table 2). The relative minor incidence of poverty can be explained by the cultural and institutional variables. Islam and its family and solidarity values provide for a social network, sometimes backed by an Arab nationalist redistribution ideology. This is also why data about wealth distribution and inequality are better in the Arab world than in Latin America or South Asia. A generally accepted indicator of poverty, that of infant malnutrition, is well below the average of developing countries. Generally speaking, the state plays a larger role than in other developing regions, mainly concerning consumption (table 3).

The economic performance of the Arab countries in the last decades has been deceptive. Table 3 shows how economic growth lagged behind any developing region with the only exceptions of Sub-Saharan Africa, Latin America and South Asia (not including India) in 1975-1990. The low rates of economic growth led to the stagnation of per capita GNP at very low levels. It has also meant a reduction of its weight in the world economy, despite these countries' being among the world's main energy exporters. The

low rate of economic growth in the Arab world can be explained by the scarcity of human capital, low levels of investment and negligible increases in total factor productivity. The low level of private and public reserves, with the only exception of GCC countries, led to substantial resource deficits, balance of payments crises and unsustainable external debts. This, in turn, led to stabilization and adjustment programs in Morocco, Tunisia, Algeria, Egypt and Turkey, sometimes with serious social unrest as a result.

Table 3: Developing countries: selected economic indicators

| | GNP growth, annual rate (%) | | GDP (% of world GDP) | GDP pc (1995 EEUUS) | | Agriculture (% GDP) | Industry (% GDP) | Services (% GDP) | Consumption (% GDP) | | Gross Domestic Investment (% GDP) | Gross Domestic Savings (% GDP) |
|-------------------------|-----------------------------|------------|----------------------|---------------------|--------------|---------------------|------------------|------------------|---------------------|--------------|-----------------------------------|--------------------------------|
| | 1975-1990 | 1990-1998 | | 1998 | 1975 | | | | 1998 | Private 1998 | | |
| DC's | 3.9 | 5.1 | 19.7 | 761 | 1,308 | 13.5 | 34.1 | 52.5 | 61.2 | 13.1 | 25.0 | 25.6 |
| LDC's | 2.4 | 3.3 | 0.5 | .. | 273 | 32.7 | 24.1 | 43.1 | 78.1 | 10.4 | 19.1 | 10.7 |
| Arab World | 3.2 | 3.0 | 1.7 | 1,753 | 2,133 | 11.7 | 39.9 | 48.4 | 58.9 | 21.6 | 22.6 | 19.5 |
| East Asia | 8.7 | 8.2 | 5.1 | 273 | 1,207 | 13.3 | 43.6 | 43.0 | 49.3 | 11.4 | 33.5 | 39.3 |
| East Asia (excl. China) | 8.0 | 5.6 | 1.7 | 3,281 | 11,899 | 3.3 | 33.7 | 63.0 | 57.0 | 10.4 | 24.1 | 32.6 |

| | | | | | | | | | | | | |
|---------------------------------|-----|------|-------|-------|-------|------|------|------|------|------|------|------|
| Latin America-Caribbean | 2.2 | 3.6 | 7.0 | 3,166 | 3,930 | 7.8 | 28.7 | 63.6 | 67.4 | 13.6 | 21.9 | 19.0 |
| South Asia | 4.0 | 5.5 | 2.4 | 283 | 481 | 27.7 | 27.0 | 45.3 | 69.5 | 11.8 | 21.7 | 18.7 |
| South Asia (excl. India) | 2.7 | 4.1 | 0.9 | 461 | 582 | 24.9 | 31.1 | 44.0 | 71.2 | 14.1 | 18.2 | 14.7 |
| South East Asia-Pacific | 5.6 | 6.1 | 1.7 | 578 | 1,354 | 13.2 | 39.2 | 47.5 | 54.6 | 9.7 | 24.2 | 35.7 |
| Sub-Saharan Africa | 2.0 | 2.3 | 1.1 | 699 | 578 | 18.8 | 29.6 | 51.6 | 69.0 | 16.0 | 17.6 | 14.8 |
| East Europe and CIS | .. | -4.3 | 2.9 | .. | 2,073 | 9.9 | 35.0 | 55.2 | 63.2 | 16.5 | 22.1 | 20.2 |
| OECD | 2.9 | 2.2 | 81.3 | .. | .. | 2.2 | 29.6 | 64.6 | 62.9 | 15.5 | 20.7 | 21.5 |
| World | .. | .. | 100.0 | .. | .. | 4.8 | 30.6 | 62.1 | 62.6 | 15.3 | 21.5 | 22.1 |

Source: UNDP, *Human Development Report, 2001*.

Note: geographic areas according to UNDP.

Economic structure varies throughout the Arab countries, but the prevalence of the primary sector (agriculture and/or natural resources) is widespread. Development strategies have also had a determining effect. Historically, the first wave of development strategies adopted in the colonial period consisted in the promotion of primary exports: Southern Mediterranean countries provided raw materials and agricultural products, whilst domestic markets, mainly in manufacturing, were controlled by the metropolis. After independence, the new states prolonged the primary exports strategy in order to mobilize the resources needed to build a national industry. Those states with energy resources became 'rent economies', with the nationalized state companies controlling income from petroleum and natural gas exports. Countries like Algeria, Libya, Iran, Iraq or the Gulf monarchies are still basically rent economies. Other countries with lesser energy resources, such as Syria, Egypt or Tunisia, also turn to energy exports in order to finance national industries. Phosphates exports are still an important source of income for countries like Morocco, Tunisia or Egypt. This dependence upon exports characterized by high price

volatility made these countries extremely vulnerable to external shocks. Furthermore, its combination with inappropriate macroeconomic policies led to typical “Dutch disease” problems: overvaluation, fiscal deficits, inflation, competitiveness losses in tradable goods, and current account deficits.

Agricultural participation in economic activity also varies widely across countries. Modern Mediterranean agricultural exports (fruits and vegetables, olive oil, flowers) coexist with low productivity, traditional cereal agriculture. Export agriculture is better capitalized, irrigated, producer-organized, with climatic conditions and labour costs that make it very competitive in European markets, to which most of the production is exported. Export agriculture is especially relevant in Morocco, Tunisia, Egypt, Syria, Turkey and Jordan. Traditional agriculture (mainly cereals) suffers from frequent drought and is penalized by state pricing policies that maintain artificially low prices to redistribute revenues towards the urban population. There is also important subsistence agriculture, based on auto-consumption and barter, which remains marginalized from official markets. The combination of this agricultural structure with high rates of population growth and urbanization generated a food dependency problem in most Arab countries, the EU being the main supplier of cereals, meat and milk products among Arab countries (the only exception being Egypt, which receives substantial food aid from the US as a result of the Camp David Agreements). Another Mediterranean non-Arab country, Turkey, has a special status, with a strong potential to become a significant food producer and exporter.

This is why agricultural liberalization in the Mediterranean is such a complex issue. On one side, the opening of European agricultural markets is likely to damage southern European producers of competing Mediterranean products and benefit continental agriculture exporters. The estimated effects of liberalization on southern Mediterranean countries’ agricultural exports are significant, mainly in terms of job creation (De Arce and Escribano, 2001; MEDINA, 2000). Also, the southern Mediterranean countries will be unable to compete with continental agricultural exports in cereals, meat and milk products making total

symmetrical agricultural liberalization unsustainable (Regnault, 1997). Therefore, a Mediterranean Agricultural Pact with a political agreement has been proposed in order to overcome the pressure from the lobbies concerned. However, at the EU internal level, reluctance by southern European countries to open Mediterranean European markets and in non-Mediterranean member states to compensate the former for bearing the cost of the agricultural liberalization is still blocking the process.

In petroleum-producer countries, industry is still dominated by extractive activities. The import-substitution strategies that followed, and often overlapped with, primary-exports strategies focused on different products across the region. Some countries started with agro-food industry and light industries; others prioritized heavy industry. Algeria, Syria and Egypt adopted the heavy industry stance, whilst Morocco and Tunisia chose light industries. The external debt crisis and structural adjustment policies that followed meant a reorientation of labour-intensive industries towards export promotion. Morocco, Tunisia, Egypt and Turkey liberalized their trade policies in varying degrees and tried to exploit their comparative advantages in clothing, shoes, construction materials and electronic components (Lorca and Escribano, 1998b, cap. 3). Outside the Arab world, but within the EU southern border, Turkey and Israel have the most diversified economies, with a larger presence of high valued-added industries, mainly in Israel. Finally, Iran is a rent economy, whose industrial sector is orientated towards domestic markets.

Differences in economic strategies and economic policies in comparison with Asia and Latin America are important. South East Asia is considered to be the example for developing countries to follow, with the sequencing of import-substitution in light industries and then export promotion of labour-intensive products first, then capital-intensive goods. Table 3 shows how growth rates stayed close to 8% between 1975 and 1990, which allowed for a fourfold increase in per capita GDP. Latin American performance has not been so successful, but economic reforms in the 80s were more convincingly applied than in the Arab world, mainly in the microeconomic dimension. In fact, macroeconomic stabilization

has achieved substantial improvements in the southern Mediterranean, but structural reforms and, especially important for our purposes, trade liberalization proceeds slowly and experience frequents reversals. Trade policy continues to be among the most protectionist in the world, the public sector still being oversized and inefficient, privatization progresses slowly, the state maintains control over prices in several sectors, bureaucracy is equally oversized and its way of functioning constitutes a burden on economic activity.

Political circumstances also differ from that observed in other frontiers. First of all, political and civil liberties indicators presented in Table 4 show how most southern Mediterranean countries have ‘illiberal’ governments (except Israel, Cyprus, Malta and, to some extent, Turkey, Jordan and Morocco). Furthermore, little progress has been made in the last decades, compared with the impressive record of political liberalization in Latin America, and even with the more mixed results in Asia. Some authors, following the seminal analysis by Lipset (1959), consider economic development as a prerequisite for democracy. Others, by contrast, consider democracy as having both an intrinsic and instrumental value in promoting development (Sen, 2000). However, the results of empirical studies about the implications of political regimes in economic development are mixed (Przeworski, 2000; Temple, 1999), backing both approaches that highlight the instrumental value of democracy (Rodrik, 1999) and the need for previous economic development to achieve democracy (Barro, 2000). However, we believe that development or democracy are not attained one at the expense of the other. We think of a virtuous circle linking both democracy and development, both of them being mutually reinforcing, that we can call the ‘D+D model’. But perhaps the most effective way to induce democratic development in the Mediterranean, or at least a ‘first move’, may consist of improving its institutional environment. The institutional ‘upgrading’, or ‘mise à niveau’, is therefore as important, or even more so, than mere productive or industrial upgrading.

Closely related to the previous question, the institutional dimension of development introduces the importance of institutions and, more concretely, property rights in economic performance (North, 1990). Efficient institutions, so the argument goes, secure property rights, reduce transaction costs and promote economic growth. However, even if empirical studies tend to support this view (Barro, 2000; Rodrik, 1999), the lack of a theoretical framework is shared with the above mentioned political regimes analysis (Temple, 1999). Table 5 shows a legal institutions quality index for some selected countries. With the exceptions of Israel, Jordan and Turkey, southern Mediterranean countries rank low in the index and some countries show the lowest levels of institutional quality in the world (Syria, Algeria, Iran or Egypt). Differences between borders are not so clear as in previous domains, but even so, Asian countries presented in table 5 have around a '5' index, due to the high institutional quality for countries such as Singapore or Taiwan; differences are even smaller with Latin America, but Latin American countries presented in table 5, some of them commonly considered highly corrupt, do not reach values as low as those for Syria, Algeria or Egypt. Institutional quality, usually labeled as governance, is weak in Arab states, and despite (rhetorical?) emphasis by the EU on democratic governance, no other pressure is being added to southern Mediterranean countries than low-profile political dialogue or indirect effects through reciprocal preferential agreements (Youngs, 2001; Escribano and Lorca, 2000).

**Table 4: Political and Civil Freedoms, selected countries,
1972-73 and 2000-01**

| MEDITERRANEAN AND ARAB COUNTRIES | | | LATIN AMERICA | | | ASIA | | |
|--|---------------|---------------|------------------|---------------|---------------|-----------------------|---------------|---------------|
| | 1972- 1973 | 2000- 2001 | | 1972- 1973 | 2000- 2001 | | 1972- 1973 | 2000- 2001 |
| Algeria | 6,6,NF | 6,5,NF | Argentina | 6,3,PF | 1,2, F | China | 7,7,NF | 7,6,NF |
| Cyprus (G) | 2,3, F | 1,1, F | Bolivia | 5,4,PF | 1,3, F | India | 2,3, F | 2,3, F |
| Egypt | 6,6,NF | 6,5,NF | Brazil | 5,5,PF | 3,3,PF | Indonesia | 5,5,PF | 3,4,PF |
| Iran | 5,6,NF | 6,6,NF | Chile | 1,2, F | 2,2, F | Korea, S. | 5,6,NF | 2,2, F |
| Iraq | 7,7,NF | 7,7,NF | Colombia | 2,2, F | 4,4,PF | Malaysia | 2,3, F | 5,5,PF |
| Israel | 2,3, F | 1,3, F | Cuba | 7,7,NF | 7,7,NF | Pakistan | 3,5,PF | 6,5,NF |
| Jordan | 6,6,NF | 4,4,PF | Mexico | 5,3,PF | 2,3, F | Philippines | 4,6,PF | 2,3, F |
| Lebanon | 2,2, F | 6,5,NF | Panama | 7,6,NF | 1,2, F | Singapore | 5,5,PF | 5,5,PF |
| Libya | 7,6,NF | 7,7,NF | Paraguay | 4,6,PF | 4,3,PF | Sri Lanka | 2,3, F | 3,4,PF |
| Malta | 1,2, F | 1,1, F | Peru | 7,5,NF | 3,3,PF | Taiwan | 6,5,NF | 1,2, F |
| Morocco | 5,4,PF | 5,4,PF | Uruguay | 3,4,PF | 1,1, F | Thailand | 7,5,NF | 2,3, F |
| Syria | 7,7,NF | 7,7,NF | Venezuela | 2,2, F | 3,5,PF | EASTERN EUROPE | | |
| Tunisia | 6,5,NF | 6,5,NF | Ecuador | 7,3,PF | 3,3,PF | Hungary | 6,6,NF | 1,2, F |
| Turkey | 3,4,PF | 4,5,PF | Honduras | 7,3,PF | 3,3,PF | Poland | 6,6,NF | 1,2, F |

Source: Freedom House.

Notes: 1) Measure on a 1 to 7 scale, with 1 the greatest degree of freedom and 7 the smallest. Countries are considered *free* (F) when the index lies between 1,0 and 2,5; partially *free* (PF) when it lies between 3,0 and 5,5; and not *free* (NP) when it is between 5,5 and 7.

2) The index is the average of the civil liberties and political rights indicators.

Table 5: Legal Structure and Security of Property Rights

| | Index | | Index | | Index |
|----------------------|-------|-------------|-------|----------------|-------|
| MEDITERRANEAN | | ASIA | | LATIN | |
| Algeria | 1,9 | India | 5,5 | AMERICA | 5,5 |
| Egypt | 2,9 | Indonesia | 4,9 | Argentina | 5,4 |
| Cyprus | 4,2 | China | 4,7 | Brazil | 6,9 |
| Iran | 2,1 | South Korea | 5,5 | Chile | 4,3 |
| Israel | 8,5 | Philippines | 4,9 | Colombia | 4,1 |
| Jordan | 7,0 | Malaysia | 5,6 | Mexico | 3,2 |
| Morocco | 4,4 | Singapore | 8,6 | Peru | |
| Syria | 0 | Taiwan | 6,3 | | |
| Tunisia | 3,9 | Thailand | 5,9 | | |
| Turkey | 5,7 | | | EUROPE | |
| | | | | Spain | 7,7 |
| | | | | Hungary | 7,2 |
| | | | | Poland | 5,7 |

Source: Gwartney and Lawson, *Economic Freedom of the World: 2001 Annual Report*.

Note: 0, minimum; 10, maximum; the index is constructed calculating the average of the following indicators: ‘rule of law’, ‘legal security of private property’, ‘intellectual property protection’, ‘jury independence’, ‘corruption’ and ‘court neutrality’.

This political structure, inherited colonial borders and Arab nationalism make conflict between neighbors highly likely. It is important to assess that such a colonial heritage is not only of European, but also Ottoman origin. Arab nationalism is pervasively used in order to hide the internal reality of several Arab countries, then easily distracting public opinion without access to a free press from real and more important problems not being addressed by national authorities. From a geopolitical perspective, the southern border of the EU hosts several conflicts: Arab-Israel, Western Sahara, Cyprus, Iran-Iraq, Kurdistan or Algeria. It also includes many of the so-termed “rogue states” (by the US State Department): Iraq, Iran, Libya and Syria. Geopolitical tension implies high military expenses, far higher in terms of GDP than the other regions considered here (table 1), and gives the military an important economic and political role in Arab states, which makes

democratization difficult. However, other regions of the world have also been conflict-prone, such as Central America or East Asia, and tensions are still present in South Asia. But all analysts agree that the Arab-Israel conflict is having a high economic and political cost on the region and that without an agreed solution to the Palestinian issue, geopolitical stability seems very difficult to reach in the South East of the Mediterranean. We have recently seen how the Palestinian issue has been employed as an excuse for anti-Western terrorism, and notwithstanding a seemingly more proactive attitude by the US than at the beginning of the Bush administration, escalation continues to take place in the region.

Another factor we would like to briefly tackle is cultural differences. Huntington's prediction about a clash of civilizations (Huntington, 1993) warned of the "bloody borders" of Islam. Independently of how much of a self-fulfilling prophecy it has been, in the map of civilizations used by Huntington, the EU is the only core with two civilization frontiers: the almost orthodox Eastern Europe and the Muslim Mediterranean. This analysis has been very controversial. For example, Huntington considers Latin America and North America as Western civilizations. In Huntington terms, the Mediterranean is the scenario of a cultural conflict, which, in turn, could cause armed conflicts and raise transaction costs between Islamic countries and the EU. In our view, this argument makes for a renewed emphasis on cultural and political dialogue and the practice of mutual respect. However, whether recent events will foster or hamper initiatives to promote cultural dialogue and mutual respect remains to be seen.

Recently, culture has been reconsidered, in a Weberian mode, as a factor of economic growth or retardation, both in historical (Landes, 1998) and contemporary analysis (Fukuyama, 1995; Harrison and Huntington, 2000). Some cultures would be better suited for economic development, notably Western and Asian cultures, than others, notably Arab-Islamic and African. However, as Lal (1998) has remarked, even if we assumed that cultural values might have been important in the past generation of technological progress and institutions, it would be easy in the globalization age to copy or to adapt it in order to profit from other cultures'

institutional and technological outcomes. That is, an institutional catch-up may accompany the economic one, as has happened in South East Asia, according to Lal. That these countries have adopted Western-style economic institutions, like those prevalent in Western market economies: mercantile legislation, independent judicial systems, transparent and accountable bureaucracies, etc..., does not necessarily imply a rupture with local traditions.

The frontiers in the world economy

Arab economies are both protectionist and dependent upon the world economy. This is due to a variety of reasons, among them the small size of internal markets, specialization on primary exports and dependence on imported manufactured goods and food. Trade openness (the ratio of exports plus imports over GDP) is influenced by energy prices, as can be seen in table 6: in 1998 trade openness was below 1990 levels, mainly due to low energy prices in 1998. Even if Arab world trade openness were to be partially interpreted as the result of the revenue nature of many Arab states, it does however represent a considerable level of interdependence with the world economy. Moreover, it compares well with regions like Latin America, South Asia or Sub-Saharan Africa, and only lagged behind East and South East Asia, and Eastern Europe and the CIS in 1998.

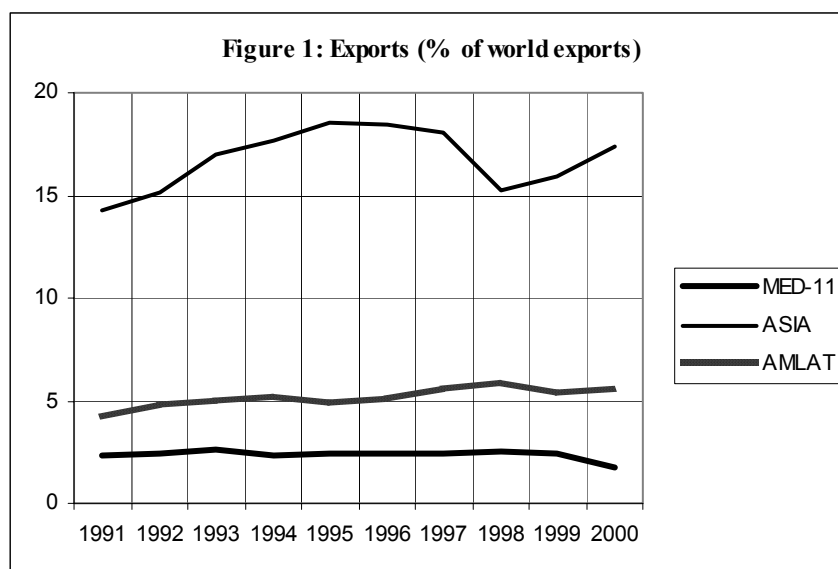
Table 6: Developing countries: Trade Openness, 1990 and 1998

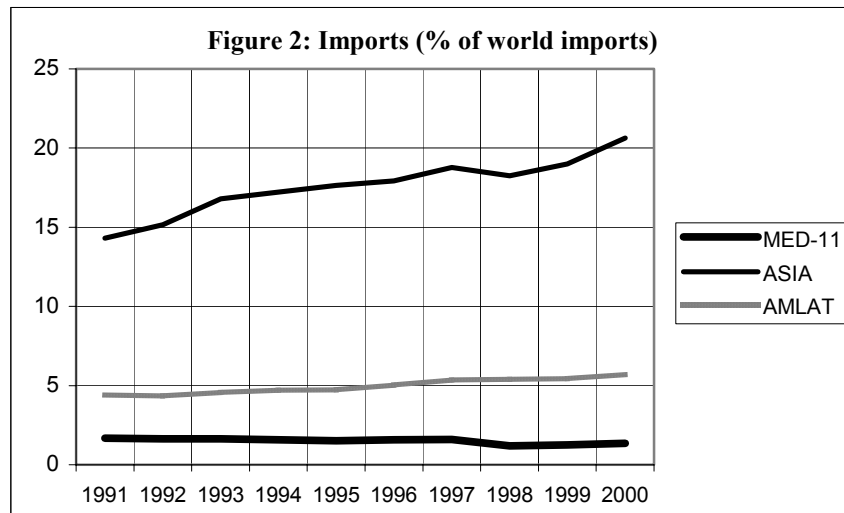
| | Exports of goods and services (% of GDP) | | Imports of goods and services (% of GDP) | | Trade Openness (% of GDP) | |
|--------------------------------|--|--------------|--|--------------|---------------------------|--------------|
| | 1990 | 1998 | 1990 | 1998 | 1990 | 1998 |
| DC's | 27.01 | 31.66 | 26.26 | 30.19 | 53.27 | 61.84 |
| LDC's | 15.97 | 20.20 | 23.92 | 28.77 | 39.89 | 48.97 |
| Arab World | 39.19 | 30.43 | 38.39 | 32.77 | 77.57 | 63.20 |
| East Asia | 37.01 | 40.23 | 34.93 | 33.43 | 71.93 | 73.67 |
| East Asia (excl. China) | 54.16 | 65.47 | 53.08 | 55.34 | 107.24 | 120.82 |
| Latin America-Caribbean | 15.36 | 16.65 | 13.32 | 19.56 | 28.68 | 36.21 |

| | | | | | | |
|---------------------------------|-------|-------|-------|-------|--------|--------|
| South Asia | 10.59 | 12.67 | 14.20 | 15.75 | 24.79 | 28.41 |
| South Asia (excl. India) | 17.06 | 16.05 | 22.53 | 19.87 | 39.59 | 35.92 |
| South East Asia-Pacific | 55.92 | 77.91 | 57.19 | 66.17 | 113.10 | 144.09 |
| Sub-Saharan Africa | 27.25 | 28.39 | 24.65 | 30.72 | 51.91 | 59.11 |
| East Europe and CIS | 24.79 | 36.65 | 25.18 | 38.00 | 49.96 | 74.65 |
| OECD | 17.44 | 21.74 | 17.86 | 20.71 | 35.29 | 42.45 |
| World | 19.16 | 23.32 | 19.41 | 22.41 | 38.57 | 45.74 |

Source: UNDP, *Human Development Report, 2001*.
 Note: geographic areas according to UNDP.

Figures 1 and 2 compare the aggregate external trade performance for the 11 Mediterranean countries included in the Euro-Mediterranean Partnership –EMP: Algeria, Morocco, Tunisia, Egypt, Israel, Jordan, Lebanon, Syria, Cyprus, Malta and Turkey. These countries have been losing an already small market share in world trade over the last ten years, whilst both Asia and Latin America now have a greater share than at the beginning of the decade. This means that the increase of external trade in the Med-11 countries has been lagging behind that of Asia, and to a lesser extent, Latin America.





Source: own calculations IMF, *Direction of Trade Statistics* (DOTS).

Notes: 1) MED-11: Algeria, Morocco, Tunisia, Egypt, Israel, Jordan, Lebanon, Syria, Cyprus, Malta and Turkey.

2) Geographic areas according to DOTS.

Differences are greater when dealing with foreign direct investment (FDI), as can be seen in table 7. The Arab World, representing 1.7% of world GDP, received just 0.93% of world FDI and 3.8% of FDI in developing countries. In the same year, East Asia received 33.6% of FDI in developing countries (4.3% without China), South East Asia 13.9% (after the 1997 Asian crisis!) and Latin America 42%. The big question is why the Arab World, and within it the Mediterranean Arab countries, do not attract FDI. Some authors have stressed the weaknesses of the regulatory framework (Alessandrini, 2000), while others stress the incidence of political instability across the region (Calleya, 1999). To these we would add the lack of democracy and the absence of promising non-rhetorical commitments by Arab leaders towards the implementation of reforms in order to build up more open societies. However, there are purely economic reasons besides the legal-institutional and geopolitical problems. The small size of national Arab markets and the lack of effective regional integration schemes, that inhibit the surge of regional or sub-regional markets

and the realization of economies of scale (Escribano and Jordán, 1999), low human capital, lack of basic infrastructures (Sideri, 2000) or cultural differences with predominantly western investors. However, in our view, these explanations are not sufficient and the lack of FDI is partially related with the EU strategy for the integration of its southern border into the European production system.

Table 7: Developing Countries: Net Foreign Direct Investment, 1987-92 y 1998

| | Millions of US\$ | | % of world FDI | | % of FDI to Developing Countries | |
|---------------------------------|------------------|----------------|-----------------|-------------|----------------------------------|-------------|
| | Average 1987-92 | 1998 | Average 1987-92 | 1998 | Average 1987-92 | 1998 |
| DC's | 31786.00 | 155225.00 | 18.69 | 24.37 | 100.00 | 100.00 |
| LDC's | 763.00 | 2747.00 | 0.45 | 0.43 | 2.40 | 1.77 |
| Arab World | 1700.00 | 5942.00 | 1.00 | 0.93 | 5.35 | 3.83 |
| East Asia | 7445.00 | 52222.00 | 4.38 | 8.20 | 23.42 | 33.64 |
| East Asia (excl. China) | 2793.00 | 6762.00 | 1.64 | 1.06 | 8.79 | 4.36 |
| Latin America-Caribbean | 10433.00 | 65320.00 | 6.13 | 10.25 | 32.82 | 42.08 |
| South Asia | 222.00 | 3733.00 | 0.13 | 0.59 | 0.70 | 2.40 |
| South Asia (excl. India) | 164.00 | 1475.00 | 0.10 | 0.23 | 0.52 | 0.95 |
| South East Asia-Pacific | 9750.00 | 21569.00 | 5.73 | 3.39 | 30.67 | 13.90 |
| Sub-Saharan Africa | 1575.00 | 5432.00 | 0.93 | 0.85 | 4.96 | 3.50 |
| East Europe and CIS | .. | 21695.00 | .. | 3.41 | .. | 13.98 |
| OECD | 143602.00 | 483951.00 | 84.44 | 75.97 | 451.78 | 311.77 |
| World | 170074.00 | 637048.00 | 100.00 | 100.00 | 535.06 | 410.40 |

Source: UNDP, *Human Development Report, 2001*.

Note: geographic areas according to UNDP.

A similar pattern can be observed concerning telecommunications, an indicator of its readiness to participate in the “new economy”. Table 8 shows how the Arab World lags behind in every indicator: number of telephone lines, public phones, cellular phones, TVs, PCs and internet connections. However, the aggregate does not do

justice to the recent developments in individual countries experienced by countries like Morocco, Tunisia, Egypt, Turkey or Jordan. Cellular phones have spread rapidly in Morocco, Tunisia, Egypt, Turkey or Jordan, and many cities in these countries have an increasing number of cyber-café's, whose social impact is not accurately captured by connectivity indicators. However, political concerns impede the expansion of the new communications technology in some Arab countries, primarily the Internet, but also cell phones. This has a significant potential cost in terms of the associated non-realized productivity gains (UNCTAD, 2001). In this regard, too, the Arab World lags behind Asian and Latin American countries.

Table 8: Developing Countries: telecommunications, selected indicators (per 1000 inhabitants)

| | Phone Lines | Public Phones | Cell Phones | TV Sets | PC's | Internet Connections |
|------------------------------------|-------------|---------------|-------------|---------|---------|----------------------|
| | 1996-98 | 1996-98 | 1996-98 | 1996-98 | 1996-98 | 1998 |
| EDC | 58 | 1.3 | 18 | 162 | .. | 0.26 |
| MDC | 4 | (.) | 1 | 29 | .. | (.) |
| Arab world | 65 | 0.7 | 10 | 144 | 12 | 0.13 |
| East Asia | 85 | 2.5 | 31 | 275 | 15 | 0.22 |
| East Asia (excluding China) | 431 | 11.2 | 310 | 344 | 162 | 4.85 |
| Latin America-Caribbean | 118 | 2.4 | 43 | 252 | .. | 0.99 |
| South Asia | 24 | 0.4 | 2 | 69 | .. | 0.01 |
| South Asia (excl. India) | 30 | 0.3 | 2 | 69 | .. | 0.01 |
| South East Asia-Pacific | 43 | 1.1 | 16 | 139 | .. | 0.32 |
| Sub-Saharan Africa | 14 | 0.5 | 5 | 50 | .. | 0.27 |
| East Europe and CIS | 193 | 1.3 | 18 | 379 | .. | 1.65 |

| | | | | | | |
|--------------|-----|-----|-----|-----|-----|-------|
| OCDE | 490 | 4.9 | 223 | 594 | 255 | 37.86 |
| World | 142 | 1.9 | 54 | 253 | .. | 7.42 |

Source: PNUD, *Human Development Report, 2001*.

Note: geographic areas according to IDH.

Consequently, it seems that Arab Mediterranean countries are losing the pace of globalization in terms of trade, investment and telecommunications when compared with Asia or Latin America. This leads us to consider the regional options facing the borders of the core countries, and to what extent regionalism or globalization are the leading forces of international integration for the borders of the core countries.

The external relations of the borders

The hypothesis that inspires these pages is based on each centre of economic power (or Trion) following the geo-economic strategy of integrating its borders within its production function. This way, the EU will concentrate its trade in the DCs on its Southern and Eastern borders (although we do not include the latter in our analysis), the USA in Latin America, and Japan in Asia. As we will see, the analysis of trade and FDI geographic specialisation of the USA, Japan, the EU and its borders present sufficiently clear results, always providing the weight of each zone in the world economy is taken into account. To do this, instead of exclusively employing the pure trade and investment percentages that each developing region of the world records (table 12 and figures 3 and 4 below), tables 9 and 10 evaluate the intensity of trade and FDI flows between the cores and the MED-11, Asia and Latin America countries. By intensity we mean whether trade or investment between two areas is greater than expected by its weight on world trade and FDI: an index greater than one means that flows are higher than expected, while an index lesser than one means low intensity of relations.

Table 9: Commercial Intensity, 1991-2000

| | EU | | USA | | Japan | |
|----------------------|-------|------|------|------|-------|------|
| | REI | RII | REI | RII | REI | RII |
| Algeria | 2.92 | 7.00 | 0.49 | 1.56 | 0.22 | 0.19 |
| Morocco | 5.78 | 3.80 | 0.59 | 0.19 | 0.27 | 0.59 |
| Tunisia | 6.82 | 4.00 | 0.33 | 0.06 | 0.28 | 0.05 |
| Egypt | 8.07 | 1.23 | 3.97 | 0.23 | 1.65 | 0.11 |
| Israel | 4.40 | 1.80 | 2.59 | 1.70 | 0.68 | 0.66 |
| Jordan | 7.41 | 0.27 | 2.51 | 0.04 | 1.51 | 0.19 |
| Lebanon | 23.43 | 0.19 | 4.51 | 0.05 | 2.18 | 0.02 |
| Syria | 3.16 | 3.47 | 0.46 | 0.10 | 0.76 | 0.07 |
| Cyprus | 12.76 | 0.87 | 1.35 | 0.03 | 2.78 | 0.01 |
| Malta | 9.15 | 2.15 | 0.66 | 0.34 | 0.61 | 0.04 |
| Turkey | 8.32 | 2.38 | 3.74 | 0.38 | 0.87 | 0.11 |
| MED-11 | 5.97 | 2.46 | 2.04 | 0.63 | 0.71 | 0.25 |
| ASIA | 0.89 | 1.17 | 1.00 | 1.42 | 2.25 | 2.19 |
| LATIN AMERICA | 1.33 | 1.06 | 3.68 | 2.83 | 0.86 | 0.64 |

Source: Own Calculations based on IMF, *Direction of Trade Statistics* (DOTS).

Notes: 1) The table is interpreted as follows: the Relative Exportation Intensity (REI) of the E U to Algeria in the period 1991-200 was 2.92, in other words 2.92 times superior to Algeria's weight of world importation; la Relative Importation Intensity (RII) of the E U coming from Algeria was 7 times superior to Algeria's weight of world exportation.

2) $REI = (X_{ij}/X_i)/(M_j/W)$; where X_{ij} : exportation of "i" to "j". X_i : total exports of the country "i". M_j : total importation of the country "j". W : total international commerce. $RII = (M_{ij}/M_i)/(X_j/W)$; where M_{ij} : imports of the country "i" from country "j". Figures are calculated on the 1991-2000 average.

3) geographic areas. MED-11: Algeria, Morocco, Tunisia, Egypt, Israel, Jordan, Lebanon, Syria, Cyprus, Malta and Turkey; Asia, according to DOTS; Latin America, Western Hemisphere according to DOTS.

In terms of international trade, table 9 shows how the intensity of extra-Community trade is especially high with the Southern border: The EU's exports to the MED 11 countries are almost six times superior to those of its weight in world trade, and MED 11 imports from the EU are 2.5 times their participation in world exports; on the other hand, trade exchange between the EU and Latin America and Asia is in line with the weight of both regions in world trade. Exports from the EU to Morocco, Tunisia, Egypt, Israel, Jordan,

Lebanon, Cyprus, Malta and Turkey are especially intense; in terms of EU imports, the greater intensity takes place with Algeria, Morocco, Tunisia, Syria and Turkey. In a similar way, the USA registers a high intensity in its commercial exchanges with Latin America, while among the countries of the MED 11, the strongest trade activity takes place in the Middle East in terms of exports: Egypt, Israel (countries with whom the USA has trade agreements by virtue of the Camp David Accord), Jordan, Lebanon and Turkey. In the case of Japan, the indexes in table 9 show a geo-economic specialisation in Asia and a relatively low intensity of Japanese trade with Latin America and the MED 11.

Table 10: Investment Intensity, 1989-1997

| | Med-11 | Latin America | Asia | Asia excluding China |
|--------------|--------|---------------|------|----------------------|
| USA | 0.82 | 2.26 | 0.55 | 0.93 |
| Japan | 0.20 | 0.89 | 0.85 | 1.24 |
| E U | 2.98 | 1.14 | 0.40 | .. |

Source: Own Calculations based on the OECD, *International Direct Investment Statistics, 1999* (IDIS).

Note: 1) The table is interpreted as follows: The average of the Relative Foreign investment intensity of the E U in the Med-11 for the period 1989-1997 was 2.98, in other words 2.98 times superior to the weight of the Med-11 as destination of world Direct Foreign Investment.

2) $IIED = (DFI_{ij}/DFI_i)/(DFI_j/W)$; where DFI_{ij} : Direct Foreign Investment of "i" to "j". DFI_i : total Direct Foreign Investment of the country "i". DFI_j : total Direct Foreign Investment received by the country "j". W : world Direct Foreign Investment. The figures are calculated on the 1989-1997 average.

3) Geographic areas. MED-11: Algeria, Morocco, Tunisia, Egypt, Israel, Jordan, Lebanon, Syria, Cyprus, Malta and Turkey. Asia: Asia according to IDIS plus South Korea. Latin America: Latin America-Caribbean according to IDIS plus Mexico.

Table 11: Investment Dominion of the Triones, 1988 and 1997

| | 1988 | 1997 |
|--------------|--|--|
| USA | Latin America: Argentina, Bolivia, Colombia, Costa Rica, Peru, Venezuela, Mexico, Trinidad and Tobago. Asia: PDR Laos, Pakistan, Philippines y Singapore. | Latin America Argentina, Bolivia, Chile, Colombia, Costa Rica, Venezuela, Mexico, Trinidad y Tobago. Asia Singapore. |
| Japan | Asia: South Korea, Singapore, Taiwan and Thailand. | Asia: South Korea, Singapore and Thailand. |
| EU | Latin America: Brazil. Asia: India. Africa: Cape Verde, Swazilandia. Mediterranean: Morocco, Tunisia. | Latin America: Brazil, Peru. Asia: India. Africa: Cape Verde, Swaziland. Mediterranean: Egypt, Tunisia Turkey. Eastern Europe: Czech Republic, Hungry, Poland |

Source: United Nations, *World Investment Report* 1999.

Note: Investment dominion: receptor countries for those which the DFI of the investor countries amounts to at least 30% of total investment flow or of the DFI stock. See note 'a' in Figure I.11, p. 22, of the WIR 1999 for some important discrepancies.

Something similar occurs with FDI, as the indicators for investment-intensity gathered in table 10 show. The EU invests in the countries of the MED-11 with special intensity (3 times more than the role of these countries as destination for world FDI), little in Asia and a little more than what is proportional for Latin America. Nevertheless, these indicators should be refined in two ways: firstly, on being calculated for the 1989-1997 average, they are under-estimated and do not include the later years or the capital flow towards Latin America in the second half of the nineties, while reflecting the Asian crisis effects; secondly, as with the trade-intensity index, the intensity is relative and not absolute, therefore we revert to the percentages contained in figures 3 and 4 and stated in previous paragraphs. The greater investment-intensity of the USA takes place on its Southern border, Latin America, and that of Japan in Asia. Table 11 shows that the countries in which the *Trions* concentrate their investment turn out to be consistent with those of the preceding analysis. In general, EU FDI is dominant in

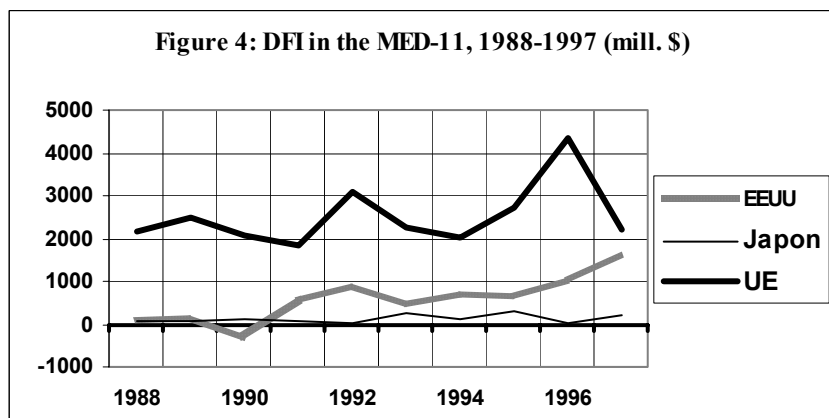
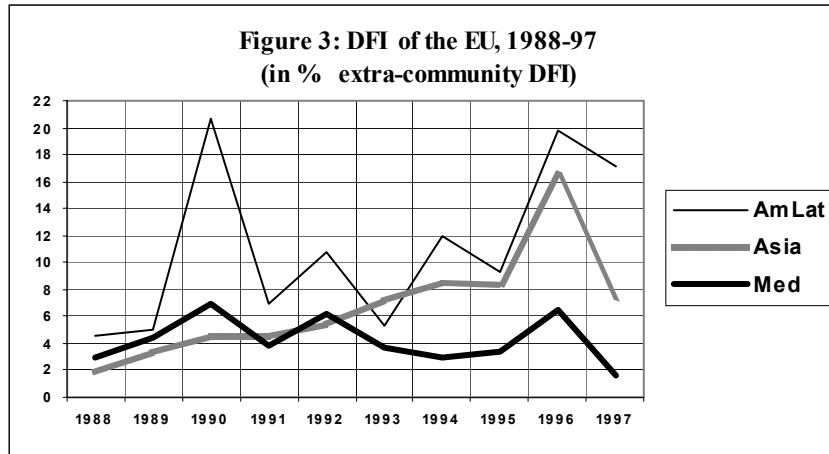
developing Mediterranean countries, while USA FDI is so in Latin America and Japan FDI in Asia. Between the end of the eighties and that of the nineties the main changes that stand out are the increase of the EU's investment dominion on the Eastern border after the collapse of the Berlin wall and the diminished influence of the USA in Asia, whatever influence the already mentioned Asian crisis might have had.

Table 12: Imports and Exports of the E U (in % for the total extra-community)

| | Exports | | Imports | | Exports | Imports |
|--------------------------|---------|-------|---------|-------|----------------------|----------------------|
| | 1991 | 2000 | 1991 | 2000 | average 1991-2000 | average 1991-2000 |
| Algeria | 1.12 | 0.65 | 1.64 | 1.49 | 0.80 | 1.23 |
| Morocco | 0.94 | 0.84 | 0.67 | 0.60 | 0.83 | 0.69 |
| Tunisia | 0.79 | 0.75 | 0.51 | 0.53 | 0.76 | 0.57 |
| Egypt | 1.11 | 0.87 | 0.47 | 0.31 | 0.95 | 0.41 |
| Israel | 1.53 | 1.71 | 0.80 | 0.94 | 1.64 | 0.87 |
| Jordan | 0.17 | 0.17 | 0.02 | 0.02 | 0.18 | 0.02 |
| Lebanon | 0.33 | 0.31 | 0.02 | 0.02 | 0.38 | 0.02 |
| Syria | 0.24 | 0.19 | 0.29 | 0.33 | 0.24 | 0.30 |
| Cyprus | 0.36 | 0.30 | 0.10 | 0.09 | 0.32 | 0.08 |
| Malta | 0.36 | 0.30 | 0.16 | 0.10 | 0.32 | 0.14 |
| Turkey | 2.18 | 3.21 | 1.40 | 1.74 | 2.56 | 1.49 |
| MED-11 | 9.14 | 9.30 | 6.06 | 6.16 | 8.98 | 5.81 |
| ASIA | 13.98 | 14.22 | 16.40 | 21.39 | 15.59 | 19.62 |
| LATIN AMERICA | 5.98 | 6.42 | 6.27 | 4.98 | 6.59 | 5.53 |

Source: Own Calculations based on the IMF, *Direction of Trade Statistics* (DOTS).

Note: 1) Geographical appendage. . MED-11: Algeria, Morocco, Tunisia, Egypt, Israel, Jordan, Lebanon, Syria, Cyprus, Malta and Turkey; Asia, according to DOTS; Latin America, Western Hemisphere according to DOTS.



Source: Own Calculations based on the OECD, *International Direct Investment Statistics, 1999* (IDIS).

Note: 1) geographic areas: See note 3 in table 7.

The analysis of trade and investment intensity should be complemented with the geographic distribution of trade and FDI, as gathered in table 12 and in figures 3 and 4. Independently of the high intensity of EU trade with the MED-11 countries, in the period 1991-2000 this group of countries represented 9% of extra-Community exports; in other words, a more important market than Latin America, although with a lesser relevance than Asia. Nevertheless, as a source of the EU's imports, and despite the geographical distance, Latin America played as important a role as

that of the MED-11, even if both regions were a long way off the 20% of the EUs imports originating from the developing Asian countries. Furthermore, the stagnation of the Med-11 in the extra-Community import quota is in contrast with the increasing tendency of Asian import quota in European markets, although it demonstrates a better performance than market quota drop experienced by Latin American exports in EU markets. Among the MED-11 group, the EU's main trade partners by flow importance are Turkey, Israel (the largest markets in the region), Morocco, Tunisia, Egypt (the three "big" signatory countries of the Association Agreements for the creation of a Free Trade Area), and Algeria. The two countries whose trade flow has demonstrated more dynamism, by gaining export quota in the EU, are Turkey and Israel, while EU trade with Tunisia and Morocco remains stagnant or shows a slight decline in relative terms.

Table 13: Index of similarities of exports to the E U-15, Cosen countries, 1998.

| | Egypt | Jordan | Morocco | Spain | Tunisia | Turkey |
|---------|-------|--------|---------|-------|---------|--------|
| Egypt | | 27,28 | 32,84 | 24,94 | 26,29 | 36,15 |
| Jordan | 27,28 | | 39,59 | 33,73 | 28,87 | 39,08 |
| Morocco | 32,84 | 39,59 | | 30,75 | 67,46 | 54,15 |
| Spain | 24,94 | 33,73 | 30,75 | | 26,91 | 43,01 |
| Tunisia | 26,29 | 28,87 | 67,46 | 26,91 | | 47,30 |
| Turkey | 36,15 | 39,08 | 54,15 | 43,01 | 47,30 | |

Source: Own calculations based on Comext *database*, Eurostat.

Note: $ISE = \sum \min(S_{iac}, S_{ibc}) \cdot 100$. S_{iac} y S_{ibc} : goods quota i in exportations to c from a and b respectively. An index of 100 represents perfect parity, while 0 implies total disparity. Rounding to 3 digits.

In addition, the countries of the Southern EU border have a problem in showing very similar comparative advantages, as we have stated in a previous section. This poses intense competition among themselves in EU markets. Table 13 shows an export similarity index with the EU-15 market for some Mediterranean countries. The countries are shown in pairs, such as Turkey-Morocco, Turkey-Tunisia, Morocco-Tunisia, Jordan-Morocco,

Jordan-Turkey and even Spain-Turkey, who have similar export structures. If we add to this the political and economic difficulties that can be observed with intra-regional integration (Escribano, 2000), and the export barriers of the EU for Mediterranean agricultural products (MEDINA, 2000), the dependency on the EU as regards trade proves to be very difficult to avoid.

From the point of view of the FDI, the EU's investment-intensity in the MED-11 is marked by the fact that the main destination for the EU's investment is Latin America (20% in 1996), followed by Asia (16%) and, well behind, the MED-11 (barely 6% - Figure 3). Despite this, as can be seen in figure 4, The EU in contrast is the number one investor in the MED-11. European investment in the MED-11 is concentrated in Turkey, Egypt, Morocco and Algeria. These figures reveal that the EU is not integrating its Southern border in its production function in the same way as the USA and Japan are doing with theirs. Intra-industry trade data, taken as an indicator of the integration of production systems reinforces this perception: The intra-industrial commerce of the USA with Latin America is much higher than that maintained by the EU with the MED-11 group (57% against 38.89%, measured by the Grubel-Lloyd index) and has evolved in a much quicker way, implying greater integration of the US and Latin American economies (Escribano and Trigo, 1999).

Final considerations

In general, the preceding sections offer us an image of an EU Southern border which is less developed than Eastern Asia and Latin America. The economic indicators show us low income per capita levels, partly due to low economic growth and partly to strong past demographic pressure. Reserve levels are incapable of financing vigorous investment and therefore balance of payment crises are recurrent, with high external debts continuing to harm economic growth in the region. In contrast with Eastern Asia and later Latin America, the developing Mediterranean has not brought about significant microeconomic reform: The economies of the region continue to suffer massive and ill-defined state intervention and public companies play an important role; administration is

inefficient and very bureaucratic; fiscal systems are equally inefficient and socially regressive; despite some countries having signed economic agreements with the objective of establishing a FTA, trade policies still are very protectionist. Despite this, the area does not suffer the levels of absolute poverty or social inequality that can be seen in Latin America. The macroeconomic environment is healthy and stable in some countries, such as Morocco, Tunisia, and more recently Egypt, even if the impact of September 11 has put increasing pressure on external equilibria in many countries in the region and with Turkey severely affected by a liquidity crisis. Some of these countries have put in place modest microeconomic reforms that will more than likely be boosted by the association agreements signed with the EU.

As for the political aspect, it is true that the region is not noted for containing democracies and exemplary rule of law states, though in the latter issue there is little difference with Eastern Asia and Latin America, and even the consolidation of open societies in Southern Asia is a relatively recent phenomenon. At an institutional level, the differences with the regions gathered in the comparative analysis are not so great either, with some exceptions such as Singapore and Chile, although it is true that the developing Mediterranean regions have a weighty challenge ahead of them in this area. The biggest problem with the political aspect is the unwillingness of the elite to move towards an open society in which the market and private agents take on areas of power until now reserved for them alone. In the international field, conflicts, especially the Arab-Israeli conflict, and the application of power politics aiming to achieve regional hegemony poses a major obstacle to economic development and regional integration.

The participation of the EU's Southern border in the globalisation process is characterised by the lack of weight in world trade and investment. Contrary to the situation of Asia and Latin America, its weight in the world economy is in decline or stagnant. The lack of education and the scarcity of communication infrastructure is high, in general, compared with that of Latin America and Asia, and poses the risk of marginalizing the Mediterranean countries,

except in a few cases, in terms of the new information technologies.

Trade and investment figures indicate that the developing Mediterranean lies within an area of EU economic influence, but, as the indicators dealt with in this paper demonstrate, in contrast to what happens in the cases of the USA and Japan, the EU is not integrating its Southern border into its production system to the same extent as Japan is doing with Eastern Asia and the US with Latin America. Japan followed the “flying geese” model; the USA the “assembly model” (maquila), the EU itself has solved the problem of the Eastern frontier by means of “enlargement”. There is no denomination for the way in which the EU could integrate its Southern border, perhaps because no model exists. Nevertheless, due to geopolitical and geo-economic reasons, the EU has to develop its Southern border. To do this it must trade, invest and dialogue with it both politically and culturally. The Barcelona process, consisting of economic cooperation, the establishment of a free trade area, and political, security and cultural dialogue, is a starting point for a new focus, but it may not be enough. Perhaps the EU should go beyond this and create a novel and imaginative design, a “model” of integration that transcends free trade and establishes its Southern border economically.

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L'ACQUIS ET LES ETATS MÉDITERRANÉENS ASSOCIÉS

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La question de la projection de l'acquis de l'Union européenne est au coeur des rapports entre l'UE et les Etats tiers méditerranéens dans le cadre de la nouvelle approche relationnelle globale et multidimensionnelle lancée au début des années 1990. Il s'agit du *partenariat euro-méditerranéen* qui englobe, outre les aspects économiques et financiers, des aspects politiques et de sécurité ainsi que des aspects d'ordre social, humain et culturel.

Reposant sur une politique de proximité, les rapports entre l'Union européenne et les Etats tiers méditerranéens ont vu le jour en même temps que naissait la CEE. Depuis plus de trente ans, l'Europe -plus précisément la Communauté-entretient une politique méditerranéenne favorisant la paix et la stabilité en facilitant le développement et ce par le biais d'une toile d'accords essentiellement économiques. A l'origine, l'héritage colonial a fortement conditionné l'action communautaire en Méditerranée ce qui faisait apparaître ces rapports plus subis que voulus.

A partir des années soixante et donnant suite aux pressantes sollicitations des pays méditerranéens du Sud et de l'Est, la Communauté a conclu avec eux des accords leur octroyant des préférences tarifaires soit à titre transitoire dans la perspective d'une future adhésion¹, soit dans le cadre d'une coopération économique². Face à un bilan critique de ces rapports

¹Il s'agit de l'accord créant une association entre la CEE et la Grèce du 9 juillet 1961 et de l'accord créant une association entre la CEE et la Turquie du 12 septembre 1963.

²Il s'agit de: l'accord commercial non préférentiel signé avec Israël en 1964; l'accord commercial signé avec le Liban en 1964; l'accord d'association avec la Tunisie du 28 mars 1969; l'accord d'association avec le Maroc du 31 mars 1969; l'accord commercial non préférentiel signé avec la Yougoslavie le 14 mars 1970; l'accord commercial préférentiel signé avec l'Espagne le 29 juin 1970; l'accord d'association avec Malte du 5 décembre 1970; l'accord d'association avec Chypre du 19 décembre 1972 et l'accord commercial préférentiel signé avec l'Egypte le 18 décembre 1972.

conventionnels, le sommet de Paris de 1972 a mentionné la nécessité de conclure des accords faisant l'objet d'une approche globale et équilibrée³ aussi bien au niveau géographique qu'au niveau matériel. De nouveaux accords dits de "coopération" et instaurant des inégalités compensatrices ont été conclus avec des Etats tiers méditerranéens⁴. Afin de pallier les insuffisances, l'approche globale a été réadaptée par *la politique méditerranéenne rénovée* introduite à partir de 1992 en vue de définir une stratégie d'ensemble à l'égard des Etats tiers méditerranéens.

La succession des aménagements, des adaptations et de rénovations des approches des rapports entre l'Union européenne et les Etats tiers méditerranéens n'ont pas réussi à dissiper les déceptions de part et d'autre. Elles n'ont pas permis, non plus, de rétrécir les écarts entre les parties. Le constat d'échec de la politique méditerranéenne a conduit l'Union européenne à repenser les termes de ses rapports avec les Etats tiers méditerranéens et à s'engager sur la voie d'une véritable refonte. C'est dans ce contexte que l'Union européenne a proposé une approche réellement globale et multidimensionnelle pour la Méditerranée. 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 diverses communications⁵, la Commission a tenté d'étendre la nouvelle approche à l'ensemble de la Méditerranée ce qui a été approuvé par le Conseil européen lors de ses réunions d'Essen en décembre 1994 et de Cannes en juin 1995. Découlant d'une approche qui se veut globale, le partenariat englobe, outre les aspects économiques et financiers, des aspects politiques et de sécurité ainsi que des aspects d'ordre social, humain et culturel. Les modalités de mise en oeuvre de ce partenariat comportent à la fois

³Point 11 du communiqué final du sommet de Paris des 19 et 20 octobre 1972.

⁴Il s'agit des accords de coopération conclus avec la Tunisie le 25 avril 1976, avec l'Algérie le 26 avril 1976, avec le Maroc le 27 avril 1976, avec l'Egypte le 18 janvier 1977, avec la Jordanie le 18 janvier 1977, avec la Syrie le 18 janvier 1977 et enfin avec le Liban le 3 mai 1977.

⁵V. notamment "Renforcement de la politique méditerranéenne de l'Union européenne: proposition pour la mise en oeuvre d'un partenariat euro-méditerranéen", COM (95) 72 final, 8 mars 1995.

une dimension bilatérale conçue sous la forme d'une nouvelle génération d'accords d'association conclus sur la base de l'article 310 du traité CE et baptisés *les accords euro-méditerranéens* et une dimension multilatérale plus connue sous le nom du "*processus de Barcelone*".

Dans le cadre de cette nouvelle approche de partenariat, la Tunisie a été le premier Etat méditerranéen à signer, le 17 juillet 1995, un accord d'association⁶. D'autres accords ont été signés avec Israël - 20 novembre 1995-, le Maroc -26 février 1996- et le Royaume hachimite de Jordanie -24 novembre 1997-. Après de longues négociations, un accord a été signé avec la République Arabe d'Egypte le 25 juin 2001, et un dernier avec la République Algérienne le 22 avril 2002. Un accord paraphé le 10 janvier 2002 avec le Liban attend toujours la signature⁷. Par ailleurs, les négociations engagées avec la Syrie, depuis octobre 1997, ne sont pas encore arrivées à terme.

Les rapports de l'Union européenne avec les Etats tiers méditerranéens ne sont pas tous identiques. Les relations avec certains Etats de la région connaissent des situations spécifiques. On cite tout d'abord, la Turquie⁸, Malte⁹ et Chypre¹⁰ qui sont

⁶JOCE, L 97 du 30 mars 1998, p. 1.

⁷La signature de l'accord d'association avec le Liban a été initialement prévue pour le mois d'avril 2002 à l'occasion de la cinquième conférence du processus de Barcelone. Elle a été reportée à cause du boycott du Liban de la conférence.

⁸La Turquie est liée par un accord d'association depuis septembre 1963. Elle a abouti à la mise en place d'une union douanière le 22 décembre 1995. Elle a été reconnue, par le Conseil européen de Helsinki en décembre 1999, comme Etat candidat à l'adhésion. Il a été jugé que la Turquie nécessite des réformes essentiellement en matière des droits de l'homme et a été autorisée à conclure un "accord de partenariat pour l'adhésion" le 4 décembre 2000.

⁹Malte est liée par un accord d'association depuis décembre 1970. Elle a demandé l'adhésion en 1998 ce qui a permis d'entamer la deuxième étape d'association et d'ouvrir les négociations pour l'adhésion.

¹⁰Chypre est liée par un accord d'association depuis décembre 1972. Elle a conclu le 19 octobre 1987 un protocole définissant les conditions et les modalités de la mise en oeuvre de la deuxième étape de l'association. Elle a demandé l'adhésion en 1990 et les négociations pour l'adhésion ont été ouvertes depuis 1998.

candidats à l'adhésion à l'Union européenne et qui, de ce fait, doivent assimiler la totalité de l'acquis de l'Union européenne. Il importe de mentionner ensuite, un cas comparable à un accord d'association à savoir l'accord euro-méditerranéen intérimaire relatif aux échanges et à la coopération conclu le 24 février 1997 entre la Communauté européenne et l'OLP agissant pour le compte de l'Autorité palestinienne de la Cisjordanie et de la bande de Gaza¹¹. Il s'agit d'un accord spécifique du fait qu'il est conclu avec une entité non encore reconnue comme Etat. C'est aussi un accord purement économique et de coopération conclu sur la base des articles 133 et 180 CE du côté communautaire et sur la base des attributions reconnues à l'OLP en matière de relations extérieures par l'accord israélo-palestinien du 4 mai 1994 du côté palestinien. Juridiquement ce n'est qu'un accord intérimaire qui prépare à l'association¹². Cependant, il est assimilable à un accord euro-méditerranéen du fait de la déclaration conjointe sur le dialogue politique adoptée par les parties en dehors de l'accord afin de contourner l'incompétence de l'Autorité palestinienne de signer un accord politique. On note enfin, que la Libye reste exclue du partenariat. Elle n'a jamais conclu d'accord de coopération avec la CE. Lors du lancement du partenariat euro-méditerranéen, la Libye a été mise à l'écart à cause de l'affaire de Lockerbie et des sanctions qui lui ont été imposées, depuis 1992, par le Conseil de Sécurité des Nations Unies. C'est suite à la suspension de ces sanctions que la normalisation des relations entre l'Union européenne et cet Etat à été entamée en avril 1999.

¹¹ *JOCE*, L. 187 du 16 juillet 1997, p. 3.

¹² Cet accord a été conclu pour une période de cinq ans qui correspond à la durée de la période transitoire de l'autonomie palestinienne telle que prévue par l'accord israélo-palestinien du 4 mai 1994. Le paragraphe 2 de l'article 75 de l'accord intérimaire précise dans ce sens "que le 4 mai 1999 au plus tard débiteront les négociations préparatoires à la conclusion d'un accord d'association euro-méditerranéen. Jusqu'à la conclusion de cet accord, le présent accord restera en vigueur". L'enlisement des négociations de paix laisse la question en suspend.

Quoique ces accords soient adaptés aux besoins et situations de chaque Etat partenaire ce qui fait que la numérotation et le contenu des articles ne sont pas tout à fait identiques, ils ont une structure très semblable. Ils établissent un partenariat qui repose sur trois piliers: dialogue politique, mise en oeuvre progressive d'une zone de libre-échange et coopération sociale et culturelle. Tous prévoient un cadre institutionnel paritaire classique constitué d'un Conseil d'association qui prend des décisions dans des domaines expressément déterminés et d'un Comité d'association qui l'assiste. Pour instaurer un échange de vues des élus des peuples des parties, un Comité parlementaire est institué et peut demander toutes les informations utiles et faire des recommandations au Conseil d'association. Des différends relatifs à l'application ou à l'interprétation de l'accord sont réglés par le Conseil d'association et, en cas d'échec, par l'arbitrage.

Quant à la dimension multilatérale, un cadre complémentaire aux accords d'association a vu le jour sous la forme de conférences euro-méditerranéennes périodiques qui regroupent les ministres des affaires étrangères des quinze Etats membres de l'Union européenne et des douze Etats partenaires méditerranéens ainsi que le vice président de la Commission européenne. Ces conférences visent à formaliser le contenu du partenariat, à dresser un bilan des étapes accomplies et à prévoir les perspectives avenir sous forme de programme d'action. Le coup d'envoi de ce processus a été la conférence de Barcelone des 27 et 28 novembre 1995 à laquelle l'Autorité palestinienne, comme représentante d'un territoire méditerranéen à part entière, a été conviée. Cette conférence a abouti à l'adoption d'une déclaration précisant les axes du partenariat euro-méditerranéen à savoir la définition d'un espace commun de paix et de sécurité dans le cadre d'un volet politique, la construction d'une zone de prospérité partagée dans le cadre d'un volet économique et financier et enfin le développement des ressources humaines et de la compréhension entre les cultures et les échanges entre les sociétés civiles dans le cadre d'un volet social, culturel et humain. Ces trois axes, identiques à ceux des accords d'associations, témoignent du caractère global du partenariat euro-méditerranéen. La déclaration de Barcelone a été complétée par un programme de travail détaillant les engagements à prendre et la

manière dont seront réalisés les objectifs convenus. Une deuxième conférence interministérielle s'est tenue, sans succès, à Malte les 15 et 16 avril 1997 à une période de tension au Moyen-Orient. En juin 1998, une conférence intérimaire s'est tenue à Palerme afin de redonner un souffle au dialogue euro-méditerranéen. Ceci a rejailli positivement sur la troisième conférence interministérielle de Stuttgart des 15 et 16 avril 1999. Toutefois, la déclaration adoptée à cette conférence, comme la précédente d'ailleurs, ne contient aucune réalisation ou avancée concrète. Les 15 et 16 novembre 2000, la quatrième conférence interministérielle de Marseille a tenté de faire sortir le processus de Barcelone du désenchantement dans lequel il a glissé en lui redonnant un nouvel élan. Faute de consensus, il a été impossible d'adopter un communiqué final et les résultats de la conférence ont été consignés dans des conclusions formelles de la présidence. La cinquième conférence interministérielle a eu lieu, à Valence les 22 et 23 avril 2002, en l'absence des délégations de la Syrie et du Liban¹³ et à une période des plus tragiques qu'a connu le Moyen-Orient. Cependant, elle a abouti à l'adoption, à l'unanimité, d'un programme de travail qui comprend des initiatives et des actions communes à court et moyen terme couvrant les trois axes du partenariat euro-méditerranéen. Il importe de mentionner que la Libye, et depuis la conférence de Stuttgart, continue à être conviée comme invité spécial de la présidence ayant un statut d'observateur.

Le partenariat euro-méditerranéen a généré, à travers les accords d'association et le processus de Barcelone, un mouvement de transition progressive et d'adaptation des législations des Etats méditerranéens associés. Ce partenariat comprend des objectifs plus ambitieux que la simple disparition des obstacles directs aux échanges et place le processus d'intégration européenne comme modèle de référence. En arrière-plan de ce mouvement d'adaptation se profile l'*acquis communautaire*. Dans un contexte mondial

¹³ Afin de protester contre l'offensive militaire israélienne lancée le 29 mars en Cisjordanie, la Syrie et le Liban ont demandé à la présidence de ne pas inviter Israël. Face au refus de la présidence, ces deux Etats ont boycotté la conférence "par respect pour les sentiments des peuples arabes et palestinien". Rappelons que ces deux Etats se sont limités à menacer de se désister de la précédente conférence tenue à Marseille.

marqué par le libre-échange, il importe de jeter les bases d'une réflexion plus globale à propos de l'impact du processus de partenariat sur les législations des Etats méditerranéens associés. Comment s'opère donc la projection de l'acquis communautaire à ces Etats "tiers" associés? Quels sont les techniques et les instruments consacrés pour mettre en place cette projection? Enfin, quel est l'acquis qui fait l'objet de cette projection? Il convient ainsi de passer en revue les techniques et les mécanismes de projection de l'acquis communautaire (I) avant de déterminer le contenu et la substance de l'acquis projeté (II).

I - Les techniques et les mécanismes de la projection de l'acquis

Le partenariat euro-méditerranéen a une certaine similitude avec le rapprochement intra-communautaire des législations des Etats membres de l'Union européenne. Tous les problèmes qui se présentent au cours de l'instauration et de la mise en oeuvre du partenariat ont été déjà affrontés et dépassés dans le cadre communautaire. C'est ce qui explique qu'un bon nombre des dispositions des accords euro-méditerranéens renvoient au traité CE ou utilisent expressément des notions et des démarches propres au droit communautaire. Les accords ainsi que le processus de Barcelone édifient des mécanismes de coopération permettant la cohérence et le suivi de l'adaptation des systèmes juridiques des Etats méditerranéens associés et par là, une projection "efficace" de l'acquis communautaire. Partant de l'accord d'association conclu avec la Tunisie en 1995, pris comme exemple¹⁴, on tentera de dévoiler les techniques (A) puis les mécanismes (B) de cette projection de l'acquis communautaire.

¹⁴Rappelons que les accords euro-méditerranéens sont presque identiques. L'accord conclu avec la Tunisie, étant le premier accord signé, à servi de modèle lors des négociations des autres accords. Les dispositions pertinentes pour les besoins de cette étude sont identiques dans tous les accords. Seule la numérotation des articles change.

A - Les techniques de la projection de l'acquis

Les accords euro-méditerranéens renvoient, pour certaines questions, au droit communautaire. Mieux encore, des références expresses aux dispositions du traité CE ou au droit matériel sont frappantes. Dans le premier sens, on peut citer d'abord l'article 39 de l'accord d'association conclu avec la Tunisie 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 dispositions des accords d'association qui ont trait à la normalisation. L'article 40 de l'accord conclu avec la Tunisie 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 certification¹⁵". L'article 51 du même accord 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". On remarque enfin et à propos d'un autre domaine plus délicat car plus lié à la souveraineté de l'Etat, que l'article 53 de l'accord d'association conclu avec la Tunisie fait allusion au rapprochement à des règles communes. Il dispose que "la coopération vise au *rapprochement de règles et normes*

¹⁵ Dans des termes similaires, l'article 40 de l'accord intérimaire conclu avec l'Autorité palestinienne dispose que la coopération vise à "la réduction des écarts existants entre les parties en matière de normes et de procédures de certification" et ceci à travers "la promotion de l'utilisation des réglementations techniques communautaires et des normes et procédures européennes d'évaluation de la conformité".

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". Quelle autre signification peut-on donner à l'expression "règles communes" si ce n'est des règles communautaires ou des règles qui s'en inspirent!

Dans le second sens, et concernant les dispositions qui reprennent des normes communautaires ou y font référence expresse, on peut citer essentiellement des dispositions du chapitre 2 intitulé "concurrence et autres dispositions économiques" du titre IV de l'accord d'association conclu avec la Tunisie. Certaines dispositions reprennent des normes communautaires tout en les adaptant. A titre d'exemple, l'article 36 déclare les ententes incompatibles avec le fonctionnement de l'accord et reprend les trois conditions de l'ex-article 85 (article 81) du traité CE définissant une entente réprimée¹⁶. Le même article 36 reprend les trois conditions de l'ex-article 86 (article 82) du traité CE permettant d'incriminer les abus de position dominante. D'autres dispositions font référence directement à certains articles du traité CE. 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 [ex-] articles 85, 86 et 92 du traité instituant la Communauté européenne ... ainsi que les règles relatives aux aides publiques, y compris le droit dérivé". Le cinquième paragraphe de ce même article renvoie expressément à un règlement du Conseil. Cette technique de référence rappelle la

¹⁶ Le premier paragraphe de l'article 36 de l'accord conclu avec la Tunisie stipule que: "sont incompatibles avec le fonctionnement du présent accord, dans la mesure où ils sont susceptibles d'affecter les échanges entre la Communauté et la Tunisie : a) tous les accords entre entreprises, toutes les décisions d'association d'entreprises et toutes les pratiques concertées entre entreprises, qui ont pour objet ou pour effet d'empêcher, de restreindre ou de fausser le jeu de la concurrence; b) l'exploitation abusive par une ou plusieurs entreprises d'une position dominante sur l'ensemble des territoires de la Communauté ou de la Tunisie ou dans une partie substantielle de celle-ci; c) toute aide publique qui fausse ou qui menace de fausser la concurrence en favorisant certaines entreprises ou certaines productions, sauf dérogations autorisées en vertu du traité instituant la Communauté européenne du charbon et de l'acier".

possibilité qu'ont les parties, en droit privé, de permettre l'interprétation de leur accord à la lumière des usages. On peut noter aussi que les accords euro-méditerranéens mentionnent des notions propres au droit communautaire telles que "mesures d'effet équivalent à un droit de douane¹⁷" et "mesures ou pratiques fiscales discriminatoires¹⁸". Ces notions ont été prévues par des articles du traité CE dans une rédaction très proche et ont fait l'objet d'une abondante jurisprudence de la Cour de justice des Communautés européennes permettant de définir leurs contours.

Ces renvois au droit communautaire ainsi que la référence aux dispositions du traité CE et au droit dérivé n'impliquent pas forcément une transposition de l'acquis communautaire. La similitude frappante entre le droit communautaire et les dispositions des accords euro-méditerranéens est affectée par une double limite. En effet, l'essentiel de ces dispositions ne sont pas d'application directe. Elles ne sont en définitive que des dispositions programmatiques permettant de réaliser progressivement les objectifs du partenariat. Aux termes mêmes de ces dispositions, elles s'adressent aux parties contractantes et nécessitent leur intervention pour les mettre en oeuvre à travers, par exemple, des décisions à prendre par le Conseil d'association ou des accords à conclure conformément à un calendrier plus ou moins établi. De ce fait, leur invocabilité directe devant les juridictions nationales des Etats associés n'est pas possible dans leur état actuel¹⁹. Elle n'est pas non plus impossible, mais tout simplement

¹⁷V. l'article 8 de l'accord d'association conclu avec la Tunisie qui représente une clause de *stand-still* interdisant l'instauration de nouveaux droits de douane ou de nouvelles taxes d'effet équivalent dans les échanges des produits industriels à partir de l'entrée en vigueur de l'accord.

¹⁸V. l'article 22 de l'accord d'association conclu avec la Tunisie qui interdit les taxes discriminatoires à l'importation.

¹⁹Rappelons que la Cour de justice des Communautés européennes a adopté ce raisonnement. Elle a mentionné, à propos de l'application directe d'une disposition de l'accord d'association avec la Turquie, qu'une "disposition d'un accord conclu par la Communauté avec un pays tiers doit être considérée comme étant d'application directe lorsque, eu égard à ces termes ainsi qu'à l'objet et la nature de l'accord, elle comporte une obligation claire et précise, qui n'est subordonnée, dans son exécution ou dans ses effets, à l'intervention d'aucun acte

reportée. A notre sens, on estime qu'elle se posera progressivement au rythme de l'évolution du partenariat et plus particulièrement de l'instauration de la zone de libre-échange. Elle concernera au premier rang les dispositions douanières et fiscales jusqu'à ce qu'on arrive à ce que la libre circulation des marchandises ne peut être garantie que par la reconnaissance de l'application directe de l'ensemble des dispositions des accords d'association. Si cette première limite n'est donc que provisoire, la similitude entre le droit communautaire et les dispositions des accords euro-méditerranéens reste confrontée à une autre limite plus structurelle. Il s'agit de la différence des objectifs ce qui doit normalement impliquer une interprétation différente des dispositions en question. Si les dispositions du traité CE et du droit dérivé visent à réaliser et à renforcer l'intégration européenne, les dispositions des accords euro-méditerranéens n'aspirent au mieux qu'à un genre de coopération renforcée entre la Communauté européenne et ses Etats membres, d'une part, et les Etats méditerranéens associés, d'autre part. Le juge communautaire a été confronté à cette question d'interprétation suite à la mise en oeuvre de nombreux accords d'association conclus avec la Communauté et il a opté pour une interprétation différenciée selon les objectifs et les finalités des accords. Dans l'arrêt *Métalsa* à propos de mesures fiscales discriminatoires, la CJCE a précisé que "l'extension de l'interprétation d'une disposition du traité [CE], rédigée en termes similaires ou même identiques, figurant dans un accord conclu entre la Communauté et un pays tiers, dépend notamment de la finalité poursuivie par chacune de ces dispositions dans le cadre qui lui est propre et que la comparaison des objectifs et du contexte de l'accord d'une part et du traité d'autre part, revêt à cet égard une importance considérable²⁰". La CJCE s'est ainsi prononcée pour une interprétation différente du principe de non discrimination fiscale prévu par un accord d'association par rapport à son interprétation antérieure des dispositions analogues de l'ex-article

ultérieur". CJCE, arrêt du 30 septembre 1987, *Demirel / Ville de Schwäbisch Gmünd*, aff. 12/86, Rec. p. 3752, parag. 14.

²⁰CJCE, arrêt du 1 juillet 1993, *Métalsa*, Aff. C-312 / 91, Rec. p. I-3773, parag. 11.

95 du traité CE. Les juridictions nationales des Etats méditerranéens associés emprunteront probablement le même raisonnement ce qui limitera "l'emprise" de cette projection de l'acquis communautaire.

B - Les mécanismes de la projection de l'acquis

Fidèle à la théorie du "*spill-over*", la logique du système communautaire réside dans le fait de ne pas essayer d'obtenir tout au même moment mais de lier la réalisation de l'intégration européenne à un échelonnement de phases successives et transitoires. Tout Etat adhérent doit dès lors admettre que toutes les étapes réalisées représentent une conquête définitive qui ne pourrait être remise en question. Le partenariat euro-méditerranéen semble emprunter cette même logique en développant des mécanismes de coopération afin de permettre l'harmonisation et l'adaptation des systèmes juridiques des Etats méditerranéens associés conformément à un calendrier plus ou moins fixé selon les aspirations des parties. Cette coopération est menée aussi bien au niveau bilatéral à travers la mise en place d'instances paritaires prévues par les accords euro-méditerranéens qu'au niveau régional grâce au processus de Barcelone.

En ce qui concerne la dimension bilatérale, tous les accords euro-méditerranéens prévoient une disposition de rédaction laconique mais très dense de signification, du fait qu'elle développe le principe général de l'harmonisation, intitulée "rapprochement des législations". Cette disposition signale que "la coopération vise à aider [l'Etat associé] à rapprocher sa législation de celle de la Communauté dans les domaines couverts par le présent accord²¹". A première vue, il s'agit d'harmonisation des législations *par coopération* ce qui signifie une implication réciproque et volontaire des partenaires. La prépondérance matérielle effective de l'Union européenne et de son acquis n'engendre t-elle pas forcément un

²¹V. à titre d'exemple les articles 52 des accords conclus avec la Tunisie et le Maroc ; l'article 55 de l'accord conclu avec Israël et l'article 41 de l'accord intérimaire conclu avec l'Autorité Palestinienne.

alignement du droit de l'Etat associé? Les dispositions de cet article indiquent clairement que l'harmonisation se résout en fait en un alignement. En l'état actuel des choses, il est difficile, voir même prématuré, de tenter de dresser un bilan des "réalisations" de ce mécanisme de coopération. Il est par contre intéressant d'expliquer son fonctionnement. Les accords euro-méditerranéens prévoient un cadre institutionnel paritaire. On distingue pour chaque cas d'association un organe central, à savoir le Conseil d'association²² et un organe subsidiaire, en l'occurrence le Comité d'association²³. Ces deux organes sont chargés de l'application et du développement progressif du régime de l'association. Pour la réalisation des objectifs fixés, chaque accord confère au Conseil d'association la tâche de la mise en oeuvre et de la gestion de l'association par la prise des dispositions nécessaires. A ce niveau, les pouvoirs du Conseil d'association sont liés à cause du fait qu'ils relèvent d'une attribution expresse de compétences dans des domaines d'action bien déterminés par chaque accord d'association²⁴. Sans aller jusqu'à énumérer tous les cas où les accords prévoient l'intervention des Conseils d'association, on peut citer à titre d'exemple, la mise en oeuvre de la politique de la concurrence²⁵, le réexamen du régime applicable aux produits

²²Le Conseil d'association est un organe politique. Il est composé, d'une part, de membres du Conseil de l'Union européenne et de membres de la Commission et, d'autre part, de membres du gouvernement de l'Etat méditerranéen associé. V. à titre d'exemple l'article 79 de l'accord d'association conclu avec la Tunisie.

²³Le Comité d'association siège au niveau des fonctionnaires. Selon le même principe de parité, il est composé de deux délégations : des représentants des membres du Conseil de l'Union européenne et de la Commission, d'une part, et des représentants du gouvernement de l'Etat méditerranéen associé, d'autre part. V. à titre d'exemple l'article 82 de l'accord d'association conclu avec la Tunisie.

²⁴Les accords d'association sont formels à ce niveau. A titre d'exemple, l'article 80 de l'accord d'association conclu avec la Tunisie stipule que "pour la réalisation des objectifs fixés par l'accord, et dans les cas prévus par celui-ci, le Conseil d'association dispose d'un pouvoir de décision".

²⁵V. à titre d'exemple l'article 36 paragraphe 3 de l'accord d'association conclu avec la Tunisie. L'article précise que cette action doit être accomplie dans un délai de cinq ans à compter de l'entrée en vigueur de l'accord.

sensibles exclus de la libéralisation commerciale²⁶ et la libéralisation réciproque et progressive des marchés publics²⁷. Dans certains domaines, le Conseil d'association n'a qu'un pouvoir de recommandation ce qui laisse entendre que la décision doit être prise par les parties contractantes sous forme d'un accord lié à l'accord d'association. A titre d'exemple, on peut citer le cas de la réalisation de la liberté d'établissement et de la libre prestation des services²⁸. Il importe de noter que l'examen de certains domaines "délicats" de l'association a été reporté et laissé expressément à l'intervention ultérieure des parties contractantes par le biais d'accords liés à l'accord d'association. Il s'agit en l'occurrence de la libéralisation des échanges réciproques des produits agricoles et de pêche²⁹. Quant au Comité d'association, il dispose d'un pouvoir de décision en ce qui concerne la gestion de l'accord ainsi que dans les domaines pour lesquels le Conseil d'association lui délègue ses compétences. Dans le cadre de la gestion de l'accord, le Comité est chargé, entre autre, de prendre des décisions en ce qui concerne la révision des calendriers de démantèlement des tarifs douaniers en

²⁶V. à titre d'exemple l'article 12 de l'accord d'association conclu avec la Tunisie. L'article précise que cette action doit être accomplie quatre ans après l'entrée en vigueur de l'accord.

²⁷V. à titre d'exemple l'article 41 de l'accord d'association conclu avec la Tunisie. Cet article se limite à fixer un objectif général de libéralisation réciproque et progressive des marchés publics et charge le Conseil d'association de prendre les mesures nécessaires pour la réalisation de cet objectif sans fixer d'échéances.

²⁸V. à titre d'exemple l'article 31 de l'accord d'association conclu avec la Tunisie. L'article limite formellement le rôle du Conseil d'association à la présentation des recommandations nécessaires à la mise en oeuvre de cet objectif. Le Conseil d'association est tenu d'effectuer un premier examen de la question au plus tard la cinquième année après l'entrée en vigueur de l'accord.

²⁹V. à titre d'exemple l'article 18 de l'accord d'association conclu avec la Tunisie en vertu duquel les parties contractantes doivent examiner la question à partir du premier janvier 2000. Des négociations ont été ouvertes comme convenu et ont abouties à la conclusion d'un accord sous forme d'échange de lettres le 22 décembre 2000.

cas de difficultés graves³⁰ et de rétablir ou de majorer les droits de douane provisoirement afin de protéger des industries naissantes³¹.

Trop peu d'informations ont été communiquées à propos des réunions et des décisions des Conseils et des Comités d'association. On peut partir du cas tunisien du fait qu'il est le plus évolué³². L'accord d'association conclu avec la Tunisie a été le premier à entrer en vigueur le premier mars 1998. Trois réunions du Conseil d'association ont eu lieu à Bruxelles successivement le 14 juillet 1998, le 24 janvier 2000 et le 29 janvier 2002. Certaines décisions ont dû être prises et aucune n'a été publiée au Journal Officiel de la République Tunisienne. Toutefois, trois décisions du Conseil d'association ont été publiées au Journal Officiel des Communautés Européennes. Il s'agit de la décision 1/98 du 14 juillet 1998 arrêtant le règlement intérieur du Conseil et à laquelle a été annexé le règlement intérieur du Comité d'association³³. Il s'agit aussi de la décision 1/99 du 25 octobre 1999 relative à la mise en oeuvre des dispositions concernant les produits agricoles transformés prévues à l'article 10 de l'accord d'association et la décision 2/99 du 3 septembre 1999 portant la création d'un groupe de travail sur les affaires sociales³⁴. A travers ces données limitées et du fait que

³⁰V. à titre d'exemple l'article 11 paragraphe 4 de l'accord d'association conclu avec la Tunisie.

³¹V. à titre d'exemple l'article 14 de l'accord d'association conclu avec la Tunisie.

³²On note que la procédure de négociation et de conclusion des accords euro-méditerranéens a été plus longue que prévu. A ce jour, seulement cinq accords euro-méditerranéens sont entrés en vigueur. L'accord conclu avec la Tunisie est entré en vigueur le premier mars 1998. L'accord conclu avec le Maroc est entré en vigueur le premier mars 2000 suivi de l'entrée en vigueur de l'accord conclu avec Israël le premier juin 2000 et l'accord conclu avec la Jordanie, le premier mai 2002. Du fait qu'il n'est pas un accord mixte, la ratification de l'accord intérimaire conclu avec l'Autorité palestinienne a été rapide et il est entré en vigueur le premier juillet 1997.

³³*JOCE*, L 300, du 11 novembre 1998, p. 20 et ss.

³⁴V. respectivement *JOCE*, L 298, du 19 novembre 1999, p. 16 et ss; *JOCE*, L 258 du 5 octobre 1999, p. 28. La non coïncidence des dates de ces décisions avec des sessions du Conseil d'association peut s'expliquer par le fait que le règlement intérieur du Conseil prévoit dans son article 10 que le Conseil d'association peut prendre des décisions par la procédure écrite entre les sessions.

l'accord d'association conclu avec la Tunisie vient juste d'atteindre la quatrième année suivant son entrée en vigueur, et donc la première échéance du développement progressif du régime de l'association à travers l'action du Conseil et du Comité d'association, on peut présumer que l'harmonisation par la coopération n'a pas encore donné lieu à la prise des décisions visées. On remarque cependant, qu'une vaste entreprise d'adaptation de la législation tunisienne déferle presque dans tous les domaines. Comment donc expliquer cette situation? Il semble qu'il s'agit d'une adaptation spontanée engagée par l'anticipation de l'application de l'accord depuis 1996³⁵. La mise en oeuvre du démantèlement douanier a nécessité des réformes fiscales puis une réorganisation des services de douane. Il s'agit d'une sorte d'engrenage qui, une fois déclenché, nécessite des adaptations qui entraînent des corrections et des réformes ultérieures dans d'autres domaines. Dans ce cas, l'adaptation quoique volontaire, laisse très peu de liberté à l'Etat associé pour déterminer le contenu de la législation. Il est contraint par la force des choses de transposer l'acquis communautaire. C'est ce qui explique par exemple, l'institution de la liasse unique à l'importation et à l'exportation des marchandises et du système intégré de traitement automatisé des formalités de commerce extérieur³⁶ et l'harmonisation de la nomenclature douanière tunisienne avec celle de l'Union européenne³⁷. Par la suite et en quête d'un meilleur accès au marché communautaire, l'Etat associé est conduit à transposer les réglementations techniques et d'accréditation ce qui entraîne une adaptation des règles relatives à la libre circulation des marchandises puis des capitaux. A partir d'un certain stade de

³⁵La Tunisie n'a pas attendu l'entrée en vigueur de l'accord pour l'appliquer. En vertu de l'article 21 de la loi n° 96 - 113 du 30 décembre 1996 portant loi de finances pour la gestion 1997, les dispositions fiscales de l'accord ont été mises en oeuvre en considérant que la date du premier janvier 1997 est le début de la deuxième année du calendrier de démantèlement. V. *J.O.R.T.*, n° 105 du 31 décembre 1996, p. 2580.

³⁶V. Décret n° 97 - 2470 du 22 décembre 1997. *J.O.R.T.*, n° 104 du 30 - 31 décembre 1997, p. 2595.

³⁷V. article 65 de la loi n° 98-111 portant loi de finance pour l'exercice 1999. *J.O.R.T.* n° 104 du 29 - 31 décembre 1998, p. 2508.

liberté de circulation des produits, les atteintes aux règles de la concurrence deviennent gênantes. L'adaptation de ces règles implique la protection des droits de propriété intellectuelle et industrielle et ainsi de suite jusqu'à ce que l'adaptation couvre tous les domaines.

Les coups d'impulsion donnés au niveau régional grâce au processus de Barcelone ont certainement aidé et orienté l'adaptation spontanée. L'essoufflement de ce processus n'a pas empêché que le partenariat euro-méditerranéen devienne identifiable. D'une conférence à l'autre, les déclarations qui se sont succédées et les programmes de travail qui se sont ramifiés ont permis d'étayer les objectifs du partenariat, de déterminer les moyens d'actions et d'instaurer un cadre institutionnel plus ou moins établi. Il suffit pour s'en rendre compte, de comparer le programme d'action de la première conférence tenue à Barcelone en 1995 et celui de la cinquième conférence tenue à Valence en avril 2002.

II - La substance de l'acquis projeté

La différence des objectifs, des moyens d'action et du cadre institutionnel du partenariat euro-méditerranéen par rapport à l'Union européenne implique que tout l'acquis de l'Union n'est pas forcément transposable et n'est pas forcément utile à l'espace euro-méditerranéen. Toutefois, la globalité recherchée du partenariat a fait qu'une partie considérable de l'acquis soit visée. Les accords d'association ainsi que les déclarations et programmes de travail du processus de Barcelone ont couvert d'importants niveaux dont notamment le développement de l'Etat de droit, de la démocratie, le respect des droits de l'homme, l'harmonisation des règles et des procédures dans le domaine douanier, le rapprochement dans les domaines de la normalisation et de la certification, le transfert de l'expérience communautaire en matière de préservation de l'environnement et la coopération en matière sociale culturelle et humaine. De surcroît, un grand nombre de domaines font l'objet de réflexions ou d'actions communes. On cite tout d'abord, le renforcement de la coopération pour prévenir et combattre le terrorisme, le trafic de drogue, la criminalité organisée et la corruption ainsi que l'élaboration d'un programme régional en

matière de liberté, de justice et de gouvernance. On énumère ensuite, entre autres, l'élimination des obstacles à l'investissement, la modernisation industrielle et l'amélioration de la compétitivité, la diversification de la production agricole, le développement des transports et l'efficacité énergétique, la modernisation des télécommunications, l'accès à la nouvelle société de l'information, la promotion du tourisme, la promotion de la recherche scientifique et la définition d'une stratégie d'aménagement du territoire. On mentionne enfin le développement des ressources humaines, l'interaction étroite des médias, le développement des échanges entre les sociétés civiles et le développement des services de la santé publique. L'étendue et l'importance des niveaux et domaines couverts par le partenariat nous rappelle le processus d'intégration des Etats tiers à l'Union européenne. Cependant et partant du fait que le partenariat n'a pas pour objectif l'adhésion des Etats tiers méditerranéens à l'Union³⁸, la projection de l'acquis permet à ces Etats une pré-adhésion à la mondialisation (A). Cette projection donne naissance à un acquis euro-méditerranéen (B).

A - Acquis assurant une pré-adhésion à la mondialisation

La volonté de l'Union européenne d'orienter la transition des Etats méditerranéens associés vers l'économie de marché ainsi qu'à un système de valeurs visant à humaniser la perception trop "économiste" de la mondialisation dans la direction requise au niveau mondial est évidente. Elle s'appuie sur l'expérience accumulée lors de la construction européenne. Les préambules des accords euro-méditerranéens soulignent l'importance que les parties attachent au respect des principes de la Charte des Nations Unies et, en particulier, au respect des droits de l'homme et des libertés politiques et économiques qui "constituent le fondement même de l'association"³⁹. Le partenariat représente un relais de la mondialisation dans la mesure où il instaure une zone de libre-

³⁸Exception faite de Malte, Chypre et Turquie qui sont dans une situation particulière.

³⁹V. à titre d'exemple le troisième considérant du préambule de l'accord conclu avec la Tunisie.

échange largement inspirée du modèle du marché intérieur européen lui-même en quête de conformité avec le système de l'Organisation Mondiale de Commerce. Il projette également un système de valeurs basé essentiellement sur le respect des droits de l'homme et de la démocratie à travers un dialogue politique.

En ce qui concerne la projection d'un système de valeurs, on note que le partenariat vise à instaurer un espace de paix et de stabilité par la promotion d'un dialogue permanent sur les aspects politiques et de sécurité. Les Etats partenaires méditerranéens doivent souscrire à certaines exigences correspondant aux standards internationaux et aux engagements de l'Union européenne dans ce domaine. Il s'agit, en l'occurrence, pour ces Etats de développer l'Etat de droit et la démocratie dans leur système politique tout en reconnaissant la non ingérence; de respecter la diversité et le pluralisme dans leur société et à respecter les droits de l'homme et les libertés fondamentales ainsi que de garantir leur exercice effectif et légitime sans aucune discrimination⁴⁰. Il importe de rappeler à ce niveau, que le Conseil européen de Dublin de 1990 a insisté sur l'engagement de l'Europe en faveur de la démocratie, du pluralisme, de l'Etat de droit et du respect intégral des droits de l'homme. La reconnaissance de ces principes, que les Etats membres de l'Union européenne se sont imposés, se trouve projetée au niveau méditerranéen par le biais du partenariat. Le premier titre de tous les accords euro-méditerranéens conclus est consacré au dialogue politique régulier, à tous les niveaux, comme un moyen par lequel les partenaires cherchent à susciter une meilleure compréhension réciproque. Cependant, les accords se sont limités à un renvoi au droit international en la matière sans dresser un catalogue de principes démocratiques et des droits de l'homme. Ils représentent des valeurs communes qui ont été déjà établies et acceptées par les parties par des actes internationaux tel que la Déclaration universelle des droits de l'homme. Le plus introduit par le partenariat réside dans le fait que la garantie de la démocratie et du respect des droits de l'homme représente, de surcroît, une

⁴⁰V. premier volet de la déclaration de Barcelone : partenariat politique et de sécurité.

condition du maintien en application des accords d'association par l'attribution à cette exigence le rang "d'élément essentiel de l'accord"⁴¹. Cette condition peut jouer un rôle dissuasif du fait que sa violation par un Etat partenaire méditerranéen peut entraîner, du côté européen, la suspension ou l'extinction de l'accord⁴² ou la suspension de l'appui financier⁴³. "Tout partenariat requiert des participants partageant des valeurs communes. La conditionnalité retrouve la bonne vieille logique du bâton et de la carotte: l'Etat, qui veut avoir accès aux avantages du partenariat (ouverture de marchés, aides financières ...), doit donner la preuve qu'il les mérite par son respect des droits de l'homme, du pluralisme démocratique⁴⁴". L'Union européenne a eu l'occasion de tirer les conséquences de l'inobservation de cette condition. Un précédent existe déjà dans le cadre ACP. Il s'agit du Togo avec qui l'Union européenne a suspendu la coopération à cause du non respect des principes démocratiques et qui a été exclu de la nouvelle convention de Cotonou du 23 juin 2000. Dans le sens inverse, le

⁴¹V. l'article 2 de l'accord conclu avec la Tunisie ainsi que celui conclu avec le Maroc.

⁴²Chaque accord euro-méditerranéen comporte une clause générale de non-exécution permettant à l'une des parties de "prendre les mesures appropriées" si elle considère que l'autre partie n'a pas rempli l'une des obligations que lui impose l'accord. Il s'agit d'un mécanisme entaché de souplesse du fait qu'il exige des parties qu'elles saisissent le Conseil d'association afin de rechercher une solution acceptable qui perturbe le moins le fonctionnement de l'accord. V. l'article 90 de l'accord conclu avec la Tunisie.

⁴³Le règlement n° 1488/96 du Conseil du 23 juillet 1996 relatif à des mesures d'accompagnement financières et techniques MEDA, réaffirme dans son article 3 la même condition. L'article 16 de ce même règlement, tel que modifié par le règlement n° 780/98 du Conseil du 7 avril 1998 précise que "lorsqu'un élément essentiel pour la poursuite des mesures d'appui en faveur d'un partenaire méditerranéen fait défaut, le Conseil peut, statuant à la majorité qualifiée sur proposition de la Commission, décider des mesures appropriées". La procédure de décision à la majorité - et non à l'unanimité - confère un maximum d'effectivité à cette menace de sanction. Le règlement n° 2698/2000 du Conseil du 27 novembre 2000 qui a modifié le règlement MEDA a maintenu ce même mécanisme de décision.

⁴⁴MOREAU DEFARGES (Ph), "Partenariat, mondialisation et régionalisation", in. *Le partenariat de l'Union européenne avec les pays tiers, conflits et convergences*, Bruxelles, Bruylant, 2000, p. 43.

rétablissement de la démocratie ouvre la voie pour le rapprochement avec l'Union européenne. Le cas le plus récent est celui des pays des Balkans occidentaux qui suite à l'engagement d'un processus démocratique ont pu gagner le soutien de l'Union européenne. Le sommet des chefs d'Etats tenu, le 24 novembre 2000 à Zagreb, a balisé la voie vers la conclusion d'accords de stabilisation et d'association en perspective d'adhésion à l'Union européenne suivant une démarche individualisée pour chacun des cinq pays des Balkans⁴⁵.

A cette exigence s'ajoute l'engagement de coopérer afin de prévenir et de lutter contre les activités terroristes, l'expansion et la diversification de la criminalité organisée et la prolifération de tous les trafics illicites. S'il est vrai que cet engagement a été initialement qualifié comme prioritaire par le programme de travail de la conférence ministérielle de Barcelone, son importance a considérablement augmenté suite aux événements du 11 septembre 2001. Lors de la conférence de Valence, les partenaires ont admis l'urgence de promouvoir la signature, la ratification et la mise en oeuvre rapide de tous les instruments internationaux pertinents dont notamment la résolution 1373 adoptée par le Conseil de Sécurité des Nations Unies, agissant dans le cadre du chapitre VII de la Charte, le 28 septembre 2001 relative au tarissement des sources de financement du terrorisme et la résolution 1390 adoptée par le Conseil de Sécurité le 16 janvier 2002. En plus de la lutte contre le terrorisme et la démocratie et droits de l'homme, on peut noter une troisième valeur à savoir le respect de l'environnement. L'engagement des partenaires en faveur d'un niveau élevé de protection de l'environnement comme garantie d'un développement durable a été dès le départ affiché et à toutes les occasions réitéré. La dimension environnementale apparaît, d'une manière moins sensible, comme condition du partenariat à travers les dispositions des accords et des déclarations du processus de Barcelone.

⁴⁵Il s'agit de la Slovénie, l'Albanie, l'Ancienne République Yougoslave de Macédoine et de la Bosnie Herzégovine, de la Croatie et enfin de la République fédérale de Yougoslavie. V. la déclaration finale du sommet de Zagreb, *Agence Europe, Documents*, n° 2221 du 30 novembre 2000.

Toutefois, le règlement MEDA consacre cette valeur en tant que condition générale du financement communautaire et en tant que condition particulière des prêts bonifiés de la Banque Européenne d'Investissement.

Concernant la projection du commerce libéral, on remarque que le partenariat vise à établir *une zone de prospérité partagée* par la mise en place *d'une zone de libre-échange*. Les partenaires ont retenu l'année 2010 comme date objectif pour établir progressivement cette zone qui couvrira l'essentiel des échanges dans le respect des obligations découlant de l'Organisation Mondiale de Commerce. Cette orientation ne représente pas un choix ou une innovation dans les rapports économiques et commerciaux entre l'Union européenne et les pays tiers méditerranéens. Il s'agit plutôt d'une obligation générale conformément aux dispositions de l'article XXIV du GATT 1994. L'ère des préférences compensatrices et de la non-réciprocité, garanties par la précédente génération d'accords de coopération, est révolue. Désormais, la libéralisation des échanges est devenue la règle et les exceptions aux obligations de non-discrimination ne sont acceptées qu'en cas d'intégration économique régionale considérée par l'article XXIV du GATT comme étant une exception conditionnée par la non-pénalisation des autres Etats et l'aboutissement dans un délai raisonnable⁴⁶.

Les accords d'association euro-méditerranéens concrétisent un programme d'action avec chaque partenaire associé afin de réaliser les objectifs du partenariat. La mise en place d'une zone de libre-

⁴⁶L'alinéa 3 du mémorandum d'accord concernant l'interprétation de l'article XXIV fixe le délai raisonnable à dix ans maximum. Ce délai ne devrait dépasser dix ans que dans des cas exceptionnels et après explication au Conseil du commerce des marchandises. Les accords d'association prévoient l'instauration de la zone de libre-échange au bout de douze ans. Ce dépassement a été justifié par le différentiel de développement. L'article V de l'accord GATS intitulé intégration économique, reprend pour la libre circulation des services les mêmes conditions prévues par l'article XXIV du GATT de 1994.

V. RUIZ FABRI (H.), "Les accords externes de la Communauté européenne sous le contrôle de l'Organisation Mondiale de Commerce", in. *Le concept d'association dans les accords passés par la Communauté: essai de clarification*, Bruxelles, Bruylant, 1999, pp. 255 - 282. V. spécialement p. 260 et p. 265.

échange avec chacun des Etats associés dans douze ans de l'entrée en vigueur de l'accord en occupe une place centrale. La libéralisation progressive des échanges est garantie pour les produits industriels par un démantèlement progressif des droits de douane sur les produits importés originaires de la Communauté moyennant un système de listes. Il importe de noter que l'accès de ces produits au marché communautaire est garantie depuis la signature des accords de coopération des années soixante dix. La libéralisation des échanges des produits agricoles a été reportée. En attendant une plus ample conformité avec le droit de l'Organisation Mondiale de Commerce, la politique de contingentement quantitatif et tarifaire continue à être la règle dans ce domaine. L'accord conclu avec la Tunisie reporte l'examen de cette question à l'année 2000. Suite à la deuxième session du Conseil d'association UE/Tunisie tenue à Bruxelles le 24 janvier 2000, les négociations ont été ouvertes. Elles ont abouties le 22 décembre 2000, à la conclusion d'un accord sous forme d'échange de lettres relatif à la modification des protocoles agricoles de l'accord d'association et par lequel les parties se sont accordées de nouvelles concessions⁴⁷. Il semble que des négociations dans ce domaine sont en cours avec les autres Etats tiers méditerranéens⁴⁸. Certaines dispositions communes à tous les accords d'association renforcent le régime de libéralisation des échanges des marchandises en s'inspirant d'une manière significative du droit communautaire et en souscrivant aux exigences du GATT. Par ces dispositions, les obligations de démantèlement et de *standstill* en ce qui concerne les tarifs s'étendent au droit de douane à caractère fiscal et au taxes d'effet équivalent ainsi qu'au restrictions et mesures d'effet équivalent

⁴⁷Cet accord a révisé le protocole n° 1 relatif au régime applicable à l'importation dans la Communauté des produits agricoles originaires de la Tunisie et le protocole n° 3 relatif au régime applicable à l'importation en Tunisie des produits agricoles originaires de la Communauté. Il a permis d'élargir la liste des produits non soumis aux droits de douane, d'améliorer sensiblement les contingents tarifaires et d'augmenter les taux de réduction des droits de douane au-delà des contingents tarifaires pour certains produits. Cet accord n'a pas été publié.

⁴⁸On cite, à titre d'exemple, le Maroc et Israël. V. *Agence Europe*, n° 7847 du 23 novembre 2000, p. 11.

aussi bien à l'importation qu'à l'exportation. A l'instar des dispositions du GATT et de l'article 30 CE (ex-article 36), des exceptions sont prévues en cas d'interdictions justifiées par des raisons de moralité publique, d'ordre public, de sécurité, de santé, de protection des consommateurs... . Les accords d'association aménagent également le droit de la concurrence en interdisant les ententes et les abus de position dominante. Ils exigent la suppression des monopoles publics, l'harmonisation du droit de la propriété intellectuelle et des procédures de certification conformément au droit communautaire et aux plus hauts standards internationaux. Les paiements courants en une monnaie librement convertible ainsi que la libre circulation des capitaux ont été admis comme étant des mesures qui permettent de renforcer la libre circulation des marchandises et de garantir des investissements directs étrangers. Des mesures de sauvegarde exceptionnelles et de durée limitée ont été prévues. La liberté d'établissement et de prestation des services a été également affirmée dans le respect des dispositions du GATS. Elle a été réduite à un objectif qui fera l'objet de recommandations des Conseils d'association. Seule la libre circulation des personnes reste exclue. Il ne s'agit pas d'une omission, mais plutôt d'une position bien déterminée des Etats membres de l'Union européenne afin de limiter les flux migratoires.

B - Acquis donnant naissance à l'acquis euro-méditerranéen

Dans un contexte de mondialisation, la projection d'un important nombre de domaines de l'acquis communautaire dans l'espace euro-méditerranéen a donné naissance à un système intermédiaire et hybride de "droit d'association". Ce droit emprunte une logique formelle de droit international complétée par une finalité matérielle d'harmonisation des ordres juridiques des Etats méditerranéens associés. De surcroît, la globalité du partenariat génère une coopération à fort coefficient multiplicateur permettant l'installation progressive et enchaînée du système à l'image d'un ensemble d'engrenages qui s'emboîtent. Il s'agit de "l'acquis euro-méditerranéen" dont la méconnaissance par un Etat associé déclenche des mécanismes de désarticulation et peut engendrer l'exclusion du système de l'Etat en question. Sept ans après le

lancement du partenariat euro-méditerranéen, le système est déjà déclenché et semble être irréversible.

L'expression "acquis euro-méditerranéen" a été utilisée pour la première fois, par la Commission de l'Union européenne, lors de la tentative échouée de l'adhésion de la Libye au partenariat. A l'occasion de la réunion de coordination du groupe arabe des Etats méditerranéens de Beyrouth en juin 1998, un accord a émergé sur la nécessité de renforcer la globalité du processus euro-méditerranéen en proposant la Libye comme membre à part entière. Divers contacts parlementaires dont notamment le forum parlementaire euro-méditerranéen réuni à Bruxelles en octobre 1998, ont permis d'introduire cette question dans la logique européenne. Le Parlement européen, lors de sa session plénière de mars 1999, a recommandé au Conseil d'inviter la Libye à participer à la conférence de Stuttgart si elle respecte ses engagements à l'égard de l'Organisation des Nations Unies et accepte *les principes de la déclaration de Barcelone*. En début d'avril 1999, la Libye a livré à la justice néerlandaise ses deux ressortissants soupçonnés de l'attentat contre le vol de la Pan Am. Ainsi, les sanctions internationales ont été suspendues et le Conseil européen a publié une déclaration, le 6 avril 1999, dans laquelle il a incité la Libye à accepter les principes de la déclaration de Barcelone pour pouvoir se joindre au partenariat. Des contacts de haut niveau ont été organisés et lors de la visite de la Troïka à la Libye, en septembre 1999, les responsables européens ont exigé l'acceptation par la Libye de *l'acquis du processus de Barcelone*. Les autorités libyennes ont commencé par le faire oralement puis par note verbale adressée à la Commission le 8 janvier 2000. Toutefois, le document libyen contient un paragraphe qui a suscité de vives perplexités à la Commission. Il s'agit de remarques formulées de façon prudente qui se limitent à observer que le problème israélo-palestinien a contribué à ralentir le processus de Barcelone et à demander s'il ne serait pas opportun que ces deux participants se mettent en retrait le temps de régler leur différend. Le 19 janvier 2000, la Commission a adressé à la Libye une demande de clarification de sa position de l'acceptation de *l'acquis euro-méditerranéen* afin de pouvoir entamer la normalisation des relations. Le 26 janvier 2000, une deuxième note verbale adressée

par la Libye à la Commission a annulé la précédente en expliquant que la question nécessite un ample examen. L'adhésion de la Libye au partenariat euro-méditerranéen reste depuis en suspens.

L'acquis euro-méditerranéen commence, à son tour, à inspirer et à influencer des intégrations commerciales sub-régionales. On mentionne dans un sens, les "accords d'association sud-sud" qui ont été conclus entre des Etats méditerranéens associés. Partant du cas de la Tunisie comme cas de référence⁴⁹, on peut noter la conclusion de trois accords de libre-échange avec l'Egypte en mars 1998, avec la Jordanie en avril 1998 et le Maroc en septembre 1999. Ces trois accords sont entrés en vigueur⁵⁰. Ils instaurent des zones de libre-échange au bout d'une période transitoire, fluctuant entre huit et dix ans selon les accords et en prévoyant un démantèlement progressif des tarifs douaniers par listes de produits. Les techniques adoptées s'inspirent amplement des accords euro-méditerranéens. On relève dans un autre sens, la création de la zone de libre-échange entre les pays arabes méditerranéens. Le Maroc, la Tunisie, la Jordanie et l'Egypte ont signé, à Agadir le 8 mai 2001, une déclaration portant création de cette nouvelle zone de libre-échange qui devrait être élargie aux autres Etats arabes méditerranéens, "tout en restant ouverte aux autres pays arabes⁵¹". Le processus euro-méditerranéen de Barcelone a enfanté le processus d'Agadir.

Quoique le partenariat se distingue de l'intégration générée au sein de l'Union européenne par ses moyens et ses objectifs propres, le droit communautaire représente dans la zone euro-méditerranéenne une importance particulière comme ordre juridique de référence. En schématisant, on peut rapprocher le partenariat à l'instauration

⁴⁹Notant que la Turquie et Chypre ont également conclus des accords avec des Etats du Machrek.

⁵⁰Ces accords sont entrés en vigueur peu de temps après leur signature. A titre d'exemple, l'accord avec la Jordanie est entré en vigueur en juin 1999 et l'accord avec le Maroc en septembre 1999.

⁵¹V. le texte de la Déclaration d'Agadir in. *Document d'Actualité Internationale*, n° 13 - 2001, p. 509.

d'un mécanisme de vol avancé dans l'espace euro-méditerranéen. Les Etats tiers possédant des moyens de vols jugés par la conjoncture désuets concourent à l'appui de l'Union européenne bénéficiant d'un système ultra perfectionné. L'acquis de l'Union européenne s'apparente, à ce niveau, à la part du savoir faire et de la technologie nécessaires à l'instauration de ce système de vol avancé. A la lumière de cette schématisation, il s'avère que la projection de la totalité de l'acquis de l'union européenne n'est ni nécessaire ni utile. Toutefois, au fur et à mesure de l'évolution de la mise en oeuvre du partenariat la projection peut s'élargir à de nouveaux domaines de l'acquis. C'est ainsi que la Commission de l'Union européenne a tenté, par sa communication de février 2002, d'étendre l'harmonisation des politiques et de réglementations relevant du volet économique du partenariat en vue d'un rapprochement plus rigoureux du marché intérieur⁵². Sous l'intitulé "d'une zone de libre-échange à un marché intérieur", la Commission a expliqué que "les perspectives liées à la création d'une zone de libre-échange ne pourront se réaliser pleinement que si elles sont accompagnées de mesures de soutien dans des domaines tels que l'harmonisation des normes et des règlements techniques, ainsi que des conditions environnementales, sanitaires et phytosanitaires". Elle a ajouté qu'une plus grande harmonisation du cadre réglementaire s'impose aussi dans d'autres domaines. D'autres domaines comme celui de la recherche et du développement qui ont un impact horizontal devraient être intégrés d'avantage. *Les mesures prises dans ces domaines peuvent ouvrir la voie à la création d'un marché intérieur euro-méditerranéen*⁵³". L'idée a reçu l'acquiescement des ministres lors de la conférence de

⁵²Le 23 septembre 1998, la Commission a commencé par émettre une communication concernant le partenariat euro-méditerranéen et le marché unique qui n'a pas eu de véritables échos à l'époque. V. COM (1998) 538 final. Cette même idée a été reprise par la communication de la Commission au Conseil et au Parlement européen du 13 février 2002 en vue de la préparation de la conférence de Valence dans son point cinq. V. SEC (2002) 159 final.

⁵³ Ibid. p. 16. Italique ajouté.

Valence et la Commission a été chargée d'identifier les domaines prioritaires de cette nouvelle phase d'harmonisation⁵⁴.

L'acquis de l'Union européenne et l'acquis euro-méditerranéen sont comme père et fils. Ayant un même air de famille, ils se ressemblent tout en gardant chacun ses caractéristiques. Les années qui passent leur apportent respectivement plus de sagesse et plus de maturité mais n'effaceront point le décalage d'âge qui les sépare.

⁵⁴Le programme de travail de la conférence de Valence stipule dans son point 12 que: "The Conference decided to welcome the launching of the Euromed Internal Market Programme and, in this framework, ask the Commission to identify priority areas where harmonisation with EU rules could be viewed as particularly useful". V. Valencia Action Plan, p. 7. Il importe de préciser que "le travail approprié de préparation et de suivi" des réunions résultant du programme de travail de Barcelone et des conclusions du Comité euro-méditerranéen du processus de Barcelone ont été confiés par la Déclaration de Barcelone aux services de la Commission. Ceci confère à la Commission de l'Union européenne une importance considérable dans la mise en oeuvre et dans le développement du partenariat euro-méditerranéen.

**THE EU'S POLICIES TO ENHANCE SECURITY AND
STABILITY IN THE MEDITERRANEAN REGION:
THE ROLE OF FUNDAMENTAL HUMAN RIGHTS
AND DEMOCRATIC FREEDOMS**

RODERICK PACE

A fundamental and long-standing principle of the EU's policies towards the Mediterranean region since the early seventies is that the enhancement of the region's security cannot be left entirely to the regional or sub-regional military balance of power or to military means alone. According to this perception, leaving aside the long standing Mediterranean conflicts (the Arab-Israeli question, Greek-Turkish relations, the Cyprus Question and the difficult relations between Morocco and Algeria that have exhibited a stubborn resistance to a solution and have to varying degrees acted as negative stimuli to the enhancement of regional-wide security) non-military measures in the political and economic fields are very crucial for the strengthening of overall regional stability. For this reason, the attainment of human rights and democratic principles was enshrined in the political and security basket of the Barcelona process on the EU's insistence. This positive measure led to a number of problems analysed in this paper, the worst being that having raised expectations the EU appears to have back-paddled preferring a soft approach on the issue.

The importance of human rights and democracy in the Euro-Mediterranean Partnership can only be adequately understood in the context of the EU's security context. Europe's assessment of its security risks in the Mediterranean region in the 1990s and beyond can be summarised thus:

- ❑ The likelihood of a north-south confrontation are remote; more likely are south-south crises;
- ❑ Many European governments are preoccupied by the threat posed by the proliferation of weapons of mass destruction in the region. But to counter this threat they can count on the continued presence of the USA in the region and NATO; the development of the Common European Defence

and Security Policy can make these issues surface to the top of the EU's agenda in the future.

- From a European perspective, the more serious and immediate threats emanate from political instability in the southern Mediterranean countries resulting from the socio-economic problems they face, caused mainly by demographic changes and insufficient economic growth. Political instability in the southern littoral states and sluggish economic growth, together or separately can send waves of economic refugees (or illegal immigrants) to Europe.
- Political turmoil in the southern states, under the banner of the poorly understood “Muslim fundamentalism” is contagious across frontiers and can lead to a domino effect, possibly also leading to the establishment of new governing elites in the southern states that might not sit comfortably with their European counterparts.
- The fear that key European countries with a sizeable Muslim community might be drawn into the vortex of the more violent shake ups in the southern states (e.g. France vis-à-vis Algeria and the rest of the Maghreb).

For these reasons, it became rather urgent on the EU side that the root cause of the instability in the region be vigorously attacked. This entailed that the economic and democratic transition in these countries should be encouraged to progress steadily with the hope that economic growth would eradicate poverty, international trade would strengthen trans-regional interdependence while increasing respect for democratic principles and freedoms would overcome authoritarianism. For centuries a strong belief has influenced European political thinking that democratic states based on a liberal, market economy are “less likely to go to war” and international stability can thus be enhanced by ensuring the spread of democracy and market economies.

On paper this formula, purposely simplified in this contribution for analytical purposes, looks logical and rational. A similar approach certainly helped stabilise Central and Eastern Europe, which had been under the sway of centralised political and economic

authorities for decades (some of these countries did not even have a democratic tradition). Since the fall of communism many have identified the main Mediterranean challenge as being that of introducing similar changes taking account of the different historic, economic, political, social and cultural conditions.

The EU's comprehensive response to these perceptions, images and expectations was the launching, after much internal debate and consultation with its partners, of the Euro-Mediterranean Partnership in 1995. Apart from aiming to tackle the challenges summarised above, another economic aim of the partnership was to help the EU consolidate a huge free trade area eventually comprising the whole of Europe and the Mediterranean region. This Euro-Mediterranean free trade area would rival in size, if not outsize, similar trading blocs being consolidated elsewhere in the world such as in North America and Mexico (NAFTA) and Asia. It might also be argued that the aim of attaining this goal often comes into conflict with the EU's human rights and democracy aims, in which case the latter will have to give way, particularly when its global rivals (the USA and Japan) make no such demands on the countries of their respective regional and economic spheres. Indeed, this may be an additional reason why the EU has often adopted a soft approach on human rights.

This paper seeks to focus on the security basket of the Barcelona Process and more narrowly on the question of human rights and democratic freedoms, which lie at the core of this basket. Broadly speaking the approach in this analysis is based on the observation made by many scholars of Euro-Mediterranean relations to the effect that the EU is caught between the contradictions of trying to promote human rights and change in the southern littoral states, while trying to stabilise the regimes in these same countries.

The International Context of the Launching of the Euro-Mediterranean Process

The problem with foreign policies is that the international context in which they are launched often changes very quickly but measures to adapt them to these changes tend to plod slowly behind

particularly when such policies are trapped in unplanned or unexpected major changes. That is what has happened repeatedly to the Euro-Mediterranean Partnership. The Partnership was launched in 1995 in an atmosphere of optimism. The vexed Middle East Problem and the Palestinian issue, that had bedevilled the EU's Mediterranean policies since the launching of the 'Global Approach' in the early 1970s, appeared to be slowly and painfully heading towards a solution. The atmosphere of reconciliation that had become manifest in most parts of the world following the fall of the Berlin Wall, except perhaps in the Balkans, also seemed to be having a positive effect on Mediterranean attitudes. In this fit of optimism it mattered very little that the Middle East problem was excluded from the Barcelona Process. After all, the problem was being dealt with successfully in a different forum and its exclusion from the Barcelona process was purposely planned to strengthen the probability of success of the latter (or of both).

But then the Middle East peace process stalled. Subsequently, following the start of the second *Intifada* in September 2000, the peace process began listing badly, eventually capsizing around the beginning of 2001 as a result of the rejection of the so-called "Clinton Plan". The negative effects of this slow and protracted death of the Middle East Peace process had meanwhile begun to spillover on to the Barcelona process itself, jeopardising its very existence. As relations between Israel and the Arab world worsened many Arab countries became increasingly inclined to practice "linkage" politics by tying progress in the Barcelona Process, particularly in the political and security chapter to progress on the Middle East problem. After five years of wrangling at Senior Official level, the *Euro-Mediterranean Charter on Peace and Stability* had to be put on ice until such time as progress in the Middle East would permit its adoption. Other key initiatives in the political and security basket had also to be toned down and sights and ambitions began gradually to be lowered. In response to these developments, the EU tried hard to salvage the rest of Barcelona by vigorously pursuing the conclusion of the bilateral free trade agreements with each of its partners in the region, (except Libya) and by encouraging them to conclude free trade agreements among themselves. With the bilateral accords between the EU and its

individual Mediterranean partners eventually concluded, the more difficult task of creating a free trade area among the southern littoral states commenced. The Agadir initiative aiming for the creation of a free trade area among key Arab states¹ of the region is a step in the right direction, but only the first one. Equally urgent and to a large extent conditioned by it, is the need to set in place a common system of rules of origin to facilitate south-south trade. The Agadir initiative is indeed still a site under construction.

When all is taken into consideration, it may be fair to say that an analysis of the Barcelona Process reveals that although it is still short of achieving its main targets, the economic leg of the three-legged Partnership² is the one where some perceptible progress has been registered in stark comparison with the other two baskets. This is interesting because one of the declared aims of the partnership from the very start was to achieve an even and balanced progress in all three baskets. Notwithstanding, it is still the declared aim of all the partners as recently reiterated during the 5th Mediterranean Foreign Ministers' meeting held in Valencia in April 2002, that balanced progress should be achieved in all three components of the process. The point made in this paper is that this has not been the case so far and progress on human rights and the democratic transition has been less than satisfactory.

Overall there has been a general failure of meaningful progress in the whole of the Political and Security basket, and not just in human rights and democratic freedoms. This is lamentable and has to be carefully dissected for any lessons that can be elicited. When the EU had originally proposed and launched the Partnership, apart from the general atmosphere of optimism which reigned, it was seeking to tackle a narrow range of priorities related above all else to its own security concerns, posed mainly by illegal immigration or the Mediterranean "boat people", the threat of terrorism and religious fundamentalism, the proliferation of weapons of mass destruction and illicit drug trafficking. It was to tackle, in addition

¹Egypt, Tunisia, Morocco and Jordan.

²The three legs or baskets of the Barcelona Process are briefly: political and security; economic and financial; social, cultural and human.

to these, the broader underlying security challenges that the EU had also entertained bold ambitions of strengthening the longer-term stability prospects of the region, and this by helping to buttress democracy and fundamental human rights in the southern littoral states. One could not but perceive a certain measure of “Fukuyaman” optimism in all this. The fall of communism led to the premature judgement that liberalism had triumphed (as indeed it had, but not so neatly) and the world’s outstanding problems could be resolved by the application of this successful remedy. European political thought had for centuries emphasised the link between democracy and peace and it was not therefore surprising that this thinking would also influence the EU’s approach towards the region. The main problem was that then, as of now, it was unclear how the EU planned to achieve these ambitious goals.

The Algerian crisis was already raging and the situation in that country served as a sufficient eye-opener to the Union that any attempt to introduce pluralism and democratic freedoms in the Arab world could in most cases lead to power being transferred through the ballot box to populist movements bent on ending the very pluralism which had facilitated their transition to political power and which they perceived or depicted as a creature of the West, to which they were opposed. But judging from the EU’s official declarations prior to and after Barcelona, hopes were indeed high that the economic transition in the southern littoral countries could somehow be yoked to a political transition towards increased democracy and human rights, both transitions being mutually reinforcing.

On the opposite shore of the Mediterranean sea, political leaders were convinced that through this policy the EU was trying to do nothing more than ride the tiger. They were frightened by this “new” emphasis, realistically perceiving such a policy as a recipe for losing political control.³ In addition to this legitimate concern, the southern littoral states did not look kindly on what they considered to be external imposition and intrusion in their

³See for example the report of Working Group 1, “*Security and Common Ground in the Euro-Mediterranean Partnership*”, EuroMeSCo, Paper 17, June 2002.

sovereignty and internal affairs. On top of all this, there are marked differences in perceptions between North and South that obstruct a meaningful dialogue on this issue. While addressing the European Parliament in June 2002, King Abdullah II of Jordan declared that his country “*is providing a model of political stability, democratic principles and the rule of law*”.⁴ But European perceptions of what remains to be done on the democratic front in Jordan are somewhat different. Political exchanges on democracy and human rights risk becoming a dialogue among the deaf, unless this gap is bridged. Furthermore, the Western media are wont to give a biased assessment of their own, as shall be discussed further on in this paper with respect to the recent referendum held in Tunisia.

These many differences in perceptions make a fruitful dialogue on human rights and democratic freedoms an arduous, sometimes impossible task. However there are other difficulties which cannot be ignored. For example, the threat of “Islamic Fundamentalism” whether a realistic or a bogus one may have been one of the primary causes for dampening the EU’s willingness to insist too strongly on human rights and democratic principles, while political leaders in the southern littoral states grasped the opportunity and used the spectre of “Islamic Fundamentalism” to justify their consolidation and further centralisation of power, concurrently also working upon the same fears to defend themselves against critical voices in Europe of their “misbehaviour”. Another widely held view was that a regime change in many of the southern littoral states might also jeopardise these countries’ economic transition toward liberal, market economies. It mattered less that while in many instances the transfer of power to the opposition in the southern states could lead to a strategic headache for the EU member states, it could also permit the establishment of new governments keen on tackling the causes of their peoples’ poverty more vigorously – with obvious dividends for Europe. Of course this is a hypothetical assertion since this road has never been explored. The problem in this case boils down to a question about Europe’s interest – whether it be ultimately better served through a

⁴ Remarks by His majesty King Abdullah II of Jordan at the European Parliament, Strasbourg, Wednesday, June 12th, 2002.

more ideologically hostile (possibly) southern littoral which is economically and socially stable or through a more amenable political elite which however is inept at tackling swelling problems and which might yet lose control of the situation in their countries?

But going back again to the Barcelona Declaration and its assertion that progress in human rights and democratic principles are crucially important in helping to establish a common area of peace and stability in the Mediterranean region, it is worth recalling that through this declaration, the EU and its Mediterranean partners undertook, among other things, to honour their long-standing obligations under the United Nations Charter and the Universal Declaration of Human Rights to which they all subscribe, to develop the rule of law and democracy in their political systems, to respect and guarantee the effective legitimate exercise of human rights and freedoms and to “give favourable consideration” through dialogue between the parties to the exchange of information on matters relating to human rights, fundamental freedoms, racism and xenophobia.⁵ Human rights and democracy clauses were also inserted in the bilateral Euro-Mediterranean Partnership agreements concluded between the EU and each of its Mediterranean partners.⁶ Similar commitments have been made on the insistence of the EU in the Lomé Convention binding it with the countries of the African, Caribbean and Pacific regions. These actions are consistent with Article 11 of the Treaty on European Union (TEU) which places the development and consolidation of human rights and fundamental freedoms as one of the objectives of the Common foreign and Security Policy (CFSP) and Article 177 of the Treaty Establishing the European Communities (TEC) which links

⁵Barcelona Declaration, Bulletin of the European Union, No 11, 1995, page 137.

⁶Agreement with Morocco: “Respect for democratic principles and fundamental human rights established by the Universal Declaration of Human Rights shall inspire the domestic and external policies of the Community and Morocco and shall constitute an essential element of this Agreement.” [OJ L 70 of 18.03.2000, page 3]; Agreement with Israel “relations between the Partners as well as all the provisions of the agreement itself, shall be based on the respect for human rights and democratic principles, which guides their internal and international policy and constitutes an essential element of this Agreement.” [OJL 147 of 21.06.2000, page 4].

development co-operation to the respect of human rights and democratic principles.⁷ Subsequent developments in the EU itself in the human rights sphere, as witnessed by the Treaty of Amsterdam, the Charter of Fundamental Rights (even though this does not enjoy legal force yet) and the Nice Treaty served to strengthen the EU's rationale behind the centrality of human rights and democratic freedoms in its foreign policy. But have the EU's foreign relations really become affected by these internal EU developments? And more to the point, what has really happened since human rights and democratic freedoms became an important part of the formal aims of the Barcelona process?

It may be argued that the pressures on the EU to include human rights and democracy clauses in the Euro-Mediterranean Partnership agreements was *quasi* irresistible and unavoidable given internal developments in the EU itself in the past couple of decades. At the same time it can also be argued that the introduction of these clauses in the agreements was not so timely given the Mediterranean realities at the time. In addition, it would also have been logical to expect that given their centrality in the EU treaties and the fact that they were inserted in the Partnership agreements, that significant progress would also be registered in their application in the Mediterranean region. The empirical data does not indicate that this has been the case.

Furthermore, the events of September 11th and the new emphasis on fighting terrorism may lead to the creation of "new" alignments that could see the process of democratisation in the region retarded further. The situation has to be watched carefully. In an article published in the *Chicago Tribune* of September 4th, 2002, attention was drawn to the fact that "*the terror war has US in dubious*

⁷Title V, Article 11, Treaty on European Union, "The Union shall define and implement a common foreign and security policy...the objectives of which shall be...to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms..."; Article 177, TEC, "Community policy in the sphere of development co-operation...shall contribute to the general objective of developing and consolidating democracy and the rule of law, and to that of respecting human rights and fundamental freedoms."

alliances".⁸ The correspondent's main thrust is that in securing the co-operation of many states in the global war against terrorism, the US had aligned itself with some of the worse human rights transgressors in the world. As Europe and the Mediterranean Basin states join in the effort against terrorism, one must be on the alert that the whole exercise does not transform itself into an alliance of convenience where under the pretext of fighting terrorism, some ruling governments take the opportunity to bash their opposition – among them human rights activists – with or without Europe's tacit agreement.

Another important factor has to be taken into consideration from this point onwards: American attitudes. The USA has always been the other important player in the region's politics and ignoring this fact is always fatal. As the USA strengthens its collaboration in the region in the service of the war against terrorism following the events of September 11th and as it prepares for possible war against Saddam Hussein, it would become increasingly difficult for the EU to make much headway in its policies when these differ markedly from those of the USA and some Mediterranean countries are willing and able to exploit the differences or transatlantic rifts.

Despite the pessimistic tone of this discussion the safer course seems to be that if ever there was a time for emphasising democratic principles and human rights in the Mediterranean region that time is now, when countries are engaged in responding to the terrorist threat. Europe has passed through periods of terrorism as intense or worse as that currently faced by many of the southern littoral states, but democracy was not suspended nor important economic reforms curtailed.

Given all these considerations, the EU's perceptible soft approach on human rights in the Euro-Mediterranean area becomes less comprehensible. Of course, empirical evidence suggests that the failure of human rights and democratic freedoms to make a significant impact in the region must not be blamed entirely on one

⁸Howard Witt, Chicago Tribune Senior Correspondent reporting from Washington, September 4th, 2002.

side or the other. Human rights and democratic freedoms seem to have fallen victim to the trade-off between securing them and achieving the other EU “priorities” such as that of contracting the southern littoral states’ co-operation in the fight against illegal immigration, illicit drug and arms trafficking and the war against terrorism. For example, the Conclusions of the Presidency of the last Euro-Mediterranean Foreign Ministers’ meeting held in Valencia were dominated by the Middle East crisis, the events of September 11th, the need to reinforce the political dialogue on defence matters and only after these, the renewed and perhaps ‘ritual’ commitment to democracy, human rights and the rule of law.⁹ The analysis here suggests that the goal of ‘common security,’ a much vaunted late arrival to the Barcelona process (recall that it was the EU’s security concerns which provided the initial impetus for launching the process), has definitely given way to the cause of maintaining regional stability by whatever means available, so long as both sides are kept happy; in other words a policy based on mutual self-interest aiming at securing the EU’s aims without rocking the regimes of the southern littoral. This policy doubtlessly yields short-term results and finds obvious political support among the political elites and decision-makers on both shores of the Mediterranean sea, but it may weaken the longer-term security prospects. Furthermore, it widens the gulf, because of the multiple misunderstandings it raises, and the obvious hardships to the southern populations which it helps perpetuate, as well as between the latter and the EU at the same time that the Union is striving to close this gap through the dialogue of civil society and the ‘dialogue of civilisations’. Indeed it is apt to ask what the longer-term security consequences are going to be for the region as a result of this policy of mutual back-scratching that is responding to the more contingent and opposed interests of current political elites? In what state will the region be left once these contingencies have changed again?

⁹Presidency Conclusions of the 5th Euro-Mediterranean Conference of Foreign Ministers, Valencia 22-23 April, 2002, Euromed Report, Issue No 42, April 26th, 2002.

A Case Example

To demonstrate the short-sightedness of this policy and its potential dangers, consider in this respect the economic vicious circle presented by the Foreign Investment-Democracy-Good-Governance nexus. The Mediterranean Basin countries, barring a few exceptions, have been losing out on Foreign Direct Investment (FDI) when compared to other emerging regions.¹⁰ Those Arab countries which are resource-rich and have a comparatively lower population are largely unaffected by this phenomenon since they can use their oil revenues to ensure a sufficient distribution of wealth in their country that is adequate enough to discourage certain forms of dissent because the most adverse forms of poverty are eradicated, while the authorities can also apply repressive methods to keep protest movements in check. Such countries (e.g. Saudi Arabia and the Gulf states) can also afford to strengthen internal political centralisation. But the lack of FDI has been one of the major factors that have negatively affected the region's economic growth prospects, particularly in those countries lacking sufficient oil resources. Declining economies have in turn produced problems that have fuelled internal opposition, which has been used by many of the Governments of the region to tighten their authoritarian grip, often strengthening bad governance in the process and the 'rentier state' that characterises most countries of the southern littoral. Economic transition is also significantly slowed down by such developments. As democratic principles and good governance pale into insignificance in these countries, or are slow to catch on, out goes one (but certainly not the only one) of the major attractions to FDI.¹¹ The shortage of FDI in turn fuels the economic downturn but social trends such as demographic changes, internal migration, unemployment and housing shortages in urban areas show no signs of abating in the face of the investment

¹⁰According to the "*Regional Strategy Paper 2002-2006 and Regional Indicative Programme 2002-2004*" of the Euro-Mediterranean Partnership", the figures for growth in trade and foreign direct investment in the Mediterranean region fall short of those being achieved by either the Central and Eastern European Countries and Latin America and opening to the world at large is proceeding too slowly." (page 11).

¹¹This is recognised in the Regional Strategy Paper, page 15.

drought. In the face of such a situation, the broadly recognised challenge lies in maintaining stability while carrying out deep political and economic transformations comprising the tackling of what have often been described as “infrastructural bottlenecks” such as in the transport, environmental, educational and social protection fields, restructuring of the public sectors, mobilising and emancipating the financial institutions and ensuring the basic instruments of economic good governance.

But what ‘political stability’ are we really talking about here? Is it of the kind that favours the existing political elites, many of whom are accused of corruption and *clientelism*, or have run out of ideas and the stamina to take on the challenge of change (“*spinta propulsiva*”)? ‘Political stability’ seems therefore to run counter to economic change and may also help retard it in many ways. In short ‘political stability’ undermines the longer-term prospects of more lasting political stability.

In the debate on current and future development strategy in the region it may be argued with some success that it is beneficial for the governments of the region to maintain authoritarian rule while carrying out economic changes, citing as examples the Chinese, Chilean or Far Eastern approaches (Singapore, S. Korea etc.). The problem with the Mediterranean Basin countries is that barring a few exceptions (e.g. Tunisia), authoritarianism has petrified both economic and political forces of change and no significant economic results have been achieved that can in a sense help ‘legitimise’ or somehow justify the increased centralisation of power that has occurred. A trade-off between increased economic welfare and lack of freedom is missing (except perhaps in Tunisia). On the contrary, in many cases social tensions seem to have been exacerbated further and ordinary citizens do not feel that their welfare has improved.

Raising Expectations

As has already been alluded to in this paper, the EU’s ‘human rights clauses’ in the Euro-Mediterranean Partnership agreements raise expectations that cannot be fulfilled and they thus open the

EU to the criticism of inaction or impotence. The EU's credibility thus suffers. This tends to reinforce the derogatory conception of the EU as an "economic giant but a political pygmy." On a positive note these clauses can theoretically serve as a 'safeguard' for the EU to resort to (or reach out for) in order to apply economic pressure on one or more of its Mediterranean Partners should their human rights situation threaten to escalate beyond acceptable levels. They may act as moderating factors on rulers, forcing them to exercise self-restraint and to check their excesses. But as an instrument for coaxing the Partner countries into registering sufficient progress on human rights and democratic principles, these clauses appear to have mattered very little, so far. To be effective they have to be linked to specific sanctions.

The Arab countries that have introduced some form of political reform have done so mainly in response to domestic pressures, not the threat of EU sanctions. Also such changes are not irreversible.¹² Furthermore the experience has been a mixed one as shall be seen below. The empirical evidence suggests this. Furthermore, in the light of the EU's 'soft' approach on human rights and democratic principles, what is the threshold of fundamental freedoms and democratic rights that have to be transgressed in a partner country for the EU to go into action with sanctions? The situation in Algeria has shown that this could indeed be very elastic.

Are the EU Institutions Pulling the Same Rope?

Another important factor is that the EU institutions themselves do not seem to be pulling the same rope. There appears to be a cleavage between the European Parliament and the Council on this issue. For example, the European Parliament's insistence on human rights and democratic freedoms is unquestionable, though not impeccable as shall be argued further on. In a resolution of February 1st, 2001 the Parliament stated that the Common Strategy

¹²For example, in Morocco the enthronement of King Mohammed was followed by a crackdown on the press particularly on reporting of the Western Saharan issue. Restrictions eased significantly from 2001 but will the pendulum swing back again?

towards the Mediterranean region adopted by the Feira European Council should accord priority to promoting human rights and democracy, direct investment and cultural dialogue.¹³ On the other hand the EU's Council of Ministers motivated no doubt by considerations of '*real politique*,' has consistently adopted a softer approach on human rights and democratic principles. At their meeting in Valencia last April, all that the Euro-Mediterranean Foreign Ministers could agree on as part of the *Work Programme* in the area of human rights was to "*encourage the continuation of the political dialogue on human rights by means of national and regional presentations. They also mandated Senior Officials to study the setting up of a more structured dialogue on this sensitive topic so as to increase its effectiveness and deepen the Euro-Mediterranean Partnership in this area.*" More concretely, the ministers agreed with the recommendation of the European Parliament to develop the parliamentary dimension of the partnership and to set up a Euro-Mediterranean Parliamentary Assembly.

Of itself the latter proposal is problematic as shown by Stelios Stavridis, who playing the role of the little boy in Hans Christian Andersen's story of the "Emperor's new Clothes" asked "*Are Southern parliaments real parliaments? That is to say à-la Western Liberal model. There is no real democracy in the South except in Malta and Cyprus. Israel is a problematic case as it is reminiscent of Western Europe during the colonial years.*"¹⁴ The legitimacy of this question, which Stavridis goes on to answer in his paper, is further corroborated by the evidence presented in this paper. Furthermore, when analysing the first two forums, Stavridis showed the somewhat high-handed manner in which the first two meetings of the Euro-Mediterranean Parliamentary Forum¹⁵ treated

¹³Resolution published in OJ C 267 of 21.09.2001.

¹⁴Stavridis Stelios, The first two Parliamentary Fora of the Euro-Mediterranean Partnership: an assessment, Jean Monnet Working Paper, University of Catania.

¹⁵The Euro-Mediterranean Parliamentary Forum is sponsored by the European Parliament and comprises a meeting between a European Parliamentary delegation, delegations from the national EU parliaments and 'parliamentary' delegations from the Mediterranean states. The last forum, the fourth, met in Bari

human rights issues. In the second forum “...*the really difficult issues of human rights violations were repeatedly ignored or countered by the (Moroccan) Chair.*” Face to face with this evidence, it seems that the European Parliament’s sponsorship of the forum does not fit its support for placing human rights and democratic principles as the first priority of the Barcelona process. The Valencia decision to set up a Parliamentary Assembly smacks of an exercise aiming to legitimise the illegitimate and removes yet another incentive for change in the southern littoral states: if parliaments can acquire democratic legitimacy without a *demos*, if they can be recognised even when they are neither properly elected nor when they do not have full legislative powers, how can they be stimulated to act as agents of change in their own countries?

Remedying the Situation

How can the situation be remedied? A start can be made on the basis of the Valencia Action Plan to set up as quickly as possible the structured dialogue on human rights and democracy. But then the ministers have already decided that the task should be entrusted to Senior Officials who would presumably follow the instructions of their national governments. We must therefore expect a lot of beating around the bush and if the officials’ performance follows the same patterns of behaviour as in the case of the Peace and Stability Charter then “the morning already shows the kind of day”.

On the other hand if the EU is really keen on making headway it must begin by assuming an effective leadership position, beginning by drafting a model agreement on the implementation of human rights and democratic principles, taking into account the particular situation of each partner, and then following this up with proper negotiations with those states able and willing to move ahead with reform, perhaps adding the incentive of increased economic and financial privileges for those partners that are ready to walk the extra mile with her. The proposed package could begin perhaps by first establishing what in reality is achievable on human rights and

in June 2002 and followed more or less the same lines as analysed by Stavridis in the paper quoted here.

democratic freedoms in the Mediterranean region in the short and longer terms. Once this is done, it is important to incorporate such goals in the EU's policy to make it both "possible" and credible. European citizens and tax payers have a right to know what their governments and the EU is doing on this issue in the Mediterranean region.

The third element is for the EU to definitely spell out what sanctions it would apply in case such goals are not met. It is also important for the EU to consider including such goals in the National Indicative Programmes (NIP) being concluded with each of the Mediterranean member states outlining the way the EU's development aid is going to be used. Alternatively it could take the form of a "Democracy NIP" negotiated with each partner individually in accordance with its individual circumstances. The underlying justification of this approach is that the Euro-Mediterranean Partnership is a two-way relationship and the Mediterranean Partners cannot plead 'non-interference' in internal affairs while expecting uninhibited access to the EU markets. There is no one-way traffic or complete autonomy in situations of interdependence such as the one being created in the Mediterranean region. The challenge is simple to comprehend, though less easy to implement: either all the countries of the Mediterranean Region work together to achieve each other's political and economic aims and interests, leading to a shared area of security and peace or they simply maintain their current minimalist approach with all its pitfalls. If a Regional Strategy Paper for the period 2002-2006 has been put together outlining the principal economic reforms and targets as well as a framework document for a "Regional Cooperation Programme in the field of Justice, in Combating Drugs, Organised Crime and Terrorism as well as Co-operation in the Treatment of Issues Relating to the Social Integration of Migrants, Migration and Movement of People" is it too much to press for parallel progress to be registered on the democracy-human rights front?

The exercise could take the form of drawing up catalogues of economic, political and social freedoms roughly corresponding to what are referred to as "first", "second" and "third" generation

rights, to be implemented in successive phases. The freedoms to be implemented in the first phase could include basic freedoms and safeguards for the individual such as freedom from arbitrary arrest, the establishment of an independent judiciary, fair and public trials, the humane treatment of prisoners, the banning of torture and the abolishment of the death penalty, women's rights and independent (from political manipulation) law enforcement agencies. Among the economic freedoms one could include rules of fair competition, arbitration, property and consumer rights as well as environmental and health standards. Social freedoms would include the effective right to education, health care and labour rights. The last phase could include fundamental political freedoms that lead to a pluralistic society, such as freedom of association, free and fair elections and free media. Constitutional changes that would see the complete transfer of power from monarchs or dominant political parties to democratic institutions could constitute the last phase of the political reform programme to be triggered off as soon as the initial phase has been successfully completed and per capita GDPs have crossed a designated threshold that is indicative of the economic progress achieved in that society. In this way the denial of full fundamental freedoms in the period of transition becomes justifiable by the fact that such freedoms are included in a definite programme of political change that will see them eventually concretised. Should such a programme be eventually agreed to, the EU's position on human rights and democratic principles will also look less ridiculous while a yard stick would have been established to measure progress on this score.

Of course such a proposal is open to debate and controversies but it may be more practical, certainly more credible than declared goals that are difficult or impossible to achieve, yet alone an open agenda with no commitments.

The Ambivalence of the EU Analysed Further

The EU's ambivalence and oscillations on its declared policy on human rights and democratic freedoms in the Mediterranean region

can be shown by the empirical evidence. The *2001 European Union Annual Report on Human Rights*¹⁶ is significant in this discussion both for what it says and for its deafening silence on a number of important issues regarding the Union's Mediterranean partners. Israel is castigated for the illegal settlements in the Occupied Arab Territories and its violation of human rights in Palestine. Syria is criticised for "the use of arbitrary detention, deficiencies in arrest and detention procedures, prison conditions and lack of freedom of expression, assembly and association." One may ask: "What other human right did Syria have to trample underfoot to prod the EU into action?" The EU's position on Syria is also rather confusing because while the Report claims that "*The EU welcomed the decision to release 600 political prisoners in 2000 but remained concerned over the large number still in detention*"¹⁷ the EU Commission was busily negotiating a partnership agreement with Damascus. When Lebanon and Syria failed to attend the Foreign Ministers' meeting in Valencia, the Ministers publicly regretted their absence but timidly "*showed respect for their decision*".¹⁸ This is stranger still when one considers that about a year prior to the Valencia meeting, Ambassador Johan Molander of Sweden, addressing the 57th Session of the Commission on Human Rights in Geneva on behalf of the EU Presidency (March 29th 2001) declared in no uncertain terms that "*The EU is ready to support all efforts aiming at greater political freedom and an improved human rights situation in Syria.*"¹⁹ The question is "how?" What kind of message has Syria been receiving from the EU on the crucial issue of democratisation and human rights? That the EU drives a hard bargain on this issue or that it is soft?

The examples shown above are not the only ones. However, for more documented evidence on the state of human rights and

¹⁶Council of the European Union, General Secretariat, *European Union Annual Report on Human Rights - 2001*, Office for Official Publications of the European Communities, Luxembourg, 2002.

¹⁷Ibid., page 63.

¹⁸Valencia Euro-Mediterranean Foreign Ministers meeting, Conclusion of the Presidency, point 16.

¹⁹Ibid., page 101.

democratic principles in the Mediterranean Partner countries, one is forced to resort to other sources, e.g the US Department of State for the individual country reports on human rights practices. Information supplied by the US Department of State shows that significant restrictions are placed on the ability of citizens to change their government in all the Arab countries although political freedoms vary from one Arab country to the other and according to the political system adopted in each (i.e. monarchy or republic). Restrictions are also placed on other freedoms such as those of expression, association and assembly. The press and media in most of the countries is restricted, particularly the domestic press. The judiciary in most cases is not independent. A summary of the main points made in the US Department of State Reports that are indicative of the state of democracy in the EU's Mediterranean partners are included in the attached Diagram.

The Diagram summarises what is perhaps common knowledge already and shows the amount of work that has still to be done to strengthen democracy and human rights in the southern littoral states.

Has Nothing Changed in the Southern Littoral States?

Faced with the picture just outlined it would be easy to say that nothing has changed in the southern littoral states over the past couple of decades or so. But this is not the case. Certain changes have taken place but these have to be analysed across the countries in the region and measured for their effectiveness in bringing about real political change. A few concrete examples will illustrate the case.

Beginning with the most recent 'controversial' issue, in Tunisia a referendum was held last May in which the people were called upon to approve a raft of constitutional amendments which if enforced could make a qualitative difference to them. These changes include strengthening judicial control over the police, humane treatment for those deprived of freedom, the inviolability of the home and so on. At the same time, however, other constitutional amendments approved in the referendum enable the

country's President, whose term in office was scheduled to come to an end in 2004, to help himself to another couple of terms thus ensuring that he will remain at the helm for quite some time in the future until he reaches the age of 75. New powers are given to the country's Chamber of Deputies. These changes are a step in the right direction but it has still to be kept in mind that in Tunisia the press is strictly controlled by the state and the electoral system is suspect given that in the 1999 elections the President polled no fewer than 99.44% of eligible votes. Another example is that an estimated 100,000 citizens, which is negligible by Tunisia's size, have access to the internet but then the two service providers in the country are run by persons with close ties to the family of President Ben Ali and web sites containing information critical of the Government are frequently blocked.²⁰ The emphasis of the Western Press on the Tunisian referendum was on the fact that President Ben Ali may have prolonged his rule by another decade or so. Little analysis was forthcoming about the effect of the other constitutional changes.

A cursory look at the rest of the Arab world shows that indeed many changes have been occurring. Naked repression is no longer favoured by the majority of the governments of the region. Forms of representative government are being tried in many of them: Jordan introduced municipal elections, Morocco's government is formed by a Party which was formerly in opposition, and despite the civil war elections to the *Majlis al-Sha'abi Al-Watani* were organised in Algeria last May - although the turnout at 46.2% was 19.4% down due to a boycott by the main opposition movements including the FIS which were banned from contesting. In all six parties and a number of independents are represented in the Majlis. However, the electoral process leaves much to be desired in all the Arab world. The dominant party or the party supporting the monarchy (or independents in the case of Jordan) invariably always win. Following the last election in Algeria the Constitutional Court

²⁰Source BBC at:
http://news.bbc.co.uk/1/hi/world/middle_east/country_profiles/791969.stm

declared a number of seats to have been elected in the Berber areas even though almost no votes were cast there.²¹

This study can go on to document such failings but the main point is to establish whether these changes are leading to improvements, a gradual democratisation, or to regress. Those who expect change in the Mediterranean region to be a linear progression are mistaken. But what can we make of what is happening? Are these changes genuine moves towards democracy or the calculated stratagems of ruling elites in their effort to survive by dampening the strongest forms of criticism? The research agenda on this aspect looks very interesting. These reforms have to be tracked, measured for their effectiveness over time and compared across countries and across time. Generalisations are not needed here; nor simplifications.

Conclusion

The arguments presented in this paper can be compressed in a few headline arguments. The EU, a community of states based on pluralism, human rights, democratic freedoms and the rule of law had really little choice but to emphasise these principles in its foreign policies. This is also one of the main aims of the Common Foreign and Security Policy. The EU's principles are based on a longstanding European philosophy that security and long-term stability cannot be achieved through the balance of power alone. Economic integration and democratic principles also strengthen regional or international stability because democratic countries are less likely to go to war against one another.

When the EU came to actually apply these principles in the Mediterranean region it encountered difficulties and had to back-paddle on them. A credibility gap opened up since expectations were raised that could not be fulfilled. Apart from a strong measure of ambivalence shown by the EU on the question of human rights and democratic principles, there are signs of a cleavage on this matter between the European Parliament and the Council. The

²¹ <http://psephos.adam-carr.net/algeria/algeria2002.txt>

EU's attempt to strengthen and perhaps hurry the democratic transition in the Mediterranean region has met the resistance of the partners themselves who fear their loss of political power. The consequences of the latter and its impact on the EU have not really been measured.

Changes in the Mediterranean region have nevertheless been occurring but their significance has to be measured across time and countries. It has to be established whether the changes are leading to a qualitative change or whether they are simply the adaptive measures of old regimes struggling for survival. What is very important is that despite these many difficulties it is important for the EU to emphasise democratic principles more forcefully in its foreign policy and not to allow any progress that has been registered so far to be reversed as a result of dubious alliances in the wake of the events of September 11 and the international fight against terrorism.

DIAGRAM

SOME INDICATORS ON THE OBSERVANCE OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS IN A SELECT NUMBER OF ARAB STATES OF THE EURO-MEDITERRANEAN PARTNERSHIP

Group 1 - Monarchical Polities

| | Morocco | Jordan |
|---|--|--|
| Freedom of speech and the press | Media are being allowed freedom to air views but some subjects such as human rights remain restricted and publications considered to be offensive can be confiscated. | Stringent restrictions are imposed on newspapers. Bans on certain books and newspapers are imposed by the Government. Academic freedom is also restricted. |
| Freedom of Peaceful Assembly | Most meetings require prior authorization by the authorities. Although most meetings can be held freely, the authorities can prevent those they consider threatening. | The Government restricts freedom of assembly. Prior permission is required before public events can be held. |
| Freedom of Religion | Most religions including Christians and Jews and other smaller minorities are allowed to practice freely. Koranic schools and mosques are kept under surveillance. | Some restrictions are imposed on freedom of religion. The three monotheistic religions are recognised but not the others. |
| Political Rights: The right of citizens to change the Government. | Citizens do not have the full right to change their Government. The King appoints the Prime Minister. Gradual improvements have been made to the electoral system but accusations of electoral fraud are still frequent. | There are significant restrictions on citizens' right to change their government. The King appoints and dismisses the Prime Minister, the cabinet and can dismiss Parliament. Executive power is vested in the King. |

Group 2 - Republics

| | Tunisia | Egypt | Algeria |
|---------------------------------|--|--|--|
| Freedom of Speech and the Press | Press freedom is restricted by direct and indirect methods. Local and international human rights activists are harassed and detained. A high degree of self-censorship is exercised. | This freedom is only partially restricted but certain limits cannot be exceeded. Heavy involvement of the Government in the media. | The state of emergency decree gives the Government broad authority to restrict press freedom and freedom of speech. |
| Freedom of Peaceful Assembly | Government imposes some restrictions on this right. | Government significantly restricts this freedom and the freedom of association. | Sharply curtailed since the 1992 emergency decree. |
| Freedom of Religion | Generally speaking Religions other than Islam are also free to practice. | Government places some restrictions on this right and mosques have to be licensed. Restrictions on Christian Coptic minority. | Islam is the only religion recognised by law although the Government has a de facto policy of tolerance towards other religions there are some restrictions. |

| | | | |
|--|--|---|--|
| Political Rights: The Right of Citizens to change the Government | In 1999, President Ben-Ali was elected president in the country's first multi-party elections obtaining 99.44% of the vote. The country has been dominated by a single party since independence in 1956. Reports of numerous irregularities in elections. | The People's Assembly the Shura Council, local government, the mass media, labour and the public sector etc are controlled by the National Democratic Party. The people do not have a meaningful right to change the government. | The military leaders of the country exercise complete control over the selection of the country's political leaders. The Wafa party is not legal due to attached ties with FIS. FIS is also banned. The last election held in 1997 showed signs of improvements as regards reliability of the electoral process. |
|--|--|---|--|

L'ÉVALUATION DU CADRE INSTITUTIONNEL ÉTABLI PAR LE PARTENARIAT EURO MÉDITERRANÉEN

JINAN LIMAM

“Méditerranée, mare nostrum, ont dit les romains ...pendant le mare nostrum des romains a fini par éclater et cette sorte d’appropriation par disparaître. La Méditerranée est devenue la mer des uns et des autres...¹”

La conférence de Barcelone de 1995² constitue l’acte fondateur d’une nouvelle ère dans les relations entre l’entité européenne et les Etats tiers méditerranéens. Le partenariat, terme à forte charge sémantique, est retenu pour qualifier cette relation. Le partenariat peut être défini³ comme un effort d’organisation de relations stables entre deux ou plusieurs entités (Etats ou ensembles régionaux). Il implique l’adhésion à un minimum de références communes, des rapports d’égalité entre les partenaires (dans le discours au moins), et une dynamique amenant à l’édification d’un avenir commun. Le partenariat est aussi un terme générique qui englobe, en réalité, plusieurs dimensions. Il y a la dimension politique et de sécurité, ayant la finalité de faire de la Méditerranée un espace de paix et de prospérité. Il y a aussi la dimension économique et financière qui vise à construire une zone de prospérité partagée. Il y a enfin une dimension sociale, culturelle et humaine en vue de développer les ressources humaines et favoriser

¹LADJILI -MOUCHETTE (J), *Histoire juridique de la Méditerranée, Droit romain, Droit musulman*, CERP, Tunis, 1990, pp18-19.

²La déclaration de Barcelone fût adoptée lors de la première conférence interministérielle euroméditerranéenne du 27-28/11/1995. Elle est de nature politique et sans force juridique. Mais progressivement les 27 partenaires ont convenu dans les conférences ultérieures que le processus de Barcelone constitue un acquis politique fondamental.

³RAUX (J), “Association et perspectives partenariales”, in *Le concept d’association dans les accords passés par la Communauté: essai de clarification*, (sous la dir) CHRISTOPHE-TCHAKALOFF (M-F), Bruylant, Bruxelles, 1999, pp89-137.

la compréhension entre les cultures et les sociétés civiles des deux rives de la Méditerranée.

Toutes ces dimensions du partenariat reposent sur l'intérêt conjoint des partenaires pour une stratégie de développement codécidée, cogérée et cofinancée.

Si la diversification du champ du partenariat ne pose aucun problème de compétence pour les Etats tiers méditerranéens du fait qu'ils sont pleinement souverains, la question est source de complexité pour la partie européenne en raison de sa nature composite et son système de compétences d'attribution. L'UE est en effet "multiple", il y a des compétences qui relèvent de la seule CE, d'autres de l'UE au titre du 2ème et du 3ème piliers et enfin des compétences qui relèvent des Etats membres. Le mode de représentation complexe de l'UE dans les structures servant le partenariat en est la preuve. Le partenariat euro méditerranéen se trouve dès lors directement affecté par les conséquences de la logique de la construction par pilier, adoptée au sein de l'Union européenne.

Par ailleurs le partenariat euro méditerranéen est servi par un réseau d'accords bilatéraux et verticaux appelés accords d'association conclus entre l'UE, ses Etats membres et chacun des 12 Etats tiers méditerranéen⁴. Cet aspect bilatéral ne se justifie qu'au niveau substantiel car sur le plan formel ces accords sont multilatéraux, ils sont conclus et ratifiés par l'UE, ses Etats membres et l'Etat associé. L'UE et ses Etats membres agissent comme une seule partie et parlent d'une seule voix, cette présence conjointe s'explique par la mixité des accords d'association et la mise en oeuvre du principe communautaire de partage des compétences. L'apport de Barcelone est la création d'un cadre multilatéral et durable engageant les 27 Etats partenaires en plus des institutions de l'UE. Cette dimension est venue compléter et étayer les accords d'association.

⁴Les accords d'association avec la Tunisie le Maroc Israël la Jordanie et l'accord intérimaire avec l'autorité palestinienne sont déjà entrés en vigueur. Les accords avec le Liban, l'Egypte, l'Algérie sont en état de ratification. Pour l'accord avec la Syrie il est encore en négociation.

Sans atteindre la complexité des structures des organisations internationales, le partenariat euro-méditerranéen s'est doté d'institutions qui symbolisent sa pérennité. L'étude du cadre institutionnel du partenariat implique une réflexion sur les organes créés et les fonctions qui leur sont attribuées. Bien que cette dimension du sujet semble être à première vue un simple instrument auxiliaire, il conditionne en réalité l'effectivité du partenariat. En plus, le degré d'institutionnalisation des structures et la nature des compétences ne sont que le reflet des rapports de force entre partenaires. Dès lors toute approche d'étude des institutions ne peut être neutre et purement descriptive. Ce qui apparaît comme procédural et de pure technique juridique est en réalité l'expression de choix politiques. Le système institutionnel établi dans le cadre du partenariat euro méditerranéen souligne en effet, tout en cherchant à l'atténuer, cette logique contradictoire d'inclusion-exclusion du Sud par le Nord⁵. Le partenariat serait t-il alors voué à être d'un point de vue politique une liaison entre partenaires inégaux? Il est donc légitime de s'interroger dans quelle mesure les structures bilatérales et multilatérales peuvent-elles être un instrument adéquat en vue de réaliser le partenariat euro méditerranéen?

Toute tentative d'évaluation du cadre institutionnel implique un bilan du partenariat euro méditerranéen, mais est ce le moment de faire des bilans. Le partenariat est en effet un processus, une dynamique, le temps paraît comme la dimension la plus déterminante.

S'il est relativement facile de dresser le schéma du cadre institutionnel gérant les accords d'association, il n'en est pas de même pour les structures du partenariat multilatéral. La facilité relative d'appréhender les institutions créées pour la gestion des accords d'association provient du fait que cette dimension du partenariat est profondément ancrée. Les premiers accords

⁵LANNON (E), "Le partenariat euro-méditerranéen. Eléments d'une analyse juridique", in *Le partenariat euroméditerranéen vu du sud*, (sous dir.) KHADER (B), L'Harmattan, 2001, pp 187-230.

bilatéraux de coopération entre la CEE et les pays tiers méditerranéens remontent aux années 70⁶, l'ex article 238 du traité CEE actuel article 310 CE en constituait le fondement. Ce même article grâce à sa formulation souple a donné lieu à une fleuraison permanente de modèles associatifs assez variés⁷ dans leurs structures et dans leurs finalités. L'association est en effet l'expression de la flexibilité et du pragmatisme du droit communautaire. Cette hétérogénéité nous incite à limiter notre étude aux seuls Etats méditerranéens non postulants à l'adhésion, seront donc exclus de notre étude la Turquie⁸ toujours candidat sine die à l'adhésion, Malte et Chypre qui figurent sur la liste des Etats concernés par l'élargissement de l'UE en 2004.

L'institutionnalisation constitue l'un des caractères essentiels de l'association. Elle implique la création d'organes communs et paritaires jouissant d'une autonomie de fonctionnement et disposant de certaines attributions pour réaliser les objectifs de l'association. Malgré cette parité juridique, les associés de l'UE, engagés individuellement, se trouvent diminués face à un bloc puissant et solidaire représenté par l'UE. Si la stratégie de l'UE d'entretenir des relations avec des regroupements régionaux en raison notamment du phénomène actuel de la multilatéralisation des relations internationales, a réussi à amorcer un dialogue inter-régional notamment avec le Mercosur⁹ et l'Asean,¹⁰ elle a

⁶Voir les accords de coopération conclus avec la Tunisie le 25-4-1976 :JOCE n°L 265/2 du 27/9/1978; avec le Maroc le 27-4-1976: JOCE n°L 264/2 du 27/9/1978; avec l'Algérie le 26-4-1976: JOCE n°L 263/2 du 27/9/1978 avec l'Egypte le 18-1-1977, avec la Jordanie le 18-1-1977, avec la Syrie le 18-1-1977 et avec le Liban le 3-5-1977.

⁷MANNAI (S), *Les accords d'association conclus ou susceptibles d'être conclus sur la base de l'article 238 CE: Essai d'une typologie*, Thèse de Doctorat, Nancy 2, 1995, p 2.

⁸Le but de l'association avec cet Etat est la création d'une union douanière visant à terme l'adhésion à l'UE ceci explique la spécificité du cadre institutionnel et l'importance des attributions qui lui sont confiées.

⁹Le Mercosur est le marché commun du sud de l'Amérique, entré en vigueur le 1-1-1995 et regroupant le Brésil, l'Argentine, l'Uruguay et le Paraguay.

¹⁰L'Asean est l'association des Nations du sud est asiatique, créée en 1967 et regroupant Brunei, la Malaisie, l'Indonésie, les Philippines, Singapour, Thaïlande et le Vietnam.

paradoxalement échoué au sud de la Méditerranée. Cette région demeure un espace peu structuré, la léthargie actuelle de l'Uma¹¹ en est l'exemple. Faute d'une structure de coordination, les pays tiers méditerranéens ont ainsi intégré ce processus individuellement. Une intégration horizontale entre les divers pays de la rive sud de la Méditerranée permettrait une plus grande puissance de négociation et donc davantage d'adhésion à la conception et à la gestion des instances multilatérales du partenariat. Pour l'instant ces structures multilatérales sont diffuses et peu identifiables du fait qu'il s'agit d'une création en pleine gestation d'où provient toute la difficulté de leur étude.

Ainsi si le partenariat bilatéral offre un système institutionnel assez structuré mais qui nécessite encore à être perfectionné (I), le cadre institutionnel multilatéral reste en revanche pour une grande partie à définir (II).

Première partie: Un cadre institutionnel bilatéral à perfectionner

Pour permettre une coopération régulière entre les parties, les accords d'association ont créé des institutions communes chargées de mettre en oeuvre ces accords. Ce lien institutionnalisé et permanent constitue d'ailleurs l'une des caractéristiques de l'association¹².

¹¹L'UMA est un regroupement régional composé par la Tunisie, le Maroc, l'Algérie, la Libye et la Mauritanie. Il est créé par le traité de Marrakech du 19-2-1989. Depuis des années l'UMA connaît un blocage aigu comme en témoigne le report du sommet au mois de juin dernier à une date ultérieure.

¹²D'après certains auteurs, l'association est "une forme de collaboration internationale caractérisée par son aspect institutionnel (Varoukakis); ou encore "une forme institutionnelle de coopération interétatique tendant à la formation d'un grand ensemble économique" (Luhaire), La définition de Pescatore se veut plus générale c'est "un lien permanent, général et institutionnalisé de coopération, consacrant une participation des pays tiers aux objectifs des Communautés. Voir PESCATORE (P), "Les relations extérieures des CE, contribution à la doctrine de la personnalité internationale des organisations internationales", RCADI, 1967, Vol II, Tome 103.

Les accords euro-méditerranéens d'association bénéficient d'un modèle institutionnel similaire même si une certaine adaptation selon les besoins et les spécificités des partenaires tiers méditerranéens demeure possible¹³.

L'étude des organes institués par les accords d'association implique en plus de l'étude organique une approche fonctionnelle portant sur les compétences de ces institutions dans la mesure où le bon fonctionnement de l'association dépend en grande partie des mécanismes mis en place. La structure particulière de l'association reflètera et conditionnera en effet la manière dont les compétences sont distribuées et exercées au sein du système institutionnel.

Cependant la mise en oeuvre des accords d'association a révélé que le modèle institutionnel n'est pas un "type idéal", l'existence de certaines défaillances dans la conception et le fonctionnement des organes de l'association expriment une certaine conception minimaliste du partenariat. Une appréciation de la structure des organes (I) et des compétences qui leur sont attribuées (II) s'avère dès lors nécessaire.

I Essai d'une description critique des organes institués par les accords d'association

Etant des organes communs émanant d'un accord bilatral, ils sont régis par le principe de parité et l'autonomie de fonctionnement¹⁴. Cependant une appréciation générale démontre que ces aspects positifs ne peuvent occulter les lacunes affectant la nature même des structures qui restent à diversifier (1) ainsi qu'une certaine

¹³La coopération sociale est plus développée dans les accords conclus avec la Tunisie et le Maroc, elle l'est davantage dans l'accord conclu avec l'Algérie (grâce à la création d'une structure spécifique) que dans les accords conclus avec les pays du Machrek du fait de l'importance des flux humains entre le Maghreb et la CE.

¹⁴BELHAJ-BOSTANGI (R), "Les organes institués par les accords d'association: Statut et fonctions", Communication présentée lors du colloque des 26-27 Novembre 1997 tenu à la FSJPS de Tunis.

lourdeur au niveau du fonctionnement des organes de l'association (2).

1 Des structures à diversifier

L'association est un lien juridique bilatéral entre des sujets de droit international, égaux juridiquement. Cela se traduit sur le plan organique par la mise en place de structures mixtes et paritaires aussi bien au niveau de l'organe central, le conseil d'association qu' au niveau du comité d'association et des autres organes subsidiaires tels que les groupes de travail.

Le titre VIII dans chaque accord est consacré aux "dispositions institutionnelles générales et finales". C'est dans le cadre de ces dispositions que sont institués les différents organes. L'accord d'association Tunisie-Union européenne, étant le premier accord signé a servi de modèle lors des négociations des accords ultérieurs, dans cette étude il nous servira donc d'exemple.

- Le Conseil d'association¹⁵

C'est l'organe principal, sa composition mixte est conforme au caractère bilatéral de l'association. Elle met en présence deux délégations : la délégation de l'Etat associé constituée au niveau ministériel et celle de l'UE, composée des membres du Conseil de l'UE et des membres de la Commission des CE. La représentation de l'UE par une délégation unique reflète la volonté de mener une politique cohérente envers les partenaires et de parler d'une seule voix¹⁶.

¹⁵Dans les accords de coopération on trouve la même structure, sous le nom du Conseil de coopération.

¹⁶CJCE, avis 1/ 94 du 15 novembre 1994, Rec. p I-5267, dans l'attendu n°108 la Cour rappelle que "lorsque la matière d'un accord ou d'une convention relève pour partie de la compétence de la Communauté et pour partie de celle des Etats membres, il importe d'assurer une coopération étroite entre ces derniers et les institutions communautaires tant dans le processus de négociation et de conclusion que dans l'exécution des engagements assumés. Cette obligation de coopération découle de l'exigence d'une unité de représentation internationale de la Communauté".

Par sa composition, le Conseil est un organe politique. Cependant la participation de fonctionnaires dans les délégations afin d'assister les membres du Conseil est admise¹⁷. Le souci d'ouvrir cette structure aux techniciens et spécialistes se confirme avec l'admission de la participation en qualité d'observateur d'un représentant de la BEI si la Banque est directement concernée par l'ordre du jour de la réunion. L'invitation par accord des parties de toute personne extérieure est également possible. La représentation des membres du Conseil empêchés est prévue, les sessions des représentants des ministres se tiennent au niveau des ambassadeurs, cela permet d'alléger le fonctionnement du mécanisme institutionnel de l'association. Cependant le Conseil doit se réunir au moins une fois par an au niveau ministériel¹⁸. Un système simple de secrétariat (composé d'un agent de l'UE et un agent de l'Etat associé) est prévu pour assister le Conseil, le même fut retenu pour le comité d'association.

- Le Comité d'association et les autres organes subsidiaires

Le comité est un organe paritaire, il se réunit au niveau des hauts fonctionnaires des deux parties associées, d'où son aspect technique.

Animés par une conception téléologique du cadre institutionnel de l'association, les accords ouvrent la voie au Conseil d'association pour créer "tout groupe de travail ou organe nécessaire à la mise en oeuvre de l'accord"¹⁹. En application de cette disposition un groupe

¹⁷Voir article 4 de la décision n °1-98 du conseil d'association UE-Tunisie datant du 14-7-1998 arrêtant son règlement intérieur.

¹⁸L'accord d'association UE-Tunisie est entré en vigueur le 1-3-1998, trois réunions ont eu lieu à Bruxelles: la première le 14-7-1998, la seconde le 24-1-2000, la troisième le 24-1-2002. Ainsi la périodicité des réunions du conseil a été affectée: de janvier 2000 à janvier 2002, il n'y a pas eu de réunions. Le Conseil peut également se réunir en session extraordinaire à la demande de l'une des parties.

¹⁹Article 84 de l'accord d'association UE-Tunisie.

de travail sur les affaires sociales a été créée en 1999 par décision du Conseil d'association UE-Tunisie.²⁰

Après ce bref exposé un constat s'impose, la structure institutionnelle demeure fortement imprégnée par le caractère intergouvernemental de l'association, elle est ainsi peu diversifiée dans sa nature. Cette déficience est révélatrice du "déficit démocratique" des accords d'association. Cela est d'autant plus paradoxal que la référence aux principes démocratiques est constante dans les accords et que leur respect en constitue le fondement. Il n'est pas prévu en effet de commission parlementaire mixte.²¹ Si on exclue le cas d'Israël, seule une allusion y est faite dans les accords, il n'est en effet question que de mesure utile que le Conseil prend "pour faciliter la coopération et les contacts entre le parlement européen et la chambre des députés"²².

De même les acteurs socio-économiques, pourtant au coeur de l'association, ne sont pas représentés dans une sorte de Comité mixte économique et social, seule une coopération entre le Comité économique et social de l'UE et la structure correspondante de l'Etat associé est prévue. Cette déficience structurelle n'est pas de nature à généraliser et à ancrer le dialogue, car les institutions restent fermées devant les acteurs clés dans la mise en oeuvre de l'accord tels que les opérateurs économiques, la société civile, les organisations intergouvernementales...

Si les structures sont appelées à se développer au fur et à mesure que l'association évolue, le mode de fonctionnement garantit-il l'effectivité espérée?

2 Un mode de fonctionnement à alléger

²⁰JOCE, 5-10-1999, L-258-28. Un groupe de travail sur les affaires sociales et les migrations a été créé par le Conseil d'association UE-Maroc.

²¹Contrairement aux accords de l'UE avec les PECO, cela s'explique sans doute par la nature particulière de ces accords en tant qu'antichambre à leurs adhésions à l'UE.

²² Article 85 de l'accord d'association UE-Tunisie.

La logique volontariste de la coopération intergouvernementale égalitaire par essence (égalité de jure) justifie le mode de fonctionnement du Conseil, du Comité et des autres organes subsidiaires. Les frais de fonctionnement de ces organes sont répartis entre l'UE et l'Etat associé conformément à la règle de parité. Le respect de la souveraineté des parties et l'absence de tout caractère supranational se manifeste à travers la règle de l'unanimité²³, retenue comme la seule procédure de prise de décision et l'exercice alternatif de la présidence des organes²⁴. Les effets de telles modalités sur le fonctionnement des organes de l'association sont mitigés. Si la présidence tournante des organes, exercée alternativement pour une année par un membre du conseil de l'UE et un membre de l'Etat associé assure des rapports égaux entre associés, la prise de décision à l'unanimité, bien qu'elle garantisse la parité et l'égalité entre associés, risque d'être une cause de blocage du processus décisionnel. Chaque délégation possède en effet le droit de veto comme force de dissuasion ultime. La menace de paralysie est d'autant plus sérieuse que le Conseil d'association est la seule institution possédant de véritables pouvoirs décisionnels. Si l'abandon de l'unanimité est improbable, son allègement est possible notamment par la création d'organes investis de pouvoir de décision. Ceci permettrait une certaine déconcentration des pouvoirs et d'établir par conséquent un équilibre institutionnel.

II Les compétences des organes

Les organes institués par les accords d'association sont investis d'une fonction principale qui leur est commune: la mise en oeuvre des accords (1). Compte tenu des difficultés qui peuvent survenir lors de l'application et de l'interprétation des accords, un mécanisme de règlement des différends, confié exclusivement au Conseil d'association est prévu (2).

1 La mise en oeuvre des accords, fonction paratagée

²³ Article 80§3 de l'accord d'association Tunisie-UE.

²⁴ Article 82§3 de l'accord d'association Tunisie-UE.

Les organes chargés de la mise en oeuvre des accords d'association disposent d'un pouvoir décisionnel par définition contraignant et d'un pouvoir de recommandation, dénué de force juridique mais qui génère une obligation morale pour les parties²⁵. La répartition des compétences entre le conseil et le comité est hiérarchisée, la compétence de principe revient au conseil, le comité ne dispose que d'une compétence d'attribution.

Le Conseil d'association en sa qualité d' "institution qui assure l'application et le développement progressif du régime d'association" dispose d'un pouvoir de décision "pour la réalisation des objectifs fixés par l'accord, et dans les cas prévus par celui-ci". Ainsi l'attribution d'un pouvoir décisionnel au conseil est subordonnée à ces deux conditions cumulatives, ayant pour effet de restreindre le champ d'intervention du conseil²⁶. Dans la pratique, le conseil use de ses prérogatives notamment pour appuyer le processus de libéralisation économique, il est responsable de la mise en oeuvre de la zone de libre échange et des différentes politiques qui la complètent, notamment la mise en place et le contrôle de la politique de la concurrence de l'association. En dehors du domaine économique, les compétences décisionnelles du conseil sont très limitées.

Dans la dimension politique de l'association, le conseil demeure l'organe principal pour l'établissement d'un dialogue politique axé sur des principes tels que la démocratie, le pluralisme politique, l'Etat de droit et le respect des droits de l'homme et des libertés fondamentales. Ce dialogue est établi à différents niveaux, au niveau ministériel principalement dans le cadre du conseil d'association, au niveau des hauts fonctionnaires et au niveau des

²⁵Voir LYCOURGOS(C), *L'association avec l'union douanière: un mode de relations entre la CEE et les Etats tiers*, PUF, 1994, p 50.

²⁶Contrairement aux institutions de gestion des accords instituant une union douanière. Le conseil dispose en effet d'une compétence générale pour prendre des dispositions nécessaires à la réalisation des objectifs de l'accord. La différence dans les prérogatives de ces deux types de conseil s'explique par la différence des régimes juridiques et des finalités de l'association- zone de libre échange de celle de l'association-union douanière.

représentants diplomatiques²⁷. L'activité du conseil en la matière relève de la soft law dans la mesure qu'il sert de forum pour discuter des questions politiques entre associés sans prendre pour autant des décisions contraignantes ce qui constitue l'une des limites de l'association.

La relativisation actuelle de la prééminence du Conseil sur le Comité, en vigueur dans les accords de coopération, s'est manifestée notamment par l'attribution expresse d'un pouvoir de décision au comité d'association pour la gestion de l'accord sous réserve des compétences attribuées au conseil. La gestion implique le suivi de l'application des accords et la supervision de leur mise en oeuvre sur le plan pratique aussi bien au niveau politique, commercial, économique et humain.

Les décisions des organes peuvent être publiées au journal officiel des CE et au journal officiel de l'Etat associé si le conseil le décide, cela relève donc davantage de l'exception que de la règle. Cependant cette faculté a été interprétée différemment par les associés. L'exposé des divergences en la matière est important puisqu'il nous conduit à nous interroger sur les retombées de ces décisions dans les ordres juridiques respectifs de l'UE, de ses Etats membres et de celui de l'Etat associé. Notre approche, se voulant brève, se contentera de poser quelques éléments de réflexion.

La pratique de l'UE en ce qui concerne la publication s'est développée depuis l'arrêt Sevince²⁸. La cour a posé la règle selon laquelle la non publication d'une décision prise par un organe institué par un accord international ne fait pas en soi obstacle à son invocabilité juridictionnelle dans la mesure où elle confère des droits suffisamment précis à un particulier. Une telle position est doublement utile, elle garantit les droits des particuliers et incite les parties contractantes à une publicité plus large des décisions prises dans le cadre de ces organes.

²⁷ Voir article 5 de l'accord d'association Tunisie-UE.

²⁸ CJCE, 20 septembre 1990, Sevince, aff. C-192/ 89, Rec, 1990, I-3641.

Cette jurisprudence est étayée par le principe de transparence, érigé en droit positif dans le traité CE(article 255). Depuis 1998,certaines décisions du Conseil d'association ont été prises, trois d'entre elles ont été publiées au JOCE²⁹.

La CJCE précise également qu'elle est pleinement compétente pour interpréter une décision prise par un organe institué par un accord international, au même titre que l'accord qu'elle vise à mettre en oeuvre, dès lors que la décision se rattache à un accord qui fait partie intégrante de l'ordre juridique communautaire³⁰. Dès lors les actes juridiques pris par les organes des accords d'association font partie intégrante de l'ordre juridique communautaire, de celui de chaque Etat membre et des Etats associés.

Si l'articulation entre "droit de l'association" et l'ordre juridique communautaire est posée en ces termes qu'en est-il des Etats associés?

Si on prend l'exemple tunisien, aucune décision n'a été publiée au journal officiel jusqu'à maintenant, le Conseil n'aurait pas autorisé la publication. Dès lors quel serait l'effet de ces décisions dans l'ordre juridique tunisien? Peut-on parler de leur invocabilité juridictionnelle?

Aucune décision n'a été rendue en la matière.

Toute solution doit prendre en considération l'obligation faite aux parties de l'accord d'association "de prendre toutes les mesures nécessaires à l'exécution de ces décisions".³¹ Il serait opportun que

²⁹Il s'agit de la décision n° 1/98 du 14/7/1998 arrêtant le règlement intérieur du Conseil et à laquelle a été annexé le règlement intérieur du comité d'association (JOCE, n° L 300, du 11 novembre 1998, p.20 et ss.).

La décision 2/99 du 3 septembre 1999 portant création d'un groupe de travail sur les affaires sociales (JOCE ,n°L 258, du 5 octobre 1999,p 28). Et la décision 1/99 du 25/10/1999 relative à la mise en oeuvre des dispositions concernant les produits agricoles transformés (JOCE, n°L 298, du 19/ 11/1999,p 16 et ss.)

³⁰ CJCE, 21 janvier 1993, Deutsche Shell, aff.C-188/91, Rec, I- 363).

³¹V. article 80 de l'accord d'association en ce qui concerne le Conseil d'association et l'article 83 en ce qui concerne le Comité d'association.

le juge tunisien en tire de cette disposition les conséquences escomptées et qui convergeraient vers l'invocabilité du "droit de l'association". Cependant il faut rappeler que pour l'instant le système juridique tunisien ne reconnaît pas l'effet direct des règles internationales et par conséquent l'applicabilité directe des décisions du conseil d'association n'est pas possible.

Cette différence entre les deux ordres juridiques crée une situation de distorsion entre les droits des particuliers selon qu'ils font partie de l'entité européenne ou de l'Etat associés. Ainsi, mettant en place deux parties qui demeurent distinctes, l'application et l'interprétation des accords peuvent générer des conflits. Un mécanisme pour désamorcer ces tensions est indispensable.

2 Le règlement des différends, apanage du Conseil d'association.

Un litige opposant l'UE à un Etat associé sur une question d'interprétation ou d'application d'un accord d'association ne peut trouver de solution que selon les principes de droit international public.

Les accords d'association présentent une similitude quant au mode de règlement des différends, ils privilégient un système léger et fortement volontariste.

Pour résoudre un différend le premier moyen est la négociation politique au sein du Conseil d'association. L'arbitrage ne constitue par conséquent qu'un mode subsidiaire de règlement des différends car c'est seulement en cas d'échec d'une solution à l'amiable que les parties font appel à l'arbitrage. Chacune d'elles a le droit de notifier à l'autre partie la désignation d'un arbitre, celle-ci est tenue de désigner à son tour un deuxième arbitre dans un délai de deux mois. Ces deux arbitres sont rejoints par un troisième arbitre, désigné par le Conseil d'association d'un commun accord.

Une fois le collège arbitral constitué, il se réunit pour examiner le fond du litige. Ses décisions sont prises à la majorité et donc le

droit de veto est exclu. La sentence arbitrale est contraignante pour les parties au différend.

A priori ce mécanisme d'arbitrage ad hoc privilégie la souplesse, cependant plusieurs lacunes font craindre son dysfonctionnement³². La première est relative à l'ambiguïté des délais pour prendre une décision; aucun accord ne fixe le délai dans lequel le collège arbitral doit se prononcer. La seconde, plus sérieuse, est relative à la désignation du deuxième arbitre, car l'accord d'association ne prévoit pas le cas où la partie défenderesse ne désigne pas un deuxième arbitre. La solution pourrait être la prise de mesures unilatérales, autorisées par l'accord d'association, et cela pour préserver leurs intérêts. Mais le véritable blocage pourrait résulter de la procédure de désignation du troisième arbitre par le Conseil d'association. Comment en effet ce même Conseil incapable de trouver une solution négociée, peut se mettre d'accord pour désigner d'un commun accord le 3ème arbitre?

Les accords d'association sont déjà entrés en vigueur et pourtant l'arbitrage demeure inutilisé. Est ce par ce qu'il n'y a pas eu de conflits sérieux amenant à la mise en oeuvre de l'arbitrage ou est ce la preuve de la prééminence de la voie diplomatique et informelle sur le mode formel et juridictionnel de l'arbitrage?

En effet la recherche d'un compromis se comprend d'un point de vue strictement politique - les parties au litige veulent en effet garder la haute main sur la gestion d'une crise plutôt que de confier son dénouement à un collège arbitral qui échappe à leur emprise³³. Cependant cela peut correspondre sur le plan juridique à un compromis boiteux³⁴ car le pays tiers associé n'est pas à même de

³²LEGER (PH), "Le règlement des différends relatifs à l'interprétation et à l'application des accords d'association." In *Les accords euroméditerranéens et leurs effets sur le droit des associés*, Colloque de la FSJPS de Tunis du 26/27 novembre 1997.

³³Ces critiques sont formulées par GAUDISSERT (L) et HENDE (V-D), "L'arbitrage et le droit européen", Actes du colloque international du CEPANI du 25 avril 1997, Bruylant, Bruxelles, 1997, p 145.

³⁴ Ibid.

contrebalancer l'influence de l'entité européenne au sein de ces organes. Ainsi les intérêts des particuliers et des opérateurs économiques privés peuvent être sacrifiés sur l'autel du compromis politique.

Le non recours à l'arbitrage dans les accords d'association pourrait être dû aux défaillances inhérentes au système de règlement des différends. Dès lors une réflexion sur les correctifs éventuels est souhaitable. Les parties à l'accord d'association peuvent s'inspirer de modes de règlement plus effectifs tel que le mécanisme de règlement des différends établi dans le cadre de l'OMC. Ce système est simple, pragmatique et efficace, il garantit par ailleurs une plus grande égalité entre les parties au litige. Lorsqu'une partie contractante demande à l'organe de règlement des différends la désignation d'un panel pour examiner un litige, cela est fait d'une façon quasi automatique³⁵.

Le panel transmet son rapport, pour adoption, à l'organe de règlement des différends, dans un délai normal de soixante jours. Une procédure d'appel est également prévue, un organe d'appel permanent est créé³⁶.

Avec un mécanisme aussi développé, les chances de règlement des litiges sont plus élevées.

De ce qui précède, il apparaît que le cadre institutionnel de l'association est dominé par le conseil d'association, il monopolise en effet la création du droit de l'association et le règlement des différends. Cette centralisation pourrait conduire à un déséquilibre institutionnel qui risque de bloquer l'association. La réforme des institutions de l'UE, entamée par le traité d'Amsterdam, visant l'établissement d'un équilibre institutionnel et d'une légitimité

³⁵Puisqu'il faudrait pour pouvoir empêcher la constitution du panel une décision de l'ORD à l'unanimité y compris la partie plaignante ce qui est difficilement réalisable.

³⁶Voir BOURGEOIS (J-H), "Some reflections on the WTO dispute settlement system from a practitioner's perspective", *Journal of International Economic Law*, 2001, pp 145-154.

démocratique pourrait servir de modèle de référence pour toute réflexion sur le futur des institutions du partenariat euro méditerranéen.

Deuxième partie: A la recherche d'un cadre institutionnel approprié au partenariat multilatéral

L'innovation de la déclaration de Barcelone était la mise en place d' "un cadre multilatéral et durable fondé sur un esprit de partenariat dans le respect des caractéristiques, des valeurs et des spécificités propres à chacun des participants"³⁷ dans le but de faire de la Méditerranée un espace de paix et de prospérité. En dépit de ces objectifs ambitieux, une appréciation générale des moyens déployés révèle que le partenariat multilatéral dans son état actuel est modeste et limité (I). Ce paradoxe nous incite à sonder les perspectives d'avenir du cadre institutionnel. L'élaboration d'un réseau institutionnel plus structuré et plus équilibré figure désormais dans l'agenda des réunions euro méditerranéennes (II).

I L'état actuel de l'institutionnalisation du partenariat

Si l'apport de Barcelone était l'institutionnalisation des relations multilatérales, il convient de préciser toutefois qu'il s'agit d'une institutionnalisation embryonnaire (1), plus orientée vers l'Union européenne que vers ses partenaires tiers méditerranéens ce qui constitue une déformation de la notion même de partenariat (2).

1 Une institutionnalisation embryonnaire

Le réseau institutionnel prévu par la déclaration de Barcelone est peu fourni, son degré d' institutionnalisation est modeste. Ce qui a été établi est une structure institutionnelle légère, souple, peu identifiable au point qu'on peut s'interroger s'il s'agit vraiment d'une institutionnalisation.

³⁷La déclaration de Barcelone, adoptée lors de la conférence euro méditerranéenne du 27/28 novembre 1995.

La structure principale est la conférence ministérielle euro méditerranéenne³⁸. C'est une réunion diplomatique qui se tient en moyenne une fois tout les deux ans³⁹ entre les ministres des affaires étrangères des 27 partenaires et le vice président de la commission européenne. Des invités de la présidence peuvent également assister, à ce titre la Libye⁴⁰ ainsi que le président de l'UMA étaient présents à la conférence de Valence. Aussi bien par leur composition que par leur attributions, les conférences des ministres des affaires étrangères ont un caractère politique. Les conférences visent en effet à formaliser le contenu du partenariat en définissant ses orientations et ses programmes d'activité.

Il convient de souligner que la délégation européenne bien que multiple parle d'une seule voix et représente une seule position (élaboré au préalable au sein du conseil de l'UE) sur les questions débattues dans la conférence, en revanche les délégations des 12 pays partenaires se présentent individuellement sans concertation préalable. A défaut d'un regroupement régional, qui servirait à unifier les positions une tentative de coordination au sein du groupe arabe a été entreprise, elle consiste en la désignation d'un porte parole.

L'apport de Barcelone réside dans la création à côté des conférences des ministres des affaires étrangères une catégorie de réunions plus spécialisées ce sont les conférences ministérielles sectorielles. On compte une quinzaine de réunions depuis 1996 dans des secteurs variés tels que le commerce, la coopération

³⁸Ce type de réunion diplomatique n'est pas en soi une innovation pour les Etats maghrébins, en effet depuis 1990, le groupe des Dix fût institué. Il réunissait les ministres des affaires étrangères des Etats de l'UMA et ceux des 5 pays européens riverains de la Méditerranée (Espagne, Italie, Portugal, France et Malte). Puis il s'est élargit en 1992 aux 12 Etats membres de la CEE.

³⁹La conférence de Barcelone: 28/11/95; la conférence de Malte: 16/4/97; la conférence de Stuttgart:15-16/4/99; la conférence de Marseille: 15-16/11/00; la conférence de Valence : 22-23/4/02.Il faut en ajouter deux autres réunions au niveau des ministres des affaires étrangères:la réunion de Palerme du 4-5/6/98 et celle de Bruxelles du 5-6/ 11/01.

⁴⁰La Libye est le seul pays maghrébin qui n'a pas encore intégré le processus de partenariat euro méditerranéen.

industrielle l'environnement, la culture, la santé, l'énergie⁴¹...Cependant la fréquence et la nature des sujets débattus dans ces réunions, restent à revoir compte tenu de l'étendue du partenariat.

En plus de ces conférences au niveau ministériel, une autre instance diplomatique a été instituée c'est le Comité Euro Med. C'est un organe important dans la direction des aspects régionaux du processus de Barcelone. Sa fonction est de préparer les conférences ministérielles et de décider les actions à mener dans le cadre du programme de travail fixé par la conférence euro méditerranéenne. C'est l'instance du suivi et de la mise en oeuvre du partenariat. Le comité est un organe mixte, il se réunit au niveau des fonctionnaires des Etats membres de l'UE (La réforme du Comité a été décidée lors de la Conférence ministérielle de Malte en 1997 pour inclure tous les représentants des Etats membres de l'UE), de la Commission et des douze pays partenaires méditerranéens. La présidence est assurée par le président du conseil de l'UE. La participation des observateurs est également admise, la Libye assiste aux travaux du comité à ce titre. Le Comité se réunit deux fois pendant chaque présidence du Conseil de l'UE. Ces réunions trimestrielles ne suffisent pas pour assurer le suivi de toutes les activités dans les trois volets multilatéraux du processus de Barcelone.

D'autres "structures" plus techniques et moins formelles sont créées pour traiter les différentes dimensions du partenariat. Deux centres d'intérêts peuvent être cernés, les relations politiques et sécuritaires et la coopération économique et commerciale. Une structuration de ces dialogues est ébauchée, des comités de travail sont mis sur pied.

Pour l'étude des questions politiques, des réunions de hauts fonctionnaires chargés des questions politiques et de sécurité sont

⁴¹A titre d'exemple 4 conférences sur la coopération industrielle ont été organisées (Bruxelles, 1996; Klagenfurt, 1998; Limassol, 2000; Malaga, 2002), 2 sur le commerce (Bruxelles, 2001; Toledo, 2002), 2 sur la question de l'eau (Marseille, 1996; Turin, 1999).

prévues. La création de groupes ad hoc est également possible, le premier qui fut créé est le groupe ad hoc sur le terrorisme. En matière de commerce, des groupes de travail ont été institués par les conférences des ministres de commerce, tels que le groupe de travail sur les mesures commerciales pour l'intégration régionale et le groupe de travail sur le commerce des services.

D'autre part la volonté d'intégrer des acteurs non étatiques dans la dimension politique s'est manifestée par la création d'une structure technique, l'euro-Mesco en 1996, qui est un réseau d'instituts de politique étrangère intégrant 35 institutions non gouvernementales.

En ce qui concerne la concertation interparlementaire, la déclaration de Barcelone, soucieuse de la légitimité politique du processus qu'elle déclenche, a opté pour une solution "minimaliste". A défaut d'instituer un parlement euroméditerranéen, elle a prévu un dialogue sans structure institutionnelle spécifique entre le Parlement européen et les parlements des partenaires méditerranéens. Des contacts similaires et réguliers entre le Comité économique et social de l'UE et les structures équivalentes dans les Etats méditerranéens sont également décidés.

L'absence de structures permanentes dont le fonctionnement est autonome et l'inexistence d'un organe jouissant de pouvoir décisionnel rend l'implémentation du partenariat difficile. En effet l'activité des structures multilatérales se caractérise par la prépondérance de la soft law, un droit mou composé d'actes non contraignants ou revêtant un caractère programmatique voir même déclaratoire⁴².

La précarité de la structure institutionnelle est aggravée par l'inégalité entre les partenaires.

⁴²AUVRET-FINCK (J), "La PESC au service des droits de l'homme", in *De la communauté de droit à l'union de droit. Continuités et avatars européens*, (sous dir.) RIDEAU (J), LGDJ, 2000, p 313.

2 Des structures orientées vers l'UE

Si la parité est le principe de base régissant les organes mixtes des accords d'association, les structures servant le partenariat sont caractérisées par leur asymétrie et leur verticalité, elles renvoient par conséquent à des rapports d'inégalité⁴³. Plusieurs éléments nous incitent à nous interroger sur la consistance de l'esprit de partenariat dans ce dialogue multilatéral, conçu, initié et financé par l'UE. Le partenariat se fonde en effet sur un financement communautaire, le programme MEDA et les prêts de la BEI. Le développement du cadre institutionnel dépend par conséquent des institutions européennes. Ce mode d'organisation obéit à une logique largement orientée vers l'UE plutôt que vers la méditerranée entière.

Au niveau structurel, la présidence du comité est confiée exclusivement à la présidence du conseil de l'UE, la fréquence de ses réunions est également dépendante de celui du conseil de l'UE. En l'absence de secrétariat, le suivi du partenariat est assuré par les services de la commission européenne.

Au niveau de la détermination des structures à créer, étant dépendante du financement communautaire, la création de toute structure répond plus aux attentes des Etats européens qu'aux celles des partenaires du sud. La réflexion sur le développement des institutions semble être l'apanage de la seule UE. Deux exemples peuvent être avancés. Si la création d'un groupe ad hoc sur le terrorisme en 2001 est justifiée par l'importance de cette question pour tous les partenaires, il n'en demeure pas moins qu'elle s'insère dans une logique de l'Europe qui tend à privilégier l'aspect sécuritaire dans ses relations avec ses voisins de la rive sud de la Méditerranée.

D'autre part l'absence d'une approche globale institutionnalisée sur la migration, en dépit de son omniprésence dans les relations euro maghrébines traduit le découplage entre la réalité et le cadre

⁴³LANNON (E), préc, pp 216-230.

institutionnel du partenariat⁴⁴. En effet compte tenu de la différence entre les attentes des pays arabo-méditerranéens et celles de l'UE, et de l'ancrage des instances multilatérales dans la logique de l'UE, la création de structures est largement influencée par la volonté de l'Union qui dispose du privilège de qualifier les questions prioritaires nécessitant d'être traitées par une structure spéciale.

Une intégration entre les divers pays du sud méditerranéen leur assurerait une plus grande puissance de négociation.⁴⁵ Cependant l'hétérogénéité des partenaires méditerranéens et la complexité des enjeux et des affinités politiques au Machrek et au Maghreb ont toujours constitué un frein à la création et au développement de telles instances.

II L'état prospectif des institutions

Lors de la Conférence de Valence la volonté de conforter le cadre institutionnel s'est manifestée. Dans le but de rétablir le véritable esprit de partenariat, des propositions sur le développement et la démocratisation du cadre institutionnel existant sont déjà formulées (1).

D'autres en revanche, figurant dans le projet de la charte euro - méditerranéenne pour la paix et la stabilité, sont axées sur le renforcement des structures du partenariat politique et de sécurité (2).

1 Vers l'adequation du cadre institutionnel

Conscient des déficiences structurelles du partenariat multilatéral, la Conférence de Valence, bien que jugée décevante par certains, a réussi à lancer un projet de réforme des "institutions" visant le

⁴⁴Une conférence ministérielle est prévue en 2003 sur la migration et l'intégration sociale des émigrés.

⁴⁵KHADER (B), " Le partenariat euro méditerranéen : le processus de Barcelone, une synthèse de la problématique", in *Le partenariat euro méditerranéen vu du sud*, (sous dir.) KHDER (B), L'Harmattan, 2001, pp 13-52.

renforcement de l'institutionnalisation des organes existants. En effet l'organisation des "institutions" existantes est revue pour garantir une certaine continuité dans les travaux en vue d'atteindre l'effectivité espérée. Des réunions ad hoc de fonctionnaires sont prévues avec la participation des directeurs des ministères des affaires étrangères des 27 partenaires et des représentants de la Commission européenne. Les réformes visent également à rendre le processus dans sa conception et dans ses structures plus accessible aux partenaires tiers méditerranéens. La restructuration du Comité euro-med est prévue pour inclure les partenaires tiers méditerranéens dans l'élaboration, la conduite et l'évaluation des programmes et projets décidés par la Conférence. La discussion de l'agenda des prochaines réunions sera considérée comme un thème permanent dans chaque réunion du Comité euro-med. Le principe de parité dans la présidence du Comité devrait être applicable car il constitue l'essence même du partenariat.

Dans le but d'ouvrir le partenariat sur la société civile et aux opérateurs économiques et de lui conférer par conséquent une légitimité politique jusque là lui faisant défaut, la conférence de Valence a repris certaines revendications des forums civils, tenus en marge des conférences officielles (Marseille⁴⁶, Bruxelles, Valence). Ces forums ont épinglé l'inconsistance, le déséquilibre du cadre institutionnel qui a pour cause principale la prépondérance de son aspect intergouvernemental. Par conséquent la conférence de Valence a appuyé les propositions tendant à la démocratisation du partenariat par la création notamment d'un parlement euro-méditerranéen. Cette structure parlementaire pourrait être investie d'un double rôle de contrôle des autorités responsables de la mise en oeuvre du processus de Barcelone et de forum de discussion sur le partenariat entre parlementaires. Ces parlementaires sont le relais indispensable vers les opinions publiques et constituent par conséquent un facteur d'ancrage du partenariat.

⁴⁶Voir synthèse de l'atelier transversal instruments du partenariat (forum civil de Marseille du 10-12 novembre 2000),
http://ourworld.compuserve.com/homepages/Erwan_Lannon/forum5.htm

En ce qui concerne les institutions de financement du partenariat multilatéral, ils n'ont pas encore vu le jour malgré l'appui des Etats tiers méditerranéens à ce projet depuis les années 80. Cela s'explique certainement par l'intérêt modeste de l'Union européenne pour le sud méditerranéen, comparé à celui montré envers les PECO, engagés dans un processus plus ambitieux, l'élargissement. Cela est apparu au grand jour lorsque la BERD fût créée rapidement alors que les maghrébins ont réclamé vainement la création d'un fonds maghreb-CE⁴⁷. Le projet de créer une Banque euro-méditerranéenne pour la promotion de l'investissement et du développement économique refait surface à valence, il est mis à l'étude.

Cependant le trait essentiel de ce processus d'institutionnalisation semble converger vers la multiplication des groupes de travail et des structures ad hoc spécialisées dans les divers volets du partenariat, ce qui correspond à une institutionnalisation à géométrie variable, sans une conception global. Cela laisse transparaître une approche multidimensionnelle, forgée au gré de l'évolution du contexte international et régional, la décision de créer un groupe de travail spécialisé est largement tributaire de la conjoncture politique dans la Méditerranée.⁴⁸ L'institutionnalisation présente ainsi un caractère plus réactif que stratégique.

2 Vers une institutionnalisation plus poussée du volet politique et de sécurité

La priorité à un partenariat politique et de sécurité plus structuré et par conséquent plus efficace est dictée par un contexte mondial marqué par la recrudescence de l'option du "tout sécuritaire." La Méditerranée identifiée comme une "région complexe"⁴⁹ fait

⁴⁷BEN EL HASSAN ALAOUI (M), *La coopération entre l'Union européenne et les pays du Maghreb*, Nathan Paris 1994, p168.

⁴⁸LANNON (E), préc, pp 216-230.

⁴⁹"Stratégies communes de l'Union européenne pour les pays tiers: suggestions et critiques de Javier Solana", Europe Documents, n°2228 du 31 janvier 2001.

l'objet d'une stratégie commune⁵⁰ adoptée par le Conseil européen le 19 juin 2000⁵¹. L'UE n'étant pas le seul acteur sur scène, se trouve concurrencée par plusieurs organisations présentant également leurs propres approches de la sécurité en Méditerranée tels que l'OTAN et l'OSCE. Le processus de Barcelone, par le biais du projet d'une charte euro méditerranéenne pour la paix et la stabilité, soumis sous la forme d'un document de travail informel aux ministres des affaires étrangères réunis à la conférence de Stuttgart, a présenté quant à lui une conception structurée de la sécurité en Méditerranée.

La charte servira "à la mise en oeuvre des principes de la déclaration de Barcelone lorsqu'il s'agira de questions de paix et de stabilité." Elle introduira des mécanismes décisionnels appropriés qui renforcent le cadre institutionnel existant". Bien que les structures instituées par la charte s'inscrivent dans une logique de complémentarité, elles seraient en vérité des organes de décision de la dimension politique et de sécurité du partenariat. Le cadre de ce dialogue politique multilatéral serait les "réunions périodiques au niveau des ministres et des hauts fonctionnaires, des "groupes ad hoc" qui peuvent être créés pour accomplir des tâches spécifiques. Les ministres des affaires étrangères se réuniraient "périodiquement ou chaque fois que des situations ou des événements particuliers l'exigent afin de se concerter et de prendre des décisions visant à promouvoir le partenariat." Les hauts fonctionnaires seraient "chargés de préparer et d'assurer le suivi des réunions ministérielles". Le projet de la Charte est peu innovant par rapport au fonctionnement du processus de Barcelone puisqu'il ne prévoit pas de structures permanentes et se contente des réunions périodiques intergouvernementales. La seule avancée serait l'attribution de compétences décisionnelles. Ces propositions

⁵⁰Le traité d'Amsterdam a introduit dans le TUE l'instrument des stratégies communes. L'idée était de créer un instrument établissant la vision globale de l'UE en matière de relations extérieures dans le moyen ou le long terme. Les premières stratégies communes sont adoptées pour des régions géographiques entourant l'UE telles que la Russie, l'Ukraine, les Balkans et la Méditerranée.

⁵¹Stratégie commune à l'égard de la Méditerranée 2000/58/PESC, JO n°L 183 du 22/7/2000, p5.

demeurent encore assez floues et doivent être approfondies et mises au point. Il faut attendre l'adoption de la charte et sa mise en oeuvre pour pouvoir apprécier l'effectivité de ces nouvelles structures. La conjoncture politique dans la région marquée par la situation d'occupation et d'agression faite par un partenaire -Israël- contre un autre partenaire -l'Autorité palestinienne- éloigne encore d'un cran l'adoption de ce texte.

Le développement de la politique européenne de sécurité et de défense ouvre la possibilité à l'UE d'avoir une capacité autonome d'action et des moyens militaires et de jouer par conséquent un rôle politique plus important en Méditerranée en appuyant notamment les mécanismes de prévision des conflits dans cette région. Ce rapprochement avec les efforts tentés pour organiser une sécurité européenne dotée d'une capacité opérationnelle permettrait d'éviter une extension éventuelle de l'OTAN, symbole de la puissance américaine dans l'espace méditerranéen⁵².

Conclusion

En l'absence d'une intégration horizontale de la région sud méditerranéenne, les pays associés de l'UE se livrent pour l'heure à une concurrence attisant rivalité et surenchère entre eux au détriment de leurs intérêts. Le renforcement du processus d'institutionnalisation du volet multilatéral du partenariat amorcé à Valence ainsi que l'état des structures des accords d'association seraient positivement influencés si des regroupements régionaux existaient. Le Maghreb par le biais d'un UMA réformé pourrait constituer le ban d'essai d'une relation de Communauté à Communauté. La situation actuelle de "non Maghreb" a favorisé l'apparition d'autres alternatives notamment le "groupe d'Agadir" en Mai 2001, qui était positivement accueillie par l'UE. Cette initiative n'ayant pas l'objectif de se substituer à l'UMA, vise la création d'une zone de libre échange entre quatre pays sud méditerranéens partenaires de l'UE: la Tunisie, le Maroc, l'Egypte et la Jordanie.

⁵²LANNON (E), préc p 216-230.

L'aboutissement de ces projets conduirait à une institutionnalisation plus structurée et surtout plus égalitaire du partenariat. Cependant il ne faut pas céder à trop d'optimisme. Le partenariat demeure un pari⁵³, il comporte des contradictions entre la logique intergouvernementale et la logique citoyenne, entre la logique d'assistance et celle d'une zone de prospérité partagée, entre les soucis de codéveloppement et les soucis sécuritaires qui font partie prenante de la donne surtout après les attentats du 11 septembre 2001. La conjoncture régionale marquée par le drame palestinien est en elle même peu favorable à l'approfondissement d'un dialogue structuré entre les deux rives de la Méditerranée. Il est donc indispensable que les parties parviennent à surmonter leurs divergences d'appréciation à propos de cette question⁵⁴ en s'appuyant sur la légalité internationale.

Finalement une question persiste, qu'attend les partenaires impliqués dans le processus de Barcelone du partenariat?

Les attentes des uns et des autres demeurent en effet fort différentes. Leur identification sincère est très importante dans la mesure ou elle permettra d'apprécier à leur juste valeur les progrès de l'institutionnalisation de ces relations. Seule une véritable compréhension des intérêts mutuels et une sécurité euro-méditerranéenne coopérative, négociée pourrait surmonter ces antagonismes et faire de la Méditerranée un espace de paix et de prospérité partagée.

Abstract

An important and wide -ranging euro-mediterranean agreement was signed in october 1995. A euro-mediterranean conference was held on 27-28 november 1995 in Barcelona involving the member states and twelve mediterranean non-member states. It adopted the Barcelona declaration establishing a wide-ranging partnership

⁵³KHADER (B), préc pp34-35.

⁵⁴KHADER (B), *L'Europe et la Palestine: des croisades à nos jours*, Paris, L'Harmattan, 1999, pp 519-528.

process including political, security, economic, financial, social, cultural and human dimensions. The Barcelona process has a bilateral dimension served by the euro-mediterranean association agreements. They have been signed first with Tunisia, Israel and Morocco, now they involve nine mediterranean countries. A joint association council and association committee have implementation and dispute settlement functions.

The intergovernmental aspect of these organs prevails so reflection on the insertion of other actors is necessary. Concerning the multilateral partnership, this is based on an embryonic institutional framework which is widely dependant on the European Union in its conception, financing and organization. The ambitious project to reform these structures has been launched in the Valencia Conference in order to deepen the institutionalization and its democratization.

**EU INTEGRATION AND THE ENVIRONMENT IN THE
MEDITERRANEAN: A LEARNING PROCESS AND
OPPORTUNITIES FOR CO-OPERATION**

RANA IZCI

The forthcoming enlargement of the European Union (EU) recalls various questions not only in the candidate and member countries. Both challenges and opportunities, which might presumably arise from this process, have been at the centre of some heated and lively debates and disputes in world politics. It is very clear that whatever the consequences of this process might be, more states will take part in shaping the future of Europe in a wide range of fields. Environment, in this context, is considered as one of the biggest challenges of the enlargement. Various reports and studies indicate that institutional, financial and legislative challenges are on the way.

What is more, the European Union has several times stated its intention to be a leading environmental actor in the world though this commitment obviously seems an ambitious political goal with serious socio-economic repercussions. Therefore, candidate countries will find themselves, particularly after accession, in a more enlarged environment even if not surrounded by it physically. It would not be wrong, however, to argue that regional and global efforts to solve many environmental problems were not restricted to the environmental concerns and policies of the European Union. Nevertheless, the European Union has developed a wide-ranging body of environmental legislation, and its own way, concentrated on facing the challenges simply caused by human activities. The sixth environmental action (2001-10) programme with its spectacular *title Environment 2010: Our Future, Our Choice* is once more accentuating the priorities and objectives of the environmental policy and global assessments made at the European level. Moreover in a document prepared by DG Environment, (Directorate General Environment) environment was clearly portrayed as “one of the areas where the candidate countries most need to catch up with EU standards” (DG Environment, May 2002: 5). After defining the significance of environment in the accession

process in that way, DG Environment also stated the following “Despite the progress made over the last twelve years, the countries still face substantial challenges in environmental protection” (DG Environment, May 2002: 5).

Questions like why and how environment has become a global issue recently or why the European Union wants to play the role of an important global environmental actor or whether the European Union is successful in formulating and implementing the necessary environmental measures and policies are far beyond the scope of this paper. However, it should be noted that the European Union has intended to accommodate the requirements of different sectors and environmental concerns. The Fifth Environmental Action Programme (1992-2000), which was titled “Towards Sustainability,” was a good point of reference to demonstrate this commitment at the European level. Furthermore at many intergovernmental meetings, particularly in the last decade, the importance of sustainable development was enshrined in the presidency conclusions as well. In the Presidency conclusions of the Gothenburg European Council, for instance, it was stated that sustainable development was an essential objective under the Treaties and that it requires global solutions (European Commission, 2002)¹. Within this framework, a consultation paper for the preparation of a European Union strategy for sustainable development proposed several topics to be included in the European Sustainable Development Strategy. Among other topics, the management of natural resources has a special importance for a region like the Mediterranean in which water scarcity and loss of biodiversity are of immense concerns. Mobility, land use and territorial development are also on the agenda of the European Sustainable Development Strategy. Hence, in a region like the Mediterranean, where tourism plays an important economic role and where high rates of urbanisation threaten the ecologic systems, the outcome of this strategy will presumably be remarkable.

All these issues plainly illustrate that Mediterranean candidate countries should accommodate their development and

¹ Gothenburg European Council, 15 and 16 June 2001.

environmental considerations to avoid falling into the trap of development-environment conflict at European Level. Otherwise environmental benign neglect - at best - would be the operative term and their concerns for development might be regarded as “bargaining strict environmental protection for more funds”.

The initial aim of this paper is not to detail the important events concerning the emergence and development of environmental policy at the European Level. However, providing a brief historical sketch of some developments will throw particular light on the current issues. Particularly if one seeks to evaluate the impact of the Acquis Communautaire in the Mediterranean, it is not possible to disregard how development issues overshadowed environmental concerns in the Southern countries for a while. The basis for most of the environmental legislation in these Southern EU Member States is clearly European legislation. Moreover, domestic influence on the emergence and development of Environmental Policy at the European level was too big to deny particularly at the early stages. The roots of the existing environmental legislation were in many cases based on environmentally proactive Northern country concerns and policy styles. These leading states, or environmental pioneers, still have considerable influence on policy formulation, priority-determination and environmental measures concerning the EU Environmental Policy. However it is also interesting to see that leading countries are also confronting some institutional adaptability and compliance problems.

These two points evidently ascertain that the ever-growing body of European Union environmental legislation is increasingly turning into a very strong and compelling agent influencing national environmental policies in different ways even though domestic influences at the European level are still remarkable. New candidate states cannot escape from the outcomes of the two level game either. Moreover, recent studies demonstrate that Environmental Policy at the European Level requires certain models that Member States have to strictly comply with. These studies also indicate that environmental legislation may produce diverse effects in different environmental sectors and Member States have certain problems in several environmental sectors not

only in transposing but also in implementing some environmental directives.

The main argument of this paper is, therefore, that Mediterranean states should not consider the transposition of environmental legislation as a mere technical transposition issue. It is certainly more than adopting a sum of environmental measures. In some way it means becoming a part of the environmental concerns of the European Union with reference also to the individual concerns of Member States before enlargement. Moreover, it should be noted that environmental rules, principles and norms are still evolving and changing the direction of EU policies to address the current environmental challenges. Therefore, sector-specific studies will offer new insights on the impact of the *acquis Communautaire* and increase the possibility of smoother adaptation patterns in the candidate countries.

Given the distinct hydrological and ecological characteristics of this semi-closed basin, in combination with the high level of maritime traffic, trans-boundary pollution-control and risk-management could not be accomplished without co-operation in the Mediterranean region. Otherwise all efforts would inevitably turn into futile and costly problems. Last but not least, this paper suggests that intensified and expanded co-operation with other Mediterranean states (Member States, associated states or third states) will also assist Mediterranean States to evaluate their state of environment more efficiently and to make projections on their current and future environmental and socio-economic needs. Indeed creating forums for discussion with Member States on environmental issues could prevent any feeling on the Southern side that their policy concerns are not addressed adequately at the European level.

The *Acquis Communautaire* and the Euro-Polity: A learning process

The existing Euro-polity with the exception of few intergovernmental policy spheres heavily depends on the *acquis communautaire*. Hence transposing, then, implementing and

enforcing the *acquis communautaire* is the *sine qua non* principle of being a Member State. In the Commission own words:

The approximation of law is a unique obligation of membership in the European Union. It means that countries aspiring to join the European Union must align their national laws, rules and procedures in order to give effect to the entire body of EU law contained in the *acquis communautaire*”(European Commission, 2001: 1).

However one of the most important and disputed notions of the EU environmental policy is still the implementation failure. So far it has been certainly open to endless reinterpretations of institutional capacities of member states along with environmental considerations and awareness within the member states. Moreover it is always argued that there are certain cultural, administrative and socio-economic differences that constitute the very basis of Northern and Southern environmental perspectives, hence policies.

...These cultural and administrative differences in the South have discouraged a serious strategic approach to environmental protection. These countries also tend to suffer from weak environmental infrastructure and expertise and it is here that the Southern countries are most distinguished from the Northern ones ” (Cini, Porter, and Pridham, 1995 : 311).

The ‘Mediterranean Syndrome’ has been one of the catch-all phrases used to describe North-South differences in many aspects within the European Union. Moreover it was until very recently particularly used in regard to the environmental policy implementation failures in the Southern states². Although questions

² In Cini, Porter and Pridham (1995: .311) while trying to illustrate the Northern and Southern concerns and policies they referred to the definition for the Mediterranean Syndrome that was used in La Spinaza and Sciortino: “The differences between Northern and Southern Europe run deeper than socio-economic backwardness. Cultural distinctions pin-point key differences in the way that the Southern states structure and run their political systems. This is characterised by a reactive and sometimes consensual policy style and a

on formulation of the environmental policy and (in) efficiency of the proposed measures for implementation at the European level were indeed considered another set of problems surrounding the issue, the following statement also clearly and briefly explains why South-North differences with regard to environmental concerns have constituted the main core of the implementation failure for a very long time.

“Environmental standards advocated and legislated for were generally aimed at environmental problems that were prevalent in the North, problems that were a consequence of cramped industrial activity such as acid rain. Problems that were specifically “Southern” such as soil degradation and forest fires were not considered of much importance. This factor becomes more important when one considers that a large proportion of the directives were drafted over the course of the 1970s in the first wave of environmental legislation. Of course at this stage in the EU’s history there was no defined Southern European lobby, with the Greeks joining the then EC only in 1981 and the Spanish and Portuguese in 1986. And it is evident in recent years that Germany has been proactive in the EC in pushing for stronger environmental controls such as over packaging and large combustion plants. For these countries, environmental legislation is considered a “foreign product”. In Italy there was a certain reluctance that environmental legislation was really a legitimate function of the European institutions, at least until the SEA brought environmental policy clearly and unequivocally under the umbrella of the European Treaties” (Cini, Porter, Pridham, 1995 312:313).

tendency to focus on abstract principles rather than policy outcomes. Indeed La Spinaza and Sciortino (1993) have identified what they see as a Mediterranean Syndrome in relation to environmental policy. This, they argue, involves: 1) a ‘civic culture’ which sanctions non-cooperative and non-compliant behaviour, 2) administrative structures and traditions which make the enforcement of regulative as well as distributive policies difficult and often haphazard; and 3) viscous, fragmented, reactive and party-dominated legislative processes”.

However, Mediterranean syndrome kinds of answers to non-compliance problems were soon proved to be deceptive. From the very beginning it was well known that behind non-compliance problems and implementation failure and ignorance or reluctance in the environmental field lay a set of thorny interrelated problems; trade, development, industrial structures, policy styles are some of them to list. Nevertheless, detailed studies on the reasons for non-compliance and difficulties in implementation and enforcement of EU environmental policy in Member States have offered very compelling and also contesting explanations for the state behaviour, and challenged the commonly held views on the EU Environmental Policy³.

It is certain that environmental policy is not a ‘foreign product’ anymore in Southern Member States, or a forced obligation, but more work has to be done in order to integrate environment into other policy considerations so that Mediterranean states can be more successful in raising their environmental concerns at the EU level.

Candidate countries might have various problems in transposing (and then implementing and enforcing) the existing European environmental legislation for different reasons. They might have sound grounds to complain about the “means” and “ends” of environmental measures. However it does not necessarily mean that candidate countries, particularly Mediterranean candidate countries, will face the same difficulties that Southern EU Member States faced years ago. The latter’s experience should indeed be helpful in showing the candidate countries how the development of environmental legislation at the European level influenced domestic environmental concerns and policies within the Member States. Besides, efforts to examine and anticipate the impact of the *acquis communautaire* on candidate countries first and foremost

³ For detailed information please see for instance Tanja A.Börzel (2000) “Why there is no Southern problem: On Environmental Leaders and Laggards in the European Union” European University Institute Robert Schuman Centre for Advanced Studies Environmental Programme Workshop *Coming to Terms with the “Mediterranean Syndrome”* Florence, 19 and 20 May 2000

require reviewing the answers given to a very basic question “Europe matters but how?” (Radelli, 2000:1). This is particularly crucial in the case of environmental policy.

Europeanisation, Member States and the Environment: No need for a crystal ball but expect the unexpected!

Studies on the impact of the *acquis communautaire* on Member States acknowledged the fact that the Euro-Polity itself strongly penetrated into the political systems of the Member States. Particularly in the last fifteen years, EU environmental policy has undergone profound changes and come to cover various policy areas. Particularly in the early 1990s, wide research was done to investigate the effects of European Integration and the Euro-polity on the Member States.

After extensive inquiries on national administrative structures, academics and researchers started to use the term “Europeanisation” more frequently to explain the functioning of policies⁴. The results of much recent research also made it possible to talk about the mechanisms of Europeanisation in order to measure the domestic impact of European Policies (Knill and Lehmkuhl, 1999).

⁴ Radelli (2000) in his article lists different descriptions of Europeanisation, which includes Borzel’s, Ladrech’s and his own definition among some other definitions:

Tanja Borzel’s definition: Europeanisation is a “process by which domestic policy areas are become increasingly subject to policy-making” (Radelli, 2000: p. 2)

R. Ladrech’s definition: “Incremental process re-orienting the direction and shape of politics to the degree that EC political and economic dynamics become part of the organizational logic of national politics and policy making (Radelli, 2000: p. 3)

Radelli’s definition: Processes of (a) construction (b) diffusion and (c) institutionalisation of formal and informal rules, procedures, policy paradigms, styles, “ways of doing things” and shared beliefs and norms which are first defined and consolidated in the making of EU decisions and then incorporated in the logic of domestic discourse, identities, political structures and public policies (Radelli, 2000: 4,5.)

Knill and Lehmkuhl described the mechanism of Europeanisation in the environmental field as positive integration. Through positive integration, they suggested, European activities in this policy area “positively prescribe an institutional model to which domestic arrangements have to be adjusted” (1999:3)⁵. Again they specified the policies of positive integration as the new regulatory policies, which obliged Member States to bring their domestic arrangements into line with a European Model (1999:3). That is why environmental policy is recognised as one of the policy areas where the level of Europeanisation is very high.

Radelli in his article described the domains of Europeanisation in order to find the impact of European policy on national decision making as covering Domestic Structures and Public Policy⁶. A detailed look at the domains of Europeanisation and research papers on different aspects of Europeanisation and on specific country and environmental sector studies clearly show that measuring the extent of Europeanisation is a complicated task⁷.

⁵ Negative integration and framework integration in their categorisation are the other mechanisms of integration. Contrary to positive integration, negative integration which is also termed old regulatory policies, aims to alter domestic opportunity structures such as eliminating barriers to free trade. Policies of negative integration are concerned with market-making whereas policies of positive integration deal with the externalities of market activities or in other words with market-shaping activities (Knill and Lehmkuhl 1999: 3)

⁶ Under Domestic Structures and Public Policy, Radelli (Radelli, 2000 p.7 figure 1) specifies sub structures and actors as such:

Domestic structures:

1. Political Structures: a. institutions (cabinet-assembly relations), b. public administration c. inter-governmental relations d. legal structure
2. Structures of representation and cleavages: a. political parties, b. pressure groups c. societal-cleavage structures
3. Cognitive and Normative Structures: a. discourse on Europe, b. norms and values, c. political legitimacy, d. identities, e. state- traditions-understanding of governance

Public Policy: a. actors, b. style, c. instruments, d. resources, e. cognitive structure of public policy, f. paradigms g. frames, h. narratives, i. policy discourse (legitimacy)

⁷ For detailed country specific cases and conceptual analysis please see the Cambridge Workshop papers: Cambridge workshop on the “Europeanisation of Environmental Policy” held in Cambridge 29 June- 1 July 2001.

<http://www.uea.ac.uk/env/cserge/cframe/Temp-pages/Eurowksp.htm>

Consequently results of case studies reject any superficial judgements such as whether some states are more Europeanised than others. It is obvious that many concerns, measures and policy styles of northern and environmentally proactive member states were transferred to the European Level. However, the mixed effects of domestication and Europeanisation are not always the anticipated ones.⁸ Even the leader states could suffer some adaptation problems⁹.

The EU environmental policy field has never displayed homogeneous member state profiles. It is very easy to find impressively-labelled state categories depending on state attitudes. 'Leaders', 'laggards', 'euro-sceptics', 'fence-sitters' are the most well-known and preferred ones. Enlargements in the history of European Union also played a significant role in shaping the decision-making structures and environmental concerns of the environmental policy, both at the national and European level. Moreover, it can be argued that the fourth enlargement-among other reasons - changed the environmental leadership structures and profile in the EU.

There is no reason to deny that Southern and Northern countries are facing different environmental challenges since they are physically surrounded by different geographies. For instance, due to water scarcity and high temperatures, soil erosion is one of the priorities for Southern states and for the Southern environmentalist movements. Even the DG Environment document admitted the importance of this problem in the region (DG Environment, May

In this workshop the effects of Europeanisation in different member states were sought to be evaluated through *policy content, policy style and policy structure*.

⁸ Here domestication denotes the effect of national policy making or decision making at the European level

⁹ See different effects on Europeanisation on Germany an environmentally leader country and on more suspicious one (Britain): Knill Christopher and Lenschow Andrea (1998) "Change as "Appropriate Adaptation": Administrative Adjustment to European Environmental Policy in Britain and Germany" *European Integration online papers* (EIOP) vol.2 n.1 <http://eiop.or.at/eiop/texte/1998-001a.htm>

2002). However, one of the recent reports of EEA (European Environment Agency) claims that soil is being irreversibly degraded in many parts of Europe and it will be a great concern after the enlargement¹⁰. Reports and studies in this kind show that environmental policy at the European level is not only for limited concerns and will not be so after the new accessions.

No doubt implementing the EU environmental legislation will impose considerable costs on candidate states. They will need to recruit more staff and to extend or build infrastructures, which all together means certain and long-term costly investments. Nevertheless environment is one of the priority areas in the accession process (DG Environment, May 2002). Recently DG Environment referred to another study in order to emphasise the benefits for the candidate countries of implementing the EU environmental measures¹¹. These benefits are stated as including: “Better public health, less damage to forests, fields, and fisheries and to buildings, cleaner water, safer and sounder waste management, better protection of nature and increased areas of protected nature and indirect benefits - for instance due to environmental investments improving economic efficiency” (DG Environment, May 2002: 13).

However, this document also lists a number of benefits for the European Union, which would likely arise from the enlargement. One of them is also stressing the European Union’s commitment to sustainable development. According to this report, enlargement provides for the European Union and its citizens “rural landscapes in candidate countries, in which rural communities still maintain practices that could form the basis for more sustainable development” (DG Environment, May 2002: 13).

¹⁰ EEA and UNEP, (2000) *Down to earth: Soil degradation and sustainable development in Europe Environmental issues series No: 16*, Luxembourg, Office for Official Publications.

¹¹ ECOTEC (2001) *The Benefits of Compliance with the Environmental Acquis* <http://www.europa.eu.int/comm/environment/enlarg/benefit.htm>

Concluding Remarks

Certainly Member States who are labelled as laggards today - mostly Southern European Member States - had a very serious disadvantage at the very beginning of their European Integration adventure. They could not catch the environmental activism of the 1970s, but had priorities dictated by development concerns (Cini, Porter, Pridham, 1995: 315-316)

Today candidate countries have to transpose almost 300 pieces of environmental law having serious impact on different policy areas. Though it is a costly and massive requirement, it offers a momentous opportunity for candidate countries. For instance at the moment there is an exceptional chance for Mediterranean candidate countries that share many of the environmental problems with the EU Mediterranean Member States to learn from the mistakes of the past and others before accession.

There is no need to list the reasons why co-operation is a necessary condition to tackle the transboundary effects of environmental degradation in the Mediterranean. There are already on-going successful co-operation projects in various fields. Obviously, co-operation in this region among other things also brings new opportunities for improving sustainable development by increasing participation in projects at the local and regional levels. Yet the term sustainable development is absolutely not a miraculous tool. Indeed it is being questioned and heavily criticised by politicians and policy makers. Moreover many environmentalists have reservations about it. However, there is no doubt that sustainable development still shows the greatest potential to offer efficient ways of enhancing co-operation and to provide grass-roots participation in areas where co-operation possibilities are vast and various as much as reasons for environmental degradation and conflict. In this context the European Union's sustainable development strategy seems to enhance the existing co-operation in the region and foster co-operation in some other environment-related fields by broadening the perspectives of sustainable development for the Mediterranean.

Environmental issues are most likely to be a part of complex bargaining procedures in the enlargement process and afterwards. Moreover, EU environmental legislation might impose more difficulties on candidate states than ever expected. However, the challenge of environment is not only a matter of EU enlargement, international bargaining, trade, and development concerns. As DG Environment recently stated “Compliance with environmental legislation is not an aim in itself. European environmental laws are tools...all this is crucial to our well-being and safety. Better quality of life for the citizens of today and tomorrow: that’s why environment is a priority in the accession process” (DG Environment, 2002: 5).

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CESDP: A TURKISH PERSPECTIVE

MÜNEVVER CEBECI

Abstract

*Despite the fact that it is a policy outside the *acquis communautaire*, the Common European Security and Defence Policy (CESDP) constitutes an important part of the European integration process and perhaps a litmus test for its future progress. This paper aims at analysing the development of the CESDP with special reference to Turkey's unique position vis-à-vis this policy. Accordingly, major research questions asked are as follows: "What were the rights that Turkey acquired through WEU Associate Membership and that it lost upon WEU's demise?", "What are Turkey's stakes in the development of the CESDP as the way it is right now?", "What are the current obstacles on the way to a sound deal?", "What is the significance of the CESDP as a European security project?" and "Why should Turkey be accommodated within such a project?"*

*This paper consists of a set of arguments rather than one major argument. One of these arguments is about Turkey's uniqueness with regard to the CESDP. This uniqueness is related to Turkey's status both as a candidate for EU membership and as a non-EU European Ally. Without a clear prospect for EU membership, the issue of inclusion in a European security framework, which is declared as the successor of WEU with regard to Petersberg tasks, constitutes a major concern for Turkey as a former WEU Associate Member that has lost all the rights that it acquired under such status. Therefore, the issue involves a loss of acquired rights that are not replaced in a satisfactory way. The second argument is that the case of Turkey vis-à-vis the CESDP is not about convergence. Although some differences exist with regard to political and security culture between Turkey and the EU Member States, they are only as grave as the differences between the EU Member States themselves. The major stake is thus at the other points. The third argument is on the implications for NATO-EU relations. Turkey is a *demandeur vis-à-vis* the EU due to its*

candidacy for Full Membership. On the other hand, the EU is also a demandeur in its relationship with NATO as it seeks to use NATO assets in its operations. The problem is that the EU continues to regard Turkey as the only demandeur in this whole set of relations. The final argument is that despite some deep misunderstandings between Turkey and the EU, Turkey should be accommodated within the new European security framework (the CESDP), since the need for a holistic approach to security is more compelling and urgent in the post-September 11 world. Turkey's accommodation could also be the way for constructing a credible CESDP that does not suffer from lack of political will for defence spending as well as proactive policies.

Introduction

Despite the fact that it is a policy outside the *acquis communautaire*, the Common European Security and Defence Policy (CESDP) constitutes an important part of the European integration process and perhaps a litmus test for its future progress. This paper aims at analysing the development of the CESDP with special reference to Turkey's unique position vis-à-vis this policy.

We all know that the CESDP is a policy developed under the second pillar, the CFSP. Its mainly intergovernmental nature distinguishes it from those policies that belong to the first pillar, which has a supranational character. This is important to our analysis in the sense that the degree of convergence the CESDP requires is different from the policies implemented in a supranational way and its nature and framework are still major areas of debate. These different dynamics of the CESDP make it an interesting case for EU enlargement as well. This is because there are no defined convergence criteria for the EU candidates in this field. It does not also seem possible to determine any due to the fact that even the EU Member States themselves cannot totally agree on the nature, framework and the implementation of the CESDP. Nevertheless, it is a widely accepted view that if achieved successfully, the CESDP will constitute the final stage of the European integration process.

As a basically intergovernmental policy realm, the CESDP suffers from a lack of institutional convergence as well as a convergence of national security and defence policies of EU Member States. This lack of internal convergence complicates the case for the EU candidates. Therefore, the question with regard to EU enlargement here is not of a convergence of policies. This is mainly a field that will develop through deliberation of Member States' stances and thus there are no requirements that should be fulfilled prior to entry to the EU.

This paper consists of a set of arguments rather than one major argument. One of these arguments is about Turkey's uniqueness with regard to the CESDP. This uniqueness is related to Turkey's status both as a candidate for EU membership and as a non-EU European Ally. There are three other countries that are in a similar position, namely, the Czech Republic, Poland and Hungary. However, these countries have a clear prospect for EU membership whereas Turkey does not. Furthermore, a comparison with the other non-EU European Allies, namely, Norway and Iceland is not relevant due to the fact that these countries are not aspiring for EU membership and do not have major stakes in the development of a CESDP in its present form. Without a clear prospect for EU membership, the issue of inclusion in a European security framework, which is declared as the successor of WEU with regard to Petersberg tasks, constitutes a major concern for Turkey as a former WEU Associate Member that has lost all the rights that it acquired under such status. Therefore, the issue is more complex than a simple inclusion/exclusion conundrum. Rather, it involves a loss of acquired rights that are not replaced in a satisfactory way.

This special situation not only creates major implementation problems for the CESDP as in the case of the Turkish veto over the EU's use of NATO assets but also adds to the distrust and misperceptions between the EU and Turkey. It can be contended that Turkey's situation *vis-à-vis* the CESDP has significant implications for European security integration and the EU enlargement process. On the other hand, this situation is closely linked with Mediterranean security in the sense that at least three

Mediterranean actors are directly or indirectly involved in the issue, namely, Greece, Turkey and Cyprus.

The second argument builds on the first one, asserting that the case of Turkey *vis-à-vis* the CESDP is not, therefore, about convergence. Although some differences exist with regard to political and security culture between Turkey and the EU Member States, they are only as grave as the differences between the EU Member States themselves. The major stake is thus at another point.

The third argument is on the implications for NATO-EU relations. Turkey is a demandeur *vis-à-vis* the EU due to its candidacy for Full Membership. On the other hand, the EU is also a demandeur in its relationship with NATO as it seeks to use NATO assets in its operations. The common belief in Europe is that Turkey is playing the NATO card to get Full Membership in the EU, and if not that, some kind of an association with the CESDP including some decision-making rights. What follows is the logic that both of these mean an intervention in the EU's decision-making autonomy. This belief and the following logic may have some truth in them but they do not convey the whole picture. This is because, while claiming its own decision-making autonomy, the EU prohibits NATO's decision-making autonomy by asking guaranteed access to NATO assets. As a matter of fact, this is not very different from WEU's subordinate situation to the EU, created after Amsterdam. It has the effect of putting NATO into WEU's place, availing itself of NATO in certain operations through guaranteed access to NATO assets. The problem with this picture is that Turkey is blamed with intervening in EU affairs as the EU continues to regard Turkey as the only demandeur in this whole set of relations.

The final argument points to a deep misunderstanding, if not distrust between Turkey and the EU in their relations in general and with regard to the construction of a new European security project in particular. Nevertheless, it acknowledges that the post-September 11 world is not to be adequately handled with the rhetoric of the early 1990s anymore. The need for a holistic approach to security is more compelling and urgent. The

development of a cohesive and comprehensive CESDP as the major European security project is inevitable, in the light of growing US unilateralism and the lingering situation of NATO. Under these circumstances it would be wise to plan ways of accommodating Turkey within this new European security framework. It could also be the way to construct a credible CESDP that does not suffer from lack of political will for defence spending as well as proactive policies.

This paper is structured in a way to cover an analysis of the background to the problematic situation between Turkey and the EU with respect to the CESDP first; and then to go on with a description of the current situation, with a conclusion that emphasizes the role of the CESDP as a European security project and examines the issue of Turkey's accommodation in this respect. Accordingly, subsequent sections will focus on the answers to the following questions: "What were the rights that Turkey acquired through WEU Associate Membership and that it lost upon WEU's demise?", "What are Turkey's stakes in the development of the CESDP as the way it is right now?", "What are the current obstacles on the way to a sound deal?", "What is the significance of the CESDP as a European security project?" and "Why should Turkey be accommodated within such a project?"

Turkey's Associate Membership in WEU¹

The WEU was a unique international organisation in the sense that it had various types of membership. These were namely; Full Member, Associate Member, Observer and Associate Partner status. Different members had different levels of involvement in WEU through which they enjoyed different rights and had different obligations. These various levels of involvement - even in the

¹ For a detailed analysis of WEU Associate Membership and Turkey's status in this regard, see Münevver Cebeci "A Delicate Process of Participation - The question of participation of WEU Associate Members in decision-making for EU-led Petersberg operations, with special reference to Turkey", *Occasional Papers*, No. 10, November 1999, (Paris: Western European Union -Institute for Security Studies). Please also note that here one can only give a very brief summary of the detailed analysis covered in this *Occasional Paper*.

decision-making in WEU - put this organisation in a unique position vis-à-vis its peers. Crucial for understanding the uniqueness of WEU is the idea that its flexible and multiple membership structure "prevented the creation and perception of insiders and outsiders in the overall institutional set-up of the organisation"² and constituted the so-called "WEU family of nations".

Associate Membership is a status created by the Declaration on WEU (Declaration No. 30) attached to the Maastricht Treaty in 1991. Through this Declaration, the non-EU European members of NATO were invited to become WEU Associate Members. Their status was later defined in a detailed way in the Petersberg Declaration of 19 June 1992 and the Declaration on Associate Membership made in Rome on 20 November 1992. The Associate Membership of Turkey, Iceland and Norway became effective in 1995. Hungary, the Czech Republic and Poland were also invited to become WEU Associate Members in March 1999 and subsequent to their acquisition of Full Membership in NATO, which was declared in the Washington Summit of April 1999, their status became effective in May 1999.

Associate Membership was a non-Modified Brussels Treaty (non-MBT) status, in that Associate Members were not endowed with Full Membership rights designed by that treaty and their status only consisted of non-Article V activities. At its starkest, they were neither under Article V guarantee, nor held responsible for Article V missions. Notwithstanding, the Associate Members could participate fully in the meetings of the WEU Council, its working groups and the subsidiary bodies under certain conditions: a) Their participation should not prejudice the provisions laid down in Article VIII of the MBT, and b) At the request of a majority of the Full Members, or half of the Full Members including the Presidency, participation might be restricted to Full Members. Stated as such, Associate Members had the right to speak and

² Natalie Tocci and Marc Houben, "Accommodating Turkey in ESDP", CEPS Policy Brief No. 5, May 2001, (Brussels: Centre for European Policy Studies), p. 4.

submit proposals, but they did not have the right to block a decision unanimously agreed by Full Members. They were associated to the Planning Cell through special arrangements and could appoint liaison officers to the Cell. In operational terms, they took part on the same basis as Full Members in WEU military operations (as well as exercises and planning) to which they committed forces. They could nominate Forces Answerable to WEU (FAWEU) on the same basis as Full Members. They had the right to be consulted and informed on WEU operations in which they were interested. They would also be directly involved in the planning and preparation of WEU operations in which NATO assets and capabilities were used within the framework of Combined Joint Task Forces (CJTFs). Associate Partners and Observers could not enjoy such rights since they were not NATO members (bar Denmark). Therefore, it can be contended that Associate Members had these privileged rights on account of their NATO membership.

Associate Members were connected to the WEU telecommunications system (WEUCOM), could participate in the activities of the Satellite Centre and were regularly informed about WEU's space activities. Turkey, Norway and Denmark (as observer and as a NATO ally) could participate in WEU Working Groups (except for the Security Committee) with decision-making at 13 and 16 (in some cases) such as the Transatlantic Forum, EUROCOM, EUROLONGTERM and Western European Logistics Group. On the other hand, Associate Members still have full rights and responsibilities with regard to the activities of the Western European Armaments Group (WEAG).

MPs from Associate Members were fully involved in the work of the WEU Assembly, although the Associate Members did not contribute to the Assembly's budget. This notwithstanding, the Associate Members were, in fact, contributing to the WEU budget (though less than the Full Members' contribution)³. Observers and

³ Turkey and Norway covered 1.9% of the WEU budget while Poland, Hungary, Czech Republic and Iceland covered 2.46% altogether. For more information on these numbers see: Antonio Missiroli, "EU-NATO Cooperation in Crisis

Associate Partners could not contribute to the budget and their participation in Working Groups and other WEU decision-making bodies were limited. They could only contribute to those military operations to which they committed forces. This stark difference between the statuses of Associate Members on the one hand and the Observers and Associate Partners on the other is a reflection of the significantly high degree of involvement that the Associate Members acquired by virtue of their NATO membership.

It was the Cologne European Council Declaration of June 1999 that announced WEU's demise as an organisation by the end of the year 2000 and led to the loss of all member statuses of WEU, bar Full Membership. Before moving on to a detailed analysis of Turkey's stakes that emerged due to the loss of its Associate Membership rights and the subsequent developments, a close look at how the European security landscape changed before and after WEU's demise would be useful.

The Construction of a CESDP and the Issue of Turkey's Involvement

From the Amsterdam Treaty to NATO's Washington Summit

Although criticised by the Europeanists for falling short of designing a significant structure for a European security and defence policy, the Amsterdam Treaty, in fact, included some important provisions. The Treaty "gave the CFSP a new scope and a wider framework, to include Petersberg tasks and take steps towards a common defence policy, and, thus, to open the way for the possibility of WEU's future integration in the EU (Article 17)"⁴. The EU Member States could not agree to integrate WEU in the EU; however, they established a stronger institutional link between the two organisations. Accordingly, the EU would avail itself of WEU to elaborate and implement decisions of the Union on Petersberg tasks and in such cases the European Council would

Management: No Turkish Delight for ESDP", *Security Dialogue*, Vol. 33 No. 1, March 2002, p. 11, [his] endnote (6).

⁴ Cebeci, footnote (1), p. 15.

establish the guidelines (Article 17.3). This provision was significant in the sense that it had put WEU in a subordinate position with regard to the cases where the EU would avail itself of WEU. This was exactly the point where the involvement of the WEU nations except for the Full Members came to the fore as a problematic issue. It was certain that the non-EU WEU nations would be confronted with the problem of participation in EU-led WEU operations that would be conducted without the use of NATO assets. This problem was partly resolved when it was agreed in WEU's Erfurt Declaration of November 18, 1997 that the Associate Members and Observers would participate fully in accordance with their status in all Petersberg operations undertaken by WEU. Nevertheless, the point with regard to "full participation" was not clarified and there were criticisms that the distinction between different WEU member statuses were getting blurred due to the fact that the Observers' status had been gradually upgraded since July 1997, owing to their membership in the EU. This was a clear shift from a WEU having intensive ties with NATO and favouring NATO nations towards a WEU that would be subordinated to the EU and, thus, would favour EU nations according to the new arrangements.

Another significant shift occurred in October 1998, giving a new course to the European security debate. This was a change in British foreign policy⁵. The British government withdrew its longstanding veto over a possible EU/WEU merger and put forward a proposal on the development of an EU defence capability allowing Member States to assemble and deploy troops in rapid response to crises. This unexpected British proposal that the EU should assume a defence capability paved the way for a Joint Franco-British Declaration on European Defence, which was made in Saint Malo on December 2, 1998. This declaration and following consultations in the Vienna Council and other informal ministerial meetings finally led to the decisions that were adopted by the

⁵ For a further analysis of the sudden shift in British foreign policy and the British Government's new position, see, Richard G. Whitman, "Amsterdam's Unfinished Business?", *Occasional Papers*, No. 7, Western European Union - Institute for Security Studies, January 1999.

European Council in Cologne in June 1999. Before continuing with the Cologne European Council, it is necessary to evoke the US and NATO reactions to the St. Malo developments at this point.

The US government declared its support for the European defence initiative, stressing, however, that it should not be at the expense of NATO and its non-EU European members. US Secretary of State Madeleine Albright repeatedly referred to three conditions in this respect: that the EU members should avoid decoupling, duplication and discrimination in putting this initiative into action⁶. One of these “three Ds”, discrimination, was significant in the sense that it starkly laid down the US views on the issue of participation of non-EU European Allies. According to this view, non-EU European members of NATO should not be excluded from the efforts for the establishment of a European defence capability and any kind of arrangement that would be made thereafter.

In NATO's Washington Summit Communiqué of 24 April 1999, the Allies announced that they welcomed the new impetus given to the strengthening of a common European policy in security and defence by the Treaty of Amsterdam and the reflections launched since then in WEU and, following the St-Malo Declaration, in the EU. They stressed that this was a process, which had implications for all Allies. Emphasising this point, the Allies stressed that NATO and the EU should ensure the development of effective mutual consultation, cooperation and transparency, building on the mechanisms existing between NATO and WEU. A natural complement of this provision was the Allies' emphasis on the situation of non-EU European NATO members. In this regard, the Allies stated that they attached “the utmost importance to ensuring the fullest possible involvement of non-EU European NATO Allies in EU-led crisis response operations, building on the existing consultation arrangements within WEU”. The phrase “the fullest possible involvement of non-EU European Allies” reveals the Allied view that these developments should not take place at the

⁶ See several Financial Times issues published after the launch of the British initiative and St-Malo Declaration, including the one published on 7 December 1998.

expense of non-EU European Allies and should not exclude them from a future European defence capability. In view of the probability of a loss of rights on the part of WEU Associate Members, the statement suggested that their involvement should be “built on existing consultation arrangements within WEU”. This statement could be interpreted as a clause that aimed at the protection of the rights of the Associate Members that they acquired within the WEU framework. EU-ISS senior research fellow Antonio Missiroli contends that some other interpretations are also possible and that the NATO statement only added to the ambivalence of the situation in that it paved the way to contrasting interpretations of its stringency⁷. NATO's Washington Communiqué is important in the sense that Turkey's main claims on the issue are based on this document and its interpretation from a Turkish perspective. This point will be analysed in detail below.

The Alliance's new Strategic Concept, adopted on 23 and 24 April 1999, included substantial statements about the new European defence initiative and the participation of non-EU European Allies in this framework. It reiterated that all European Allies should be involved in the new European defence initiative, "building on arrangements developed by NATO and WEU". The Allies suggested that the initiative would enable *all* European Allies to make a more coherent and effective contribution to the missions and activities of the Alliance as an expression of the Allies' shared responsibilities. It would reinforce the Transatlantic partnership and assist the European Allies to act by themselves as required through the readiness of the Alliance, "on a case-by-case basis" and "by consensus", to make its assets and capabilities available for operations in which the Alliance was not engaged militarily under the political control and strategic direction of WEU or as otherwise agreed, taking into account the full participation of all European Allies if they were so to choose. The Strategic concept also used the terms “full participation” and “building on arrangements developed by NATO and WEU” adding that any decision on the use of NATO assets would be made on a "case-by-case basis" and

⁷ Missiroli, footnote (3), p. 13.

by "consensus". This is also another point on which Turkey bases its claims and will be discussed in the following sections.

*Cologne, Helsinki and Nice Developments*⁸

Building on the developments achieved after St. Malo. The European Council Declaration on strengthening the Common European Policy on Security and Defence made in Cologne in June 1999 announced that the EU members decided to give the Union necessary means and capabilities to assume its responsibilities in this field. In international crises and for the implementation of the Petersberg tasks in such situations, the Union should have the capacity for autonomous action, backed up by credible military forces; the means to decide to use them, and a readiness to do so, without prejudice to NATO actions. With this intention, the European Council tasked the General Affairs Council to prepare the conditions and measures necessary to achieve the objectives set out in the Declaration, including the arrangements for the inclusion of those functions of WEU, which would be necessary for the EU to fulfil its new responsibilities for Petersberg tasks. The European Council set the time limit for the completion of the necessary arrangements as the end of the year 2000. Upon completion of those arrangements, WEU, as an organization, would have completed its purpose. This statement was the most important part of the Cologne European Council Declaration, since it openly announced the demise of WEU as an organization by the end of the year 2000.

However, WEU's demise as an organisation did not mean the annulment of the MBT, in that the alliance between the ten Full Members of WEU would remain the foundation of the collective defense of its members. Therefore, the collective defense guarantee (Article V) of the Modified Brussels Treaty (1954) would not be affected by this demise. The neutral status of some of the EU

⁸ For the texts of all these European Councils (texts dealing with the CESDP) please see Maartje Rutten (ed.) "From St Malo to Nice - European defence: core documents", *Chaillot Papers*, No. 47, May 2001, (Paris: Western European Union -Institute for Security Studies).

members would not be affected either, since the EU would only take on the non-Article V functions of WEU that it mostly performed in the area of crisis management, and thus, Petersberg tasks. Concerning the non-EU European Allies, WEU Associate Membership would come to an end since it was a non-MBT status. On this point, the European Council only stressed that arrangements, which would allow the non-EU European Allies to take part to the fullest possible extent within the CESDP framework would be put in place.

The Cologne European Council decisions on the CESDP were mostly criticized for their vagueness. According to the US and some non-EU European Allies, the Declaration remained inadequate and elusive in emphasizing NATO as the first resort in the conduct of crisis management operations, in defining the arrangements for the establishment of institutional links between the EU and NATO, in determining the status of non-EU European Allies, and above all, in describing how the EU would maintain the necessary capabilities⁹.

The Helsinki European Council of December 1999 was significant in two respects. First it recognised Turkey as a "candidate" for EU accession. Secondly, it clarified some of the points mentioned above, appeasing the non-EU Allies to a certain extent. On the face of it, these two different aspects of Helsinki decisions may be regarded as separate points, however, in reality, they are interlinked. A closer look at these decisions reveals that the EU regards Turkey's case with regard to the CESDP as an extension of the country's quest for EU membership and thus develops its policies accordingly. This point will be clarified below.

With regard to the CESDP, the Helsinki European Council laid down the necessary provisions for the establishment of the political and military bodies necessary for the planning, decision-making

⁹ Munevver Cebeci, "European Security and Defence Identity: A Trojan Horse for Transatlantic Relations?", *Turkey Investor*, Issue No. 12, May-June 2000, p 22.

and implementation of autonomous EU-led operations. It further set a common European "headline goal", stating that the "Member States must be able, by 2003, to deploy within 60 days and sustain for at least 1 year, military forces of up to 50,000-60,000 persons capable of the full range of Petersberg tasks". This statement marked the creation of a European task force for crisis management, usually referred to as European Rapid Reaction Force (ERRF). For the creation of the ERRF, the European Council established collective capability goals in the fields of command and control, intelligence and strategic transport. Implementation and review methods were also envisaged within this framework. Accordingly, the existing defence planning procedures would be used, including, as appropriate, those in NATO.

The Helsinki European Council reiterated the EU members' determination "to develop an autonomous capacity to take decisions and, where NATO as a whole is not engaged, to launch and conduct EU-led military operations in response to international crises". This process would avoid unnecessary duplication and would not imply the creation of a European army. This was an open statement of the EU members' acceptance of NATO as the "first resort" in crisis situations. What is more, it was clearly maintained in the Presidency reports adopted by the Council that NATO remained the foundation of the collective defence of its members and would continue to have an important role in crisis management. The European Council envisaged that the EU crisis management operations could be carried out with or without recourse to NATO assets and capabilities.

There were also clauses on the involvement of non-EU European Allies. The Helsinki European Council acknowledged that measures would be taken for necessary dialogue, consultation and cooperation with NATO, its non-EU members and with "candidate countries", "with full respect for the decision-making autonomy of the EU and the single institutional framework of the Union". Accordingly, the non-EU European Allies could participate if they so wished in an operation requiring recourse to NATO assets and capabilities whereas they had to be *invited* by the Council in case of EU-only operations. Nonetheless, the non-EU European Allies and

the candidate countries were granted same rights and obligations in the day-to-day conduct of the operations to which they committed significant military forces. Notwithstanding the open statements on other matters, the question of the establishment of institutional links between NATO and the EU and the issue of the involvement of non-EU European Allies were not mentioned in a detailed way and were again left vague. As a matter of fact, the main problem with regard to the Helsinki decisions was that the EU members had not made a distinction between the non-EU European Allies and the other candidate countries and they were put "in the same basket"¹⁰. This explains and endorses the assumption that the EU regards Turkey's case with regard to the CESDP as an extension of its quest for EU membership and thus develops its policies accordingly. This is a crucial point that should be kept in mind since it constitutes the point of departure for one of the major arguments of this paper.

The Feira European Council of June 2000 made a trivial distinction between the accession candidates and the non-EU European Allies. Accordingly, exchanges would be made with the non-EU European NATO members where the subject matter required it, such as on questions concerning the nature and functioning of EU-led operations using NATO assets and capabilities; and a single, inclusive structure would be established, in which all the 15 countries concerned (the non-EU European Allies and the candidates for accession to the EU) could enjoy the necessary dialogue, consultation and cooperation with the EU. Nevertheless, these provisions also fell short of clarifying the picture.

The Nice European Council of December 2000, on the other hand, adopted a Presidency report that clearly defined the arrangements concerning the non-EU European Allies and other countries, which are candidates for accession to the EU. It contained some specific arrangements for the non-EU European Allies. Although these arrangements were a step forward from Feira, they were still far from satisfying the non-EU European Allies, especially Turkey. Furthermore, it should be kept in mind that it was this report that

¹⁰ Missiroli, footnote (3), p. 14.

identified the structure, competence and the tasks of the Political and Security Committee (PSC), the Military Staff, and the Military Committee. Therefore, a clearer picture with regard to the involvement of the non-EU Allies and the candidate countries within this framework came as no surprise.

The Presidency Report made a differentiation between permanent consultation arrangements during non-crisis periods and arrangements during crisis periods. For non-crisis periods, the Report stipulated a minimum of two meetings to be held during each Presidency at EU+15 format, and on an ad hoc basis. Within this framework, a minimum of two meetings would also be held at EU+6 format. The Report envisaged one ministerial meeting bringing together the 15 and the 6 countries that would be held during each Presidency. The PSC would have the leading role in the implementation of these arrangements. A minimum of two meetings would be held at Military Committee level. Exchanges at military experts level would also be done for the establishment of capability objectives as well as for enabling the non-EU European Allies and other candidates to contribute to the process of enhancing European military capabilities. Meetings of military experts could be called on for other purposes, such as for information on the strategic options in crisis times.

The non-EU European Allies and other candidates were also given the right to appoint a representative from their missions to the EU to follow the ESDP and act as an interlocutor with regard to the PSC, if they so wished. The willing third countries were given the right to appoint a liaison officer accredited to the EU Military Staff. In addition, the Report opened the way for specific liaison arrangements for NATO/EU exercises.

For crisis periods, two phases were determined by the Report: pre-operational phase and operational base. For the pre-operational phase, intensified dialogues and consultations were envisaged in the event of the eruption of a crisis. When the possibility of an EU-led crisis management operation was under consideration, these consultations would be made with the aim of ensuring that the countries potentially contributing to such an operation were

informed of the EU's intentions, particularly with regard to the military options envisaged. These consultations could be held at politico-military experts level. If the EU began to examine in depth an option requiring the use of NATO assets and capabilities, particular attention would be paid to consultation of the NATO 6.

For the operational phase, the Nice Presidency Report reiterated that the non-EU European Allies could participate if they so wished in an operation requiring recourse to NATO assets and capabilities whereas they had to be *invited* by the Council in case of EU-only operations. However, there were some additions in terms of modalities. Accordingly, once the Council had chosen the strategic military option(s) the operational planning work would be presented to the 15 and the 6, which had expressed their intention to take part in the operation so that they could decide on the volume of their contribution. After the decision to start the operation and the subsequent invitation for the interested third parties to join, the operational planning for the operations requiring recourse to NATO assets and capabilities would be carried out by the Alliance's planning bodies and the non-EU European Allies would be involved in planning according to the procedures laid down within NATO. On the other hand, the operational planning for an autonomous EU operation would be carried out within one of the European strategic level headquarters. For autonomous EU operations in which the 15 and the 6 were invited to take part, they might send liaison officers to the European Military Staff bodies at strategic level for exchanges of information on operational planning and the contributions envisaged.

The Presidency report stipulated that the Committee of Contributors would be responsible for the day-to-day management of the operations. All EU Member States and only the contributing third countries would take part - on an equal footing - in the day-to-day management of the operations. Nevertheless, PSC would retain the political control and the strategic direction of the operations and it would only take account of the views expressed by the Committee of Contributors.

By and large, it can be contended that the provisions of the Nice Presidency report envisaged a structure within which the non-EU European allies and other candidates would be involved in decision-*shaping* and implementation phases of the CESDP (although on slightly different levels) while the decision-*making* proper and political control would remain the EU's preserve. It is obvious that the Nice arrangements were also far from replacing the rights that the non-EU European Allies acquired through their Associate Membership in WEU.

It is worth pondering on a very interesting point with regard to the Nice Presidency Report here. Under two headings in the Report, the issue of guaranteed access to NATO planning capabilities and assets were mentioned. One of them was "Standing Arrangements for Consultation and Cooperation between the EU and NATO" and the other was "Annex to the Permanent Arrangements for Consultation and Cooperation on the Implementation of Paragraph 10 of the Washington Communiqué". Under the former heading, the Presidency laid down the provisions for NATO/EU relations in times of crises and it envisaged that upon the determination of initial strategic military options, the Staff might "call on external planning sources, in particular the guaranteed access to NATO planning capabilities, to analyse and refine these options"¹¹. Under the latter heading, the Presidency report stated that building on the Washington Communiqué¹², it was suggested that the EU should have guaranteed permanent access to NATO's planning capabilities. Within this procedure the DSACEUR would be involved (perhaps to silence opposition) as a strategic coordinator. Concerning other NATO assets and capabilities, the Report suggested that a *pre-identified* set of assets and capabilities of the Alliance would be ready at the EU's disposal in case it needed them. These assets and capabilities would be determined by EU and Alliance experts, validated by a meeting of the Military Committees of the two organisations and approved under each organisation's specific procedures. With regard to the chain of

¹¹ From the text of the Nice Presidency Report in Rutten, footnote (8), p. 205.

¹² This point reflects the differences of interpretation between Turkey and EU with regard to the Washington Communiqué.

command, through consultations with the NAC, the Council would appoint the operation commander. The Report stipulated that, from then on, the entire chain of command should remain under the political control and strategic direction of the EU throughout the operation¹³. Within that framework, the operation commander would "report on the conduct of the operation to EU bodies only"¹⁴. NATO would only be informed of developments in the situation by the appropriate bodies.

To put it bluntly, the Nice Presidency Report implicitly suggested that NATO would replace WEU's subordinate position vis-à-vis the EU so that the EU would avail itself of NATO through guaranteed access to its assets and capabilities. At this point, Antonio Missiroli's term "EU-isation of ESDI"¹⁵ can be appropriately used to define this situation, although he may not have intended to use this term for coming up with such an argument. For brainstorming purposes, this term may be reworded as the "EU-isation of NATO", if one finds the former wording as inadequate to describe the situation. As a matter of fact, Missiroli mentions a *partial* "ESDP-isation of NATO"¹⁶ in order to mean NATO's "becoming an essential provider of military services for missions in the European area"¹⁷.

Turkey's Stakes

Given the fact that Turkey lacks a clear prospect for EU membership¹⁸, it can be asserted that Turkey's stakes in the development of the CESDP in its current structure are greater than all the other non-EU European Allies' stakes. This is especially true in the sense that Iceland and Norway have already made clear that

¹³ Rutten, footnote (8), p. 208.

¹⁴ *ibid.*

¹⁵ Missiroli, footnote (3), p. 15.

¹⁶ *ibid.*, p. 22.

¹⁷ *ibid.*

¹⁸ Please note that notwithstanding the Helsinki decision that recognised Turkey as an EU candidate, the country's name was not even mentioned in the Nice Treaty arrangements for adjusting the weighted voting system to EU enlargement. This is a clear reflection of the EU's intentions about Turkey.

they would not mind as long as they were fully informed about the developments, and that a solution which would - in a way - mean their entrance in the EU from the backdoor would not be in their interest¹⁹. The three other Associate Members, namely, Poland, Hungary and the Czech Republic, on the other hand, are in the process of accession negotiations with the EU, and, thus, have a clear prospect for EU membership. This means that they do not have to worry about exclusion from the CESDP. These are the facts that raise Turkey's stakes while making Turkey's case unique.

In the light of the data given above concerning the institutional arrangements with regard to the CESDP, Turkey's stakes in the development of the CESDP in its current structure may be listed as follows:

1. stakes arising from the loss of its Associate Membership rights in WEU and a backtracking of the NATO's Washington Summit decisions,
2. stakes with regard to Greece and Cyprus²⁰,
3. geo-political concerns arising from geographical proximity to potential crisis areas, and
4. stakes arising from a possible downgrading of Turkey's status in European security affairs and sensitivity in public opinion.

Stakes arising from the loss of its Associate Membership rights in WEU and a backtracking on the NATO Washington Summit decisions

It is obvious that even the Nice European Council decisions fell short of replacing the rights that the non-EU European Allies enjoyed due to their Associate Membership in WEU and granting these countries a similar level of participation in the CESDP structure. Furthermore, Nice Decisions overlooked the decisions

¹⁹ Cebeci, footnote (1), p. 23.

²⁰ Please note that for the sake of simplicity and to avoid any confusion, the name "Cyprus" is used here to define the Greek Cypriot authority on the island. This does not necessarily reflect the writer's view of the Cyprus question.

adopted at NATO's Washington Summit, which called for the non-EU European Allies' fullest possible involvement within the new EU defence structure, built on existing consultation arrangements within the WEU. Therefore, the Nice decisions were regarded as "backtracking in comparison to the Washington decisions"²¹ by Turkish officials.

But what are the rights that are lost and not replaced? Although the WEU Associate Members did not have the right to veto a decision taken unanimously by the WEU Full Members, they had a right to speak in the decision-making process. On the operational side of the issue, they had all the rights that the WEU Full Members enjoyed with regard to those WEU operations that would be made through access to NATO assets. With regard to EU-led WEU operations, they would not be able to participate only if a majority of Full Members decided so. However, this is not the case that we observe right now, especially with regard to the non-EU European Allies' participation in EU-only operations. This is exactly the point around which Turkey's stakes revolve. According to Nice decisions, non-EU European Allies can participate in an autonomous EU operation only if they are invited by the Council. Due to the intergovernmental nature of the CESDP, the decision on such an invitation is subject to unanimous voting, which means that even a single EU member "can block an invitation to a non-EU European Ally like Turkey to take part in any given autonomous EU operation"²². This brings us to the issue of Turkey's stakes with regard to Greece and Cyprus.

Stakes with regard to Greece and Cyprus

Turkey's stakes with regard to Greece and Cyprus have two dimensions. One of them is about the possible use of EU/CESDP and ERF against Turkey by Greece and the other is being left out of an operation that would seriously affect its security interests,

²¹ Onur Öymen- Permanent Representative of Turkey to NATO, "Guest Editorial: Turkey and the New Challenges to European Security", *European Foreign Affairs Review*, Vol. 6, 2001, p. 403.

²² *ibid.*

especially in its neighbourhood, due to a Greek (or a future Cypriot, or most probably, a future Greek and Cypriot) veto.

In the Petersberg Declaration, which declared Turkey as a WEU Associate Member along with Norway and Iceland, and Greece as a Full Member, Part III-A envisaged the relationship between Associate Members and Full Members. According to this Declaration, their mutual differences would be settled by peaceful means and they should also refrain from resorting to the threat or use of force against each other. The crucial point with regard to this declaration was that the following paragraph stressed that the security guarantees and defence commitments in the Treaties which bound the Member States within WEU and which bound them within NATO were mutually reinforcing and would not be invoked by those subscribing to Part III of the Petersberg Declaration in disputes between Member States of either of the two organisations. Although this statement did not refer to any specific countries, it was obvious that it addressed Turkey and Greece due to their thorny relationship. Recalling that as a Full Member Greece would be protected under the Article V guarantee of WEU, this was an escape clause, on the part of the WEU Full Members, which would prevent WEU involvement in any kind of a dispute between Turkey and Greece as it would mean direct confrontation with Turkey. The practical impact of this clause was that Greece was not given the card to use WEU against Turkey in their disputes.

The conditions that the said clause covered formed a significant part of the Protocol of Accession that Greece signed on 20 November 1992²³. It is because of this Protocol of Accession that this specific clause is still valid, although the non-MBT arrangements of the WEU no longer hold. Therefore, there is no problem with regard to Turkey's loss of its Associate Membership in this regard. What constitutes a stake for Turkey is the involvement of the EU in any kind of a Greek-Turkish dispute

²³ For further information on Greece's accession to the WEU see, Assembly of Western European Union, *WEU*, Report submitted by Mrs. Guirado (Spain) and Mrs. Katseli (Greece) on behalf of the Committee for Parliamentary and Public Relations, (Paris: Assembly of WEU), 1998, pp. 40, 41.

through the CESDP. Such a situation would allow Greece to use the EU/CESDP card against Turkey in their relations. Such behaviour on the Greek side does not lack precedence if one considers Greece's blocking of EU financial aid to Turkey, which was a part of the Financial Protocol of the Customs Union decision between Turkey and the EU. Therefore, it can be contended that the first stake with regard to Greece is the probability that it can use the CESDP or the ERRF against Turkey in case of a dispute over the Aegean or Cyprus, which are top security priority areas for Turkey. This would raise Turkish concerns seriously if the ERRF ended up as a European Army in the future. That is why Turkey seeks a similar arrangement to that covered by the Petersberg declaration, which would prohibit the use of EU/CESDP against it.

The same scenario holds true for Cyprus as well. The EU has repeatedly declared that Cyprus would be accepted as a Full Member regardless of the issue of the resolution of the Cyprus conflict, and thus has already become a part of the problem rather than being a part of the solution. If we consider that Cyprus will become an EU member soon, the same logic applies to Cyprus too. As a matter of fact, Cyprus has already revealed its intention, as its representative stated at an EU+15 informal meeting of Defence Ministers before the Nice Summit, that they regarded the ERRF as a potential peacekeeping force on the island²⁴. Considering that Turkey and the EU have increasingly taken diverging positions on the Cyprus conflict since early 90s, it would not be hard to guess why Turkey has a stake in the issue. At this point, it can be asserted that Turkey is trying to prevent these political divergences from spreading to the security domain²⁵.

The second stake is about participation in CESDP operations. As mentioned above, there is a high probability that Greece may veto a decision to invite Turkey to join an EU-only operation and thus block its participation. Turkish policy makers also consider the probability that using its veto in NATO against certain operations (especially those to be conducted in sensitive areas for Turkey),

²⁴ Missiroli, footnote (3), p. 17.

²⁵ Tocci and Houben, footnote (2), p. 6.

Greece could bypass the principle of NATO's being the first resort in crisis situations, and cause the matter to be considered in the EU for an autonomous EU operation and then use its veto in the CESDP to make sure that Turkey is not invited to participate in the operation, leaving Turkey totally out of the picture. Although this appears as a worst-case scenario, it does not seem very unrealistic. Assuming that Cyprus will also become an EU member soon, it is natural that Turkey raises stakes on these probabilities. Such cases would be crucial for Turkey especially if an EU-only operation (without Turkey's involvement due to a Greek veto, for instance) were to take place in a geographical area that would seriously affect the country's security interests.

Geo-political concerns arising from geographical proximity to potential crisis areas

One does not have to be an expert to spot that the CESDP is a part of a larger European project, the project of the EU's becoming a global actor. This means that it has the intention of handling crises in and around Europe through the use of CESDP/ERRF. As a country surrounded by 13 of the 16 potential crisis areas defined by NATO, it is obvious that Turkey would be critically affected from an operation of CESDP/ERRF that would take place in its neighbourhood. Therefore, Turkish officials emphasize that Turkey's participation in operations that would take place in its immediate neighbourhood is of great importance for Turkey not only as a NATO ally but also as a regional actor whose interests would inevitably be affected by further developments. In particular, the use of NATO assets and capabilities in such operations via guaranteed access by the EU could have negative implications for Turkey's security interests. In view of such a possibility, Turkey wants to retain its right to veto the use of NATO assets and capabilities in operations that would seriously affect Turkey's security interests. That is why Turkey opposes the EU's guaranteed access to NATO assets and capabilities and insists on approval on a case-by-case basis.

An EU-only operation (without recourse to NATO assets) in its neighbourhood might also seriously affect Turkey's security

interests. For example, EU intervention in the Caspian Region, Palestine, the Balkans or the Caucasus or even in the Kurdish regions of Iraq might directly impact Turkey's security concerns and raise its stakes. Turkey needs its voice to be heard in the EU before, during and after a decision regarding an autonomous EU operation in Turkey's neighbourhood, so that it can make sure that the EU Member States take its stakes into consideration and decide accordingly. The need to have a say in the CESDP affairs is closely related to Turkey's role in European security.

Stakes arising from a possible downgrading of Turkey's status in European security affairs and sensitivity in public opinion

Turkey's loss of Associate Member rights in WEU and lack of adequate arrangements to replace these rights within the CESDP framework have some practical and psychological implications. On the practical side of the issue, the CESDP arrangements do not envisage Turkey's participation in CESDP military exercises or in the work of the Satellite Centre. The situation looks more complicated in view of the ongoing WEU operations taken over by the EU - to which Turkey has committed forces. The case of Turkey's involvement in the MAPE, the police element that is taken over by the EU from WEU in Albania, remains elusive, for example²⁶. Therefore, Turkey's loss is not only confined to some decision-making rights but it also has some practical implications. Turkey's involvement in WEU exercises and operations in a sense enhanced Turkey's involvement in European security affairs. That is why deprivation from the status provided by WEU Associate Membership is regarded by the political elites and by public opinion as Turkey's being forced to accept a "lesser role"²⁷ in European security affairs when compared to the country's previous situation. Given that Turkey "has contributed to NATO for 50 years"²⁸ and that "it has proportionately provided more soldiers and more resources than any other European army"²⁹ due to its

²⁶ For further information see Tocci and Houben, footnote (2), p. 7.

²⁷ Öymen, footnote (20), p. 402

²⁸ Ismail Cem, "A Necessary Role in Defence", *Financial Times*, May 29, 2001.

²⁹ *ibid.*

population and Gross National Product, it is not hard to guess why it has stakes in a lessening of its status in European security affairs. It should also be kept in mind that Turkey has the biggest army in Europe.

Comments by some European analysts also add to Turkey's stakes. Peter Schmidt's proposal for special ties between Turkey and the EU along the lines of the NATO-Russia Joint Council³⁰ is worth special consideration here. Especially when it is contemplated that the CFSP arrangements between EU and Russia envisage monthly consultations, and that the rare frequency of consultations between the EU and non-EU European Allies is not even based on such a regular basis, there is no gainsaying that Turkey has already been put in a very disadvantaged position. This simply means that a key NATO ally that constituted the southern flank of Europe against the Soviet Union and the Warsaw Pact during the Cold War is regarded in the same category - and in some cases in a lesser one - as the major power which threatened Europe for almost forty-five years. From a Turkish point of view, this is not only the devaluation of the country to the status of an old adversary but also a lack of appreciation on Europe's part. This is exactly the point where Turkey's position vis-à-vis the CESDP adds to the general frustration in Turkish public opinion over the EU's treatment of the country especially with regard to its quest for EU membership. This is exactly the point where a question comes to Turkish minds: "If the EU is serious about its accession process towards Turkey, why does it insist upon an ESDP institutional structure that moves away from the WEU framework?"³¹

Current Situation

In the light of Turkey's stakes analysed in detail above, Turkey stated its demands for a sound solution to the problem as follows:

³⁰ Peter Schmidt, "Neuorientierung in der Sicherheitspolitik?", *Stiftung Wissenschaft und Politik*, January 1999, p. 17.

³¹ As a matter of fact, this question also comes to European minds and here it is quoted from Tocci and Houben, footnote (2), p. 7.

1. Turkish foreign policy-makers contended that NATO had already established its position on the issue of guaranteed access by the EU to NATO's assets and capabilities³². Therefore, they demanded that the EU build on the decisions taken at NATO's Washington Summit concerning this issue. These statements reveal that Turkey does not regard the issue as a dispute between Turkey and the EU but rather as a NATO matter. That is why it asks its fellow NATO members to abide by the decisions taken in Washington.
2. Within this framework, Turkey's major expectation from the EU was stated as the adoption of any necessary provisions that would enable the participation of non-EU European Allies in EU operations (including preparation and planning, political control and strategic direction) if those operations made use of NATO's assets and capabilities, or if and when these countries raised their concerns that the envisaged EU operation was in their geographical proximity or might even have an effect on their own security interests³³.
3. Turkish officials also demanded that the EU establish the necessary arrangements for enabling the non-EU European Allies to participate in EU exercises (including preparation and planning) in order to ensure full operational coherence and effectiveness in any future operation³⁴.

Turkish Foreign Minister, Ismail Cem, summarised the Turkish stance with regard to the CESDP in an article in the Financial Times dated May 29, 2001 as follows: "Turkey is not prepared to allow the use of these [NATO] capabilities and assets it shares unless it has a right to participate reasonably in their use."

Many proposals for persuading Turkey to come to terms with the EU were proposed from 1999 till early December 2001. Among all the proposals, an informal British paper is worth mentioning here.

³² Cem, footnote (27)

³³ This paragraph is basically taken from Öymen, footnote (20), p. 404.

³⁴ This paragraph is basically taken from *ibid.*

The British proposal was significant in the sense that while emphasizing the concept of assured access for the EU to some pre-determined NATO assets³⁵, it made a stark distinction between "strategic" and "non-strategic" assets. According to the proposal, the EU would have automatic access to non-strategic assets (including SHAPE). With regard to the strategic assets (such as air refuelling and airlift, as well as C3I), the EU would need approval from the NAC. The proposal also envisaged increased consultations at EU+6. The proposal also gave some assurances to Turkey that its security concerns would be taken into account in cases concerning its immediate geographical security environment³⁶. The British proposal, although initially agreed by the Turkish government, was later rejected due to opposition from its National Security Council.

The Ankara Agreement (so-called "Istanbul Document")

Turkey agreed on another proposal by the British, this time drafted together with the US, in the wake of the NAC ministerial held on 6 December. Interestingly, there is a lot of confusion about its name since it is frequently referred to as the Ankara Deal or the Ankara Agreement by the press, but its original name is the Istanbul Document with a subtitle as "the final version agreed by Ankara"³⁷. The document basically laid down the terms for EU-NATO cooperation in military crisis management including the arrangements with regard to the situation of non-EU European Allies. The most important point that the document covered in this respect was the statement that in whatever crisis, the CESDP would not be used against any Ally and would respect in every case the obligations of EU Members States towards their NATO Allies.

³⁵ As a matter of fact this was not very different from the wording of the Nice Presidency Report which used the phrase "guaranteed access to a pre-identified set of NATO assets".

³⁶ For further information on the British proposal and Turkish response see Judy Dempsey, "Turkey agrees to use of NATO assets by EU force", *Financial Times*, 30 May 2001.

³⁷ Missiroli, footnote (3), p. 21

With regard to institutional matters, the document envisaged more frequent consultations with non-EU European Allies. It also introduced some arrangements that would enable them to provide input to the CESDP and be associated with decisions and actions within this policy domain. The document also stipulated a mechanism through which the non-EU European Allies would be permanent interlocutors of the PSC. They would also be given the right to assign representatives to the Military Committee. Building on the former British proposal, the criterion of geographical proximity was introduced once again, with the statement that in case of crises in the geographic proximity of non-EU European Allies - with a potential to affect their national security interests considerably - the EU Council would engage in dialogue and consultations with the countries concerned and would take their positions into consideration within the confines of Article 17 of the Treaty on European Union.

On the operational side of the issue, non-EU European Allies would be entitled to be involved as observers in operations which would be planned and coordinated by SHAPE and conducted without their participation. In case of autonomous EU operations in which the non-EU European Allies were invited to commit forces, the Committee of Contributors would act as the main forum for the management of the operation whereas the PSC would retain political control over the operation.

The Istanbul Document was found satisfactory by the Turkish government, since it was a text that took Turkey's major stakes (if not all of them) into consideration and adequately addressed the issue of reducing them. The explicit statement that the CESDP would not be used against any Ally and the provisions for further involvement of the non-EU European Allies within the CESDP structures through assigning representatives, establishment of permanent arrangements with the PSC, etc., were the basic points that satisfied Turkey to a certain extent, although the operational arrangements introduced were still suffering from vagueness. Nevertheless, Turkey agreed on the deal and openly stated that it

was the last document that it agreed on and that it would not negotiate on this document³⁸.

Greek concerns were also taken into consideration and Turkey's name was not mentioned in the documents. Instead the term "non-EU European Allies" was used. Nevertheless, the Greeks were not as satisfied with the Istanbul Document as the Turks were. As a matter of fact, they perceived the document as a "take-it-or-leave-it" proposal³⁹ as Turkey declared that it would not negotiate on it. Although the Greek government did not reject the deal as a whole in the first instance, it prevented the issue from being taken up at the Laeken European Council on 14-15 December 2001. Therefore, the Belgian Presidency could not declare that a deal has been reached between the EU and NATO on the issue of the use of NATO assets and capabilities by the EU. Nevertheless, on paper the CESDP was declared operational at the Laeken European Council, despite the fact that in reality it could not become so due to Greek objections this time. The CESDP's first task on the agenda, the task of taking over the peacekeeping operation "Amber Fox" in Macedonia from NATO, was endangered by these objections⁴⁰.

Greek Stakes and Objections

The "take-it-or-leave-it" attitude that Greece was faced with just before the NAC Meeting in December 2001, in a way, left the Greek government in a disadvantaged position with regard to domestic politics in view of the looming local government

³⁸ For the reflections on the Istanbul Document in the press please see Leyla Boulton and Judy Dempsey, "Turkey lifts objection to EU rapid reaction force" *Financial Times*, 04 December 2001 and "Turkish military compromise comes when NATO is at stake: Common sense prevails in Ankara over European Army", *Turkish Daily News*, 04 December 2001.

³⁹ Missiroli, footnote (3), p. 21.

⁴⁰ For further information on the implications of Greek objections for operation Amber Fox, see, Judy Dempsey, "Greek-Turkish Dispute hinders Amber Fox mission - EU military operation in doubt", *Financial Times*, May 16 2002, and Kerin Hope, "Greece adds to dispute on Turkey's role in EU force", *Financial Times*, May 28, 2002.

elections and, thus, limited its area for manoeuvre in its external relations. Therefore, it was basically the way in which the Ankara agreement was reached and then presented to Greece that raised Greek objections. The major argument on which Greek claims were based was that this deal, which gave non-member Turkey a say in the EU's use of NATO facilities undermined the autonomy of the EU. Greece also regarded the text of the Ankara Agreement as one-sided since the deal was only negotiated with Turkey, and Greece was asked to accept it. Furthermore, Greek authorities claimed that the document compromised Greek security. Stating its objections as such, Greece put forward several principles concerning the CESDP. These principles are as follows⁴¹:

Equality between NATO and the EU: This is mainly about the decision-making autonomy of the two organisations, reflecting the Greek view that the decision-making autonomy of NATO and the EU should be equally respected. It is also a reference to a provision in the Istanbul Document, which suggests that the EU will not undertake action in areas touching vital interests and in the geographical proximity of a NATO country. Greece wants to add the following statement to this paragraph: "NATO will not undertake action in areas touching vital interests and in the geographical proximity of an EU country".

Reciprocity in some of the concerns: As Greece regards the Ankara agreement as a one-sided text, it asks for a new or amended text, which will equally address Greek and Turkish concerns and thus involve reciprocal guarantees. For example the guarantee that the ESDP would not be used against Turkey can be reciprocated with a guarantee that Turkey will not use force against an EU country.

Peaceful settlement of disputes: This principle can be read as the Greek quest for a solution to Turkish-Greek disputes via the International Court of Justice, which was also covered by the

⁴¹ "Papandreou briefs the TDN over the basic principles for the EU army: Both Ankara and Athens open for discussions over the ESDP", *Turkish Daily News*, June 27, 2002.

Helsinki European Council and the Accession Partnership Document prepared by the European Commission for Turkey.

Not to use force and not to use the threat of force: This principle is related with Greek perceptions of Turkey as a threat. As an extension of the principle of peaceful settlement of disputes, this principle is designed to make the parties refrain from the use or threat of force in their disputes.

These principles at least clarified what assurances Greece needed in order to accept an EU-NATO deal. However, such a deal could not be reached at the Seville European Council and the issue was skilfully postponed by the Greek government to the period of Greek Presidency of the CESDP, which amounts to one year together with the coming Greek Presidency of the EU. Just before Greece's taking up of the CESDP presidency due to Danish opt-out, Turkish officials declared that the Istanbul Document was the bottom line vis-à-vis the CESDP, but if any additions were made to it, Turkey would first see the wording and then decide to negotiate on the additions. This was actually an opening on Turkey's part in that it was a shift from Turkey's initial stance on the issue. In June 2002, top Turkish officials briefing the Turkish Daily News said that Turkey was ready to negotiate the ESDP with the Greek side⁴².

The basic flaw in the Greek logic (that giving non-member Turkey a say in the EU's use of NATO facilities undermines the autonomy of the EU) is that it overlooks the fact that the EU as an autonomous organization, demands to use NATO assets, the assets of another autonomous organization. The decision on the use of NATO assets is subject to Turkish approval since decision-making in NATO is unanimous. Therefore, Turkey has a say in the issue, not as a non-member intervening in EU's decision-making autonomy but as a NATO member, which has a right to veto the use of NATO assets by other organizations. Simple and out. What complicates the issue is that the EU and especially Greece prefer and insist to see Turkey only as a candidate - a demandeur from the EU, playing the NATO card to get in the EU - so that they can have

⁴² *ibid.*

leverage on the country. Theirs, of course, is an inadequate presentation of the issue that inevitably adds to the already constructed negative image of Turkey in Europe. Examples of how Turkey was defined with regard to the CESDP could help one to see this picture clearly: Charles Grant describes Turkey's stance on the issue as "unwilling to compromise, inflexible and unreasonable"⁴³. Antonio Missiroli contends that Turkey's stance on the issue has raised "a fundamental problem of *political style*" in that European policy-making requires a certain degree of flexibility and willingness to compromise in order to settle diverging national interests and Turkey has showed neither on this issue⁴⁴. He also states that Turkey has been persisting in acting as a "demandeur" on the one hand, "taking political hostages" on the other⁴⁵. Although he acknowledges that the EU is also a demandeur vis-à-vis NATO, he does not base his arguments on a more balanced approach and gives in to the European logic described above. These are only a few of the many examples one can come across when one reads about the CESDP.

Although some European analysts are eager to praise the victory of liberal-institutionalist and critical theories over the realist theory with regard to the European integration process and thus the EU, the Greek case is a significant example of how realist policies can be pursued successfully within the EU framework. The game played by Greece with regard to Turkey's quest for membership in the EU in general and to the CESDP in particular is a clear example of the fact that balance of power can be maintained against a challenging country by using the EU. It is quite natural for a country to pursue its own national interests. The chance to use the CESDP, especially if it becomes effective and credible in the future, against Turkey can be regarded as the realisation of Greek aspirations to change the balance in Greek-Turkish relations in its favour. Especially in view of the lingering role of NATO in

⁴³ Charles Grant, "A European View of ESDP", Paper prepared for the IISS/CEPS European Security Forum, 10 September 2001, p. 2.

⁴⁴ Missiroli, footnote (3), p. 19.

⁴⁵ *ibid.*

European Security, this may tip the scales in an unprecedented way.

By virtue of being a member of a club, Greece does have a right to enjoy the privileges provided by that club. But the issue here is that the nature and the aims of the club, as described by liberal-institutionalist and critical theorists, contradict the member's ends. Especially when we consider that the EU was founded to overcome animosities between European countries and establish a cooperative framework on the continent, as the European rhetoric suggests, the Greek attitude does not fit in this picture. Greek objections to Turkish involvement in the CESDP constitute a clear indication of Greek intention to use the CESDP against Turkey. This in a way testifies to the realist assumption that national interests and power politics supersede the motives for cooperation and still shape world politics. It also alludes to the weakness of the CFSP/CESDP as an intergovernmental project, telling a lot about how only one Member State can block the whole system to achieve its own foreign policy aims.

Conclusion: CESDP as a European Security Project and Turkey

Since its inception, the CFSP and its new component, the CESDP, have suffered from a lack of political will on the part of the Member States, as policy realms that touch sensitive areas such as national sovereignty and top priority national interests. Institutional turf battles and inconsistencies, as well as problems with regard to convergence of national security and defence policies and a general reluctance to spend more on defence have constituted the major obstacles to the establishment of an effective and credible CFSP/CESDP. The events of September 11 took place in just such an unfavourable climate for the CFSP/CESDP.

The immediate European response to the September 11 attacks was a "renationalisation of security and defence reflexes"⁴⁶. Despite the

⁴⁶ Jolyon Howorth, "CESDP After 11 September: From Short-term Confusion to Long-term Cohesion?", *EUSA Review*, Vol 15, No. 1, Winter 2002, p. 1.

initial invocation of NATO's Article 5, the EU Member States preferred to engage in bilateral talks with the US to show their solidarity and made their individual pledge of military assets directly to the US rather than using the NATO framework. Furthermore, their view of the causes of and the ways to deal with terrorism differed to a great extent. The UK attitude was significant in this respect, since it abandoned its role of a leading power in the CESDP and shifted its policy to an unconditional transatlanticism that even superseded its stance before October 1998. Another divisive development was the establishment of an unofficial *directoire* by Germany, France and the UK through a meeting on the military involvement of their respective national forces in Afghanistan. This meeting was held just before the European Council in Ghent that would take place on October 19, 2001, and had the effect of overshadowing the decisions of the European Council⁴⁷. The *directoire* planned to meet again on November 5 at a dinner in London, but upon protests from other EU members, a last minute change occurred and the number of participants at the dinner was raised to eight with the addition of Berlusconi, Aznar, Solana, Verhofstadt and Kok. The establishment of this *directoire* was indicative of a new distinction with regard to the CESDP in that there appeared to exist two levels of security actors within the EU: the serious ones and the others⁴⁸. This marked the addition of a new division within the CFSP/CESDP to those already existing ones such as, Allies and neutrals, militarists and pacifists, Transatlanticists and Europeanists and an "opt-out" Denmark⁴⁹. The *directoire* raised "distrust and suspicion of the big three"⁵⁰ on the part of the other Member States.

On the other hand, the September 11 attacks have also had a positive impact on the CESDP. The US resort to unilateralist policies immediately after the invocation of NATO's Article 5 and the need for a retreat from Europe in order to focus more on the

⁴⁷ *ibid.*, p. 2.

⁴⁸ Simon Duke, "CESDP and the EU Response to 11 September: Identifying the Weakest Link", *European Foreign Affairs Review*, Vol. 7, 2002, p. 161.

⁴⁹ Howorth, footnote (46), p. 2.

⁵⁰ Duke, footnote (48), p. 169.

fight against terrorism via increased involvement in other parts of the world inevitably put the development of a solely European security and defence capability on the front burner of the European security agenda. The initial sentiment in Europe after the invocation of Article 5 was that NATO was the major European security and defence organisation and would continue to be so for a long period of time. Nevertheless, events took a very different course and the modest military commitments of the European Allies as well as the US determination to go it alone and to "discuss military cooperation via multiple bilateralisms"⁵¹ undermined NATO in a considerable way. The solidarity that the Allies showed immediately after the attacks emphasized NATO's political significance whereas modest action on the military side underscored NATO's diminishing role as a collective defence organisation. With NATO enlargement on the agenda, it is not hard to guess that NATO's role as a collective defence organisation will be further diluted and it will rather serve as a platform of collective security. These developments with regard to NATO also reveal the need for an autonomous European defence capability strengthening the prospects for the CESDP.

Furthermore, the changed nature of security threats after the end of the Cold War and increased emphasis on global and non-military aspects of security after September 11, caused the CESDP to be considered by many analysts as the only European security and defence framework via which these threats could be handled effectively⁵². These views proceed from the assumption that the EU's role as a civilian power endows the CFSP/CESDP with a wide spectrum of foreign policy tools ranging from humanitarian and development aid to economic sanctions that are essential for the pursuance of long-term policies for the elimination of root causes of terrorism and other security challenges. Apart from being an effective short-term policy tool aimed at suppression of the problems rather than solving them, military power is important in the sense that it provides an effective deterrent as well as an

⁵¹ Howorth, footnote (46), p. 2.

⁵² For such analyses please see Howorth, footnote (46), p. 3 and Duke, footnote (48), pp. 164, 165 and 168.

apposite policy tool to back up economic, political and diplomatic measures and render them effective and credible. Therefore, the growing emphasis on the significance of the CESDP hinges on the idea that the EU as a civilian power has to back up its foreign policy with credible military force in order to deal effectively with the challenges brought about by the end of the Cold War and September 11. This also marks the need for more cross-pillar policies, blurring the lines between the three pillars.

Notwithstanding these positive changes with regard to the CESDP, the institutional maze that takes the form of turf battles between different bodies (such as those between the HR-CFSP and the DG Responsible for External Relations, between the GAC and the Commission, and between foreign ministries and defence ministries); difficulties with regard to the intersections between communitarized and intergovernmental policy realms; and the urgent need for regular and formal meetings of Council of Defence Ministers circumvents the creation and implementation of effective and efficient policies. The differences between Member States with regard to cultural approaches to security policy as well as their political methods; the predominance of national sovereignty in this policy domain also remain as weaknesses of the CESDP. Another weakness that needs urgent consideration is the need for increased defence spending⁵³. This is especially important since the question of the use of NATO assets and capabilities is still unresolved and the EU may have to duplicate some strategic assets if this problem persists. It is also worth mentioning here that the widening gap between European and US military capabilities also hinders interoperability within NATO urging the need for more military spending by EU members.

Under such conditions the issue of accommodation of Turkey within the CESDP comes to the fore. This is due to several reasons.

⁵³ For a detailed analysis of the institutional, national and defence spending problems facing the CESDP please see Jolyon Howorth, "European defence and the Changing Politics of the European Union: Hanging Together or Hanging Separately?", *Journal of Common Market Studies*, Vol. 39, No. 4, November 2001, pp. 765-789.

First of all, post-Cold War security challenges, especially those observed after September 11, require a holistic approach to security⁵⁴. Such an approach is not only confined to "a high degree of integration between the internal and external security aspects of the EU"⁵⁵ and increased consistency between the communitarized and intergovernmental policy realms in this respect. It also necessitates the involvement of all significant security actors in Europe within this framework. Turkey, as a NATO member and having the biggest army in Europe is definitely a major European security actor, which has already offered an infantry brigade of 5000 men, two air squadrons (and two transport aircraft) and one amphibious infantry battalion (plus seven ships and one submarine) to the ERRF⁵⁶.

In view of the widening gap between European and US military capabilities and the lingering role of NATO in European security, the contribution that Turkey's defence capabilities can make to the CESDP should not be overlooked. Inclusion of Turkey within the CESDP may prove the sincerity of European attempts for a more balanced burden-sharing within the Alliance. This may even be a way of reducing US concerns on the issue. It should also be kept in mind that Turkish forces are apt to the Petersberg tasks and military measures for countering terrorism more than any other European army due to its experience and capabilities for *rapid deployability, sustainability, flexibility, survivability, interoperability* as well as *effective command and control*.

However, it is this military strength of Turkey and its experience with regard to combating terrorism that marks the cultural difference between Turkey and the EU with regard to security. The predominance of Turkish General Staff in Turkish politics and foreign affairs, some methods used for combating terrorism that sometimes inevitably contradicted with the protection and preservation of fundamental rights are some of the factors that

⁵⁴ For arguments supporting this view see Cebeci, footnote (1) p. 30 and Duke, footnote (48), p. 169.

⁵⁵ Duke, footnote (48), p. 169.

⁵⁶ This information is taken from Missiroli, footnote (3), p. 25 [his] endnote (13).

negatively affect Turkey's quest for becoming a Full Member in the EU in general and being accommodated in the CESDP in particular. Many analysts contend that there are evident differences of approach to security between Turkey and Europe in the sense that Turkey pursues realist policies in this realm and this does not fit in with the liberal-institutionalist and some times critical set of ideas that guide the EU in its security policy⁵⁷. Not without irony however, these analysts do not draw the same grey picture with regard to the differences between the EU Member States in this respect, ranging from unilateral German recognition of former Yugoslav republics, to the British involvement in the military action against Iraq in February 1998, while praising the idealist nature of the European integration project.

This does not, of course, mean that the argument here is based on the assumption that there are no differences between Turkey and the EU in their approach to security or that the irony in European politics is put forward to justify Turkey's realist stance with regard to security. It only serves to come up with the conclusion that the differences between Turkey and the EU with regard to their approach to security are only as grave as the ones between individual EU Member States. However, the negative image of Turkey already constructed in European minds make the differences look bigger than they are.

There is no gainsaying that there are crucial misunderstandings and misperceptions between Turkey and the EU. However, it is in the interest of both parties to improve their security relations regardless of the issue of Turkey's membership in the EU, which seems a remote possibility, if not totally out of question. As a matter of fact, the need for such an improvement is all the more compelling after September 11. What Europe needs right now is a holistic approach to security and not to draw new dividing lines across Europe, especially when there is a risk that it may be interpreted as an

⁵⁷ Some even go further and call Turkey a soft-security consuming country in this respect. For an example of such arguments see, Dietrich Jung, "Turkey and Europe: Ongoing Hypocrisy?", COPRI Working Paper No. 35 (2001).

intentional move to leave the Muslim world on the one side and the Christian world on the other.

**ISRAEL AND A EURO-MEDITERRANEAN INTERNAL
MARKET - A SURVEY OF EXISTING BARRIERS
TO TRADE AND POSSIBLE REMEDIES**

TAL SADEH*

Abstract

This paper tries to briefly estimate how integrated the Israeli economy and state currently are with the EC in the sectors and fields of cooperation that the Commission and the Euro-Mediterranean ministerial conferences have identified as important to the formation of a Euro-Mediterranean internal market. In each issue area the paper describes the Israeli commitments under the EMAA and relevant multilateral agreements, and the practice of EC-Israeli exchange. The EC-Israel bilateral agenda is not distinguished from the regional agenda, as both are interrelated, and both determine the practice of EC-Israel integration.

The paper first explores possible distortions to EC-Israeli trade in industrial goods arising from the asymmetric effects of rules of origin, drawbacks, standards, the embargo on dual use goods, boycotts of Israeli goods, exports from the settlements, obstructions to EC-Palestinian trade, and customs procedures. It then deals with trade in agricultural goods and trade in services. It describes Israel's commitments under GATS and elaborates the potential gains and difficulties in EC-Israel trade in services in five major sectors: Financial services, air and maritime transportation, tourism, telecommunication and trade in labor. Other issues explored include public procurement, foreign direct investments in Israel and the regulatory investment environment, intellectual property rights, competition, the EC's financial assistance to Israeli infrastructure development, and EC-Israeli cooperation in research and development.

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The general conclusion is that while Israel aspires to OECD institutional and legislative standards, die-hard monopolies still persist in various sectors, and well-intentioned government officials still believe in the need for government planning and regulation in many sectors. That being said, the transformation in Israel's economy in the past decade is remarkable and its trade with the EC is probably less distorted than that of its fellow Mediterranean countries. With the final completion of the financial liberalization process in 2003 more progress can be expected.

List of Abbreviations

- BP - Barcelona Process
- CEECs - Central and Eastern European Countries
- DIIME - Declaration on International Investments and Multilateral Enterprises
- EC - European Community
- EIB - European Investment Bank
- EMAA - Euro-Mediterranean Association Agreement
- EP - European Parliament
- EU - European union
- FATF - Financial Action Task Force
- FDI - Foreign Direct Investment
- FICC - Federation of Israeli Chambers of Commerce
- FTA - Free Trade Area
- GATS - General Agreement on Trade in Services
- GCC - Gulf Cooperation Council
- GDP - Gross Domestic Product
- GLP - Good Laboratory Practice
- GNP - Gross National Product
- GPA - Government Procurement Agreement
- ILS - Israeli Shequel
- IMF - International Monetary Fund
- IPR - Intellectual Property Rights
- MOF - Ministry Of Finance
- MOTI - Ministry Of Trade and Industry
- MRA - Mutual Recognition Agreement
- NCCT - Non-Cooperating Countries and Territories
- NTB - Non-Tariff Barrier

NTC - Non-Trade Concerns
OECD - Organization for Economic Cooperation and Development
OSCE - Organization for Security and Cooperation in Europe
PA - Palestinian Authority
ROO - Rules Of Origin
RTD - Research and Technical Development
SII - Standards Institute of Israel
SM - Single Market
SPS - Sanitarian and Phyto-Sanitarian
TASE - Tel Aviv Stock Exchange
TBT - Technical Barriers to Trade
TRIMs - Trade Related Investment Measures
TRIP - Trade Related Intellectual Property
UN - United Nations
UNSCR - United Nations Security Council Resolution
USTR - United States Trade Representative
WETA - Wider European Trade Area
WIPO - World Intellectual Property Organization
WMDBM - Weapons of Mass Destruction and Ballistic Missiles
WTO - World Trade Organization

1. INTRODUCTION

The last decade has been one of dramatic developments, both in the politics and economics of Israel. Gross Domestic Product (GDP) per capita increased from USD 12,000 in 1990 to USD 18,000 in 2001. Israel's purchasing power parity GDP per capita now equals 88 percent of the average among members of the Organization for Economic Cooperation and Development (OECD). The Israeli economy became more open and dynamic, with trade accounting for almost 80 percent of GDP. High-tech industries became the engine of economic growth, which averaged an annual 5 percent in the 1990s. According to the World Development Report Israel ranks 36th and 32nd in terms of Gross National Product (GNP) and GNP per capita respectively, and 22nd in the UNDP Human Development Report. The International Monetary Fund (IMF) regards it as an advanced economy, and the World Bank Atlas defines it as a high-income economy (OECD, 2002, 15).

The underlying sources for this remarkable development of the Israeli economy were the growing international interest in emerging markets, and the favorable geopolitical conditions from the Madrid conference in 1991, through the Oslo process, and until the outbreak of hostilities in October 2000. In addition, since the mid-1980s the involvement of the Israeli government in the economy was reduced, regulated sectors were liberalized, and public companies were privatized. Israeli authorities became increasingly successful in controlling inflation, government deficits and national debt. During the 1990s Israel also liberalized its exchange system. In May 1998 the Israeli Shequel (ILS) became almost fully convertible (OECD, 2002, 25-7).

Israel and the European Community (EC) signed a Free Trade Area (FTA) agreement in 1975, which has been implemented in full since 1989. Since the late 1980s Israel has been seeking to deepen its economic cooperation with the EC. The relationship had to be adjusted to the economic and technological developments in the world, and to the changes in the EC itself, such as the Single Market (SM) program and the admission to the EC of new members, including three Mediterranean countries - Greece, Spain and Portugal. The demise of the Soviet Bloc increased the interest of the EC in its southern flanks. The Gulf Crisis, in particular, demonstrated the dangers of Middle Eastern instability to Europe. In this context, the peace process that started at the Madrid Summit of 1991 was a major factor in the EC's willingness to respond positively to Israel's needs.¹

Thus, the European Council decided in Essen in December 1994, "that Israel, on account of its high level of economic development, should enjoy special status with the European Union (EU) on the basis of reciprocity and common interests" (Commission of the European Communities, 1995, 147). In fact, the German version of the declaration translates literally as "privileged status." The negotiations toward a new agreement, which lasted from

¹ The author is well aware that the European Union (EU) was established at the beginning of 1992. However, since the paper deals with Israel's economic relations, the EC is generally the proper reference.

September 1992 to November 1995, led in the end to the conclusion of a Euro-Mediterranean Association Agreement (EMAA) between the EC and Israel.² Israel's privileged status was reflected in its association, since August 1996, with the EC's Framework Programs for Research and Technical Development (RTD). Israel was the first non-European country to be associated with these framework programs.

This new approach towards Israel is part of the new policy of the EC toward the Mediterranean region as a whole, known as the Barcelona Process (BP). The BP, launched in 1995, aims at enhancing economic development, democracy and liberal values in the Mediterranean basin; the lack of these so far is deemed by the EC to pose an increasing threat to its own political stability. Euro-Mediterranean cooperation in the BP encompasses three "baskets": Economic, political and cultural. These baskets are reflected in the EMAAs, which the EC has so far concluded in the framework of the BP with all of the Mediterranean countries (including Jordan) except for Libya and Syria.³ Each EMAA consists of provisions allowing for a FTA in industrial goods, and liberalization of trade in agricultural goods and services, capital movements, government procurement, competition policy, and protection of Intellectual Property Rights (IPR). Each EMAA also consists of a bilateral political dialog, and cooperation on cultural and social matters. The implementation of each EMAA and dispute settlement are governed by an Association Council, and an Association Committee.

Within the economic basket the aim of the BP is to establish by 2010 a FTA among the EC and all Mediterranean countries, based on the EMAAs and on FTA agreements between Mediterranean countries. To this effect the EC has been pressing for liberalization of Mediterranean economies and structural adjustments. The MEDA financial assistance program has been set up, through which the EC helps in the development of infrastructure and the business communities in its partner. The BP is taking place within

² See Dafni, 2000; and 2001; Kosnikowski, 1999; and Paasivirta, 1999.

³ Negotiations with Syria are ongoing. Libya is not part of the Barcelona Process.

the context of agreements of the World Trade Organization (WTO), and aims to be compatible with them. Thus, the EC has been urging its Mediterranean partners to join all of the WTO's multilateral agreements and commitments, including the General Agreement on Trade in Services (GATS).⁴ Annual Foreign, Industrial and Trade Ministers Conferences have been established to develop the BP as a common interest, in addition to the Euro-Mediterranean committee, which acts as a steering committee. Working groups have been established on industrial cooperation, Rules of Origin (ROO), services, and regional-integration-related trade measures. Businesses, environmental, research, and cultural networks have been established as well.

Thus, while initial activity in the context of the BP focused on allowing duty-free trade among the Mediterranean partners, increasingly the focus is shifting to wider and more fundamental issues. The Euro-Mediterranean Ministerial conference on Trade decided to implement an Action Plan on Trade and Investment Facilitation covering customs procedures, standardization, regulatory framework for investment, protection of IPR (Commission of the European Communities, 2002a). The Fifth Euro-Mediterranean Conference of Ministers of Foreign Affairs in Valencia in April 2002 endorsed this Action Plan, and asked that the harmonization of ROO and liberalization of services would be considered as well (Commission of the European Communities, 2002b). These plans for further liberalization of trade and harmonization of technical issues, which would otherwise form barriers to trade, follow on the proposals of the Commission of the European Communities (the Commission).⁵ The Commission also recommended improving market access in agriculture and increasing financial assistance to the Mediterranean partners.

The tendency to view the BP not merely as a scheme for regional trade integration but as a process of profound economic and political change among the participants follows on the same Neo-Functionalist logic on which the EU is founded. Cooperation in

⁴ See COM (2000) 497 final, 6, 8.

⁵ See SEC (2002) 159 final.

supposedly simple and technical issues spills over to much more fundamental issues, increasingly impinging on state sovereignty. Thus, in its recent recommendations to foreign ministers of participant states to the BP, the Commission states that proposals should be put forward "...with a view of introducing the appropriate reforms for the gradual development of a Euro-Mediterranean internal market."⁶

This paper tries to briefly estimate how integrated the Israeli economy and state currently are with the EC in the sectors and fields of cooperation that the Commission and the Euro-Mediterranean ministerial conferences have identified. The paper assesses the existing barriers to trade and the required remedies. Section 2 explores possible distortions to EC-Israeli trade in industrial goods arising from the asymmetric effects of ROO, drawbacks, standards, the embargo on dual use goods, boycotts of Israeli goods, exports from the settlements, obstructions to EC-Palestinian trade, and customs procedures. Section 3 deals with trade in agricultural goods.

Section 4 is devoted to trade in services. It describes Israel's commitments under GATS and elaborates the potential gains and difficulties in EC-Israel trade in services in five major sectors: Financial services, air and maritime transportation, tourism, telecommunication and trade in labor. Section 5 analyzes the issue of public procurement. Section 6 discusses Foreign Direct Investments (FDI) in Israel and the regulatory investment environment. Section 7 elaborates on the issue of IPR. Section 8 focuses on the legal and institutional innovations in Israel in the recent decade that improved competition in the markets, and contrasts them with data on the concentration of the Israeli economy. Section 9 is devoted to the EC's financial assistance to Israeli infrastructure development over the years. Section 10 deals with EC-Israeli cooperation in research and development. Section 11 concludes.

⁶ See SEC (2002) 159 final, 14.

This is not a legal review of the differences in the laws and codes that regulate these issues in the EC and Israel. Rather, in each issue area this paper describes the Israeli commitments under the EMAA and relevant multilateral agreements, and the practice of EC-Israeli exchange. Multilateral agreements are increasingly emphasized by the Commission as a common ground, the adherence to which by all parties would help achieve a Euro-Mediterranean internal market. In addition, this paper does not distinguish EC-Israel bilateral agenda from regional agenda, as both are interrelated, and both determine the practice of EC-Israel integration. Obviously, the issues this paper encompasses are vast, and therefore the present analysis should be viewed as of a preliminary nature.

2. TRADE IN INDUSTRIAL GOODS

The EU and Israel allow each other's goods duty free access according to the EMAA. Except for agriculture, Israel employs very little import licensing requirements. Israel has not been an active user of anti-dumping legislation or countervailing or safeguard measures in the 1990s (WTO, 1999, xxi).

Total trade between the EC and Israel has doubled in the last five years, from Euro 14 Billion in 1995 to Euro 26 billion in 2000. Excluding diamonds EC-Israel trade represented 32 percent of Israeli exports and 41 percent of Israeli imports. Israel's main exports to the EC are electrical machinery and equipment (39 percent), chemical products (17 percent), plastics and rubber (9 percent), agricultural products (9 percent), and optical and medical equipment (8 percent). Israel's main imports from the EC were electrical machinery and equipment (35 percent), chemicals (13 percent) and base metals (6 percent). In the last 20 years the share of EC-Israel exchanges in their total trade with the rest of the world has almost doubled, and currently Israel is the EC's 15th largest export market.⁷

⁷ See Second Meeting of the Association Council – Declaration of the European Union, 14271/01 (Presse 433 - G), 6.

The development of EC-Israel trade was accompanied by a growing Israeli trade deficit. In 1990 Israel's trade deficit with the EC amounted to USD 3.5 billion, which was equivalent to 102 percent of Israel's total trade deficit. In other words, Israel was at an aggregate surplus with its non-EC trade partners. By 2000 Israel's trade deficit with the EC inflated to USD 6.9 billion, which was equivalent to 159 percent of Israel's total trade deficit. At the same time Israel's trade surplus with the US rose from USD 643 million to USD 5.1 billion.⁸ The simultaneous incidence of Israel's deficit with the EC and its growing surplus with the US raised the possibility of distortions in Israel's trade and provoked studies over the right framework for Euro-Israeli relations.⁹ The following sub-section surveys a few explanations that were offered for this puzzle, including the asymmetric effects of ROO, drawbacks and standards.

A few technical and political bilateral issues plague Euro-Israeli trade in recent years and disturb the free flow of goods. The last five sub-sections explore them: The embargo on dual use goods, the boycott of Israeli goods in Europe, customs debts arising from exports to the EC of goods origination in the Israeli settlements, Israeli obstructions to EC-Palestinian trade, and customs procedures.

2.a. Hypotheses about the causes of Israel's chronic trade deficit with the EC

Conspiracy theory: The first and rather instinctive explanation was offered by some Israeli officials who complained that the deficit is the result of unfair trade practices on the part of the EC. Needless to say, EC officials flatly denied these suggestions.

The incomplete Single Market: Other officials argue that while European goods better suit Israeli consumption preferences than

⁸Israel's Central Bureau of Statistics (2001) *Statistical Abstract of Israel*, 52, Table 16.5.

⁹See Hirsch, Inbar and Sadeh, 1996. For earlier appraisals of EU-Israeli trade relations see Pomfert and Toren, 1980; and Silber and Berrebi, 1988.

American ones, the European market is less attractive to Israeli exporters than the American market because the internal market is still uncompleted. While this could have been a reasonable explanation in 1990, it seems less credible in 2000.

High-tech trade: Perhaps the growing US-Israeli trade in high-tech goods is responsible for the Israeli surplus in the late 1990s. According to this explanation, since Israel's overall deficit is macroeconomically determined by factors such as national saving and investment, its great surplus with the US forces a large deficit with the EC. While this hypothesis could go a certain distance in explaining Israel's trade deficit with the EC, it suffers two shortcomings. The first is that the high-tech sector was not developed in the early 1990s, when Israel's deficit with the EC was already growing. The second shortcoming is that the trade-balance forms only one part of Israel's current account, which is the true macroeconomic variable. The absence of comprehensive data on the direction of trade in services makes it hard to verify the high-tech explanation.

Distance: The effects of distance partly explain the fact that Israel does not have a trade deficit with the US (Sadeh, 1999).

The asymmetry of the ROO and the pan-European system of origin: An alternative explanation was offered by Sadeh (1999), who argued that the FTA agreements that Israel signed with its major trade partners are at fault. The FTA agreements between Israel and the US and between Israel and the EC redistributed welfare in favor of Israel's partners, and increased its trade deficit with them. Estimating a gravity equation, Israel's imports were found to be much more correlated with the existence of an FTA than its exports. This was especially pronounced in the 1990s, as the implementation of the FTA agreements progressed.

This asymmetry in the trade effects of Israel's major FTAs, which are inherently deficit-enhancing, was also supported by Foux (1997, 20), although in his estimates Israeli imports were unaffected by the FTA, while exports actually declined. The

tendency of these FTAs to widen Israel's trade deficit can be accounted for by the nature of the ROO.

Both the EC and the US are big and sophisticated economies. Their producers can in most cases exploit economies of scale without recourse to foreign subcontractors. Also, being geographically large they are economically diversified with a different specialization in different regions within. This again reduces the need for an international process of production. Israel on the other hand is a small economy that relies much more on foreign subcontractors (supplying different components and services) than the EC and the US. This in turn means that there are more Israeli exports to these FTA partners that do not comply with the ROO and are not tariffs-exempt, than Israeli imports from those partners that do not comply with the ROO.

Of course, cumulation of origin is recognized between the partners of FTAs, but not between them and third parties. For example, Israeli exports to the EC would not be tariffs-exempt if a significant portion of the Israeli good was produced in the US, in Eastern Europe or in the Far East. It can be assumed that Israeli exporters to the EC are much more involved with non-EC foreign subcontractors than EC exporters to Israel. This is because Israel is not part of the SM and has no borders with the EC members (Hirsch and Almor, 1996).

Thus, on the imports side, Israel experienced trade creations as well as trade diversions upon the establishment of the FTA with the EC, while on the exports side it experienced a muted positive welfare effect. Israel's FTA partners, in contrast, experienced muted trade creations and trade diversions on their imports side (not discriminating in favor of those Israeli producers who do not pass the origin test); they also experienced a strong positive welfare effect in their exports. In other words, *prima facie*, the asymmetry in the ability to comply with the ROO leads to an asymmetry in the balance of the FTA's welfare effects, in favor of Israel's partners (Sadeh, 1999).

To refine the argument further, an FTA agreement carries an additional distinct distortion beyond the usual distortions of trade agreements. Either the origin criterion is fulfilled (and a full exemption from the tariff is given to the member), or the criterion is not fulfilled (and no exemption at all is given). This discontinuity in the tariff level is a source of distortion. For example, a 50 percent non-European component in an Israeli good would not award it a tariff exemption, if more than 50 percent Israeli content is required (in reality the origin criteria in the Euro-Israeli FTA are not defined in terms of added value, but the logic still holds). Under a CU, however, the Israeli producer pays the full Common Customs Tariff only on 50 percent of the good's value when the non-European components are purchased. So effectively, the tariff is higher under an FTA for a small country producer, than under a CU. Similarly, it is higher under a CU than under an FTA, for a large country producer.

Recognizing this, Israel is keen on joining the pan-European system of origin, known also as the Wider European Trade Area (WETA), which was established between the EC and its European trade partners in recent years and is gradually being implemented since 1997. The system ensures harmonization of the ROO among the members and diagonal cumulation of origin among them (Hirsch, 2001b).¹⁰ In March 2002 the Euro-Mediterranean Ministerial Conference on Trade agreed to the principle of the participation of Mediterranean partners to the system of pan-European cumulation of origin. A special working group, which was set up by the trade ministers in May 2001, is currently working out the details of this participation (Commission of the European Communities, 2002a).

Joining WETA would enable Israel to export tariff-free products made in eastern European countries to the EC.¹¹ In order to join

¹⁰Diagonal cumulation of origin allows peripheral country A to use inputs from peripheral country B in the production of a good exported to the EC while still identifying the final good as a country A good.

¹¹Currently Israel enjoys only bilateral cumulation of origin with the EC. Therefore, Israeli goods with East European inputs may not comply with the ROO in the EMEA.

WETA Israel must modify its trade agreements with those countries and adopt the WETA ROO model. Since the differences between the ROO in these agreements and the WETA model are relatively minor, this can be done in a relatively short time. The modification of the ROO in the EMAA merely requires approval by the Euro-Israeli Association Council, without member states' involvement and a long ratification process. While allowing diagonal cumulation of origin can greatly develop Israel's exports to the EC, the harmonization of ROO in itself should not entail significant effects on Israel's trade (Hirsch, 2001a; and Hirsch, 2001b).¹²

Drawbacks: Another FTA-related factor possibly accounting for the simultaneous incidence of Israel's trade deficit with the EU and its balance with the US are drawbacks. Drawbacks are refunds that an exporter gets from his home country's customs authorities due to tariffs paid on imported inputs used for the production of the exported goods. Such refunds are considered to be a kind of export subsidy, and are therefore banned under the EMAA (as well as in all of the trade arrangement in Europe). However, under the American-Israeli FTA drawbacks are permitted.

Standards: Another asymmetry in the application of the FTA agreement stems from the difficulty of Israeli producers in certifying their quality. Wherever the EC standards are applied in EC-Israel trade, the Israeli producers are often at a relative disadvantage, having to adjust themselves to these standards and go through expensive tests in Europe. To this effect the Israeli Ministry of finance (MOF) has sought to reach a Mutual Recognition Agreement (MRA) with the EC, which would allow both mutual recognition between the laboratory accreditation authorities of the EC and Israel, and mutual recognition in EC and Israeli standards (Dafni, 2001). The European authorities refused this so far, arguing that MRAs such as those reached between the

¹² According to Israeli trade officials the EC is currently in the process of modifying its agreements with the CEECs. Once that process is complete Israel is expecting to receive from the Commission a revised draft of the EMAA ROO protocol.

EC and Japan and the US are technically very complicated and are not justified in the case of the small Israeli economy. Officials in the Standards Institute of Israel (SII) are skeptical too of a Euro-Israeli MRA, arguing that the SII is often able to help Israeli exporters to Europe in getting the certification they need.

Nevertheless, some progress was achieved in May 2000, when the Agreement on Good Laboratory Practices (GLP) entered into force, allowing Israeli laboratories to certify the fulfillment of EC industrial standards by Israeli producers of industrial chemicals, cosmetics, medicine, pesticides, and food additives.¹³ Israel submitted to the Commission a list of fields in which it would like to negotiate mutual recognition of laboratory tests. These include pressure vessels, telecommunications terminal equipment, medical services, electromagnetic compatibility, low voltage, and machinery (Hirsch, 2001a). Anyway, increasing global harmonization of standards gradually erodes the potential benefits of a bilateral MRA. A related issue, which mostly falls under consumer protection, is the Israeli desire to participate in the European Rapid Alert System, alerting consumers to damaged or malfunctioning goods and removing them from the market (Hirsch, 2001a). The Commission's initial response was positive and Israel is currently preparing a draft proposal.

A more profound way to solve the standards problem is for Israel to adopt the EC standards. For example, in 1993 the SII introduced the Green Label, for environmentally friendly products, based on EU Directive 880/92 (WTO, 1999, 68). However, Israeli adoption of EC standards, a possibility that so far was not raised officially, could put Israel at odds with the United States Trade Representative (USTR), since American industrial standards differ from those of the EC. In fact, according to Israeli officials the USTR has sought in a number of cases to alter Israeli standards to better suit American manufacturers. Examples include standards of ladders, food products and cars, and allowing products to be marketed in round non-metric weight units (such as pounds and ounces). Generally, some Israeli officials see potential for

¹³ See *Official Journal*, L263, 9 October 1999, and <http://www.eu-del.org.il>.

participation of the SII in the European system of standards institutes, because of the greater participation of European institutes in the making of standards, compared with American institutes, which are mostly private. Under the European system, each national institute carries one vote, and thus, as a small country Israel could exert greater influence on new standards than in the context of its bilateral relations with the main trading blocks.

Anyway, the tendency in the 1990s has been to reduce the scope for mandatory standards. Israel has amended its standards law, aimed at meeting its commitments under the WTO's agreement on Technical Barriers to Trade (TBT). In January 1998 the Standards Law was narrowed so that fewer standards could be made mandatory. The status of about 250 standards changed from mandatory to voluntary or partially mandatory. Some 500 mandatory standards still exist, mostly in the food and electrical engineering sectors, although a quarter of these are equivalent to international standards (WTO, 1999, 67-9).

In spite of this progress, Israeli importers often view the SII as heavily influenced by the interests of the Israeli industry. They complain that Israeli standards are sometimes tailored to the needs of the local industry, and designed to thwart foreign competition. Examples include certain requirements for Kosher labels, and restrictions on the size of letters on the package, and on marketing foreign private labels in Israel. Israeli importers argue that tailored standards are applied to glass bottles, electrical sockets, ladders, instant coffee, tea, aerosols, electrical transformers, car engines, special shoes, industrial vacuum cleaners, and cement. The Federation of Israeli Chambers of Commerce (FICC) complains that in addition to this violation of the principle of national treatment, the SII is acting to preserve its monopoly over certification in Israel. This monopoly, which according to the FICC allows the SII to charge unreasonable prices, is to be replaced by a competitive certification market, according to the decision of the Israeli government of August 2000.

2.b. Israel and the European embargo on dual use goods

The EC's regime for the control of exports of dual use items and technology, based on Council of Ministers' (the Council) regulation 1334/2000, entered into force in September 2000 and is an integral part of the Common Commercial Policy. According to this regulation, exports of items and technology that can be used to develop, produce, handle, operate, maintain or store Weapons of Mass Destruction or Ballistic Missiles (WMDBM) require special authorization (Annex I), except for intra-EC trade and exports to ten specifically listed non-member states (Annex II).¹⁴ Special authorization is also required for exports of non-WMDBM items and technology that can be intended for military end-uses to countries that are under an arms embargo by the EU, the Organization for Security and Cooperation in Europe (OSCE) or the United Nations (UN). Each member state can put together its own list of such items (Article 3, Paragraph 2). Finally, Article 5 allows each member state to prohibit or restrict the export of items that it considers to be of dual use for reasons of public safety or human rights.

Thus, the EC's regime for the control of exports of dual use items and technology can be described as a three-layer regime. At the top layer, relating to WMDBM, both the items and the banned destinations are collectively and specifically defined. At the middle layer, relating to exports of non-WMDBM items with possible military end-uses to countries under an arms embargo, the banned destinations are defined collectively, but the banned items are defined nationally. At the bottom layer, relating to exports of non-WMDBM items with possible military end-uses to countries that are not under an arms embargo, both the items and banned destinations are defined nationally. In other words, the rules of the regime are tight at the top layer, but loose at the bottom layer. However, the implementation of this regime is left to the member states, since the power to authorize exports rests with them, rather

¹⁴ Annex IV lists additional items that are so sensitive that they need an authorization to circulate even within the EC.

than with some supra-governmental, inter-governmental or non-governmental organization.

As Israeli-Palestinian violence intensified, some have sought to apply the EC's dual use regime at the middle and bottom layers to the Middle East. In April 2002 the European Parliament (EP) called on the Council to institute an arms embargo on Israel and the Palestinians. In fact, the EP also called on the Commission and the council to suspend the EMAA.¹⁵ The fact that this call so far went unheeded is only of partial comfort for Israel since it reflects the public opinion in Europe and sometimes the official opinion too.

It is at this point that the looseness of the rules at that bottom layer of the EC's dual use regime comes into play. While no EC policy with regard to exports of dual use items to Israel was made public, increasingly EC member states restrict exports to Israel under the dual use argument. These restrictions result to some extent from legitimate decisions regarding specific items, but mostly from an enhanced enforcement effort in the Israeli case. This discriminatory enforcement of the dual use regime is in violation of the national treatment principle.

These developments are a cause for growing concern among Israeli businessmen and officials. The restrictions are applied mostly on Israeli imports of electronics, chemicals and metals, and mostly by the authorities of Britain and Germany. For example, Germany refused to export tank spare parts, and Britain suspended the sale of parts of fighter jets. While these two states are generally among the more pro-Israel of the member states, their decisions are potentially more damaging to Israeli imports as they constitute major sources. Other known cases were the refusals of Belgium and Austria to export handguns to Israel. Somewhat surprisingly, France, which is often regarded as the more pro-Arab among the member states, has generally not been enthusiastic to apply the dual use regime to Israel, although it did refuse to export riot gear.

¹⁵ See the EP's resolution on the Middle East P5_TA (2002) 0173 of 10 April 2002.

Israeli officials are so far mostly successful in convincing European trade officials that the items are not destined to military end-uses. When needed problems are solved at the ministerial level. In the end the damage to EC-Israel trade is mostly in the delays caused to shipments, and the bureaucratic hassle involved. Sometimes Israeli businessmen and the government simply prefer to find alternative sources for such restricted imports, although such alternatives come at a delay as well. For example, certain Israeli imports are recently diverted from Belgium to the US. Arms sales are another example. From Israel's point of view the application of the European dual use regime amounts to a Non-Tariff Barrier (NTB). From the European point of view this raises the question of the effectiveness of the application of the dual use regime to Israel, which comes at a price for Europeans too.

2.c. European boycott of Israeli goods

Another issue that has a potential to disturb EC-Israel trade recently is a boycott of Israeli goods in Europe. Potentially, a boycott has three levels. At the state level, a boycott can be a government policy applied by the public sector, or a law, binding on individuals and firms as well. At the corporate level a boycott is the result of policies of firms. At the individual level a boycott is the result of many decisions by individual consumers, whether coordinated by NGOs or not.

While European governments and the Council have so far refrained from suspending the EMLA, calls for a boycott of Israeli goods were sounded in Europe at the corporate and individual level. At the corporate level a few cases of stores refusing to purchase Israeli goods are known in Scandinavia (mostly in Norway, which is not an EC member state, but also in Sweden and Denmark), Belgium and Britain (Selfridge). This boycott was mostly directed at Israeli food products and cosmetics. So far almost all of these decisions were reversed following pressure on the stores from pro-Israeli consumer lobbies.

At the individual level data is harder to come by, but Israeli trade officials detect a decline of sales of Israeli consumer goods in

Scandinavia. This is true especially for Israeli fresh produce, where the origin of the goods is clearly marked. The boycott against Israeli goods at the corporate and popular level has caused unease to the Norwegian government, to the extent that in the spring of 2002 the Prime Minister came out with a declaration supporting trade with Israel. Somewhat surprisingly in France the possibility of a popular boycott against Israeli goods was only recently raised by anti-Israeli lobbies and may be currently gathering support. However, Israeli officials reckon that the French legal system provides Israel with ample remedies.

2.d. The Israeli settlements in the occupied territories

The EC decided not to recognize products originating outside the green line (Israel's 1948 border) as having an Israeli origin. While this view is popular in Europe, the EMAA does not define the territory of the State of Israel. Israel unilaterally annexed the Golan Heights and Eastern Jerusalem, and in practice applies the Israeli law to the settlements in the West Bank and the Gaza strip as well. The Commission argued that public international law takes a different view, and supported its argument in relevant United Nations Security Council Resolutions (UNSCRs) and UN General Assembly resolutions. The Commission argued that although not adopted under Chapter VII of the UN charter, those UNSCRs are an authoritative interpretation of international law. Others have argued that the settlements are illegal according to the 1949 Geneva Convention IV, which prohibits the transfer of the civilian population of an occupying power into the territory it occupies.¹⁶

Although the main motive of the above decision in 1998 was political, so far both parties seemed keen to maintain a technical profile to the issue. In its memorandum on the matter, the Commission put it in the context of the desire to allow cumulation of origin among Euro-Mediterranean partners.¹⁷ Exports from the settlements to the EC with an Israeli certificate of origin were

¹⁶ See Paasivirta, 1999, 315-6; and SEC(1998)695 final, 7-8.

¹⁷ See Council conclusions of 29 June 1998 (Bull. EU 6-1998, point 1.4.98); and SEC (1998) 695 final, 3.

violating the EMAA's protocol on ROO in the Commission's opinion, and therefore, were obstructing the progress towards cumulation of origin in the Mediterranean, and the developments of EU-Israel relations. In the next paragraph the Commission put the settlements issue on a par with the infamous orange juice case, explaining that such matters of ROO have been encountered and solved in the past.¹⁸

Various working groups have tried to tackle the issue on a technical level, involving customs officials from both parties. 2500 certificates of origin were sent for examination by the Israeli customs authorities, which starting in March 2001 have been sending back verifications for certificates in question. In May 2001 Israel formally announced that all certificates in question were verified, and all comply with the requirements of the EMAA (Arbeli, 2001). Of course, the Commission took a different view. Thus, in November 2001, following a meeting of the Euro-Israeli Association Council, the Commission published a notice (Avis) warning EC importers of products coming from the settlements that they might be charged tariffs over these imports.¹⁹ In addition, based on Protocol 4 to the EMAA, the Commission has initiated in November a ten-month period of verification, at the end of which the Commission could start to collect the customs debt.

The next step could be legally binding arbitration, according to Article 75 in the EMAA. However, Israel probably prefers to avoid legal procedures, lest an international tribunal find in favor of the EC, and reinforce the opinion that the settlements are illegal. This could determine the borders of the State of Israel before the issue has been resolved in a political process between Israel and the Palestinians.

Israeli officials estimate industrial exports from the settlements to Europe at USD 100 million. The damage to these exports from the loss of duty-free access to the EC is estimated at a mere USD 5 million, since the MFN tariff on many of these products is very

¹⁸ See below.

¹⁹ See OJ C-328, 23 November 2001.

low. In anticipation of customs debt collection by the Commission, legislation is underway in the Israeli parliament (the Knesset) to compensate the settlers to this amount.

2.e. Obstructions to EC-Palestinian trade

Obstructions to EC-Palestinian trade distort EC-Israeli trade. Due to a lack of outlets the Palestinians depend on transit through Israel for their trade with the EC. The EC complains that Israel has not allowed the implementation of the 1997 EC-PLO Interim Association Agreement on Trade and Cooperation, long before the outbreak of the current hostilities. The 1997 agreement provides that the Palestinian customs authorities issue certificates of origin. In addition, the Israeli-Palestinian 1994 Paris Protocol on Economic Relations accords the Palestinians the right to export their agricultural and industrial produce to external markets without restrictions on the basis of certificates issued by the Palestinian Authority (PA) (Paasivirta, 1999). Therefore, the Commission concludes, Israel has acknowledged the PA's right to sign international agreements. However, the Paris Protocol also establishes the principle of the territorial indivisibility (for the interim period) of the Israeli-Palestinian customs union, which Israel argues is violated by the EC-PLO agreement. In practice, according to the Commission, Israel puts important barriers to the free movement of goods and does not grant Palestinian exporters trade and economic treatment on an equal footing.²⁰

Since many Palestinians cannot in practice export their goods to the EC, or might suffer damage and delay while attempting to do so, they are tempted to export it under an Israeli certificate of origin, according to the Commission. Often Israeli and Palestinian produce are mixed in the process, but sometimes the Israeli agent simply sticks a "Made in Israel" label on the Palestinian produce. Examples, according to the Commission, include cut flowers from the Gaza strip, strawberries, aubergines, oranges, lemons, pickles, fruit juice, shoes, leather products and garments.²¹

²⁰ See SEC (1998) 695 final, 9-10.

²¹ See Paasivirta, 1999, 323; and SEC (1998) 695 final, 11.

In the same manner, the Commission argues, Palestinian imports are suffering from Israeli practices. Israeli port and airport authorities have required all Palestinian importers to sign a legally binding pledge to sell imports from the EC only in the West Bank and Gaza strip, while Israeli importers were not required to sign such a pledge. This, of course, enables Israeli agents to enjoy a mediation rent, or avoid competition with a Palestinian importer of the same product.²²

For the same purpose, the Commission argues, the Israeli authorities delay or do not grant import licenses to Palestinians, making them dependant on Israeli agents (for example paint and pharmaceuticals from Germany, Britain and the Netherlands). While legitimate reasons may be given for such delays and refusals, at the same time an Israeli agent is often granted a license to import the same product.

2.f. Customs Procedures

Customs procedures have long been recognized as another form of technical trade barriers. Within the framework of its WTO commitments, Israel has modernized its customs valuation legislation in the 1990s. The customs valuation method has been changed from the Brussels Definition of Value to the transaction value method. Under the Brussels Definition of Value the value of imported goods was the value of the goods on the open market on the day when they are released from the custom authorities.

Israel also abolished in 1998 the "harama" system, which in the past increased the value of most imports by as much as 10 percent before tariffs were imposed. According to the "haramah" system, the Israeli customs authorities uplifted the value of most products imported by exclusive agents to bring it to an "acceptable" level for customs valuation (WTO, 1999, 30).

Two Euro-Israeli committees are in charge of resolving customs issues and developing cooperation in this field. The first is the

²² See SEC (1998) 695 final, 12.

Customs Cooperation Committee, established in accordance with Article 39 of Protocol 4 to the EMAA. The second committee is an informal framework of customs experts, established to maintain a professional dialog, as called for in Article 49. In September 2000 the first meeting of the informal group took place. The Israeli officials expressed their interest in joining the Commission's OLAF database, which is very useful for customs inquiries (Arbeli, 2001).

The cooperation between EC and Israeli customs authorities was put to the test in 1994, when the Commission reported that the Israeli authorities were asked to verify the authenticity of certificates of origin of certain goods. Specifically, the goods in question were orange juice concentrates, which were alleged to have contained an excess of non-originating components, entering the EC as tariff-free Israeli goods. In the absence of a satisfying verification on the part of the Israeli authorities the Commission called into question the ability of the Israeli authorities to implement the ROO. Accordingly, it published in November 1997 a notice (Avis) warning EC importers of non-originating products coming from Israel that they might be charged with tariffs over these imports (Paasivirta, 1999, 322). In its notice the Commission stated that "...various elements have come to light which confirm a lack of effective administrative cooperation... between the Community and Israel... to the extent that the validity of all preferential certificates issued by Israel, for all products, are put in doubt."²³

Obviously, these developments complicated EC-Israeli trade relations. Officially, any eventual customs debt would be recovered from EC importers. Thus, European businessmen were wary of dealing in Israeli goods. In effect Israeli exporters were often asked by their European counterparts to provide financial guarantees in case their certificates turn out unacceptable.²⁴ The Israeli authorities have undertaken to verify origin certificates from 1995

²³ See OJ C-338, 8 November 1997, 13.

²⁴ As were, according to the Commission, Palestinians exporting to the EC through Israeli agents. See SEC (1998) 695 final, 11.

onwards (Paasivirta, 1999, 322).²⁵ More than 2000 certificates were examined and some were indeed revoked. Finally, as stated above, in November 2001 the Commission published a new notice, replacing the one of November 1997.²⁶ The new notice, in addition to warning EC importers about goods originating in the settlements, stated that "...movement certificates for orange juice, found to be invalid, have been withdrawn by Israel and that the necessary measures have been taken to allow administrative cooperation..."²⁷

The orange juice case underscores the need for a better definition of responsibilities with regard to certification of the origin of goods. Under the EMAA the exporter has to apply to his home customs authorities for a certificate of origin. Each shipment needs a separate certificate, and the verification of the goods' origin is the responsibility of the national customs authorities. Only specially authorized exporters are allowed to issue certificates of origin on their own. This process is expensive and cumbersome, and involves many documents. However, in the end the certificate of origin carries very little information. In effect the customs authorities cannot open a real investigation each time they issue a certificate of origin.

On the other hand, the US-Israel FTA leaves the responsibility over certificates of origin for each shipment with the exporters. Specially-authorized exporters are even allowed to issue annual certificates of origin, rather than shipment-specific ones. The exporters are required to provide details on the certificates of origin, which would enable verification (Shimoni, 1997). The US-Israeli procedure for origin verification is much more efficient than the Euro-Israeli one. It is less of a trade barrier, more effective in ensuring honesty, and makes verification by the authorities easier. It is also important to make sure that disingenuous declarations of origin are a felony according to the exporting country's law.

²⁵ In fact, by 1998 the Commission has expressed its satisfaction at the progress achieved on this issue. See SEC (1998) 695 final, 3.

²⁶ See above.

²⁷ See OJ C-328, 23 November 2001.

3. TRADE IN AGRICULTURAL GOODS

Agricultural exports formed 3 percent of Israel's total export in 1999, and the EC's markets absorbed 76.2 percent of this trade. Almost one half of Israel's domestic agricultural product is intended for the EC markets. In 1998-2000 Israel's agriculture trade with the EC was in a small balance (roughly USD 100 million), with annual turnover averaging USD 1.5 billion. Israeli exports to the EC consisted mainly of cut flowers, vegetables (potatoes, tomatoes, sweet pepper, spices and herbs); fruit (oranges, grapefruits and avocado), seeds, raw cotton, and processed products. Israeli imports from the EC consisted mainly of bovine frozen meat, fish, milk powder, wheat, barley and corn.²⁸

Like the EC, Israel supports its agricultural sector through different means, including import quotas, licensing requirements, variable levies, and subsidization of inputs such as water and capital. A number of agricultural products receive unlimited protection against imports, as licenses to import them are not usually granted (Halevi, 1994; and WTO, 1999, 41, 82-91). Under the WTO's agriculture agreement, which entered into force in January 1996, Israel is considered a developing country, and as such is not required to tarifficate its trade barriers. Israel was allowed to impose any tariff it chose below a certain binding ceiling. The ceiling is decreasing over a ten-year period, starting with tariffs of hundreds of percents in some sectors, and averaging 24 percent in the process (Munin, 1996).

However, in practice Israeli applied rates are often lower than the binding rate, due to a liberalization program, which was devised by the MOF, the Ministry Of Trade and Industry (MOTI), and the Ministry of Agriculture. According to this program, imports of fresh produce with a CIF price lower than the local production costs will be subject to a 100 percent tariff. Imports with a CIF price higher than the local production costs, as well as off-season imports, will be subject to a 30 percent tariff. A rise in local

²⁸ Ministry of Agriculture's data and Israel's Central Bureau of Statistics (2000) *Statistical Abstract of Israel*, 51, Tables 6.7, 8.6 and 9.13.

wholesale prices beyond 200 percent of the local production costs will automatically trigger free imports. As for processed food, the Israeli liberalization program set the tariff ceiling at 100 percent at the beginning of a seven-year tariff-reduction process, and 50 percent at the end.²⁹ The program also established a 12 percent floor for the effective tariff at the end of the process (Munin, 1996). Agriculture has always 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 the conclusion of the 1995 EMAA. In spite of the small share of agriculture in the GDP and the small share of the labor force of Israel and the EC employed in agriculture, both parties consider it an important sector from a political point of view. Over the past 30 years Israel's agricultural exports to the EC underwent a cyclical process of preferential treatment and preference erosion.

Thus, while mutual customs concessions were granted in the 1975 agreement, the fundamentals of EC-Israel agricultural trade changed significantly thereafter, 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-member states and was enlarged to the south. In order to adapt the EC-Israel agricultural regime to these changes, in 1987 the parties signed a fourth protocol to the 1975 agreement, according to which most of the Israeli agricultural exports to the EC were given zero-tariff quotas, and others were subject to reduced-tariffs quotas (Hirsch, 1996).³⁰

Alas, these preferences eroded further due to parallel concessions given to eastern European states, the establishment of the EEA, the

²⁹ A few sensitive products were allowed a 60 percent tariff ceiling at the end of the process, such as wine, apple and grape juice and concentrates, chicken, frozen vegetables and conserved corn, peas and carrots.

³⁰ The 1987 agreement also enabled reference quantities, which are arbitrary quantitative import restrictions, designed to protect the local producers in response to seasonal or unexpected changes in local and foreign production levels. However, reference quantities were never used in effect in EC-Israel agricultural trade, according to the Israeli agricultural representative in Brussels.

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. 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 (Hirsch, 1996).

A repetition of the process of preference erosion is inevitable. Specifically, the EC's anticipated enlargement to the east, and the gradual process of liberalization in agricultural trade at the WTO level would further weaken the relative position of Israeli agricultural exporters. In addition, the growing shortage of water in Israel is gradually changing the composition of Israeli agricultural production and exports. For example, cotton and citrus fruits are gradually being phased out.

In fact, Article 11 to the EMEA mandates further liberalization of EC-Israeli agricultural trade and an examination of the situation from 1 January 2000. Article 14 states that the Association Council shall examine the possibility of the parties granting each other further concessions. Article 15 states that the EC and Israel will examine, three years after the entry into force of the EMEA, the possibility of granting concessions in fisheries products. Indeed, following the entry into force of the EMEA a meeting of the Association Council decided to start negotiations on further liberalization of agricultural trade. Meetings took place in May and September 2000, and in May 2001. Israeli officials reckon that by now the negotiations are more or less complete at the experts level. The signing of the protocol is apparently awaiting political approval.

In the recent negotiations Israel was especially interested in expanding its export quotas in products that return a high yield relative to the water input, or in high value-added niche markets. These products include cut flowers, easy peelers (citrus fruits),

exotic fruit, fresh herbs, off-season greenhouse vegetables, and organic agriculture. The main obstacle in the negotiations was the price preference mechanism used by the EC in flowers. This mechanism is especially harmful to Israeli rose growers, who cannot know in advance whether they would receive a tariff concession. On the other hand, competing flowers from ACP countries (mostly Kenya) and from Morocco enter the EC free of tariffs (Shavit, 2001). According to Israeli officials EC officials were willing to address these grievances. Another problem is the EC's refusal to allow Israeli exports of olive oil.

On the other hand, EC officials were unhappy with the discriminating way in which Israeli Kosher requirements are applied to imports from the EC.³¹ In addition, special Israeli levies are applied as of January 1996 solely on EC products in yogurt, sweet corn, pasta, baked goods and ice cream (Munin, 1996).³² However, the demands of EC negotiators focused on larger quotas for its exports in milk powder, potato seeds, cheese, apples and pears, dried fruit and nuts.

Beyond export quotas, Israeli trade officials are concerned that veterinarian Sanitary and Phyto-Sanitary requirements (SPS) are increasingly replacing tariffs as trade barriers, and are seeking equivalence agreements with the EU, such as those recently signed with the US and Canada. Israeli importers of plants and vegetables from the EC share this concern and complain that the Israeli authorities make it very difficult to obtain a license. On the other hand, the EC and Israel cooperate at the WTO level in introducing Non-Trade Concerns (NTC) to the next WTO agricultural agreement. These center mostly around the preservation of the rural sector and the environment (Shavit, 2001).

³¹ For example, shrimps are imported to Israel from the US but not from the EC. In addition, non-Kosher meat can be produced locally but not imported.

³² The EC agreed to these levies at the time due to their sensitivity.

4. TRADE IN SERVICES

4.a. The GATS framework

Trade in services has grown in importance in recent decades. For example the external trade of the EC in services reaches about one-third of the value of its trade in goods. However, the provision of and trade in services are burdened by heavy national regulation. Even when the regulation is not intended to protect the domestic industry, it often has a non-tariff barrier effect. The thick regulation makes bilateral negotiations on trade in services very complicated and prolonged. Thus, the WTO's GATS provides a convenient global common ground for liberalizing trade in services. Like many other countries the EC and Israel prefer to regulate their trade in services in the framework of GATS.³³ So far no special agreement on trade in services was concluded between the EC and Israel. The EMAA (Articles 29-30) includes only a general statement on the need to widen the scope of the Agreement to cover trade in services, and a reference to the commitments of the parties under GATS.

GATS defined four modes of supply of services. The first is "cross-border" supply such as in computing services and software transmitted electronically. The second mode is "consumption abroad" such as in tourism and education. The third mode of supply is "commercial presence" such as in food and serving services. The fourth mode of supply of services is "presence of natural persons" such as foreign workers and foreign legal representation. The GATS definition of services excludes services supplied in the exercise of governmental authority such as law enforcement and security.

Under GATS the contracting states commit to particular obligations concerning market access and national treatment. Registering as "None" in a certain sector means no limitations are applied there

³³ The EC is regarded here as a block since discrimination in the provision of services based on nationality or place of residence is forbidden among the member states, and national legislation affecting trade in services is harmonized.

and trade is free. On the other hand, registering as “Unbound” means the contracting party is not committed to free trade. The GATS Agreement adopts the MFN principle, although some aspects of this principle are given a derogation, such as regional agreements in services. Each contracting state chooses the sectors and the modes of supply it is willing to bring under the terms of GATS (Hirsch, 1996; and Munin, 2000; and 2001).

Under GATS Israel agreed to varying degrees of liberalization in communication, financial, and tourism services. A number of additional services were allowed all modes of supply except the presence of natural persons. These include sewage and refuse disposal services, legal services (but commercial presence was limited to Israeli residents or citizens), accounting, architectural services, engineering services, urban planning, advertising, market research and public opinion, management consulting, scientific and technical consulting, photographic services, and computer services. Services incidental to mining and oil fields were allowed only the commercial presence mode of supply.³⁴

The remainder of this section will elaborate the potential gains and difficulties in EC-Israel trade in services in five major sectors: Financial services, air and maritime transportation, tourism, telecommunication and trade in labor.

4.b. Financial services

Under GATS Israel committed itself to allow foreign commercial presence in banking, insurance and securities, but as financial liberalization was not mature enough in the early 1990s Israel did not commit to the cross-border mode of supply. In April 1997 the EC (and US) invited Israel to bilateral negotiations on further liberalization of trade in financial services, in the framework of the general negotiations to conclude a GATS agreement in this field. The EC’s main requests from Israel were three. First, Israel was asked to ease the restrictions on capital flows. The second request was to commit consumption abroad of maritime transportation

³⁴ See GATS/SC/44.

insurance. Finally, the EC asked Israel to allow MFN treatment of foreign banks in Israel. Israel agreed to the second request and included it in the second supplement to the GATS schedule of commitments.³⁵ Regarding the other two requests Israel explained that restrictions on capital flows and on foreign bank activity were part of its exchange controls, and would duly be relaxed when the process of financial liberalization is complete (Susnitsky, 1997). Unfortunately, no progress has yet been achieved in liberalizing Israel's banking sector.³⁶

However, the process of liberalization of capital flows in Israel, which began in 1989, is almost complete. In 1993 Israel formally accepted the obligations of Article VIII of the IMF's Articles of Agreement, which prohibits exchange controls on payments and transfers for international current account transactions. In 1998 Israeli individuals were allowed complete freedom with regard to holding foreign assets, but the holdings of foreign assets by financial institutions such as pension funds and insurance companies were still restricted to no more than 5 percent of their portfolio. This limitation was since relaxed to 20 percent, and is planned to be completely waived in January 2003. In addition, the recently adopted tax reform plan is supposed, among other things, to reduce fiscal distortions to the capital account.

One of the unfortunate results of the liberalization process has been the attraction to Israel of money laundering activity. This caused the OECD-based Financial Action Task Force on Money Laundering (FATF) to include Israel in the list of Non-Cooperative Countries and Territories (NCCT). This meant that financial institutions were advised to take particular care when doing business and transactions with individuals, companies and institutions in Israel. Obviously, this had a significant potential to disturb capital flows to and from Israel. However, following measures taken by the Israeli government to close the legal loopholes, Israel was removed from the NCCT in June 2002, with the support of the EC. Especially, in August 2000 the Knesset

³⁵ See page 216.

³⁶ See page 218.

enacted the Prohibition on Money Laundering Law, and in February 2002 the Israel Money Laundering Prohibition Authority began to operate.

As the liberalization in capital flows progressed, the scope for the development of Israel's foreign trade in financial services expanded. The involvement in the Israeli economy of foreign financial institutions and companies brought to the fore the difficulties that financial regulation caused to trade in financial services.

In financial services, state regulation is intended to protect the customers and the stability of the financial system. Thus, national authorities closely monitor the activities of financial institutions in their territory. Providers of financial services must fulfill a minimum solvency margin, and foreign providers usually are required to hold some of their financial assets in the state's territory. Thus, in the absence of an agreement among states, international trade in financial services among them might suffer from a duplication of supervision.

There are generally two alternative principles according to which international trade in financial services can be regulated without duplication of supervision. The first principle, which the EC applies, is home control. According to this principle the state in which a financial institution is established is responsible for supervising its operations, whatever the territory in which they take place. Thus, financial institutions need only a single license in order to market their services all over the EC (Hirsch, 1996).

The second principle for regulating international trade in financial services is local control, under which each state supervises the activities of all undertakings in its territory, whatever their nationality. For example, in the EC insurance sector non-member undertakings need a license for each member state in which they operate. This is because the establishment in EC territory of branches of foreign undertakings is left to the discretion of the member states, which are required 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 that it keeps in the EC (Hirsch, 1996). The remainder of this sub-section is divided into the two main financial sectors: Insurance, and banking and capital market activity.

Insurance: In the insurance sector the Israeli authorities have consistently applied the principle of local control (except for reinsurance and direct insurance from abroad). Until the mid-1990s Israel was quite restrictive in allowing competition in insurance, particularly in life insurance. Considerable bureaucratic obstacles prevented not only the entry of foreign insurers but also the establishment of new Israeli competitors. These obstacles were excused by the need for exchange controls and financial stability. The expected contribution of the foreign insurers to the Israeli insurance industry and to the economic policy of the government was another alleged consideration (Sassoon, 1990, 236).

However, the strong pressure that the local insurance sector exerted on the Israeli decision-makers was also an important factor in policy-making. The rent of local insurers, especially in life insurance, was ensured by the government, which in addition to preventing competition guaranteed a high interest on the insurance companies' assets. Thus, a high level of concentration and relatively high prices characterized the Israeli insurance sector. During the negotiations leading to the conclusion of the EMEA the EC's proposal for broad provisions concerning trade in insurance services was rejected (Hirsch, 1999).

In spite of these obstacles to free trade, foreigners were not altogether banned from the Israeli insurance market. Lloyds and dozens of other foreign insurers had a representative in Israel for many years. About 75 percent of the total Israeli reinsurance was transacted with European firms, most of them from EC member states (Levi, 1994). In effect, the Israeli insurers were often mere intermediaries between the Israeli consumer and the European insurers.

Similarly, under GATS Israel agreed not to prohibit the entry of new foreign insurance firms into the non-life local insurance market and accepted the possibility of cross-border supply. It registered as 'None' in the cross-border and commercial presence modes of supply both in market access and in national treatment, and as 'Unbound' in the consumption abroad and presence of natural persons modes of supply. However, in life insurance and pension funds it committed only to commercial presence.³⁷

An important turning point came in 1995, when Doron Shorer was appointed as capital market commissioner in the MOF. During his office term the staff of his department was doubled and replaced with young liberal-minded professionals. The licensing procedure was changed, and applicants were granted a license solely on the basis of their ability to maintain an insurance business. As a result, new insurance companies entered the market, such as the Israeli insurer Direct Insurance in 1996, and the American insurer AIG in 1997. The entrance of the credit insurer EMI in 1998 enabled a significant expansion of the Israeli mortgages market. Currently, foreigners control some 12 percent of the Israeli non-life insurance market. In addition, the Italian Generali insurance company bought the Israeli Migdal insurance company in 1996 and gained control over some 30 percent of the Israeli life insurance market. The old insurance companies had to restructure, as their profits were no longer guaranteed.

However, limitations on the operations of foreign insurers in Israel persist. The first and minor barrier to foreign insurance companies is the minimum solvency margin set by the Ministry of Finance at USD 5-12 million. Another barrier is the current policy of the MOF that prefers foreign insurers to operate in Israel through the commercial presence mode, and is generally reluctant to allow new ones to operate through the presence of natural persons. In other words, setting up an Israeli subsidiary is encouraged, rather than opening a local branch or sending a representative. Existing foreign companies with a representative in Israel such as the German diamond insurer Delvag, the Swiss Alpina, and Guardian are

³⁷ See GATS/SC/44.

allowed to continue operating in this mode, but are required to keep a certain minimum of their assets in Israel.³⁸ Israeli subsidiaries of foreign insurers (such as AIG) are planned to be relieved of that requirement in January 2003, when the liberalization of capital flows would be completed. MOF officials argue that allowing local branches to operate exposes the Israeli insurance market to short-term considerations, while foreign direct investment has positive spillover effects.

Finally, the duplication of prudential requirements is also a barrier to foreign activity in Israel, as well as Israeli activity in the EC. Foreigners are subject not only to Israel's system of supervision, but also to supervision by their home states' authorities. While the same goes for Israeli companies in the EC, the potential profits from operating in a small market like Israel's are often too little to make this double regulation worthwhile (Hirsch, 1999). This difficulty could be overcome by the adoption of the EC's supervisory rules by Israel, and the full adoption of the principle of home control between the EC and Israel. In fact the MOF has already commissioned and received a report by external consultants on such possible harmonization.

In the 1997 round of GATS negotiations on financial services Israel switched to 'Unbound' in cross-border supply of non-life insurance, except for reinsurance, insurance intermediation, and marine and transportation insurance, in which Israel committed itself to restrict only the presence of natural persons mode of supply. In services auxiliary to insurance (consultancy, actuarial services, risk assessment, and claim settlement services) which were not specifically related to in 1994, Israel allowed only commercial presence. Compulsory car insurance required a special license. Foreign reinsurers were subjected to special registration.³⁹ The lack of progress in Israeli commitments under GATS in

³⁸ The French insurer COFACE is another exception, given a license in 2000 to operate without setting up a subsidiary, because of the MOF's special desire to develop the Israeli credit insurance market.

³⁹ See GATS/SC/44/Suppl.2; and WTO, 1999, 106-7. The liberalization of marine and transportation insurance was in response to a specific request by EC negotiators (Susnitsky, 1997). See page 211.

insurance services can be attributed to an incomplete financial liberalization process. Perhaps in the next round of negotiations on financial services Israel would allow more cross-border and consumption abroad of insurance.

As for Israeli insurance of European clients, the potential is not great. Although Israeli insurers are not suffering any discrimination in Europe, most of them preferred not to establish commercial presence abroad, and incurred losses when attempting the cross-border or natural presence modes. Nevertheless, as the Israeli insurance market grows and local companies develop it is possible that their presence in the EC would be felt.

Banking and capital market activity: The 1990s saw a dramatic rise in investment flows to Israel, motivated mostly by the development of the high-tech industries and the central role of capital markets in financing the growth of these industries. The progress of the financial liberalization process has enabled foreigners to invest in Israeli undertakings through the Tel-Aviv Stock Exchange (TASE), and enabled Israelis to raise capital through foreign stock exchanges. Flows not related to FDI accounted for 56 percent of the total USD 33.2 billion invested in Israel between 1995 and 2000.⁴⁰ At the same time USD 10 billion were invested by Israeli residents abroad, of which 43 percent was in the form of non-FDI. At USD 5 billion, inward non-FDI investment flows in 2000 equaled 4.6 percent of GDP, and outward flows reached USD 2.8 billion. At the end of 2000 non-FDI foreign investment stocks in Israel reached USD 96 billion, equal to 88.5 percent of GDP, and outward foreign investment stocks reached USD 60.7 billion, equal to 56 percent of GDP (OECD, 2002, 16-7).

Under GATS Israel agreed not to prohibit the commercial presence of foreign banks but registered as 'Unbound' in all other modes of supply both in market access and in national treatment. This was excused by the macroeconomic need to maintain exchange controls. No limitations were placed on the repatriation of

⁴⁰ FDI flows are analyzed separately in Section 6.

distributed profits. In capital market services such as trade in securities Israel also allowed cross-border activity.⁴¹

In the 1997 round of GATS negotiations on financial services Israeli commitments in banking hardly changed, although in the fields of financial data processing and the provision of guarantees Israel allowed all modes of supply except the presence of natural persons. The Israeli commitment to foreign commercial presence was limited to banking institutions as regards depositing, lending, and leasing. As regards settlement and clearing services for financial assets Israel made clear that such services in the TASE are exclusively provided for the Stock Exchange members.⁴²

The lack of progress in Israeli commitments under GATS in banking and capital market services can once again be attributed to the incomplete financial liberalization process. Indeed, the presence of foreign investors in the Israeli banking sector has remained minimal. Nine foreign banks (including BNP PARIBAS and Crédit Industriel et Commercial) have opened representative offices in Israel in recent years, three more foreign banks have opened branches, and three small Israeli banks were purchased by foreigners. In addition, a non-banking American investor purchased 34.5 percent of Israel's biggest bank, and the Italian-based Generali purchased 9.6 percent of the second biggest bank. The main reason for the relatively limited activity of foreign investors in Israeli banking is the centralized structure of the sector (OECD, 2002, 42-3). The five largest banks control 93.7 percent of all bank assets, and the three largest control 75 percent. Reciprocity conditions may apply in the granting of banking licenses to foreign banks not established under Israeli jurisdiction, and there are incorporation requirements for some activities in securities. For example portfolio manager and investment advisor licenses are only granted to Israeli citizens or residents and Israeli-registered companies (OECD, 2002, 69-70, 73-4).

⁴¹ See GATS/SC/44.

⁴² See GATS/SC/44/Suppl.2; and WTO, 1999, 101-5.

4.c. Air and maritime transportation

During the 1990s the Israeli government adopted a policy of liberalization and facilitation of greater competition in the international and domestic civil aviation sector. Some restrictions on the capacity of supply of companies were lifted and transport charter flights policy was liberalized. This has led to lower prices, a greater variety of destinations and an increase in the flow of passengers and cargo (OECD, 2002, 76; and WTO, 1999, 108-10).

However, since aviation was excluded from the terms of the GATS agreement by a special annex (Munin, 2000), Israel is unbound by commitments in this sector. Acquiring an Israeli airline license is conditional upon at least two thirds of the capital of the company being held by Israeli nationals (inconsistent with the principle of national treatment) and at least two thirds of the directors being Israeli nationals. Cabotage operations may only be conducted by Israeli airlines.

Thus, El-Al is still the only Israeli air carrier operating scheduled international flights; It competes with 45 other scheduled airlines operating in Israel pursuant to bilateral aviation agreements and several charter companies. El-Al is usually not a profitable business, and the government's attempts to privatize it have so far failed.

The outbreak of hostilities in the Middle East has dealt a major blow to the Israeli aviation market even before 11 September 2001. With the decline in tourism and business travel foreign airlines reduced the frequency of their flights to Tel-Aviv or terminated their service altogether. Many Israeli officials concurred that these developments justified the strategic argument for the maintenance of the loss-making national airline. In this atmosphere of uncertainty it seems that further liberalization of this sector will await better times (OECD, 2002, 76).

The Israeli market for maritime transport is small but steadily increasing. Over 43 million tones of cargo arrived in 2000 in Israel via the sea. The main shipping company in Israel is Zim, of which

the state owns 48.6 percent. Zim is planned to be fully privatized during 2002. Israel undertook no commitments under GATS in the maritime transport sector. Foreign-controlled enterprises established in Israel are entitled to register a vessel in Israel, conditional upon the holding of over 50 percent ownership in the licensee company by the state, an Israeli national or a corporation established under Israeli law. Cabotage operations are limited to Israeli vessels and to foreign vessels subject to a reciprocity condition (OECD, 2002, 76-7; and WTO, 1999, 110-1).

4.d. Tourism

Tourism accounts for 3 percent of Israel's GDP. Foreign investors control some 20 hotels in Israel, equal to 5 percent of the number of hotels, usually luxury hotels. This amounts to 20-25 percent of assets in the entire hotel industry. This sector was affected more than any other sector by the outbreak of hostilities in the region and the terrorist attack of 11 September 2001, which are estimated to have halved activity. The cost to the economy is estimated at USD 2 billion (OECD, 2002, 87).

Under GATS Israel agreed to allow the consumption abroad and commercial presence modes of supply in market access to hotel services, stating that ownership must be in the hands of an Israeli-registered company. As for national treatment, tourists are exempt from VAT on services given by hotels and paid in foreign currency. Food serving services were allowed all modes of supply both in market access and in national treatment, except for presence of natural persons. Travel agencies were allowed the consumption abroad and commercial presence modes of supply, but Israel stated that ownership must be in the hands of an Israel-registered company, and that travel agencies should employ at least one Israel-licensed travel expert. Finally, with regard to tourist guides services, while consumption abroad was allowed, commercial presence was permitted only by an Israeli resident or citizen.⁴³

⁴³ See GATS/SC/44; and WTO, 1999, 114-5.

4.e. Telecommunication

The Israelis are great consumers of telecom services. For example, 96 percent of households had at least one direct telephone line in 1996, and more than 5.5 cellular lines were in use (an 85 percent penetration) in 2001 (OECD, 2002, 42). The Israeli telecommunications sector, traditionally monopolistic and government-owned, went through major deregulation and privatization in recent years, which turned it into a great attraction for foreign investors.

Thus, the long-distance telephone service market was opened for competition among three operators in 1997. One of the competitors, which in 2000 controlled 30 percent of outgoing calls, is 46 percent foreign owned, of which 10.5 percent are by Deutsche Telecom and a similar portion by France Telecom. 26.4 percent of another competitor, which in 2000 controlled another 30 percent of calls, is owned by Italy Telecom. Thus, European telecom companies control some 14 percent of the Israeli market. As a result of these developments, prices dropped considerably, and the market expanded (OECD, 2002, 42).

There are currently four cellular service providers in Israel. According to current market shares of these operators and the portion of foreign ownership in them, foreigners, all of whom are based in North America and Hong Kong, control 42.5 percent of the Israeli market. In cable TV there are three operators, each with a monopoly over a given geographic area, one of whom is 45 percent owned by the Dutch based UPC (OECD, 2002, 42).

However, elsewhere more work has to be done in opening the Israeli telecommunications sector to competition. Under GATS Israel agreed to allow the cross-border and commercial presence modes of supply in postal and courier services of items above 500g, in mobile phone services, and in data and message transmission. Indeed a recent government decision opens postal services to competition by January 2005. However, with regard to mobile phone services Israel stated that the number of licenses is subject to tests of economic needs, and that commercial presence may

require a local partner. Data and messages must be transmitted via the infrastructure of a local licensee. Audiovisual services were allowed the consumption abroad and commercial presence modes of supply, but movies with at least a 25 percent Israeli investment component are entitled to a grant.⁴⁴

In the 1996 round of GATS negotiations on communication services Israel expanded its commitments in the telecommunication sector. The government stated that Bezeq - the Israeli telecommunication company - has exclusive rights in domestic telecommunication services and infrastructure, which will terminate not later than 2001.⁴⁵ Foreign equity participation in Bezeq was permitted. The government also stated that there are three operators of international services, which have exclusivity until January 2002, and promised to reexamine its policy regarding further competition in this field towards 2001. Foreign ownership in providers of international and cellular services was limited to 74 and 80 percent respectively. Public voice telephone and facsimile services were allowed the cross-border (through the network of Bezeq or any other licensee) and consumption abroad modes of supply. Non-public voice telephone (closed user groups and private networks) was also allowed the commercial presence mode, but resale of excess capacity and any transmission to a third party were not permitted. Paging and satellite services were allowed all modes of supply except presence of natural persons.⁴⁶

In 2002 Israel stated that the control of a domestic fixed-line operator must be held by an Israeli individual or a corporation incorporated in Israel, in which an Israeli individual holds at least a 20 percent interest. The ceiling on foreign ownership of providers of cellular, satellite, and cable TV services was reduced to 74 percent, and foreign operators were banned from holding more than

⁴⁴ See GATS/SC/44; and WTO, 1999, 111-4.

⁴⁵ Bezeq's monopoly in fixed-line telephone services indeed terminated legally in 2000, but no competitors have entered the market yet. The Histadrut national trade union organization blocked the tenders in this sector, fearing mass layoffs. Much of the rent of this monopoly goes to Bezeq's employees, who are wary of losing it.

⁴⁶ See GATS/SC/44/Suppl.1; and WTO, 1999, xx.

49 percent of the control of a licensee. The 49 percent ceiling was also applied to foreign ownership of commercial television and regional radio (OECD, 2002, 80).

4.f. Labor services

EC-Israeli labor flows are very limited, compared with flows between the EC and other Mediterranean countries (Paasivirta, 1999, 307). Israel's immigration policy resulted in the significant limitation of the fourth GATS mode of supply of services - the presence of natural persons. As a general rule Israel banned this mode of supply, except for the temporary entry of specialists in compliance with labor market tests, and the temporary entry of executives and managers, without requiring compliance with labor market tests. In addition, the Israeli Companies Law requires that a public corporation must have on its board of directors at least two directors representing the public at large, who must be residents of Israel.⁴⁷ However, companies that list their shares abroad can appoint a non-resident director (OECD, 2002, 49).

Foreign workers are not allowed to work in Israel except for special cases or in specific sectors. Nevertheless foreign workers (including unreported ones) account for some 10 percent of the Israeli workforce. In agriculture and construction, which are labor-intensive sectors, the Israeli economy is heavily dependent on foreign workers. Since 1967 Palestinian workers were employed in these sectors. In the 1990s, mainly due to security problems, Israel has been in the process of replacing the Palestinian workers in these sectors with workers from other countries, notably Romania, Thailand, the Philippines, and increasingly China. Thus, while in 1993 only 6,000 work permits were issued, in 1997 the number of work permits reached 106,000 (Dar, 2001). However illegal foreign workers in Israel (both legal workers whose permits have expired and tourists whose visas have expired) are estimated at almost the same number.

⁴⁷ See GATS/SC/44.

In order to stem the tide of foreign workers, the Israeli government decided in 2000 to expel illegal workers and penalize their employers. However, the number of foreign workers has not declined. In 1999 the Knesset approved a law that ensures appropriate living conditions and health insurance for foreign workers. This law serves both humanitarian concerns and the interest of local workers who can otherwise be replaced by what in many accounts amounts to slavery. In addition, different fees apply to employers of foreign workers. Currently the Israeli government is reducing the number of permits of foreign workers, in an effort to force more employers to hire Israeli workers and reduce unemployment (OECD, 2002, 52). As a result of the new policy some European undertakings have encountered difficulties in getting their personnel into Israel. Recent examples include a manager in Alitalia and employees of a Spanish construction company.

As for Israeli labor outflows, certainly a potential exists here as well. Israel's workforce is highly skilled, with one of the world's highest proportions of engineers and scientists for its population. Almost a third of the population over the age of 15 has post-secondary or degree-level qualifications, and illiteracy is practically non-existent. So far, however, the economy was able to absorb these skills due to the high growth rate (OECD, 2002, 52). The Israeli government does not object to migration, but is not enthusiastic about it either, because Israelis usually do not send their earnings back home, as do, for example, Turkish workers in Germany.

5. PUBLIC PROCUREMENT

Governments are inclined to prefer domestic products even when foreign products are cheaper or better. In spite of the privatization process in Israel and the EC, governments and their agencies are still large purchasers of goods and services, and in some sectors, such as telecommunications, governments even have a dominant purchasing power. According to the WTO (1999, 72) purchases by the central government represent some 12 percent of Israel's GDP. Of this, about 15 percent was awarded to foreign-based suppliers.

The 1994 WTO Government Procurement Agreement (GPA) covers only specified goods and services and certain public utilities, applies only to the public entities specified in its annexes, only to the extent of each state's commitments, and only to contracts over a certain value threshold (Hirsch, 1996).

According to the principle of national treatment, governments are to treat producers of the contracting parties no less favorably than domestic ones, including tendering procedures. The contract must be awarded to the applicant whose offer is either the cheapest or the most advantageous in terms of the specific evaluation criteria. The GPA 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).

The EC's obligations under the GPA are generally incorporated into EC law under the Treaty of Rome (Article 300). Regarding non-members, the 1993 EC Utilities Directive dealing with the water, energy, transport and telecommunications sectors, which were not included by the EC in the GPA, authorizes EC members to give preference to EC suppliers. The foreign applicant to the tender 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 (Hirsch, 1996).

EC suppliers of water, energy, transport and telecommunications are protected by the principles of rejection and preference. Under the rule of rejection, any offer may be rejected when the proportion of the products originating from third countries exceeds 50 percent of the total value of the products. Under the preference rule, when two or more offers are equivalent in light of the award criteria, the prices would be considered equivalent if the price difference does not exceed 3 percent (Hirsch, 1996).

Similar to the EC's policy, Israel also does not apply the GPA to contracts for the purchase of water and energy. Otherwise, the GPA applies to most Israeli government entities and state-owned

corporations except the Ministry of Defense, the Office of Internal Security, and the aircraft industry. 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 percent. Israeli law, however, prohibits this preference whenever it is inconsistent with the state's international obligations. Contracts exceeding ILS 2.15 million (roughly USD 450 thousand) oblige the foreign supplier to offsets of at least 30 percent of the value of the contract. Israeli offsets requirements are legal under the GPA because Israel invokes developing country status. However, as a developing country, the GPA mandates that Israeli offsets be lowered to 20 percent by 2005. Established foreign-controlled enterprises can benefit from this system of preferences on the same basis as domestic producers provided they fulfill the same local content conditions. The local content requirement may take the form of a requirement for a local partner (OECD, 2002, 57-8; and WTO, 1999, 73-5).

Public procurement was one of the important subjects discussed in the negotiations that led to the EMAA. Israel postponed the ratification of the GPA until it could secure access to European public tenders for telecommunication equipment.⁴⁸ 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 up completely governmental procurement between the two parties (Hirsch, 1996).

Israel was not interested in opening up the entire sphere of government procurement, so the negotiations subsequently focused on the opening up of specific sectors. The EC wanted the new agreement to include the sectors of public transportation, energy and medical instruments, where it felt its industries had an advantage. Israel was prepared to include the sectors of energy and medical instruments, but refused the inclusion of public transportation. The reason for this position was the practice of

⁴⁸ See <http://www.eu-del.org.il>.

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).⁴⁹

Two agreements were reached in the end in December 1995 and entered into force in August 1997. In the first, Israel agreed to apply the GPA to a variety of services including maintenance and repair services, building-cleaning services, property management, publishing and printing. Medical equipment and 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. However, Israel excluded El-Al from the GPA. This paved the way for Israel's political discrimination of Airbus in favor of Boeing in public tenders in 1997 and in 1999, much to the anger of the EC, which issued an official diplomatic protest. While El-Al preferred the Airbus airliners on a professional basis, the Israeli government, which still controls El-Al, was under heavy pressure from the American government to prefer Boeing passenger carriers.

In the second agreement, specifically-listed operators of telecommunications were forbidden from discriminating 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 EMTA forebode additional discriminatory measures, beyond those agreed in the GPA, in the fields of heavy electrical and medical equipment.

6. FOREIGN DIRECT INVESTMENT

As a party to the WTO's Trade Related Investment Measures (TRIMs), Israel is committed to apply the national treatment principle with regard to foreign and local investments. Quantitative

⁴⁹ The EC request to open the public transportation market was apparently initiated by Spain, who wanted its industry to have a greater share of the Israeli bus market, the majority of which is in the hands of the German bus industry.

restrictions are prohibited as well, such as conditioning the imports of a foreign undertaking in Israel on its exports, or requiring certain levels of local procurement. However, TRIMs relates to goods, not to the provision of services. An important recent development is the eligibility of Israel, as of July 2002, for adherence to the OECD Declaration on International Investments and Multinational Enterprises (DIIME). This declaration promotes national treatment of foreign direct investment, proposes voluntary standards of behavior to multinational enterprises and encourages moderation and restraint in the use of investment incentives and conflicting regulatory requirements. Above all, Israel's eligibility for adherence to the DIIME signals its emerging status as a developed country, and the compliance of its regulatory investment environment with western standards, barring a few exceptions.

This followed a decade of law-making in Israel that transformed it from a socialist and patronage-oriented economy into a capitalist one. Most of these changes are documented in other sections of this paper. One of the most important changes that is not mentioned elsewhere, is the new Israeli Companies Law (1999), which came into effect in February 2000, and revised the legal framework to make it more favorable to the international business environment. Foreign investors wishing to operate in Israel via an incorporated enterprise are subject to ordinary corporate registration requirements, unless they apply for special government incentives. There are generally no special rules or procedures for the acquisition of Israeli companies by foreign investors.

However, certain non-negligible discriminatory entry restrictions apply, such as in the form of equity restrictions in the communications, electricity and transport sectors. Foreign investors may also operate as foreign companies, but have to register as such, nominate an Israeli-resident attorney, and translate their documents into Hebrew (OECD, 2002, 47-50, 64). Land in Israel is almost entirely owned by the state and is leased, but rarely sold. Nevertheless, the Israeli law guarantees a high degree of protection for property rights. Contrary to the national treatment principle, foreign-owned companies are required to have the approval of state authorities in order to acquire rights to use a land, but such

approval is normally granted for business purposes. There is no other discrimination *re* foreigners relating to land use (OECD, 2002, 50-1). Partly as a result of these changes FDI flowed into Israel in large amounts in the mid-1990s, attracted also by the high-tech industry, the competitiveness of the food and textiles industries, and by the liberalization of the financial and telecommunications sectors. FDI in Israel amounted to USD 14.6 billion between 1995 and 2000, and peaked at USD 4.4 billion in 2000, accounting for 4 percent of GDP (OECD, 2002, 16). Outward Israeli FDI flows amounted to USD 5.7 billion between 1995 and 2000, and USD 2.9 billion in 2000. Inflows from the EC amounted to Euro 155 million in 1999 (bringing the stock to more than Euro 1 billion), and outflows to the EC amounted to Euro 116 million (bringing the stock to Euro 613 million).⁵⁰ FDI flows proved resilient to the global downturn in the high-tech sector, the worldwide economic slowdown, and the deteriorating geopolitical situation in the Middle East. At USD 3 billion, inward FDI in 2001 was higher than in 1999 (OECD, 2002, 16-7). At the end of 2000 FDI stocks in Israel reached USD 21 billion, equal to 19.4 percent of GDP. Israeli FDI stocks abroad reached USD 9.6 billion (OECD, 2002, 17).

While NASDAQ attracted the majority of Israeli capital-raising abroad, the role of European exchanges has been growing recently too, as a result of their own development and the waiving in 1994 of the secondary and tertiary Arab boycott by the Gulf Cooperation Council (GCC) states. European exchanges such as the Swiss SWX New Market, the German Neuer Markt of Deutsche Borse, the British AIM and techMark, and the French-Belgian-Dutch Euronext, offered flexible registration conditions, the possibility of raising small amounts of capital, and high obtainable prices in biotechnology and medical equipment. The number of Israeli companies registered for trading in European stock exchanges rose from two in 1996 to 29 in 2000.⁵¹ Of a total of USD 4.4 billion

⁵⁰ See Second Meeting of the Association Council – Declaration of the European Union, 14271/01 (Presse 433 – G), 6. In 1996 FDI inflows from the EC amounted to USD 226.1 million (Dafni, 2000).

⁵¹ However, at 125, Israel was the third largest country after the US and Canada in terms of the number of listed companies in NASDAQ.

raised in 2000 by Israeli companies abroad, USD 1.3 billion were raised in Europe. European investors, especially Swiss and Italians, accounted for 41.6 percent of FDI through the TASE (OECD, 2002, 17-21).

As for Israeli FDI outflows, flows to Western Europe amounted to USD 320 million in 2001 compared with USD 262 million to North America, and stocks in Western Europe amounted to USD 3.7 billion compared with USD 3.2 billion. However, many of the Israeli investments in Western European based companies use them as a channel for investments in Central and Eastern European Countries (CEECs) (OECD, 2002, 21-22).

7. INTELLECTUAL PROPERTY RIGHTS

Israel is a member of the World Intellectual Property Organization (WIPO). Since 2000 Israel is also a party to the WTO's Trade Related Intellectual Property (TRIPS) agreement.⁵² Under TRIPS Israel is committed to the national treatment and MFN principles. In according with Annex 7 of the EMAA Israel will soon join the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations. In addition, Annex 7 commits Israel to accede a few other multilateral conventions on IPR, no later than three years past the entry into force of the EMAA. Thus, by June 2003 Israel has to comply with international rules regarding literary and artistic works, registration of marks, and patent procedures. According to Israeli trade officials, acceding to some of these conventions poses difficulties for Israel, and the matter would be discussed in the next Euro-Israeli Association Council, scheduled to meet in December 2002.

However, Israel was placed on the USTR's Special 301 Watch List in 2000 and 2001 because of high levels of piracy, inadequacy of the copyright law and enforcement problems. The FICC estimates that copyright violations in Israel caused losses of USD 250 million in 2000 (OECD, 2002, 54). The USTR's complaints centered on the

⁵² Prior to 2000 Israel invoked the developing country status. See OECD, 2002, 48, 112; and WTO, 1999, 75-8.

Israeli pharmaceuticals industry, computer software, music and clothing. Part of the counterfeited goods is of local production, and part is contraband. However, over the last two years Israel has devoted substantial resources to the revision and enforcement of its IPR regime corresponding to international norms.

For example, products are now required to bear a marking identifying the manufacturer, and a special court jurisdiction was established to resolve copyright disputes. Special IPR police units and prosecutors were established, and the customs authority has put in place a revised enforcement program. The number of IPR-related convictions has risen, resulting in imprisonment, significant fines and other sanctions on the convicted. The government has implemented programs to prevent the unauthorized use of computer software by its officials and employees, and the Ministry of Education has initiated high-school level courses on IPR protection. Further legislation is underway (OECD, 2002, 54).

It is important to note that when it comes to IPR problems in Israel, Europeans are often at a disadvantage compared with Americans. While American complaints are handled by the USTR, offended European owners of intellectual property must individually contact the MOTI. This could be a hurdle not worth the trouble. Thus, the USTR is the source for 90 percent of IPR-related complaints directed at the MOTI. European complaints are rare, the Dutch-based Philips (household electric appliances) being a recent example.

8. COMPETITION

Israel's industry is small and has traditionally been plagued with centralization and non-competitive market practices. This can be seen in Regev and Bar-Eliezer's (1994) concentration index. This index is the percentage of sales of the three biggest producers out of the total sales in the market. If the index exceeds 80 percent,

then the market structure is considered to be monopolistic.⁵³ Table 1 and Figure 1 are based on the work of Regev and Bar-Eliezer and its updates.⁵⁴ Imports were defined as competing imports if their share of the market did not exceed 80 percent, and/or a high tariff rate was imposed. The figures in the table are the weighted averages of 94 industrial averages.

Table 1: Israeli Market Structure

| 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 |
| 1995 | 30.7 | 31.6 | 37.7 |
| 2000 | 28.1 | 37.4 | 34.5 |

Sources: Regev and Bar-Eliezer, 1994; and http://www.cbs.gov.il/hodaot2002/23_02_76.htm.

The period 1965-1977 is characterized by an increase in foreign competition at the expense of both leading and non-leading producers, thus increasing the 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. Nevertheless, Table 1 shows that although there are FTAs between Israel and its major trading partners and import penetration has been increasing since 1982, some non-competitive monopolies still exist in Israel.

⁵³ 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.

⁵⁴ See http://www.cbs.gov.il/hodaot2002/23_02_76.htm

The researchers found that Israeli monopolies suffer from low productivity and are non-competitive on an international level. Israeli monopolies tend to concentrate around small industrial branches - mostly mining, food industries and base metals. Foreign competition, which tends to lower prices and increase productivity in Israeli industry, is especially low in these branches, but strong in the fields of rubber goods, machinery and precision equipment. In the second half of the 1990s import penetration increased mostly in the leather, clothing, electronics, and pharmaceuticals sectors. Table 1 and Figure 1 also indicate that while increased import penetration came at the expense of leading Israeli producers from 1982 to 1992, imports in the 1990s replaced mostly small Israeli firms.

In order to address competition problems the Restrictive Business Practices law was revised in 1988, including the introduction of merger control rules. The law now also covers cartels, restrictive agreements, monopolies and abuse of dominant position. The law is based on a mix of European, American and Canadian models. Restrictive agreements are defined as agreements that fix prices, or determine market shares or profit margins, and that harm competition. Monopolies are defined as a market share control of over 50 percent. The restrictions on monopolies are similar to those in European legislative framework (OECD, 2002, 55-6; and WTO, 1999, 58).

Responsibility for antitrust activities was extended beyond corporate entities to include company executives. The enforcement of the law is the responsibility of the Antitrust Commissioner, who heads the Antitrust Authority, an independent government agency created in 1994. The Antitrust Commissioner is also responsible for the granting of exemptions from the law. A special antitrust tribunal vigorously enforces the law, including criminal prosecutions, substantial fines and prison sentences (OECD, 2002, 55-6; and WTO, 1999, 58).

Figure 1: Israeli market structureIsraeli market structure 1965-1990

| 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 |
| 1995 | 30.7 | 31.6 | 37.7 |
| 2000 | 28.1 | 37.4 | 34.5 |

Sources: Regev and Bar-Eliezer, 1994; and http://www.cbs.gov.il/hodaot2002/23_02_76.htm.

9. FINANCIAL ASSISTANCE FOR INFRASTRUCTURE DEVELOPMENT

Israel is generally not a recipient of MEDA funds. Due to its developed economy it has no need for a bilateral aid program for structural adjustment. Nevertheless, Israel is eligible for MEDA funds directed at regional cooperation. Thus, Israel participated in recent years in many MEDA funded regional schemes in the fields of youth, audio-visual, cultural heritage, economic and industrial networking, the information society and the environment.⁵⁵

However, Israel did receive bilateral financial assistance from the EC over the years, assistance that was formalized in financial protocols, signed periodically by the EC and Israel for a five-year period. Between 1977 and 1991 four financial protocols were concluded, offering altogether ECU 215 million of non-preferential loans from the European Investment Bank (EIB), the last one

⁵⁵ See <http://www.eu-del.org.il>. However, in effect the Israeli participants in these schemes have received negligible sums of money.

expiring in 1996 (Kosnikowski, 1999, n. 17). In 1995, a new financial protocol was signed, providing for financial assistance by the EIB to infrastructure development projects in Israel. The assistance consisted of loans of up to Euro 22 million for a 20-year period at an annual interest rate of 6.8 percent. However, at the time Israeli undertakings had no difficulty in raising capital and credit in international financial markets, at more convenient terms. The EIB is deemed to be bureaucratic and the Israeli government is wary of providing state guarantees for the loans it provides. Thus, the EIB facility was unutilized for a few years. The money was eventually used in the late 1990s for the “Nahal Soreq” environmental project. As a result of this situation the Israeli MOF tried to negotiate a more favorable financial protocol, which would better suit the credit rating of the Israeli economy.

In June 2000 the EIB and Israel signed a new financial protocol. The terms of the new protocol were not significantly different from those of the previous one, and at the time of its signature MOF officials were skeptical regarding its economic usefulness. Various public companies such as the Airports Authority and Israel Electric turned it down. However, with the deterioration of the geopolitical and economic situation in Israel, and the global slowdown, the new financial protocol might yet come in useful.

10. RESEARCH AND DEVELOPMENT

Israel was the first non-European country to be associated to the EC’s Framework Program for RTD. Israel's special status is the result of its very high level of scientific competence and the dense network of longstanding relations in scientific and technical cooperation between Israel and the EU. In March 1999 Israel and the EC signed the second agreement for Scientific and Technical Cooperation, associating Israel with the fifth framework program for EC RTD (1999-2002). That followed the association of Israel with the fourth framework program, since August 1996, in accordance with Article 40 of the EMAA. As of May 2001, aid for Israeli counterparts in the context of the framework program totaled some Euro 110 million (Hirsch, 2001a). Table 2 details the main recipients and fields of research.

Research and development is considered to be one of the most successful parts of Euro-Israeli cooperation. Israeli universities and companies are taking part in consortia together with thousands of European counterparts. Aside from the scientific gains, the scientific framework programs help introduce Israeli establishments into European business networks.

However, Israel's participation in the fifth framework program followed six-month long difficult negotiations, as a few member states had reservations about Israel's participation. Israel is obviously keen on participating in the Sixth program, which is currently being planned. In particular, Israel is interested in participating in the Galileo satellite project, whether in the context of the Sixth program or in commercial contracts (Hirsch, 2001a).

Table 2: Allocation of Funds to Israeli Participants in the Fifth Framework Program

| Recipient | Environment | Aerodynamics | Information society | Life sciences |
|--------------|-------------|--------------|---------------------|---------------|
| Universities | 53% | 32% | 26% | 64% |
| Companies | 23% | 66% | 70% | 11% |
| Others | 23% | | 4% | 25% |
| Total | 100% | 100% | 100% | 100% |

Source: Hirsch, 2001a, 14.

11. MAIN FINDINGS AND CONCLUSIONS

Israel should join the pan-European system of *origin*, known as WETA. By allowing diagonal cumulation of origin the asymmetry between the EC and Israel in the ability to comply with the ROO would be reduced. Joining WETA would enable Israel to export tariff-free products made in eastern European countries to the EC.

In addition, to avoid distortions to trade the *drawbacks* method should be harmonized in all of Israel's FTAs.

As for *standards*, it is recommended that Israel adopt EC industrial standards and the SII join the European system of standards institutes, or an MRA be signed between the EC and Israel. This being said, it is important that global harmonization of industrial standards continue so as to limit distortions to Israel's trade with the US.

The EC should harmonize the lists of *dual use* goods used by its different member states with regard to Israel, and avoid discriminatory enforcement.

The EC should also take measures to stop unofficial *boycotts* of Israeli goods in Europe, as these cause more distortions in EC-Israel trade and fly in the face of its desire to develop a Euro-Mediterranean internal market.

As for goods origination in the Israeli *settlements*, some technical compromise is essential to avoid a worsening in Euro-Israeli relations. For example, perhaps the customs debt can be left uncollected (backed by state guarantees) until the matter is resolved in a final Israeli-Palestinian settlement.

Regarding Israeli *obstructions to EC-Palestinian trade*, it is recommended that the EC allow Israeli-Palestinian diagonal cumulation of origin, even if no Israeli-Palestinian accord exists. This solution is practical (other solutions are simply unenforceable), efficient (some of the leverage Israeli middlemen have on Palestinian producers will be reduced), and politically wise (encouraging Israeli-Palestinian economic cooperation and development even when political cooperation is lacking). Perhaps the EC can adopt the US policy of allowing Israeli-Jordanian diagonal cumulation of origin.

As for *customs procedures*, it is recommended that the (criminally-sanctioned) responsibility for certifying the origin of goods be placed with the exporters, as is provided for in the US-Israeli FTA, rather than with the customs authorities. This would reduce the obstacles to trade, improve the ability of the authorities to verify

the origin of goods under doubt, and deter disingenuous declarations of origin.

In *agricultural* trade, the EC and Israel should sign the almost finished new protocol to the EMAA. It is recommended that equivalence agreements between the two parties be signed, to reduce the risk of abuse of SPS requirements. Negotiations on trade in fisheries products should commence in January 2003.

Great progress has been achieved in liberalizing Israel's *insurance* sector and fostering greater competition. Foreign insurers now control 12 percent of the Israeli non-life insurance market and 30 percent of the Israeli life insurance market. However, the MOF's policy of preferring Israeli subsidiaries of foreign insurers to local branches or representatives is still a trade barrier. Another barrier is the MOF's requirement that foreign companies with a representative in Israel keep a certain minimum of their assets in Israel. While allowing local branches to operate arguably exposes the Israeli insurance market to short term financial fluctuations, the gains from trade liberalization should be taken into account as well. The Israeli schedule of GATS commitments still features too many "Unbounds". Finally, the duplication of prudential requirements is also a barrier to foreign insurance activity in Israel, as well as Israeli activity in the EC. This difficulty could be overcome by the adoption of the EC's supervisory rules by Israel, and the full adoption of the principle of home control between the EC and Israel.

In spite of the impressive growth in financial activities in the 1990s the liberalization of the Israeli *banking* sector is highly disappointing. Five large banks control the market and competition is limited. In GATS Israel is unbound by commitments in all modes of supply except for commercial presence, and even that is limited to banking institutions as regards depositing, lending, and leasing. Reciprocity conditions may apply in the granting of banking licenses to foreign banks not established under Israeli jurisdiction, and there are incorporation requirements for some activities in securities.

As for *air and maritime transportation*, while future privatization of EL-Al seems inevitable, the current geopolitical situation, as well as global conditions in the air travel sector, seem to preclude any quick progress. However, progress can be expected in the privatization of maritime transportation in Israel.

Tourism is another beleaguered sector. However, perhaps these difficult times provide an opportunity for restructuring and liberalization. National treatment should be ensured in hotel services. Limitations on the ownership and operation of travel agencies in Israel should be relaxed.

The *telecommunications* sector is another example of successful progress in liberalization. European telecom companies control some 14 percent of Israel's long-distance telephone service market. Foreigners, all of whom are based in North America and Hong Kong, control 42.5 percent of the Israeli mobile phone market. However, limitations to commercial presence and foreign ownership in the mobile phone, satellite, and cable TV sectors should be relaxed. The principle of national treatment should be applied to audiovisual services. Most importantly, Bezeq's monopoly in domestic telecommunication services and infrastructure has indeed legally terminated, but in practice no progress has been achieved in opening up this sector to competition.

As in the EC, current Israeli immigration policies are not directed at greater liberalization in international *labor flows*, because of the deep recession and the high unemployment rate. This is especially true for skilled labor, where the Israeli government fears that the replacement of Israeli professionals by low-wage foreign professionals might enhance emigration or reduce the incentive for education. Currently, this is not much of an issue on the bilateral EC-Israeli agenda, since EC nationals are high-wage earners. However, European contractors in Israel might find it difficult to import cheap labor to Israel in the near future. In addition the potential for EC-Israel labor flows may grow when the EU is enlarged to the east.

With regard to *public procurement*, Israel should give up its status as a developing country. There is no justification for this status but as an excuse to avoid liberalization. A country that aspires to join the OECD could do without offset requirements. Adherence to the GPA, not to mention privatization, would also free Israel from American political interference in its public tenders, such as in the case of airliners. Alternatively, EC-Israel bilateral public procurement commitments could be developed to cover all sectors. Israel's eligibility for adherence to the DIIME signals its emerging status as a developed country, and the compliance of its *regulatory investment environment* with western standards, barring a few exceptions.

In the field of *IPR*, much has been achieved in Israel. At this point, though, it is imperative to develop better EC-Israeli coordination mechanisms to protect Europeans offended by IPR violations in Israel.

The revision in Israel of the Restrictive Business Practices law, the introduction of merger control rules and the creation in 1994 of the Antitrust Authority improved the legal and institutional framework for *competition*. However, while increased import penetration came at the expense of leading Israeli producers from 1982 to 1992, imports in the 1990s replaced mostly small Israeli firms. This situation, which is mostly the result of decisions of policy makers such as the Antitrust Commissioner, must be changed.

Regarding *infrastructure development*, the EIB should re-examine the terms of credit it offers Israeli undertakings. In order to be useful these terms should match market conditions and Israel's credit rating. In Israel's case ways to relax the requirement for state guarantees to EIB loans should be found.

Israel is a peculiar participant in the BP. Politically Israel is neither a candidate for EU membership nor an Arab state. Economically, Israel is developed and advanced well beyond all other non-EU participants (Dafni, 2002). Thus, for most Israeli officials and businessmen the participation in the BP serves Israel's political ends by enhancing its legitimacy in the region. However, on the

economic level most Israelis reckon that the BP is irrelevant to Israel, an artificial framework that the EU forces on Israel for political reasons, which ignores the obvious differences between Israel and other countries in the region.

This skepticism towards the BP is reflected in a tendency among Israeli officials to think about EU-Israeli relations mostly in bilateral rather than regional terms. From a historical point of view this new skepticism is replacing the old Euro-skepticism that characterized Israeli official thinking in the 1980s. In the 1990s Israeli businessmen and senior officials increasingly developed a European orientation and an appreciation of the strength and importance of the process of European integration to Israel. It is now time to start treating the BP seriously as well. For that to happen, the EU must find ways to reconcile its Mediterranean policy with Israel's uniqueness.

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**LA CONTRIBUTION DU PARTENARIAT
EURO MÉDITERRANÉEN AU DEVELOPPEMENT
DU SECTEUR DES PRODUITS PHARMACEUTIQUES
ET DE LEUR UTILISATION PAR LES PARTENAIRES DE
L'UNION EUROPÉENNE
(A Partir de l'exemple tunisien)**

LAURENT HUGELIN

La déclaration et le programme de travail établi lors de la conférence de Barcelone des 27 et 28 novembre 1995 qui se fixait comme objectif de faire du bassin méditerranéen une zone de dialogue d'échanges et de coopération qui garantirait la stabilité et prospérité, partait du principe qu'une discussion globale à la fois sur le plan politique, économique, social, et culturel entre les vingt-sept partenaires permettrait de renforcer leur liens.

L'espoir d'une progression globale et d'un approfondissement du partenariat euro méditerranéen s'est émoussé avec l'enlisement du processus de paix au proche orient.

Naturellement, la remise en cause du « processus de paix » que les partenaires soutenaient a des conséquences sur l'ensemble du partenariat. Car si les relations bilatérales entre la communauté européenne et les États méditerranéens ont pu aller dans le sens d'un approfondissement, quelquefois avec certains retards par rapport aux objectifs initiaux, il est bien évident que *l'attraction économique de l'ensemble la région méditerranéenne est lourdement handicapé par le conflit israélo palestinien et l'instabilité qui règne à la marge de la région.*

Du point de vue économique les effets de la crise actuelle du processus de paix dépassent largement les effets directs et les coûts que ce conflit a entraîné. La crise va aussi nettement réduire l'attractivité de toute la région en terme d'investissements par ce qu'elle génère instabilité, incertitude pour les investisseurs, et qu'elle laisse prévoir qu'il y aura moins de croissance économique dans la région que si la paix avait enfin été rétablie dans la région.

C'est donc toute la région qui pâtit de cette situation de guerre larvée.

Et cela est préoccupant lorsque l'on sait que le succès à long terme des accords de libre échange entre la Communauté et ses partenaires dépend en grande partie du niveau des investissements étrangers, et notamment européens dans les pays partenaires¹.

Est-ce pour autant que l'espoir né à la déclaration de Barcelone doit s'effacer?

Non, et il suffit de se remémorer les vicissitudes qui ont conduit à la création de l' Union européenne pour constater que la fondation d'une région de paix et d'une région économique développée sont toujours le fruit d'un long cheminement, et quelquefois de coups d'arrêt brutaux.

L'optimisme est donc de mise, ce qui n'empêche pas réalisme et pragmatisme.

Il est possible que la globalité du processus de Barcelone , qui a été incontestablement à l'origine de son succès pendant ses premières années par le dynamisme qu'elle a pu insuffler, doive laisser place aujourd'hui à une *politique plus différenciée*, et donc moins universelle suivant les aires géographiques de la Méditerranée.

Cette orientation était déjà en germe dans les propositions de la commission européenne en l'an 2000 qui proposait un approfondissement de relations avec les partenaires qui le souhaitent, ce qui conduit bien évidemment à admettre que les

¹ Cette nécessité des investissements étrangers pour soutenir les accords de libre échange résulte du fait que la plupart des pays partenaires disposent de monnaies dont la convertibilité sur le long terme ne peut pas être assuré autrement que par une balance monétaire équilibrée, or les accords d'association ont pour effet d'augmenter les déficits commerciaux, ce qui n'est pas supportable sans des courants d'investissements contraires.

relations entre la communauté et chaque partenaire seront moins homogènes².

Toutefois, la commission adopte toujours une vision globale du partenariat qui correspond à des orientations politiques transversales pour l'ensemble de la région.

Or, ces orientations du partenariat sont fondées sur des politiques de coopération économique telles, les politiques de développement et d'investissements, la protection de l'environnement, le développement du secteur de l'énergie, de la modernisation du secteur agricole, le développement des infrastructures et des technologies d'information et des télécommunications.

Le partenariat n'étant pas fondé sur des politiques sectorielles, de telles politiques ne manquent - elles pas ?

Au regard de l'expérience de la construction communautaire, on constatera que la constitution de la Communauté Economique du Charbon et de l'Acier a été justement fondée sur l'approfondissement des liens économiques entre les membres de la communauté dans des domaines sectoriels.

Il semble que pour que ce type d'intégration ait quelques succès, les secteurs en cause doivent avoir une portée symbolique puissante. Par exemple, le secteur de l'eau (dans le partenariat) présente un tel caractère symbolique. Mais a-t-on pour autant, dans le partenariat « épuisé » les politiques sectorielles envisageables ?

Il y a peut être là, un domaine de réflexion à mener pour analyser si le partenariat euro méditerranéen ne laisse pas de côté des possibilités de collaborations fructueuses entre les deux rives de la Méditerranée, et qui auraient à terme un impact tout aussi important que des politiques trop globales handicapées par les tensions générées par le conflit du Proche-Orient.

² Communication de la commission au conseil et au parlement européen du 6 septembre 2000, COM(2000)497 Final.

Le secteur pharmaceutique présente à cet égard des potentialités non négligeables à la fois comme secteur économique, et comme symbole d'un développement partagé.

Si on prend l'exemple de la Tunisie, ce secteur a connu un développement remarquable, et est passé d'une simple phase de substitution aux importations, à une véritable démarche exportatrice³.

Ces progrès ont conduit à l'amélioration des produits distribués localement, et par ailleurs à une augmentation des marchés d'exportation, notamment en Afrique.

Les effets économiques de cette évolution sont déjà importants et c'est ainsi que la Tunisie peut espérer développer un secteur industriel d'exportation de médicaments qui bénéficiera des avantages octroyés à tous les investissements dans des sociétés exportatrices telles les réductions impôts, la possibilité d'importation en exonération des droits de douane de produits semi-finis ou de matières premières, et des aides à la promotion de investissements⁴.

Il s'agit d'un secteur qui génère une forte valeur ajoutée et qui conduit donc à une meilleure intégration de la Tunisie dans les circuits mondiaux.

³ La situation économique du secteur est la suivante : en 2001, le marché national des médicaments était de 226 Millions de Dinars.

Le taux de couverture par la production nationale était de 42 % contre 7% en 1987. Les projections estiment que la couverture sera de 60% de la consommation locale en 2005.

Le secteur est composé de 13 fabricants de médicaments dont ADWYA et AVENTIS, MYERS SQUIBB UPSA, mais aussi des firmes d'origine nationales telle OPALIA, AVICENNE...auxquels il faut ajouter les fabricants de prothèses, et accessoires.

A notre connaissance, la situation est la même en Egypte ou les fabricants nationaux multiplient les spécialités fabriquées, ... notamment le Viagra.

⁴ Ces textes sont regroupés dans le code d'incitation aux investissements créé par loi n° 93-120 du 27 décembre 1993, et par.

Mais tout cela n'est que l'aspect économique de ce phénomène qui se présente aussi comme hautement symbolique.

En effet, les institutions internationales soulignent le lien intime entre le développement des facultés locales de production de médicaments et l'amélioration de la santé des populations et elles considèrent aujourd'hui que le développement des facultés locales des industries pharmaceutiques est un facteur important sinon prioritaire de la lutte dans l'amélioration de la santé des populations des pays sous-développés.

Dans le cas tunisien, l'émergence de ce secteur a été favorisée par une législation paradoxalement sévère et soucieuse d'assurer la sécurité des produits. Cette réussite doit aussi beaucoup aux investissements considérables du pays dans l'éducation et le développement des capacités techniques, et d'une main-d'œuvre qualifiée. Ceci n'a été possible que par ce qu'un seuil de développement a été franchi.

Mais, ce développement d'un secteur national de fabrication de médicament, est dans le cas tunisien aussi lié à l'application d'une politique tarifaire adaptée, fondée sur des droits de douanes élevés sur les produits dont un équivalent fabriqué localement existe, et des exonérations de droits de douanes et de TVA sur les matières premières utilisées dans la fabrication locale.

Or, cette politique douanière ne va pas pouvoir se maintenir dans le cadre des accords de libre échange comme nous allons le voir, ce qui pose un problème pour le développement futur de ce secteur en Tunisie si, par ailleurs, il ne dispose pas d'un accès privilégié au marché européen.

Cette étude s'est donc fixée comme objectif au regard de l'exemple de l'évolution de l'industrie pharmaceutique tunisienne, d'analyser les apports possibles du partenariat euro- méditerranéen dans ce domaine.

Dans un premier temps, il s'agira de montrer en quoi la législation tunisienne est très similaire à la législation communautaire. Les

conditions d'une intensification de la coopération dans ce domaine afin de favoriser l'accès des produits tunisiens aux marchés européens sont donc réunies.

Dans un second temps, il conviendra de constater à la fois les limites de cette évolution, les différents aspects dans lesquels le partenariat euro-méditerranéen peut contribuer à l'évolution positive de ce secteur dans l'ensemble de la Méditerranée, et plus généralement il s'agira d'ouvrir le débat sur des problématiques récurrentes dans la région en matière pharmaceutique ou médicale.

I. L'ETAT ACTUEL DE LA LEGISLATION TUNISIENNE ET SA CONCORDANCE AVEC LE DROIT COMMUNAUTAIRE

La concordance entre la législation tunisienne et le droit européen peut aisément se remarquer même si leurs objectifs divergent.

1- Les objectifs

La législation tunisienne fondatrice du secteur de l'industrie pharmaceutique résulte de la loi du 22 novembre 1985⁵.

Les objectifs de cette législation sont de garantir la sécurité des consommateurs et de moraliser le secteur de l'industrie pharmaceutique pour assurer son développement en garantissant la crédibilité de cette industrie.

Cette législation est en effet intervenue alors que différents scandales surgissaient en Afrique sur la vente de médicaments périmés ou même toxiques⁶, très généralement contrefaits.

⁵ Loi n° 85-91 du 22 novembre 1985 réglementant la fabrication et l'enregistrement des médicaments destinés à la médecine humaine, J.O.R.T. 26 novembre 1985.

⁶ La contrefaçon des médicaments est un phénomène dont l'ampleur a été remarqué au début des années 80. Elle sévit surtout dans les pays d'Afrique noire et certains pays d'Asie. Les pays le plus souvent cités comme pays producteurs de ces contrefaçons étaient l'Inde, l'Égypte, sporadiquement le Brésil. Le risque existait que ce trafic s'organise notamment en Tunisie.

Les objectifs du droit communautaire sont différents puisqu'il s'agit de mettre en œuvre le principe de libre circulation des marchandises en ce qui concerne ces produits particuliers dits « sensibles ». Dans ce domaine, le droit communautaire a reconnu l'importance de la sécurité de consommateurs et les États ont conservé un contrôle sur la qualité des médicaments distribués sur leur territoire et leurs règles propres.

Progressivement, le droit communautaire au travers de directives a tendu à rapprocher les législations des standards de sécurité les plus élevés, pour parvenir à une situation homogène des conditions de fabrication de médicaments.

Les objectifs divergents sont fondés sur des moyens très comparables comme nous allons le constater car, ce sont des législations qui concilient une sécurité maximale des médicaments et les nécessités d'une exploitation commerciale.

2- *La similitude des moyens*

La loi du 20 novembre 1985 soumet à autorisation toute exploitation d'une entreprise de fabrication de produits pharmaceutiques et impose une autorisation de mise sur le marché pour toute commercialisation d'une spécialité donnée.

Par ailleurs, le décret n° 90-1400 du 3 septembre 1990⁷ réglemente la publicité des produits, alors qu'un décret n° 90-1401 du même jour précise les limites dans lesquelles la recherche et l'expérimentation sur l'Homme est autorisé.

Ce phénomène demeure et la contrefaçon des produits pharmaceutiques représente aujourd'hui 6% des produits contrefaits, ce qui est plus que la contrefaçon sur les produits de luxe. Souvent le produit contrefait est toxique.

⁷ Décret n° 90-14000 du 03 septembre 1990 fixant les règles de bonnes pratiques de fabrication des médicaments destinés à la médecine humaine, le contrôle de leur qualité, leur conditionnement, leur étiquetage, leur dénomination ainsi que la publicité y afférente, J.O.R.T. du 21 septembre 1990.

Ce sont des moyens similaires que l'on retrouve dans la législation communautaire au travers notamment de la directive 75/319⁸ qui prévoit que toute fabrication de médicament suppose une autorisation. La directive du conseil 65/ 65 prévoit l'exigence d'une autorisation préalable de mise sur le marché pour tout médicament. Par ailleurs, la publicité des médicaments est réglementé par la directive 92/25⁹. La directive de 2001/20¹⁰ a posé les règles relatives à la protection minimales des personnes humaines lors d'essais cliniques de médicaments.

En outre, les domaines couverts par ces législations sont comparables. Car, la législation tunisienne fait référence aux médicaments par présentation, par fonction, et la jurisprudence y ajoute la notion de médicaments par composition. De même, la notion de médicaments est appliquée largement et sévèrement aux produits «frontières».

On remarquera aussi que les bonnes pratiques de fabrication s'appliquent en Tunisie non seulement aux médicaments stricto sensu mais aussi aux produits similaires tels les accessoires, les pansements et leurs accessoires, et tous les articles destinés à véhiculer le médicament.

3- Les garanties en matière d'exploitation d'une entreprise de fabrication de médicaments

En droit tunisien, ces garanties sont pratiquement similaires à celles posées par la législation communautaire.

Un responsable de fabrication doit être désigné, et par ailleurs la fabrication est soumise à des règles de bonne pratique qui visent à assurer la qualité de l'ensemble de la production.

⁸ Directive du Conseil 65/65 /CEE relative à l'approximation des dispositions et les pratiques en matière de médicaments, J.O.C.E. 369/65 du 09.02.1965.

⁹ Directive n°92/25/CEE relative aux règles de distribution de gros de produits médicaux, J.O.C.E. L11330.04.1992.

¹⁰ Directive 2001/20/CEE, J.O.C.E. L121 du 01.05.2001.

L'ensemble de ces conditions sont vérifiées lors de la demande d'autorisation d'ouverture d'un établissement de fabrication de médicaments auprès du Ministre de la santé. Cette autorisation est nécessaire pour toute fabrication de médicaments sur le territoire tunisien, y compris à l'exportation.

Toute autorisation est précédée d'une visite préalable des Pharmaciens inspecteurs, qui disposent en outre du pouvoir de dresser procès verbal lors de visites imprévisibles en cours d'exploitation.

***Le pharmacien responsable de l'exploitation**

La loi impose qu'un pharmacien responsable soit désigné y compris, lorsque le fabricant est une société. Le fabricant ne peut être qu'une personne physique ou morale de nationalité tunisienne.

Le responsable désigné, qui est nécessairement un pharmacien inscrit auprès du conseil de l'ordre, est personnellement responsable de l'application de lois et règlements en vigueur. Il engage donc sa responsabilité pénale et civile personnelle, ce qui n'exclut pas une responsabilité solidaire de la société.

Pour éviter toute dilution de sa responsabilité, des pouvoirs lui sont toujours attribués, quelle que soit l'organisation sociale. Il signe les autorisations de mise sur le marché et il doit organiser la production ainsi que la publicité des produits. Il a nécessairement autorité sur les pharmaciens assistants, et sur les pharmaciens dirigeants des établissements distincts. Dans les SARL, il est gérant, et dans les SA, il est soit PDG, soit directeur général.

Le poste de pharmacien responsable ne peut jamais être vacant. Toute modification du titulaire du poste doit être notifiée au ministère de la santé, et la suppléance du pharmacien responsable est nécessairement organisée en cas d'empêchement.

De même, en cas de conflit avec la direction, il peut saisir le conseil de l'ordre des pharmaciens et le ministère de la santé suivant les hypothèses.

En cas d'ouverture de plusieurs établissements, chaque établissement doit être pourvu d'un pharmacien en charge de celui-ci. L'ouverture doit être autorisée par le ministre de santé.

Ce sont des règles comparables qui existent en droit communautaire, et qui sont posés par la directive 75/319¹¹. Les exigences du droit communautaire sont substantiellement identiques, puisque le responsable de toute exploitation fabriquant des médicaments doit être «une personne qualifiée». Il s'agit bien évidemment a fortiori du pharmacien.

La directive communautaire va plus loin en ce qu'elle exige que le responsable justifie d'une expérience professionnelle dans le secteur pharmaceutique de deux ans au moins. Cette différence ne nous semble pas fondamentale, compte tenu de la sévérité de la loi tunisienne quant aux personnes qui peuvent être responsables.

*** Les bonnes pratiques de fabrication**

C'est le décret du 3 septembre 1990¹² qui pose diverses conditions tenant aux locaux ainsi qu'à l'appareillage technique, et aux procédures d'assurance qualité à mettre en place dans toute activité de fabrication.

Les locaux doivent être adaptés à la fabrication, hermétiques, de bonne hygiène, permettant un stockage sécurisé et différencié des produits, et une séparation des lieux de fabrication et du laboratoire de contrôle, et ils doivent permettre le nettoyage.

L'appareillage technique doit correspondre aux spécialités dont la fabrication est prévue. La licence de fabrication est donc liée à une liste de produits spécifiques, et elle devra être modifiée en cas de modification des produits fabriqués.

¹¹ Directive 75/318 normes et protocoles, J.O.C.E. du 20.05.1975 L 147/1 du 29 mai 1975.

¹² Cf référence supra n.7.

La liste des personnels chargés de la fabrication doit être fournie ainsi qu'un organigramme qui précise les responsabilités de chacun. En effet, l'autorisation de fabrication prend en compte la compétence supposée du personnel.

Un pharmacien distinct du pharmacien responsable est responsable de la mise en place du système d'assurance qualité. Ce service doit être distinct du service de fabrication, et il a vocation à contrôler les matières premières, les produits fabriqués, les conditions de conditionnement et d'emballage.

Le contrôle de la qualité doit porter sur tous les lots fabriqués. Il est notamment prévu qu'à dossier de fabrication doit être tenu par lot et que des échantillons des lots doivent être sauvegardés. De même, une procédure de traitement des réclamations doit être organisée pour l'entreprise, et le fabricant est tenu de mettre en place un système de suivi qui lui permette de retourner des lots fabriqués et mis sur le marché, notamment en cas de retrait d'autorisation de mise sur le marché.

Ce sont des bonnes pratiques qui sont très comparables à celles en vigueur dans la communauté et prévues par la directive 91/412/CEE¹³, et qui sont particulièrement sévères.

En effet, le non-respect des bonnes pratiques de fabrication, entraîne des sanctions pénales, et ce quelle que soit l'infraction considérée. C'est une menace particulièrement sérieuse lorsqu'on connaît le caractère très détaillé de ses bonnes pratiques de fabrication.

4- Les garanties liées à la mise sur le marché

On sait que la directive 65/65 dispose qu'aucun médicament ne peut être mis sur le marché d'un état membre sans autorisation préalable délivrée par l'autorité compétente de cet État. Cette directive précise les contours des autorisations nationales.

¹³ Directive 91/356/CEE J.O.C.E. L 228 du 17.08.1991.

Une analyse comparée des dispositions de la directive et de la loi tunisienne permet de constater, là encore, des similitudes frappantes.

Toute mise sur le marché tunisien suppose une autorisation préalable, les éléments du dossier étant très comparables à ceux prévus par la directive communautaire.

Par exception, le ministre de la santé publique peut autoriser sans délai, après consultation d'un comité technique, l'introduction de médicament à caractère urgent présentant un intérêt majeur pour la santé publique dans l'attente de la fin de la procédure d'examen habituel. Cette possibilité existe aussi dans les droits européens, et est justifiée par un intérêt supérieur de santé publique.

Dans la législation tunisienne et pour ce qui concerne les fabrications locales, le fabricant est le seul à pouvoir obtenir les autorisations de mise sur le marché. Le droit communautaire fait preuve de plus de souplesse, et il fait la distinction entre le fabricant et le titulaire de l'autorisation de mise sur le marché.

Les conditions de retrait, de suspension des autorisations de mise sur le marché sont tout à fait conformes à celles envisagées par les différentes directives communautaires. L'autorisation de mise sur le marché est toujours temporaire et est d'une durée limitée à 5 ans, ce qui est conforme à la directive 83/750.

Finalement, il apparaît que sur l'essentiel, le niveau de protection de la santé assuré par la loi tunisienne est très comparable au niveau européen.

Certaines divergences subsistent en matière d'étiquetage. Un examen attentif devrait aussi préciser les divergences qui peuvent exister au niveau des essais techniques et notamment s'agissant des essais sur lesquels sont fondés les dossiers d'autorisation de mise sur le marché.

C'est dans ce sens que la coopération bilatérale entre la communauté et des pays tels la Tunisie pourrait trouver à s'épanouir.

Pour des pays dont la législation est à un stade moins avancé, le partenariat peut aussi être utile en posant les bases de législations assez restrictives qui améliorent le niveau de sécurité des médicaments et donc les politiques de santé de ces pays. Nous l'avons dit : l'exemple tunisien démontre qu'il y a un lien entre développement d'un secteur d'une industrie pharmaceutique et haut niveau de sécurité des produits.

II. LES PERSPECTIVES D'APPORTS DU PARTENARIAT EURO MÉDITERRANÉEN

Une réflexion globale sur la contribution que pourrait apporter le partenariat euro méditerranéen sur l'ensemble des questions concernant le secteur des produits pharmaceutiques m'a conduit à relever trois perspectives.

En premier lieu, il convient de souligner que le partenariat porte en germe un tel développement et qu'il n'est pas totalement absent du secteur de la santé. Dans la déclaration de Barcelone, les partenaires affirment : *«l'importance du secteur de santé pour un développement durable et manifestent leur volonté d'encourager la participation effective de la collectivité aux actions de promotion de la santé et du bien être de la population.»*

Dans le sillage de la déclaration, une conférence s'est tenue à Montpellier le 03 décembre 1999 où les partenaires ont envisagé d'associer les partenaires méditerranéens au réseau européen de surveillance épidémiologique créée l'année précédente¹⁴. L'accent a aussi été mis sur le développement de bonnes pratiques de vaccination, la préservation de la qualité de l'eau, l'hygiène des nourrissons, la mise en ligne d'informations médicales (EUMEDIS) et les activités de recherches.

¹⁴ Décision n° 2119/98/EC du Parlement et du Conseil.

Mais, les réalisations du partenariat sont restées exclusivement liées au partenariat en matière sociale et non en matière économique.

Les apports du partenariat pourraient à mon sens être les suivantes.

Le premier volet concerne évidemment l'apport du partenariat pour favoriser les échanges des produits pharmaceutiques entre les partenaires, ce qui implique les échanges entre partenaires méditerranéens et pas seulement les échanges avec l'union européenne.

Le second axe de coopération pourrait concerner les questions particulières relatives aux investissements dans le secteur pharmaceutique. C'est en effet un secteur où des problèmes particuliers se rencontrent assez souvent, ce qui ne favorise ni le transfert de technologie, ni l'apparition d'un secteur intégré de cette industrie au niveau régional.

Enfin, une série de questions concerne plus particulièrement les sociétés civiles européennes. Il s'agit d'une part, des problèmes de pharmacovigilance et d'autre part, des problèmes éthiques qui sont soulevés par la recherche en matière pharmaceutique.

1- Favoriser les échanges de produits pharmaceutiques, et des matières premières

*** les actions à poursuivre**

On sait que les règles posées par les accords d'association conclus entre la communauté et les partenaires méditerranéens ne peuvent régler, seules, le problème des obstacles actuels aux échanges de ces produits sensibles.

Or, il ne faut pas négliger l'impact négatif des accords de libre échange en ce domaine sur le développement des industries des pays partenaires de l'Union européenne.

Si l'on prend l'exemple de la Tunisie, on constate que le secteur de l'industrie locale s'est développé en tant que substitut à l'importation, et que cette stratégie demeure fondamentale : on importe, puis on fabrique, puis on exporte. Certes, une nouvelle tendance se dessine, avec des entreprises directement tournées vers l'exportation (UPSA), mais cela reste marginal.

Or, les accords de libre échange vont désormais rendre cette politique beaucoup plus difficile pour ne pas dire impossible, car les médicaments sont considérés comme des produits industriels classiques.

Dans le cas de la Tunisie, les droits de douanes doivent disparaître sur 12 ans de la manière suivante:

- Pour une liste reprise à l'annexe 3 de l'accord, les droits de douanes doivent disparaître la cinquième année après l'entrée en vigueur de l'accord;
- Pour une liste reprise à l'annexe 5, les droits doivent disparaître sur douze ans la 8^{ème} année la protection sera de moins de 50%)

... Et la question est donc de savoir si cet accès privilégié et amélioré au marché national tunisien se traduit par une amélioration du statut des médicaments fabriqués en Tunisie sur le marché européen.

Cela n'est pas le cas. Car, par nature, les accords de libre-échange conduisent à la disparition des mesures restrictives tarifaires et quantitatives, mais n'empêchent pas l'application de règles indistinctement applicables aux produits nationaux et étrangers, telle la législation d'autorisation de mise sur le marché et des règles de fabrication.

En outre, dans les accords d'association conclus entre la communauté et ses partenaires, figure toujours une clause de sauvegarde qui autorise chaque partie à créer ou maintenir des restrictions aux échanges justifiés par une réglementation

protectrice de la santé publique, ce qui est évidemment le cas en notre matière¹⁵.

En conséquence, les obstacles qui résultent des régimes juridiques différents vont toujours subsister.

L'un des problèmes de l'exportateur tunisien sera donc notamment d'obtenir pour les marchés d'exportation, une autorisation de mise sur le marché, ce qui implique des procédures spécifiques, des tests spécifiques...et des coûts.

Sur ce plan là, l'accord de libre échange ne règle rien.

Cela conduit à s'interroger sur les moyens à mettre en œuvre pour améliorer à terme la circulation des médicaments fabriqués en Tunisie.

Dans la communauté européenne, la solution a été d'harmoniser les conditions d'autorisation de mise sur le marché en fixant des normes communes, notamment pour les tests à réaliser¹⁶. Une procédure dite multi états a aussi été organisée.

Dans ses relations extérieures, la communauté a d'ores et déjà conclu un certain nombre d'accords qui visent à favoriser les échanges avec des pays industrialisés¹⁷.

¹⁵ Par exemple, l'article 28 du traité d'association entre la Tunisie et les communautés européennes.

¹⁶ C'est l'objet notamment de la directive 75/318/CEE du 20 mai 1975.

¹⁷ Avec les Etats-Unis, il s'agit d'un accord multisectoriel du 22 juin 1998, JOCE L31 du 04.02.1999 comprenant les bonnes pratiques de fabrication des médicaments et aussi des moyens médicaux.

Deux accords avec le Canada ont été adoptés le 22 juillet 1998, et avec l'Australie le 18 juin 1998, comprennent les bonnes pratiques de fabrication.

La Suisse et la Nouvelle Zélande sont parties à des accords spécifiquement dédiés à la reconnaissance mutuelle des bonnes pratiques et des inspections de chaque administration compétente. Ce sont des accords qui comprennent l'ensemble des médicaments. Respectivement, accord du 30 avril 2002, publié au J.O.C.E. du même jour, L 114, et du 18 juillet 1998 publié au J.O.C.E L229 du 17.08.1998

Dans des accords récents, la communauté et ses partenaires s'engagent à reconnaître le résultat des examens et des contrôles effectués par les services compétents de contrôle du partenaire¹⁸. Ces accords comportent aussi la reconnaissance mutuelle des pratiques de fabrication par l'autre partie, et notamment des dispositions de contrôle de la qualité des produits.

Donc, les parties à ces accords ne peuvent plus s'opposer à la pénétration sur leur territoire d'un produit pharmaceutique sous prétexte de faire justifier des pratiques de fabrication utilisées, ou même sous prétexte que ces pratiques ne correspondent pas aux pratiques en vigueur sur ce territoire. Mais cela permet aussi que les industriels (de la communauté notamment) soit déchargé d'une lourde responsabilité: en droit commun, ils ont l'obligation de contrôler que les produits semi finis utilisés ont été fabriqués suivants de bonnes pratiques, et ils prennent donc des risques considérables en important des matières premières ou des produits semi finis des pays tiers. Ces règles sont donc de nature à permettre une meilleure intégration de ces secteurs entre partenaires¹⁹.

Dans le cas des rapports E.U. – C.E., l'accord est beaucoup moins engageant en ce qu'une période transitoire de coopération entre les autorités respectives est mise en place.

Mais ces accords ne règlent pas nécessairement l'ensemble des problèmes, et notamment pas celui des divergences dans les procédures d'autorisation de mise sur le marché notamment dans les différences dans les techniques de test et d'essais. Dans ce domaine, des accords de reconnaissance mutuelle peuvent aussi être envisagés.

¹⁸Les accords avec la Suisse et la Nouvelle Zelande.

¹⁹Le système est en principe un système « d'auto certification » et le produit porte un certificat normalisé signé du responsable de production attestant que les pratiques du pays de fabrications ont été suivies.

*** Le niveau du partenariat euro méditerranéen impliqué**

Au niveau des associations à la communauté européenne, il doit être souligné que les accords de libre échange devraient conduire à certaines adaptations des droits des pays méditerranéens.

Nous en prendrons pour exemple dans le cas tunisien:

- le fait que les frais de dossier d'une autorisation de mise sur le marché pour un fabricant étranger sont plus élevés que les frais exigés du fabricant local, constitue une taxe d'effet équivalent à un droit de douane²⁰, dont le comité d'association pourrait être saisi.
- La loi tunisienne ne prévoit pas de délai pour l'examen de la demande d'autorisation de mise sur le marché, ce qui peut conduire à l'absence de réponse... et à un obstacle de fait à toute importation du produit. Cela pourrait relever d'une mesure d'effet équivalent à une restriction quantitative.

Pour ce type d'obstacles, les organes de l'association sont naturellement les mieux placés.

S'agissant des normes techniques, des essais ainsi que des reconnaissances mutuelles des contrôles administratifs ou des règles de bonne pratique de fabrication, la technicité et la complexité de ces domaines implique certainement une approche bilatérale différenciée entre l'union européenne et chacun des partenaires jugé éligible.

Les accords d'association peuvent servir de base et de cadre de négociation, car ils retiennent très souvent des actions de coopération en matière industrielle visant à établir des accords de reconnaissance mutuelle²¹.

²⁰ Arrêté des ministres des finances et de la santé publique du 22 Février 1997, J.O.R.T. N°18.

²¹ Cf l'article 51 du traité d'association entre la Communauté et la Tunisie.

Mais, les organes de l'association n'ont aucune compétence en ce domaine et tout accord passe donc par un acte séparé sous forme de traité.

En revanche, le niveau multilatéral du partenariat pourrait être le lieu d'échange sur les nécessités d'adoption de législations garantissant un niveau de protection élevé des consommateurs par tous les pays méditerranéens. Il faudrait commencer par faire un état des lieux des législations des partenaires. Des rencontres entre industriels de ce secteur pourraient faciliter les coopérations et l'intégration régionale du secteur.

Le niveau multilatéral est aussi le niveau cohérent pour envisager, cette fois entre partenaires méditerranéens, le développement des échanges. Car, il est bien évident que les pays méditerranéens n'ont pas toujours la possibilité de développer des gammes complètes de produits et qu'une complémentarité régionale peut s'instaurer²². Il est de ce point de vu regrettable que les efforts de ces partenaires demeurent purement « national » et qu'ils ne soit pas coordonnés.

2- *La promotion des investissements*

Une relative libre circulation des produits est un préalable indispensable. La promotion des investissements repose essentiellement sur une politique fiscale attractive qui pousse à la délocalisation d'un certain nombre d'activités. Ces incitations de délocalisation ne trouvent à s'appliquer, que si un accès au marché visé est favorisé.

De ce point de vu le problème de la coopération entre l'Union européenne et ses partenaires se pose peu car, par hypothèse, les investisseurs européens disposent généralement des autorisations de mise sur le marché pour les produits pharmaceutiques qu'ils viennent dans un second temps produire dans les pays partenaires.

²² Un tel rapprochement serait aussi profitable dans le cadre de réduction des dépenses de sécurité sociale.

Deux autres problèmes particuliers se posent pour les investissements dans le secteur pharmaceutique, s'agissant de l'environnement légal de ces investissements.

Les réglementations de ces activités, indispensables en elles même, peuvent conduire à des obstacles aux investissements.

On prendra pour exemple l'obligation faite par le droit tunisien que tout fabricant soit de cette nationalité²³.

Certes, le texte précise qu'il peut s'agir d'une société, ce qui ouvre une certaine liberté sur la composition du capital. Mais l'on doit se souvenir que justement, la nationalité tunisienne a longtemps été liée non pas au lieu de son siège social mais en fonction de la nationalité des titulaires du capital social. Alors, toute société fabricante était nécessairement dominée par des personnes de nationalité tunisienne ce qui revenait à interdire l'investissement majoritaire étranger.

Ces problèmes ne sont que partiellement résolus compte tenu du fait que le pharmacien responsable doit être de nationalité tunisienne et qu'il est nécessairement gérant de la S.A.R.L. ou occupe une fonction de direction de la S.A.

Le second problème résulte souvent des dispositions relatives à la propriété industrielle et commerciale et notamment à la législation sur les brevets.

Là encore, si l'on prend le cas de la Tunisie, la loi du 24 août 2000²⁴ retient le principe de brevetabilité des préparations, produits et compositions utiles à des fins diagnostiques ou thérapeutiques pour une durée de 20 ans. Cette protection est renforcée par la possibilité d'obtenir la saisie des matériels présumés contrefaits par les douanes. En outre, comme une autorisation de mise sur le

²³ Article 1 de l'arrêté du 15 décembre 1990 fixant les conditions d'attribution de la licence d'exploitation d'un établissement de fabrication à usage humain.

²⁴ Loi n°2000-84 du 24 août 2000 relative aux brevets d'invention, J.O.R.T. du 25 août 2000.

marché est nécessaire pour tout médicament, la loi prévoit que le titulaire du brevet dispose d'un délai supplémentaire de deux ans au delà des 4 ans en principe accordés pour commencer à exploiter son invention sans craindre de cession obligatoire de licence²⁵.

On doit donc noter le caractère favorable de certaines dispositions conformes aux accords TRIPS²⁶.

D'autres dispositions ne doivent pas soulever l'enthousiasme des investisseurs potentiels : l'article 47 de la loi précise que les droits du brevet ne s'étendent pas «aux actes nécessaires à la fabrication de médicaments génériques», une licence obligatoire peut être délivrée y compris avant le délai évoqué plus *haut si le produit n'est pas commercialisé en quantité suffisante pour satisfaire aux besoins du marché tunisien*²⁷, et des licences d'office sont possibles «si l'intérêt de la santé publique l'exige» et «qu'ils sont mis à la disposition du public à des prix anormalement élevés»²⁸.

Il faut souligner que ces dispositions du droit tunisien sont, dans leurs principes, admises y compris par les accords TRIPS. Le problème résulte seulement des conditions de mise en œuvre qui ne garantissent pas toujours au titulaire du brevet une rémunération adéquate de son invention.

Pour chaque pays, les problèmes qui peuvent se poser sont nombreux, notamment lorsque les licences sont accordées par des non résidents au sens du droit des changes.

Il conviendrait donc, dans le cadre multilatéral, que les problèmes rencontrés par les investisseurs soient posés et qu'un état des lieux des obstacles rencontrés soit dressé. Il est probable qu'une conciliation entre la protection de la santé publique et ces obstacles puisse apparaître. Mais certaines évolutions législatives ne vont pas

²⁵ Article 51 de la dite loi.

²⁶ Accord en annexe 1C des Accords GATT 1994 conclu à Marrakech le 14 avril 1994, dit accords ADPC ou TRIPS .

²⁷ article 69.

²⁸ article 78.

sans poser de délicats problèmes éthiques ainsi que cela va être développé maintenant.

3- *Favoriser le bien être social*

En la matière, le développement d'une industrie plus sûre avec des produits de meilleure qualité et à terme, un certain choix des consommateurs, contribue au bien être social.

Mais le partenariat doit aussi favoriser l'émergence de valeurs communes et le partage d'informations qui présentent pour l'ensemble des populations un intérêt vital.

*** Développer des positions sur les problèmes éthiques**

Le droit de la pharmacie en ce qu'il touche à l'Homme touche aussi aux principes éthiques.

Par exemple, le développement de la recherche pharmaceutique, et les conditions imposées pour obtenir l'autorisation de mise sur le marché conduisent nécessairement à des recherches sur l'Homme pour certaines spécialités.

C'est par décret que les principes de recherches sur l'humain sont fixés en droit tunisien²⁹: toute recherche doit être préalablement autorisée par le Ministre de la santé qui doit se prononcer sur la nécessité de cette recherche par rapport aux connaissances acquises. L'autorisation est délivrée si la recherche se justifie *en fonction des finalités thérapeutiques* par rapport aux *risques* auxquels les participants sont exposés en prenant en compte les *bénéfices que ceux-ci* peuvent en attendre.

²⁹Décret n° 90-1401 du 03 septembre 1990 fixant les modalités de l'expérimentation médicale ou scientifique des médicaments destinés à la médecine humaine, J.O.R.T. du 21 septembre 1990 modifié par le décret du 14 mai 2001 n°2001-1076 et l'arrêté du Ministre de la santé du 28 mai 2001 approuvant les cahiers des charges relatifs à l'expérimentation médicale ou scientifique des médicaments destinés à la médecine humaine.

Ce texte pose aussi le principe d'une responsabilité de plein droit du promoteur de la recherche. En outre, le consentement éclairé de celui qui s'y soumet doit être vérifié. Les recherches sur les mineurs sont interdites, et celles sur des majeurs protégés ne sont autorisées qu'à des conditions très strictes.

Certes ce texte est d'une origine normative « inférieure » (c'est un décret inférieur à la loi dans la hiérarchie des normes), mais combien de pays méditerranéens ne disposent pas de telles règles ?

Une réflexion dans le cadre du partenariat sur ces problèmes éthiques doit être envisagé pour faire valoir la position de la méditerranée dans ces débats, et ceci dépasse le cadre strictement pharmaceutique.

Aujourd'hui «les délocalisations» des activités immorales et illégales sont systématiques. Voici qu'en Europe, certains médecins dont les pratiques sont dénoncées dans leurs pays d'origine s'expatrient pour réaliser certaines opérations dans des pays plus accueillants. Ces problèmes ont donc une dimension régionale. Cela concerne les transplantations d'organes, les techniques de reproductions³⁰, les expérimentations.

La méditerranée est absente de l'ensemble des débats éthiques de notre temps. Va-t-on admettre la brevetabilité du vivant ? Va-t-on admettre des recherches en matière de clonage humain ? Ce sont des problèmes qui vont se poser à brève échéance, y compris dans l'espace régional.

*** La Pharmacovigilance**

Il est inutile de revenir sur l'importance de la vigilance et des procédures d'alerte pour tous les dommages qui peuvent survenir

³⁰ J'en veux pour exemple que la Tunisie s'est doté très récemment d'un texte relatif à l'utilisation des techniques de reproduction assistée. Par la loi du 07 août 2001 n° 2001-41, la République tunisienne interdit le recours à des tiers donneurs de gamètes, et limite toute technique de reproduction aux deux membres de couples *mariés*.

pour les produits pharmaceutiques mais aussi pour les différents accessoires de santé, les matériels, et naturellement, les produits sanguin.

En la matière, la coopération régionale pourrait recouvrir plusieurs aspects complémentaires.

Le premier point serait d'imposer, au travers des législations nationales, des obligations spécifiques aux fabricants de ces produits pour assurer une gestion systématique des réclamations, et une obligation de déclaration aux autorités compétentes de tout incident grave révélé dans certaines conditions.

Le second point serait de s'assurer du développement d'administrations chargées de la pharmacovigilance dans tous les Etats partenaires. On peut penser que la plupart des états de méditerranée disposent maintenant d'une telle administration.

Le troisième point consisterait à compléter les réseaux existants afin d'assurer un maillage complet de l'ensemble des administrations compétentes des partenaires méditerranéens au même système d'alerte.

On voit donc que les perspectives d'apport du partenariat euro-méditerranéen aux secteurs des produits pharmaceutiques, et plus généralement, dans le domaine de la santé, sont riches et aux facettes à la fois industrielle et sociales.

Conclusion

Il apparaît en définitive que les perspectives d'apports du partenariat euro méditerranéen dans des secteurs déterminés tel le domaine de la santé publique sont tout à fait réelles.

Un dynamisme nouveau du partenariat pourrait résulter de telles démarches si elles concernent des secteurs hautement symboliques comme celui des produits de santé.

Bien évidemment, cette proposition d'engager le partenariat dans des politiques plus ciblées et sectorielles ne doit pas être pensée comme un substitut à la politique existante mais comme un aspect complémentaire de celle-ci. Car, quel que soit l'impact des politiques sectorielles, elles ne permettront pas d'atteindre les objectifs à long terme du partenariat. D'ailleurs, il ne s'agit pas d'une révolution puisque certaines politiques « thématiques » existent déjà dans le partenariat (eau-énergie-transport-télécommunications).

La modification proviendrait du fait que le partenariat chercherait à développer ces perspectives sectorielles.

A un moment où le partenariat vit des jours difficiles et où les objectifs finaux de celui-ci semble s'éloigner, il est peut être opportun de faire des projets plus limités que les partenaires ont la capacité de mener à terme tout de suite.

LE NOUVEAU CADRE JURIDIQUE TUNISIEN EN MATIERE DE L'EVALUATION EN DOUANE

BASSEM KARRAY

Résumé

L'adoption d'un nouveau cadre juridique en matière d'évaluation en douane des marchandises importées traduit « l'adhésion » spontanée de la Tunisie à l'acquis communautaire. Pour réussir son ancrage irréversible au partenariat euro-méditerranéen, l'Etat tunisien a désormais aligné sa législation en matière de la nomenclature tarifaire sur celle de la Communauté et il a mis en conformité les mécanismes de détermination de la valeur en douane avec les dispositions du code de douane communautaire. Les nouvelles dispositions consacrent des méthodes d'évaluation neutres, objectives et uniformes largement appréciables pour l'essor des échanges entre les partenaires à l'association. L'administration douanière est désormais dans l'obligation d'évaluer les marchandises importées sur la base de leur valeur transactionnelle. L'inexactitude ou l'inexistence de cette valeur autorise l'administration à mettre en œuvre des méthodes subsidiaires.

Cependant, l'œuvre législative demeure, en matière du traitement douanier des marchandises importées, incomplète. Les règles d'origine, troisième élément de l'assiette des droits de douane, sont curieusement restées incompatibles avec les dispositions communautaires. Les exigences d'un traitement non discriminatoire entre les différents opérateurs recommandent la révision du cadre juridique relatif aux règles d'origine.

1. Datant du 29 décembre 1955, le code des douanes tunisien est resté en vigueur en dépit de l'instabilité des conjonctures économiques et du changement de la politique commerciale de l'Etat. Passant de l'ère du dirigisme des années soixante au libéralisme modéré des années soixante-dix qui connaîtra une accélération avec le plan d'ajustement structurel adopté en Tunisie en 1986, la législation douanière est restée fidèle à sa philosophie

protectionniste. Les changements substantiels des choix politico-économiques n'avaient curieusement pas conduit à une refonte en profondeur du code des douanes¹. Les rédacteurs du code avaient, semble-t-il, l'intention d'élaborer une législation valable pour toutes stratégies commerciales, fussent-elles contradictoires. Conçu comme un pilier fondamental de la construction de l'Etat nouvellement indépendant, le code marqua un fort attachement à la consolidation de la souveraineté douanière. «*Le code des douanes fut une pièce maîtresse dans la reconstruction de l'Etat qui retrouve ainsi ses frontières.*»²

2. Mais l'ancrage progressif et irréversible de l'Etat au libre échangeisme a conduit les décideurs à engager des réformes du cadre juridique relatif au commerce extérieur³, auquel le code des douanes ne pouvait échapper. Les pouvoirs publics sont désormais conscients de l'incompatibilité de l'actuel code avec les choix politico-économiques de l'Etat⁴ et avec les engagements internationaux de la Tunisie. Il en a été ainsi de l'article 26 relatif au système d'évaluation des marchandises en douane, dont la révision était devenue juridiquement impérative.

3. L'adhésion de la Tunisie au G.A.T.T (l'Accord Général sur le Commerce et les Tarifs Douaniers) en 1990 ainsi que sa qualité de Membre fondateur de l'O. M. C. (l'Organisation Mondiale du Commerce) lui ont créé l'obligation de conformer sa législation de la valeur en douane avec l'Accord sur la mise en œuvre de l'article 7 du G.A.T.T 1994 (l'Accord sur la valeur en douane). La loi 2001-

¹ La constitution tunisienne du 01/06/1959, pourtant assimilée à une constitution rigide, fût révisée 14 fois, par contre le code de douane n'a été modifié et complété que 10 fois par des lois conjoncturelles qui n'ont pas bouleversé son équilibre initial. Voir sur la question des modifications apportées au code BACCOUCHE (N.) :Les implications de l'accord d'association sur le droit fiscal et douanier. In Mélanges en l'honneur de Habib AYADI , C.P.U.2000, p.9 et s.

² BACCOUCHE (N.) :Les implications de l'accord d'association sur le droit fiscal et douanier. In Mélanges en l'honneur de Habib AYADI , C.P.U.2000, p.9.

³ Certaines lois importantes ont d'ailleurs ont été récemment promulguées, dont notamment la loi n°.98-108 du 18/12/1998 relative aux mesures de sauvegarde et la loi n°.99-9 du 09/12/1999 relative aux pratiques déloyales à l'importation.

⁴ Un projet d'un nouveau code des douanes est en cours de préparation dans l'administration depuis au moins cinq ans.

92 du 7 août 2001 est venue modifier et compléter l'article 26 du code⁵. L'adoption de cette loi est devenue une nécessité suite à la fin du délai de report d'application des dispositions de l'Accord sur la mise en œuvre de l'article 7 du G.A.T.T fixé à cinq ans à partir de la date d'entrée en vigueur de l'Accord de l'O. M. C. dans l'ordre juridique des Etats membres. Ce traitement différencié est essentiellement accordé aux pays en développement qui n'étaient pas parties aux Accords de Tokyo Round⁶.

4. La Tunisie se devait de modifier sa législation de 1955 avec l'arrivée du terme du délai prévu par les textes multilatéraux⁷. L'article 20 de l'accord sur l'évaluation en douane prévoit un report d'application des dispositions du présent accord en faveur des pays en développement pour une période qui ne doit pas excéder les cinq ans après la date de l'entrée en vigueur de l'Accord instituant l'O.M.C⁸..

Le nouveau article 26 rompt définitivement avec des pratiques administratives largement préjudiciables à la stabilité des relations d'affaires et devenues de plus en plus incompatibles avec un environnement hostile à l'arbitraire et à la discrétion des services de douanes. L'administration pouvait, sous le système de la valeur minimale en douane⁹, commettre des abus sans être réellement censurée. L'ancien système a constitué pour longtemps une sorte de barrières non tarifaires à l'accès au marché tunisien. Ce système

⁵ *J.O.R.T* n°.63, du 07/08/2001, p.2020. Cette loi n'est entrée en vigueur qu'au 29/09/2001 et ce en vertu de son article 3. Elle a été suivie d'un arrêté du ministre des finances du 19/10/2001, *J.O.R.T.* n°.85 du 23/10/2001 et d'une note commune datant du 06/11/2001. *B.O.D.I.*, n°.716/01-11, p.731.

⁶ Voir l'article 20 de la 3^{ème} partie relatif au traitement spécial et différencié de l'Accord sur la valeur en douane (-VED).

⁷ Le retard dans l'adoption d'un nouveau code des douanes conforme aux engagements multilatéraux risque de multiplier les interventions successives et circonstanciées du législateur, ce qui pourrait déboucher sur des incohérences.

⁸ La Tunisie a bénéficié de ce report d'application en raison de son statut d'un pays en développement. L'annexe II de l'Accord V.E.D. prévoit la possibilité de prolongement de délai sur demande.

⁹ Ce système accordait à l'administration les pouvoirs les plus étendus en matière de détermination de la valeur en douane sans se soucier même de la valeur retenue par les parties.

n'était-il pas à l'origine d'une hausse démesurée des droits de douane ? L'abandon par les opérateurs économiques des stocks dans les dépôts de la douane ne constitue-t-il pas l'une des résultantes de la hausse imprévisible des droits dus ?

Bien qu'il ait été une source importante de revenus pour l'Etat et une technique de protection des intérêts des producteurs nationaux¹⁰, le système de la valeur minimale en douane entravait les opérations de commerce international avec la Tunisie et faussait les règles de la concurrence sur le marché local.

L'ancien article 26 portant sur la valeur des marchandises à l'importation, sujet de nombreuses critiques, vient d'être remplacé par «*les articles 26*». La concision de l'ancien texte est curieusement abandonnée au profit d'une exhaustivité en vertu de laquelle le nouveau texte est divisé en 14 sous-articles. Avant d'analyser le contenu de cette nouvelle loi, il incombe de rappeler la définition du concept de la valeur en douane ainsi que son évolution historique.

5. La valeur en douane des marchandises importées est définie comme étant la valeur attribuable à des marchandises importées en vue de la perception des droits de douane ad valorem¹¹. «*Si, dans un système douanier reposant pour l'essentiel sur la taxation spécifique des marchandises, la détermination de la valeur de la marchandise ne présente qu'un intérêt tout à fait secondaire, il n'en va pas de même, à l'évidence, dans un système de taxation ad valorem*»¹².

¹⁰ Voir CARREAU (D.) et JUILLARD (P.) : Droit international économique. LGDJ-DELTA, 4^{ème} éd. p.214.

¹¹ Cette définition a été retenue par le nouveau article 26, premier paragraphe, point(a). Il est à signaler que dans le système de taxation ad valorem «le droit applicable à une marchandise donnée est fixé en pourcentage de la valeur de celle-ci», définition de BERR (J-C.) TREMEAU (H.): le droit douanier communautaire et national. Economica, 4^{ème} éd.1997.

¹² TREMEAU (H.) et BERR (C-J.) : le droit douanier communautaire et national. Economica, 4^{ème} éd. 1997, p.129.

La détermination de la valeur en douane constitue une étape axiale dans l'opération de dédouanement de la marchandise, ainsi que pour l'établissement des droits de douane proprement dits et les autres prélèvements requis si nécessaire¹³. Elle constitue un élément de l'assiette des droits de douane en plus de la qualification du produit (l'espèce tarifaire dans la nomenclature objet des articles 18 à 24 du code des douanes) et la détermination de l'origine des marchandises objet de l'article 25.

6. L'Etat tunisien n'a pas manqué à l'obligation d'harmoniser sa législation en matière de la qualification des marchandises en procédant, en premier lieu, à la ratification de la convention sur le système harmonisé de désignation et codification des marchandises (SYHA DE COMA)¹⁴ et, en deuxième lieu, en alignant la nomenclature douanière tunisienne (N.D.T) avec la nomenclature combinée de la communauté européenne et ce en application de l'article 30 de l'Accord d'Association du 17/07/95¹⁵.

¹³ Le deuxième paragraphe de l'article 6 relatif à la détermination de la base imposable du code de la T.V.A de 1988 (loi n°88-61 du 02/06/1988, *J.O.R.T.*n°39 du 10/6/1988, p.827 et s.) a prévu que la valeur imposable à l'importation est constituée par la valeur en douane. Il prévoit que: «A l'importation, la valeur imposable est constituée :1/s'il s'agit d'une importation réalisée par un assujetti ou par l'Etat, les collectivités publiques locales et les établissements publics à caractère administratif, par la valeur en douane, tous droits et taxes inclus à l'exclusion de la taxe sur la valeur ajoutée ».

¹⁴Cette convention est conclue en 1983 sous les auspices du conseil de coopération douanière (l'actuelle O.M.D). La Tunisie a repris la nomenclature du système harmonisé (N.S.H.) à travers la loi 87-2 du 06/02/87. *J.O.R.T.* n°. 10 du 10/2/1987,p.191.

¹⁵ Voir l'article 65 de la loi de finances pour la gestion de 1999. Tout récemment la direction générale des douanes a publié la note commune n°D.G.D. 2002/12 du 17/01/2002, D.G.D. p.27 portant sur des amendements à la N.S.H. apportés suite à la recommandation adoptée par le conseil de l'O.M.D. lors de ses sessions du 21 au 23 juin 1999. Ces amendements qui devraient entrer en vigueur à la date du 1^{er} janvier 2002 conformément aux dispositions de l'article 16.4b de la convention du système harmonisé, ont été différés jusqu'au 15/04/2002. De même, la nouvelle nomenclature tunisienne est conforme à la nouvelle version du système harmonisé et celle de la nomenclature combinée de la Communauté Européenne. Voir la note commune n°D.G.D 2002/61 du 08/04/2002, D.G.D,p.353.

7. Les textes internationaux se rapportant à la valeur en douane se caractérisent par leur ancienneté et leur multiplicité¹⁶, alors qu'en matière des règles d'origine, ils se caractérisent par leur généralité et par leur brièveté. Le premier texte international remonte au G.A.T.T. 1947 qui a énoncé les principes de l'évaluation des marchandises¹⁷ et invité les parties contractantes à élaborer une définition internationale de la valeur en douane. Plus tard, en 1950, le conseil de coopération douanière adopta une définition connue sous l'appellation : le système de convention de Bruxelles (DVB) qui a prévu une méthode basée sur le prix normal. La valeur de la marchandise est le prix normal, c'est-à-dire le prix réputé pouvoir être fait pour cette marchandise au moment où les droits de douane deviennent exigibles, lors d'une vente effectuée dans des conditions de pleine concurrence entre un acheteur et un vendeur indépendant l'un de l'autre. Outre l'imprécision conceptuelle que renferme cette définition, le système de Bruxelles accorde à l'administration douanière de chaque Etat la possibilité de substituer le prix de vente adopté par les parties par une valeur qui lui est propre. Ce pouvoir discrétionnaire de l'administration est largement préjudiciable pour la conduite des relations commerciales internationales¹⁸. L'opérateur économique n'est pas à l'abri d'une évaluation excessive par les services douaniers.

D'ailleurs, les usagers ont longtemps souffert de la détermination unilatérale et parfois abusive de la valeur en douane par l'administration douanière qui peut écarter discrétionnairement la valeur fixée par les parties, fut-elle objective et fiable.

¹⁶ Les premières réflexions sur la question sont déjà amorcées lors des conférences économiques internationales tenue à Genève en 1927 et 1930 sous l'égide de la Société des Nations. Ces conférences ont mis en exergue que les obstacles au développement du commerce international sont liés essentiellement à la diversité des conceptions nationales de la valeur en douane.

¹⁷ Les dispositions relatives à la valeur en douane du G.A.T.T 1947 ont été invoquées dans un différend entre les U.S.A. et le Canada relatif aux exportations de pommes de terre à destination du Canada. Voir rapport du groupe spécial adopté le 16 novembre 1962 (L/1927, IBDD, 11S/90).

¹⁸ Voir BERR (C.-J.) : Les règles nouvelles de l'évaluation en douane. In réflexions offertes à Paul SIBILE: études de fiscalité, volume 13, éditions Bruylant, Bruxelles, 1981, p.139.

8. En raison de ces inconvénients, les parties contractantes du G.A.T.T. ont renoncé à ce système et adopté une nouvelle conception, lors du cycle des négociations de Tokyo 1979, fondée sur une valeur transactionnelle à laquelle se succède nombre de méthodes subsidiaires, rompant, de la sorte avec la discrétion de l'administration. Ce nouveau système a été repris par la plupart des pays développés et groupements régionaux dont notamment la Communauté Economique Européenne, le premier partenaire économique de la Tunisie¹⁹.

9. Quant au cadre juridique tunisien, les dispositions relatives à la valeur en douane des marchandises remontent au code des douanes du 19/12/1955²⁰ qui adoptait, dans sa cinquième section, le système d'évaluation de Bruxelles²¹. Bien que la réglementation internationale ait été modifiée au cours du cycle de Tokyo de 1979, le code a maintenu son attachement au système de D. V. B.²². Juridiquement la Tunisie n'était pas dans l'obligation de modifier son système par celui de Tokyo Round, parce que, jusqu'à 1990, elle n'était pas une partie contractante du G.A.T.T.²³

Mais l'incompatibilité de la législation tunisienne avec la législation multilatérale est née de l'accession de la Tunisie au

¹⁹ Le cadre juridique communautaire actuel en matière d'évaluation en douane figure dans les articles 28 à 36 du code des douanes communautaires adopté par le règlement 2913/92 du 12/10/1992 tel qu'il a été complété par le règlement 2454/93 de la commission du 02/07/1993 fixant certaines dispositions d'application.

²⁰ Un arrêté du ministre des finances datant de 26/6/1956 et relatif à la détermination de la valeur en douane des marchandises importées (J.O.T. n°54 du 6/7/1956, p.953) avait été adopté sur la base des articles 17 et 26.

²¹ La cinquième section du code est scindée en deux articles, l'article 26 porte sur la valeur des marchandises à l'importation et l'article 27 sur la valeur des marchandises à l'exportation.

²² Le système de Bruxelles a été abandonné par la CEE en 1981, les USA et le Japon en 1982, suite à l'adoption du Code de Tokyo Round.

²³ En pratique le maintien de l'ancien système de Bruxelles était une source de discrimination. Alors que l'importateur communautaire bénéficie d'un traitement douanier fondé sur la valeur transactionnelle, l'importateur tunisien est resté soumis au traitement douanier fondé sur le prix normal, lequel est jugé théorique et non lié à la transaction.

G.A.T.T. en 1990²⁴, sa signature de l'acte instituant l'O. M. C en 1994²⁵ et sa conclusion d'un Accord d'Association avec les Communautés Européennes et ses Etats membres le 17/07/1995²⁶. *«L'ancrage de la Tunisie dans l'espace euro-méditerranéen conduira le législateur à reconsidérer le droit douanier pour le rendre moins nationaliste et à reconsidérer le droit fiscal pour le rendre moins national»*²⁷.

Le cycle de l'Uruguay de 1986 a entériné la refonte du système d'évaluation en douane en substituant la méthode de la valeur réelle par une autre plus objective : la valeur transactionnelle et en prévoyant des méthodes de secours (subsidiaries) équitables, uniformes et neutres.

D'où, la loi du 04/08/2001²⁸ dont l'objet a été de dissiper l'incompatibilité de l'ancien article 26 avec le nouveau contexte. En application de l'article 26 quaterdécies, un arrêté du ministre des finances en date du 19/10/2001 a eu pour objet de fixer les modalités d'application des articles 26 à 26 Terdecies du code des douanes²⁹. La direction générale des douanes a publié le 06/11/2001 une note commune ayant pour objet la valeur en douane³⁰.

²⁴ La Tunisie a adhéré au G.A.T.T par le protocole d'adhésion ratifié par la loi n°90-61 du 28/06/1990. *J.O.R.T.* du 26/06/1990, n°44, p.839. Ce protocole est entré en vigueur le 01/07/1994 en vertu de son paragraphe 6.

²⁵ La Tunisie a ratifié l'Accord de l'O. M. C. par la loi n°95-6 du 23/01/1995 portant ratification des Accords de l'Uruguay Round. *J.O.R.T.* n°9 du 31/01/1995, p.271.

²⁶ L'Accord euro méditerranéen établissant une association entre la république tunisienne d'une part et les communautés européennes et leurs Etats membres d'autre part a été ratifié par la loi n°96-49 du 20/06/1996. *J.O.R.T.* n°51 du 25/06/1996, p.1311. Cet accord est curieusement entré en vigueur avant même sa ratification : voir la loi de finances pour la gestion de 1996.

²⁷ BACCOUCHE (N.) : Les implications de l'accord d'association sur le droit fiscal et douanier, article précité, p.9.

²⁸ Loi n°2001/92 du 07/08/2001 modifiant et complétant le code des douanes *J.O.R.T.* du 07/08/2001, n°63 p.2020.

²⁹ *J.O.R.T.* du 23/10/2002 n°85, p.3739.

³⁰ *B. O. D. I.* n°716/01-11, *D. G. D.* 731, texte n°. *D. G. D.* 165/2001 du 06/11/2001.

10. La base de l'évaluation en douane des marchandises devrait être, dans la mesure du possible, la valeur transactionnelle³¹. Le nouveau cadre juridique tunisien se caractérise par une certaine spécificité, il est plus détaillé que l'ancien au point qu'il ressemble à un véritable code d'évaluation en douane. L'architecture actuelle de l'article 26 n'a guère l'avantage de la simplicité dans la mesure où le législateur a opté pour une numérotation compliquée (14 sous-articles)³².

Ces complications d'ordre formel, s'ajoutent à la technicité de la matière douanière, en général, et l'évaluation en douane, en particulier, et qui est source de difficultés de compréhension³³.

11. Certes, le nouveau cadre juridique offre l'avantage d'une évaluation des marchandises en douane sur des bases transparentes et objectives, mais encore faut-il que l'administration douanière puisse se débarrasser des pratiques anciennes et se mettre à niveau pour affronter les nouveaux défis.

³¹ Le premier paragraphe de l'introduction générale de l'accord sur l'évaluation en douane.

³² Article 26 : des définitions d'ordre général.

26 bis : La méthode de la valeur transactionnelle des marchandises importées.

26 ter : L'ordre d'application des différentes méthodes d'évaluation.

26 quater: La méthode de la valeur transactionnelle des marchandises identiques.

26 quinquis: La méthode de la valeur transactionnelle des marchandises similaires.

26 sexies: La méthode de la valeur transactionnelle fondée sur le prix unitaire.

26 Septies : La méthode de la valeur transactionnelle calculée.

26 acties: La méthode de la valeur transactionnelle fondée sur des moyens raisonnables

26 nonies: Les éléments à prendre en compte dans la détermination des éléments constitutifs de la valeur transactionnelle des marchandises importées.

26 décies : Les frais à prendre en compte.

26 indecies : La valeur en douane des supports informatiques importés.

26 duedecies : Les exigences de la conversion monétaire.

26 Terdecies : Le respect de la confidentialité des renseignements.

26 quaterdecies : Le renvoi à un arrêté du ministre des finances pour fixer les modalités d'application.

³³ TREMEAU (H.) et BERR (J-C.) : Le droit douanier communautaire et national, ouvrage précité, p.1.

Ayant pour fondement l'Accord sur la mise en œuvre de l'article 7 du G.A.T.T et pour source d'inspiration le code de douane communautaire, la nouvelle législation offre l'exemple d'une réception fidèle de la norme internationale dans l'ordre juridique tunisien.

L'apport essentiel du nouveau article 26 est l'abandon de la valeur minimale en douane et son remplacement par la notion de la valeur transactionnelle comme élément de base dans la détermination de la valeur en douane (*Première partie*). L'inexistence ou l'inexactitude de la valeur transactionnelle n'autorise pas l'administration à déterminer la valeur de la marchandise discrétionnairement. Désormais, elle est dans l'obligation de recourir à des méthodes subsidiaires (*Deuxième partie*).

Première partie: La valeur transactionnelle élément de base dans la détermination de la valeur en douane

12. L'établissement de la valeur en douane repose sur un régime déclaratif³⁴. Le déclarant est soit l'importateur en personne ou une personne habilitée ou agissant pour son compte. Sous l'ancien article 26 «*la valeur à déclarer était le prix normal de la marchandise, c'est-à-dire le prix réputé pouvoir être fait pour ces marchandises, au moment et dans le lieu fixés ci-après lors d'une vente effectuée dans des conditions de pleine concurrence, entre un acheteur et un vendeur indépendant*». L'assimilation de la valeur en douane au prix normal de la marchandise a été dénoncée par la doctrine comparée en raison des difficultés de détermination du prix normal et aux acceptions théoriques auxquelles il renvoie³⁵. Le

³⁴ La déclaration en détail présentée par le déclarant est sujette à un contrôle qui s'exerce sur la facture, les documents relatifs à la transaction et même sur les colis. L'administration peut également procéder à des expertises sur les registres comptables de l'acquéreur des marchandises déclarées. Toute fausse déclaration de la valeur est passible de répression et ce conformément aux articles 279 et suivant du code (283 et 295).

³⁵ Voir sur la question TREMEAU (H.) et BERR (J-C.) : Le droit douanier communautaire et national, précité, p. 131.

nouveau article semble opter pour une notion plutôt positive, concrète et proche de la volonté des parties.

La valeur en douane est désormais «*la valeur transactionnelle c'est-à-dire le prix effectivement payé ou à payer pour les marchandises lorsqu'elles sont vendues pour l'exportation à destination de la Tunisie, après ajustements conformément aux articles 26 nonies et 26 decies*»³⁶. Quelles sont les conditions requises pour admettre de la valeur en douane lors d'une déclaration? (A) Quelles sont les modalités d'ajustement de cette valeur ? (B)

A. Les conditions d'authenticité de la valeur transactionnelle

13. La valeur transactionnelle est la prestation due réglée ou à régler en contrepartie d'une vente de marchandise pour l'exportation à destination de la Tunisie. De la sorte, il faut qu'il y ait une exclusion des opérations de non ventes internationales (a) et un règlement pécuniaire à la charge de l'acheteur(b).

a) l'exigence de l'exclusion des valeurs prévues dans des opérations de non-ventes internationales

14. La notion de vente internationale n'a pas été définie par l'article 26 qui s'est limité à écarter la valeur transactionnelle dans des opérations de vente non représentatives³⁷. En règle générale,

³⁶ Les dispositions des articles de 26 bis à 26 octies s'appliquent à l'évaluation en douane des marchandises. La valeur en douane de supports informatiques importés n'est pas déterminée sur la base de ces articles. L'article 26 undecies la soustrait expressément. En la matière la valeur en douane est arrêtée uniquement sur la base du coût ou de la valeur du support informatique proprement dit. Les données ou les instructions ne sont prises en considération dans le calcul de la valeur que si leur valeur est distincte du coût ou de la valeur du support informatique considéré. Il est à remarquer que l'accord multilatéral sur la VED ne prévoit pas de dispositions relatives aux supports informatiques importés. Par contre, l'article 34 du code des douanes communautaire renvoie à des règles particulières pour l'évaluation en douane des supports informatiques importés.

³⁷ Il s'agit des cas de vente entre personnes liées au sens de l'article 26 paragraphe 2 dans laquelle le risque d'affectation du prix est imminent.

une vente internationale de marchandises est une opération passée entre des parties ayant leur établissement dans des Etats différents impliquant un mouvement transfrontalier de marchandises et / ou de moyens de paiement au travers des frontières³⁸.

Sous un angle économique, un contrat de vente internationale entraîne « *un double mouvement de flux et de reflux* »³⁹. Ce critère économique est retenu par l'article 26 bis. Pour l'administration douanière, chargée de l'établissement des droits de douane requis, l'élément à retenir en considération est exclusivement le franchissement du territoire douanier. Ce fait constitue le générateur des opérations de dédouanement dont notamment la détermination du montant du droit de douane exigible.

15. La préoccupation principale de l'administration douanière porte sur la valeur transactionnelle insérée dans le contrat de vente. Etant l'élément de base dans la taxation douanière, elle doit être suffisamment représentative, fiable et objective. Tout en faisant foi à la volonté des parties, le législateur énumère certaines situations non qualifiées comme ventes. La note commune du 6/11/2001 dresse une liste non exhaustive des opérations d'importation de marchandises non qualifiées de ventes en raison de l'absence de la valeur transactionnelle ou de sa non représentativité. Il s'agit en particulier des livraisons gratuites, des marchandises importées sous le régime commercial de la vente en consignation, des marchandises importées par des intermédiaires qui ne les achètent pas mais qui les vendent après importation, des marchandises importées par les succursales qui n'ont pas la personnalité juridique, des marchandises importées en exécution d'un contrat de location ou de crédit bail, des marchandises qui ont été prêtées à l'importateur tout en restant la propriété de l'expéditeur⁴⁰. L'article 26 bis énumère également dans son premier alinéa des cas où la

³⁸ La convention de Vienne sur la vente internationale des marchandises conclue sous les auspices des Nations Unies du 11/04/1980 n'a retenu que le critère de l'établissement dans des Etats différents dans son article premier relatif à la définition de la notion de vente internationale des marchandises.

³⁹ GOURION (P.A.) et PEYRARD (G.): Droit du commerce international, L.G.D.J., 1994, p.96.

⁴⁰ Note commune du 6/11/2001, précitée, DGD 733.

véracité de la valeur transactionnelle est contestable. En l'occurrence lorsque le contrat de vente prévoit des dispositions liant l'acheteur, tel par exemple:

- les restrictions concernant la cession ou l'utilisation de la marchandise⁴¹,
- la vente (ou le prix) est subordonnée à des conditions ou des prestations dont la valeur n'est pas déterminable,
- une partie du produit de toute revente, cession ou utilisation ultérieure des marchandises ne revient directement ou indirectement au vendeur,
- la valeur transactionnelle est affectée par l'existence des liens entre les parties à l'opération.

16. En ce qui concerne la vente entre personnes liées, la nouvelle législation marque une évolution par rapport à sa prédécesseur. L'ancien article 26 considère qu'une vente effectuée entre personnes liées est réputée être faite dans des conditions de non concurrence. Il établit ainsi une présomption que la simple existence des liens d'affaires entre le vendeur et l'acheteur affecte l'authenticité du prix convenu. Cette position, reprise de la convention de Bruxelles, s'explique par la réalité économique de la première moitié du 20^{ème} cycle où les firmes ne développèrent des relations partenariales qu'occasionnellement. Alors qu'après guerre, le mouvement d'internationalisation de l'économie incita les Etats à abandonner une conception autarcique de l'économie en faveur d'une interdépendance très poussée. Le commerce international d'aujourd'hui est essentiellement celui des grands réseaux fortement intégrés, des alliances et des partenariats.

Il est quasiment certain que l'existence des liens d'affaire est une source de doute sur la sincérité des valeurs déclarées pour l'administration douanière, mais elle ne doit pas être une raison pour exclure systématiquement la valeur transactionnelle. Conscient des enjeux que peuvent causer l'existence des liens, le législateur a préféré dresser une liste dans l'alinéa 2 de l'article 26 aux personnes réputées être non liées.

⁴¹ Toutefois, en la matière, l'article admet certaines restrictions.

b) *L'existence d'un règlement pécuniaire entre le vendeur et l'acheteur*

17. Le prix devrait être la prestation due de l'acheteur envers le vendeur. *«Le prix effectivement payé ou à payer est le paiement total effectué ou à effectuer par l'acheteur au vendeur, ou au bénéfice de celui-ci, pour les marchandises importées»⁴².*

La nouvelle législation a adopté une acception large en matière de détermination du prix. Quant aux paiements, elle n'a retenu que le paiement total et non partiel. Les formes auxquelles les parties procéderont au règlement financier ne sont pas limitées. Les modes de paiement acceptés prennent plusieurs formes dont, notamment, le paiement par lettre de crédit ou par des instruments négociables.

Le paiement peut être également soit au comptant, différé ou anticipé. L'essentiel est que le paiement ait lieu et en proportion avec la valeur réelle de la marchandise. Le règlement de la somme due peut être effectué soit directement par le débiteur soit par l'intermédiaire d'une tierce personne habilitée.

18. L'élément prix a une importance particulière, il constitue l'obligation principale de l'acheteur. Alors que la livraison de la marchandise constitue l'obligation principale du vendeur. En règle générale *«le prix de la vente doit d'abord être non seulement réel et sérieux, mais encore juste, afin de donner effet à l'accord des volontés»⁴³.*

Issu des négociations, sa détermination peut être arrêtée lors de la conclusion du contrat de vente ou subordonnée à une prestation à la charge de l'acquéreur. La validité du prix est tributaire également de sa véracité en ce sens qu'il ne devrait pas être fictif ou simulé. Il arrive que les parties à un contrat de vente procèdent à une dissimulation du prix réel pour frauder. Un prix dérisoire ou non sérieux devrait être, à juste titre, écarté et il ouvre à l'administration douanière la voie pour mettre en œuvre les méthodes subsidiaires

⁴² L'article 26 bis (3) a.

⁴³ GATSI (J.) : Les contrats spéciaux, éd. Armand Colin, 1998, p.15.

d'évaluation⁴⁴. L'arrêté du ministre des finances du 19/10/2001 prévoit que si le prix n'a pas été effectivement payé, le prix à payer pour le règlement au moment considéré est pris comme base pour l'évaluation en douane⁴⁵.

19. Si la marchandise objet de la transaction entre dans le cadre ou constitue une partie d'une grande quantité achetée dans une seule transaction, le prix dû devrait être calculé proportionnellement en fonction des quantités déclarées par rapport à la quantité totale achetée. Un prix unitaire portant sur une grande quantité, peut être décomposé suivant la quantité déclarée aux frontières. Cette détermination proportionnelle s'étend également au cas d'endommagement d'une partie de la marchandise avant sa mise en consommation. Cette partie sera soustraite d'office dans l'établissement de la valeur. En application du principe de l'interdiction de la double imposition, une taxe intérieure exigible dans le pays d'exportation ou le pays d'origine ne devra pas être incorporée dans la valeur en douane, à moins que la marchandise ait été exonérée⁴⁶.

20. Guidé par des exigences d'équité et de neutralité, le législateur a fait preuve d'une certaine flexibilité en privilégiant un traitement casuistique, alors qu'il a accordé, sous l'ancienne législation, un large pouvoir discrétionnaire à l'administration douanière incompatible avec la recherche de l'essor des activités de commerce extérieur.

Aux termes de l'article 26 bis «*La valeur en douane des marchandises importées est la valeur transactionnelle, c'est-à-dire le prix effectivement payé ou à payer pour les marchandises lorsqu'elles sont vendues pour l'exportation à destination de la Tunisie, après ajustement conformément aux articles 26 nonies et 26 decies...*». La véracité de la valeur transactionnelle nécessite parfois certains ajustements.

⁴⁴ Voir infra : la deuxième partie.

⁴⁵ L'article 1 de l'arrêté du 19/10/2001.

⁴⁶ L'article 3 de l'arrêté du ministre des finances.

B. Les ajustements correctifs de la valeur transactionnelle⁴⁷

21. Les opérations de commerce international dont notamment les ventes, se caractérisent par leur complexité et leur diversité. Reposant sur les principes de la liberté contractuelle, elles prennent diverses formes au point qu'il est difficile d'élaborer des modèles préétablis. Outre l'accord fondamental sur l'élément prix, les parties à un contrat international de vente de marchandises conviennent des charges de l'opération. De la sorte, la valeur transactionnelle insérée dans le contrat de vente peut contenir certains frais et charges additionnels, qu'il faut retrancher dans l'établissement de la valeur en douane **(a)**. En d'autres circonstances, si la valeur transactionnelle ne comporte pas certains frais et charges essentiels, il faut les ajouter avant l'établissement de la valeur en douane **(b)**.

a) les éléments à retrancher de la valeur transactionnelle

22. Le paragraphe premier de l'article 26 bis énonce le principe d'ajustement, qui est présenté dans le détail dans l'article 26 décies et l'article 15 de l'arrêté du 19/10/2001⁴⁸. Une charge n'est susceptible de soustraction que si elle répond à trois conditions cumulatives. D'abord, il faut que la charge soit déjà incluse dans le prix payé ou à payer, ensuite qu'elle soit quantifiable, c'est-à-dire reprise d'une manière distincte sur la facture et enfin qu'elle ne fasse pas partie des éléments constitutifs de la valeur tels qu'ils sont prévus par l'article 26 nonies. L'article 26 decies énumère limitativement les éléments à déduire. Il s'agit:

- a) des frais de transport des marchandises, après l'arrivée au lieu d'introduction dans le territoire douanier de la Tunisie,

⁴⁷ Les éléments servant à la détermination ou à l'ajustement de la valeur en douane sont dans la plupart des cas exprimés en monnaie étrangère. Pour les besoins de conversion, le taux de change qui devrait être retenu en application de l'article 26 duodecies est celui en vigueur à la date d'enregistrement de la déclaration en détail.

⁴⁸ Les éléments à retrancher figurent dans la rubrique C du verso de la déclaration des éléments de la valeur (D.E.C.V.).

- b) les frais relatifs à des travaux de construction, d'installation, de montage, d'entretien ou d'assistance technique entrepris après l'importation,
- c) Les frais relatifs au droit de reproduire les marchandises importées en Tunisie,
- d) Les commissions d'achat,
- e) Les droits et taxes à l'importation en Tunisie⁴⁹,

23. Les éléments supportés par l'acheteur devront être, dans le calcul de la valeur, retranchés dans la mesure où ils surévaluent artificiellement cette dernière. Le point (a) de l'article 26 decies mérite, à cet égard, quelques éclaircissements portant sur la notion du lieu d'introduction qui peut être soit le port de débarquement, le premier bureau de douane, le premier aéroport d'arrivée et/ou le lieu de franchissement de la frontière terrestre. Le lieu d'introduction varie selon le mode d'acheminement de la marchandise en question.

En ce qui concerne les frais de transport, l'article 16 de l'arrêté ministériel prévoit qu'ils devraient être répartis proportionnellement à la distance parcourue en dehors et à l'intérieur du territoire douanier tunisien⁵⁰ déduit dans certains cas⁵¹ et calculés suivant des tarifs habituels s'il est assuré gratuitement⁵².

b) les éléments à ajouter à la valeur transactionnelle.

24. L'hypothèse selon laquelle il peut être procédé à l'ajout de certains éléments à la valeur transactionnelle figure dans l'article 26 nonies. L'ajustement à faire ne doit pas se fonder sur des bases arbitraires et subjectives. Toute correction devrait être objective et quantifiable.

⁴⁹ La note commune du 06/11/2001 n'a curieusement prévu que les trois premiers éléments.

⁵⁰ Article 16/a de l'arrêté du 19/10/2001.

⁵¹ Article 16/b de l'arrêté du 19/10/2001.

⁵² Article 16/c de l'arrêté du 19/10/2001.

L'élément à ajouter au prix payé ou à payer doit réunir au moins deux conditions essentielles. En premier lieu, il doit être un élément constitutif de la valeur en douane. En second lieu, il ne doit pas être déjà incorporé dans le prix payé ou à payer⁵³.

Les éléments à ajouter sont énumérés dans l'article 26 nonies à titre limitatif, en ce sens qu'il n'est pas autorisé à ajouter d'autres éléments⁵⁴. Ils se caractérisent par leur diversité et leur multiplicité. Il s'agit:

- des coûts supportés par l'acheteur : tels les commissions, les frais de courtages, les coûts des contenants traités, les coûts d'emballage de la main d'œuvre et des matériaux,
- les produits et services fournis par l'acheteur, sans frais ou à coût réduit, et utilisés lors de la production ou de la vente pour l'exportation des marchandises importées⁵⁵,
- les redevances et droit de licence,
- produits de toute revente, cession ou utilisation ultérieure revenant au vendeur,
- et frais de livraison jusqu'au lieu d'introduction en Tunisie.

Tous ces éléments ne peuvent être ajoutés que s'ils répondent aux conditions précitées.

25. En ce qui concerne l'élément redevances et droits de licence, l'article 26 nonies 4^{ème} paragraphe prévoit que les frais relatifs au droit de reproduire des marchandises importées en Tunisie ne peuvent être ajoutés au prix effectivement payé ou à payer. De même pour « *les paiements effectués en contrepartie du droit de distribuer ou de revendre les marchandises importées si ces*

⁵³ Les éléments à ajouter sont repris dans la rubrique B de la D.E.C.V.

⁵⁴ Alinéa 3 de l'article 26 nonies.

⁵⁵ Il s'agit des matières, composants, parties, outils, matrices, moules utilisés pour les marchandises importées, matières consommées dans la production des marchandises importées et travaux d'ingénierie, l'étude, d'art et de design, plans, croquis exécutés ailleurs qu'en Tunisie et nécessaires pour la production des marchandises importées.

paiements ne sont pas une condition de la vente, pour l'exportation, des marchandises importées à destination de la Tunisie »⁵⁶.

L'inexactitude ou l'absence de la valeur transactionnelle ouvre la voie à l'administration pour mettre en œuvre les méthodes subsidiaires et ce en application de l'article 26 octies.

Deuxième partie: Les méthodes subsidiaires d'évaluation de la valeur en douane

26. En plus de l'introduction de la notion de valeur transactionnelle qui rompt avec la notion du prix normal dont son acception est fortement contestée, la nouvelle législation a systématisé certaines méthodes accessoires auxquelles l'administration douanière pourrait recourir en vue d'établir la valeur transactionnelle.

Les articles de 26 quater à 26 octies énumèrent les différentes méthodes d'évaluation. Le recours à ces méthodes de secours est strictement conditionné par l'impossibilité de déterminer la valeur en douane sur la base de l'article 26 bis. L'administration doit prouver l'inexactitude ou la non représentativité de la valeur transactionnelle de la marchandise importée pour passer successivement aux différentes méthodes décrites par l'article 26 ter⁵⁷. Ces méthodes sont généralement classées suivant deux critères : les méthodes de la valeur en douane alternative (**A**) et les méthodes de la valeur en douane construite (**B**).

A. Les méthodes de la valeur en douane alternative

27. Les méthodes alternatives sont des méthodes de réserve qui ne sont mis en œuvre que s'il s'avère impossible de retenir la valeur transactionnelle prévue dans le contrat de vente de la

⁵⁶ Le point (b) du paragraphe 4 de l'article 26 nonies.

⁵⁷ BERR (J-C.) a nuancé le fait que le choix d'une méthode d'évaluation est strictement tributaire des dispositions juridiques. Il n'exclut pas que ce choix peut être dicté en fonction de la force économique de l'opérateur international. Voir son article :les règles nouvelles de l'évaluation en douane, précité, p.150.

marchandise⁵⁸. En application de l'article 26 ter, la valeur en douane doit être établie sur la base des deux méthodes de la valeur transactionnelle de marchandises identiques à celle objet d'évaluation et de la valeur transactionnelle de marchandises similaires.

*«Il s'agit, dans les deux cas, de se référer, pour évaluer les marchandises à taxer, à la valeur d'autres marchandises»⁵⁹
«vendues pour l'exportation à destination de la Tunisie et exportées au même moment ou à peu près au même moment que les marchandises à évaluer»⁶⁰.*

28. Ces deux méthodes présentent des similarités et une différence. S'agissant des points communs, ils sont au nombre de quatre.

En premier lieu l'assimilation à entreprendre⁶¹ devra se situer au même stade commercial, en ce sens que lorsque la marchandise objet d'évaluation est importée sous forme d'un produit fini, on doit se référer également à un produit fini identique ou similaire, ainsi que pour le produit semi fini.

En second lieu, il faut que la marchandise identique ou similaire à laquelle on s'est référé soit importée en Tunisie dans la même quantité que celle objet d'évaluation, c'est-à-dire de la marchandise importée. Le prix alloué à une marchandise importée en grande quantité diffère du prix de celle importée en petite quantité. A défaut d'une comparabilité quantitative, l'administration peut se référer à un prix détail si elle estime qu'il est suffisamment représentatif à un prix de gros.

⁵⁸ BERR (C-J.) et TREMEAU (H.) considèrent ces deux méthodes comme des méthodes d'évaluation par référence (voir leur ouvrage: Droit douanier communautaire et national, précité, p.146 et 147).

⁵⁹ THEMEAU (H.) et BERR (C-J.) : Droit douanier communautaire et national, précité, p.146.

⁶⁰ L'article 26 quater 1-a) et 26 quinquies 1-a).

⁶¹ Il s'agit dans ce cas d'assimiler la valeur en douane de la marchandise importée à la valeur en douane soit de la marchandise identique, soit de la marchandise similaire.

En troisième lieu, l'importation de la marchandise identique ou celle similaire devra intervenir « *au même moment ou à peu près au même moment que les marchandises à évaluer* ». L'administration doit tenir compte à cet égard des différences qui peuvent exister entre les coûts et les frais compris dans la valeur transactionnelle de la marchandise importée et de la marchandise identique ou similaire. En pratique, l'administration douanière accepte de remonter à une vente faite dans un délai maximum de 90 jours. L'inexistence d'une opération d'importation d'une marchandise identique ou similaire faite au même stade commercial et à une même quantité et au même moment autorise l'administration à se référer à une valeur transactionnelle identique ou similaire d'une marchandise vendue à des niveaux commerciaux différents ou à des quantités différentes sous réserve de procéder à des ajustements nécessaires qui en résultent de ces différences⁶².

En quatrième lieu, la marchandise identique ou similaire à laquelle se réfère l'administration devrait en principe être produite par l'exportateur lui-même. Toutefois, on peut se référer à une valeur transactionnelle d'une marchandise identique ou similaire alternative mais produite par d'autres exportateurs si « *aucune valeur transactionnelle de marchandises à évaluer, ne peut être constatée par application du paragraphe 1 du présent article* »⁶³.

En cas d'une pluralité de valeur transactionnelle identique, il faudra en retenir celle la plus basse.

29. La seule différence entre ces deux méthodes réside dans le rapport qu'elles entretiennent avec la marchandise importée, il est soit un rapport d'identité soit de similarité. La notion des marchandises identiques « *s'entend des marchandises qui sont les mêmes à tous égards y compris les caractéristiques physiques, la qualité et la réputation. Des différences d'aspect mineures n'empêcheraient pas des marchandises conformes par ailleurs à la définition, d'être considérées comme identiques* »⁶⁴.

⁶² L'article 2b quater 1-b).

⁶³ Le paragraphe 5 de l'article 26 quater.

⁶⁴ L'article 26 –1-c) du code.

Alors que les marchandises similaires ne sont pas identiques à tous égards mais présentent uniquement des caractéristiques semblables et composées de matières semblables, ce qui leur permet de remplir les mêmes fonctions et d'être commercialement interchangeables. A cet égard, à une pièce d'origine, on ne peut se référer qu'à une pièce adaptable, qui lui est similaire, composée de matières semblables mais ne bénéficiant pas d'une même réputation. Par contre une marchandise identique à une pièce d'origine ne peut être qu'une autre de la même valeur et réputation.

30. Entre l'identité et la similarité, les différences sont notables⁶⁵ et il ne s'agit pas d'une distinction oiseuse⁶⁶ dépourvue d'effets pratiques. La complexité technique de certains produits peut être une source de confusion dans la détermination de leur rapport avec la marchandise importée. Une bonne qualification technique des agents de la douane est exigée afin de ne pas commettre de fausses assimilations.

⁶⁵ M.BARKETI (CH.) a apporté dans son ouvrage «la valeur en douane» (éd. C.L.E. 1998, p.91) quelques exemples qui illustrent les différences entre les marchandises identiques et celles similaires: soit deux expéditions de stylos de la même marque dont les couleurs, les dimensions et la longueur sont identiques. La seule différence réside dans le fait qu'une est destinée à un libraire grossiste à une quantité plus importante que la deuxième qui est destinée à un centre de formation. Dans ce cas, les deux expéditions en question sont identiques, les différences se rapportant à la quantité et à l'utilisateur final n'affecte pas le rapport d'identité. De même pour les différences de couleur pour des ballons de même dimension et fabriqués par un même industriel et expédiés en deux envois à deux magasins importateurs. Alors que deux envois de poste de téléviseur de même marques, dimensions et couleurs sont destinés à deux importateurs. Les téléviseurs du premier envoi sont présentés à l'état monté, ceux du deuxième à l'état démonté. Ces différences des caractéristiques physiques emportent de ne pas les considérer comme des marchandises identiques. Deux articles qui ne peuvent être interchangeables (recharges pour stylos à placer par pression et recharges à placer par filetage) ne sont pas considérés des articles similaires. Par contre, deux envois de lampes électriques normalisées mais de marques différentes sont considérés similaires parce qu'ils répondent aux mêmes besoins et peuvent être interchangeables.

⁶⁶ TREMEAU (H.) et BERR (J-C.) ont qualifié les définitions présentées aux notions de marchandises identiques et celles similaires comme des définitions byzantines.

A défaut de mise en œuvre d'une valeur transactionnelle d'une marchandise identique ou similaire, l'administration doit être en mesure de recourir à la méthode constructive.

B. Les méthodes de la valeur en douane construite

La méthode constructive consiste à constituer la valeur transactionnelle sur des bases comptables (a) ou à partir des moyen raisonnables (b).

a) Les méthodes d'évaluation comptable

31. Prévues par l'article 26 sexies et 26 septies, ces méthodes sont au nombre de deux. La règle générale dans l'application des différentes méthodes est prévue dans l'article 26 ter qui dispose que lorsque la valeur en douane ne peut être déterminée selon les modalités de l'article 26 bis, il y a lieu de passer successivement aux articles 26 quater, 26 quinquies, 26 sexies et 26 septies jusqu'au premier de ces articles qui permettra de la déterminer. Toutefois, ledit article admet un ordre inversé dans l'application des articles 26 sexies et 26 septies, sous condition d'être sollicité par l'importateur et « *c'est seulement lorsque cette valeur en douane ne peut être déterminée par application d'un article donné qu'il est loisible d'appliquer l'article qui vient immédiatement après lui dans l'ordre établi en vertu du présent paragraphe* »⁶⁷. Les méthodes d'évaluation comptable sont: la méthode déductive (article 26 sexies) et la méthode de la valeur calculée (article 27 septies)⁶⁸.

-1/ la methode deductive:

32. L'appréhension de cette méthode exige une distinction entre deux hypothèses : soit que les marchandises importées ou les marchandises identiques ou similaires importées sont vendues en Tunisie en l'état ou elles sont importées, c'est-à-dire sans

⁶⁷ L'article 26 ter.

⁶⁸ Voir TREMEAU (H.) et BERR (J-C.): Le droit douanier communautaire et national, précité, p.147 et 148.

transformation ni ouvraison, soit elles ne sont pas vendues en Tunisie dans l'état ou elles sont importées c'est-à-dire qu'elles avaient subi des modifications et des transformations.

Dans la première hypothèse, la valeur en douane des marchandises importées «est fondée sur le prix unitaire correspondant aux ventes des marchandises importées ou des marchandises identiques ou similaires importées totalisant la quantité la plus élevée»⁶⁹ avec la condition qu'elles soient faites à des personnes indépendantes, au même moment ou à peu près au même moment⁷⁰ et avec les déductions afférentes.

Partons d'un exemple concret : des marchandises sont vendues sur la base d'un prix courant comportant des prix unitaires favorables pour les achats en quantités relativement importantes:

| Quantité par vente | Prix unitaire | Nombre de vente | Quantité totale vendue à chaque prix |
|--------------------|---------------|---|--------------------------------------|
| 1 à 10 unités | 100 | 10 ventes de 5 unités 5 ventes de 3 unités | 65 |
| 11 à 25 unités | 95 | 5 ventes à 11 unités | 55 |
| plus de 25 unités | 90 | 1 vente de 90 unités 1 vente de 5 unités | 80 |

Le plus grand nombre d'unités vendues à un prix donné est de 80; en conséquence, le prix unitaire correspondant aux ventes totalisant la quantité la plus élevée est de 90⁷¹.

Dans la deuxième hypothèse, lors de la vente sur le marché local, les marchandises en question perdent leur identité sous l'effet de la

⁶⁹ Article 26 sexies premier paragraphe point (a).

⁷⁰ Une importation n'est réputée être effectuée au même moment ou à peu près au même moment que si elle ne dépasse pas le délai de 90 jours de celle objet d'évaluation.

⁷¹ Cet exemple est prévu dans la note relative à l'article 5 du premier annexe de l'accord sur l'évaluation en douane des marchandises.

valeur ajoutée par l'ouvraison ou la transformation. L'administration douanière ne peut appliquer la méthode déductive que si elle tient compte de la valeur ajoutée par l'ouvraison et après déduction de certaines charges qui auraient modifié la valeur du produit⁷².

-2/ La méthode de la valeur en douane calculée :

33. Il ne s'agit plus dans ce cas d'une valeur transactionnelle mais plutôt d'une valeur en douane calculée. L'absence et la non authenticité de la valeur insérée dans le contrat de vente ouvre à l'administration la voie de la constituer sur la base de l'article 26 septies. Elle procédera à sa construction suivant une opération de sommation de certains éléments énumérés limitativement dans l'article 26 septies:

- les coûts ou la valeur des matières premières et des opérations de fabrication,
- un montant pour les bénéfices et frais généraux,
- et le coût ou la valeur des frais de transport et d'assurance des marchandises importées, prévus par l'article 26 nonies paragraphe 1 sous (e) du code.

La détermination de la valeur en douane conformément à cette méthode est basée sur les renseignements immédiatement

⁷² Ces charges sont prévues par le premier paragraphe de l'article 26 sexies:

- commissions généralement payées ou convenues ou marges généralement pratiquées pour bénéfices et frais généraux y compris les coûts directs ou indirects de la commercialisation des marchandises en question relatifs aux ventes en Tunisie, de marchandises importées de la même nature ou de la même espèce,
- frais habituels de transport et d'assurance, ainsi que les frais connexes encourus en Tunisie,
- les coûts et frais visés à l'article 26 nonies, paragraphe 1 sous (e) ce code, le cas échéant,
- droit de douane et autres taxes à payer dans le marché intérieur en raison de l'imputation ou de la vente des marchandises.

disponibles⁷³. Aux fins de déterminer le montant des coûts et des valeurs requis, l'administration devra se baser sur des données comptables tenues en conformité avec les principes de comptabilité généralement admis.

34. Cette nouvelle disposition rompt avec une ancienne pratique de l'administration qui consistait à calculer la valeur de la marchandise suivant ses propres méthodes, généralement opaques. Les opérateurs économiques se plaignaient longtemps d'une casuistique précaire de l'appréciation en douane des marchandises. Cette méthode est applicable surtout dans l'hypothèse où l'acheteur et le vendeur sont liés par des liens d'affaires, d'où la difficulté d'établir les coûts de la façon la plus objective possible.

Les éléments prévus par cet article devront être en principe déterminés sur la base des renseignements fournis par le producteur ou en son nom *«à moins que les chiffres qu'il communique ne soient incompatibles avec ceux qui correspondent normalement aux ventes de marchandises de la même espèce ou de la même nature que les marchandises à évaluer, réalisées par des producteurs du pays d'exportation pour l'exportation à destination du pays d'importation»*⁷⁴.

35. Il est reconnu à l'administration un pouvoir d'appréciation de la compatibilité des données présentées avec des opérations d'importations similaires. La similitude est limitée à cet égard aux dimensions physiques de la marchandise touchant à son espèce et à sa nature. Bien que certaines marchandises revêtent une telle similitude, il n'en demeure pas moins vrai que leurs valeurs soient différentes eu égard à l'intervention de certains travaux de perfectionnement.

⁷³ Dans la conquête des renseignements, l'administration peut affronter certaines difficultés du fait que les fournisseurs étrangers refusent de communiquer des informations sur les niveaux de coût de fabrication, par exemple.

⁷⁴ Le paragraphe 4 de la note relative à l'article 6 de l'Accord sur l'évaluation en douane.

De même, il faut que l'administration douanière tienne compte de certaines circonstances commerciales particulières qui modifient artificiellement la valeur de la marchandise. Un programme de lancement d'un produit exige la réalisation d'un bénéfice faible ou nul en vue d'attirer la clientèle⁷⁵, en pareil cas le prix risque d'être dévalué.

Ces circonstances excluent la possibilité de fixer ces frais sur la base des renseignements fournis par le producteur, l'autorité chargée de l'enquête sera en mesure de le faire sur des renseignements pertinents autres que ceux qui auront été fournis par la production ou en son nom. Mais en tout état de cause, l'impossibilité de déterminer la valeur calculée oblige l'administration à mettre en œuvre la dernière alternative qui consiste à établir la valeur en douane sur des bases raisonnables.

b) La valeur en douane fondée sur des moyens raisonnables

36. L'épuisement des différentes méthodes précédentes est une condition indispensable pour recourir à cette dernière méthode. Une marchandise devrait avoir une valeur sur la base de laquelle le droit de douane sera établi.

Le recours à cette méthode d'évaluation sur la base des moyens raisonnables devrait être justifié par l'épuisement des méthodes précédentes⁷⁶. Le premier paragraphe de l'article 26 octies dispose que «*si la valeur en douane des marchandises importées ne peut être déterminée par application des articles 26 bis et 26 quater à 26 septies de ce code, elle est déterminée sur la base des données disponibles en Tunisie par des moyens raisonnables compatibles avec les principes et les dispositions générales de l'accord sur la*

⁷⁵ Il arrive également dans d'autres cas où on se contente d'un bénéfice faible : lorsque les producteurs sont contraints d'abaisser temporairement leur prix en raison d'une diminution imprévisible de la demande ou lorsque les opérations de vente viennent pour compléter une gamme de marchandises produites ou lorsque la production suit une politique d'abaissement des prix en vue de maintenir sa compétitivité.

⁷⁶ BARKETI (CH.) a qualifié cette méthode comme la méthode du dernier recours. Voir son ouvrage «la valeur en douane», précité, p. 94 et s.

mise en œuvre de l'article 7 de l'accord général sur les tarifs douaniers et le commerce». Il ne s'agit pas d'une valeur transactionnelle, ni d'une valeur calculée, ni d'une valeur déductive, mais d'une valeur arrêtée par l'administration douanière dans les limites des principes généraux et des dispositions de l'accord sur l'évaluation en douane. Le texte renvoie à des principes mais sans avoir à les déterminer. Quels sont donc les principes que l'autorité chargée de l'enquête doit respecter ?

37. La note relative à l'article 7 de l'accord en question apporte quelques détails. La préférence est dans le recours, dans la plus grande mesure du possible, aux valeurs de douane antérieurement déterminées. Le recours aux méthodes précédentes avec une souplesse raisonnable serait conforme aux objectifs et aux dispositions de l'article 26 octies. A titre d'exemple, les notions de marchandises identiques et similaires peuvent être interprétées avec une souplesse raisonnable. Le délai de 90 jours prévu dans la méthode déductive peut à cet égard être modulé avec souplesse.

Afin que cette option d'établir la valeur en douane sur des bases raisonnables ne soit pas un prétexte pour l'institution de valeurs inexactes, l'alinéa 2 de l'article 26 octies énumère 8 hypothèses de ne pas faire à la charge de l'administration. La valeur en douane déterminée dans ce cas ne doit pas être fondée:

- sur le prix de vente, dans le marché intérieur, de marchandises produites en Tunisie,
- sur un système prévoyant l'acceptation, à des fins douanières de la plus élevée de deux valeurs possibles,
- sur le prix de marchandises sur le marché intérieur du pays d'exportation,
- sur le coût de production, autre que les valeurs calculées qui auront été déterminées pour des marchandises identiques ou similaires conformément à l'article 26 septies,
- sur le prix de marchandises vendues pour l'exportation à destination d'un pays autres que la Tunisie,
- sur des valeurs en douane minimales,
- et sur des valeurs arbitraires ou fictives,

La loi impose à l'administration une obligation d'information en vertu de laquelle elle est tenue d'informer par écrit l'importateur, s'il en fait la demande, de la valeur en douane retenue et de la méthode utilisée.

Conclusion

38. Le nouveau cadre juridique en matière d'évaluation en douane s'inscrit dans le cadre des mutations douanières profondes consécutives à la libéralisation du droit de commerce à l'échelle interne et externe. Le démantèlement progressif des droits de douane retient, certes, l'attention des pouvoirs publics en raison de son effet érosif sur le trésor, mais encore faut-il qu'ils réfléchissent à une restructuration des structures douanières. *«L'administration des douanes est dotée de prérogatives exceptionnelles dont aucune autre administration tunisienne ne dispose»⁷⁷.*

Ces mutations devront, en principe, toucher l'administration qui risque de rester conditionnée par ses traditions d'autoritarisme qui ont favorisé le développement d'un climat de défiance avec les opérateurs économiques. L'administration douanière était et reste encore perçue comme le premier ennemi des importateurs et des exportateurs. De leur côté, certains opérateurs économiques ont contribué à l'aggravation de cet environnement par leurs manœuvres frauduleuses. C'est dire que le chemin à parcourir pour rétablir une relation de confiance entre la douane et les opérateurs est encore long. L'élaboration d'une loi, même bien faite, ne suffit pas. La lenteur des opérations de dédouanement est largement préjudiciable pour les marchandises périssables.

39. Le législateur devrait procéder à l'élaboration d'une approche globale et cohérente dans la législation douanière. S'il a modifié en profondeur les deux éléments d'assiette, l'espèce tarifaire et la valeur en douane, le troisième élément, l'origine de la marchandise, objet de l'article 25 est resté intact depuis 1955. Le maintien de cet article sous cette version paraît être paradoxal avec les dispositions

⁷⁷ BACCOUCHE (N.) : Les implications de l'accord d'association sur le droit fiscal et douanier, précité, mélanges AYADI, p.15.

de l'Accord d'Association de 1995 et notamment celles du 4^{ème} protocole annexé à l'Accord et relatif aux règles d'origine.

40. Cependant, ne perdons pas de vue que la mise à niveau de la législation tunisienne avec la législation internationale et sa mise en œuvre en toute bonne foi dépendront des possibilités et conditions financières de l'Etat tunisien. Plus la balance des paiements connaîtra des difficultés, plus l'Etat sera tenté d'agir sur l'instrument douanier pour juguler les importations. En revanche, une balance des paiements équilibrée ou même excédentaire conduira naturellement les autorités douanières à être plus tolérantes et moins protectionnistes. C'est pourquoi les partenaires européens de la Tunisie doivent avoir une bienveillance et un souci constant pour que sa balance de paiement ne soit pas fortement déséquilibrée. L'intérêt commun des parties au partenariat recommande cet impératif.

**LA LOI TUNISIENNE N° 2001-36 DU 17 AVRIL 2001
RELATIVE A LA PROTECTION DES MARQUES:
UN PARANGON VALABLE D'APPROXIMATION
AU DROIT EUROPÉEN**

MOUNIR BAATOUR

Situé au flanc sud, la Tunisie fait face à l'Europe avec laquelle elle se trouve réunie utérinement par la méditerranée. Ce lien géographique physique se double également d'un profond et séculaire lien civilisationnel et surtout économique¹ ayant conduit l'Europe à conclure avec la Tunisie des accords d'association à trois reprises (1969, 1976 et 1995). Dans le cadre de cette relation aussi importante et profonde consolidée par le dernier accord conclu en 1995, la Tunisie a essayé de préparer un terrain propice aux investissements européens par plusieurs moyens dont notamment la mise en place d'un environnement juridique incitateur et surtout protecteur. Parmi les éléments de protection, on met l'accent, dans ce contexte, sur la protection des marques. Un investisseur étranger titulaire de droit sur une marque a besoin d'être rassuré que son droit bénéficiera dans notre pays d'une protection de même degré que celle dont il jouit dans le sien.

Dans cette perspective, la Tunisie, Etat tiers de l'Union Européenne a promulgué une nouvelle loi relative à la protection des marques et ce dans une tentative d'approximation au droit européen².

¹V.R. SAADA, l'UMA dans les relations internationales, Mélanges Hareth MZIOUDET, Faculté de Droit et des sciences politiques de Tunis, 1994, pp 175 et s.

²Dans le cadre des mouvements de rapprochement de systèmes de droit, l'approximation, catégorie assez originale, peut être définie comme un mouvement unilatéral d'un Etat tiers de l'Union Européenne qui repose sur une volonté propre de rapprochement en fonction des normes communautaires. V. Concernant la question de l'approximation au droit communautaire, L. HUGELIN, Réflexion à propos du domaine de l'approximation à l'acquis communautaire.

Bien qu'elle soit établie (première partie) parce qu'elle est presque parfaite, cette approximation recèle, néanmoins, quelque nuances quasiment imperceptibles (deuxième partie) et qui se retrouvent d'ailleurs dans certaines lois des pays de l'Union Européenne³.

PREMIÈRE PARTIE: UNE APPROXIMATION ÉTABLIE

N'étant pas arbitraire, l'approximation du droit tunisien des marques au droit européen, avec toutes ses manifestations générales (B), se trouve motivée par plusieurs facteurs hétérogènes (A).

A- Les motivations de l'approximation

Les motivations de l'approximation sont de deux ordres : des motivations se rattachant aux obligations internationales et des motivations se rattachant aux relations avec l'Union Européenne.

S'agissant des obligations internationales, la Tunisie, pays membre de l'organisation mondiale (OMC) du commerce, a adhéré à l'ensemble des conventions multilatérales auxquelles appartiennent le traité douanier du « GATT » et l'accord sur les aspects de droit de propriété intellectuelle qui touchent au commerce (ADPIC ou TRIPS en anglais).

Cet accord fait obligation aux Etats membres de l'OMC de mettre en harmonie leur législation avec les dispositions dudit accord. Cette obligation trouve son fondement dans l'article 1.3 qui prévoit que «*les membres accorderont le traitement prévu dans le présent accord aux ressortissants des autres membres*».

Voyant l'intégration de son économie dans l'espace euro-méditerranéen comme étape ou partie de l'intégration dans

³La loi tunisienne n° 2001-36 du 17 avril 2001 relative à la protection des marques de fabrique, de commerce et de services est largement inspiré du livre septième du code français de la propriété intellectuelle relatif aux marques de fabrique de commerce ou de service et autres signes distinctifs.

l'économie mondiale, la Tunisie a choisi comme modèle d'harmonisation, le droit français. Or, dans le domaine des marques, ce dernier est évidemment inspiré de la directive européenne n° 89-104 du Conseil du 21 décembre 1988 rapprochant les législations des Etats membres (de la CEE) sur les marques.

Pour arriver à harmoniser ses règles avec le droit international des marques, le législateur tunisien a donc préféré prendre le chemin de l'approximation au droit européen.

Cette approximation est également fondée et justifiée sur le plan des relations de la Tunisie avec l'Union Européenne.

Elle est, d'abord, fondée sur l'article 52 de l'accord d'association qui dispose 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*».

Elle est ensuite et en outre justifiée puisque les ressortissants de la Tunisie, Etat membre de l'OMC, peuvent être titulaires de marques communautaires et ce en vertu de l'article 5.b) du règlement CE n° 40-94 du 20 décembre 1993 du Conseil sur la marque communautaire. Or pour que les tunisiens soient en mesure d'accéder au régime de cette dernière sans difficulté, il est opportun et de la bonne logique qu'il aient une législation de marque appliquant un régime similaire à celui applicable aux pays de l'Union Européenne.

N'étant pas, donc sans motivation, l'approximation du droit tunisien des marques au droit européen a été mise en œuvre d'une façon presque parfaite à un tel point qu'elle pourrait constituer un modèle à suivre sur ce plan.

B- Les manifestations générale de l'approximation

L'approximation au droit européen des marques a constitué aussi une réforme apportant des dispositions novatrices jugées comme

modifications tendant à améliorer le régime juridique des marques. Ainsi en est-il de l'admission de la protection des marques de service au même titre que celle des marques de produit. Il en est de même de la précision de la définition des signes susceptibles de constituer des marques et de la protection des marques notoires qui s'étend aux marques de service. L'introduction de l'enregistrement comme condition d'acquisition du droit de marque est aussi une manifestation de l'approximation. Quant au règlement sur la marque communautaire, son incidence principale se trouve dans l'adoption de la procédure d'opposition qui n'est pas visée dans la directive de 1988.

En plus de ces grands traits de l'approximation, le régime de déchéance pour défaut d'exploitation, la création de nouveaux cas de déchéances à l'égard de la marque devenue générique ou déceptive, la forclusion par tolérance et la procédure de renouvellement, constituent également des manifestations de l'approximation.

Bref, le législateur tunisien a presque adopté tous les éléments prévus au droit européen. Mais, bien qu'elles soient quasi imperceptibles, on peut relever quelques nuances.

DEUXIÈME PARTIE : UNE APPROXIMATION IMPERCEPTIBLEMENT NUANCÉE

Les quelques nuances qu'on peut relever touchent au caractère distinctif (A), à la licéité de la marque (B) et à la déchéance du droit à la marque (C).

A- Nuance touchant au caractère distinctif

Cette nuance touche plus exactement à l'incidence de l'usage sur l'acquisition du caractère distinctif.

Selon l'article 3.3°) de la directive européenne de 1988, les Etats membres peuvent prévoir qu'une marque n'est pas refusée à l'enregistrement ou, si elle est enregistrée n'est pas susceptible

d'être déclarée nulle en application du paragraphe 1, point b) c) ou d), lorsque le caractère distinctif a été acquis sous l'influence de l'usage, même après la demande d'enregistrement ou après l'enregistrement. Il s'agit ici d'une sorte de prescription acquisitive de la validité d'une marque. Le signe usuel, nécessaire, générique ou descriptif peut acquérir le caractère distinctif par l'usage. A la différence de la directive européenne, la loi tunisienne, à l'instar du droit français, ne précise pas le moment auquel cette possibilité est envisageable. Toutefois, il semble que la solution judiciaire qui s'accorde avec le bon sens, devrait normalement conduire à ce que l'acquisition du caractère distinctif par l'usage n'est possible qu'avant la date de la demande d'enregistrement puisque toutes les conditions de fonds de la marque sont appréciées à ce moment et la demande d'enregistrement ne peut être déclarée recevable que si ces conditions sont respectées.

B- Nuance touchant à la licéité de la marque

La directive européenne prévoit que chaque Etat membre peut prévoir qu'une marque est refusée à l'enregistrement ou, si elle est enregistrée, est susceptible d'être déclarée nulle lorsque et dans la mesure où elle comporte un signe de haute valeur symbolique, et notamment un symbole religieux.

La loi tunisienne, dans ce cadre, se contente de prévoir l'interdiction de la marque contraire à l'ordre public ou aux bonnes mœurs. Or cette notion aussi fuyante a une signification sociale évolutive qui peut ne pas englober la religion. L'abstention du législateur tunisien sur ce point serait probablement justifiée par une volonté de ne pas se référer à la religion qui risque d'être interprétée comme signifiant exclusivement l'Islam et non toute autre religion dans son acception générale.

C- Nuances touchant à la déchéance du droit à la marque

Ces nuances concernent la déchéance de la marque devenue générique (a) ainsi que la déchéance pour défaut d'exploitation (b).

a- Nuance concernant la marque devenue générique:

L'article 36 de la loi n° 2001-36 prévoit dans son paragraphe (a) que le titulaire d'une marque peut être déchu de ses droits lorsque la marque est devenue de son fait la désignation usuelle dans le commerce du produit ou du service.

«La rançon du succès dû à la célébrité de la marque et au caractère innovant des produits marqués, c'est bien souvent que le public se met à utiliser la marque comme un nom commun, comme le terme générique, pour désigner une catégorie de produit⁴».

Pour qu'une marque devienne générique ou usuelle pour un produit ou service, il ne suffit pas seulement que le public emploie le signe comme un terme générique. Il faut aussi que ce phénomène soit dû à une attitude du titulaire de la marque. Sur ce point, la Directive européenne est beaucoup plus précise que le droit interne⁵. L'article 12.2°.a) de la Directive prévoit, dans ce contexte, que le titulaire d'une marque peut également être déchu de ses droits lorsque, après la date de son enregistrement, la marque est devenue, *par le fait de l'activité ou de l'inactivité* de son titulaire, la désignation usuelle dans le commerce d'un produit ou d'un service pour lequel elle est enregistrée.

La loi interne, par son manque de précision, peut laisser entendre que seule l'attitude active du titulaire du droit entraîne la déchéance de la marque devenue générique alors que même l'attitude passive peut engendrer le même effet. La passivité consiste dans le fait que le titulaire ne défend pas sa marque contre son usage générique; il tolère, sans réagir, l'usage généralisé du signe à titre générique.

⁴F.Pollaud-Dulian, Droit de la propriété industrielle, Montchrestien, Paris, 1999, p. 602, n° 1290.

⁵L'imprécision dans ce cas se rencontre aussi bien en droit tunisien qu'en droit français.

Or, le propriétaire de la marque peut, dans cette situation, assurer une certaine veille pour éviter la déchéance. Il peut y échapper en faisant preuve de diligence raisonnable pour avertir le public du caractère de marque protégé du signe notamment par voie de presse ou de publicité.

b- Nuance concernant la déchéance pour défaut d'exploitation

L'article 34 de la loi n° 2001-36 subordonne la déchéance à un défaut d'exploitation pendant une période ininterrompue de cinq ans. Deux hypothèses sont envisageables : soit l'exploitation a été commencée puis abandonnée pendant plus de cinq années ininterrompues, soit l'exploitation n'a jamais été entamée dans les cinq années de l'enregistrement. Dans cette dernière hypothèse la loi interne ne précise pas si le point de départ du délai de cinq ans se situe à la date du dépôt de la demande d'enregistrement ou à celle de l'enregistrement lui-même. Ce même manque de précision a donné lieu, en France à une divergence d'interprétation. Le fait que l'enregistrement produit ses effets à la date du dépôt pourrait faire pencher en faveur de la première interprétation (la date du dépôt de la demande). Néanmoins une telle solution aurait l'inconvénient d'imposer au déposant d'entamer l'exploitation à un moment où il n'est pas encore certain d'obtenir un droit sur la marque objet de sa demande. Le législateur aurait pu éviter les controverses que pourrait causer cette imprécision en employant la formule de l'article 10 de la Directive européenne suivant lequel le délai de cinq ans commence à courir à compter de la date à laquelle la procédure d'enregistrement est terminée.

**LES APPORTS DE LA LOI TUNISIENNE DU 17 AVRIL
2001 RELATIVE A LA PROTECTION DES MARQUES DE
FABRIQUE, DE COMMERCE ET DE SERVICES**

MOUNIR BAATOUR

L'idée de mettre sur des objets fabriqués un signe servant à les reconnaître semble remonter à la plus haute antiquité.

Au moyen âge, le fonctionnement du régime corporatif impliquait un large usage de la marque dont le rôle était davantage un rôle de police du système corporatif qu'un rôle de conquête de la clientèle.

Avec le système de la liberté des commerce et de l'industrie proclamé par la révolution française, la fonction de marque prend un autre aspect . En effet, l'avènement du machinisme et le développement considérables de l'industrie du XIXème siècle ont contribué à l'apparition de la marque au sens moderne du terme.¹

En effet, la marque possède de nos jours une portée économique qui diffère à bien des égards de celle qui était sienne à la fin du siècle dernier, époque à laquelle fût promulguée une législation spéciale la concernant.

Support nécessaire de la publicité moderne, la marque est aujourd'hui la technique irremplaçable de toute expansion commerciale. La conquête des marchés repose souvent, essentiellement, sur une bonne stratégie de la marque

En Tunisie, la législation réglementant le droit sur les marques remonte au décret du 3/6/1889 qui fût élaboré sur le modèle de la loi française du 23/6/1857 avant sa modification par la loi du 31/12/1964 ensuite par le Code de la propriété intellectuelle de 1992.

¹BOUDIN (W) "la protection des marques de fabrique et de commerce Mémoire de DEA, Faculté de Droit et des Sciences politique de Tunis 1991".

Après une application qui a duré plus d'une centaine d'années, le décret de 1889 sur les marques de fabrique et de commerce et les textes qui l'ont complété ou modifié ont été abrogés par la loi n°2001-36 du 17 avril 2001, relative à la protection des marques de fabrique, de commerce et de services² laquelle loi constitue une reproduction quasi-intégrale des dispositions du code français de la propriété intellectuelle relatives aux marques (articles 711-1 à 721-1).

L'on remarquera de prime abord une extension dans le champ d'application de la législation sur les marques. En effet, outre la protection des marques de fabrique et de commerce, la nouvelle loi permet dans ses articles 1 et 2 la protection des marques de services et ce conformément aux dispositions des articles 15 et 16 de l'Accord sur les ADPIC.

Le décret de 1889, faut-il le rappeler a été muet quant à la protection des marques de services bien que l'organisme chargé de la propriété industrielle (Institut National de Normalisation et de Propriété Industrielle: INNORPI créée par la loi n°82-66 du 6 Août 1982 relative à la normalisation et à la qualité), essayant de remédier à cette situation, ait appliqué les dispositions du décret de 1889 aux marques de services en ce qui concerne leur enregistrement³.

La marque de fabrique, de commerce ou de services est désormais définie par l'art2 de la loi 2001 comme étant "un signe visible permettant de distinguer les produits offerts à la vente ou les services rendus par une personne physique ou morale."

Outre la loi de 2001, font partie de l'arsenal juridique tunisien l'ensemble des conventions dûment ratifiées par la Tunisie dont notamment la convention de l'Union de Paris, l'accord de libre échange avec l'Union Européenne et l'accord du GATT. L'on notera tout de même que depuis le 9/4/1988 la Tunisie ne fait plus partie

²JORT du 17 Avril 2001 P 834

³KTARI (S), la marque de fabrique, RJL, mai 1997 p 80.

de l'Arrangement de Madrid de 1891 concernant l'enregistrement international des marques.

En conséquence, toute marque non déposée à l'INNORPI conformément à la législation tunisienne ne jouit pas de la protection légale sur le territoire tunisien.⁴

L'on soulignera que la loi nouvelle procède d'une double exigence. La première qui était d'améliorer notre législation nationale et en particulier, de consacrer ou de modifier de nombreuses solutions jurisprudentielles qui avaient au fil des années pallié sur certains points la carence législative. Mais, il fallait aussi que notre droit national se mit en conformité avec les exigences de l'accord ADPIC annexé à l'accord du GATT, visant au rapprochement des législations nationales en la matière.

Le loi de 2001 n'a pas bouleversé fondamentalement le régime des marques en Tunisie mais comporte néanmoins un certain nombre de modifications.

Ces modifications ont porté beaucoup plus sur les modes d'acquisition d'un droit sur la marque que sur la question touchant à leur mise en œuvre.⁵

Dans ses articles 27, 28, 29 et 30 la nouvelle loi régleme désormais les contrats relatifs aux marques tels que la cession, la mise en gage et la licence.

⁴ Sur la question de la dénonciation par la Tunisie de l'Arrangement de Madrid Lamy I: le manuel permanent du droit des affaires tunisien, juillet 1994.

⁵ l'art.1 du décret 1889 était ainsi libellé: "...sont considérés comme marque de fabrique et de commerce, les noms sous une forme distinctive, les dénominations, emblèmes, empreintes, timbres, cachets, vignettes, reliefs, lettres, chiffres, enveloppes et tous autres signes servant à distinguer des produits d'une fabrique ou les objets d'un commerce".

Elle introduit également de nouvelles sanctions aux atteintes au droit sur la marque : il s'agit en fait des mesures à la frontière auxquelles la loi 2001 consacre tout un chapitre.

Dans le cadre de cette étude nous nous limiterons aux nouveautés de la loi 2001 touchant à la question de l'acquisition d'un droit sur une marque.

Sur ce plan la nouveauté de la loi de 2001 réside , d'une part, dans le perfectionnement des conditions de fond pour l'acquisition d'un droit exclusif sur un signe (chap1) et dans le fait qu'elle fait de l'enregistrement une condition de forme désormais obligatoire (chap 2).

Chap1: le perfectionnement des condition de fond

Le décret de 1889 étant lacunaire en matière de l'exposé même des conditions de fond (sect.1) et silencieux en ce qui concerne la sanction du défaut de l'une ou de l'autre de dites conditions (sect2) la nouvelle loi de 2001 a dû intervenir pour y remédier.

Sect 1: Exposé

De l'ensemble des conditions de fond telles que développées en droit comparé, le décret de 1889 ne semble avoir consacré que le caractère distinctif et le caractère non déceptif⁶ de la marque.

La loi 2001, quant à elle, consacre à la question l'ensemble des articles 2, 3, 4 et 5 dont l'étude révèle la nécessité de l'existence de conditions tant positives que négatives.

⁶ l'art 16.2 du décret de 1889 était ainsi rédigé: "sont punis d'une amende de 30 à 1.200 francs et d'un emprisonnement d'un mois à un an ou de l'une de ces peines seulement: 2. ceux qui on fait usage d'une marque portant indications propres à tromper l'acheteur sur la nature du produit ."

Parag 1. Conditions positives

Avec la loi 2001, pour être valide, la marque doit être aussi bien disponible (parag 1) que distinctive (parag 2).

A - la disponibilité

Selon l'art. 5 de la loi 2001, "ne peut être adopté comme marque, un signe portant atteinte à des droits antérieurs ..."

Il en découle clairement que pour qu'une marque soit disponible encore faut il qu'elle ne doive pas déjà faire l'objet d'un droit antérieur.

L'on rappellera que la disponibilité est régie par deux principes majeures: la spécialité et la territorialité.

La règle de la spécialité de la marque signifie que "la marque est limitée aux objets ou services revendiqués dans l'acte de dépôt de la marque (pour les pays à dépôt attributif de droit) ou ceux qui sont revêtus de la marque (pour les pays où l'usage est attributif de droit)"⁷.

La règle de la territorialité, quant à elle, veut que la marque n'est en principe protégée que dans l'Etat où elle a été déposée.

En dehors de cet État, la marque en question est disponible à moins qu'il s'agisse d'une marque notoirement connue ou d'un enregistrement international.⁸

L'art. 5 de la nouvelle loi tunisienne nous donne à titre indicatif, une série d'exemples dont notamment les marques notoires les quelles marques constituent une exception aux principes de spécialité et de territorialité.

⁷THRIERR (A) "les grands traits de la protection des marques et la contrefaçon", Gazette du Palais, 16-17 Déc.1992 doctrine p 8.

⁸ KTARI (S), op cit, p 90.

La protection de la marque notoire⁹ constitue une avancée par rapport au régime de 1889 . En Effet alors que le décret de 1889 n'a pas prévu de protection pour les marques notories la loi 2001 , quant à elle bien que ne l'ayant pas défini a consacré la notion de marqués notories et ce conformément à celle prévue à l'accord sur les ADPIC¹⁰, en l'occurrence une protection accrue par rapport à celle accordée par la convention de Paris¹¹.

Une marque notorie peut être définie comme étant une marques qui fait l'objet, en tous pays, d'un usage de longue durée, qui a bénéficié d'un exploitation constante, massive et qui, plus généralement , est connue par une large fraction du public comme "jouissant d'une représentation de premier plan.

Il est à signaler que même si le décret de 1889 passait complètement sou silence la question des marques notories, cette notion a été appliquée par la jurisprudence tunisienne .

En effet, il a été jugé qu'une marque déposée peut être opposée au dépôt ultérieur de cette même marque par un tiers afin d'obtenir son annulation, non seulement à cause de l'antériorité du dépôt mais aussi parce que ladite marque présente un caractère notorie¹².

Reste à remarquer que la multiplication des dépôts entraînant un encombrement qui rend difficile le choix d'une marque disponible, il était souhaitable d'introduire un mécanisme de déchéance pour

⁹Sur cette question notamment Ouertani (S)," la protection des marques notories" mémoire de DESS, Faculté de droit et des sciences politiques de Tunis, 2000-2001; THRIERR (A), op cit p12 et ss. La loi de 2001 y a consacré les articles 5(a), 11, 24 et 33.

¹⁰ Art.16.

¹¹ Puisque l'art 6bis de la convention de Paris n'évoque que la protection des marques notoriés de fabriques et de commerce sans pour autant mentionner les marques de services.

¹² CA de tunis, Arrêt n°1593 du 13/2/1987, SONY et SONYA, inédit.

libérer les marques non exploitées. De ce fait, la loi de 2001¹³ a prévu une déchéance pour défaut d'exploitation pendant une période de cinq années, ce qui constitue une autre nouveauté par rapport au décret de 1889, qui lui ne sanctionnait en aucune manière le défaut d'utilisation de la marque.

B- la distinctivité

A lorsque la condition de disponibilité est nouvellement introduite par la loi 2001, celle de distinctivité existait déjà dans le décret de 1889. L'apport de la loi de 2001 réside dans le fait qu'elle précise les signes dépourvus de caractère distinctif . En effet, qu'ils soient dénominatifs,¹⁴ figuratifs¹⁵ ou sonores,¹⁶ les signes sont dépourvus de caractère distinctifs lorsqu'ils sont:

- nécessaires, génériques ou usuels¹⁷
- descriptifs¹⁸
- ou déceptifs¹⁹

Parag 2: conditions négatives

Autre nouveauté de la loi 2001 par rapport au décret de 1889 est que dans le nouveau régime, l'on prévoit textuellement des conditions de fond négatives pour l'acquisition d'un droit sur une marque.

¹³ V. les art.34, 35 et 36.

¹⁴ Art .2 (a).

¹⁵ Art 2 (b).

¹⁶ Art 2 (c).

¹⁷ Art 3 (a).

¹⁸ Art 3 (b) et 3 (c).

¹⁹ Art 4 (d).

Ces conditions ont été prévus par l'art 4 (a) , (b) et (c) dont la teneur suit:

"ne peut être adopté comme marque ou élément de marque, tout signe

- a) Reproduisant ou imitant les armoiries, drapeaux et autres emblèmes, sigles, dénominations ou abréviations de dénomination de tout État ou de toute organisation internationale intergouvernementale ou de toute organisation créée par une convention internationale, à moins que cette utilisation ne soit autorisée par l'autorité compétente de cet État.
- b) Reproduisant ou imitant des signes ou poinçons officiels de contrôle et de garantie adoptés par un État, à moins que cette utilisation ne soit autoriser par l'autorité compétente de cet État.
- c) Contraire à l'ordre public ou aux bonnes mœurs, ou dont l'utilisation est légalement interdite.

Sect 2: Sanction: la nullité

L'apport de la loi de 2001 ne réside pas seulement dans l'introduction de nouvelles conditions de fond, il se manifeste à travers le fait que la nouvelle loi a prévu une sanction en cas de défaut de l'une ou de l'autre des dites conditions. Cette sanction consiste dans la nullité. L'action en nullité est régie par les articles 32 et 33 de la loi de 2001.

En effet, l'enregistrement qui ne remplit pas les conditions de validité prévues aux articles 2, 3, 4 et 5 est annulable par une décision de justice émanant du tribunal compétent et dont l'effet est absolu.

Cette action est ouverte tant au ministère public, qui peut agir d'office sur le fondement des articles 2, 3 et 4, qu'au titulaire d'un droit antérieur, qui peut agir sur le fondement de l'art 5 . Seulement, et dans le second cas, l'action du titulaire d'un droit antérieur n'est

pas recevable si la marque a été déposée de bonne foi et s'il en a toléré l'usage pendant cinq ans.

Par ailleurs, l'action en nullité ouverte au propriétaire d'une marque notoirement connue se prescrit par cinq ans à compter de la date d'enregistrement, à moins que ce dernier n'ait été demandé de mauvaise foi.

Chap.2 : l'introduction de l'enregistrement comme une condition de forme obligatoire.

Outre le perfectionnement des conditions de fond pour l'acquisition d'un droit sur la marque, la nouvelle loi tunisienne a fait de l'enregistrement une formalité obligatoire.

Les rapports du nouveau régime se situent tant sur la nature juridique de l'enregistrement (sect 1) sur ses modalités (sect 2) que sur ses effets (sect 3).

Sect 1: Quant à la nature juridique de l'enregistrement passage d'un système déclaratif à un système attributif de droit.

Le décret de 1889 conférait au déposant une présomption simple de propriété de la marque, présomption qui pourrait être combattue essentiellement par le premier usage.

Autrement dit, sous l'ancien régime, le droit à la marque naissait du premier usage, mais la marque devait être enregistrée pour être opposable aux tiers. Même non déposée, la marque était protégée, comme toute propriété, contre les atteintes qui pouvaient lui être portées et ce sur le fondement de l'article 82 et 92 COC. En dehors de tout usage, le droit sur les marques pouvait naître du dépôt effectué au greffe du tribunal de commerce.

Le décret de 1889 s'est révélé défectueux avec l'évolution contemporaine de l'industrie et du commerce. En particulier, la règle de l'acquisition du droit à la marque par le premier usage était génératrice d'une incertitude peu compatible avec le développement des instruments publicitaires.

Il s'avérait nécessaire de fonder le droit à la marque sur un acte de dépôt dont la date était incontestable et aisément vérifiable .

En effet, avec le développement de la marque indépendamment de tout usage, avec le développement de la publicité, ce régime devenait insatisfaisant. Un commerçant ayant fait effectuer des recherches d'antériorités aboutissant à le persuader qu'un terme était disponible, le déposait comme marque et consacrait un énorme budget au lancement de cette marque. Il risquait de voir tout cet effort financier réduit à néant en raison de l'existence d'une marque non déposée et d'un usage local tout à fait limité .

Cette insécurité n'était plus admissible.

C'est pourquoi la nouvelle loi tunisienne a, et c'est tout a fait nouveau, introduit le principe de l'attribution du droit par l'enregistrement désormais, c'est le premier dépôt seul qui permet d'acquérir la propriété d'une marque.

L'art 6 de la loi de 2001 énonce clairement que "la propriété de la marque s'acquiert par l'enregistrement".

Un tel système confère une certaine sécurité juridique pour les tiers qui peuvent facilement étudier les marques ayant fait l'objet d'un enregistrement et d'un dépôt et déterminer celles qui sont indisponibles. Le système de l'enregistrement permet, néanmoins, l'enregistrement de marques dites de "barrages" au détriment d'utilisateurs de bonne foi, alors qu'un système fondé seulement sur l'usage permet difficilement de savoir quelles sont les marques disponibles.

Les législations modernes privilégient actuellement le système de l'enregistrement pondéré par des mesures destinées à permettre la déchéance pour non utilisation des "marques de barrages". C'est bien le cas de notre nouveau droit.

L'enregistrement s'effectue selon des modalités qui ne manquent pas d'innovations.

Sect 2: Quant aux modalités de l'enregistrement

Sans entrer dans les détails des modalités de l'enregistrement pour lesquelles il faudra se référer aux articles correspondants dans la loi de 2001 et dans les textes d'application et dont l'application a été confiée à l'INNORPI, l'on soulignera que la grande innovation de la nouvelle loi sur ce plan réside dans l'examen de validité que subit cet enregistrement. Cet examen peut être fait à l'initiative soit de l'INNORPI (parag 1) soit des tiers (parag 2).

Parag 1: Examen à l'initiative de l'INNORPI

L'examen de la régularité de l'acte de dépôt a été confiée à l'INNORPI. l'art 8-2 de la loi 2001 prévoit en effet que " tout dépôt donne lieu à vérification par l'organisme chargé de la propriété industrielle:

- qu'il a été présenté conformément aux modalités prévues à l'alinéa premier du présent article.
- L'on remarquera que l'examen de régularité exercé par l'INNORPI touche également aux conditions de fond²⁰ déjà exposées.

En cas de non conformité de la demande d'enregistrement aux conditions tant de fond que de forme, notification motivée en est faite au déposant. Un délai d'un mois à compter de la notification lui est imparti pour régulariser la demande d'enregistrement ou contester les objections de l'INNORPI.

A défaut de régularisation ou de présentation d'observations permettant de lever les objections, la demande d'enregistrement est rejetée.

Il est à noter que le rejet de la demande d'enregistrement peut être partiel lorsque les motifs de rejet n'affectent la demande d'enregistrement qu'en partie. Il est également à noter ce qui

²⁰ Art 8-2 2^{ème} tiré.

constitue une autre nouveauté que les décisions du représentant légal de l'INNORPI en matière de délivrance ou de rejet des marques sont susceptibles de recours devant les tribunaux compétents et selon des conditions de délai, des forme et de fond bien déterminées par les articles 38 à 43 du chapitre V de la nouvelle loi.

Parag 2 : Examen à l'initiative des tiers

La procédure d'opposition.

La grande innovation de la loi 2001 par rapport au décret 1889 consiste dans l'introduction d'une procédure d'opposition permettant d'éviter des procès pouvant intervenir après une exploitation plus ou moins longue d'une marque qui se trouverait antérieure.

Selon l'art 11.1, bénéficiant de cette procédure tant le propriétaire d'une marque enregistrée ou déposée antérieurement ou le bénéficiaire du droit de priorité, le propriétaire d'une marque notorie antérieure²¹ que le bénéficiaire d'un droit exclusif d'exploitation sans stipulation contraire du contrat.

L'opposition doit être présentée dans les deux mois suivant la publication de la demande d'enregistrement de la marque auprès du représentant légal de l'INNORPI selon des modalités particulières.

Une fois présentée, l'opposition peut connaître l'un des deux sorts qui suivent:

- soit elle est non conforme aux conditions légales, auquel cas elle est irrecevable
- soit elle est conforme aux conditions légales, auquel cas l'INNORPI tente la conciliation des deux parties selon une procédure spécialement prévue à cet effet.

²¹ La procédure d'opposition constitue un mécanisme de mise en œuvre de la protection des marques notories sur cette question, OUERTANI (S), op cit , p18.

Sect 3: Quant aux effets de l'enregistrement

D'abord, le dépôt confère au propriétaire d'une marque la garantie de la loi pénale.

Il détermine, ensuite l'étendue de la protection tant quant à la marque qu'aux produits. L'art 21 de la loi 2001 prévoit en effet, que "l'enregistrement de la marque confère à son titulaire un droit de propriété sur cette marque pour les produits et services qu'il a désignés lors du dépôt". C'est bien la consécration textuelle du fameux principe de spécialité.

On notera enfin que l'enregistrement produit ses effets à compter de la date de dépôt de la demande, et ce, pour une période de dix ans indéfiniment renouvelable.²² Rappelera que sous le risque de 1889, le dépôt produisait ses effets pour une durée de 15 ans.

Le renouvellement de l'enregistrement est possible par simple déclaration écrite remplissant les conditions légales²³. Il n'est soumis ni à l'examen de validité ni à la procédure d'opposition.²⁴

Tels étaient les apports de la nouvelle loi quant à l'acquisition du droit sur la marque . Qu'en est il des apports touchant à sa mise en œuvre?

A titre de conclusion, on ne peut qu'appeler, derrière la doctrine tunisienne²⁵ à la promulgation d'un code qui ressemble tous les textes régissant la question de la propriété industrielle dont les dispositions seraient en harmonie avec les autres codes.

²² Art 6-2.

²³ Art 16-2.

²⁴ Art 16-5.

²⁵ KRID (B) et KRID (A), la protection des marques de commerce en droit tunisien et en droit comparé RJL p. 271.

**THE LEBANESE PUBLIC ADMINISTRATION, THE
MANAGEMENT OF CHANGE, AND EFFECTIVE
COOPERATION BETWEEN LEBANON AND THE
EUROPEAN UNION**

FAYEK ABILLAMA
HILDA BAIRAMIAN

The Mediterranean area is of geo-strategic as well as economic importance to the EU. More than six years after the Barcelona process, it is interesting to find answers to the following questions:

-“Have the institutions been created to give effect to the Partnership Agreements?

-What is the EU’s policy on the Mediterranean at a time when history is being made and the map of Europe is being redrawn with the proposed enlargement of the EU?”¹

Given the strategic position of Lebanon on the Mediterranean sea and its historical, cultural vocation to play an active role in the integration process, Lebanon has a priority interest in the policies pursued and the instruments developed to reach the Barcelona objectives.

Dr Nasser SAIDI, former Minister of Economy and Trade, former Minister of Industry, currently first Vice-Governor of “Banque du Liban” declared on September 2000 the great importance Lebanon attaches to the Euro-Mediterranean Partnership given its expected favorable impact on the political and economic level in Lebanon. Many discussion forums have been organized around various subjects related to the Lebanese commercial policies, intellectual property protection concerns, economic reform, the implementation of the value-added tax and many other issues.

Trade, cooperation and aid are issues that turn into subjects of analysis. This paper will give a rapid overview of these matters,

¹ Paper presented by Dr Nasser Saidy in Damascus, Syria - March 2001.

covering the international resource flows, aid and assistance to the developing countries and to the Middle East, North Africa region.

The topics covered in the second part of this research will give general guidelines of proposed orientation to define tracks that will facilitate the challenging integration process that the Barcelona process is seeking to achieve. During the past seven years the European Union has certainly been active in many fields starting with infrastructure improvements going to provide help in the economic, social, and cultural fields.

The research will also consider the overall macro environment of the Mediterranean area after September 11th 2001. Can we speak of a “fear economy”? Should the European Union and the Mediterranean countries add another dimension to their cooperation project? Are there opportunities to fashion a new world order after September 11th ?

Section 1.01 Overview of aid and cooperation policy towards developing countries

- According to “Development Assistance Committee OECD-January 2000” (Table to be found in Annex 1) official development assistance (ODA) ceased to grow during the 90s.

Foreign direct investment flows registered a notable expansion at the beginning of the 90s and followed a sustained increase through 1999- In parallel, portfolio and equity flows (bond finance, portfolio flows and bank lending) increased considerably to unprecedented levels before collapsing with the Asian financial crisis and its aftermath in emerging economies.

- The MENA region has received comparatively limited amounts of international resources – Although it witnessed a pick-up in 1999, it attracted only 6.84% of total aggregate net L.T resource flows to developing countries compared to 6.02% to Sub-Saharan Africa, 36.88% in Latin America, 15.5 % for Europe and Central Asia and

30.36 % for East Asia and the Pacific- (source: World bank: Global development Finance-2000-table4)

- The MENA region has not been able to attract private international financial flows over the past years. In particular its share of the total remains very limited compared to the rising needs for development financing. The region records a limited participation in the international capital markets. Few of the countries (with the notable exceptions of Lebanon, Tunisia and Turkey) have access to the international debt commercial bank lending markets.

- *Trade*: Member states of the EU are the main trading partners of the Mediterranean countries. Despite a slight fall-back in trade relations over the past decade, they remain the major provider of Mediterranean imports, their share-out of the total period 91-99 averaged 59.2 %. This concentration of trade is also true of exports: the EU countries constitute the main destination for MED – exports, with an average share of 67.1 % over the same period.

The MED countries have not been able to gain wider access to the EU's growing markets (domestic or external) reflecting weak external competitiveness.

The Barcelona process set the stage for a new form of cooperation and assistance between the EU and the MED, enlarging the scope of cooperation to encompass the following objectives:

- a- Achieving peace and Stability in the Euro-Med zone
- b- Promoting sustainable economic development, creating employment opportunities and reducing the development gap via the establishment of a free trade area by 2010
- c- Fostering South-South integration.
- d- Reducing migratory pressure and illegal immigration.

As such, the conclusion of Euro-Mediterranean Partnership Agreements gave the trade-related issues an even more prominent role. The paradigm is that trade liberalization will in the short and

medium-term cause disruptions in the economies of the MED partners. The transition and adjustment will require a comprehensive reform of the institutional, regulatory and legislative framework in partners countries, enabling them to meet the challenges imposed by the partnership (the second part of this paper highlights some of the proposed actions Lebanese authorities should be able to take in order to face the challenge).

- *MEDA evaluation*

The evidence and country experience over the last years shows that the MEDA program was unable to foster reforms sought by the partnership due to the rigidity of the implementation mechanism, the predominance of technical assistance and the absence of performance indication or criteria.

An additional element that adds complexity to the Euro-Med aid relationship in the foreign policy and security dimension that the Barcelona process brings to the European-Mediterranean partnership- while the development aid agenda of the European union is underpinned by the EU's political ambitions in the region, the EU is faced with a difficult political and security situation in the MED countries.

Further, the frequently divergent political interests of the member states often negatively affects the coherence of the EU aid cooperation strategy in the region and contributes to the delay in the disbursement of funds.

It is evident that the complex system employed has often caused substantial delay of the reform efforts undertaken by the recipient countries and thus negatively impacted the progress towards achieving the Partnership objectives and the credibility of the MEDA program.

We can assume that the reform of the aid process is critical for the success of the Partnership. The MENA region including Lebanon requires substantial capital for investment to improve its growth prospects - Capital investment needs arise for structural and macro-

environmental objectives, indeed for the large-scale economic reform and liberalization and the process of privatization of publicly owned assets.

It appears that success in achieving Barcelona objectives as well as EU enlargement requires fundamental changes in three major EU policy areas:

- a- Common Agricultural Policy (CAP): Conditions and policies should allow Mediterranean countries to exploit and benefit from their comparative advantage in agriculture and food production.
- b- The EU migration Policy: The EU requires immigration in order to stabilize old-age dependency ratios. The policy implication is that the EU needs to encourage, rather than discourage and control, immigration from the labor surplus in the Mediterranean in order to help support its ageing populations.
- c- The EU's trade policies need reform in order to allow greater access to goods originating in the Mediterranean countries - A major effort has to be undertaken to amend non-tariff barriers to trade.

In other words seven years after Barcelona, it is obvious that the time has come to work in a more determined and realistic manner, the common objective being to reduce discrepancies and to render the Euro-Med Partnership an additional factor working for the consolidation of development in the Southern Mediterranean region.

Suggested orientation to facilitate the expected integration between EU and Mediterranean countries in the face of world-wide challenges

Globalization has its unconditional supporters as well as its opponents. We add to this issue the changes that the economic, political, financial areas are witnessing after the events of September 11th 2001. Observation leads us to state that the world is

under the dominance of the “fear economy²”. However, it will always be possible to exploit such an unprecedented historical and strategic situation and turn it into an opportunity specifically by supporting the Barcelona process; and the EU can play an active role in this field.

In spite of globalization and the Barcelona process we observe that commercial exchanges between the MED countries and the EU did not increase. The Barcelona process can certainly be characterized by the favorable objectives it hopes to reach, but the implementation of the MEDA program has not yet fulfilled expectations.

Where does Lebanon stand in this picture?

The Partnership Agreement that has been proposed to Lebanon is on the right track of implementation. Many steps have already been realized:

- Since April 1999 Lebanon has the official status of an observer country on the list of the WTO.
- In May 2001, Lebanon presented to the WTO an analytical paper about its commercial policy.
- The suggested Partnership Agreement will eliminate import duties in order to facilitate the creation of a free trade area over a 12-year period; however, some agricultural and manufactured goods will be excluded of the Agreement.
- The Agreement calls on Lebanon to liberalise its service sector and exploit fully its liberal legislation concerning the law affecting the establishment of companies. This can be done with close cooperation with the EU countries, hence encouraging EU companies to create operating units in Lebanon that will allow them to benefit from all the advantages of being part of a network of contacts established with the Arab World.

² Mr. Paul Kurgan article - The New York Times - September 30th 2001

- IDAL is a Lebanese public organization that aims to provide all required information and support for facilitating any type of foreign investment in Lebanon.
- The cooperation between Lebanon and the EU is expected to have a favorable impact on many sectors in Lebanon such as in the agricultural, economic and manufacturing fields. Unfortunately, these favorable expected results are at cost i.e the need to find new financing sources to enable Lebanese companies to modernize equipment and machinery, to adopt international quality standards etc. This financial need has been evaluated (including also the capital good investment) at around 1% of the GDP per year over a five year period. Lebanon has already signed an improvement agreement with the EU on June 2001; the financing is of 11 million Euro aimed at improving the industrial sector in Lebanon.
- The EU - Mediterranean Agreement will have a favorable impact on the Lebanese economy in general, since 45% of goods imported by Lebanon come from the 15 EU member countries and given that import duties represent around 47% of public revenue.
- In early 2002 Lebanon began collecting VAT from companies operating on its territory.
- Obviously the optimum impact of the Agreement between Lebanon and the EU will be obtained only through the implementation of financial policies supporting and facilitating the transfer of technologies, the orientation of Lebanese manpower in the field of new technologies, of the IT field etc. At this stage the EU can have a monitoring role.

We believe that the EU has an active role to play via the successful implementation of the Agreements with the Mediterranean countries. One such role should definitely be to give to the Mediterranean states as well as to other emerging markets in the area the opportunity to fully exploit their comparative advantage in the agricultural field.

A focus in food stuffs and other related areas should have long-term favorable impact on all the parties involved in the process.

For Lebanon and other Mediterranean countries to fully exploit the opportunities that the Barcelona process offers, the EU Member States should be able to help by taking necessary measures to facilitate the entry of products originating from the Mediterranean area into their markets; in other words, by reviewing the commercial policy concerning the existing trade barriers.

The Mediterranean countries need a transition period to facilitate the integration that is the optimum objective of the whole Barcelona process.

Lebanon, just like the other Mediterranean countries, is aware that it has to go through serious changes and sometimes radical improvements if it wants to fully benefit from all the advantages of the Agreement.

In particular:

- We need to improve productivity and gain comparative advantage.
- We need to encourage regional economic integration, since this issue can be considered as a top priority for the EU, as has been declared during the Marseille meeting. For Lebanon and its neighboring countries this means the realization of the Free Arab Trade zone area, expected to take place in 2007. The EU experience of integration can represent a valuable experience to share and learn from.
- The proposed regional integration will have an impact on the country of origin effect approach. Cumulation of origin can benefit all trading partners.

To conclude, we would say that in such ways and with courage and a strong will we can overcome the “fear economy” syndrome that has become so obvious after September 11th 2001, and build a successful future.

For example, Lebanon is already facing the challenge of competition with candidate countries to be part in the EU. This competition is expected to be fierce in the agricultural sector of the economy.

Seven years after the Barcelona process, all parties involved should adopt a more realistic approach. Sample list of suggested objectives:

- Change the EU-Mediterranean agreement into a means of reducing differences between countries
- Turn the agreement into an “active engine” supporting development in the Mediterranean area
- Participate in the creation of safe, secure and protected environments.

**TURKEY'S ADOPTION OF THE
ACQUIS COMMUNAUTAIRE:
AN UNDERVALUED ACQUAINTANCE**

ARMAGAN EMRE ÇAKIR¹

To the precious memory of Professor Dominik Lasok²

Introduction

A researcher who chooses to study the chronicle of the process of adoption of the Community *acquis* by Turkey would probably take the official announcement by the Turkish Government of its own National Program for the Adoption of the EU *Acquis* on 19 March 2001 as the starting point of his narrative. Indeed, after Turkey was recognised as a candidate for accession at the Helsinki European Council in December 1999, the standard 'package performance' for the Candidate States was put on stage: the European Commission started to prepare an Accession Partnership document for Turkey, which was declared on 8 March 2001; the framework regulation that would constitute the legal basis for the Accession Partnership was adopted by the General Affairs Council on 26 February 2001; the Accession Partnership document was approved by the Council on 26 February 2001; and Turkey, on her part, announced her own National Programme for the Adoption of the EU *acquis* on 19 March 2001. The same 'package' had been staged twelve times for each candidate after the 1997 Luxembourg summit, and this was seen as just another 'performance' of the same routine. But in fact it was not. Turkey was different than the other eleven Candidate

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² Professor Dr. Dominik Lasok (QC, OPA, LenDr, LL.M., Ph.D., Dr. Juris LL.D., Dhc) (1921-2000) was, for many, the greatest scholar in the field of EU Law. He taught at the European Community Institute of Marmara University from its establishment in 1987 to 1994. In 1990, with a group of Turkish scholars, he embarked on an academic research project on the compatibility of Turkish legislation with that of the Community *acquis*. The outcome of this project was published as a special issue of the Marmara Journal of European Studies in 1992 (European Community Institute, 1992).

States in that she was already acquainted with the adoption process of the *acquis*. Peculiar as she had always been in many ways in her relations with the Union, Turkey was once again calling for a different and more conscientious examination. Such an examination is what the present article endeavours to render.

The article hopes to draw attention to four conspicuous but usually unobserved details that are typical to the case of Turkey:

- i) Turkey, owing to the prolonged reign of its Association Agreement, has not only laboured to adopt the Community *acquis*, but also had the chance to make a contribution to it beyond a symbolic degree without attaining full-membership status.
- ii) Different from most of the other candidates, she adopted a considerable portion of the *acquis* before becoming a candidate.
- iii) Some phases of the process of adoption of the *acquis* by Turkey were carried out while Turkey was deprived of certain necessary assistance mechanisms of the Union which the other Candidate States were making use of.
- iv) By entering into a customs union with the Community without becoming a full-member, Turkey put herself under the obligation of adopting a relevant portion of the *acquis* in the creation of which she was not allowed to take part but which, at the same time, had a substantial and critical effect on her economy.

Let us examine these points closely in turn.

i) Turkey's Contribution to the *Acquis Communautaire* Without Becoming a Member

The Community *acquis* is a comprehensive term defined as “the body of common rights and obligations which bind all the Member States together within the European Union” (European Commission, 2000: 17). Within such a broad ambit, the Community *acquis* includes, *inter alia*, international agreements concluded by the Community. The Ankara Agreement signed between Turkey and the EEC on 12 September 1963 is considered

in this context³. The Agreement was devised to lead to a customs union between the two entities first, and then pave the way for the full-membership of the former to the latter, entailing some other areas of economic co-operation. With the exception of the 1980-1986 period when the relations between Turkey and the EC were frozen, the Agreement has hitherto served its aim while, at the same time, contributing to the Community patrimony.

The contribution of the Ankara Agreement to the Community *acquis* does not emerge from its mere existence; as a matter of fact, in two cases⁴ the ECJ held that the Ankara agreement laid down only general guidelines for the attainment of its objectives and as such, its provisions were not directly applicable, but added that these guidelines were materialised in the decisions of the Association Council.

The actual implementation of the provisions of the Agreement as well as the resolution of the disputes arising thereof are in the

³ Professor Lasok maintains that despite the fact that the Ankara Agreement is an 'association agreement' in terms of Article 238 of the EEC Treaty signifying less than admission to the Community but more than a mere trade agreement, it is still "for all intents and purposes a treaty-contract in the classical sense of International Law". (Lasok, 1991: 27). See also (Lasok and Bridge, 1991: 77).

⁴ Case 12/86 [Demirel v Stadt Schwäbisch Gmünd (1989) 1 CMLR 421] and case 192/89 [Sevince v Staatsecretaris van Justitie (1989)]. In the first case, a Turkish lady who tried to settle in Germany with the purpose of joining her husband in Germany was refused by the German authorities. She tried to base her claim on Article 12 of the Ankara Agreement which envisages that the parties will be guided by the relevant provisions of the EEC Treaty ensuring freedom of movement for workers. The ECJ ruled that the Ankara Agreement *per se* cannot engender rights for individuals. In the second case, a Turkish citizen married a Turkish lady living in the Netherlands, and acquired a residence permit. However, his residence permit was issued conditional to his marriage. Indeed, when his marriage ended after a short time, the Dutch authorities refused to renew the permit. Different from the Demirel case, this time the litigant attempted to use decisions 2/76 and 1/80 of the Association Council. Decision 2/76 stipulated that after five years of regular work in a Member State, a worker shall enjoy free access to any type of employment in that country. Decision 1/80 reduced this to four years. The ECJ noted that these decisions concerned with the right to work not to reside. For the status of the Association Council decisions see also (Kabaalioglu, 1999: *passim* esp. 117).

hands of the Association Council that consists of the members of the governments of the Member States, members of the Council and the Commission and -as a reinforcement for our argument here- members of the Turkish government. The 41 meetings of the Association Council held so far added many elements to the *acquis* the most important of which being the Customs Union between Turkey and the EC which came in in 1996. The contribution of the Ankara Agreement has gone so far as to create, via the decisions of the Association Council, directly applicable rights for individuals.

The implementation of the terms of the Ankara Agreement is in the hands of the Council of Association⁵ whose decisions are binding upon the signatories *i.e.* the Community, the Member States and Turkey. Thus the Council gives life to the Agreement by transforming its provisions into binding rules of law. Without that transformation, the Agreement remains only an expression of expectations or a programme of action. The decisions of the Council, as confirmed by the Community Court, have a binding force.... (Lasok, 1991: 47)

When Turkey was recognised as a candidate for accession at the Helsinki European Council in December 1999, the Association Council had already held 38 meetings. Besides, the Customs Union foreseen in the Ankara Agreement had been realised and functioning with its own regime as a part of the *acquis* since 1 January 1996.

The following is a list of the decisions of the Association Council taken since 1972⁶ in chronological order:

Decision No: 1/72 of the Association Council *authorising Turkey to derogate from the most-favoured-nation clause referred to in Article 17 of the Interim Agreement*

Decision No: 1/72 of the Association Council *fixing the percentage of the Common Customs Tariff duties to be taken into consideration when determining the rate of the levy provided for in Article 3 (1) of the Additional Protocol to the Ankara Agreement*

⁵ Probably in accordance with the official English translation of the Ankara Agreement, Professor Lasok would prefer the term “Council of Association” to “Association Council”.

⁶ Decisions taken prior to 1972 were recorded in Turkish and French only.

Decision No: 3/72 of the Association Council *laying down detailed rules for collecting the compensatory levy provided for in Article 3(1) of the Additional Protocol to the Ankara Agreement*

Decision No: 4/72 of the Association Council *on the definition of the concept of 'originating products' from Turkey for implementation of Chapter I of Annex No 6 of the Additional Protocol to the Ankara Agreement*

Decision No: 5/72 of the Association Council *on methods of administrative co-operation for implementation of Articles 2 and 3 of the Additional Protocol to the Ankara Agreement*

Decision No: 1/73 of the Association Council *on new concessions on imports of Turkish agricultural products into the Community*

Decision No: 2/73 of the Association Council *amending Decision No 5/72 of 29 December 1972 on methods of administrative co-operation for implementation of Articles 2 and 3 of the Additional Protocol to the Ankara Agreement*

Decision No: 1/75 of the Association Council *amending Decision No 4/72 on the definition of the concept of 'originating products' from Turkey for implementation of Chapter I of Annex No 6 of the Additional Protocol to the Ankara Agreement*

Decision No: 2/75 of the Association Council *on the imbalance of the EEC-Turkey trade balance*

Decision No: 1/76 of the Association Council *amending Decision No 5/72 on methods of administrative co-operation for the implementation of Articles 2 and 3 of the Additional Protocol to the Ankara Agreement*

Decision No: 2/76 of the Association Council *on the implementation of Article 12 of the Ankara Agreement*

Decision No: 1/77 of the Association Council *on new concessions for imports of Turkish agricultural products into the Community*

Decision No: 1/78 of the Association Council *amending Decision No 5/72 on methods of administrative co-operation for implementation of Articles 2 and 3 of the Additional Protocol to the Ankara Agreement*

Decision No: 2/78 of the Association Council *relating to proof of origin for certain textile products exported by Turkey*

Decision No: 1/80 of the Association Council of 19 September 1980 on the development of the Association

Decision No: 2/80 of the Association Council of 19 September 1980 on exceptional aid totalling 75 million European units of account for Turkey

Decision No: 3/80 of the Association Council of 19 September 1980 on the application of the social security schemes of the Member States of the European Communities to Turkish workers and members of their families

Decision No: 1/83 of the Association Council of 25 April 1983 replacing the unit of account by the ECU in Decision No 5/72 on methods of administrative co-operation for implementation of Articles 2 and 3 of the Additional Protocol to the Ankara Agreement

Decision No: 1/93 of the Association Council of 8 November 1993 amending Decision No 5/72 on methods of administrative co-operation for the implementation of Articles 2 and 3 of the Additional Protocol to the Ankara Agreement (93/599/EC)

Decision No: 1/94 of the Association Council of 19 December 1994 concerning the application of Article 3 of the Additional Protocol to the Ankara Agreement to goods obtained in the Member States of the Community (94/905/EC)

Decision No: 2/94 of the Association Council of 19 December 1994 amending Decision No 5/72 relating to methods of administrative co-operation for implementation of Articles 2 and 3 of the Additional Protocol to the Ankara Agreement (94/906/EC)

Decision No: 1/95 of the Association Council of 22 December 1995 on implementing the final phase of the Customs Union (96/142/EC)

Decision No: 2/95 of the Association Council on temporary exceptions to Turkey's application of the Common Customs Tariff in respect of third countries

Decision No: 3/93 of the Association Council of 24 July 1995 amending Decision No 1/94 concerning the application of Article 3 of the Additional Protocol to the Ankara Agreement to goods obtained in the Member States of the Community (95/318/EC)

Decision No: 4/95 of the Association Council of 22 December 1995 amending decision No 5/72 on methods of administrative co-operation for the implementation of Articles 2 and 3 of the Additional Protocol to the Ankara Agreement (96/144/EC)

Decision No: 5/95 of the Association Council of 22 December 1995 on the arrangements for involving Turkish experts in the work of certain technical committees (96/145/EC)

Decision No: 6/95 of the Association Council of 22 December 1995 on extending the list of committees referred to in Annex 9 to Decision No 1/95 of the EC-Turkey Association Council (96/146/EC)

Decision No: 1/96 of the Association Council of 2 September 1996 repealing Decision 5/72 relating to methods of administrative co-operation for implementation of Articles 2 and 3 of the Additional Protocol to the Ankara Agreement (96/541/EC)

Decision No: 1/97 of the Association Council of 29 April 1997 on the arrangements applicable to certain processed agricultural products (97/303/EC)

Decision No: 2/97 of the Association Council of 4 June 1997 establishing the list of Community instruments relating to the removal of technical barriers to trade and the conditions and arrangements governing their implementation by Turkey (97/438/EC)

Decision No: 1/98 of the Association Council of 25 February 1998 on the trade regime for agricultural products (98/223/EC)

Decision No: 2/98 of the Association Council of 23 February 1998 repealing Decision No 2/78 relating to proof of origin for certain textile products exported by Turkey (98/224/EC)

Decision No: 1/99 of the Association Council of 5 January 1999 on the introduction of common outward processing arrangements for textiles and clothing (1999/11/EC)

Decision No: 2/99 of the Association Council of 8 March 1999 concerning the extension of the list of committees referred to in Annex 9 to Decision No 1/95 on implementing the final phase of the Customs Union (1999/208/EC)

Decision No: 1/2000 of the Association Council of 11 April 2000 repealing Decision No 4/72 on the definition of the concept of 'originating products' from Turkey for implementation of Chapter I of Annex to the Additional Protocol to the Ankara Agreement (2000/376/EC)

Decision No: 2/2000 of the Association Council of 11 April 2000 on the opening of negotiations aimed at the liberalisation of services and the mutual opening procurement markets between the Community and Turkey (2000/377/EC)

Decision No: 3/2000 of the Association Council *of 11 April 2000 on the establishment of Association Committee subcommittees (2000/378/EC)*

As the reader might have noticed, the majority of the decisions are related to ‘free movement of goods’/‘customs union’ issues, and hence the compilation may look unidimensional. Yet, there do exist some other decisions that impart depth and potential to the whole such as the Decision No: 3/80 on the application of the social security schemes of the Member States to Turkish workers and members of their families, or the Decisions 2/76 and 1/80 that referred to right to work (see footnote 4 above). However, the Ankara Agreement had foreseen a type of association relation that would be built upon on a richer ground. The association was supposed to cover the following freedoms and policy areas⁷:

Freedoms

Free movement of workers: Article 12 of the Association Agreement that refers to Articles 48, 49 and 50 of the Treaty of Rome,

Free movement of Services: Article 14 of the Association Agreement that refers to Articles 55, 56 and 58 of the Treaty of Rome,

Free movement of Capital: Articles 19-20 of the Association Agreement,

Freedom of establishment: Article 13 of the Association Agreement that refers to Articles 56 and 58 of the Treaty of Rome

⁷ With small amendments the list was taken from Kabaalioglu, 1999: 117-118.

Common Policies

| | |
|--|--|
| Agriculture: Article 11 of the Association Agreement | } All the principles laid down in the Treaty of Rome (Title 5 of Part III) concerning these issues must be made applicable in their relations within the association |
| Transport: Article 15 | |
| Taxation | |

Discrimination on Grounds of Nationality: Prohibited by Article 9 of the Association Agreement in line with Article 7 of the Treaty of Rome

Duty to take all appropriate measures, to ensure the fulfilment of obligations arising from the Agreement (Article 7 of the Association Agreement)

Duty to refrain from any measures to jeopardise the objectives: Article 7/2 of the Association Agreement

Whilst it is true that the capacity of the Ankara Agreement as well as of the Association Council have not been exploited to their fullest extent especially in terms of the topics covered, this thematic limitation that reduced the association process to a narrow tunnel leading to a customs union, however, did not originate from the Turkish side who had always been willing to extend the scope of the relations from their inception, nor from her inability to cope with the colossal body of the Community *acquis*. On the contrary, the Association Council proved to be an adaptable mechanism able to handle diverse matters, a forum of proficient agents who have high diplomatic and technocratic virtues, and, among other things, a testimony to that Turkey is able to not only adopt but also contribute to the Community *acquis*.

Among the candidate countries this characteristic position of Turkey was shared only by Cyprus. Being the three countries which signed the so-called 'first generation' association agreements Turkey (1963), Cyprus (1972) and Malta (1970) had the

opportunity to work through Association Councils. Of these, Cyprus displayed an especially good record of adopting/contributing to the Community *acquis*. But of course, it would not be fair to compare Turkey to these relatively small countries.

The other Candidate States that are from central and eastern Europe signed the new version of the Association Agreement, which is called 'Europe Agreement', at much later dates which almost coincided with the approval of their candidacy. Therefore, in their case the interesting phenomenon of contributing to the *acquis* without becoming a Member State has not been experienced.

ii) Turkey's Adoption of the *Acquis Communautaire* Before Becoming a Candidate⁸

Until 1981, the Association Council was the main institution through which the Community *acquis* was created/transferred into Turkish law. With Decree No. 8/3987 passed on 15 December 1982, the duty of co-ordinating the relations with the European Community was assigned to the State Planning Organisation. To this aim a special directorate within the Organisation was established without delay. On 17 October 1986, an ambitious step was taken and a ministry was established within the cabinet configuration which would be responsible for the surveillance and co-ordination of the relations with the Community. With a circular dated 16 February 1987, each ministry as well some important state institutions were required to establish units within themselves that would deal with EC matters in their field of responsibility.

Following the application of Turkey for full-membership status on 14 April 1987, these activities gained a new impetus. A Higher Council to be chaired by the Prime Minister or the Deputy Prime Minister, and composed of ministers and ministerial advisers was established. Besides, an EC Co-ordination Council comprising high-

⁸ The narration of the events until the year 1997 under this title was taken from Karluk, (1996: 517-522) and Karluk, (1997: 157-171). The later period was summarised from Tekeli and Ilkin (2000: 435-441).

ranking advisers and directors of related state institutions, and an EC Consultation Council including the representatives of pertinent civil society institutions, trade unions, foundations, associations and similar bodies were set up. Most importantly, -and more in the course of our theme here- 19 sub-committees were founded that would work in the field of harmonisation of Turkish law with the Community *acquis*. Each sub-committee was made responsible for one of the following fields: 1) Administrative Organisation, 2) EC budget and financial subjects, 3) Customs, 4) Agriculture, 5) Fishing, 6) Right of establishment and free movement of services, 7) Transportation, 8) Competition Law and Policy, 9) Taxation, 10) Economic and Monetary Policies and Free Movement of Capital, 11) External Relations and Agreements, 12) Industrial Policy, 13) Standardisation 14) Regional Policies, 15) Consumer Protection, 16) Statistics, 17) Business Law, 18) Environment, and 19) Informatics.

The application for full-membership also triggered a series of activities for training the personnel needed for the relations of with the Community. Institutes and similar units were opened up within universities, state institutions established their own training divisions, and students and state officials were sent to EC institutions and European universities to receive training.

These activities quickly yielded some outcomes in terms of the adoption of the Community *acquis*: the State Planning Organisation made a compilation of the provisions of the *acquis* that were of primary importance and translated them into Turkish. To follow the *acquis* on a daily basis, an online connection was established between CELEX and the State Planning Organisation in December 1988. With the help of the CELEX database, a registry was created about the internal market of the Community to be completed in 1992. The registry included the elements of the *acquis* relevant to the upcoming Internal Market, and was constructed with a mind to prepare Turkey for harmonisation of her laws with those of the Community in the field of the Community Internal Market. The EC Co-ordination Council mentioned above decided to establish 24 sub-committees on an inter-ministerial basis to work in this project.

On 7 December 1994, an important step was taken and the Competition Law was approved at the Grand National Assembly of Turkey. The first half of the year 1995, saw a series of other developments in the context of harmonisation of Turkish legislation with the Community *acquis*: Consumer Protection Law was accepted, certain articles of the Law of Intellectual and Artistic Works were changed, Turkey signed two international treaties in the context again of intellectual and artistic works. Numerous other laws were introduced or changed in accordance with the Community *acquis*⁹.

Furthermore, to ensure the compatibility of her market with the internal market of the EC, Turkey did not wait for the due date for the Customs Union which was 1 January 1996. With a Decision by the EC Co-ordination Council taken on 28 November 1988, 8 Sub-committees were established for this target. These were to work in the following fields: 1) Elimination of physical barriers, 2) Animal and plant sanitary inspections, 3) Standardisation and technical harmonisation, 4) Financial services and capital movements, 5) Transportation, new technologies and services, 6) Technological co-operation and public procurements, 7) Harmonisation of indirect taxes, and 8) Free movement of labour and professions.

Besides state institutions, universities and other actors civil society had their modest contributions to the analysis of the *acquis*. For example, Marmara University EC Institute carried out a project for this objective and dedicated a special issue of its Journal to publish the results¹⁰, and Istanbul University realised a similar project¹¹.

In the years 1998 and 1999, Turkey took further significant steps towards the alignment with the *acquis*. The Banking Supervisory and Regulatory Authority, the Public Procurement Authority, regulatory authorities in the energy and the telecommunications

⁹ For a comprehensive list of legislative reform in this period, see Kabaalioglu, (1996).

¹⁰ See footnote 2.

¹¹ Tekinalp, (2001).

sectors, as well as the National Agency in the field of education were established.

In the post-Helsinki period, the year 2000 and thereafter, Turkey mainly followed the strategy of adopting the *acquis* in line with her National Program for the Adoption of the EU *Acquis* announced on March 19th, 2001. Yet, this was what naturally was expected from all the candidates, and as such it is already outside the context of the present title which aims to shed light to the period where Turkey adopted the *acquis* without becoming a candidate.

This adoption prior to her becoming a candidate should be taken as an evidence of Turkey's experience in adopting the *acquis*, as well as a sign of her determination to complete the whole process of accession.

iii) Turkey's Deprivation From Some Necessary Assistance Mechanisms

For a long time in adopting the Community *acquis*, Turkey operated without the help of two vital assistance mechanisms which the other Members were enjoying:

The first of these mechanisms was 'screening'. The White Paper of May 1995 that was on preparing the countries of central and eastern Europe for integration into the Union's single market set down an initial table of the Community legislation that these countries have to adopt before joining the Union. The accession negotiations began on March 1998, and the analysis of the Community *acquis* on 3 April 1998. The first stage of that was called the 'screening' process consisted of evaluating the compatibility of each applicant country's legislation with Community rules. The screening was carried out by each applicant country together with the Commission.

The account of Turkey's adoption of the *acquis* until the year 2000 in the previous title has already shown Turkey was without the support of the Commission.

At the Association Council meeting of April 11th, 2000, 8 sub-committees were set up with the task of monitoring the process of analytical examination of the *acquis*. The sub-committees completed their second round meetings within July 2001.

Substantial progress has been made during these meetings. The *acquis* has become more tangible and meaningful for the Turkish bureaucracy. Yet in this process, the need for a more detailed evaluation of the *acquis* became apparent. Therefore, Turkey suggested initiating a formal screening exercise. The request was especially pronounced during meetings with the Commission officials, before the announcement of this year's Progress Report.

The fact that the Progress Report for 2001 did not propose the initiation of a screening process for Turkey is its most negative aspect. Initiating the screening process with Turkey would have been important in two aspects. Firstly, it would indeed provide a further technical capacity of developing the integration process. Secondly, beginning the screening process would give added impetus to the implementation of the reform measures undertaken by the government in the political and economic spheres.

It is an unfortunate development that a number of EU Member States have made the initiation of the screening process a political issue and identified it with accession negotiations. The fact that there is a linkage between screening and membership negotiations is not challenged. However, there are no conditions to start a screening process, while to begin accession negotiations, political criteria must be fulfilled. Moreover, as the experiences of other candidate countries reveal, there are no uniform procedures for the initiation of the screening process. As the Helsinki European Council Conclusions pointed out, there should be no discrimination between the candidate countries and future steps for Turkey should also be similar to those of the other candidates. (Ministry of Foreign Affairs: 2002).

The second mechanism Turkey was not offered for some time was TAIEX. It is the technical assistance office which was established with the same White Paper that initiated the screening mechanism, but then its service was extended to all the applicant countries by a decision taken at the Luxembourg European Council in December 1997. TAIEX works with the public administrations of the applicant countries providing them with the legal texts of the *acquis*, organising seminars for their officials, and sending its own experts if needed by the country. It has a key role in the screening process.

It was only with the 40th Turkey-EU Association Council meeting that was held in Luxembourg on 26 June 2001 as the second Association Council meeting after Turkey's recognition as a candidate at Helsinki in 1999, that Turkey's admission to the services TAIEX rendered was accepted. Turkey's inclusion into the TAIEX budget was realised as late as 15 March 2002. These may not be important delays taking the whole length of the adoption process. Nevertheless, it is an evidence of a discrimination against Turkey.

iv) Turkey's Adoption of the *Acquis Communautaire* Related to the Customs Union Without Becoming a Member

Article 5 of the Ankara Agreement states that the final stage of the association relationship between Turkey and the Community would be based on a customs union. The timetable for the implementation of this customs union was provided in the Additional Protocol signed in 1970, and in accordance with this timetable the Customs Union between Turkey and the European Community was realised on 1 January 1996 with an Association Council decision of 1995 as stated above. By this Customs Union, Turkey had to adopt some fragments of the *acquis*. However, she did not have a right to shape these fragments although they would affect her economy intensely; these decisions were being taken by the full-members and she just had to abide by them automatically. In this way, Turkey was put under a series of obligations and restrictions. These were¹²:

¹² The list has been summarised from Manisali (1996).

- a) The obligation to comply with the Common Commercial Policy of the Community (Article 64 of the Ankara Agreement and some other articles),
- b) The obligation to adopt the trade agreements that the European Community has concluded and will conclude with third countries (Article 16 of the Ankara Agreement),
- c) The restriction brought to Turkey's prospect to conclude preferential trade agreements with third countries (Article 16, paragraphs 2 and 3 of the Ankara Agreement),
- d) Turkey's obligation to comply with the *acquis* that will have a reference to the Customs Union (Articles 52-63 of the Ankara Agreement).

Turkey's consent in being party to this kind of asymmetrical relationship must be taken as an indication of her resolution to advance this relationship to its final destination which is full-membership.

Conclusion

The present enlargement wave is a unique and historic opportunity for the European Union as much as it is for each of the candidate countries; the Union is about to become a superpower both in terms of sheer size as well as capabilities. However, this process proves to bear several intricacies in proportion to its importance. These intricacies necessitate delicate engineering.

One of the prerequisites in this process is to assess all the Candidate States well both within themselves and in comparison to each other. An assessment of such kind when done in terms of capabilities and experience in adopting the Community *acquis* will reveal that Turkey has had a better record than most of the candidates. She has also shown her determination by binding herself by the portion of the *acquis* related to the Customs Union, in the drawing up of which she is not involved.

This assertion of ability and determination on Turkey's behalf may seem paradoxical, and it may be difficult to reconcile this assertion with the protracted pre-accession phase of Turkey. However, this

article argues, the delay in Turkey's case can be attributed to numerous factors other than Turkey's inability to adopt the *acquis*. It is true that some of these factors undeniably refer to Turkey's inability in other areas that had their repercussions on the adoption of the *acquis* process. But the adoption process taken in isolation appears not to have had the appreciation it deserves.

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**AUDIOVISUAL POLICY ON THE WAY TO THE EU:
THE TURKISH CASE**

CEM PEKMAN

Abstract

*This paper analyses the adoption process in Turkey of the *acquis communautaire* in the audiovisual field. Although broadcasting is often seen as a side matter of policy making, it became in the last few years one of the hottest spots of the accession debate carried out between the EU and Turkey. The reason behind it was its relation to the sensitive problem of broadcasting in Kurdish, since the broadcasting law in Turkey was simply not allowing the use of mother tongues used in Turkey other than Turkish in radio and television broadcasts. This regulation, above all in contradiction with the Copenhagen criteria, was seen as one of the major obstacles to Turkish accession to the EU. This study, after a discussion of the merits of this prohibition, defends its abolition not only for the sake of accession relations but for that of building a healthier broadcasting system as well. It suggests that the audiovisual area is wide enough not to be restricted to an unreasonable debate, and tries to demonstrate other points of importance as far as the broadcasting policies of the EU and Turkey are concerned. An analysis of what the Turkish side did to harmonize its broadcasting legislation with that of the EU follows; concluding with a critical look at what further needs to be done for both parties to draw a better European audiovisual landscape.*

Introduction

The “collision” of the Turkish broadcasting system with the European Union’s audiovisual policy dates back to November 2000, when the EU Commission issued the two reports on Turkey’s accession, namely “2000 Regular Report on Turkey’s Accession” and “Turkey: 2000 Accession Partnership”. These were the documents drawing up the so called “road map” towards Turkish accession to the EU -after the candidacy of Turkey was announced in the 1999 European Council held in Helsinki- by setting a whole

range of criteria from economics to politics, from human rights to regional policies to be accomplished by the Turkish side and thus specifying the “homework” to be done, as it is frequently referred to in the Turkish media.

Within its vast scale, this road map also comprised some audiovisual matters, giving some homework to the Turkish side on that field too. The first of them and, as it is perceived in Turkish public opinion, the most difficult one to tackle appears to be the issue of “the use of mother tongue in radio and television broadcasting”. To be clear, the EU was referring to the legal obstacles forbidding the citizens of Turkey to use their mother tongues other than Turkish in radio and television broadcasts, and this expression was of course pointing out Kurdish citizens and the Kurdish language. Not only did the Turkish broadcasting regulation really “collide” with the EU’s audio-visual policy, as I mentioned in the beginning, but the overall policies and policy-making structures of the two parties collided as well. The Kurdish language problem, seen as a matter of internal policy and security by the Turkish side, and taken as a matter of universal human rights and culture by the EU, arises not solely as a problem of broadcasting or communication (therefore not only a “language” problem), but as part of the general Kurdish problem, thus occupying the ongoing debate about Turkish accession.

In this paper, I will try to argue that the above issue of “the use of mother tongue in radio and television broadcasting” is practically of minor importance regarding the EU-Turkey accession relations and the two sides’ respective audiovisual policies, and to show that it can easily be coped with by realizing a few necessary “changes”. What I actually want to demonstrate here is the fact that the audiovisual policies in their integrity are matters certainly of major importance not to be reduced to restricted discussions. From this point of view, I will try to point out some other current problems of Turkish broadcasting, and investigate their potential for conflict with the EU’s audiovisual policy, if there is any. Doing so, I plan to arrive to a general critical stance, stressing the weaknesses of both the Turkish broadcasting system and of the EU audiovisual policy.

The Use of Mother Tongue in Broadcasting

The EU Commission's Progress Report of 2000, under the heading "criteria for membership", refers to the problem of the use of mother tongue in broadcasting, determining that Law no. 3984 which governs radio and television broadcasting in Turkey provides that "*radio and television broadcasts will be in Turkish (with an exception for languages that will contribute to the development of universal culture and science)*". Further, it argues that "*cultural rights for all Turks, irrespective of their ethnic origin, such as the right to broadcast in their mother tongue, to learn their mother tongue or to receive instruction in their mother tongue, are not guaranteed*". Apart from the issue of broadcasting, we need to remember here that the issue of education in the mother tongue, or to be specific, education in Kurdish is another hot issue in the debate on Turkish accession.

At the same time, the report "Turkey: 2000 Accession Partnership" has taken the mother tongue issue among its short term priorities to be accomplished for membership. That is to say, by the end of 2001, the Turkish side should have removed "*any legal provisions forbidding the use by Turkish citizens of their mother tongue in TV/radio broadcasting*".

Such a legal provision is in fact included in Law no. 3984, which has been in force since 1994. Article 4(t) provides that "*radio and television broadcasts will be in Turkish, except broadcasts for teaching and news transmission purposes in languages that contribute to the development of universal culture and science*". At the date of issuance of the law, the aim of this provision clearly was to prevent broadcasts in other languages, Kurdish first of all, without hampering some educational and news broadcasts in languages such as English, German and French that were being transmitted by the public channels. Especially in the first half of the 1990s it was a reality that the Kurdish separatist movement was fighting the Turkish army and security forces and this article was inevitably a reflection of the status quo and the sensitivity of the law-maker in that respect.

Nevertheless, it can not be denied that such an obstacle on the use of mother tongue in broadcasts is now unjust and unreasonable, whether one takes into consideration basic human rights and universal agreements in which the Turkish republic has participated, or the requirements and technological level of contemporary communication. On one hand, insisting on this provision prevents Turkey from fulfilling the Copenhagen criteria and slows down the accession process, and on the other it is practically useless since communication technology easily overcomes such obstacles. As a matter of fact, there are several Kurdish television channels on air today, broadcasting from various countries and accessible via satellite dishes. These are known to be widely watched in the Eastern part of Turkey. The programming content of such broadcasts are to be supervised by the “host countries” in which these broadcasts are transmitted according to the general approach adopted in international agreements. So Turkey, like any other country, is able to control these broadcasts within the terms of international agreements it takes part in, such as the Council of Europe’s Convention on Transfrontier Television dated 1989. Article 7 of the Convention states that “*All items of programme services, as concerns their presentation and content, shall respect the dignity of the human being and the fundamental rights of others. In particular, they shall not: ... (b) Give undue prominence to violence or be likely to incite racial hatred*”. On the other hand, the EU Directive of 1989 on “Television Without Frontiers”, being the basic text of EU audiovisual policy, also stresses on this issue in its article 22: “... *Member states shall also ensure that broadcasts do not contain any incitement to hatred on grounds of race, sex, religion or nationality*”. All other broadcasting conventions and agreements, those of the United Nations and UNESCO, are also respectful to security and sovereignty of member states in that respect and for instance the United Nations’ Convention on Broadcasting of 1936, a pioneer for international broadcasting agreements, is entitled “the International Convention of Broadcasting for Peace”.

In fact, the Turkish side once exercised the international watch over mechanism suggested by these agreements. Being a party to the Council of Europe’s Convention, it succeeded a few years ago in

causing the “host countries” to stop transmissions by the television station MED TV, which was the media of the terrorist Kurdish party PKK, violating international law and standards through its broadcasts uplinked from some European countries.

As far as the security and sovereignty issues are concerned, one must recall that there are several clauses in Turkish broadcasting law itself, which sets out the basic principles for broadcasting, which are in compliance with the above mentioned international standards. These are some of the provisions provided again in article 4 of Law no. 3984: (a) *Broadcasts shall not be contrary to the entity and independency of the Turkish Republic, and its national and territorial integrity; ...* (f): *Broadcasts shall not condemn people on grounds of race, sex, social status or religion;* and (g): *Broadcasts shall not consign people to violence, terror, ethnic seperatism and incite hatred.*

It is clear enough that national security and sovereignty issues are given due importance and covered both in international legislation and in Turkish broadcasting law. Under these circumstances, it is difficult to understand the hesitation of the Turkish side to abolish the related paragraph on the “mother tongue” from its broadcasting law. This would in no way weaken the regulatory power or control of broadcasting authorities in Turkey since the above mentioned provisions are applicable to all broadcasts in all languages and clear enough to set the standards. In so doing, I believe an important step towards the realization of Copenhagen criteria and accesssion, and perhaps a more vital one towards the cultural unity and peace in the country would be taken.

Actually, Turkish public opinion is now more positive than ever to “change(s)”, with a vast majority of citizens, most of the political parties and non-governmental organizations being in favour of EU accession. My belief is that Turkish legislation has to be responsive in that matter to the pressure not only from the EU but also from within the internal dynamics. Being an unjust and unreasonable

provision, the Turkish side needs to overcome this “problem” in the short term and concentrate on other areas of importance.¹

Turkish Broadcasting Law and EU Policy: Areas of Harmonization

In the Accession Partnership Report of the Commission, the culture and audiovisual policy area is envisaged within the short term priorities and the Turkish side is required to “*start alignment of legislation in the field of audio-visual policy, in particular with regard to the Television Without Frontiers Directive*”. In addition, the Accession Partnership Report requires Turkey to “*complete alignment of audio-visual legislation and strengthen the capabilities of the independent television/radio regulatory authority*” in the mid-term or in other words at the end of 2004.

To start with, one must recall that being a signatory to the Transfrontier Television Convention of the Council of Europe, Turkey initiated an indirect alignment through issuing its broadcasting law no. 3984 of 1994 which shall be in compliance with the Convention. This can be qualified as an indirect harmonization since the Convention and the Television Without Frontiers Directive of the EU are identical texts including identical provisions for television broadcasting.

¹Soon after this article was submitted to the editor, in August 2002, a new law was passed in the Turkish Parliament, which brought a series of constitutional changes for further harmonization with the *acquis communautaire*. Among the changes that this revolutionary package introduces, such as the abolition of the death penalty, the freedom to impart and receive education in mother tongues other than Turkish and so on, the abolition of the legal obstacle to radio and television broadcasting in Kurdish (and the like) is also included. Shortly after the issuance of this law, the Turkish broadcasting authority Radio and Television Supreme Board (RTUK) announced that it will issue a by-law in accordance with the new legislation and the present broadcasting law will be harmonized accordingly. This progress is very encouraging and as far as the overall audiovisual policy of the country is concerned it will no doubt broaden our perspective to concentrate on other issues, probably more important than this “artificial” problem, as this text tries to suggest.

Although the alignment process started with the issuance of Law no. 3984, we need to stress that the Turkish side still needs to take steps for a full harmonization with EU legislation. As a matter of fact, chapter 20 of the Regular Report on Turkey's Accession identifies major discrepancies concerning "*definitions, jurisdiction, freedom of reception, discrimination on grounds of nationality, promotion of European and independent works, advertising and teleshopping, and protection of minors*". According to the report, "*Furthermore, the law sets limits to the share of foreign capital in radio and television enterprise (20%)*".

Apart from the mother tongue issue and related problems discussed above, these discrepancies may be clarified as follows. First, Turkish broadcasting legislation is in apparent conflict with the Directive. Article 2 paragraph 2 of the Directive provides that "*Member states shall ensure freedom of reception and shall not restrict retransmission on their territory of television broadcasts from other member states for reasons which fall within the fields coordinated by this Directive*". This provision in fact is the basis for the "free movement" of television broadcasts, which underlines the philosophy of the EU's audiovisual policy. However article 26 of Law no. 3984 does not permit the retransmission of foreign broadcasts except on cable. The reason for that ban was pragmatic since at the date of issuance of the Law, many Turkish channels were transmitting their broadcasts from foreign countries and breaking the law which at the time prohibited commercial broadcasting. With settlement of the dispute and the legislation of commercial broadcasting, the article naturally remained useless and unreasonable.

The new law amending some provisions of the existing broadcasting law brings an improvement in that field, freeing the transmission and retransmission of "non-continuous" broadcasts; whatever is meant by the term remains to be seen. In any case, we may accept this as a harmonizing step.

Secondly, another important provision of the Television Without Frontiers Directive, again signifying the philosophy of the audiovisual policy, is that on the promotion of distribution and

production of television programmes. Article 4 states that “*Member states shall ensure where practicable and by appropriate means, that broadcasters reserve for European works ... a majority proportion of their transmission time, excluding the time appointed to news, sports events, games, advertising and teletext services*”. In addition, according to article 5, “*Member states shall ensure, where practicable and by appropriate means, that broadcasters reserve at least 10% of their transmission time excluding the time appointed to news, sports events, games, advertising and teletext services, or alternately, at the discretion of the member state, at least 10% of their programming budget, for European works created by producers who are independent of broadcasters*”. This article is known to be a quota in practice, especially against the invasion of the rapidly-growing European market by American programming. Since the term “European work”, according to its definition in the Directive comprises domestic or local production, there is no problem for Turkey in practice in applying this provision. Moreover, the provision in the Turkish Law requiring the broadcasters “*to reserve at least half of their transmission time to domestic productions excluding the time appointed to news, sports events and advertising*” is abolished in the new text. This step seems to suffice for the textual harmonization of the Law and the Directive in addition to the practical harmony.

A more serious discrepancy lies in the field of advertising. European legislation gives due importance to this field, since advertising is the major item of income for the commercial television environment which is shaped by the Directive and the Convention. In such an environment where public concerns are likely to be undermined by the quest for profit, the European legislator had to draw up a detailed and careful set of rules in order to control advertising broadcasts for the sake of consumer and public rights. Advertising standards, duration, form and presentation, their insertions within the programming schedule, bans on advertising of particular products are regulated clearly in these texts.

The Turkish legislation however is quite disordered in this field, as we often criticize. Although the 1994 broadcasting law declares

that the law is intended to be consonant with the Convention which Turkey ratified, and indeed adopted many provisions from it, among them advertising rules as well, the picture we have in front of us today as far as advertising broadcasts is concerned is a real mess. There seem to have been serious “misunderstandings” during the adaptation, and with the by-laws on advertising passed after the issuance of the law, the picture becomes more complicated. The present legislation is biased in favour of the broadcasting companies and in conflict with the European legislation, provoking violations especially of the provisions on duration, form and presentation and insertion of the advertisements. It is also interesting to note that the new law amending Law no. 3984 contains absolutely nothing on advertising. It seems that the broadcasting authorities and radio-television companies are in a compromise to continue the de facto control of advertising on radio and television channels, which is in practice shaped by the channels themselves. The broadcasting authority Radio and Television Supreme Board (RTUK) is ineffective in intervening or applying the European standards on advertising. Its income is derived from a 5% share of radio and television stations’ advertising revenues and this provision is criticized as building an organic relation between the Board and the companies. This seems to be one of the major reasons for the weakness of the authority, which the EU reports refer to by expressing the need for “*strengthening the capabilities of the independent television/radio regulatory authority*”.

The composition of the Board is another reason for concern as to its independence and power. Although it is designed to be an independent and autonomous organization by law, the Board is a politically-biased council, composed of 9 members, 5 from the candidates of the governing party/parties and 4 from the opposition. Since it was founded in 1994, it has proved ineffective in applying rules not only on advertising, but on frequency distribution and concentration as well, and seemed not resistant to pressures from politicians and big media trusts and their interrelated interests. As is mentioned, the Board’s primary task, frequency allocation, has still not been achieved since it was founded in 1994, due to such pressures. Radio and television stations are de facto owners of the frequencies they hold and functioning under licences distributed

after such an allocation is done between themselves. Moreover, these non-allocated and de facto owned frequencies are bought and sold freely.

Radio and television law includes an article to support pluralism in broadcasts, which provides that the Supreme Board shall, after allocating 1/4 of the channels and frequencies to the public broadcaster TRT, allocate at least 50% of the remaining channels and frequencies on the basis of time-sharing and considering a regional balance. This also could not be applied in practice, since the frequencies are shared de facto, on a first come first take basis as mentioned above. The final announcement of the Board for a bid for frequency allocation to take place in April 2001 remained fruitless against heavy pressure and lobbying of the commercial broadcasters.

The “concentration” issue is the last but not the least to concentrate on. Among the standards that Law no. 3984 brings in, Article 29 includes the anti-trust provisions. According to that provision,

- (i) a company is allowed to establish only one radio or one television station;
- (ii) a shareholder in a station shall not hold more than 20% of the shares, and if he owns shares in several stations, the total ratio of his shares may not exceed 20%;
- (iii) close relatives are not allowed to be shareholders in the same radio or TV station;
- (iv) a newspaper owner that is a shareholder of a company operating a station may not hold more than 20% shares in such company operating a station; if there are more than one newspaper owners among the shareholders of a company operating a station, such newspaper owners may not collectively hold more than 20% shares in such company; and
- (v) a shareholder owning an interest exceeding 10% in a radio or TV company is not allowed to take part in public tenders or operate in the stock exchange.

On the other hand, the same Article 29 prevents political parties, associations, trade unions, professional organizations, cooperatives, foundations, local governments (a heavily criticized part of the provision) as well as production, investment, import, export, marketing and finance companies from establishing or holding shares in private radio and television stations. In terms of limits to foreign capital presence, foreigners shall have a maximum of 20% share in radio or television companies, and a foreign partner in a certain radio and television station shall not be a partner in another radio and television station. Such provisions limiting shareholdings of nationals or foreigners do not exist for the press or for other media. Also in general, there is no limitation for market shares, including radio and TV broadcasting.

The above-mentioned strict legislation on media concentration is fine on paper, but in practice the larger media companies find ways to bypass these rules. Holding companies functioning in other sectors are leading the media market as well, controlling several newspapers, radio and TV stations and other media at the same time. Also media owners are freely functioning in the stock exchange, and participate in public tenders. The Board is not intervening in such operations and prefers rather to imply strictly some broadcasting codes in the law and distribute some penalties accordingly. These penalties are in the form of transmission interruptions, which are in themselves found to be anti-democratic.

Nevertheless, this picture needs to be placed into the general competition law framework comprehending broadcasting as well. The Law on Protection of Competition has been in force in Turkey since 1994, and it is in compliance with the competition law of the European Union set out in Articles 81-82 of the Treaty of Rome. As a matter of fact, the Law on Protection of Competition was issued as a part of the process of harmonization of Turkish legislation to EU law, as Turkey is a prospective full-member. Therefore, in theory, EU competition rules are applicable in Turkey. Even though the Law on Protection of Competition entered into force in 1994, its legal provisions became enforceable in 1997, when the Board of Competition was set up by the Government. The Competition Board, which remained inactive in the media field till

the end of 1999, started to intervene in cases of abuse of a dominant position and concerted practices and agreements in the sector by the year 2000. The two major multi-media groups Dogan and Bilgin, and their own distribution companies were fined quite heavily within those terms. These two groups were also fined for forming a joint agency for advertising sales for their television stations. Also, the Board intervened in relation to Dogan Group's interests in an energy tender. The State Council (Supreme Administrative Court) on the other hand also canceled some public tenders, which were given to consortia having media companies as partners. These two institutions seem to have undertaken the role of the Supreme Board of Radio and Television regarding media concentration in practice; however, this does not suffice to stand against the power of media trusts to successfully break the law.

Prospective Changes in the Broadcasting Law: Short-term Solutions

As I mentioned before, a new law amending Law no. 3984, which was on the agenda of the Parliament for a long time, was finally issued in May 2002. The President of the Republic, who once vetoed the new Law, now brought it to the Constitutional Court and the case is still under examination by the Court.

Although we need to wait for the Constitutional Court's decision, we may perhaps speculate on some of the prospective changes the new law brings. To start with the positive ones, we may recall that the old provision restricting the transmission and retransmission of foreign television broadcasts is removed. Also mentioned above, another positive step is the removal of the provision on the quota for "domestic" programming, thus harmonizing the legislation with the *Acquis*.

Progress is also made on the composition of the Radio and Television Supreme Board. Whereas the former composition of the Board is politically biased with 9 members, 5 from the candidates of the governing party/parties and 4 from the opposition, according to the new arrangement 5 members of the Board will be elected by the Parliament and 4 by the Higher Education Council, the National

Security Council, and the Press Unions and Press Council. Although this change is irrelevant to the EU Directive since it does not regulate the formation of national broadcasting authorities, we take this as a positive move towards the independence and autonomy of the Turkish authority, apart from the harmonization efforts.

The new law transfers the duty of investigating and preparing the “frequency map” of the country to the Telecommunications Council. This plan is to be presented to the Supreme Board of Communication, another communication authority, and the allocation procedure and schedule is to be determined by this Board. The Radio and Television Supreme Board is the final authority on the allocation of frequencies. This rearrangement looks as though it by-passes the Radio and Television Supreme Board as a response to its ineffectiveness in the frequency allocation process until now. However, to what extent this new and rather complicated structure will be effective in solving the vital problem of Turkish broadcasting remains to be seen.

As I have criticized above, the Supreme Board RTUK, while remaining usually reticent about executing the fundamental law, opted rather to imply strictly some “blurred” broadcasting codes into the law and impose penalties accordingly. With the amendment, such penalties are basically converted into fines. Although this is progress, we are hesitant to applaud since the blurred and sometimes conservative and anti-democratic nature of broadcasting codes is protected in the amended law.

Commercialization and Concentration: Harmonization without Frontiers?

It is apparent that the Turkish side has moved a considerable way towards adopting EU standards in broadcasting. However, besides saying what has been done, we also need to comment on what could not be done. Similarly to the inability of the Turkish authorities and law or policy makers, there are quite a number of things which the EU legislators or policy makers were unable to date to do in the audiovisual field. Therefore, one has to be equally

critical of the international framework, while criticizing a national structure within it. In the following concluding paragraphs, the weaker points of the EU's audiovisual policy will also be mentioned, while I go briefly over the shortcomings of the Turkish broadcasting system.

First of all, as far as the issue of advertising is concerned, no change or even no touch is apparent in the new amendment to the Turkish radio and television law, as mentioned before. The current Turkish legislature and executive are incapable of regulating advertising broadcasts, and unfortunately there seems to be no intention to do so. This is very disappointing, not just for the sake of harmonization, but for the sake of audiences, both national and international, which are sadly more and more transformed into "consumers" or "target groups". This is a general and serious criticism raised by many, directed not only against commercialized national systems but against the supra-national audiovisual framework of the EU as well. It is often criticized for neglecting national and public concerns in a field essentially of culture, and for being over-pragmatic and over-commercialized. That is to say, even the well-designed and detailed advertising legislation of the EU is found biased in favour of commerce. Yet, we know that similar problems to the Turkish case which we discussed before are being witnessed in some of the member states or prospective members of the EU too.² The Commission of the EU is known to be busy especially with this issue in order to implement its audiovisual policy and an overall harmonization within the given framework is no doubt a priority. However, at the same time we need to be critical over the degree of commercialization present today both at national and European level and to work to bring into harmony once again the two concepts of broadcasting and public service.

This argument, I think, is well applicable to the problem of media concentration and the Turkish case is again not the only example of

² We might even suggest that breaking the advertising rules is quite a Mediterranean practice. Most cases brought to the Commission's agenda are from Mediterranean countries such as Greece, Italy, Spain and Portugal.

such difficulties. The new Turkish broadcasting legislation is about to alter radically the provisions on concentration drawn up in article 29, which is a tight anti-trust provision as mentioned above, not surprisingly in favour of the media conglomerates. The revised article practically removes the limitations on shareholding in radio and television stations and for cross-ownership in media and also removes obstacles for media companies to participate in public tenders and in stock-exchange operations. As for foreign shareholdings, the upper limit is raised from 20% to 25% (which represents slight progress for harmonization). Overall, this change is no doubt the core of the amendment and among critics is believed to be the real reason for issuing a new law. It in fact legalizes the de facto situation where the original anti-trust provisions were in no way applied and the rules of the game were determined by the leading actors. This “amendment”, once rejected in the Parliament and once vetoed by the President is now on the agenda of the Constitutional Court, and the media giants appear to be insistent and powerful enough to finally get what they desire.

We need to remember at this point that powerful European media companies were one of the targets of the EU audiovisual policy. These were projected to withstand giant competitors especially from the United States, which were blowing the commercialization and globalization wind of the 80s over Europe, and hopefully sail with this wind for European interests. This is becoming a reality today although multi-nationalism is crossing the borders of the Continent, and European interests are turning into global interests of ever-growing multi-media companies. Once again, reservations on the level of media commercialization, concentration, expansion and globalization reached today are raised.

In fact, the Commission began to address these concerns, with a view to regulating the field of media ownership separately, in addition to its general competition policy framework. The planned and very probable liberalization of media ownership and concentration here in Turkey may seem lacking in relevance to the EU audiovisual policy or may seem an independent, “national” case, but this view is misleading. The EU’s approach in that respect of remaining silent, simply reminding the Turkish side to open up

the landscape to European capital by raising foreign ownership limits, is also misleading. Everything is essentially continental, even global, in today's audiovisual world. The future of the European audiovisual landscape-possibly with the addition of the Turkish counterpart-, its policy, and especially the sensitive areas of commercialization and concentration are matters to be watched with interest. Harmonization, both in national and European terms, is ongoing.

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**TURKEY AIMS AT FULL HARMONISATION WITH THE
EU *ACQUIS COMMUNAUTAIRE* IN INTELLECTUAL
PROPERTY AS A REQUIREMENT OF MEMBERSHIP**

DENIZ ILGAZ

- I. Introduction
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 - III. B. Harmonisation Starts with an Analysis of Existing Domestic Legal Measures and Implementation: the Example of Data Protection
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I. Introduction

In the Turkish Republic, the aim of full membership in the European Union has been the driving force behind a 40-year old project of adjustment and development, adopted by all governments as part of the country's "westernization" program. The political and economic criteria which must be met by all candidate countries, as well as the *acquis communautaire* of the European Union to be fulfilled according to certain deadlines stipulated in official documents such as the Accession Partnership Document or the National Program of Turkey, in 2000 and 2001 respectively, helped to hasten and make more visible the work that has to be completed soon in all areas, including the subject of Intellectual Property Rights.

Turkey needs to evaluate intellectual property rights also from the global perspective. Economic and trade relations worldwide in this century have made it imperative that with a population of 70 million and a level of production that is well-integrated into the global economy, the Turkish Republic cannot afford to stay aloof from the dynamics of the current age. Turkey inevitably needs to

update all legal measures in relation to intellectual property, complete successfully the necessary institutionalization in this area, and devise a system whereby the public in Turkey is made fully aware of and responsible for the recognition and protection of intellectual property rights that also constitute an important dimension of human rights in general.

Protection of both economic and moral rights of inventors in technology, authors of all creative works and persons making contributions in industry, is clearly indicated in the provisions of a great number of international and regional agreements or treaties of intellectual property rights. The contents of such provisions need to be translated into real life in the form of respect and recognition by each member of the community for the rights of those who spend their time, effort and savings upon creative ideas and offer their inventions for the use of the public. However, it is not enough to realize only community support for the protection of creativity through organized or widespread education; there should also be an established web of legislative measures and a fully functioning system of intellectual property protection in the country, resting upon a well-equipped and properly functioning judiciary.

The practical consequences of protecting intellectual property is in the development of industry and the increase of exports, both dependent upon primarily the production of industrial and technology goods. High quality production requires the effective protection of costly Research-Development activities carried on domestically and at the same time the government has to provide for the legal protection of imported technology and know-how against unauthorized domestic use which disrupts fair competition and discourages the transfer of technology. Especially at a time when Turkey is seriously in need of foreign direct investments, Turkey has to provide the same level of protection for intellectual property as is available in other countries competing for foreign investors.

The Turkish Republic has already taken considerable strides in 1995, by means of the Customs Union established between the European Community and Turkey, in the Partnership Council

Decision No. 1/95, and its Appendix No. 8, entitled “Intellectual, Industrial and Commercial Property Rights.” Concurrently, Turkey has signed the Agreement Establishing the World Trade Organisation and its additional Agreement on the Trade-Related Aspects of Intellectual Property Rights (TRIPS). Under the requirements of these two important international commitments, Turkey has become a party to various treaties or signed their current texts as required, and also updated its laws according to European Community regulations or decisions.

A most important step has been Turkey’s participation, as the 20th member, in the European Patent Organisation, whereby the European Patent Convention went into effect in Turkey on 1 November 2000. The developments taking place in relation to the creation of a Community Patent within the European Patent system is of great interest to businessmen, scholars and lawyers, especially in respect of a new approach towards the issue of translations of patent documents including the claims and in the establishment of a central patent court for the Member Countries of the EU.

Turkey has not yet joined the two WIPO Treaties, known as “Internet Treaties”, one on the Rights of Authors and the other on the rights of Performers and the Producers of Phonograms, both dated 1996. Efforts on accession to these Treaties are being carried on, as well as works to join the Trademark Law Treaty (TLT). Another treaty Turkey works on joining is the Geneva text of the Hague Agreement on the International Registration of Industrial Designs. Other than these, Turkey attended the diplomatic conference on the Patent Law Treaty (PLT) and signed the Agreement, and shall start the procedure of ratification for membership after the Treaty goes into effect within the allocated time.

There were also some domestic measures that were taken in order to make intellectual property protection more effective inside the country. A novel system was put into effect by Law No. 4421, dated 1.08.1999, on Amendments to be made to the Turkish Penal Code and to the Procedural Law on the Execution of Penal Measures, which brought increases in the amount of fines.

According to this system, fines to be applied for the infringement or violation of intellectual property rights become more effective in preventing such acts, since the fines are reevaluated each year according to the inflation rate.

Other measures which were taken in order to improve the conditions with respect to the protection of intellectual property in Turkey include three important Official Communications: Communication No. 98/3, issued by Money-Credit and Coordination Council, on “Support for Registration Expenses for Patents, Utility Model Certificates and Industrial Designs”; Communication No. 2000/2 on “Educational Scholarships”; and, Communication No. 2000/3 on “Support for Activities Directed at Trademarking of Turkish Products Abroad, their Advertisement and Sustainability in Trade, and the Establishment of the Turkish Image.”

II. Harmonisation with the EU Acquis Communautaire in Intellectual Property

In the Turkish Republic, the following institutions are responsible for the applications of the different areas of intellectual property rights:

The Turkish Patent Institute: in the subject of all industrial property issues and the institutionalization of attorneyship for patents and trademarks.

The Ministry of Culture: copyrights and related rights.

The Ministry of Agriculture and Village Works: rights of plant breeders related to plant varieties.

The Ministry of Justice: in relation to the establishment of specialised courts on intellectual and industrial property.

Department of External Commerce: in relation to the application of the incentives system for foreign direct investments.

The Board of Competititon: in relation to license agreements concerning patents, trade secrets and know how in the transfer of technology.

The Ministry of Health and the Ministry of Agriculture and Village Works: in relation to the protection of undisclosed data (data exclusivity).

The Turkish Patent Institute (TPI), which was established on 24.06.1994 by Government Decree No. 554, is the organisation responsible for carrying on measures related to industrial rights protection. The TPI is connected to the Turkish Ministry of Industry and Trade but has an independent budget and is run by a personnel of 155. The institutional infrastructure of the Turkish Patent Institute needs to be upgraded in accordance with the EU standards, including the employment of experts, specially trained to deal with issues in separate units concerning patents, trade and service marks, industrial designs, geographical indications and topographies of integrated circuits. In general, the needs of the personnel in in-service training should be met in upgraded terms, while acquisition of new personnel should be made with a special concern for EU specialization of such persons.

On the subject of industrial property, the following Decrees were prepared and went into effect by their publication in the Official Gazette on 26.06.1995: Decree No. 551 on the Protection of Patent Rights (amended by Decree No. 566 which went into effect on 22.09.1995); Decree No. 554 on the Protection of Industrial Designs; Decree No. 555 on the Protection of Geographical Indications; Decree No. 556 on the Protection of Trade and Service Marks. Implementation Regulations relating to the said Decrees have also been published in the Official Gazette and went into force. A Law which organizes the penal measures in connection to the Decrees, Law No. 4128, went into effect on 7 November 1995.

Decree No. 551 on the Protection of Patent Rights was prepared in view of Turkish obligations under the TRIPS Agreement. Article 65 of the TRIPS Agreement acknowledges that Turkey, among

others, may postpone granting patent protection to pharmaceuticals until 2000 or 2005, according to the development level of the country. However, the later amendment which was made by the transitory provision 4 in Decree 566, took into consideration the need to harmonise the Turkish patent law with the applications in the European Community. According to Turkey's obligations arising from the Partnership Council Decision No. 1/95 which established the Customs Union, and Article 70 (8) of TRIPS Agreement, it was stipulated that patent protection for pharmaceuticals and veterinary products and processes would start on 1.01.1999. All patent applications for products and processes up to the said date were to be accepted by the TPI, and government would grant them the exclusive right to market the product in Turkey until the grant of the patent on 1.01.1999. The effects of this procedure have been as follows:

- a) All applications were treated as stipulated in the TRIPS under the criteria for the grant of the patent. However, in connection with the search for novelty, the state of the art at the time of application was not taken as the basis. Only at the time of search for novelty, the standards at the grant of the patent and the state of the art were evaluated;
- b) When the patent was granted after 1.01.1999, the period of protection would start from the date of application or the priority date.

There is the need to create the necessary infrastructure in order to carry on patent examination procedures in accordance with the requirements stipulated in the Turkish Patent Decree No. 551; the patent application procedures should be equally simplified in harmony with the applications in the European Patent Organization and within the international patent application system (the Madrid Agreement and the Protocol).

The Turkish Patent Institute has prepared a draft law, not yet approved by the Turkish Grand National Assembly (TGNA), based upon Council Directive EC 87/54 on the protection of the topographies of integrated circuits, which is one of the subjects that

was included in the list of measures to be created or be fully harmonized with EC law within three years after the realization of the Customs Union, resulting from the EC/Turkey Partnership Council Decision, No 1/95.

The Decree on the Protection of Industrial Designs was prepared according to the draft of the Council Directive, 98/71/EEC, which later went into effect in somewhat different form in relation to the subject of the manufacturing and sale of spare machine parts. The Turkish Decree is mainly in harmony with the said Directive, but as far as the manufacture and sale of spare parts is concerned, the draft of the Directive is closer to the Turkish text. The Decree on the Protection of Geographical Indications was prepared with a larger scope in view of the rich array of goods Turkey claims as having geographical significance; not just wines, spirits and foodstuffs as in the European Union legislation. The Turkish Decree therefore involves a wider area of application, including local arts and handicrafts, which may turn out to be more appropriate as discussions in the current WTO Councils may successfully end up with a more favorable approach to the international protection of rich local geographical specialties of many Third World countries.

In relation to the protection of know-how and trade secrets, there is no *sui generis* law in Turkey for the protection of such rights. However, there are effective provisions both in the Commercial Code, under provisions on unfair competition, and the Code of Obligations which can be resorted to for effective protection of know-how and trade secrets. The EC-Turkey Partnership Council Decision No. 1/95 included a provision that Turkey would pass the necessary legislation on this subject within three years after the coming into effect of the Customs Union in January 1996. No major legal shortcoming makes this issue an urgent matter right now, however Turkey should meet this obligation in the near future and create a *sui generis* law on know-how protection.

A *sui generis* legal measure still needs to be drawn up organising license agreements concerning the transfer of technology incorporating patents, trade secrets and know how. This should be

done in accordance with the Commission Regulation, EC 240/96, dated 31 January 1996, in relation to the Transfer of Technology.

The Turkish Republic should complete works toward accession to the UPOV Convention on the Protection of Plant Varieties. The structuring of the new establishment, planned to take place under the auspices of the Ministry of Agriculture and Village Works, in accordance with the Draft Law, needs to be realized in order to protect the rights of plant breeders in relation to new plant varieties. Furthermore, there is the need to adopt measures incorporating the recognition of certificates for Additional Periods of Protection for plant varieties, as stipulated in Council Regulation EC 1610/96. Similarly, the Council Regulation, EC 1768/92, allowing for certificates of Additional Periods of Protection for pharmaceutical products, has to be taken into account.

The Turkish Republic will be completing work on accession to the Geneva text of the Hague Agreement on the International Registration of Industrial Designs and, accession to the Trademark Law Treaty (TLT).

On the subject of copyrights and related (neighboring) rights, in order to smooth out the problems that arise from the lack of institutional infrastructure in this area, the existing unit under the auspices of the Ministry of Culture should be reconstructed to operate in a similar semi-independent way as the Turkish Patent Institute. Law No. 4630, dated 21.02.2001, makes some amendments to the 1951 Law No. 5846 on Literary and Artistic Works, that had been subjected to two earlier amendments. Among the changes made, new provisions were introduced with respect to the protection of owner's rights in cable and satellite broadcasting, in accordance with EC Council Directive 93/83. Law No. 4630 also deals with the unlawful circulation of copyright material through electronic means, such as computers and the Internet.

Not much success has been achieved in relation to a new Law on measures guaranteeing protection for the first recording of a work and its subsequent reproduction, as well as its renting or lending out, corresponding to measures envisaged in Council Directive EC

92/100 (392 L 0100/OJ L 346, 27.11.92); nor in relation to the protection of data bases by means of a *sui generis* law, as stipulated in EC Council Directive 96/9 (396 L 0009/OJ L 077, 27.03.96). Article 80 of Law No. 5846 on the Protection of Literary and Artistic Works is still not in full harmony either with the EC Council Directive 92/100, or with the Rome Convention, or with the TRIPS Agreement, in relation to the rights to be recognized for owners of related rights.

The latest amendment (Law No. 4630) to copyright law in Turkey, nevertheless, redefines the concept of the right holder, while it introduces new provisions in order to make more effective the prevention of unauthorized reproduction of literary and artistic works and to better combat widespread piracy of copyright works. The new law also increases the penal measures, with longer terms of imprisonment, and greater fines for those who violate the economic and moral rights of authors. It is, however, a shortcoming of the amending law that it fails to provide full terminological consistency. One example is the reference to “related rights”, where the reference is not in the new way of designating the said group of rights owners, “Performing Artists, Producers of Sound Recordings and the Rights of Radio-TV Broadcasting Establishments,” but in the old way of using the term “neighboring rights.” Moreover, the latest amendments to Law No. 5846 lack parallel measures that would fulfill requirements for harmonisation with EC Directive 2001/29 on Authors’ Rights and Related Rights in the Information Society, which brings in new measures in line with the passage of the European Union into the information society.

A Regulation Concerning the Use of Copyright Works on Television and the Radio Broadcasts, which aims to regulate the procedural law in connection with the protection of the rights of authors and related rights concerning rights of performers, producers of phonograms and broadcasting organizations, was published in the Official Gazette on 15.09.2001 and went into effect; similarly, another Regulation, which brought in security measures for the copyright protection of books and other publications by means of original and numbered stickers issued by

the Ministry of Culture, was published in the Official Gazette on 8.11.2001 and went into effect.

The Turkish Republic should complete accession to the two WIPO Treaties, known as the Internet Treaties: one on Copyrights and another one on Related Rights and the Rights of Performers and Producers of Phonograms.

There is the need to make further amendments to Law No. 3257 on the Protection of Cinematographic, Video and Musical Works, in order to bring it fully into line with international norms and make it compatible with the provisions of the Law on Literary and Artistic Works. Law No. 4629, dated 21.02.2001, eliminated the Fund for the Support of Cinematographic and Musical Arts, established by Law No. 3257, and created instead a new mechanism within the general budget in order to provide support for the said arts.

On the subject of trade and service marks, Decree No. 556 on the Protection of Trade Marks should be brought into full harmony with the Council Directive 89/104/EEC, in order to overcome the lack of convergence with respect to the following points:

The shape of the good and its getup (packaging): In the second paragraph of Article 5 of Decree No. 556, it is stated that “the trademark can be registered together with the good and its getup. In this case, the registration of the good and its packaging does not provide the owner with an exclusive right for the good and its packaging. This statement is in disharmony with Turkish Law No. 4128 which accepts “the shape of the good and the getup” as trademark; the statement also contradicts Article 4 of the Community Trademark Regulation.

On the time limit for the commencement of proceedings on invalidity of trademark right: Decree No. 556 recognizes the right to start an invalidity action after the registration of the mark. However, in paragraph (c) of Article 4 of the Decree, where claims of invalidity are stated as possible in case the mark is not used for five consecutive years, the time limit within which a case may be

started is not stated. The said clause of the Turkish Decree should be made compatible with EC Council Directive 89/104 where it is clarified that the right to start a case is lost if an invalidity action is not started within five years, even though it is known to the third party that the mark has not been used.

Acquisition of distinguishing quality as a result of use: According to the second paragraph of Article 7 of the Decree, which was added by Law No. 4128, if a mark had been used before the date of registration and had acquired a distinguishing quality with respect to the goods or services subject to the said use, the registration of the mark can not be refused according to provisions (b), (c) and (d) of the same Article. This means that, according to paragraph 2, also in the case of an application for the registration of the same mark or a similar mark by a third party for the same type of goods and services [provision (b)] as a registered mark or a mark for which an application for registration has been made, and if the second applicant can prove that his use of the mark before the registration date had resulted in the acquisition of a distinguishing quality, this second request for registration can not be refused. Thus, the same mark is registered for the same goods and services in the name of two different owners, creating contradiction with Article 3/3 of the EC Directive 89/104, and should be eliminated.

Use of the terms “the same” and “same as to be indistinguishable” takes place in section (b) of Article 7 of Decree No. 556, under the title, “Absolute Reasons for Refusal of the Registration of Marks.” The term used in this provision, “same as to be indistinguishable” needs to be changed to “similar as to be indistinguishable,” in order to eliminate the confusion over the double use of the word “the same.”

The provision concerning collective marks in Decree No. 556 is not satisfactory since it fails to correspond to the applications of the collective marks in the European Union; it fails to be in harmony with Article 7 of the Paris Convention and the relevant article in the Community Trade Mark Regulation.

Condition of use in opposition: It is stipulated in Article 43 of the Community Trade Mark Regulation that previous trademark owners placing opposition for a published CTM ought to prove use of their marks. If the objecting former owner has not used the mark in five years, his opposition can not be valid. On the other hand, the Turkish Decree No. 556, in Article 35 on opposition, evaluates opposition for lack of use only in relation to failure of renewal of the mark within two years, and makes no general evaluation with respect to failure of use of the mark in five years. Harmonisation needs to be achieved with respect to provisions on the invalidity of the mark.

Limitations on trademark right in violation: Article 53 of the Community Trademark Regulation includes a provision which prohibits a trademark owner who had remained silent for five years against the unauthorized use of the trademark from commencing an action if the mark had been used in good faith. Such a limitation does not feature in the Turkish Decree No. 556; therefore, an amendment needs to be made.

Fees, costs, and Value Added Tax (VAT): The existing practice of three different payments in the form of fees, costs and the VAT in Turkey in relation to the protection of industrial rights does not correspond to practice in the European Union. The Turkish Patent Institute needs to solve the existing incongruency in the subject of payments. Tariff No. 8 in relation to industrial rights is organized by Law No. 492 of 2.07.1964, which has not been updated since, other than as regards the increase of the amounts of payments. Obsolete concepts and terminology in the Law do not correspond to the more recent terminology adopted in 1995 in the new industrial property Decrees. Moreover, there are no references in the Tariff with respect to the payments in connection with the registration and opposition mechanisms of industrial designs and geographical indications.

The Ministry of Industry and Trade issued an additional Communication of Payments, published in the Official Gazette No. 24286, dated 13.01.2001, which increases the official payments as fees, costs and the VAT, unlike the practice in the European Union.

In the procedures involving the protection of industrial property rights, the EU Member Countries do not resort to VAT. However in Turkey, foreigners who apply for registration of marks, for obtaining of patents or utility design certificates, and for industrial design registration are also required to pay VAT, as published in the Official Gazette No. 23948, on 29.01.2000.

On the subject of trade and service marks, Communication No. BİK/TPE: 2002/2, on the Classification of Goods and Services in Connection with the Application for Registration of Marks, which was published in the Official Gazette on 31.12.2001 and went into effect, made it possible to bring trade mark applications in Turkey into harmony with the international Nice Classification system.

A Memorandum of Understanding has been signed by the Community and Turkey in order to create parallel measures in law, administration and technical issues between the parties, concerning the inclusion of Turkey within the system of Community Trade Mark and Design, under the provisions of the Agreement signed between OHIM (the Office in Alicante, Spain) and the EU candidate countries.

As regards border controls against the violation of intellectual rights, the necessary measures have been taken in the Turkish customs Code, No. 4458, dated 5.02.2000, prepared on the basis of Council Regulation 3295/94 and Commission Regulation 1367/95 on counterfeit goods or unauthorized reproduction of trademarked goods.

New technologies in communications have created new problems in intellectual property violations and brought the necessity of devising new measures and making new arrangements for the detection and prevention of crimes connected with the technological vehicles of communication. In the age of the Internet, where no national boundaries exist, electronically processed personal data used on the Internet are under threat of being recovered and manipulated by unauthorized persons.

Within a wide framework of efforts to create a secure and dependable environment for informatics, the Turkish Ministry of Justice has prepared a proposal for a Law on the Protection of Personal Data. The model for this proposal has been the Swiss Federal Law of 19 June 1992 on the Protection of Data; the EC Directive 95/46 EC has been used as another source. In addition, the provisions and principles of the European Convention on Human Rights and Fundamental Freedoms have been the guiding elements.

There is a continuing effort to establish in a more appropriate structure the rights societies (occupational associations), which constitute one of the most important and basic functional elements of intellectual property protection, one that meets the needs of greater numbers. Nearly 16 associations exist in Turkey in the areas of scientific and literary works; the cinema and the fine arts; the right of performers, recorders of musical works and broadcasters on the radio/television.

Specialised courts to deal with intellectual property cases should be set up in greater numbers and dispersed throughout the country. The Ministry of Justice, with the financial support of the European Union, has embarked upon a project on the Effective Application of Intellectual Property Laws. The project, to be completed fully by 2005, includes the establishment of specialised courts in eight pilot areas. Initially, a specialised court was established in Istanbul on 25.01.2001, subsequently followed by other Intellectual and Industrial Rights Civil and Penal Courts in Ankara and Izmir, the next two big urban centers. The in-service training of judges and prosecutors is an important part of the project. Furthermore, a documentation center is to be established; and a network of computerised information exchange system is planned between the Ministries of Justice and Culture, the Turkish Patent Institute, the Department responsible from the Customs, the specialised courts and the documentation center.¹

¹ Fikri Haklar Konusunda AB Uyum Çalışmaları Durum Raporu (19 Nisan 2002). [Proposal on EU Harmonisation in Intellectual Property], TÜSIAD, Türk Sanayici ve İşadamları Derneği, Şirket İşleri Komisyonu, Fikri Haklar Çalışma

III.A. New Efforts at Approximation on the Road to Membership: the Protection of Undisclosed Information (Data Exclusivity)

What is the generally accepted rule about undisclosed and proprietary information that has intellectual property value? It is a category that takes a seemingly peripheral place in the spectrum of intellectual and industrial property rights; however, proprietorial information is secret know-how that has commercial worth, is part of the firm's property, and brings added value to the goods of the undertaking in terms of fair competition with other undertakings.

“Data Protection” or "Data exclusivity" is an intellectual property category which may overlap with patents in pharmaceutical and agricultural/chemical industries, but constitutes a right that is quite distinct from patents. While in the case of patent rights, the inventor is entitled to a period of protection in return for revealing willingly his/her invention, data exclusivity is a certain period of protection from imputation within which any other firm is prohibited from applying for obtaining a marketing permit in line with the studies and tests which a firm had carried on and submitted, upon lawful request, to a government authority in order to get the necessary permit for marketing a certain pharmaceutical or a chemical invention. The "lawful request" arises from the TRIPS Agreement, where a provision obliges governments of states parties to the Agreement to put effectively into application the said period of protection from imputations.

The TRIPS Agreement, in Article 1.2, defines the concept of data exclusivity as the protection of undisclosed information. In the case of an obligation to submit pharmaceutical or agro/chemical data in order to obtain official marketing approval, as stipulated in Article 39/3, WTO member states are expected to protect such data against the commercial use of them that would create unfair competition. The reason behind the said provision of the

Grubu, TS/ŞİR/02-190 (Report of Working Group on Intellectual Property, Association of Turkish Industrialists and Businessmen).

Agreement is the fact that the data submitted for official approval are the result of extensive investment in private research and experimentation.

The TRIPS Agreement aimed to create in Article 39.3 a certain period of time that needs to be observed by government officials as the proper length of time to keep the data secret, within which the owner of the invention and the tests has a chance to recoup the expenses of the clinical and experimental stages. Only upon the termination of this period, should local producers of a generic be allowed to have market approval of their goods based upon the clinical findings of the owner of the original product which had been submitted to health or other government officials. Then the producers of the generic alternative only need to carry on studies in order to prove the bio-equivalence of their products with the original product that has completed its period of data exclusivity.

Article 39/3 of the TRIPS Agreement does not restrict the publicizing of the said data. The data, concerning the tests and experiments carried out in relation to the pharmaceutical product for which marketing permission is requested from government authorities, is published and offered as knowledge to all interested parties; however, no unfair use of it is to be allowed to any domestic third party by the government officials.

However, if independent tests and experiments have been carried out for a domestically produced generic pharmaceutical product and the marketing permission has been obtained as based upon such independent tests, then there could be no objection to the marketing of the said good, in view of the condition that there exists no patent.

The limitation of the period of data exclusivity first entered the EU area in 1987, three years after it was applied in the USA, and is practiced by state officials. Continental Law in Europe defines the protection of data in relation to the marketing of pharmaceutical products as a *sui generis* right which needs a *sui generis* law that would bring measures for the prohibition on the use of such data until the end of a certain period of time. A report prepared by the

EU Commission in 2001 said that Article 39/3 of the TRIPS Agreement means without any doubt that there should be data exclusivity for a certain period of time, against unauthorized and unfair uses of such data. The Report added that there has been no request by any WTO Member in order to have an alternative system to the one devised in Article 39/3.

In the EU, the period of data exclusivity is ten years where Community procedure is applied; otherwise, reciprocal measures can be applied for six years, as in Austria, Denmark, Finland, Ireland, Greece and Portugal. There are various pharmaceutical products that could not meet the novelty criteria for patentability, however long years of experimentation had gone into its development, and a great deal of effort had resulted in proving its safety. Both unpatented and patented products therefore are entitled to the protection of ten-year (or less) data exclusivity period.

A Proposal which the Commission is submitting to the Parliament and the Council, aims to eliminate the six-year exclusivity and extend it to eleven years. Upon approval of new indications or formulations of a certain pharmaceutical product that has achieved important clinical benefits within the first eight years of its presence on the market, it will be possible to get an additional year of protection for all the indications submitted to the state officials.

Patents are covered in Part I, Section II of the TRIPS Agreement, while data exclusivity is covered in Section VII of Part II, in Article 39/3. But the two issues are parallel to each other in the subject of pharmaceuticals and agro/chemical inventions. Turkey's legal measures are not fully compatible as yet, in the area of pharmaceuticals, either with Article 39/3 of the TRIPS Agreement or with the European Union legislation in this subject. There is especially the need to make Article 9 of the Turkish Directive on the Licensing of Medical Pharmaceutical Products (which went into effect by its publication in the Official Gazette No. 22218 on 2.03.1995) compatible with both Article 39/3 of the TRIPS Agreement and the EU legal measures in the related subject.

In Turkish Patent Law, until the Decree of 1995, there was no patent protection for pharmaceuticals, or for chemicals, agricultural products and foodstuffs. The Patent Decree of 1995 brings patent protection for pharmaceutical products but does not recognize pipeline protection; that is, protection for pharmaceuticals that were already on the market before 1995. Possibly, with the going into effect of data exclusivity in Turkey, a product for which clinical and experimental data had been submitted to government authorities but for which there had been no patent application in 1992, will be eligible for marketing in 2003, and will also be entitled to another year of protection for indications and two more years of protection for generic product licensing. In this case, a domestic generic production that is the result of independently carried on clinical and experimental work for nearly the same or similar molecule and which is eligible for marketing can freely enter the market due to the lack of a patent.

Elsewhere, practice is as follows: in the USA, the government does not accept imputations for a generic product within five years; in Japan, until all the evaluation procedures in relation to an original pharmaceutical product are fully completed and a six-year period of reexamination is completed, no imputation on a drug is allowed to be marketed.

The creation of a new pharmaceutical product involves two basic procedures. First, long years of intensive research and inventive activity results in the finding of the basic molecule; later, there is the equally lengthy and laborious process of experimenting whether the invention is qualified, secure and effective for use upon the target group of patients. The data verifying the second process provide the proof for public authorities that the said product is suitable for marketing.

The patent obtained, which allows the right owner to prohibit the unauthorized production, use, export/import of the good by others for twenty years, provides in essence an incentive to the creator to carry on further research and show willingness to reveal the results of his/her findings. Data exclusivity is an additional intellectual property right, which is realized by the protection provided by

governments for the submitted information about the applicability of the patented product; or, in the case when patent laws in the country do not provide patent protection for a newly invented molecule, the highly costly R&D investments are still encouraged by means of data protection of secret information entrusted to government officials.

Lengthy studies upon thousands of molecules may prove to be successful only on one molecule. After the testing and experimentation period which in itself consists of several stages, the government health officials to whom the (secret) undisclosed clinical and experimental data is submitted may allow these findings to be used as the basis of some generic products of domestic producers who made no contribution to the testing and experimentation but seek to become free riders on the successful results (outcomes). This creates unfair competition.

From the legal perspective, data exclusivity is reflected in the TRIPS Agreement as the recognition of the big effort and financial investment by the inventor of a pharmaceutical product to be placed on the market; but this issue also has its protective health dimension and in addition needs to be evaluated from the perspective of keeping individuals and companies researching and producing in this sector.

The issue of data protection was the subject of heated discussions in the past both in the USA and in Europe; while the state claimed to act in the interest of the public good, it was also acting in favor of the competing generic producer who would be turned into a free-rider on testing and experimentation costs and efforts. Therefore, it was seen as a compensation for the original inventor to have the 10-13 year period of data exclusivity in order to recoup his investments under conditions of fair competition.

III.B. Harmonisation Starts With an Analysis of Existing Domestic Legal Measures and Implementation: the Example of Data Protection

Data protection emerges in Turkish law from a series of legal arrangements starting with the Constitution of the Republic. Article 5 of the Constitution stipulates that “the basic aim and obligation of the State is to base the Turkish economy upon a free economic order and to secure the right to fair competition.” Article 10/3 further stipulates that “the organs as well as the administration of the State, have to act in its application according to the principle of equality before the law.” Article 17 states that “individuals have the right to develop their material and moral existence.” Article 27 states that “individuals are free in science and the arts.” Article 48 states that “it is the responsibility of the state to take the necessary precautions in order to make it possible for private enterprises to work with confidence and security.” Article 40 states that the State shall pay compensation for the losses incurred by persons due to unfair acts or omissions of government officials. Article 35 states that every individual is entitled to property and inheritance rights.

The above are domestic constitutional legal measures that make data exclusivity a protectable right; as to the international measures, it should suffice to look at Protocol No. 1 of the European Convention on Human Rights and Fundamental Freedoms. The Article on property rights has been interpreted by the European Court of Human Rights as follows: “Rights related to moveable-immovable, tangible-intangible property are under constitutional protection (guarantee).”

All these provisions point to the unquestionably fair application of the following legal measure: “Not to pay attention to the protection of the inventor’s data in a way that would fail to prevent unfair use of such data by third parties would constitute a violation of property rights, which is essentially of the intangible kind.” Furthermore, if the State grants license to such use, it does not mean that the existing legal contradiction is eliminated, as observed from the perspective of the law of unfair competition in Turkey.

The provisions on unfair competition in the Turkish Commercial Code (TCC) are taken from the law of Switzerland.

The present framework Article 56 of the TCC states that “it is unfair competition to act fraudulently and in violation of the rules of good faith in competition,” in similar terminology with the definition of fair competition in Article 1 bis of the Paris Convention for the Protection of Industrial Property. While protecting the smooth and fair functioning of the system of competition, the provisions on unfair competition actually protect original effort and toil and prohibit acts which would constitute violation of goodwill so as to disrupt fair competition. In commercial and economic life, intangible property grows in importance. This has been the way patents, trade and service marks and, more recently, neighboring (related) rights have gained in importance in the last decades and have increased in significance with respect to the protection of the original effort and toil. Similarly, the protection of data, or “data exclusivity”, has gained in importance in the mid-1980s and aims to protect original and high quality effort and toil toward a specific goal which may be a pharmaceutical/chemical product that is patented or not.²

Protection of medical pharmaceutical data for the obtaining of a marketing license in the Turkish Republic depends on three basic health measures: Law No. 1262, dated 1928, on Medicinal Products; the basic Code No. 3359 on Health Services; and the Government Decree on the Organisation and Duties of the Ministry of Health. The last two include provisions to the effect that the Ministry of Health is competent and responsible for issuing marketing licenses for pharmaceuticals. The first does not include any direct provision on the subject; however, the Licensing Directive for Medicinal and Pharmaceutical Products, dated 2.03.1995, includes a provision on the protection of data in Article 36, entitled “Secrecy”. The Article states that, “concerning a

² Ali Necip ORTAN (Temmuz 2002). Küreselleşen Ekonomide Veri Korumamın Önemi, Panel, 31 Ocak 2002, Ankara, UPAV (Ulusal Politika Araştırmaları Vakfı), Ankara.

medical pharmaceutical product, the information that is submitted to the government by the owner seeking a marketing license for the product is secret, and it is the responsibility of the Ministry to protect the secrecy of the said information.”

This ‘objective responsibility’ means that the state, through its official personnel employed by itself, is responsible for acts that result in the revelation of such secret information due to failure to taking the necessary precautions. Moreover, in accordance with Article 40/3 of the Constitution, “the state shall make compensation for the losses caused by public institutions or public employees.”

In addition to the above, there is also a provision in the Turkish Penal Code, in connection with the security of secret information. In Article 364, it is stipulated that if a person, by means of his status and official duty, occupation or calling, is in possession of information related to scientific discovery or patents or industrial applications which he is bound to keep secret, but reveals this information; upon the complaint of the injured party, the former shall be liable to imprisonment for up to six months and the payment of a heavy fine. The legal interpretation of such a provision is to protect secret data with respect to scientific inventions and those having industrial significance, to prevent their unfair revelation and in this way to ensure public security for the protection of science and the arts.

Article 3 of the Licensing Directive points to the two basic Laws and to the Decree stated above. The Directive has a legal basis also in the Government Decree on the Protection of Patent Rights. A provision to the same effect takes place also in Article 39/3 of the TRIPS Agreement. As to the Turkish Patent Law, the present Decree includes, as a last minute addition to the proposal, a provision within Article 83, which states that with regard to the results of undisclosed research and experimentation concerning human and veterinary pharmaceuticals or agro/chemical drugs for which patent application has been made, and where in order to obtain the required permit from government authorities for the production and marketing of the said product, the relevant data is submitted, the authority in whose possession the said data lie, shall

take the necessary measures to prevent their unfair use by third parties.”

Article 83 includes this provision that is not related either to the functions of the Patent Institute nor to the granting of the patent itself, but to the granting of a marketing license for a pharmaceutical invention. The text of the Directive, which is of importance in the applications in Turkey concerning the marketing of pharmaceuticals, stipulates in Article 8 that all data, information and documents, results of tests and clinical research are to be submitted to government authorities for health inspection purposes; otherwise, the patented drug can not freely enter the market.

The Directive, in Article 9/1, includes the provision that data on original products already submitted concerning results of certain tests and experimentation will not be required in relation to alternative generics of bioequivalence produced by domestic firms.

IV. Conclusion

The framework of a pre-accession strategy was adopted for Turkey, and in particular the establishment of an Accession Partnership, dated 8.11.2000, which outlined the short term and middle term priorities for membership of Turkey in the European Union.³ In this document, the subject of intellectual property was included as a short term priority with a target date of the end of 2001, under the heading of the Single Market. Turkey was advised to carry further the positive and constructive efforts made in this area, underlining especially the need to concentrate on the prevention of piracy.

Among the middle-term priorities listed in the Accession Partnership Document, again on the subject of the Single Market, the protection of data bases and the harmonisation of laws in this

³ Pre-accession strategy for Turkey, Report on the proposal for a Council Regulation on assistance to Turkey in the framework of the pre-accession strategy, and in particular on the establishment of an Accession Partnership (COM (2000) 502 - C5-0468/2000 - 2000/0205 (CNS))

respect were emphasized, while it was underlined that the new measures should be focused on implementation. The importance of data protection was also stated under the subject of Justice and Home Affairs, with respect to the accession of Turkey into the Schengen Information System and Europol.

In the 2001 Regular Report on Turkey's Progress Toward Accession⁴, the subject of intellectual property is included under Company Law, and it is stated that Turkey has made some progress in this area, in particular concerning the legislation on Intellectual Property Rights (IPR), and has also made efforts to implement this legislation. Turkey is applauded for adopting legislation which aims to align the Turkish regime with the Directives on rental and lending rights and other rights related to copyrights. Approval is expressed also for harmonisation achieved with the Directive on the co-ordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, and with the Bern and Rome Conventions, as well as with the TRIPS Agreement, the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty.

The 2001 Report approved the Parliament adopting in March 2001 a Law establishing specialised Courts to deal with intellectual property issues in the major provinces, while the General Civil Courts and General Penal Courts have been authorised to handle cases related to IPR issues. It is added that Turkey ratified the European Patent Convention in November 2000 together with the Memorandum of Understanding in order to harmonise Turkish practices with those of the Office for Harmonisation in the Internal Market (OHIM). The Law on Customs adopted in February 2001 is praised since it contains measures aimed at fighting violations of IPR at the frontiers and contains measures concerning counterfeited and pirated goods.

⁴ 2001 Regular Report on Turkey's Progress Towards Accession, Commission of the European Communities, Brussels, 13.11.2001, SEC(2001) 1756.

The 2001 Report nevertheless advised Turkey to fully implement its commitments under the Customs Union, and added that Turkey is not a member of the WIPO Copyright Treaty nor of the WIPO Performances and Phonograms Treaty, and should advance its efforts to align with these. While the Report approved that the adoption of a Law on Protection of Topographies of Integrated Circuits was well underway, it stated that the piracy of audio-visual materials continues to be a serious problem, and that efforts to address this situation should be hastened. The Turkish Patent Institute is criticized for not being a fully independent body.

The previous Report, covering the period until 30 September 2000, had referred favorably to the adoption of Customs Law No. 4458 on the defence of IPR, which entered into force in February 2000, aiming to fight against counterfeiting trademarks and pirated copyrights. It had stated the need to pursue the process of substantive efforts to align legislation with the *acquis*. It had emphasized the creation of a coherent IPR enforcement system in Turkey, *inter alia*, to combat piracy. Adequate training had been advised for police officials, judges and prosecutors.

The 2000 Report had pointed out that enforcement of IPRs depended on the Ministry of Culture, which was said to be planning to set up a specialised institute with a wide range of powers. While it had been stated that piracy of audio-visual materials was a serious problem, Turkey had been advised to become a member of the WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty.

The 2000 Report had also referred to the protection of Topographies of Integrated Circuits, for which a proposal Law in Turkey, modelled upon the Council Directive, EC 87/54, dated 16.12.1986, was prepared for submission to the TGNA.

On its own initiative, Turkey should consider the extensive and widespread application of intellectual property education in the country, not only in the faculties of law but also as courses in secondary schools and in undergraduate programs of general arts

and sciences, engineering and architecture, industrial design and communications, as well as trade, commerce and economics.

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**IMPACT OF MEMBERSHIP OF THE EUROPEAN UNION
ON SMALL AND MEDIUM-SIZED
ENTERPRISES IN TURKEY:
A CASE STUDY IN THE ESKISEHIR REGION**

NECDET SAGLAM

Summary

The enlargement of the European Union is one of the challenges that European countries will face in the years ahead. The economic impact of enlargement is difficult to assess, as the process will be “staggered” so that its consequences will come into force piece-meal over a long period. However, there is little doubt that the overall impact will be positive in the long run. However, this will not necessarily be true for all sectors, regions, and types of enterprises, especially during the initial phase of integrating new members into the EU as Turkey. This study analyses the impact of EU enlargement on small and medium sized enterprises in the region Eskisehir in Turkey and gives recommendations for EU and Turkey policy on small and medium-sized enterprises (SMEs).

1. Introduction

One of the most important challenges in the history of European Union is its enlargement to include Turkey, other Mediterranean States and the Central and Eastern European countries. Enlargement will bring an Internal Market of over 570 million consumers and an open, border-free area where goods, services, capitals and persons can circulate freely.

The Helsinki European Council concluded, "Turkey is a candidate State destined to join the Union on the basis of the same criteria as applied to the other candidate States. Building on the existing European Strategy, Turkey, like other candidate States, will benefit from a pre-accession strategy to stimulate and support its reforms." In the study, the impact of enlargement at sectoral and regional level was analyzed. A survey was carried out in Eskisehir Industrial Area to measure the effect of enlargement on Turkish SMEs.

60% of EU small and medium sized enterprises view enlargement of the Union as beneficial. This is the result of a survey conducted at the end of the last year amongst almost 4,000 EU businesses in the framework of the EU Single Market Scoreboard. The same percentages of SMEs agree that market conditions in the candidate countries have improved over latter years.

The SMEs including the skilled crafts in Turkey-as nearly in all developed and developing countries-are the backbone of the economy. Nevertheless, despite the fact that they have a considerable share of SMEs in total investments, total production and total employment, the support they receive from the finance sector is only marginal and insufficient.

2. Characteristics of Turkish Small And Medium Industrial Enterprises

A general nation-wide evaluation shows that small and medium enterprises occupy an important place in the economic and social fabric of Turkey in terms of three important indicators, the number of enterprises, the number of employees and value added.

SMEs account for 99.5% of all manufacturing industrial enterprises and have a 61.1% share within total employment in the manufacturing industry. As regards value added created, the share of SMEs is 27.3%. They produce more and offer a more diversified range of products with less investment. The SMEs

- create employment with lower investment costs;
- are less affected by economic fluctuations due to their structure;
- are more flexible in adapting to changes in and diversification of demand;
- are more prepared to adopt technological innovation;
- contribute to inter-regional development;
- mitigate effects of a skewed income distribution pattern;
- encourage, channel and mobilise individual savings;
- are an indispensable support and are complementary of large industrial enterprises;

- are an element of balance and stability in political and social systems;
- are one of the main guarantees of democratic society and a liberal economy.

SMEs are faced by numerous general problems in Turkey, which mainly include

- difficulties in access to credit;
- practical lack of access to state incentives;
- predominant low level of technology;
- inability to keep up with technical and commercial development at home or abroad;
- shortage of skilled personnel;
- need to enhance their competitiveness within the customs union process with the EU.

There are a number of useful initiatives underway with a view to supporting enterprises in Turkey. Support services for small businesses, such as the network of industrial estates for small companies, are well developed. However, their impact will be limited if the business environment does not become more stable and predictable. The Turkish government should act to improve the conditions for SMEs.

Turkey has made some progress in revising its SME policy and reforming the state support system for business promotion. In particular, it has launched the “SME Action Plan Framework” which contains some useful initiatives. The new Economic reform programme was designed after consulting the Social partners and the economic operators, including SMEs. Limited progress can be recorded concerning the improvement of the business environment.

3. The Reason for Choosing Eskisehir for the Survey

The effect of enlargement on SMEs will be different in different regions of Turkey. In this study the Eskisehir region is chosen because of its representation of a general view of the country.

Eskisehir is located in the north-west of the Central Anatolian region. Mountains occupy a total of approximately 22% and lowlands a total of 26% of Eskisehir. 94% of land is suitable for agriculture and a total of 41% of land is used for agriculture. Total population of the province is 658.991, and 483.212 of them live in the city center. Eskisehir, taking advantage of its geographical location, is the west portal of Anatolia. Owing to the railway and highway intersections, developments in agriculture and industry, as well as the abundant mining resources, Eskisehir has become an important economic center. Eskisehir also has one of the highest education levels of the country, with a province average of 96% literacy. There are two universities in the city.

According to research based on 58 parameters of the State Institution of Planning (DPT) "Social and economic development of provinces (1996)", Eskisehir was the 6th most developed province among 76 provinces. The researches of foreign institutions also show the social and economic development of Eskisehir in recent years. Research in 1997 by the United Nation Development Program, "Social Development Report", which was also published by the Turkish Foundation of Economic and Social Researches indicates that Eskisehir is the 3rd socially most developed province.

Eskisehir, an important industrial center of Turkey, is an area where SME industry is active. The surveys of the sectors of the province show that not only a single sector but also a variety of sectors are developing. Machinery, metal and food industry have a share of 72% in the total industry. Development trends over recent years show that the clay and ceramic sectors have been growing. As stated in table 1, the textile industry has a share of 7% in the total industry of the province and new investments have been implemented in this sector in recent years.

Table 1: Share of the Sectors in the Industry of the Province

| Industry Sectors | Share % |
|---------------------------|---------|
| Machinery and Metal Items | 40 |
| Food | 32 |
| Clay and Ceramic | 15 |
| Textile | 7 |
| Other | 6 |

Some of the products produced in Eskisehir have also an important market share in Turkey. The survey results of some products produced in the province show that production of aircraft engines, diesel locomotives and borax has a share of 100% in the total national production. The share of other products is shown in table 2. The borax reserves totally supply the demand of the country, and, moreover, it is mainly exported. 60% of the total borax reserves of the world are in the Eskisehir Region.

Table 2: The share of Eskisehir in the national production of some products

| Products | Share % |
|---------------------------|---------|
| Aircraft engines | 100 |
| Diesel locomotives | 100 |
| Borax | 100 |
| Refrigerator compressors | 95 |
| Refrigerators | 60 |
| Magnesia | 60 |
| Stove and accessories | 40 |
| Ceramics (floor and wall) | 40 |
| Biscuits and cakes | 35 |
| Tiles and bricks | 25 |

3.1 The Scope of The Research

The Eskisehir Chamber of Industry has 453 members in 9 different sectors. As is shown in table 3, there are 96 members in the machinery, equipment and electrical devices industry, 74 in the metal industry, 57 in clay and rock based industry, 56 in the wood, paper and furniture industry, 53 in the food industry, 42 in the chemical, petroleum and rubber industry, 30 in mining, 28 in textile and leather industry, and 17 in other industries.

Table 3: Members of Eskisehir Chamber of Industry by Sectors

| SECTORS | Number of Enterprises |
|--|-----------------------|
| Mining | 30 |
| Food industry | 53 |
| Textile and leather industry | 28 |
| Wood, paper and furniture industry | 56 |
| Chemical, petroleum and rubber industry | 42 |
| Clay and rock based industry | 57 |
| Metal industry | 74 |
| Machinery, equipment and electrical devices industry | 96 |
| Other industry | 17 |
| TOTAL | 453 |

Some of the members of the Eskisehir Chamber of Industry are not active members but they are still included in the survey.

Data was collected from 171 enterprises. The sample enterprises included in the survey represents 75% of total 453 members with respect to turnover. 90% of these enterprises are SMEs. Surveys data transferred to computer and SPSS and excel programs were used in in the survey.

3.2 The Sectors in the Survey

As seen in table 4 below, 171 enterprises are from different sectors; 34 enterprises in the machinery and equipment industry, 29 in the metal industry, 23 in the chemical, petroleum and rubber industry, 23 in the clay and rock based industry, 17 in the food industry, 16 in the wood, paper and furniture industry, 12 in the mining, 7 in the electrical devices industry, 7 in other industries and 3 in the textile and leather industry.

Table 4: Result by Sectors

| Sectors | Number of Enterprises |
|---|------------------------------|
| Machinery, equipment industry | 34 |
| Metal industry | 29 |
| Chemical, petroleum and rubber industry | 23 |
| Clay and rock based industry | 23 |
| Food industry | 17 |
| Wood, paper and furniture industry | 16 |
| Mining | 12 |
| Electrical devices industry | 7 |
| Other industry | 7 |
| Textile and leather industry | 3 |
| Total | 171 |

4. Enterprise Capacity

4.1 Capacity-using rate of 2001

Average capacity-using rate in all the enterprises included in the study in the year 2001 is 57%, but it changes depending on the enterprise. The capacity-using rate by group is shown in table 5 below.

Table 5: Capacity-Using rate

| Capacity using rates | Number of Enterprises |
|----------------------|-----------------------|
| 1-10% | 5 |
| 11-30% | 13 |
| 31-50% | 36 |
| 51-80% | 77 |
| 80-100% | 37 |
| N.a. | 3 |
| Total | 171 |

The Turkish manufacturing industry was operating at 69.9 percent capacity in August 2001 according to the State Institute of Statistics (DIE). The capacity using rate of Eskisehir is less than that of Turkey as a whole.

4.2 The reasons for not using full capacity

One major reason for not using full capacity is insufficiency of domestic demand (57%). Other reasons are financial problems (19%), insufficiency of external demand (8%), raw material problems (4%), seasonal problems (5%) and others (7%).

Table 6: Shortage of full capacity

| | | | | | | | | |
|-----------------------|--------|-------------------|----------------------------------|----------------------------------|--------|-------------------|-------|---------|
| Raw material problems | Labour | Financial reasons | Insufficiency of domestic demand | Insufficiency of external demand | Energy | Seasonal problems | Other | Total |
| 4,93% | 1,20% | 19,15% | 53,73% | 8,11% | 0,78% | 5,02% | 7,08% | 100,00% |

5. Employees

5.1 Numbers of employees

19,510 employees were working in the enterprises included in the survey in 2000 and 18,100 in 2002. In 2002, it was 1400 employees less than it was in 2000 because of economic crises in Turkey. A total of 29,004 personnel were employed in 453 Eskisehir Chamber of Industry enterprises in 2001, and 67% of this employment was in the survey enterprises. Turkish SMEs have been particularly affected by the recent financial crisis.

Table 6: Numbers of Employees

| Employees | 2000 | 2001 |
|------------------|-------|-------|
| Workers | 17928 | 16414 |
| Managers | 1187 | 1290 |
| Top managers | 395 | 396 |
| Total | 19510 | 18100 |

According to the figures of the State Statistical Institute (DIE), 42,000 people are employed in 2,200 businesses in Eskisehir. 29,004 people are employed in 453 businesses registered at the Eskisehir Chamber of Industry. Table 7 shows that the machinery, equipment and electrical devices sector is in first place with a share of 30%.

Table 7: Employment distribution in enterprises registered at the Eskisehir Chamber of Industry

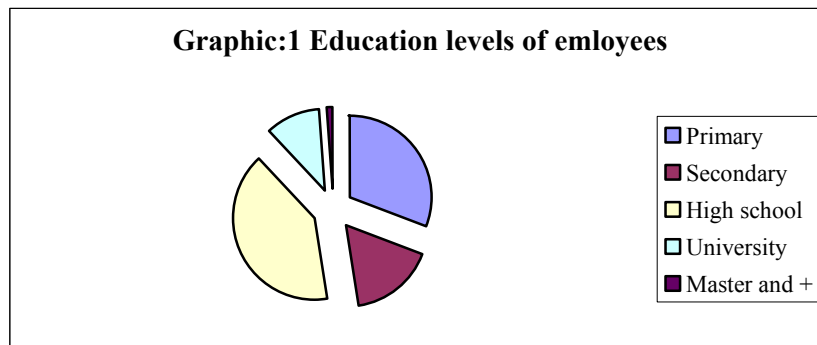
| Sectors | Share % |
|--|---------|
| Machinery, equipment and electrical devices industry | 30 |
| Clay and rock based industry | 19 |
| Food industry | 13 |
| Metal industry | 13 |
| Textile and leather industry | 10 |
| Mining | 5 |
| Wood, paper and furniture industry | 5 |
| Chemical, petroleum and rubber industry | 5 |
| TOTAL | 100 |

5.2 Educational Level of Employees

The educational level of employees in these enterprises is shown in table 8 and the graphic 1. 40% of them received high school education, 31% primary school, 16% secondary school, 11% university and 1% master degree level.

Table 8: Educational Level of Employees

| Primary | Secondary | High school | University | Master and + |
|---------|-----------|-------------|------------|--------------|
| 0,310 | 0,166 | 0,405 | 0,110 | 0,010 |



5.3 Foreign Language Skills

Foreign language skills were also studied. There are 795 employees that know a foreign language. It could be said that 4% of total employees know a foreign language. These languages are mainly English, German, French, Russian, Spanish, Italian and Bulgarian. 18 enterprises have no employee who knows a foreign language.

5.4 Computer Using Skills

3436 employees were computer literate in 2001. It could be said that 21% of total employees can use a computer.

5.5 Education and training of employees

Education is very important for product quality and enterprise growth. As seen in the table 9, 76 enterprises provide education themselves in their enterprises, and 48 enterprises (18% of total) do not provide any education and training program in their enterprises.

Table 9: Education and training of employees

| Institution | Number of Enterprises |
|---|------------------------------|
| Applied themselves in Enterprises | 76 |
| The institution which purchased machinery | 40 |
| Private institution | 36 |
| Small and Medium Industry Development Organisation (KOSGEB) | 26 |
| Other governmental institutions | 14 |
| University | 10 |
| Not applied | 48 |
| N.a. | 21 |

Lack of trained manpower is another weakness for SMEs. SMEs in fact have always acted as vocational training institutions where the employees are also the trainees. Economic competition and the need for adaptation to technological innovations entail employment of better equipped employees. SMEs need to be encouraged to work in close co-operation with schools, universities, governmental and private institutions.

5.6 Number of Trade Unions

5121 employees are members of a trade union (29% of total employees). Trade Unions are organised in 18 enterprises of the total 171 enterprises. 11% of total enterprises are working with a trade union. The development of a skilled and adaptable workforce through a policy of promoting the right balance between flexibility and security at workplace must be supported.

6. Marketing and Competition

6.1 Marketing Department

44 enterprises have a marketing department in Turkey but the other enterprises do not. It could be said that 26% of enterprises have a marketing department.

Table 10: Existence of Marketing Department

| Marketing Department | Number of Enterprises |
|----------------------|-----------------------|
| Yes | 44 |
| No | 121 |
| N.a. | 6 |
| Total | 171 |

6.2 Advertising activities in 1995-2001

86 of the enterprises on survey did some advertisement activities in 1995-2001 and the others did not.

Table 11: Advertising activities in 1995-2001

| Advertising activities. | Number of Enterprises |
|-------------------------|-----------------------|
| Yes | 86 |
| No | 74 |
| N.a. | 11 |

The advertising activities are given in table12. They are in the form of brochure and catalogue, product sample, website/internet, domestic exhibitions, media, encouraging retail and wholesale, international exhibition and others.

Table 12: Advertising methods

| Advertising methods | Number of Enterprises |
|------------------------|-----------------------|
| Brochure and catalogue | 77 |
| Product sample | 56 |
| Website / internet | 55 |
| Domestic exhibition | 50 |

| | |
|-----------------------------------|----|
| Media | 43 |
| Encouraging retail and whole sale | 26 |
| International exhibition | 26 |
| Others | 6 |
| N.a | 79 |

6.3 Competition in the domestic market

As is shown in table13, SMEs suffer from reduced domestic demand, while their competitive position is not strong enough to allow them to take advantage of the devaluation of the Turkish Lira.

They see themselves as less competitive in efficiency of capacity, raw material provision, labour costs, after-sales services, qualified labour, product price, possibilities of product type, level of technological development, sufficiency of productivity. Most of them think that they lack competitiveness in foreign currency policy, government incentives, energy cost, financing possibilities, existence of R&D activities, sufficiency of market share and sufficiency of marketing strategy.

Table: 13 Competition in domestic market

| Competition in domestic market | Yes | No | N.a. |
|--|------------|-----------|-------------|
| Efficiency of capacity | 106 | 49 | 1 |
| Raw material provision | 105 | 50 | 1 |
| Labour costs | 104 | 52 | 0 |
| After-sales services | 98 | 56 | 1 |
| Qualified labour | 97 | 58 | 1 |
| Product price | 96 | 60 | 0 |
| Possibilities of product type | 91 | 63 | 0 |
| Level of technological development | 88 | 67 | 1 |
| Sufficiency of productivity | 88 | 67 | 1 |
| Raw material prices | 87 | 69 | 0 |
| Suitability of international standards | 85 | 70 | 1 |
| Existence of distribution organisation | 73 | 82 | 1 |
| Sufficiency of marketing strategy | 69 | 86 | 1 |
| Sufficiency of market share | 67 | 88 | 1 |

| | | | |
|-----------------------------|----|-----|---|
| Existence of R&D activities | 59 | 95 | 1 |
| Financing possibilities | 57 | 98 | 1 |
| Energy cost | 50 | 105 | 1 |
| Government incentives | 26 | 129 | 1 |
| Foreign currency policy | 20 | 135 | 1 |

6.4 Competitiveness with Enterprises in EU Countries

It is observed that 60-70 % of enterprises on survey see themselves as competitive with European countries on quality of product, labour cost, qualified labour and production capacity. They see themselves as less competitive on the technological level and raw material cost. Most of them think that they lack competitiveness on knowledge of foreign market, transportation costs, energy costs, financing possibilities, foreign currency policy, regulation.

Table 14: Competition with Enterprises in EU Countries

| Competition with the EU | | | | |
|--------------------------------|------------|-----------|----------------|-------------|
| Countries | Yes | No | No idea | N.a. |
| Raw material cost | 57 | 69 | 13 | 19 |
| Labour cost | 111 | 21 | 7 | 19 |
| Quality of labour | 96 | 38 | 6 | 19 |
| Financing possibilities | 17 | 102 | 14 | 19 |
| Foreign currency policy | 14 | 105 | 15 | 19 |
| Knowledge of foreign market | 29 | 87 | 13 | 19 |
| Technological level | 54 | 66 | 14 | 19 |
| Capacity | 88 | 36 | 10 | 19 |
| Product quality | 109 | 26 | 7 | 19 |
| Energy costs | 23 | 94 | 14 | 19 |
| Transportation costs | 28 | 83 | 18 | 19 |
| Difference of regulation | 10 | 93 | 23 | 19 |

6.5 Competitor countries in the domestic markets.

The priority of competitor countries in the domestic markets is given below. According to table 15, the main competitors are from the EU countries, second is Far East Countries and third is USA and East Europe and Balkan countries.

Table 15: Competitor countries in the domestic markets

| Countries | Number of Enterprises | N.a |
|----------------------------------|-----------------------|-----|
| EU Countries | 74 | 19 |
| Far East | 54 | 39 |
| America | 41 | 51 |
| East Europe and Balkan countries | 41 | 52 |
| Others | 35 | 58 |
| Africa | 29 | 64 |

6.6 Competitiveness factors in the domestic and foreign markets

The priority of competitiveness factors in the domestic and foreign markets is given below. Enterprises on survey see themselves as more competitive in production quality, labour cost, product type, qualified labour, etc but less competitive in marketing strategy, organisation and after-sale services in the domestic market.

They see themselves as more competitive in production quality, labour cost, product type, qualified labour, but less competitive in marketing strategy, organisation and after-sales services in external markets.

Table 16: Competitiveness factors in domestic and foreign markets

| Factor of competition | Domestic | | External Markets | |
|-----------------------|----------|----|------------------|-----|
| | Yes | No | Yes | No |
| Production quality | 133 | 20 | 79 | 72 |
| Production type | 101 | 52 | 61 | 90 |
| Qualified labour | 94 | 60 | 60 | 91 |
| Labour cost | 86 | 66 | 67 | 83 |
| After-sale services | 85 | 68 | 42 | 109 |
| Organisation | 73 | 81 | 44 | 107 |
| Marketing strategy | 67 | 87 | 22 | 128 |

6.7 The Competitors in Foreign markets.

Competitors in Foreign markets are lined up on table 17 below according to their importance. According to this the main competitors are the EU countries, the second Far East, third Turkish enterprises, fourth East European and Balkan countries.

Table 17: The Competitors in Foreign markets with level
(Most important=1...6=Unimportant) Competition level

| Countries | 1 | 2 | 3 | 4 | 5 | 6 | 7 | N.a |
|------------------------|----|----|----|----|---|----|----|-----|
| EU countries | 45 | 15 | 5 | 4 | 1 | 0 | 1 | 27 |
| Far east countries | 20 | 13 | 8 | 10 | 4 | 4 | 1 | 38 |
| Turkish enterprises | 15 | 12 | 13 | 7 | 6 | 4 | 1 | 40 |
| East Europe and Balkan | 7 | 12 | 12 | 9 | 6 | 0 | 0 | 52 |
| Other | 6 | 2 | 2 | 1 | 3 | 5 | 15 | 64 |
| America | 3 | 16 | 10 | 4 | 7 | 1 | 0 | 57 |
| Africa | 2 | 2 | 1 | 2 | 3 | 15 | 5 | 67 |

6.8 Competitiveness factors on foreign markets

The priority of competitiveness factors in foreign markets is given below. The enterprises on survey see themselves as more competitive on labour cost, sufficiency of capacity, product quality, product type, qualified labour, suitability of international standards, product price, suitable prices, productivity level, technological level, but

less competitive on government incentives, marketing strategy, bureaucracy, knowledge of foreign market information, R&D and innovation and trade marks.

Table 18: Competitiveness factors on foreign markets

| Factors | Yes | No |
|---|------------|-----------|
| Labour cost | 82 | 49 |
| Sufficiency of Capacity | 75 | 56 |
| Sufficiency of product quality | 73 | 58 |
| Product type | 72 | 59 |
| Qualified labour | 72 | 59 |
| International standards | 69 | 62 |
| Product price | 67 | 64 |
| Suitable prices | 66 | 65 |
| Productivity level | 62 | 69 |
| Technological level | 58 | 73 |
| Efficiency of organisation | 56 | 75 |
| Efficiency of after-sale services | 55 | 75 |
| Trade marks. | 47 | 84 |
| Raw material advantage | 46 | 85 |
| R&D and innovation | 43 | 88 |
| Raw material cost | 43 | 88 |
| Efficiency of advertising and sales | 41 | 90 |
| Knowledge of foreign market information | 38 | 93 |
| Bureaucracy | 25 | 106 |
| Financing possibilities | 26 | 105 |
| Energy costs | 25 | 106 |
| Marketing strategy | 21 | 110 |
| Governmental encouragement | 21 | 110 |
| Foreign currency policy | 15 | 116 |

7. Obtaining of basic Input and Exports

The enterprises obtain their basic input from the private sector, imports, governmental institutions and company resources.

Table 19: Obtaining of basic input

| Company Resources | Governmental institutions | Private sector | Imports | Total |
|-------------------|---------------------------|----------------|---------|--------|
| 12,71% | 12,81% | 40,98% | 33,15% | 100, % |

As seen in the table, 34% of total enterprises on the survey exported their material to foreign markets.

Table 20: Export

| Export | Number of Enterprises |
|--------|-----------------------|
| Yes | 58 |
| No | 97 |
| N.a. | 16 |
| Total | 171 |

Exports by enterprises registered at the Eskisehir Chamber of Industry were at a level of 544 million \$US in 2000 and 639 million \$US in 2001. The export ratio per capita in Eskisehir is higher than the average for Turkey. 53% of exports by chamber members are to EU countries.

The sectoral distribution of exports in 2001 is shown in table 21. Machinery production together with its subindustry and the mining sector has an export share of 60% among Eskisehir Chamber of Industry members.

Table 21: Sectoral Distributions of exports by Eskisehir Chamber of Industry Members

| Sectors | Number of Companies | Export in 2001 | Total share 2001(%) |
|--|---------------------|----------------|---------------------|
| Mining | 8 | 107.543.000 | 16.8 |
| Food Industry | 11 | 13.547.577 | 2.1 |
| Textile and leather industry | 8 | 24.795.422 | 3.9 |
| Wood, furniture and paper industry | 8 | 3.416.920 | 0.5 |
| Chemical, petroleum and rubber industry | 5 | 3.121.339 | 0.5 |
| Clay and rock based industry | 17 | 190.912.207 | 29.8 |
| Metal industry | 23 | 244.495.758 | 38.2 |
| Machinery, equipment and electrical devices industry | 8 | 33.518.832 | 5.2 |
| TOTAL | 110 | 639.625.164 | 100.00 |

8. Technology

8.1 The average age of machinery and equipment

Table 22 below gives average age of machinery and equipment. As seen, most equipment is new.

Table 22: The average age of machinery and equipment

| Average age of machinery and equipment | 0-2 years | 2-5 years | 5-9 years | 9 + years |
|--|-----------|-----------|-----------|-----------|
| 0-%20 | 110 | 74 | 77 | 85 |
| %21-%40 | 29 | 31 | 46 | 19 |
| %41-%60 | 8 | 26 | 12 | 12 |
| %61-%80 | 6 | 7 | 11 | 9 |
| %81-%100 | 5 | 21 | 13 | 33 |

8.2 Information on new technology and innovation.

The enterprises do generally follow information on new technology, and innovation. As seen in table 23, 135 enterprises follow new technology and innovation.

Table 23: Information on new technology and innovation

| Information on new technology and innovation | Number of Enterprises |
|---|------------------------------|
| Yes | 135 |
| No | 27 |
| N.a | 9 |
| Total | 171 |

SMEs have to be helped to better use of research and technology, and Turkey must encourage it.

8.3 Following new technology and innovation in production

85% of the enterprises do follow new technology and innovation in manufacturing.

Table 24: New technology and innovation in production

| Following new technology and innovation in production | Number of Enterprises |
|--|------------------------------|
| Yes | 145 |
| No | 15 |
| N.a. | 11 |
| Total | 171 |

8.4 Using of new technology and innovation.

The enterprises on survey use new technologies and innovation in production. These are internet and international computer network, production with Turkish quality standard, design and production

based on computer (CAD,CAM), ISO 9000 quality certificate and Total Quality Management (TQC).

Table 25: Using of new technology and innovation

| Using of new technology and innovation. | Yes | No |
|---|-----|-----|
| Internet and international computer network | 90 | 63 |
| Production with Turkish Quality Standard | 75 | 78 |
| Design and production based on Computer (CAD,CAM) | 45 | 108 |
| ISO 9000 quality certificate | 35 | 118 |
| Total Quality Management (TQC) | 32 | 121 |

9. Internet

9.1 Internet connection

125 enterprises (73% of total on survey) have Internet connection, 36 of them do not. Advantage of new tools, such as electronic commerce, which are available and important in a global market should be taken. The use of Internet should be encouraged in order to exploit the tremendous opportunities offered by the world-wide computer network to assist start-ups in the development of their activities at very low cost and external contacts with business partners, electronic commerce.

Table 26: Internet connections

| Internet connection | Number of Enterprises |
|---------------------|-----------------------|
| Yes | 125 |
| No | 36 |
| N.a. | 10 |
| Total | 171 |

9.2 Electronic mail

115 of the enterprises in surveys have an e-mail address. 33% of the enterprises use contemporary and cheap communication type of electronic mail.

Table 27: E-mail connections

| Electronic mail | Numbers | Share % |
|------------------------|----------------|----------------|
| Yes | 115 | 67,2 |
| No | 26 | 15,2 |
| N.a. | 30 | 17,54 |
| Total | 171 | 100 |

9.3 Websites

Internet use by SMEs is a measure of the ability to access an enormous wealth of online data, including business-to-consumer e-commerce. 55 of the enterprises (32.8%) have a Website, but 116 of them still do not have a web page. That is, Websites are not used effectively.

Table 28: Website

| Website | Number | Share % |
|----------------|---------------|----------------|
| Yes | 55 | 32,8 |
| No | 36 | 21,3 |
| N.a | 80 | 45,9 |
| Total | 171 | 100 |

10. Standards and Patents

10.1 ISO-9000 Standards

ISO 9000 is a standard for Quality Management Systems, and ISO certification is rapidly becoming mandatory for companies around the world. The ISO 9000 Standard is generic and independent of specific industries or economic sectors. The standard is applied to

tangible products, intangible concepts, or a combination of the two. 35 enterprises use ISO 9000 standards.

Table 29: ISO-9000 Standards

| ISO-9000 Standards | Yes | No | N.a |
|--------------------------------|-----|-----|-----|
| Don't need | 45 | 101 | 25 |
| Using | 35 | 111 | 25 |
| It is necessary but don't use | 30 | 116 | 25 |
| Will use | 21 | 125 | 25 |
| No idea | 8 | 138 | 25 |
| Do not know if it is necessary | 7 | 139 | 25 |
| ISO 14000 | 5 | 131 | 25 |

ISO 14000 deals with environmental management system requirements such as documentation, training, auditing, defining environmental aspects and their impact, performance evaluation, life cycle assessments, leadership, and continuous improvement. It is the intention of the ISO 14000 standard to protect the earth's environment while spurring international trade and commerce. The ISO 14000 guidelines are intended to be practical, useful, and usable for all size companies in manufacturing and service industries. Only 5 enterprises use ISO 14000.

10.2 Application of useful models and patents

The use of patents to measure innovation suffer from several well-known drawbacks. 57 enterprises had applied for trademark registration. 18 enterprises applied for product patent.

Table 30: Application of useful models and patents

| Application of useful models and patents | Yes | No |
|---|-----|-----|
| Product patent | 18 | 132 |
| Production process | 1 | 149 |
| New useful design | 5 | 145 |
| Trademark registration | 57 | 93 |

Simplifying procedures giving SMEs access to easier remedies for infringement should further encourage the use of patents by SMEs.

11. Finance

11.1 Financing sources of investment capital

Financing sources of investment capital are shareholders' sources, private bank credit, government bank credit, private credit institutions and others. As seen in the table, most enterprises have been established using own sources.

Table 31: Financing sources of investment capital

| Financing sources of investment capital | Number of Enterprises |
|---|-----------------------|
| Shareholder's sources | 138 |
| Private Bank credit | 23 |
| Government Bank credit | 17 |
| Private Credit institutions | 8 |
| Others | 1 |

SMEs are predominantly dependent on their own capital and the share of small industry in the overall financial and fiscal incentives is only 4-5 % in Turkey. Banks do not lend money on the basis of the feasibility study or the work plan of the start up SMEs. They only lend money if they can secure the return of the credit by guarantees.

11.2 Financing sources of enterprises in 2000-2001

Enterprises were financed in 2000 – 2001 from shareholder's sources, private bank credit, private credit institutions, Halkbank, family borrowing etc. As seen in table 32, most enterprises were funded from shareholder's sources (51%). The major problem for Turkish SMEs remains access to finance. This problem has become even more acute in the current economic situation. As a state-owned public bank, Halkbank is the only financing institution which is established to offer credit funds for skilled crafts and SMEs. Even in this case debt security remains a problem for SMEs.

Table 32: Financing sources of enterprises

| Financing source of the enterprises | 2000-2001 | |
|-------------------------------------|-----------------------|---------|
| | Number of Enterprises | Share % |
| Shareholder's sources | 128 | %51 |
| Private Bank credit | 36 | %14 |
| Private Credit institutions | 27 | %11 |
| Halk Bank | 16 | %6 |
| Family borrowing | 12 | %5 |
| Eximbank | 10 | %4 |
| Governmental Bank credit | 9 | %4 |
| Turkish Development Bank | 3 | %2 |
| Other enterprises | 4 | %2 |
| Others | 2 | %1 |
| Governmental Institution | 1 | %0.5 |
| Capital markets | 1 | %0.5 |
| Others | 1 | %0.5 |

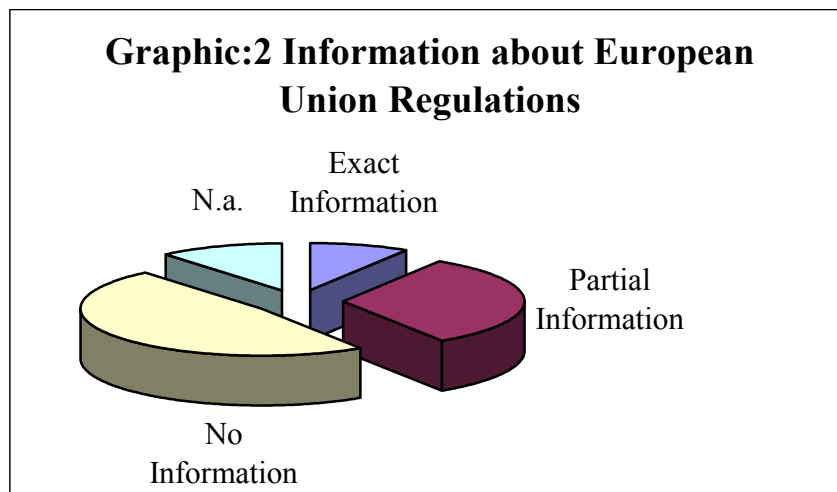
SMEs' liquidity problems are further aggravated by the practice of late payment in commercial transactions, which unfortunately continues to be widespread in Turkey. SMEs are in need of short and long term credits; however, the main factor that restricts utilization of such credits is their high cost.

12. The European Union

12.1 Information about the European Union Regulations

48% of the enterprises are not fully aware of EU Regulations. Only 15 enterprises have the exact information. 55 enterprises have some information. This shows that all enterprises must be informed about EU regulations.

| Exact Information | Partial Information | No Information | N.a. | Total |
|-------------------|---------------------|----------------|------|-------|
| 15 | 55 | 82 | 19 | 171 |



12.2 EU Regulations Related to Products, and Source of Information

Most enterprises follow the EU regulations related to their products using own resources. Other sources of information are special units in their enterprises, chamber of industry, domestic consultant companies, government institutions. 14 enterprises have no search on EU regulations.

Table 33: Search Methods and Sources about EU Regulations

| Search Methods and Sources on EU Regulations | Number of Enterprises |
|---|-----------------------|
| There are no EU Regulations on their products | 13 |
| Followed Themselves | 19 |
| Special Units in their enterprises | 12 |
| Domestic Consultant Companies | 6 |
| Foreign Consultant | 2 |
| Government Institution | 4 |
| Chamber of Industry | 11 |
| No Search | 14 |

12.3 The harmonisation of Regulations Between EU and Turkey on Products

Most enterprises are willing that harmonisation proceed step by step. 15 enterprises' products are up to EU Standards.

Table 34: The harmonisation of Regulations Between EU and Turkey on Products

| The harmonisation of Regulations Between EU and Turkey on Products. | Yes | No | N.a |
|---|-----|----|-----|
| Harmonisation must be done immediately. | 9 | 55 | 107 |
| Harmonisation must be done step by step. | 31 | 33 | 107 |
| Harmonisation must be done at the end of integration. | 7 | 57 | 107 |
| Harmonisation is necessary, but 5 years is not enough. | 14 | 50 | 107 |
| No problem, production is up to EU Standards. | 15 | 49 | 107 |
| No need. | 1 | 63 | 107 |

12.4 The effect of Harmonisation of Regulations Between EU and Turkey on Products

30 enterprises have no idea on the effect of harmonisation of Regulations between EU and Turkey on products. As seen in table 35, 13 enterprises say there will be no effect, 13 a positive effect and 11 a negative effect. 4 said production might cease.

Table 35: The effect of harmonisation of Regulations Between EU and Turkey

| The effect of harmonisation on production | Yes | No | N.a |
|--|------------|-----------|------------|
| No idea | 30 | 36 | 105 |
| No effect | 13 | 53 | 105 |
| Positive effect | 13 | 53 | 105 |
| Negative effect | 11 | 55 | 105 |
| Perhaps production will stop | 4 | 62 | 105 |

12.5 Adaptation to CE Mark

The European quality mark (CE) is getting popular in many countries. As seen in table 36, enterprises in the survey do not use the CE mark.

Table 36: Adaptation to CE Mark on production

| Adaptation to CE Mark on production | Yes | No | N.a |
|--|------------|-----------|------------|
| "CE" includes its product but not use | 16 | 45 | 110 |
| Not use "CE" | 4 | 57 | 110 |
| Its products include other regulations | 13 | 48 | 110 |
| Its products are not end-user but it included other regulations. | 8 | 53 | 110 |
| No idea. | 20 | 41 | 110 |

13. Proposal of partnership from a foreign company

Partnership is important for an enterprise getting "globalized".

Table 37: Proposal of partnership from a foreign company

| Proposal of partnership from a foreign company | Number of Enterprises |
|---|------------------------------|
| Yes | 25 |
| No | 133 |
| N.a. | 13 |
| Total | 171 |

14. Conclusion

For private businesses, new opportunities but also competitive challenges will emerge from enlargement, both in the EU and in the candidate countries. Turkish SMEs are able to take advantage of a larger European Single Market and move into new markets, thus contributing to growth and employment. But for integration of Turkish SMEs in the EU, there will be the need for greater openness to new techniques, to new forms of organisation and co-operation within networks of enterprises, and also for a stronger focus on issues like quality, design, marketing, research and training.

Turkey has to promote SMEs to improve competitiveness, to generate growth and create jobs in the country. Action should be taken in the following key areas to support and encourage SMEs

- Education and training for entrepreneurship and training of employees;
- Cheaper and faster start-up;
- Better legislation and regulation for harmonisation with EU legislation;
- Availability of skills;
- Improving online access and making use of successful e-business models and developing top-class small business support;
- Promoting SMEs with financing sources, taxation and other incentives;
- Strengthening the technological capacity of SMEs;
- Developing stronger, more effective representation of SME interests at Union and national level;
- Access to finance for SMEs at an earlier stage, and finance for expanding and hi-tech firms;
- Access to research and innovation; better use of patents by SMEs; increasing Turkish SMEs' participation in EU programs;
- Improving the visibility of support services;
- Improving public administration; and
- Improving employment and working conditions.

Turkey has to realise the following main macroeconomic goals to create a suitable environment for SMEs in Turkey.

- to control inflation (Inflation imposes the heaviest burden on SMEs and impairs their development and even their survival. Because of inflation; it becomes difficult to restore their eroding capital).
- to promote growth and to maintain a sustainable growth path, and
- to keep the current account balances close to zero in 2002 and beyond.

Structural policies should eliminate the sources of the recent crises. Special emphasis is to be put on reforming the banking sector, enhancing transparency of economic management and increasing the role of SMEs.

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