

EUROPEAN UNIVERSITY INSTITUTE

Department of Law

FRANCESCA MARTINES

THE COOPERATION AGREEMENTS BETWEEN THE EEC AND MAGHREB COUNTRIES  
A Contribution to the Study of the Consistency of EEC Development  
Cooperation Policy

Thesis submitted for assessment with a view towards obtaining the  
degree of Doctor of the European University Institute in Law.

Members of the Commission

Chiar.mo Professor Roberto BARSOTTI (Università di Firenze)  
Professor Renaud DEHOUSSE (European University  
Institute) (Supervisor)  
Professor Francis SNYDER (European University Institute)  
Chiar.mo Professor Antonio TIZZANO (Università di Roma)  
Professor Joseph H.H. WEILER (Harvard Law School)

Florence, January 1993

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*To my mother and  
my father*

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*LIST OF ABBREVIATIONS.*

<i>ACP</i>	<i>Africa-Caribbean-Pacific State (Lomé Convention)</i>
<i>AFDI</i>	<i>Annuaire Francais de Droit International</i>
<i>ASEAN</i>	<i>Association of South-East Asia Nations</i>
<i>CDE</i>	<i>Cahiers de Droit Européen</i>
<i>Com.Int.</i>	<i>Comunità Internazionale</i>
<i>CMLRev.</i>	<i>Common Market Law Review</i>
<i>DCSI</i>	<i>Diritto Comunitario e degli Scambi Internazionali</i>
<i>Dev.P.Rev.</i>	<i>Development Policy Review</i>
<i>EEC</i>	<i>European Economic Community</i>
<i>EC.Bull.</i>	<i>European Communities Bulletin</i>
<i>EC Bull.Sup.</i>	<i>European Communities Bulletin, Supplement</i>
<i>ECR</i>	<i>European Court Reports (official reports of the European Court, English version)</i>
<i>EFTA</i>	<i>European Free Trade Association</i>
<i>EFTA Bull.</i>	<i>European Free Trade Association Bulletin</i>
<i>EJIL</i>	<i>European Journal of International Law</i>
<i>ELRev.</i>	<i>European Law Review</i>
<i>Ford.JIL</i>	<i>Fordham Journal of International Law</i>
<i>Foro it</i>	<i>Foro Italiano</i>
<i>Int.Aff.</i>	<i>International Affairs</i>
<i>Interec.</i>	<i>Intereconomic</i>
<i>Int.Spec.</i>	<i>The International Spectator</i>
<i>LIEI</i>	<i>Legal Issues of European Integration</i>
<i>Mich.L.R.</i>	<i>Michigan Law Review</i>
<i>MJIL</i>	<i>Michigan Journal of International Law</i>
<i>JCMS</i>	<i>Journal of Common Market Studies</i>
<i>JWTL</i>	<i>Journal of World Trade Law</i>

O.J.                    *Official Journal of the European Communities*

RCADI                *Recueil des Cours de l'Academie de Droit International*

RDE                    *Rivista de Diritto Europeo*

RDI                    *Rivista di Diritto Internazionale*

Rev.Dr.Rur.        *Revue du Droit Rural*

Rev.Dr.Suisse      *Revue de Droit Suisse*

Rev.Int.Eur.        *Revue d'Integration Européenne*

Riv.Dir.Eur.        *Rivista di Diritto Europeo*

RIDPC                *Rivista Italiana di Diritto Pubblico Comunitario*

RGDIP                *Revue Générale de Droit International Public*

RMC                    *Revue du Marché Commun*

RTDE                *Revue Trimestrelle de Droit Européen*

VRAS                *Voluntary Restraint Agreements*

Yale L.J.            *Yale Law Journal*

**THE COOPERATION AGREEMENTS WITH MAGHREB COUNTRIES**  
**A Contribution to the Study of Consistency of EEC Development**  
**Cooperation Policy.**

**List of Abbreviation**

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*INTRODUCTION*



*INTRODUCTION*

The starting point of my thesis on the Cooperation Agreements concluded by the Community with Maghreb countries (Morocco, Tunisia, Algeria) is the fundamental inconsistency which exists in the Mediterranean policy of the EEC: the Community is both a partner and a competitor with Mediterranean countries.

In fact, on one hand, the EEC member States and Maghreb countries are mutually dependent, from the point of view of economy and security. On the other hand, they have diverging interests and are in competition in many economic fields.

Third Mediterranean countries represent the third most important market for Community exports (after EFTA countries and the US). It is clear, therefore, that only the steady development of this market can guarantee the absorption of Community exports.

The economic gap between the EEC and Maghreb States underlies many of the social problems currently encountered in the Maghreb: high unemployment, resurgence of religion and a population explosion which increases food requirements and exacerbates the unemployment situation. Moreover, the economic division between Maghreb countries and the Community can be further enlarged by the EEC integration with EFTA States and, on a long term basis, Eastern European States.

The political and social instability deriving from this situation is to be feared by the Community since Maghreb and Mashrak countries are not only producers of raw materials, like natural gaz and oil, but their territories are passages for Community energy supplies.

On the other hand, the Community is the traditional point of reference for these countries. Two thirds of trade from Maghreb is directed to the EEC<sup>1</sup>.

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<sup>1</sup> RICCI, L. *Il Maghreb e l'Europa Com.Int.* 1990, p. 549-567.

In the following paragraphs I will provide some examples of the complementary and conflicting aspects of the economic relationships between the EEC and Maghreb.

As has been mentioned above, the Community is a key market for exports from Maghreb, which are essentially raw materials: minerals and agricultural products.

The export of agricultural products consists of olive oil, wine, tomatoes. The very narrow or even non-existent inter-regional market<sup>2</sup> makes the Community a fundamental outlet for these types of products.

It should be considered, moreover, that the cultivation of some of these products was introduced during colonialism for exclusive use by the colonial mother country. Domestic consumption, therefore, remains very limited which further emphasizes the importance of foreign (Community) markets.

The case of Algerian wine is significant in this respect, if one takes into account that it represents 80% of agricultural exports for this country and that only a very limited percentage of the production is locally consumed<sup>3</sup>.

Agricultural exports, however, are in competition with Community agricultural production.

It should be remembered that the EEC, in particular since the entry of Spain and Portugal<sup>4</sup>, is self-sufficient for the majority of Mediterranean products.

Thus, competition for Community producers is tougher due to

---

<sup>2</sup> Trade between Algeria and Morocco was interrupted in 1974 and was resumed only recently.

<sup>3</sup> Efforts of reconversion in Algeria led to a decrease of vineyards from 365,000 h. in 1962 to 245,000 in 1979. The objective are 210,000 see DUPOUY, A. Le statut juridique de la coopération entre l'Algérie e la CEE Rev. Algerine des sciences jur.ec. et pol. 1979, p. 2 ff.

<sup>4</sup> The adaptation of mechanism required by Spanish and Portuguese memberships will be discussed in Part II, Chapter II of this thesis.

the fact that the mechanisms of common agricultural policy applied to Mediterranean products are less protective than those applied to milk and cereals producers.

Further still, Maghreb products have to face the competition of EEC products also on third country markets. Prices offered by Community producers would in fact be higher than those actually paid if it was not for the difference between Community and international prices being reimbursed through the common agricultural policy.

The Maghreb constitutes a "safety-valve" for the Community surpluses of cereals. For its part, Maghreb is highly dependent on imports to cover its alimentary needs although, until the 50s, both Morocco and Tunisia exported cereals.

One of the causes of this situation is the demographic growth: the Maghreb population is forecast to a approximately 80 million people in 2000 with a high percentage of people less than 25 years old (65% of the population in 1986) and an unemployment rate of 35%.

Food requirements, in particular cereals as the basic dietary intake of the diet in these countries, therefore grow progressively in correlation with the increase of population, and are mainly covered by imports. Low prices applied by the Community (to get rid of surpluses) have discouraged local production. At present, the increase of the population has led to an increase of imports with negative consequences in the balance of payments of these countries, the subsequent raising of prices has led to the much publicized social disorders.

Food self sufficiency, therefore, becomes a key priority for these countries. Although this objective cannot be reached in the immediate future, the achievement of this goal would mean a loss or a shrinkage of a market absorbing at least part of the Community surpluses.

With regard to industrial products<sup>5</sup>, exports from Maghreb States to the Community (textile products) are also on competition in the Community market in relation to both national industry and with imports from other third developing countries. It should, moreover, be taken into account that recent development programmes<sup>6</sup> for Maghreb countries seek an improvement in productivity and a strengthening of exports, which would be fostered by low cost working force. Likewise, the development of a national chemical industry could take advantage of raw materials which, so far, have primarily been exported. This industry could, prospectively, enter in competition with a Community industry.

Algerian, Moroccan and Tunisia workers have traditionally emigrated to the Community, and to certain Member States in particular. For Maghreb countries, emigration means guaranteeing a low price work force for these countries and a outlet for the high levels of unemployment. Moreover, salaries sent to the countries of origin are an important entry source in the balance of payments of these countries.

Recently, however, the worsening of the economic situation has led to an increase of the migratory pressure towards the Community. The latter's Member States are, for their part, facing a period of economic recession and of higher unemployment and are less inclined to open their doors to developing countries' workers whose presence triggers social tensions, which would have otherwise remained quiescent in period of economic stability

From what has been observed above, it must be observed that the level of competition between the economy of the EEC and of Maghreb is not the same in all economic sectors. In some cases

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<sup>5</sup> See KHADER, B. *Le debolezze dell'industrializzazione nel mondo arabo* Politica int. 1988, pp. 135-144.

<sup>6</sup> GAZZO, Y. *Les économies arabes face à la crise: solution libérales et limites* Maghreb Mashrak 1988, pp. 48-67; HARIK, I. *Privatisation et développement à la marocaine: la loi sur le transfert au secteur privé de certaines entreprises publiques* Ibidem pp. 84-101.

competition is not present but rather latent and can become actual as a consequence of an economic recession (see the example of exports of textile products or the case of migrant workers).

It can also be submitted, on the basis of the above observations, that the economic development of Maghreb countries might emphasize or at least make the level of competition which exists in certain sectors significant. If this hypothesis is correct, this would lead to tension between the development of Maghreb and the enhanced competition between Maghreb and the Community. On the other hand it should also be considered that the development of Maghreb countries respond to a fundamental interest of the EEC and is the declared objective of its policy.

It should in fact be taken into account that the main instrument used by the Community to encourage economic and social development of the countries of this geographic area is the cooperation agreement.

The keystone of the agreement is the preferential treatment based on the theory whereby development can be stimulated by an increase of exports. On this basis Maghreb countries are granted unilateral duty free entry of their products in the market of the EEC.

One should ask how the opening of market can be reconciled with the existence of competitive production which could, on the contrary, lead to the adoption of protectionist instruments.

This hypothesis, however, could be mediated by the existence between the two economies of a relation of partnership which, if developed, could contribute to the achievement of the established objective.

A principal aim of this thesis is to examine, from the legal point of view, the various provisions of the cooperation agreement concluded by the Community with each Maghreb countries.

My first question examines whether this inconsistency is revealed in the agreement, or whether the existence of competitive interests can prejudice the relations which the agreement aims at

establishing between the partners.

The second research question relates to the status of these agreements in the framework of the treaty-based relationships of the Community with third countries.

The most sophisticated theory of classification of Community agreements has been made by C. Flaesch-Mougin<sup>7</sup>.

According to this author, the practice of the Community clearly shows that it departed from the typology provided for in the Treaty, as based on the well-known distinction between association and trade agreements.

It soon became clear that these two instruments were not sufficient when the Community started to enlarge its relationships with third countries. A number of political, economic and legal factors led the Community to develop its instruments from a quantitative and qualitative point of view.

The result is a complex system of agreements concluded with third countries throughout the world, differing considerably as regards the flexibility of the application of the instruments expressly provided for in the Treaty in the field of external relations and other which were not conceived to this scope but endorsed by the Court of Justice, whose case-law is particularly revolutionary in this sector.

C. Flaesch-Mougin proposes an hypothetical classification of these agreements.

Community agreements are set up on an axis the opposite ends of which are represented, at one hand, by the absence of relationships with third countries and at the other by accession to the Community<sup>8</sup>.

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<sup>7</sup> Les accords externes de la Cee. Essai d'une typologie Ed. Université de Bruxelles, Bruxelles, 1979.

<sup>8</sup> Correctly, the hypothesis of the accession is not considered by Flaesch-Mougin as a part of external relations, since accession means that the third state becomes member.

Agreements are thus classified on the basis of the links they establish between the Community and the third state.

Agreements limited to the regulation of exchanges of one product or which govern a specific sector of activity are closer to the first end (absence of agreements). Association agreements on the contrary are at the other end (near accession), since those types of agreements establish the closest link that the Community is able to establish with a third state, through the extension of the free circulation of goods, services, capitals and workers and providing for harmonization of some policies such as agriculture.

Other typologies, although elaborated to a lesser extent than that of Flaesch-Mougin have been proposed.

Another typology is suggested by MISHLANI, ROBERT, STEVENS, WESTON<sup>9</sup>.

Their classification regards the relationships of the Community with developing countries<sup>10</sup>.

The criterion for the classification applied by these authors is that of preferential treatment offered by the Community to developing countries. Graphically, the typology is represented as a pyramid.

Agreements providing for a preferential treatment are at the top of the pyramid (Lomé Convention for instance), whereas those providing for a less privileged treatment are closer to the base of the pyramid.

The criterion proposed by Flaesch-Mougin, whereby the agreements are classified according to the extent of relationships between the EEC and third countries, is also applied in a typology

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<sup>9</sup> MISHLANI, P., ROBERT, A., STEVENS, C., WESTON, A. The Pyramid of privilege STEVENS, C. (ed) EEC and Third World: a Survey, Vol. I, Holmes & Meier, London, 1981, pp. 60-82.

<sup>10</sup> Although this classification also cover autonomous actions of the Community (like the SGP) this element does not weaken the validity of this example.

represented by the image of the concentric circles<sup>11</sup>.

The center represents the Community and the circles represent the agreements concluded by the Community with third countries: the closer the circle to the center, the stronger the link established with the Community.

None of these typologies, however, seems to offer a correct representation of treaty-based relationships with the Community.

It is clear that the application of the criterion of intensity of the link and that of preferential treatment lead to two different classifications which represent diverse aspects of the reality.

Each typology could be correct even if their results were different.

Time would modify the classifications, since the agreements reflect the political, economic, social and legal changes and evolutions taking place in the international community. Therefore, the Community's partners and the relationships established between them are subject to a parallel evolution (let us take for example the changes taking place in Eastern Europe and the new agreements concluded with the EEC).

My criticism does not concern the criterion of classification (intensity of relationships or preferential treatment) but the methodology applied which seems to invalidate these typologies.

When speaking of methodology, I refer to the manner of selecting agreements which are included in the same class, or, in other words, to the choice of elements which lead Flaesch-Mougin to the consideration that a number of agreements concluded by the EEC with different partners establish, between contracting parties, relations having the same intensity and can, therefore, be placed in the same position in her hypothetical axis.

Flaesch-Mougin and other cited authors classify the agreements on the basis of the provisions contained therein.

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<sup>11</sup> PESCATORE, P. *La constitution, son contenu, son utilité*, *Rev. Dr. Suisse* 1992, p. 64.

For instance, Flaesch-Mougin classifies, as free-trade agreements, those agreements providing for the elimination of tariff and non-tariff obstacles (customs duties, quotas, measures of equivalent effects), taxation and dumping, provisions related to competition and payments concerning exchanges.

Agreement of association of free-trade<sup>12</sup> are the agreements which, if compared with those mentioned above, contain provisions in the field of services, capital and workers. Agreements designed by Flaesch-Mougin as "accords commerciaux forts"<sup>13</sup> have a more restrictive content since they provide for the elimination of tariff and non-tariff agreements, dumping and aids.

This type of agreement can be distinguished from the classic non-preferential trade agreement ("accord commercial période transitoire"), which provides for the elimination or the reduction of quotas and customs duties.

Mishlani, Robert, Stevens and Weston seem to apply the same methodology when they place the agreements on the pyramid according to the preferential treatment established in the agreements.

Thus, for instance, in order to place the agreements with Maghreb countries after the Lomé Convention and after those concluded with Greece, Spain and Portugal and before the agreements with Mashrak countries, from the top of the pyramid, they consider the provisions of the agreements establishing preferential treatment (abolition of duties, quotas, measures of equivalent effect for industrial products and duties reduction for agricultural products) and financial aid contained in these agreements.

However, this method and the classification deriving from its application, frames the treaty-based relationships between the Community and third countries in a fixed pattern which does not correctly represent its complexity.

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<sup>12</sup> See p. 210.

<sup>13</sup> See p. 206.

All these studies, in fact, omit the consideration of the question of the interpretation of the agreement provisions.

If the classification of agreements is based on their content, two agreements with identical provisions will be included in the same class.

If, however, the provisions of these two agreements are interpreted in a dissimilar manner, the relationships that the agreements establish between the Community and the two third countries will have a different value, as regards the intensity of the links and as regards the preferential treatment if this is established.

A different interpretation would affect the classification of the agreements.

Let us give an example of this thesis.

Supposing that the Community concludes two agreements with two countries prohibiting the application of customs duties, quotas and measures of equivalent effect applied to the trade of industrial products and prohibiting discrimination in the field of social security for workers regularly employed in each country being extended to the members of their families.

In accordance with the usual practice, none of these agreements clarifies the meaning of "measures of equivalent effects" and "family" of the workers.

If one applies the method of Flaesch-Mougin, i.e. if one classifies the agreements according to their content, than the agreements in our example would be included in the same category, since they contain identical provisions and would create links having the same intensity between the contracting parties.

Let us now presume that a restrictive interpretation of the notions of measures of equivalent effect and of family is applied only to one of the two agreements. For example, measures of equivalent effect would cover only those regulations which discriminate against imported products compared to national ones and the notion of family would not be extended to parents.

In this case is unlikely that the two agreements could be included in the same category since the level of liberalization of exchanges and the level of integration established by them would be highly different.

One could argue that the interpretation of the provisions can modify the classification of agreements having the same content, but an agreement of global cooperation establishing a preferential trade regime creates closer relationships than a non-preferential agreement limited to few products.

This observation does not seem to undermine the thesis submitted.

Although a priori analysis of the content of the agreements could identify two or three general categories of agreements, a complete typology of Community agreements based on this methodology would offer a limited and partial vision of the reality it tries to classify.

There exist different provisions in the cooperation agreements whose range can significantly vary according to the interpretation that is offered.

The second aim of my analysis will therefore be the examination of these provisions to verify their possible interpretation and how such different interpretations can modify the range of preferences and of advantages granted by the Community to its Mediterranean partners.

This thesis is therefore based on two hypothesis.

The first one is that the competition between the EEC and Maghreb cannot have but a negative influence upon the agreement.

The second hypothesis is that the interpretation of its terms affect the relationships established between the parties under the agreement.

It can also be submitted that the two hypotheses are interrelated.

As far as interpretation is concerned, the question is the following "which elements affect the interpretation of a

provision?" This should correctly be determined according to the scope pursued by the agreement, but it can also be submitted that the interests of one of the contracting parties could prevail and thus the provision could be interpreted to favor the latter.

I will go back to this hypothesis in the concluding observations.

The choice of examining cooperation agreements with Maghreb is not accidental.

These agreements in fact seem to gather a number of important elements which make them a good example for the type of analysis suggested:

- the agreements have been "experienced" since they were concluded more than 15 years ago;

- these countries are located in a particular geographic area and have a strategic importance both as a source and a passage for Community's oil supplies;

- the level of complementarity and competition between the economies is very high.

Although cooperation agreements were concluded separately by the Community with each Maghreb country, they were conceived as part of the same system and pursue the same objectives. This implies that their provisions are practically identical.

In this thesis, therefore, I will refer to the Articles of the Cooperation Agreement concluded with Morocco. The provisions of the other agreements will be referred to only when they substantially differ from those contained in the agreement with Morocco.

The thesis is divided into four main parts.

In the First Part I will analyze the legal framework of the agreements starting from the question of the choice of the legal basis, concluding procedures, the creation of common institutions and the status of the agreement and of derived legislation in the

Community legal order.

I will then discuss the provisions regulating the relationships between the parties in the field of trade (Second Part), of technical and financial cooperation (Third Part). Finally, the Fourth Part will consider the provisions concerning safeguard and derogating measures.

In the field of trade and financial cooperation, the agreement endorses the principle of "trade and aid" sponsored at international level (UNCTAD) by developing countries and adopted by the Community as keystone to its development cooperation policy<sup>14</sup>.

In the field of trade this principle means that a non-reciprocal preferential treatment is granted by the EEC to products originating from developing countries.

In the Cooperation Agreement this requires the elimination of customs duties, quotas and measures of equivalent effect for industrial goods and the reduction or suspension of customs duties for agricultural products.

The first part of the thesis will verify, firstly, the interpretation of provisions regulating trade in industrial goods, taking as its reference point the relevant Community case-law, and secondly, it will discuss the provisions applying to agricultural trade in order to ascertain the role of the common agricultural policy.

The trade regime will be finally analyzed in relation to the rules governing the origin of products, that is the access to the preferential treatment.

The provisions of the Cooperation Agreement and the Financial and Technical Protocols regulate questions concerning for example the choice of beneficiaries, sectors of application and the preparation of projects. This part of the thesis will also discuss

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<sup>14</sup> <sup>14</sup> See for example the system of generalized preferences and the financial aid to non-associated developing countries of Asia and Latin America.

problems related to the sources of financing, i.e. the Community budget and the European Investment Bank. A study of the rules on the management of aid will offer the opportunity of drawing some conclusions on the roles of the two institutions in the field of development cooperation policy.

The Cooperation Agreements with Maghreb countries also contain provisions in the field of labor, whereby workers of the Contracting Parties are granted non-discriminatory treatment as regards pay, working conditions and social security.

The questions examined in this part of the thesis mainly concern the range of application of the non discrimination principle and the conditions of maghreb workers in relation to workers of other third countries in the Community.

The fourth part of the thesis will discuss the possibility of deviating from the provisions of the agreement by means of safeguard and derogating rules.





## A) THE LEGAL FRAMEWORK OF THE COOPERATION AGREEMENTS.

## 1) Title of the Agreements.

The agreements concluded between the Community and the Maghreb and Mashrak countries are entitled "Cooperation Agreements". The term "cooperation" has been used very commonly and extensively by the Community in its treaty relationships with third countries, in particular after 1972<sup>15</sup>.

Are cooperation agreements a new type of agreement<sup>16</sup>?

Practice<sup>17</sup> clearly shows that the term cooperation is not used to describe a specific type of relationship: in fact the features

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<sup>15</sup> From an examination of Community practice from 1957 to 1972 it emerges that the term cooperation does not appear in the title of any agreement with the exception of that with Lebanon of 1968 (Agreement on Trade and Technical Cooperation) Q.J. L 244 1973 (legal basis 113,114).

<sup>16</sup> In the field of external relations the term cooperation is used in two Articles of the Treaty: Articles 230 and 231 providing for the establishment of cooperation between the Community and, respectively, the Council of Europe and the Organization for European Economic Cooperation. One can note that the French and Italian text of Article 231 use the term "collaboration", "collaborazione" as opposed to cooperation. This suggests that the term cooperation has a very general meaning. In practice cooperation with those Organisations has taken the form of the exchange of information, establishment of contacts and the creation of permanent delegations of the EEC to these organisations.

<sup>17</sup> One can mention the Cooperation Agreement with the member States of the Cartagena agreement (113-235) and with the countries party to the General Treaty on Central Economic Integration and Panama (see Q.J. L 153 1984 and Q.J. L 172 1986). Other agreements contain the term cooperation in the title: the Agreement concluded with Poland on Exchanges and Commercial and Economic Cooperation, the Framework Agreement for Cooperation with Brazil (113-235), the Agreement for Commercial and Economic Cooperation with India (113-235) (see J. L 339 1989, Q.J. L 281 1982 and Q.J. L 328 1981); the Commercial Cooperation Agreement with Bangladesh (113) and Sri Lanka (113) (Q.J. L 319 1976 and Q.J. L 247 1975); the Framework Agreement for Commercial and Economic Cooperation with Canada (see Q.J. L 260 1976).

of these agreements vary, some are merely trade agreements, whereas others provide for the establishment of relations in other economic fields or in the framework of development cooperation. It is clear, therefore, that a classification of the agreements concluded by the Community with third countries cannot be based on a formal criterion (the title of the agreement), but must take account of more substantive criteria such as the objectives and the content of the agreement<sup>18</sup>.

Although the Treaty does not require a formal classification of agreements<sup>19</sup> and since the same term is used to describe different types of relations, it should, however, be asked whether the term cooperation has any specific meaning, and why it is so commonly used.

In particular, some doubts may be expressed about the irrelevance of the title used for agreements concluded under Article 238. Here the terminology may be in fact more relevant. As will be seen later, Article 238 does not define the field of action of the Community while it provides for a type of agreement having certain characteristics, it is silent about its content.

In other words, one should consider whether the cooperation agreement is to all intents and purposes an association agreement under a different name or whether changing the "description" also

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<sup>18</sup> The qualification of an act according to its content and the irrelevance of how it is formally defined are general principles applied by the Court of Justice of the EEC for Community acts (See joined cases 16, 17/62 Confédération nationale producteurs fruits et légumes v. Council 14.12.1962 (1962) ECR p. 471, the same could be applied to international agreements concluded by the Community.

<sup>19</sup> See Written Questions 731/77 and 732/77 Q.J. C 88 1978 p.2-4. Article 113 lays down the Community's competence in the field of commercial policy. Once it is established that the Community can conclude commercial agreements it is of little relevance from a legal point of view whether the agreement is qualified as trade cooperation or as only a commercial agreement. Agreements concluded with third countries can also be based on Article 235 and on the internal competence of the Community (see *infra*) and in these cases the Community seems to enjoy the widest freedom in the appellation of the agreements concluded on these bases.

reflects a modification of the content of the agreement.

The practice seems oriented, also in the context of Article 238, towards a certain flexibility in the title of the agreements concluded under Article 238, for instance in the most recent agreements concluded with some East European Countries called "Europe Agreements"<sup>20</sup>.

It should be noted that the description of the agreement is often the result of a request by the partners of the Community. This is the case of Maghreb agreements, where the use of the term cooperation is due to a precise request by the Community partners who wished to underline their complete equality with the Community and to mark the refusal of the colonialist implication contained in this term due to the "precedent" of the association based on Part IV of the Treaty and on the Declaration of Association annexed to the Treaty regarding Morocco and Tunisia<sup>21</sup>.

We can presume that, with the term cooperation, the Contracting Parties wished also to underline the different type of relations established with these agreements as compared with those concluded in 1969, which were also based on Article 238.

When the "precedent" of association under Part IV of the Treaty does not exist, association may be opposed to the term cooperation to indicate a closer form of relationship<sup>22</sup>. This is the

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<sup>20</sup> The title "marks the importance of the political initiative they represent". Communication of the Commission to Council and Parliament Association Agreements with the Countries of Central and Eastern Europe: a General Outline Europe Documents, 1646/47 7.09.1990 p.2

<sup>21</sup> See European Parliament debates, session 77/78 O.J. 224 1977 p.208 and in particular the intervention of Cheysson (Commission) p.211.

<sup>22</sup> Such a differentiation was made in the doctrine of the early seventies. It was suggested to title as association agreements only those agreements which established complex legal engagements (future accession, customs union, complex institutional structure). In the other cases the use of the term cooperation was suggested. See PESCATORE, P. Contribution to the discussion TIMMERMANS, VOLKER (eds) Divisions of Powers between the Community and its Member

meaning that is ascribed to the association established between the Community and some Central and Eastern European Countries (Poland, Hungary and Czechoslovakia)<sup>23</sup>.

## 2) The Legal Basis.

### 2.a) The Meaning of Legal Basis for Action and in the Field of External Relations.

All the acts adopted by the Council or the Commission must indicate their legal basis, i.e. the Article(s) of the EEC Treaty on which the Community authority to act is founded. This is laid down in Article 190 of the EEC Treaty which requires that "regulations, directives and decisions of the Council and of the Commission shall state the reasons on which they are based.."

Although the above-mentioned provision does not expressly refer to the legal basis, the Court has clearly ruled that this forms an "integral part of the statement of reason which shall indicate the element of facts and of law on which an act is founded"<sup>24</sup>. The acts through which the Community approves the

States p.71. TORRELLI, L'Association avec la Grèce L'Association à la Cee Ed. Université de Bruxelles, Bruxelles 1970 p.29. Moro Report European Parliament Document n.134 28.11.1966 cited in footnote (37) COSTONIS, The Association with Nigeria Ibidem p.237.

<sup>23</sup> In the preamble to these agreements the Contracting Parties proclaim their wish to strengthen and widen "the relations established in the past notably by the Agreement on Trade and Commercial and Economic Cooperation..".

<sup>24</sup> See case 24/62 Germany v. Commission 4.7.1963 (1963) ECR p. 63. HEN, La motivation des actes des institutions communautaires CDE 1977 pp.49-91; TIZZANO, La Corte di Giustizia delle Comunità Europee Jovene, Napoli 1967 pp. 336-341. The absence of legal basis however, can be corrected by the elements of the whereas when the illustration of the facts and aims can clearly indicate the legal basis. See case 112/80 Dinbeck v. Hauptzollamt Frankfurt 5.5.1981 (1981) ECR p.1095, grounds 19 and 20. The absence or the wrong indication of the legal basis are grounds for annulment of Community acts under Article 173 as an infringement

agreement concluded<sup>25</sup> with third countries make no exception.

The technical-legal rationale of the obligation to indicate the legal basis is derived from the fact that the Community enjoys only a "compétence d'attribution" whereby it can act within the limits of the powers and competencies established in the Treaty.

The Community can therefore act in a specific area only if it is possible to find an Article in the Treaty which confers such an authority to the Community.

It shall, however, be considered that the sphere of the Community competencies and powers is not clearly defined in the

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of essential procedural requirements. The Court has, however, declared an act void only when the legal basis which has been incorrectly referred to modifies the voting procedures. Thus decision 87/369 whereby the Council concluded the International Convention for the Harmonized System of Nomenclature of Goods based on Articles 28, 113 and 235 was not quashed because both provisions required unanimity in the Council (the decision was adopted before the entry into force of the SEA which has modified the voting procedure of Article 28). On the contrary Regulation 2096/87, on the temporary admission of containers, founded on Articles 28 and 235, and adopted after the entry into force of the SEA, was declared void because Article 235 requires a different voting procedure than Article 28. See cases 165/87 Commission v. Council 27.09.1988 (1988) ECR p.5545, 275/87 Commission v. Council 2.02.1989 (1989) ECR p. 259.

<sup>25</sup> In Community law the term used is "conclusion" of agreement. Since the entry into force of these acts (usually a regulation or a decision) the agreement becomes integral part of the Community legal order. There is not need of an incorporation of agreements into a Community Act. See case 181/73 Haegemann v. Belgium 30.4.1974(1974) ECR p. 449. TIZZANO, A. Nota alla causa 181/73 Foro it. 1974 p.311. See PESCATORE, P. L'application judiciaire des traités internationaux dans la Communauté Européenne et dans les Etats Membres Mélanges Teitgen Pedone, Paris, 1984, pp.391-409, p. 394

Treaty<sup>26</sup> and, moreover, this has been enlarged by the doctrine of implied powers and through the application of Article 235<sup>27</sup>. It shall be remembered that the Treaty expressly gives treaty-making power to the Community in Articles 113<sup>28</sup>, 238 and, since after the entry into force of the Single European Act agreements can be concluded in the field of research and technology (Article 130N)

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<sup>26</sup> "...the sphere of Community competence is defined by reference to a combination of elements to be assessed; it is based on the subject dealt with as well as on the action the Community may undertake and the powers which have been conferred upon it for that purpose" TIZZANO, A. *The Powers of the Community Commission of the European Communities Thirty Years of Community Law* European Perspectives, Luxembourg 1981 pp.43-67 p. 43.

<sup>27</sup> See TIZZANO, A. *Lo sviluppo delle competenze materiali delle comunità europee* RDE 1981 pp. 139-210.

<sup>28</sup> The extent of the Community competence to enter into agreements with third countries on the basis of this Article depends upon the interpretation given to the notion of commercial policy. The Court has so far adopted an extensive interpretation of this notion. See opinion 1/75 11.11.1975 ECR (1975) p. 1355; 1/78 4.10.1979 (1979) ECR p. 2871. The extensive interpretation has been confirmed more recently in case 45/86 26.03.1987 Commission v. Council (1987) ECR p.1493, case 275/87 op.cit. (containers), Greece v. Council 62/88, op.cit. The exclusive competence of the Community in the field of commercial policy, based on joined cases 37,38/73 13.12.1973 (1973) ECR p.1609 and on opinion 1/75, op.cit. was put into question by case 174/86 Bulk Oil v. Sun International 18.02.1986 (1986) ECR, p. 559. The Court afterwards re-confirmed, although in an obiter dictum, the exclusivity of the commercial policy (case 127/87 Commission v. Greece 21.06.1988 (1988) ECR p.3333. See for criticisms of the extensive interpretation of the commercial policy GILSDORF, *Portée et délimitation des compétences communautaires en matière de politique commerciale* RMC 1989 pp.195, DEMARET, P. *La politique commerciale: perspectives d'évolution et faiblesses présentes* SCHWARZE, SCHERMERS (eds.) Structure and Dimensions of European Community Policy Nomos, Baden-Baden 1987 p.83 where the author underlines the necessity of defining the respective fields of action of Member States and the Community and finds in the "evolutionary" character of commercial policy an obstacle to this operation.

and of the environment (Article 130R<sup>29</sup>). The Community's power to conclude agreements with third countries also derives<sup>30</sup> from the competence to adopt internal rules (theory of the parallelism between internal and external competence<sup>31</sup>). Article 235 is also,

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<sup>29</sup> See on the specific subject CONSTANTINESCO, V. *Les compétences de la CEE et de ses Etats Membres à travers l'Acte Unique* DEMARET, P. (ed) Rérelations Extérieures de la Communauté Européenne et marché intérieur: aspects juridiques et fonctionnels Story-Scientia, Bruxelles 1987 pp. 65-90, p.69 ff. and EHLERMANN, C.D. *L'Acte unique et les compétences externes de la Communauté: un progrès?* *Ibidem* pp. 79-90. Both the authors discuss the question of whether, on the basis of the theory of parallelism, Article 100A can be used as legal basis agreements with third countries concluded by the Community. See CONSTANTINESCO p. 68 and EHLERMANN p.88. Agreements for scientific cooperation were, however, concluded on the basis of Article 235 even after the entry into force of the Single European Act. See the Cooperation Agreement with Austria on research related to advanced materials in O.J. L 276 1988. This reference seems contrary to the holding of the Court in case 45/86, op.cit.

<sup>30</sup> See case 22/70 Commission v. Council 31.03.1971 ECR (1971) p.263; joined cases 3,4,6, /76 Kramer and others, 14.07.1976 (1976) ECR p.1308, opinion 1-76 26.04.1977, ECR (1977) p. 754. There is a vast literature on the subject which is impossible to cite here. See BOULOIS, J. *La jurisprudence de la Cour de Justice dans les relations extérieures* RCADI 1978 (II) PESCATORE, P. *External Relations in the case-law of the Court of Justice of the European Communities* CMLRev 1979 pp. 615-645 KOVAR, R. *Les compétences implicites: jurisprudence de la Cour et pratique communautaire* DEMARET, P. (ed) Rérelations Extérieures op.cit. pp. 15-36. A closely related question is that of the division of treaty-making power between the Community and the Member States. The question will be analyzed more extensively later.

<sup>31</sup> The doctrine does not use uniform terminology. For instance competence and power are often used as synonyms. I consider that is better to distinguish the two as follows: competence refers to the authority of an entity (Community or Member State) to act in a certain subject matter, whereas capacity is the power or the authority to use a certain instrument (agreement, rules applicable internally) through which the entity exercises its competence. Thus the Community may have the authority to act in a specific area only through the adoption of internal rules ("internal" competence) but not the power to conclude agreements with third countries on the same matter ("external competence). Therefore it is more correct to say that the Court of Justice has extended the

as mentioned above, a possible legal basis for Community agreements<sup>32</sup>.

There is also a political-institutional consideration which should be considered. The choice of legal basis determines the instruments available to the Community (regulations, directives, programmatic acts, consultation, agreements with third countries) and the procedures which must be followed (voting majority in the Council, consultation of other institutions).

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power of the Community (from internal norm-setting power to treaty-making power) more than its competence. See WEILER, J.H. *The Transformation of Europe* Yale L.J 1991, pp. 2403-2482, p.2416. For a distinction between competence and power see CONSTANTINESCO, V. Compétences et pouvoirs de la CEE ..., NEUWALL, N. *Joint Participation in International Treaties and the Exercise of Power by the EEC and its Member States: Mixed Agreements* CMLRev 1991, pp. 717-740, p. 718. For a distinction between capacity and competence see LACHMANN, P. *International Legal Personality of the EC: Capacity and Competence* LIEI 1984, pp.3-21; BIEBER, R. seems to use the term power as synonym of competence *On the Mutual Completion of Overlapping Legal System: the Case of the EC and the National Legal Orders* ELRev 1988, pp.147-158.

<sup>32</sup> The possibility to refer to Article 235 as a legal basis for Community agreements with third countries was sanctioned by the Court in the ERTA case, op.cit. The difference between the theory of parallel powers and application of Article 235 is that in the former case the Community already has competence to act, although only internally, in a certain field, in the latter case the Community competence is extended to a new field of action. Article 235 has been used together with Article 113 in the case of agreements of cooperation with some countries in Latin America, Asia and more recently in Eastern Europe and the States of the Gulf Cooperation Council. FERNANDEZ SOLA, N. *Relations avec les Pays de l'AELE et de l'Est, aspects Juridiques* RMC 1990, pp.208-216; LUCRON, C.P. *Communauté Européenne et pays du Golfe* RMC 1989, pp.527-535. MARESCAU, M. A general survey of the current legal framework of trade relations between the European Community and Eastern Europe MARESCAU, M (ed.) The Political and Legal Framework of Trade relations between the European Community and Eastern Europe Martinus Nijhoff, Dordrecht, 1989, pp.3-20

Disputes between the Community and its member States and amongst the Community institutions themselves, therefore arise<sup>33</sup> in relation to the choice of legal basis, particularly since the entry into force of the Single European Act<sup>34</sup>.

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<sup>33</sup> The cases before the Court concerning the question of the legal basis can be distinguished between 1) claims of the Commission versus the Council where the former contested the choice of legal basis requiring unanimity in the Council and 2) appeals of Member States contesting the legal basis requiring the majority in the Council because the Article of the Treaty on which the act was founded was insufficient. When a specific legal basis is not sufficient a second provision may be referred to enlarge the Community authority to act. The second legal basis suggested by the Council or the Member States in the cases cited above are Article 235 or 100 or, Article 130S. It is not by chance that these articles provide for a voting procedure by unanimity in the Council. For cases of the Commission versus the Council see 165/87, (tariff nomenclature) op.cit.; 275/87, (containers), op.cit., 242/87 30.05.1989 (1989) ECR p.1425 (Erasmus); case 131/87 16.01.1989 (1989) ECR p. 3743 (100/43 trade in animal glands); 300/89 11.06.1991 (1991) nyr (choice between Articles 100A and 130S). See also, as regards inter-institutional disputes over legal basis case 70/88 European Parliament v. Council, 22.05.1990 (1990) ECR p. 2041. For the claims of the Member States see 131/86 UK v. Council, 23.02.1988 (1988) ECR p. 905 (hens kept in battery cages), 68/86 UK v. Council 23.02.1988 (1988) ECR p.855 (hormones), joined cases 51/89, 90/89, 94/89 UK, France and Germany v. Council 11.06.1991 nyr (Comett II/ Article 128 no sufficient legal basis). In Greece v. Council, Greece required the annulment of regulation 3955/87 concerning the import regime of agricultural products from third countries after the Chernobyl accident because Article 113 did not constitute a sufficient legal basis because the act pursued aims of protection of health which could not be covered by Article 113 alone. See ROBERTI, M. La giurisprudenza della Corte di giustizia sulla "base giuridica" degli atti comunitari Foro It 1991, Parte IV pp.99-120. ROSSI, L. L'armonizzazione fiscale dopo l'Atto Unico: problemi di base giuridica DCSI 1989, 247-251. PILLITU, A.P. Sulla "base giuridica" degli atti comunitari in materia ambientale Foro It 1991, Parte IV, pp.370-383.

<sup>34</sup> The large number of cases decided by the Court after the Single European Act can be explained by the fact that the SEA not only introduced a number of significant amendments concerning majority voting (since before the SEA the practice was to reach an agreement by consensus even when the Treaty requires majority voting) in the Council but modified the approach to voting. Majority voting was not an aim per se but was conceived of as functional to the construction of the internal market. See

Let us illustrate this with an example. Article 113, one of the most discussed provisions of the EEC Treaty, lays down the Community (exclusive) competence to act in the field of commercial policy. However, this notion is not defined in the Treaty. This means that a broad interpretation of this notion will narrow down the scope of action left to the Member States.

Moreover, the reference to Article 113 means that the Council will vote by qualified majority, depriving a Member State of the possibility of vetoing a measure contrary to its national interests.

Finally, in the field of external relations, there is another consequence ensuing from the choice of the legal basis.

The choice may also have a symbolic significance. The case of Yugoslavia can provide an illustration. A five year non-preferential trade agreement was concluded for a duration of three years in 1973 with Yugoslavia<sup>35</sup> on the basis of Articles 113 and 114, it was then renewed in 1975 for a period of five years. In 1980 a new agreement was concluded on the model of the other Cooperation Agreements with the Mediterranean countries. This agreement went even further, since it included provisions on cooperation in the field of environment and fishery policy. The adoption of measures for the protection of investments was also envisaged<sup>36</sup>. A main difference concerned technical cooperation financed only with loans from the European Investment Bank. When the Community concluded the agreement, it drew its legal basis from

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DEHOUSSE, R. 1992 and Beyond: the Institutional Dimension of the Internal Market Programme LIEI 1989 pp. 109-136. See also WEILER, J.H. The Transformation of Europe Yale L.J. 1991, pp. 2403-2483 p. 2461 where the author notes "today, an actual vote by the majority remains the exception. Most decisions are reached by consensus. But reaching consensus under the shadow of the vote is altogether different from reaching it under the shadow of the veto".

<sup>35</sup> Q.J. L 224 1973.

<sup>36</sup> See Articles 4 and 5.

the EEC Treaty<sup>37</sup> as its legal basis. The reasons for this choice can be found in the fact that Yugoslavia, in view of its status as a non-aligned country, did not want to be included, formally at any rate, within the framework of Mediterranean policy. Alternatively, the reference to Article 238 could have suggested a choice in this direction<sup>38</sup>. It is interesting to note that the interim agreements which provided for the application of trade relations and financial cooperation pending the entry into force of the Cooperation Agreement (which, being mixed, required the ratification by the Member States' national Parliaments) were founded on Article 113 and Article 235<sup>39</sup>, respectively, which confirms the option to avoid Article 238.

The development of the relationships with the Community and its Member States and a change in the political climate contributed to the removal of the symbolic obstacle presented by Article 238. In 1987 the second Financial Protocol was concluded on the basis of Article 238<sup>40</sup>.

Another case related to the symbolic value of the legal basis is the agreement of 1975 with Israel based on Article 113 even if it is not merely restricted to trade relationships.

Presumably, this can be due to the reticence of the Council to conclude an association agreement with Israel as suggested by

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<sup>37</sup> Q.J. L 41 1983.

<sup>38</sup> It should be taken into account that a high number of joint-ventures contracts linked European and Yugoslavian firms and that Yugoslavian economy was organized as a market economy where the State did not exert direct control over enterprises. See GOLDSTAIN, A. The Relations of Yugoslavia and the EEC CMLRev 1981 pp. 569-587.

<sup>39</sup> See Q.J. L 130 1980.

<sup>40</sup> See Q.J. L 389 1987. Following the recent events in Yugoslavia the agreement was suspended by a decision of the Council and the representatives of Member States meeting within the Council, see Q.J. L 315 1991.

the Commission and the Parliament<sup>41</sup>.

The conclusion of an agreement which extended trade cooperation to include provisions on investment and transfer of technology can be seen as a compromise between the different points of view among the Community institutions.

The adoption of the Financial and Technical Protocol in 1978,<sup>42</sup> on the basis of Article 238, marked the definitive alignment of the relationships with Israel to the Mediterranean global policy. This also implies that the renewal of the financial and technical cooperation is submitted, after the amendments of the Single European Act, to the new procedural requirements laid down in Article 238. Consequently, as will be discussed later, the adoption of the third financial Protocol was deferred by the European Parliament's refusal to give its assent.

Further examples of the political and symbolic meaning of Article 238 can be found in the agreements concluded with Poland, Czechoslovakia and Hungary, replacing (and improving) the previous agreements based on Articles 113 and 235.

As will be argued later, the modification of the legal basis of the Agreements with European countries, seems more an indication of the different type of relations than a requirement due to the subjects matters covered.

## 2.b) Article 238.

Article 238 lays down the legal basis for the conclusion of association agreements between the Community and a third State, a union of States or an international organization. The association agreement is not defined in the above mentioned provision which simply states that such agreements involve "reciprocal rights and

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<sup>41</sup> See VITTA L'accordo tra la Comunità europea e lo Stato di Israele TIZZANO, A. La politica Mediterranea della Cee Napoli, ed. Scientifica 1981, p. 76-77.

<sup>42</sup> Q.J. L 270 1978.

obligations, common action and special procedures."

Let us examine the above mentioned attributes indicated in Article 238 to qualify association agreements.

Reciprocal rights and obligations. This seems to be a feature characteristic of all international agreements. The question arising in this context is whether the preferential treatment granted only by one Contracting Party contradicts the letter of Article 238.

In the case of the agreements which are the objects of this study, for example, as will later be discussed in more details, only industrial and agricultural products imported into the Community from Maghreb countries are granted the abolition of customs duties, charges of equivalent effect, quotas and measures of equivalent effect. This does not mean that no obligations placed upon the Maghreb countries as regards the importation of products from the Community. Maghreb countries are in fact obliged to apply "the most-favored nation clause" to the Community in the field of trade. Other duties imposed on the Community partners concern the consultation or notification obligations laid down in certain provisions, as in the case of a derogation from the most-favored nation clause. Corresponding rights and duties are established for some of the provisions on social cooperation or in those establishing common institutions.

Practice reveals that Article 238 covers preferential agreements (in the framework of the development cooperation policy of the Community) and non preferential agreements with European countries (Agreements with EFTA countries, while not yet in force still presumably founded on Article 328).

Common action. This is often connected with the power of adopting recommendations or decisions by the common institutions created by the agreement. This very general term also suggests<sup>43</sup> cooperation between the parties, although this leaves room for very

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<sup>43</sup> CAPOTORTI, F. Relazione introduttiva La politica Mediterranea.. op.cit.

wide interpretation. For instance, in the case of the EEA Agreement the Contracting Parties contracted to strengthen cooperation, inter alia, in fields such as research and technological development, the environment, social policy and consumer protection. This Cooperation might take different forms such as the participation of EFTA states in Community framework programmes, or the establishment of joint activities in specific areas (see Article 78-88).

Special procedures. This expression does not refer to the procedures of negotiation which are indicated in another Treaty Article (228). There is common agreement in legal doctrine that this term is intended to mean the establishment of common institutions. Common institutions have also been established in commercial agreements. If, therefore, institutionalization per se does not characterize association agreements, it can be argued that a more complex institutional structure may, on the contrary, distinguish association agreements from other agreements based on a different legal basis.

This observation is founded on the examination of actual practice, which shows that association agreements usually set up an Association or Cooperation Council composed of members of the EEC Council or of representatives of Member States, members of the Commission and members of the government of the other contracting party, a Committee, and in some cases, a Parliamentary Assembly composed of representatives of the European Parliament and the Parliament of the other contracting party.

The establishment of this institutional structure is the consequence of other characteristics of the association agreements, such as its indefinite duration and the framework character of such agreements, which require "adjustments" to changing circumstances and the adoption of decisions or other acts for the administration

of the agreement<sup>44</sup> (see Article 5 of the Cooperation Agreement with Morocco which provides that the Cooperation Council periodically defines the guidelines of cooperation and Article 32 concerning the adaptation of the tariff nomenclature).

Thus it is clear from what has been observed above that none of these terms can really clarify the content of the term association<sup>45</sup>.

It is in fact commonly agreed in the literature that these features are not capable per se to provide a basis for distinguishing association agreements from other agreements founded on a different legal basis. As mentioned above, while in other cases the legal basis identifies the field of action which is the object of the agreement<sup>46</sup> there is nothing in Article 238 which indicates the possible content of association agreements.

Article 238 does not lay down a competence for the Community to act in a specific area but only indicates a category of agreements<sup>47</sup>.

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<sup>44</sup> BISCOTTINI, G. Considerazioni sugli accordi di associazione alla Cee BISCOTTINI, G. (ed.) Tavole rotonde di diritto Comunitario Vol. I (1967-1977) Vita e Pensiero, Milano 1980, pp. 90-106. COLOMBO E.M. La nature juridique de l'association à la Communauté Economique Européenne L'association à la CEE. Aspects Juridiques, Ed. Université libre de Bruxelles, Bruxelles 1970 pp.1-14

<sup>45</sup> See FOIS, Articolo 238 PENNACCHINI, MONACO, FERRARI BRAVO (eds) Commentario CEE pp. 1726-1736, DE NOVA R. Gli accordi di associazione alla Cee. Rilievi comparativi. BISCOTTINI Tavole rotonde .. op.cit. pp.107-115.

<sup>46</sup> Under Article 113 or in another area where the Community has competence where the external competence is based on the internal one (ERTA doctrine). Article 235 enlarges the field of action of the Community in external relations as well. The content of agreements based on this provision is not defined and encounters the only limit laid down in this provision.

<sup>47</sup> According to FLAESCH-MOUGIN, C. the association is a "frame" that can have a different content according to the Community's partner(s). Les accords externes de la CEE. Essai d'une typologie, Ed. Université de Bruxelles, Bruxelles 1979 pp.33-41, DE NOVA op.cit.

It is therefore significant that the interpretations of Article 238 proposed by the various commentators are based and inspired by a study of actual practice. At the beginning of the seventies a distinction was made between association and adhesion and was clearly influenced by the association agreement with Greece and Turkey<sup>48</sup>. Attempts have also been made, on the basis of actual practice, to create a "typology" of association agreements. Verloren Van Themaat distinguishes between: a) association as a substitute for membership, b) association as a special form of development assistance and c) association as a precondition for membership<sup>49</sup>. Capotorti refers to association of a first and second generation (respectively the agreement with Greece, Turkey and with Malta and Cyprus) and cooperation with Maghreb countries. For this author, in the Mediterranean in practice one model of agreement has developed with some variations<sup>50</sup>. The EEC Commission seems to distinguish between association for the purpose of development and association prior to accession, which does not exclude the possibility of a "combination" of these two types<sup>51</sup>.

Since neither the wording of this provision nor the practice of application seems to clarify the notion of association it should be asked whether Article 238 furnishes a correct legal basis for relationships with Maghreb countries or whether it would be possible to use any alternative provisions in the Treaty.

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<sup>48</sup> See PESCATORE, P. *Les relations externes de la CEE* RCADI 19.. pp.139 ff. LUCHAIRE, F. *Les Associations à la CEE* RCADI 1975, I, pp.245-308. See BISCOTTINI op.cit.

<sup>49</sup> See KAPTEYN, P.J.G. VERLOREN VAN THEMAAT Introduction to the Law of the EC Kluwer, Deventer, Boston 1989 p.828.

<sup>50</sup> See also POCAR, F. *Caratteri ed evoluzione degli accordi internazionali stipulati dalla CEE* BISCOTTINI, G. (ed) I trattati internazionali stipulati dalla CEE Tavole rotonde di diritto comunitario 1980, Vita e Pensiero, Milano 1983 pp.86-99.

<sup>51</sup> See case 12/86 Demirel v. Stadt Schwäbisch Gmünd 30.09.1987 ECR (1987) p. 3719, report for the hearing p.'3730

Article 113 can be excluded because the notion of commercial policy cannot cover technical and financial cooperation as laid down in the Cooperation Agreements, even if one adopts a broad notion of commercial policy<sup>52</sup>. These difficulties could have been partially overcome with the participation of Member States in the negotiation and conclusion of the Cooperation Agreements. However, it is questionable whether the role of the EIB in the financing of cooperation could be covered by Article 113<sup>53</sup>. Moreover, a "deterrent" against the use of Article 113 lies in the exclusivity of common commercial policy<sup>54</sup> which would have precluded the conclusion of similar agreements by Member States.

A possible solution to the absence of a Community competence in the field of technical and financial cooperation would have been to add Article 235 to Article 113. From a legal point of view the conditions of application of Article 235 would have been satisfied if one considers that i) the aim of association is inscribed in the EEC Treaty, Article 3.k and that ii) the Community did not possess the necessary powers to make such far reaching agreements, since, it could have been argued, Article 238 provides for reciprocity of rights and duties and could not be applied to a non-preferential

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<sup>52</sup> Financial and technical cooperation, as conceived in the Cooperation Agreements, cannot be considered as "individual clauses of an altogether subsidiary or ancillary nature" in relation to trade cooperation which, although a fundamental pillar of the Agreements is not the essential objective of the relationships established by them. See Opinion 1/78 op.cit. para. 56. At the time of negotiations and conclusion of these agreements the Court of Justice had not yet fully developed its case law on common commercial policy.

<sup>53</sup> See the case of the Financial Cooperation with Yugoslavia which was financed by loans of the Bank and for whose conclusion the Community applied Article 235.

<sup>54</sup> See opinion 1/75 op.cit. p. 1363.

agreement<sup>55</sup>.

Why was Article 238 chosen? Perhaps a more technical legal reason is to be found in the very character of Article 238 as an "elastic" construction. "The essential quality of this regime is its great flexibility; on the one hand, it permits both bilateral and multilateral associations. On the other, it authorizes all forms of scheme, those which borrow only a few provisions from the Treaty of Rome and those which entail virtually its total adoption."<sup>56</sup> This therefore means that the subject matters that can be covered by the Agreements are not defined a priori. The flexibility of Article 238 seems to be confirmed by the conclusion of new types of agreements (for the extension of areas covered and for the scope pursued) based on this provision between the Community and its Member States with the EFTA member States and Liechtenstein (EEA Agreement) and with Poland, Czechoslovakia and

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<sup>55</sup> The reference to Article 235 alone would not be correct since a important part of the Agreement concern trade. The use of Article 235 when an alternative basis exists in the Treaty was sanctioned by the Court only in 1987 in case 45/86 (system of Generalized Preferences). See for comparison case 8/73 Hauptzollamt Brenerhaven v. Massey Ferguson 12.7.1973 (1973) ECR p. 897. Although in a previous case the Court ruled on the "complementarity" of Article 235 (joined cases 73-74/64 (1964) ECR p. 23, in Massey-Ferguson recourse to Article 235 was not censured by the Court, notwithstanding the presence in the Treaty of specific provisions, that is Articles 9,27,28 11 and 113, which, by admission of the Court itself, could have provided the necessary authority for the Community to adopt regulation 803/68 on the determination of value of goods for customs purposes. This case-law was modified in case 45/86. The concern of the Court in this latter case, that the use of Article 235 as alternative to Article 113 would have modified the voting procedure within the Council, would not have raised in the case of the alternative with Article 238 since both the provisions establish for the consultation of the Parliament and for the voting by unanimity in the Council.

<sup>56</sup> First Memorandum from the Commission to the Council Bruxelles, Feb., 26 1959. Cited by COSTONIS Treaty -Making Power of the European Communities: the Perspectives of Decade CMLRev. 1967 pp.421-457 footnote n. 95 p. 448.

Hungary (Europe Agreements)<sup>57</sup>.

Second, the term association recalls that used in the Declaration of Intent for Morocco and Tunisia and Article 238 acquired that symbolic meaning which has been discussed above.

Finally, Article 238 requires unanimity in the Council.

It seems that the choice of Article 238 as legal basis for the Cooperation Agreements with Maghreb countries can be justified for two reasons:

- It allows the conclusion of agreements covering a large number of subject matters. The question of the subjects which can be covered by the association agreements is particularly relevant if one considers that all the agreements concluded on the basis of Article 238 are mixed<sup>58</sup>, that is concluded by the Community and by the Member States. The few exceptions are limited to the first

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<sup>57</sup> The EEA Agreement should create a homogeneous European Economic Area which means the free circulation of persons, services, goods and capital and the application of uniform rules of competition in the whole Area. In the words of the Commission the aim of the agreement is that of creating an homogeneous economic area where a law which is substantially identical to that in force within the Community should apply as uniformly as possible. In opinion 1/91 rendered on the basis of Article 228 the 14.12.1991 (nyr) the Court of Justice ruled on the incompatibility of this agreement with the EEC Treaty. The Agreement was modified. A second opinion (1/92), required by the European Parliament, was rendered the 10.04.1992. In this case the Court found the amended agreement compatible with the Treaty as far as the questions submitted by the Parliament were concerned. The Europe Agreements have the scope of establishing a cooperation in various fields between the Community and some Eastern European countries with the scope of helping them towards market economy and with the ultimate aim of integrating these countries in the process of European integration. The agreements establish a political dialogue between the parties (on the Community side using the mechanisms of the European Political Cooperation), a free trade area (to be reached at the end of a transitional period) for industrial products and cooperation in fields such as energy, environment, transport, tourism, culture, telecommunication.., temporal financial assistance is also provided for.

<sup>58</sup> The literature on the subject is vast, see, *inter alia*, O'KEEFFE, SCHERMERS (eds.) Mixed Agreements, Kluwer, Deventer 1983.

associations agreements (Morocco and Tunisia). The correlated problem is therefore whether the Community could conclude the Cooperation Agreements with Maghreb countries alone, or if the ratification by Member States was necessary. Mixity is justified for reasons not solely relating to the absence of community competencies to avoid pre-emption. This will be discussed in the following section (c).

- Article 238 symbolized, the provision founding the treaty relationships with "privileged" developing countries. This will be discussed in section (d).

## 2.c) The Subject Matters of Agreements of Association.

As regards the areas covered by a "pure" Agreement 238, some indications have been inferred by the legal doctrine from the position of Article 238 (Article 238 is contained in Part Six of the Treaty, General and Final Provisions in the Treaty) and from the rules of procedure established therein<sup>59</sup>.

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<sup>59</sup> See LOUIS, J.V., BRUCKNER, P. Relations Exterieures MEGRET, J. Le Droit de la CEE Vol. 12, pp.84-93. The interpretation of Article 238 as covering all the subjects of competence of the Community see also COLOMBO, La natura.. op.cit. p.6, DEWOST, Les compétences explicites: délimitation et mise en oeuvre DEMARET, P. (ed) Rélations extérieures op.cit. pp.1-14. See observation of the Commission in case 12/86 Meyrem Demirel v. Stadt Schwabisch Gmund 30.9.1987 (1987) ECR p.3731 where it refers to the position of Article 238 showing the Community general power to conclude agreements, which also explains the heavy procedural requirements: unanimity in the Council and assent of the European Parliament. Should the association agreement require amendment to the Treaty, these are adopted according to the procedure of Article 236. According to RAWLINSON, W., An Overview of EEC Trade with Non-Community Countries and the Law Governing these External Agreements Fordham International Law Journal 13, 1989-1990, pp.205-233. Article 238 envisages agreement falling outside the scope of the Treaty. "This is evident from the reference in Article 238 to Article 236, which set out procedures for amending the EEC Treaty". It seems to me that this proves the contrary. If an agreement concluded on the basis of Article 238 covers areas outside those covered by the Treaty, amendments are required.

The Court has never specified which areas can be included in an agreement based on Article 238. In Haegeman<sup>60</sup> the Court ruled that agreements concluded under Articles 228 and 238 are acts of the Community institutions within the meaning of Article 177.1.b and therefore the Court has jurisdiction to give a preliminary ruling on the interpretation of these agreements.

However, in the case of mixed agreements it is not clear whether the Court's interpretation extends to all the provisions of such agreements, i.e. even those falling within the Member States' exclusive competence. The technique of mixed agreements is based by the division of competencies between the Community and the Member States<sup>61</sup>, whereby the Community has competence over certain areas and the Member States over others. In the majority of mixed agreements, the division of competence, i.e. which part of the subjects covered by the agreement, are under the exclusive or concurrent competence of the Community and which are outside is

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<sup>60</sup> Case 181/73 R & U Haegeman v. Belgium 30.04.1974, (1974) ECR, 459. The agreement in question was the association agreement concluded with Greece. For the question of the competence of the Court to give a preliminary ruling on the interpretation of agreements see ADAM for whom the object of the preliminary ruling of the Court ex Article 177 cannot be other than the acts adopted by the Community to conclude or implement the agreement, and not the agreement itself. ADAM, R. Corte comunitaria ed interpretazione degli accordi di associazione RDI 1975 pp. 584-589. See the observations of Advocate General Warner favorable to an analogous restrictive interpretation acknowledging the competence of the Court to interpret the agreement as a parameter to judge the validity or interpretation of a Community act adopted to enforce the agreement. See KOVAR, R. Note on Haegeman Journ.Dr.Int. 1976, pp. 193-195.

<sup>61</sup> See NEUWALL, N. Joint Participation in International Treaties and the Exercise of Power by the EEC and its Member States: Mixed Agreements CMLRev 1991, pp. 717-740, according to this author mixity is not always imposed by the question of the division of powers between Member States and the Community, see p. 717 and footnote (3).

unclear<sup>62</sup>.

Therefore, Haegemann can be interpreted in two different ways.

On the one hand, it can be argued that the Court interprets only the provisions for which the Community has competence, otherwise the Court would act ultra vires. Thus, since the Court has interpreted provisions concerning freedom of establishment and social security for third countries' migrant workers, these are areas within the Community's competence and can be included in an association agreement. In the cases Razanatsimba<sup>63</sup> and Kziber the Court interpreted provisions concerning, respectively, the freedom of establishment and the social security treatment of third countries' migrant workers. It is interesting to note that in none of these cases was the competence of the Court to interpret the relevant provisions contested on the basis of the lack of competence of the Community to act in that area (both the agreements concerned are mixed).

On the other hand, the Court can interpret all the provisions of an agreement even those within the competence of the Member States<sup>64</sup>, and consequently the interpretation by the Court of these areas has no consequence on the division of competence between the Community and Member States. The rationale of the latter interpretation is that Member States in concluding such agreements undertake an obligation to fulfill the duties deriving from the agreement as regards the Community, which is therefore authorized to determine the extent of those obligations (Kupferberg). The argument that interpretation by the Court would assure uniform interpretation across the whole Community territory, even of the

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<sup>62</sup> On the difficulties linked to a declaration of competence see TEMPLE LANG, J. *The Ozone Layer Convention: a New Solution to the Question of Community Participation in "Mixed" International Agreements* CMLRev 1986, pp.157-176.

<sup>63</sup> Case 65/77 Razanatsimba 24.11.1977 (1977) ECR p. 2229.

<sup>64</sup> See GAJA, G. *Sull'interpretazione di accordi misti da parte della Corte di Giustizia* RDI 1988, pp. 605-606.

provisions outside the Community's competence<sup>65</sup> is more convincing.

The question of the jurisdiction of the Court to interpret provisions which are in principle outside the Community external relation power was not dealt with expressly in Razanatsimba and Kziber cases. This was done in Demirel. Germany and the United Kingdom considered in fact that the Community could interpret only those provisions falling within its exclusive competence, which excluded the Articles on the free movement of Turkish migrant workers. Germany and the U.K. asked therefore whether the Court is competent to rule on a matter outside the Community's competence.

The Court dismissed the question<sup>66</sup>, affirming that the area fell within the Community's competence and thus the Court had jurisdiction to interpret the relevant provisions. According to the Court, in fact, Article 238 empowers the Community to undertake commitments as regards third countries in all the fields covered by the Treaty. Since the free movement of workers is one of them "it follows that commitments regarding freedom of movement fall within the power conferred on the Community by Article 238". This case leaves some questions open. First, it should be noted that the Court does not seem to give a general ruling on Article 238, but to reason on the specific case. The Court in fact maintains that "the agreement in question<sup>67</sup> is an association agreement creating special, privileged links with a non-member country which must, at

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<sup>65</sup> See NEUWALL Joint Declaration op.cit.

<sup>66</sup> Weiler points out the fact that the Court restates the points made by the UK and German governments and refers to the submission of the two governments as challenging the Court's competence to interpret provisions of agreements on the basis of the fact that these fall within the power of the Member States. If the Court had simply ruled that the Community had competence in the field of free movement of workers this could have been interpreted as meaning that this was an area of concurrent competence. See WEILER, J.H. *Thou Shalt Not Oppress a Stranger: On the Judicial Protection of the Human Rights of Non EC Nationals - A Critique.* EJIL 1992, pp. 65-91.

<sup>67</sup> Emphasis supplied.

least to a certain extent, take part in the Community system, Article 238 must necessarily empower the Community to guarantee commitments towards third countries in all the fields covered by the Treaty."<sup>68</sup>

In other words it should be asked (i) whether the extensive interpretation given to Article 238 only applies to pre-accession agreements, which justify the participation of third countries to the Community system<sup>69</sup>.

A second question concerns (ii) the interpretation of the terms "fields covered by the Treaty", while a third problem arises in relation to (iii) the connection between external competence and internal power. It is in fact true that the Community has competence in the field of free movement of workers but only as insofar as workers of Community Member States are concerned. As regards third country workers the commitments deriving from the agreement are to be implemented by Member States. As the Court specifies: "it is for Member States to lay down the rules which are necessary to give effect in their territory to the provisions of the agreement"<sup>70</sup>. This seems to indicate that external competence can exist without an internal power to enact common rules.

Let us now examine these questions more closely. (i) The pre-accession model seems to create a privileged type of relationship. However, it does not seem correct to make a distinction between pre-accession association and other association agreements to found a different Community competence as regards the fields covered by

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<sup>68</sup> Para 9.

<sup>69</sup> See observations of Advocate General Darmon "when such a convention looks towards further accession, the Community must of necessity hold the most extensive powers to conclude agreements with non-member countries in order to cover all the fields of activity contemplated by the EEC Treaty" p. 3741 and Commission's submission according to which agreements preparing an accession must be capable of dealing with matters covered by a future accession Treaty p.3731.

<sup>70</sup> Demirel op.cit. para. 10.

Article 238. To admit such a possibility would also require a definition of a pre-accession-model which is far from being clear. There are examples, such as the Agreements with Malta or Cyprus which can be considered to fall into a "grey area" between the two categories. It could moreover be questioned whether accession must be expressly provided for or if the possibility of future accession is enough.

It is thus submitted that once it is established that Article 238 covers all the fields included by the Treaty this applies to all association agreements.

(ii) The reference to the "fields covered by Treaty" is a very general expression. It can be argued that the competence is not limited to the four freedoms but may also include subject matters like agriculture or competition. But quid juris in the case of areas for which there is no Community norm-setting power?

Let us take the case of social policy, for which the Treaty provides the Community (the Commission) with a power to coordinate the actions of the Member States (Article 118). Could the Community alone conclude an agreement of association containing provisions on social security?

The Cooperation Agreements with Maghreb countries contain provisions on this area. In light of the Demirel case is it possible to submit that this field, which is covered by the Treaty, can be the object of a provision in an association agreement where Member States have not participated? A negative answer would be based on the consideration that Member States would lose, albeit in the limited fields of Maghreb migrant workers, the competence to regulate social security. It could on the contrary be argued that the Agreement only establishes the obligation of non-discrimination on the basis of nationality; there is a Community competence to act albeit not a norm-setting power. Article 238 could not be the basis for a Community internal power to adopt binding rules, and it should therefore be based on another Treaty

provision such as Article 235<sup>71</sup>.

Some of the instruments provided for in these agreements, like the mechanisms of import-earning stabilization (Stabex in Lomé) or financial and technical cooperation, have also been used by the Community to pursue development cooperation aims in relation to other developing countries in the framework of Community unilateral actions.

As seen above, both complex and financial aid to non-associated countries are based on Article 235. The fact that the same instruments for which the Community is required to refer to Article 235 are used in an agreement based on Article 238 can lead to two conclusions: either Article 238 confers on the Community the competence to act in fields where it has no express competence in the Treaty or another basis must be found. It is argued that, since there is nothing in Article 238 which justifies Community competence to conclude development cooperation agreements, the application of financial and technical cooperation is only possible because of the mixed conclusion of these agreements<sup>72</sup>.

In fact, the participation of Member States in the conclusion of the Cooperation Agreements has always been explained by the fact that cooperation was financed through contributions from Member States. This interpretation seems consistent with the fact that subsequent to the entry in the EEC budget of funds to finance cooperation with Mediterranean countries, the protocols have been concluded by the Community alone. It can, however, be submitted that financial Protocols do not need to be mixed because they are the application of the general principles laid down in the Cooperation Agreements and are closely connected to them.

The participation of Member States allows the Agreement to

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<sup>71</sup> See WEILER, J.H. *The Transformation...op.cit.* p. 2448.

<sup>72</sup> The same applies to the Financial Protocols which were concluded with Malta, Cyprus and Israel to adjust the relationships with these countries (based on commercial agreements) to the new global policy.

establish cooperation with third countries in fields which are not within the competence of the Community. This interpretation seems also to explain the fact that the Protocols with Israel are mixed although the source of financing is not the Member States but rather the Community budget.

The assertion that the participation of Member States in the Agreement is justified by the fact that they finance cooperation is not convincing since it seems that financing derives from a competence in the field of technical cooperation<sup>73</sup> and not the reverse.

In other words if the Community could undertake obligations vis-à-vis third countries on the basis of Article 235, could it do the same on the basis of Article 238? Article 238 gives the Community the power to act externally in the fields covered by the Treaty, that is where the Community has competence regardless of the question whether it has a norm-setting power. If the Community had to adopt common rules internally or to conclude an agreement with a third country outside the association, recourse to Article 235 would be required (giving norm-setting power to the Community), but in the framework of the association Article 238 is a sufficient legal basis.

(iii) Finally, what about the power to implement the agreement within the Community?

As already mentioned above, the solution to this problem seems to be indicated in the Demirel where the Court held that "in the field of freedom of movement for workers, as Community law now stands, it is for the Member States to lay down the rules which are necessary to give effect in their territory to the provisions of the Agreement..." (ground 10). In practice, the Community would have treaty-making power but not the power to enact internal rules. This can be considered as inconsistent with the construction of the

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<sup>73</sup> For the questions of agreements concluded by the Community alone and containing provisions on technical cooperation (see *infra*).

external competence of the Community, which has been based on its internal competence. However, one should consider that in Demirel the Court did not apply the theory of parallel powers to Article 238<sup>74</sup>. Therefore the presence of Member States in an association agreement limited to subject matters within the competence of the Community would not be required even if the power to enact internal rules remain in the hands of the States. It is well-established in fact that Member States are required within the Community system to assure the respect of commitments undertaken by the Community in an agreement concluded with third countries<sup>75</sup>.

A different conclusion should be drawn in the case of an association agreement containing provisions on a subject matter not covered by the Treaty such as, for example, the protection of environment before the entry into force of the Single European Act. This is the case, for example, of the Cooperation Agreements with Maghreb countries providing for a technical cooperation in the fields of science, technology and environment. It shall be noted that the Declaration by the Contracting Parties on the interpretation of the term "Contracting parties" as used in the Agreement does not clarify, as it is usually the case in Declarations of this type, which are the subject matters for which the Community and its Member States are, respectively, competent. The declaration merely specifies: "the expression Contracting Parties..means on the one hand the Community and the Member States, or either the Member States or the Community alone, and on the other hand the Kingdom of Morocco. The meaning to be attributed to this expression in each case is to be deduced from the provisions in question of the Agreement and from the corresponding provisions

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<sup>74</sup> It is therefore possible to understand that the Community can have competence to conclude an agreement on the free movement of Turkish workers while its internal competence only concerns workers of Member States. See also Commission in Demirel p.3731

<sup>75</sup> Case 104/81 Hauptzollamt Mainz v. Kupferberg 26.10.1982 (1982) ECR p. 3641.

of the Treaty establishing the Community."<sup>76</sup>

In the specific case of the Cooperation Agreements with Maghreb countries mixity was justified by the fact that aid was financed by contributions from Member States. Funds from the Community budget replaced Member States financing in the second Financial Protocol which, in fact is concluded by the Community alone.

By way of summary, Article 238 lays down the Community treaty-making power in the fields where there is Community competence, but it does not extend the Community's competence beyond the limits of the Treaty. When an association agreement includes subject matters outside the Community competence three possible solutions are open: mixity, recourse to Article 235 or an amendment to the Treaty ex Article 236.

What are the reasons indicating that there is a clear preference on the part of Member States to conclude mixed association agreements ? The following answers may be suggested.

The consideration of the areas to be included in the agreement, in particular in the case of association, also depends on the Community's partners and is a question which is therefore difficult to know in advance. If this was the case, Member States would consequently demand participation in the negotiating phase, which, as one can imagine, would lead to their concluding the agreement, especially if one considers that it is not clear, as discussed above, which areas can be covered by Article 238.

The fact that almost all the agreements based on Article 238 are mixed can be explained as a way of avoiding pre-emption. In the field of concurrent powers, once the Community has exercised its competence (either internally or with the conclusion of international agreements), Member States are not allowed to act in

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<sup>76</sup> Declaration annexed to the Cooperation Agreement op.cit. p. 109.

the same subject matter<sup>77</sup>. The conclusion by the Community alone of an association agreement covering several fields of action would imply, if this doctrine is applied, that Member States would be prevented to conclude agreements with third countries in these areas.

This incidentally leaves two questions unresolved. To what extent are national measures still allowed once the Community has adopted common rules? Does preemption mean that Member States are not allowed to adopt any act or does the prohibition only cover those acts which negatively affect the common rules adopted by the Community? To what extent is an area preempted? In other words do Member States lose their power to act for the whole area or only to the extent of the Community intervention? These two questions seem closely connected. A strict interpretation of preemption - banning any action by Member States unless authorized by the Community - could be accepted only if a very strict interpretation of the area preempted is also applied. For example, in the field of common agricultural policy, the adoption of a Regulation establishing a common market organization for certain products does not preclude the Member States from adopting any acts in the same field. Such a Regulation enacted by the Community of wholesale prices does not mean that the member States cannot regulate prices at the retail and consumption stages, while any national regulation

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<sup>77</sup> I follow here the distinction made by some authors between exclusivity and pre-emption. The first refers to the area for which the Community has been conceded a power to act in the Treaty which excludes any action of the Member States, as in the case of common commercial policy; the latter indicates those fields where a concurrent competence of the Member States exists and where the action of the Community deprives the Member States of the power to act in the same field. See LENAERTS, K. *Les répercussions des compétences de la Communauté européenne sur les compétences externes des Etats membres et la question de la "preemption"* DEMARET, P. (ed) *Rérelations extérieures.*, *op.cit.* pp.37-62. NEUWALL *Joint Participation op.cit.* p.720. For the case-law on preemption see case 22/70 AETR, paras. 17 and 22.

which can affect the wholesale prices is prohibited<sup>78</sup>.

If the theory - whereby the Member States are free to act in the external sphere until the Community has concluded an association agreement in relation to areas of shared competence between the Community and Member States - is applied to Article 238, then, once the Community had concluded an association agreement in all the fields covered by the agreement, Member States would be precluded from concluding agreements in the same field with the third country party to the Agreement.

It is however necessary to consider that until very recently association agreements have been concluded with developing countries. Leaving aside the provisions on trade, for which there is exclusive Community competence to act both internally and externally, the other fields of action concern financial and technical cooperation where the relationship between the Community and the Member States' action is to be conceived as complementary more than concurrent<sup>79</sup>. It is in fact clear that in terms of financial aid or technical assistance it would be senseless to consider that the intervention of the Community would prevent the Member States from financing or assisting the development of these same developing countries.

The question, however, remains open for other areas that could be covered by an agreement based on Article 238.

Would it be possible to avoid, in the case of an association

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<sup>78</sup> See case 216/86 Antonini v. Prefetto di Milano 1.07.1987 (1987) ECR p. 2519. See WAELBROECK, M. The Emergent Doctrine of Community Pre-emption: Consent and Redelagation SANDALOW, STEIN Courts and Free Markets: Perspectives for the United States and Europe Vol. II, Clarendon Press, Oxford pp.548-580.

<sup>79</sup> See MORVIDUCCI, C. La cooperazione italiana allo sviluppo e la CEE Riv.It.Dir.Pubb.Com. 1991 pp.371-389 p.388. See also the draft treaty on Political Union signed in Maastricht on 19 December 1991, Title XVII on development cooperation. The new competence of the Community is conceived as concurrent to that of Member States. See Europe Documents 7.02.1992 n.1759/60

agreement which only concerns the fields covered by the Treaty, pre-emption without recourse to mixity<sup>80</sup>?

It can be useful to draw a parallel with other agreements concluded by the Community and covering a large number of fields. These are the agreements with developing countries in Asia and Latin America<sup>81</sup> which regulate trade, economic and development cooperation. The legal basis of these agreements are Article 113 and Article 235. Article 235 is required by the absence of Community competence to act in some of these areas.

All these agreements include the so-called Canada clause<sup>82</sup>, whereby the Member States are free to conclude with third countries agreements in the same fields as those covered by the agreements. This clause seems to avoid pre-emption.

A feature common to both these types of agreements is that some of their provisions (in particular economic and development cooperation) are drafted in very general terms, indicating the sectors where the Community can act rather than specifying action to be taken. It can be submitted that pre-emption should apply only in the cases where the Community has acted concretely and not as a mere consequence of the conclusion of the agreement. This interpretation would make the inclusion of the Canada clause superfluous in cooperation agreements based on Articles 113 and 235.

Analogously, the participation of Member States in the association agreements covering only the fields included in the Treaty would not be considered necessary if the theory of pre-

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<sup>80</sup> I refer to the case where mixity is not justified, my observations are not dictated by a negative judgment of mixed agreements *per se*.

<sup>81</sup> The first "framework cooperation agreement" on the double basis of Articles 113 and 235 was, however, not concluded with a developing country but with Canada *Q.J.* L 260 1976.

<sup>82</sup> From the first agreement containing such clause, see footnote *supra*.

emption was applied as it is applied within the Community: it is the concrete exercise of a competence (and therefore not the conclusion of a framework agreement) which pre-empts Member States' treaty-making power.

#### 2.d) Article 238 and "Preferential" Agreements.

The EEC Treaty does not confer on the Community a competence in the field of development cooperation<sup>83</sup>. This can easily be explained if one considers that the Community's competence in the field of external relations was originally limited and conceived of as functional to the common market.

The first developing countries to enter into agreements with the Community were those issued from the process of decolonization which had formerly been associated to the Community on the basis of Articles 131-136. These provided for the association with non-European countries and territories which maintained "special relations" with some of the Member States, an elegant euphemism to indicate a colonial relationship. The alleged scope of the association was to promote the economic and social development of these countries, although the association was a formula which allowed the Member States concerned (France in particular) to maintain close economic relations with these countries and territories<sup>84</sup>.

Likewise, the very close relationships of Morocco and Tunisia with France, their former "mother country", explains the Declaration of Intent annexed to the EEC Treaty, where the Contracting Parties declare "their readiness, as soon as the Treaty enters into force, to propose to these countries the opening of

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<sup>83</sup> See the Maastricht Union Treaty which includes a Community competence to act in the field of development cooperation. Article 130W..

<sup>84</sup> See IACCARINO Articles 131-136 QUADRI, R., MONACO, R., TRABUCCHI, A. Commentario Cee Giuffrè, Milano 1965 pp.1025-1046

negotiations with a view to concluding conventions for economic association with the Community."

The evolution of the association relations is well known. Once the countries which were associated with the Community became independent, the association Convention was first "transformed" in the Yaundé Conventions and finally, in 1975 in the first Lomé Convention.

The legal basis of Lomé' Conventions<sup>85</sup> and of the first association agreements with Morocco and Tunisia was Article 238.

Despite the original limits, development cooperation has become a very important policy of the Community which has developed in this framework unilateral instruments and a network of agreements with other developing countries in Asia and Latin America. The legal basis had been Article 113 and of Article 235.

Article 113 has been used as a legal basis for instruments such as the system of generalized preferences whereby the Community grants preferential access (reduction or abolition of customs duties) to industrial and some agricultural products originating in developing countries. The reference to Article 113 to base the competence of the Community to act in the above-mentioned field has been made possible also by the extensive interpretation of the notion of commercial policy by the Court of Justice<sup>86</sup>. Article 235

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<sup>85</sup> The fourth Lomé Convention was concluded in 1990 (O.J. L 229 1991) for a period of application of ten years (the first three Conventions were concluded for 5 years each). The agreement not only provides for the preferential entry of ACP industrial products in the Community and for financial and technical cooperation, but establishes a global relationship covering the fields of environment, agriculture, food security, rural development, energy, services, mining, industrial, cultural, social and regional cooperation. Instruments used are commercial preferences, Stabex and Sysmin and financial aid.

<sup>86</sup> The landmark decision is certainly Opinion 1/78 4.10.1979, (1979) ECR p. 2871 para.45 and 46. More recently in case 45/86, Commission v. Council 26.03.1987, (1987) ECR p.1493 the Court was required to rule on the question of the correct legal basis of the regulations for the application of the SGP for 1986, stated that the link with development problems "does not cause a measure to be

has been used for unilateral Community actions like the complex, a system of import earning stabilization for countries outside the ACP Convention<sup>87</sup>, financial and technical cooperation for non-associated developing countries<sup>88</sup> and food aid<sup>89</sup>.

The agreements concluded with Latin America and Asian countries, which can be included in the framework of the development cooperation policy of the Community are based on Articles 113 and 235. The main features of these agreements is that they do not provide for a preferential customs duties treatment for their exports to the Community and do not include financial aid.

As seen above Article 235 has been referred to, together with Article 113, as the foundation for cooperation agreements with some

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excluded from the sphere of the common commercial policy as defined by the Treaty". See AUVRET-FINCK J. Note à l'affaire 45/86 RTDE 1988 pp.162-182, sp.p.172 ff. Article 113 has been the legal basis for the conclusion of commodities agreements negotiated under the aegis of UNCTAD. See Opinion 1/78 and MUREAU, F. L'Europe communautaire dans la négociation Nord-Sud Paris, Puf, 1984, p. 92 ff.

<sup>87</sup> See regulation 428/87 O.J. L 43 1987 and comments of LEBULLANGER, J. La politique communautaire de coopération au développement RTDE 1988, pp.123-157

<sup>88</sup> See Regulation 442/81 O.J. L 48 1981. See CRETIEN, Y L'aide financière et technique aux pays en voie de développement non associés MEGRET, J (ed) Le droit de la CEE, Vol.14 pp.114-127, NTUMBA, L. L'aide financière et technique de la CEE aux pays en voie de développement d'Asie et d'Amérique Latine RMC 1989 pp.336-346

<sup>89</sup> Regulation 3972/86. To note that before 1982 when Regulation 3331/82 was adopted, Community food aid intervention was based on Articles 113 and 43. The evolution of food aid from an instrument of commercial policy to an instrument of development cooperation, which started with Regulation 3331/82, adopted on the basis of Articles 113 and 235 has been completed with the adoption of Regulation 3972/86 which replaces the former and is based only on Article 235. See SNYDER, F. The European Community's New Food Aid and Legislation, Towards a Development Policy? SNYDER, F., SLINN, P. (eds.) International Law of Development Milton, Abingdon, 1987, pp.271-305.

Latin American and Asian countries<sup>90</sup>.

The contractual-based relationships of the Community with developing countries are thus distinguished in two areas, the "area 238" and the "area 113-235". The different choice of the legal basis are more the symbol of the different type of the relationships than they are due to the different content of the agreements (see observations made in section (c)).

2.e) Article 238 and its Application in the Convention Based Relationships Between the Community and Maghreb Countries.

2.e.i) Interim Agreements.

Prior to the conclusion of the Cooperation Agreements currently in force, the Community entered into agreements with Morocco and Tunisia which were concluded by the Community on the basis of Article 238<sup>91</sup>. The agreements provided for the establishment of an association between the Community, Morocco and Algeria.

If an agreement, like any other act of the Community, must be determined on the basis of its content, than one wonders why these were labelled as association agreements and were based on Article 238. Both the agreements in fact only regulate trade relationships

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<sup>90</sup> See the agreements concluded with ASEAN countries Q.J. L 144 1980 in particular Article 4, with the member countries of the Cartagena Agreement, Q.J. L 153 1984 Article 2 and with the member countries of the General Treaty on Central American Economic Integration Q.J. L 172 1986 Article 6. The development cooperation policy of the Community towards Asia and Latin America is carried out more through unilateral actions, like the SGP, the Comprex or financial and technical aid than through the agreements. The provisions on development cooperation are laid down in very general terms.

<sup>91</sup> Association agreement with Morocco 31.03.1969 Q.J. L 197 1969. English Version L 239 1973. Association agreement with Algeria 28.03.1969 Q.J. L 198 8.08.1969, English Version L 239 1973.

between the contracting parties and, it is submitted, could have been based on Article 111<sup>92</sup>. The choice of Article 238 and a different title (for instance association instead of trade) can be explained by the provisions contained in the Treaty relating to association of these countries to the Community, which were discussed in the previous section, and by the fact that these two countries belonged to the "Franc Area" and had very close relationships with their former "mother country", France. This also explains the Declaration of Intent annexed to the EEC Treaty, where the Contracting Parties declare "their readiness, as soon as the Treaty enters into force, to propose to these countries (Morocco and Tunisia) the opening of negotiations with a view to concluding conventions for economic association with the Community."

It is interesting to compare the agreement with Israel<sup>93</sup> which was concluded a few years later by the Community in the same area. This agreement (not defined) found its legal basis in Article 113. However, it does not contain only provisions on trade but also one, Article Art.18 on technical and economic cooperation. Although cooperation is perceived as being complementary to trade and could have been considered as being "absorbed" by trade cooperation, it is interesting to note that very similar agreements were concluded on a different legal basis, perhaps more on the basis of political considerations than on legal consistency.

The ratification procedures of the Cooperation Agreement, requiring approval by national Parliaments, delayed their entry into force. It was therefore decided to conclude interim agreements with the Mediterranean partners for the application of the rules

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<sup>92</sup> At the time of negotiations and the conclusion of the agreement Article 112 applied (the transitional period expired on the 31 December 1969). The question of the voting procedures in the Council was, therefore irrelevant since Article 111 provides for unanimity.

<sup>93</sup> Q.J. L 136 1975.

governing agricultural and industrial trade<sup>94</sup>. These agreements were based on Article 113 of the EEC Treaty. This can be considered a proper legal foundation since the content of the interim agreement is limited to trade relations. The reference to this Article was, however, criticized because it excluded the participation of the European Parliament whose consultation was considered necessary, since the modification of customs duties and levies, being a source of Community financing, entered into the competence of the European Parliament<sup>95</sup>. One cannot but agree with this very pertinent comment, but it could be observed that Raux's remark does not apply only to the agreement with Maghreb countries, but is on the contrary a general limitation of Article 113 and one which has only partially been overcome by the (informal) consultation procedure with the European Parliament. On the other hand, it can be considered that in the case of the Interim Agreements with Maghreb and Mashrak, these were by definition to be applied only for a limited period, i.e. until the entry into force of the Cooperation Agreements based on Article 238.

#### 2.e.ii) Additional Protocols.

The content of these agreements will be discussed in the second part of this thesis when examining the trade regime applicable to agricultural products imported from Maghreb countries to the Community.

Additional Protocols were negotiated between the Community and Maghreb countries in order to take into account the accession of Spain and Portugal to the Community<sup>96</sup>. One should in particular take into account that the application of the common agricultural

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<sup>94</sup> Q.J. L 141 1976 pg. 97

<sup>95</sup> RAUX, J. *Chronique RTDE* 1977 pg. 458

<sup>96</sup> The 1st of January 1986.

policy, as a consequence of the accession, to the competitive agricultural products of the two new Member States could lead to a deterioration of the terms of exchange between the Community and its Mediterranean partners.

The Protocols lay down rules concerning exclusively trade in agricultural goods. The legal basis of the decision for the conclusion of these agreements is Article 238<sup>97</sup>.

If one considers the content of the agreements, it may be submitted that Article 113 could have provided a sufficient legal basis. Since, as has already been noted, the agreements regulate the phasing out of customs duties, and the conditions of application for certain products of tariff quotas and reference prices, the subject matter is concerned with trade and the competence of the Community to enter into agreements with third countries in this field finds its basis in Article 113 of the Treaty.

However, there are two considerations that could justify recourse to Article 238. First, the Additional Protocols are without any doubt linked to the Cooperation Agreements. This clearly emerges from the title of these agreements, which are defined as Protocols Additional to the Cooperation Agreements and from the preamble of the Protocols where it is emphasised that the rules laid down have the scope of maintaining the traditional export trade of the Mediterranean partners with the Community. In other words the Protocols establish the rules necessary for adaption to the regime laid down in the Agreement to avoid any undermining of the scope of the Cooperation Agreement and of the cooperation thereby established by the enlargement of the Community.

The choice of Article 238 can therefore be considered as the application of a principle of parallelism between the Cooperation

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<sup>97</sup> See for Morocco Q.J. L 224 1988, for Algeria Q.J. L 297 1987

Agreement and the other co-related contractual instruments<sup>98</sup>. A second reason can be cited in justification of statement made above: The Single European Act has modified, *inter alia*, the procedure laid down in Article 238 requiring the assent of the European Parliament for the conclusion of association agreements.

The first opportunity for applying the new procedure occurred in the context of Additional protocols and the Financial and Technical Protocols with Maghreb and Mashrak countries. It could be considered that the choice showed a lack of respect to say the least for the new power of the Parliament allowing recourse to a different legal basis such as Article 113 which, as is well-known, does not require the intervention of the Parliament, not even for consultation<sup>99</sup>.

The assent of the Parliament seems moreover particularly timely if one considers the implication for the common agricultural policy of the regime introduced by the Additional Protocols<sup>100</sup>.

#### 2.e.iii) Decisions of the Cooperation Council.

The Cooperation Councils created under each of the Cooperation Agreements have the power to adopt binding decisions.

As regards the Community legal order, these acts do not have to be transposed into Community law since they are an integral part

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<sup>98</sup> See FLAESCH-MOUGIN, C. Les accords externes de la CEE. Chronique 1 juillet 1986/31 octobre 1989) *RTDE* 1990, pp.85-124, p.89

<sup>99</sup> It shall be remembered that the Luns procedure, discussed below, is a development of the practice.

<sup>100</sup> This is an observation made by RAUX in relation to the interim agreement (see *supra*). The doubts expressed above in relation to the interim agreement were founded on the idea that Raux's criticisms could apply in general to Article 113 and not only to the interim agreement. In the case of the Additional Protocols the choice between Articles 113 and 238 seems more relevant than in the case of the interim agreement because of the amendments brought about by the Single European Act.

of the Community legal order<sup>101</sup> from the date of their entry into force. The adoption of a Community act is necessary only when supplementary Community measures are required for the implementation of the rules set up in the Decision.

In this case on which basis is the internal act founded?

The choice of the legal basis of a Community internal act will depend on the subject matter of the Cooperation Council's Decision. Thus if the provision concerns trade (as is often the case) Article 113 should be applied.

Would it be possible to base the competence of the Community to adopt an internal act for the implementation of a Decision of the Cooperation Council on Article 238? It has been suggested that the case-law of the Court on the parallelism between internal and external competence could be applied in this case. This would mean the application of the theory by inverting the terms on which it is founded. The theory would not be used to expand the treaty-making power of the Community but to enlarge the internal norm-setting power. The theory of parallelism has been seldom used<sup>102</sup> because of its pre-emption effect. A similar resistance on the part of Member States would probably derive from the "inverted" parallel power theory. The application of the theory in this sense would mean that in the case of an extension of treaty-making power the Community has, in the internal dimension, the power to lay down binding rules. What should be noted is that the extension of internal power would be based on a provision, Article 238, which does not clearly define the areas which the Community has treaty-making power.

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<sup>101</sup> Case 30/88 Greece v. Commission 14.11.1989 (1989) ECR p. 3711 and case 192/89 Sevince v. Staatssecretariat van Justitie 20.09.1990 (1990) ECR p.3461.

<sup>102</sup> An application can be found in the sector of fishing See the agreements with Sweden and Norway in O.J. L 226 1981 (based on Article 43)

The Commission seems to have adopted this theory when it proposed a regulation to the Council for the implementation of a Decision of the Association Council established by the Association Agreement with Turkey concerning the application of social security schemes of the Member States to Turkish workers and the members of their families which was based on Article 238<sup>103</sup>. Such a choice would at present require the European Parliament to give its assent according to the new procedure laid down in Article 238 (infra). Recourse to Article 238 is more valuable for the Parliament than the other possible legal bases (Article 235) under which the Parliament is only granted a mere consultative power. The intervention of the Parliament would be inconsistent with the more limited role that is conceded to it as far as the adoption of internal legislation is concerned. In support of the intervention of the Parliament and of the application of Article 238, it could be argued that the Parliament's assent would be limited to the implementation of the agreement to whose adoption it had already participated.

### 3) The Procedure for Concluding Agreements.

#### 3.a) Article 228.

Article 238, as amended by Article 9 of the Single European Act, provides that agreements shall be concluded by the Council acting unanimously and after receiving the assent of the European Parliament acting by an absolute majority of its component members. This provision shall be supplemented by Article 228 which establishes the procedures<sup>104</sup> that have to be followed by the

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<sup>103</sup> Proposal for a Regulation submitted to the Council on the 8th of February 1983, Q.J. C 110 1983.

<sup>104</sup> See LOUIS, J.V., BRÚCKNER P. Relations exterieures MEGRET, J. (Ed.) Le droit de la CEE Vol. 12, pp.25-63.

Community when it concludes agreements with third countries<sup>105</sup>. Agreements are negotiated by the Commission and concluded by the Council. Consultation with the European Parliament is provided for only when required by the Treaty (that is only by Article 238 according to the original version of the Treaty before amendments by the SEA). It shall be noted that Article 228 does not indicate the voting majority in the Council which is established by the relevant agreements (majority according to Article 113, unanimity according to Article 238).

In practice, the procedure followed by Community institutions is more complex<sup>106</sup> than it appears from the wording of Article 228.

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<sup>105</sup> More precisely, the first words of Article 228 read: "where this Treaty provides for the conclusion of agreements between the Community and one or more Member States or an international organization..". This has been interpreted as an indication that the external powers of the Community were restricted to the specific cases where the Treaty expressly confers the power to enter into agreements with third countries, that is Articles 111, 113, 238. It is well-known that this interpretation was rejected by the Court in case 22/70 Commission v. Council 31.03.1971 (ERTA) (1971) ECR p. 263. It is interesting to note that while in the draft Treaty on Political Union adopted by the Maastricht European Council the initial wording of Article 228 was not modified; in the version submitted by the Luxembourg Presidency to the European Council on June 1991 Article 228 opened as follows: "Where agreements with one or more States or international organizations in fields covered by this Treaty need to be negotiated..". The adoption of such a version would equate to the express acknowledgment of the Community power to conclude agreements in all the areas of the Treaty. It should be noted that it was not specified whether the parallelism between internal and external competence was limited to the fields where the Community has internal norm-setting power. The use of the terms seems to indicate a general Community external competence. For the text see Agence Europe Documents n.1722/1723 5.07.1991. The text was then revised to take account of the observations of the Intergovernmental Conference on Political Union. See for the amended version of Article 228 the working document prepared for the Foreign Ministry session of 12/13 November 1991. Europe Documents 1746/1747 20.11.1991.

<sup>106</sup> BOT, B.R. Negotiating Community Agreements; procedure and practice CMLRev 1970 pp. 286-310. QUINTIN, H. Participation de l'Assemblée parlementaire européenne aux déroulement de la procédure de négociation des accords commerciaux RTDE 1975 pp.211-

Moreover there is a tendency towards uniformity of the procedures for all types of agreements<sup>107</sup>. Since the questions which regard negotiations and the conclusions are common to all Community agreements<sup>108</sup> it is sufficient to mention the more relevant ones with reference to the agreements which are the object of this study.

Negotiations are carried out by the officials of the relevant Directorate General of the EC Commission. In the case of association agreements, which cover more than one area and which may have important repercussions on internal Community policies, the presence of all the Directorate Generals involved is required. In the case of Cooperation Agreements with Maghreb Development Cooperation (DG VIII), (Agriculture?..). Procedural requirements provided for in Article 113 have been extended to all the agreements concluded by the Community. According to this Article the Council authorizes the Commission to open negotiations which will be carried out on the basis of directives of negotiations issued by the Council. A Committee (called Committee 113) is created which ensures control on the part of the Council over the progress of negotiations carried out by the Commission.

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<sup>107</sup> See for a study and a comment of the actual practice as it developed from the very beginning COSTONIS, J. *The Treaty-Making Power of the European Economic Community: the Perspectives of a Decade* CMLRev 1967/78 pp.421-457.

<sup>108</sup> It also clear that the rules of international law on the law of the treaties apply to the Community. The matter is regulated by the Vienna Convention on the law of treaties between States and International Organizations and between International Organizations concluded on the 21st March 1986 in Vienna and which is a duplicate of the Vienna Convention on the Law of the Treaties of 1969 applying to States. See Riv.dir.Int. 1986 p.198

The acts whereby the agreement is "concluded" do not transform<sup>109</sup> the agreement in Community law<sup>110</sup>. Thus, the power vested by the Treaty in the Council<sup>111</sup> is that of adopting an act, a regulation or a decision, by which it declares the Community's consent to be bound by the agreement<sup>112</sup>. The date of the entry into force of the agreement is indicated in the agreement. In the case of the Cooperation Agreements with Maghreb the date was the first day of the second month following notification that the procedures, by which the agreement was approved by each contracting party, were (Article 60 Cooperation Agreement with Morocco). The negotiations and conclusion of the Cooperation Agreements with Maghreb countries have some points in common with all other (bilateral) mixed agreements concluded by the Community and its Member States. In the

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<sup>109</sup> For an examination of the different opinion in legal doctrine see JACOT-GUILLARMO, O. Droit Communautaire et Droit International Public, Genève, Librairie de l'Université Georg & C., 1979, pp. 104-105 and footnotes, the author espouses the monist approach. See also PESCATORE, P. Ordre Juridique des CEE Presse Universitaire de Liège, Liège p. 151 for an illustration of the application of the monist theory to Community law.

<sup>110</sup> International law distinguishes three moments: (i) signature of the agreement, which has the consequence of authenticating the text which has been negotiated; (ii) approval by national Parliaments when required by the national legal order and (iii) ratification by which the competent national organs declare the State to be bound by the agreement. The entry into force is often subject to the exchange of the ratification instruments. The signature of the agreement is considered as part of the procedure of the conclusion and is therefore part of the competence of the Council. Initialling on the contrary is within the competence of the Commission, since it is considered that this constitutes the final phase of negotiation. See BRUCKNER, LOUIS op.cit. p.34.

<sup>111</sup> The Council's power has been defined as the power of "prior authorization, concurrent control and final approbation" see BOT Negotiating..op.cit. p. 289.

<sup>112</sup> See GAJA, G. Fonti comunitarie Digesto utet, Torino, Vol. VI pp.433-453, p.450. In the Community the so-called simplified procedure is also applied whereby the Community is bound by the signature of the agreement.

case of the Cooperation Agreements with Maghreb and Mashrak countries the Commission negotiated on the basis of the authorization by the Council and of a mandate by Member States<sup>113</sup>.

### 3.b) The Role of the European Parliament Under Article 238.

A final question needs to be discussed more thoroughly considering its the particular relevance in relation to agreements concluded under Article 238.

The original version of Article 238 required the opinion of the European Parliament for the conclusion of the association agreements. Although it was mandatory for the Council to require and obtain the opinion of the Parliament, this was recognized only as a consultative power similar to that provided for in other Articles of the Treaty. The amendment to Article 238 introduced by the SEA, which requires the assent of the Parliament, has modified, at least apparently, the power of this institution in the procedure of adoption of agreements under 238 but at the same time gives rise to a number of questions.

The difference between the procedure applied before the SEA and the one in force at present is clear. In the first case the Council could disregard the negative opinion of the Parliament, but according to the new version the Parliament has in practice a veto power: its assent is in fact a conditio sine qua non for the conclusion of the agreement by the Community.

The debate concerning the power of the Parliament has for a long time focused on the question of the timing of its consultation<sup>114</sup>. It was held that the opinion of the Parliament

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<sup>113</sup> LOUIS, BRUCKNER *op.op.cit.* p. 50

<sup>114</sup> The "ambiguity" of the term conclusion was also responsible for the controversy and was used by both the Council and the Parliament to support their respective arguments. For the Parliament "conclusion" means signature, therefore a literal interpretation required the opinion of the Parliament before signature. For the Council conclusion meant ratification whereby

should be requested before the signature, while the practice of requesting the opinion between the signature and the conclusion rendered the intervention meaningless and the possible observations of the Parliament without any practical significance<sup>115</sup>. It does not appear whether the opinion of the Parliament could be given before or after the signature changes the issue. Firstly, the Council was not obliged to follow Parliament's opinion, secondly, even if not signed the text of an agreement at the end of negotiations is usually complete and is often the result of delicate equilibria: it is difficult therefore to accept or even to propose modifications at that stage. The creation of a permanent link between the Parliament and the Commission and the Council was set up by the Luns procedures<sup>116</sup>. It provides for consultation between the Parliament and the Council in three phases: debate before the Parliament preceding the opening of negotiations, consultation between the Commission and the competent Committees of the European Parliament and confidential communication by the Council before the ending of negotiation<sup>117</sup>.

The limited participation of Parliament in the field of external relations is consistent with its role in the legislative process. As a consequence, the "new" role of Parliament, as regards

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the practice of consulting the Parliament after the signature was correct. See COSTONIS *The Treaty-Making..op.cit.* pp. 442-443.

<sup>115</sup> WEILER, H.J. The European Parliament and its Foreign Affairs Committees CASSESE, A. (ed.) Control of Foreign Policy in Western Democracies Cedam, Padova, Oceana, New York 1982, Vol.II, p.90,

<sup>116</sup> Luns I for association agreement and Luns II (or Westerterp) for commercial agreements.

<sup>117</sup> See WEILER, H.J. The Transnational Setting. The European Parliament and its Foreign Affairs Committees CASSESE, A. (ed.) Control of Foreign Policy in Western Democracies Cedam, Oceana, Padova, New York 1982, Vol.II, sp. pp.89-98. NICOLL, W. Les procédures Luns/Westerterp pour l'information du Parlement Européen RMC 1986, pp.475-476.

external relations<sup>118</sup> with the amendments of the SEA, is to be connected to the other amendments of the Treaty introduced with the SEA and moreover which have, to a limited extent, enhanced the role of the Parliament in the adoption of Community legislation<sup>119</sup>.

In this respect it can be observed that the Parliament has been recognized a "power of co-decision"<sup>120</sup> in the adoption of Community binding acts only in the field of external relations. This power is however limited. First, it only concerns Article 238, while the SEA has not amended Article 113. It is well known that this provision does not even require the opinion of Parliament. The objection that in practice the Parliament is consulted also in the case of commercial agreements does not seem convincing because this procedure is not based on a binding provisions, therefore the Council could suspend this practice without any legal consequence<sup>121</sup>. The absence of the requirement for Parliament's

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<sup>118</sup> The assent of Parliament is also required by Article 237 as amended by Article 8 of the Single European Act for the conclusion of agreements for the accession of new members in the Community. This, however, could hardly be considered a subject matter related to external relations.

<sup>119</sup> See the cooperation procedure introduced by Article 7 of the SEA (see Article 149 EEC Treaty) The picture will be more complete if one considers the Parliament's power as regards the budget (see reference above, in the chapter on financial cooperation) and the role that the Court of Justice has recognized to the Parliament under Article 173. See case 294/83 23.04.1986 Parti Ecologiste "Les Verts" v. European Parliament (1986) ECR p.1339 (where the Court ruled that Article 173 covers the acts of Parliament), case 70/88 European Parliament v. Council 22.05.1990 (1990) ECR I-2041. For the locus standi ex Article 175 (failure to act) see case 13/83 European Parliament v. Council 22.05.1985 (1985) ECR p. 1513. See GUILLERMIN, G. Le principe de l'équilibre institutionnel dans la jurisprudence de la Cour de Justice des Cee J.Droit.Int. 1992, pp. 319-345.

<sup>120</sup> So defined by the Court in case 302/87 European Parliament v. Council 27.09.1988 (1988) ECR p. 5615 para. 26.

<sup>121</sup> When, on the contrary, the Treaty requires the opinion of the Parliament, an act adopted without this opinion can be declared void for infringement of an essential procedural requirement. The Court has also ruled that it is not sufficient for the Council to

opinion under Article 113 is a lacuna which should be tackled if one considers the relevant number of agreements concluded on this basis. The second limit of the co-decision procedure is the "negative power"<sup>122</sup>, in fact in practice the Parliament can only make the adoption of the act more difficult but is not involved in the negotiations. However, the possibility of a veto from the Parliament should at least theoretically require closer cooperation between the Parliament, the Council and the Commission<sup>123</sup>.

"So it is not just the Council which may influence the negotiations, Parliament may also do so during the negotiating process in the certainty that its views will be taken into account in the agreement."<sup>124</sup>. It is not by chance that the Parliament's rules of procedures were modified after the entry into force of the SEA to include for both the association and trade agreements the so-called Luns-Westerterp procedures (Articles 33 and 35)<sup>125</sup>. For the Parliament there are other agreements which are politically as important as the agreements concluded under Article 238. Article 34 of the rules of procedure of the European Parliament extends the Luns procedure and the requirement of Parliament's assent to those agreements, which are defined as "significant international

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ask for the Parliament's opinion, the requirement implies that the Parliament actually expresses its opinion. See case 138/79 Rouquette v. Council 29.10.1980 (1980) ECR p.3333.

<sup>122</sup> BIEBER, R., PANTALIS, J., SCHOO J. Implications of the Single Act for the European Parliament CMLRev 1986 pp.767-792 p.779.

<sup>123</sup> Although, as the case of the Protocols with Israel shows, the rejection of the agreement by the Parliament in plenary session cannot be avoided even if the assent is reached within the competent Parliament Committee. See ADAM, R. I protocolli Cee-Israele davanti al Parlamento Europeo RDI 1988 601-605.

<sup>124</sup> See Report on the Role of the European Parliament in the Field of Foreign Policy in the Context of the Single European Act Rapporteur Puchades, PE DOC A 2-86/88 26.05.1988.

<sup>125</sup> The revision and improvement of the procedures was considered a necessity by the Parliament after the amendment of the SEA. Ibidem p.11.

agreements" ("significant within the terms of the solemn declaration on the European Union"<sup>126</sup>). From a legal point of view, the provision of the rules of procedure cannot modify the rule contained in the Treaty. It is clear that it is possible for the Council to extend the Luns procedure to all types of agreements (the procedure is a development of the actual practice and it is not contained in any provision of the Treaty or in any secondary legislation). Similarly, the optional consultation of the Parliament is always possible. However, in the event of Parliament's rejection of agreements concluded on a different legal basis than Article 238, the Council could adopt these agreements without legal consequences.

What happens if Parliament does not deliver its opinion? This hypothesis is different from the case of a negative opinion since in this latter case the opinion is delivered, while in the former case Parliament does not act. Before the requirement of assent for association agreements, the possibility of delaying the delivering of its opinion was a more pertinent problem. At present the Parliament has a more important instrument for blocking the conclusion of the agreement which it does by refusing to give its assent. In fact, before the adoption of the Single European Act, its negative opinion could be ignored by the Council. The only way therefore of increasing de facto its power was by refusing to deliver its opinion, i.e. making use of the Roquette decision whereby the Parliament must express its opinion. It seems however, that Roquette does not allow the Parliament to use its consultative power in such a way<sup>127</sup>. In the case described above, the Council had not exhausted all the possibilities of obtaining the Parliament's

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<sup>126</sup> Parliament claimed the right to decide which agreements are significant. See FLAESCH-MOUGIN *Chronique* 1990 op.cit. p. 94. Doc. A2-131/86.

<sup>127</sup> The Court did not examine the issue of whether the Parliament could use the consultative competence to hold up legislation indefinitely just by refusing to give an opinion.

opinion on the regulations in question, and for this reason the Court declared them void for infringement of an essential procedural requirement. The use of the right to express its opinion to block the adoption of an act seems to go beyond the scope of the power which is recognized to the Parliament. The Parliament must give its opinion within a reasonable time limit, the length of which may depend on the circumstances and on the urgency for the adoption of the act. What can be inferred by the ruling of the Court is that where the Council has exhausted all the possibilities to obtain the opinion of the Parliament, it could adopt the act without the Parliament's opinion<sup>128</sup>.

Parliament's role in the field of external relations, where the Community has express external power to conclude agreements with third countries, may be summed up as following:

- agreements concluded under Article 113: Parliament's opinion is not requested. The Luns-Westerterp procedure can be applied but there is no obligation on the part of the Council to do so;
- agreements concluded under the double basis of Articles 235 and 113. Article 235 requires the opinion of the Parliament, which, however, is not binding on the Council;
- agreements concluded under Article 238: the assent of the Parliament is required;
- agreements in the field of research and technological development and of the environment (see Articles 130f-130q and 130r-130t respectively). In the first case the cooperation procedure applies. Article 130Q in fact establishes that the Council in adopting, inter alia, the provisions referred to in Article 130n (cooperation with third countries) acts in cooperation with the European Parliament. This technique does not seem the most appropriate way

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<sup>128</sup> See JOLY, G. Observations sur l'arrêt isoglucose CDE 1983, pp.66-88, JACOBS, F Isoglucose resurgent: two Powers of the European Parliament Upheld by the Court CMLRev 1981, pp.219-226, HARTLEY, T. Consulting the European Parliament ELRev 1981 pp.181-185.

to associate the Parliament with the conclusion of an agreement<sup>129</sup>. For agreements in the field of the environment Parliament is consulted (see Article 130s);

- agreements founded on an other legal basis (theory of parallelism between internal and external competence); Parliament's position as regards the agreement depends on its power as regards the adoption of internal legislation.

Some of the comments on the new procedure of Article 238 emphasize that this could lead to an inter-institutional dispute on the choice of the legal basis of agreements, made worse by the problem of defining the notion of association and of trade policy<sup>130</sup>.

In practice, regarding the most significant agreements concluded by the Community after the entry into force of the SEA, this seems not to be the case. Article 238 was in fact referred to as the legal basis for the fourth Lomé Convention (traditionally based on this Treaty provision), for the third financial Protocols with Mediterranean countries, and presumably the fourth<sup>131</sup> Protocols, for the so-called new "European agreements" with some Eastern European countries and with EFTA countries. Articles 113 and 235 have been the legal foundation of agreements with the member countries of the Cooperation Council of the Gulf. This last case gave raise to some doubts as regards the possible use of Article 238, especially if one considers that Article 238 was used as legal basis for the Cooperation Agreement with Jordan which could hardly be defined as a Mediterranean country, although it is

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<sup>129</sup> EHLERMANN, C.D. L'Acte unique et les compétences externes de la Communauté: un progrès? Rérelations Exterieures..., op.cit. p.79-90.

<sup>130</sup> Ibidem. p. 89. FLAESCH-MOUGIN, C. speaks of a "tentation de l'article 238" for Parliament, see Les accords externes, Chronique... op.cit. p.90.

<sup>131</sup> Only the Protocol with Tunisia has entered into force, those with Morocco and Algeria are waiting the assent of Parliament.

clear that this was a political choice<sup>132</sup>.

The assent of the European Parliament was refused to the financial Protocols of the agreement with Israel, Syria and Morocco.

It is interesting to note that in the case of Israel, the relevant Commission of the Parliament was in favor of giving its assent to the conclusion, but Parliament refused to it. It has rightly been observed that this seems to contradict the assumption that the consultation between the Parliament Committees and the Council during the negotiations could avoid the risk of a refusal of assent from Parliament<sup>133</sup>. This is related to the question of the object of the assent of the Parliament. Does the Parliament take into account the content of the agreement or can the assent be given or refused on the basis of more general political consideration related to the Community partner? The refusal of assent in the case of the financial protocols with Israel (and with Morocco on the basis of alleged violations of human rights) seems to indicate that an examination by the Parliament is not limited to the content of the agreement itself. It seems clear, therefore, that consultation between the Parliament and the Council during the negotiating stage can only concern the content of the agreement which is being negotiated. This means in other words that the improvement of the phase of consultation can be useful only as far as the technical aspects of the agreement are concerned, but this is useless if political considerations are at the heart of Parliament's refusal to give assent. On the other hand it should

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<sup>132</sup> See the Resolution of the European Parliament which indicated Articles 238, 113 and 235 as a basis for the agreement with the Gulf countries. Q.J. C 12 1989 p.80. See also Resolution on the significance of the free trade agreement to be concluded between the EEC and the Gulf Cooperation Council where the parliament strongly criticizes the lack of consultation on the mandate to the Commission for the negotiation of the agreement see points 15 to 18 Q.J. C 231 1990 p. 216.

<sup>133</sup> See ADAM, R. I protocolli...op.cit.

also be considered that political evaluations have been the basis of the freezing of trade and association agreements between the Community and Spain, Greece and Turkey. I do not see why the same type of consideration should not be applied by the Parliament, a highly political institution, when requested to pronounce on agreements concluded by the Community<sup>134</sup>.

### 3.c) The Amendments of the Procedure for Adoption of Agreements as Contained in the Maastricht Treaty on European Union.

The provisions which have been discussed in this section are the object of significant amendments contained in the Treaty on European Union signed in Maastricht on the 11th of December 1991 amending the Communities Treaties in force.

The entry into force of the Treaty is foreseen for January 1993 although the process leading to ratification by national Parliaments is proving long and complicated.

Article 228, as amended by the Union Treaty (I will refer to it as Union 228 while I will refer to the version at present in force as EEC 228), becomes a more complete provision codifying the actual practice, absorbing some of the procedural requirements contained in other Treaty Articles and introducing important modifications in particular with regard to the power of the European Parliament<sup>135</sup>.

While the amendments seem to provide answer to some of the criticisms and doubts expressed above, over the procedure at present in force, they give rise to other questions which could probably be clarified by future practice.

In the new version of Article 228, the initiative for the

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<sup>134</sup> In the case of Israel, assent was refused because of the political situation in the occupied territories, although assent was later given. See SILVESTRO, M. Les protocoles.. op.cit. p. 462.

<sup>135</sup> REICH, C. Le traité sur l'Union Européenne et le Parlement Européen RMC 1992, pp.287-292.

conclusion of agreements with third countries comes from the Commission which makes a recommendation to the Council. The latter authorizes the Commission to open negotiations issuing directives followed by the Commission during negotiations. The Commission is assisted by a special committee appointed by the Council.

This provision extends the procedure provided for in Article 113 (common commercial policy) to all the agreements of the Community codifying a common practice of the Community (see supra).

As regards the opening words of Article 228 Union it should be remarked that they do not modify Article 228 EEC. It is however, interesting to note that, in an early version of the draft Treaty on the Union Article 228, reads as follows: "Where agreements with one or more States or with an international organization in fields covered by this Treaty need to be negotiated..."<sup>136</sup>. The adoption of this version would have meant an express acknowledgment of the parallelism between internal and external competence, that is that the Community could conclude agreements with third countries in all the areas where competence has been given to the Community.

Article 228 Union specifies that the voting procedures in the Council are, both as regards the phase preceding the conclusion<sup>137</sup> and the conclusion itself, by qualified majority or by unanimity. Qualified majority applies in general, while unanimity is applied in the case of agreements under Article 238 Union or when the agreement covers a field for which unanimity is required for the

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<sup>136</sup> See Non-Paper submitted by the presidency of the Intergovernmental Conference on Political Union reported in Europe Documents n.1709/1710 3.05.1991 and the Draft Treaty submitted by the Luxembourg Presidency on 20.06.1991 Europe Documents n. 1722/1723 5.07.1991. The Draft Treaty presented by the Dutch Presidency in November contain a version of Article 228 which is closer to the one adopted see Europe Documents n.1746/1747 20.11.1991.

<sup>137</sup> That is the authorization to open negotiations to the Commission and to adopt directives for negotiation.

adoption of Community legislation.

This requires a "cross reading" of the Treaty provisions, which makes the choice of the voting procedure quite complicated, in particular if one considers that in many cases the provisions of the Treaty refer to procedures contained in other Treaty Articles.

Article 130M Union (research and technological development) makes reference to Article 228 Union. What is the voting procedure to be followed by the Council in this case? Reference should be made, according to Article 228, to the voting procedures followed in the Council for the adoption of Community acts in the same field. The Community rules in this field are contained in the multiannual framework programme implemented by specific programmes which include cooperation with third countries. The specific programmes are adopted by the Council voting by qualified majority (Article 130I.4).

In the case of the environment Community legislation is adopted following the procedure laid down in Article 189C Union. The general rule in this case is majority but when the Parliament rejects the common position at the second reading the Council votes by unanimity.

Which then will be the procedure to be followed for the conclusion of agreements in the field of environment? In Article 228 Union the word "field" is used. It is not clear if it can also refer to a specific area or sector of activities. In this case the voting procedure to be followed for the conclusion of the agreement could be the same as the one applied for the adoption of the basic Community legislation in the area concerned.

The same reasoning could apply in the field of development cooperation. According to Article 130W Union the measures taken by the Council to further the objectives laid down in Article 130N Union are adopted under the procedure of Article 189C Union.

Article 228 Union fixes the rules concerning the consultation of the European Parliament. The general rule is consultation, which

applies when agreements are concluded in a field requiring the procedures established in Article 189B or 189C Union for the adoption of Community legislation.

The Council may fix a time-limit within which Parliament delivers its opinion. In the absence of this opinion the Council may act. It is regrettable that the opinion of the Parliament is explicitly excluded in the case of trade agreements.

The assent of the Parliament is required in some cases by way of derogation from the general rule. It is not only required for association agreements but is extended to (i) "other agreements establishing a specific institutional framework by organizing cooperation procedures, (ii) agreements having important budgetary implications for the Community and (iii) agreements entailing amendment of an act adopted under the procedure referred to in Article 189b". It can be submitted that these new categories of agreements have been introduced to answer Parliament's request, proposed in its rules of procedures, to extend the assent to other significant agreements.

As for agreements under (i), it can be observed that the definition given in Article 228 Union could apply to framework cooperation agreements concluded with developing countries in Asia and Latin America (see supra) and based on Article 113 and Article 235 EEC. The extension of the Parliament's assent to these agreements should avoid the potential competition between, on the one hand, Article 238 Union, and on the other Articles 113 and 235 because Parliament would arguably support the choice of Article 238 instead of Articles 113 and 235. It is also possible to apply this definition to other agreements based on Article 113 alone, where these create common institution with a view to adopting common provisions in the field of trade.

The definition of agreements under (ii) leave scope for different interpretation if one considers, for instance, that preferential trade agreements diminish the financing of the Community since one of the sources of revenue are customs duties.

As for agreements under (iii), the rationale behind the provision seems consistent with the principle of the institutional balance. When Parliament has been granted a power of co-decision for the adoption of internal rules, a corresponding power is also granted in the same areas when the Community concludes agreements with third countries. This means in practice that the assent of Parliament will be required for agreements in the fields of development cooperation (Article 130W Union provides for application of Article 189C Union), research and development (Article 130I requires application of Article 189C Union) and the environment (Article 130S refers also to Article 189C Union).

In the case of assent the Council can fix a deadline for the Parliament only in an urgent situation.

Article 228 Union recognizes the power of the Commission to approve modifications to agreements in two cases: when the agreements allow modifications to be adopted with a simplified procedure

or when the agreement establishes that amendments can be adopted by the bodies created by the agreement (case of modification of the rules of origin protocol in Maghreb..).

As for Article 238 Union, the rules of procedure and the rule whereby amendments of the Treaty required by the association agreement are adopted according to Article 236 Union, are included in Article 228 Union. Article 238 Union is the equivalent of the first para. of Article 238 EEC. The only modification in the text relates to the possibility of concluding association agreements with one or more international organizations. The extension of "an international organization" to "one or more ..international organizations" can be interpreted as laying down the possibility of concluding an agreement involving more than one organization at one time, which however could not be excluded by the version of Article 238 of the EEC Treaty.

**B) THE "INSTITUZIONALIZATION" OF THE COOPERATION AGREEMENTS.**

1) The Creation of Common Institutions in the Field of External Relations.

The "institutionalization" of agreements, that is the creation of institutions composed of representatives of the Contracting Parties is a common feature of many agreements concluded by the Community with third countries.

The number of organs, their composition, task and competence depends on the content, scope and degree of integration aimed at in the various agreements.

Generally speaking, these organs provide the Contracting Parties a forum for consultation through which the agreement can be monitored although the solutions depend again on the purpose of the agreements and its characteristics.

Thus, for instance, trade agreements with a limited scope, may create consultative bodies for the examination of the trend in the marketing of the products concerned<sup>138</sup>. Other trade agreements which are more ambitious in scope, such as the free trade agreements with EFTA, creating a free trade areas concerning all industrial products, establish common institutions (joint committees) which in addition to implementing and administering the agreements, are also empowered to take binding decisions<sup>139</sup>.

In the case of Framework Agreements, the task of the institutions is that of identifying areas of cooperation and suggesting practical measures to be taken by the Contracting Party in the fields covered by the agreement<sup>140</sup>. In other cases, a even

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<sup>138</sup> See for instance the Consultative Committee in the voluntary restraint agreement with Argentina Q.J. L 275 1980.

<sup>139</sup> See for example the trade agreement concluded with Finland in Q.J. L 328 1973

<sup>140</sup> See the Agreement for commercial and economic cooperation between the EEC and India Q.J. L 328 1981 Article 10 creating a Joint Commission. The framework on scientific and technical cooperation with Austria in Q.J. L 216 1986 creating a Joint

more general task of the Joint Committee is to "promote and keep under review the various cooperation activities envisaged between the Parties in the framework of the Agreement"<sup>141</sup>.

The agreements with the highest level of institutionalization are the Association Agreements concluded with Greece and Turkey, the Lomé Conventions, the Agreement concluded with the EFTA countries creating an European Economic Area (hereafter EEA Agreement) and the Agreements concluded with some Eastern European countries (Europe Agreements). For the Association Agreements concluded with Turkey and Greece, the bodies created by these agreements are designed on the model of the Community institutions, which can be explained by the fact that these were conceived as pre-adhesion agreements. For the Lomé Convention<sup>142</sup>, the degree of institutionalization, can be explained by the objective difficulties which arise in administering an agreement with a high number of Contracting Parties and involving a wide range of activities. In the EEA Agreement, the Joint Committee has important competencies in ensuring the uniform interpretation of the Agreement and of its provisions reproducing those contained in the EEC Treaty<sup>143</sup>. In the Europe Agreements, the Association Council,

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Committee and the COST agreement creating a concertation committee, Q.J. L 388 1981.

<sup>141</sup> See the Cooperation Agreement between the EEC and the member countries of ASEAN Q.J. L 144 1980 Article 5 instituting a Joint Cooperation Committee, the Cooperation Agreement concluded with the General Treaty on Central American Economic Integration and Panama Q.J. L 172 1986 Article 7 (power or recommend solution to differences that may arise on interpretation of agreement). See Framework Agreement for cooperation between EEC and Brazil Q.J. L 281 1982, Article 4.

<sup>142</sup> The Convention sets up of a Council of Ministers, a Council of Ambassadors (executive tasks), a Committee and groups of work and a Parliamentary Assembly.

<sup>143</sup> The Joint Committee has the general competence of ensuring effective implementation of the Agreement and in the field of the settlement of disputes and safeguard measures. Other institutions

the main organ of the Agreement, with the power of supervision, settlement of disputes and of adopting binding decisions, is assisted by an Association Committee. The Association Parliamentary Committee is a forum for exchange of views between the Contracting Parties.

## 2) Composition and Procedures Followed by the Common Institutions.

Article 44 of the Agreement with Morocco (Title IV "General and Final Provisions") establishes a Cooperation Council which, with regard to its competence and composition is the primary organ of the agreement. Other organs include a Cooperation Committee (article 47.1) and other committees which may be created by the Cooperation Council itself to assist it in the performance of its duties (Article 47.2). The Protocol on the Rules of Origin creates, in Article 29, a Customs Cooperation Committee. It is composed of customs experts of Member States and of competent officials of the EEC Commission. This Committee applies the same rules of procedure of the Cooperation Council.

This original institutional structure has been supplemented by other bodies created by the Additional Protocol (whose content on agricultural trade has been studied above in Chapter I, section B. More precisely, a Trade and Economic Cooperation Committee and an advisory working party were created, respectively, by Article 5 of the Protocol and by the Joint Declaration in annex on new potatoes (it shall be remembered that the Additional Protocols are an integral part to the Cooperation Agreements). One should also

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created by the Agreement are the EEA Council, the political body responsible of giving political impetus to the implementation of the Agreement and which takes the political decision for amendments, a Joint Parliamentary Committee and a EEA Consultative Committee composed of representatives of the EEC Economic and Social Committee and of the analogous EFTA Committee with consultative competencies.

note that Article 47.2 of the Cooperation Agreement provides that the Cooperation Council may set up other committees to assist in the performance of its duties. The two above-mentioned organs, however, were created by agreement of the Contracting Parties and not by the Cooperation Council; they are part of the institutional mechanisms of the Agreement (see Article 5 of the Additional Protocol).

The Cooperation Agreement specifies in Article 45 that members of the Cooperation Council are on one hand members of the Council and of the Commission of the Community and, on the other, members of the Government of Morocco. The rules of procedures do not give any clarification on the constitution of the Council, it is only stated that representatives of the European Investment Bank are admitted as observers, when relevant questions involving the actions of this institution (in the field of financial cooperation), are included in the minutes (Article 3 of the rules of procedure).

Member States of the Community, which are contracting parties of the agreement, are not members of the Cooperation Council. It should, on the contrary, be noted that the Cooperation Agreement establishes in Article 47 that the Cooperation Committee is composed by one representative of each Member State and one representative of the Commission and of representatives from Morocco. One can submit that the varied composition is due to the different tasks of these two organs. The Cooperation Council as we will discuss in more details later, has the task of supervising the functioning of the Agreement and has the power of taking binding acts, whereas the Cooperation Committee has the responsibility of preparing the work of the Cooperation Council. The number of Community representatives is unclear: according to the terms of Article 45 it seems that all the members of the Council are represented in the Cooperation Council while for the Commission the number of officials may vary.

The Cooperation Council is chaired, alternatively every six months (April-September and October-March) by a member of the Council and a member of the Government of Morocco. The Cooperation Council shall meet once a year unless additional reunions are necessary at the request of either Contracting Party. Article 15 of the rules of procedure specifies that the secretary is provided by a member of the General Secretary of the Council and by a member of the government of the other Contracting Party.

The Cooperation Agreement does not provide, as in the case in Lomé, for the establishment of an institution composed of representatives of the members of the Parliament of the Community (MS) and Morocco. Article 48, however, establishes that the Cooperation Council shall take any measures to facilitate contacts between the European Parliament and the Chamber of Representatives of Morocco<sup>144</sup>.

The composition of and procedure followed by the Trade and Economic Cooperation Committee set up by the Additional Protocol (Article 5) shall be decided by the Cooperation Council. According to the Joint Declaration the members of the "advisory working party" (Joint Declaration, on new potatoes annexed to the Additional Protocol) are designated by the governments of the Mediterranean exporting and Community importing countries. In other words it seems that this is an institution common to all those concerned Mediterranean countries (see other Joint Declaration). This seems to be a positive development for the coordination and integration of the markets (see tasks of the advisory working party).

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<sup>144</sup> ..disposition sans grande portée pratique, les parlements étant suffisamment souverains pour établir d'eux-mêmes de tels contacts" BRODIN La politique d'approche globale méditerranéenne de la Communauté MEGRET, J. Le Droit des Communautés Economiques Européennes Vol. XIV, pp. 197-298, p. 254. In the practice delegations of representatives of the European Parliament and of the Parliaments of the Mediterranean countries meet periodically. (Intergroup) They, however, remain outside the structure of the agreement.

In principle the Cooperation Council should meet once a year, but additional meetings are also possible. The Agreement does not specify how often the other bodies shall meet. According to the rules of procedures, the Contracting Parties can request consultation with the other Party at any moment. Such meetings take place within twenty-one days from the date of the request. The questions discussed are listed in the minutes. A provisional minute is prepared by the President and the formal minute is approved by the Cooperation Council at the beginning of each session (Article 8).

### 3) Competencies of the institutions.

The competence of the Cooperation Council may be summed up as follows.

(i) It provides for a forum for consultation of the Contracting Parties. This consultation takes place in the case of unilateral revision of the agreements. The consultation is mandatory, when the arrangements applicable to petroleum products are modified by the Community (article 13), whilst in the case of modification of the provisions of agricultural trade (article 25) and introduction of new customs duties by Morocco (Article 28), the consultation takes place only at the request of the other contracting party.

Consultation is held within the Cooperation Council in crisis situations as in the case of adoption of safeguard measures (Article 38 and 39) or when the advantages granted to Morocco, as regards agricultural products, are jeopardized by abnormal conditions of competition (Joint Declaration annexed to the Cooperation Agreement). Finally, consultations are carried out in the event of the conclusion of Association Agreements or trade agreements which have a particular incidence in the functioning of the Cooperation Agreement at the request of one of the Contracting Parties. Consultation has the general aim of watering down the unilateral character of the decisions even if in these cases the

final decision is the competence of one of the parties;

(ii) The Cooperation Council has a specific task in the settlement of disputes that might arise between the Contracting Parties.

When one party considers that the other has not fulfilled its obligations under the Agreement it may take "appropriate measures". However, before doing this, it is obliged to inform the Cooperation Council which shall examine the situation in search of a solution. According to Article 52, the Cooperation Council is competent to examine disputes which may arise between the Contracting Parties on any questions of interpretation of the Agreement. If the dispute is not settled at the Cooperation Council meeting an arbitration procedure takes place. Each Contracting Party (the Community and the Member States are considered one party) appoints an arbitrator and a third one is appointed by the Cooperation Council.

(iii) The Cooperation Council may modify the Agreement and enact binding rules for its implementation<sup>145</sup>.

In the case of a modification of the tariff nomenclature the task of the Cooperation Council is to adapt the nomenclature used in the Agreement (article 32). In the case of social cooperation the task of the Cooperation Council is to implement, through the adoption of binding rules, the principles set up in Article 41 regarding the abolition of discrimination in the treatment of migrant workers and of the members of their families (see for the details the chapter on social cooperation).

Article 28 of the Protocol on rules of origin, empowers the Cooperation Council to make changes on the provisions of the protocol. An annual examination is carried out for this purpose.

(iv) The Cooperation Council sets up guidelines of cooperation.

The rules on financial cooperation are conceived as framework

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<sup>145</sup> For a distinction between "implementing" and "legislative" power delegated to international bodies and the consequence for the Community institutional balance see LENAERTS, K. Regulating the Regulatory Process: Delegation of Powers in the European Community Paper presented at a Workshop organized by the European University Institute, Florence on 16 June 1992.

provisions, in this context the role of the Cooperation Council is, at least in theory, relevant. In fact, although its role is not very precisely defined, it is empowered to take binding decisions to implement the cooperation.

The competence of the Cooperation Committee is not defined in the Agreement. Article 47 only indicates as the task of this body that of assisting the Cooperation Council in the performance of its duties. According to the rules of procedures (Article 14) its duties are not much more specified: it prepares the resolutions of the Council, examines questions referred to by the Cooperation Council and it assures the continuation of the cooperation.

The task of the Economic Cooperation Committee (Additional Protocol concluded in 1987, Article 5) is that of assuring a regular exchange of information on trade, production data and forecast. The duty of the "potatoes working party" (1987 Additional Protocol Joint Declaration) is more specifically that of setting up timetables for export of potatoes to avoid the concentration of deliveries on sensitive periods for the Community market.

The Customs Cooperation Committee guarantees the administrative cooperation for the correct application of the customs provisions of the Agreement and carry out the specific executive tasks conferred by the Cooperation Council. It has not autonomous power of decision and it is provided for that it has to refer to the Cooperation Council whenever a question concerning the application of the Agreement arises.

#### 4) Acts Enacted by the Common Institutions.

The Cooperation Council can enact decisions, which are binding on the Contracting Parties and recommendations, opinions and resolutions. Decisions are enacted only where expressly provided for in the Agreement, whereas the other instruments, which are not binding, can be adopted whenever it is considered desirable by the Cooperation Council.

The technical bodies created by the Agreements and Additional Protocols are empowered to adopt only specific acts which are related to their duties, as is the case with the reports that the Trade and Economic Cooperation Committee may submit to the Cooperation Council, upon request of this latter and the export timetables of the "potatoes working party" (see supra).

The Cooperation Agreement merely specifies that the decisions "shall be binding on the Contracting Parties, which shall take such measures as are required to implement them."

The legal value of the binding decisions of the Cooperation Council within the Community legal order will be discussed in the following section.



C) The Direct Effect of the Cooperation Agreements and of the Decisions Enacted by the Cooperation Council.

The scope of this section is to examine whether the Cooperation Agreements concluded with Maghreb countries and the decisions adopted by the Cooperation Council created by the Agreements can, according to the case-law of the Court of Justice in this matter, have direct effect in the Community legal order.

The direct effect of a provision is a question of interpretation of the agreement which, in the Community legal order, is a task of the Court of Justice<sup>146</sup>.

The question of direct effect of provisions of the agreement concluded by the Community with a third State can be decided in a different manner by the Court of this State<sup>147</sup>.

The question of acknowledgment of direct effect is less relevant from a perspective of balanced enforcement<sup>148</sup> of the

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<sup>146</sup> See Haegemann, *infra*.

<sup>147</sup> See the case of the agreement concluded with Austria and Switzerland which were denied direct effect by the Tribunals of these countries. See IMBRECHTS, L. Les effet internes des accords internationaux des Communauté Européenne Rev.D'Int.Europ. 1986/1987, pp.59-77, p. 65 footnote 19. The decisions of these Courts have not prejudiced the EEC Court of Justice ruling on the same matter. According to the Court of Justice the judgments of these Courts does not violate the reciprocity required by the agreements. See Kupferberg op.cit. para 18. According to JACOT-GUILLARMOD,O., the Court of Justice in Kupferberg sent an indirect but clear message to the EFTA Courts to follow its position as regards the question of direct effect. The author also underlines that the consequences of the different case-law on the matter are the unbalanced position of EFTA and EC enterprises in the market of the other Contracting Parties. For reference of EFTA Case-law see this author's article: Le protectionnisme judiciaire: faculté juridique ou défi politique pour le libre-échange en Europe EFTA Bull. 1985, pp. 8-12.

<sup>148</sup> See BOURGEOIS, J.H.J., Effect of International Agreements in European Community Law: Are the Dice Cast? Mich.L.R. 1984 pp. 1250-1273.

agreement in the case of the Cooperation Agreement with Maghreb countries. As it will be discussed in detail in the following chapters, the majority of obligations are laid down for the Community and the number of obligations for Maghreb countries are very limited.

An example of a provision laying down a certain and unconditioned obligation for Morocco and which could, therefore, be invoked before a national Court, is contained in Article 33 establishing that "The Contracting Party shall refrain from any measure or practice of an internal fiscal nature establishing, whether directly or indirectly, discrimination between the products originating in the territory of the other Contracting Party".

A provision contained in an international agreement has direct effect<sup>149</sup> when it creates rights upon individuals which do not require the adoption of further acts by the contracting parties of the agreement for their implementation. As a consequence, the rights can be invoked by the individuals before their national Courts if the State of the individual does not apply this right or violates it. In other words, when a Court is required to enforce a rule contained in a provision of an international agreement, it will verify if this provision meet a number of requirements whereby it directly creates subjective rights or if the action of the legislative organs is necessary<sup>150</sup>.

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<sup>149</sup> This expression is employed in Community law in relation not only to agreements concluded with third countries but also, and especially, in connection with Articles of the EEC Treaty and acts of derived Community legislation. See PESCATORE, P. *The Direct effect of Community Legislation: an Infant Disease of Community Law* *ELRev.* 1983, pp. 155-177. In international law the terms self-executing norms are more often used. For a distinction between direct applicability and direct effect in Community law see GAJA, G. *Fonti..op.cit.*

<sup>150</sup> When the possibility of invoking of an international agreement provisions is raised before a Court the questions examined concern, firstly, the possibility of enforcement and then their merit, that is the interpretation of the rights invoked. As

According to the well-established case-law of the EEC Court of Justice a provision contained in an agreement concluded with a third country has direct effect<sup>151</sup> when two criteria have been satisfied.

One is the so-called "preliminary question"<sup>152</sup>, that is the capacity of the agreement to have direct effect. To ascertain this the Court examines the "nature" and the "purpose" of the agreement<sup>153</sup>.

The second criterion concerns the wording of the provision itself, which must contain an obligation "clear, precise and unconditional" not requiring, for its application, the intervention of any further act<sup>154</sup>.

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discussed later, in Polydor the Court first gave an interpretation of the provision of the agreement with Portugal to avoid to rule on the Agreement direct effect. Case 270/80 Polydor Limited and RSO Records Inc. v. Harlequin Record Shops and Simon Records 9.02.1982 (1982) ECR p. 329.

<sup>151</sup> See joined cases 21-24/72 International Fruit Company v. Produktschap voor Groenten en Fruit, 12.12.1972, (1972) ECR p.1219, (GATT); case 87/75 Bresciani v. Amministrazione italiana delle Finanze, 5.02.1976, (1976) ECR p.129 (Yaoundé Convention); case 17/81 Pabst & Richarz v. Hauptzollamt Oldenburg, 29.04.1982, (1982) ECR p.1331, (Association Agreement with Greece); case 104/81 Hauptzollamt Mainz v. Kupferberg 16.10.1982, (1982) ECR p.3641, (Free trade agreement with Portugal); case 12/86 Demirel, op.cit.; case 192/89 Sevince v. Staatssecretaris van Justitie, 20.09.1990 (1990) ECR p.3461.

<sup>152</sup> See TAGARAS, H.N. "L'effet direct des accords internationaux de la Communauté" CDE 1984 pp.15-53, p. 29 ff, IMBRECHTS, L. "Les effets internes op.cit. p.65, MARCH-HUNNINGS, N. "Enforceability of EEC-EFTA Free Trade Agreements" E.L.Rev. 1973, p.183.

<sup>153</sup> In case 87/75, Bresciani, the Court speaks of the "spirit", the "structure" and of the "wording" of the Convention and of the Article (para. 16), in case 17/81, Pabst, the terms used are "object" and "nature" of the agreement (para. 27).

<sup>154</sup> The fact that one provision of an agreement has not direct effect does not imply that other provisions cannot create rights upon individuals which are directly enforceable.

1) The Cooperation Agreements.

The direct effect of a provision contained in the Cooperation Agreement with one of the Maghreb countries was examined by the Court of Justice in case 18/90 Kziber. As it will be discussed in another part of the thesis (see Part III, second chapter), this concerned the daughter of a Moroccan workers established in Belgium who was refused the grant of unemployment benefits paid to Belgium nationals because of her Moroccan nationality. Ms. Kziber invoked the principle of non-discrimination established by Article 41 of the Cooperation Agreement to be admitted to the above mentioned benefits. The Court of Justice was therefore required to rule on the direct effect of Article 41 and on the interpretation of the principle of non-discrimination. It would have seemed logical for the Court to first examine whether the Cooperation Agreement with Morocco had the capacity of having direct effect and, secondly, whether Ms. Kziber could rightly invoke Article 41. Instead, the Court examined the nature and the purpose of the Agreement only after having positively solved the question of direct effect of Article 41.<sup>155</sup> I will then begin by examining the capacity of the Agreement to have direct effect.

The object and the nature of the agreement are taken into account by the Court to establish the possibility of its having direct effect: "the direct effect is not contradicted by the examination of the nature and the object of the Agreement .." The

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<sup>155</sup> An analogous form of reasoning was followed by the Court in case 192/89 Sevince, op.cit., where one of the question addressed to the Court concerned the direct effect of two decisions adopted by the Association Council created by the Association Agreement with Turkey. The Court, after having examined the wording of these decisions, declared that it had direct effect having regard to the object and the nature of these decisions and of the Agreement to which these are linked. For comparison, see joined cases 21-24/72 International Fruit Company 12.12.1972 (1972) ECR p.1219, para.27, Kupferberg op.cit., para.22.

Court affirmed that the objective of the Agreement<sup>156</sup> was to promote global cooperation between the contracting parties, in particular, with regard to the labor force. The fact that the Agreement aims essentially at the economic development of Morocco and is limited to establishing a cooperation among the parties, without pursuing a future membership of Morocco in the Community, does not prevent the direct applicability of some of its provisions" (para 21). Kziber seems consistent with the case-law, cited above, as regards the criteria laid down by the Court<sup>157</sup>. One question is worth mentioning, however, as it is related to what it has been discussed in other part of this thesis concerning the links which are established by the Cooperation Agreement. Even if in Kupferberg<sup>158</sup> the Court seemed to have abandoned the thesis that only the agreements establishing particular links between the parties may have direct effect, it is also true that the fact that the Court has never explicitly pronounced on this matter, imposes "une certaine prudence quant aux conclusions à tirer de l'arrêt Kupferberg"<sup>159</sup>.

The reference made by the Court to the "global cooperation"

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<sup>156</sup> The aim and the nature of the Agreement are analyzed at the very beginning of the Court's Decision, but with the purpose of making the object of the preliminary question submitted to the Court more precise (see paras. 8 and 9).

<sup>157</sup> The Advocate General, Van Gerven, gave a very detailed analysis of the Cooperation Agreement in the light of the Court's case law to demonstrate the capacity of the agreement to have direct effect.

<sup>158</sup> Case 104/81, Kupferberg, on the agreement concluded with Portugal (legal basis Article 113 EEC Treaty) establishing a free trade area between the contracting parties.

<sup>159</sup> See TAGARAS "L'effet direct des accords.." 1984 op.cit. p.47. For other authors the Kupferberg decision marks in this sense a "revirement" of the Court case-law. See BEBR, G. "Agreements Concluded by the Community and their Possible Direct Effect: from International Fruit Company to Kupferberg" CMLRev 1983 pp.35-73, p. 63, IMBRECHTS, L. "Les effets internes des accords.." 1986, op.cit. p.69.

between the parties as the main aim of the agreement seems to indicate that the tightness of the links is a relevant criterion in judging whether an agreement has direct effect.

As regards the capacity of Article 41.1 for having direct effect, the Court recognized that its wording was "clear, precise and unconditional" (ground 17). In this respect, two issues are discussed by the Court. The first is related to the formulation of Article 41.1., which reads: "Subject to the provisions of the following paragraphs, workers of Moroccan nationality and any members of their families living with them shall enjoy, in the field of social security, treatment free from any discrimination based on nationality in relation to nationals of the Member States in which they are employed" (emphasis added).

According to the Court, the reservation contained in this Article means that for family allowances, the addition of insurance periods, the transfer of pensions and annuities to Morocco, the principle of non-discrimination shall be regulated within the limits established in paragraphs 2,3 and 4 of this same Article 41<sup>160</sup>. For the remaining questions of social security, the non-discrimination principle remains unconditional (para. 18).

The second point examined by the Court was whether the application of Article 41 was subordinate to the intervention of the Cooperation Council as provided for by Article 42, which reads: "Before the end of the first year following entry into force of this Agreement, the Cooperation Council shall adopt provisions to implement the principles set out in Article 41" (emphasis added).

This argument, submitted by France and the Commission, was rejected by the Court. It held that the task of the Cooperation Council according to Article 42 is to promote the principle of non-discrimination, and that the intervention of the Cooperation Council was conceived for the application of the principle to aggregation of insurance periods, but it could not be considered

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<sup>160</sup> For an analysis of these rules see *infra*.



as a condition of application of the non-discrimination principle. c

Finally, the Court specified that Article 40 and 41,<sup>161</sup> do not have a programmatic character. This decision by the Court recalls a previous decision, case 12/86, Demirel, where a provision of the Association Agreement with Turkey, and of the Additional Protocol of 1970 were denied direct effect on the ground, inter alia, that they had a programmatic character<sup>162</sup>.

The importance of this case is that it is the first time that the Court examines the direct applicability of a Cooperation Agreement concluded with one of the southern Mediterranean countries. Although in other cases the Court has examined agreements concluded on the basis of Article 238

## 2) The Decisions of the Cooperation Council.

The Cooperation Council, the main institution common to every Cooperation Agreement<sup>163</sup>, has amongst others, the power to enact binding acts (decisions). Article 44 of the Cooperation Agreement with Morocco merely specifies that the decisions "shall be binding on the Contracting Parties, which shall take such measures as are required to implement them."

Which is the value of the decisions taken by the Association Council ? Are they part of the Community legal order ?

In two judgments the Court of Justice examined the questions of the binding acts enacted by an institution created by an

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<sup>161</sup> The Court also mentioned that Article 40 has direct effect, although the question of the direct applicability of this provision had not been raised. It can be affirmed thus that the direct effect of Article 40 cannot be contested. See RAUX, J. "La mobilité des personnes et des entreprises dans le cadre des accords externes de la CEE RTDE 1979, 466-478, p.474, NADIFI, A.. "Le statut juridique.... op.cit., RMC 1989, pp.289-295, p.291.

<sup>162</sup> Case 12/86, Demirel op.cit. ground 23.

<sup>163</sup> See supra when the provisions concerning the organs of the Agreement have been discussed.

association agreement. Although the Cooperation Agreements with Maghreb countries differ from the Association Agreements with Greece and Turkey, in particular as regards the different objectives they pursue, the question of the legal effect of the decisions adopted by the Association Council created by these agreements is the same for the two types of agreements.

In case 30/88,<sup>164</sup> Greece brought an annulment action before the Court against two Commission decisions approving the financing of certain projects for Turkey. Greece claimed, inter alia, that the Association Council's decision 2/80 did not constitute a sufficient legal basis for the implementation of payments, but that an act of the Council was required to transpose the decision of the Association Council in the Community legal order. Greece invoked Article 2(1) of the Intergovernmental Agreement laying down the rules for the procedures to be followed in the implementation of the Association Agreement with Turkey<sup>165</sup>. This provides that the decisions of the Association Council "shall, for the purposes of their implementation, be the subject of acts adopted by the Council acting unanimously after the Commission has been consulted".

According to the Commission, the words "for the purpose of their implementation" do not mean that any Association Council's decision should be transposed, but that the adoption of Community acts is necessary only when the rules contained in the decisions require, for example, the amendment of internal legislation.

The Council practice conflicts with this interpretation. In several cases, in fact, the Council adopted regulations implementing decisions adopted by the Cooperation Councils under Mediterranean agreements<sup>166</sup> even where this was not required, by the

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<sup>164</sup> Case 30/88 Hellenic Republic v. Commission 14.11.1989 (1989) ECR p.3711.

<sup>165</sup> Q.J. L 217 1964.

<sup>166</sup> See Regulation 561/79 implementing decision 3/78 of the Cooperation Council EC-Tunisia and Regulation 3252/80 for regulation 1/80 Morocco-EEC Cooperation Council Q.J. L 342 1980.

decision according to what has been specified above.

Such a Decision was Decision 2/80, which determined the amount of aid and the procedures to be followed by Turkey when submitting projects to be financed to the Commission. Both the institutions, supported by Advocate General, rightly considered therefore that the implementation of this decision did not require transposition.

The Court accepted this interpretation on the basis of the following reasoning. After having recalled its previous judgment in case 12/86 (Demirel), where it ruled that the agreements concluded under Articles 238 and 228 are, from their entry into force in the Community, an integral part of the Community legal system, the Court held that, since the decisions taken by the Association Council are directly connected with the Association Agreement, they form an integral part of the Community legal system.

On the basis of the examination of its content, Decision 2/80 does not require the adoption of supplementary measures for its implementation.

Case 192/89<sup>167</sup> concerned the interpretation of certain provisions of two decisions taken by the Association Council in the framework of the Association Agreement with Turkey. These provisions were invoked by M. Sevince, a Turkish national, to support his application for a residence permit. The Court was requested by the Raad van State of the Netherlands to give a preliminary ruling determining whether, inter alia, the decisions referred to above fell within the scope of Article 177 and whether certain provisions of these decisions had direct effect.

It should be remembered that the Court held in Haegemeann, that agreements concluded with third countries are acts of institutions of the Community and are therefore covered by Article

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See for other Agreements with third countries practice cited by GILSDORF, P. *Les organes institués par des accords communautaires: effets juridiques de leur décisions* RMC 1992 pp.328-338.

<sup>167</sup> Case 192/89 Sevince op.cit.

177. The Court recognizes its competence to interpret the decisions taken on the basis of the Association Agreements under Article 177<sup>168</sup> in the light of its competence to interpret the provisions of the Agreement. In other words, it is the link between the agreement and the act of the Association Council which is relevant for the Court<sup>169</sup>. The decisions of the Association Council can be considered, as has been done by the Commission, as international agreements which are binding on the Community, which is expressly stated in the Association Agreement itself. The binding effect of the decisions enacted by the Cooperation Council is the product of the agreement between the Contracting Parties of the Cooperation Agreement.

To recapitulate: the decisions of the Cooperation Council are always part of the legal order of the Community as Contracting Parties of the Agreement; this is more evident when the decisions are "transposed" in the Community legal order by an act of the EEC

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<sup>168</sup> Article 177 does not apply to the agreement but to the act of conclusion of the agreement. The agreement is a parameter for the validity of internal act (violation of the agreement is violation of the Treaty (article 228). The competence of the Court to interpret the agreement exists when its interpretation is required to establish the validity of an act of the EEC or for its interpretation. ADAM, R. *Corte comunitaria e interpretazione in via pregiudiziale degli accordi di associazione RDI* 1975, pp.584-589. WAELBROECK, M. *Enforceability of EEC-Efta Free Trade Agreements: a Reply ELRev.* 1978, pp.27-31. The agreements are bilateral and multilateral acts and cannot be identified with unilateral acts whereby the Community gives its assent to the Agreement (the decision or regulation which concludes the agreement). See HARTLEY, T.C.. *The Foundations of European Community Law* Clarendon Press, Oxford 1988 p.251-254. See BEBR, G. *Agreements Concluded... op.cit.*

<sup>169</sup> "...why would the acts of the organs of an international body set up by such agreement and which have come into being through the participation of the Community..not be attributable to the institutions of the Community representing the latter in the decision making organs of the international body and therefore qualify for judicial review under Article 177(b) of the EEC Treaty?" LENAERTS *Regulating... op.cit.* p. 20.

Council but this applies to the other decisions, also those which are not published.

Ultimately, the fact that the decisions are part of the Community legal order is relevant for the question of direct effect. The direct effect of the provisions contained in the Association Council decision was in fact opposed by Germany on the grounds that the contested decision was not part of the Community legal order. However, once it has been established that the decisions of the Association Council are sources of law for the EEC, the direct applicability of those provisions cannot be excluded in principle (see Advocate General Darmon in Sevince para. 11).

It should be noted that the direct effect of a provision does not result from the fact that this is part of the Community legal order but it is clear that if the rule is not part of it cannot have direct effect in the Community. Thus, the General Agreement on Tariffs and Trade although part of the Community legal order does not have direct effect therein.

The Court's ruling on the direct effect of Decisions of the Association Council reaffirms the well established case-law on the subject. Account is taken of the object and the nature of the Decisions of the Association Agreement and of the features of the obligation which must be clear, precise and not subordinated to any further act.

The programmatic character of the Articles of the Association Agreement on which the Decisions are based (Article 12 and 36 of the Additional Protocol) is not an obstacle to their direct applicability. Although the Decisions of the Association Council provide for the adoption of national measures which should fix the modalities of application, the national authorities do not have any discretionary powers. The non-publication of Association Council Decisions is irrelevant to the question of its having direct effect.

The specification contained in Article 44.1 second paragraph of Cooperation Agreement with Morocco whereby the Contracting Parties "...shall take such measures as are required to implement them" does not require Contracting Parties to adopt implementing acts for every Decision of the Cooperation Council but lays down the principle that it must be executed in good faith<sup>170</sup>.

In Sevince, the Court gave a preliminary ruling concerning the interpretation of the decision of the Cooperation Council, but it seems clear that, since the Court's jurisdiction under Article 177 extends to the validity of "acts of the institutions", a ruling of the Court on the validity of the Cooperation Council decisions would be legitimate<sup>171</sup>. In the event that the Court annuls such decisions, its ruling would obviously apply only within the Community legal order and problems of international responsibility would arise, since the Community would be bound vis-à-vis the other contracting party(ies) to implement the decisions of the Cooperation Council.

There is a final question which needs to be examined with regard to the status of Cooperation Agreements and of the decisions of the Cooperation Council within the legal order of the Community and of the Member States. What happens if a provision contained in an act of the Community or of the Member States conflicts with the Cooperation Agreement or with a decision of the Cooperation Council?

The direct effect and the status of an agreement are two separate questions. A provision contained in the Cooperation Agreement can have direct effect without at the same time taking priority over a provision enacted subsequently. The cases examined by the Court on the direct effect of provisions of Community

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<sup>170</sup> See Sevince para 23.

<sup>171</sup> See HARTLEY, T.C. European Community..., op.cit. p. 253, see also LENAERTS Regulating... op.cit. p. 20 footnote (57).

agreements concerned the relationship between provisions of the agreement and Member States' legislation enacted before the entry into force of the agreement.

It is also clear that there is a difference between the principles of supremacy and direct effect as applied in the relationships between Community and Member States law and in the relationship between international and Community law<sup>172</sup>.

Article 228.2 establishes the rule that an Agreement concluded according to the procedures laid down in the paragraph 1 is binding for the Community institutions and for the Member States<sup>173</sup>. As has already been mentioned, the "conclusion" is the process whereby the Community approves the agreement and express its consent to be bound. As clarified by the Court in Haegemann, the agreement becomes part of Community law as soon as it enters into force. Transformation, that is the incorporation of an agreement in Community law, is required only when the provisions of the agreements require to be integrated by internal rules for their application<sup>174</sup>. Agreements concluded with third states become sources of law for the Community and their Member States and have the status of Community law within the Member States legal order.

These provisions take priority over "derivative" community legislation<sup>175</sup> but have the same status as the EEC Treaty. This means that the Community institutions are obliged not only to adopt

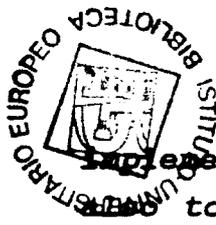
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<sup>172</sup> See BOURGEOIS, J.H.J. *The Tokyo Round Agreement and Technical Barriers and Government Procurement in International and Community Perspectives* CMLRev. 1982, pp. 5-33, p. 25.

<sup>173</sup> This distinguishes the Community from other international organizations, the general rule is in fact that the agreements concluded by an organization do not bind its Member States.

<sup>174</sup> See BOURGEOIS, *Effect of International.. op.cit.* p. 1257.

<sup>175</sup> See MEGRET, J. *Conclusion, formes et effets des accords internationaux passés par la CEE RMC 1965*, 19-27, p. 25; IMBRECHTS *Les Effets internes.. op.cit.* p. 77.



Implementing measures, when this is required by the agreement, but ~~also~~ to refrain from adopting any act which is contrary to the agreement (and which could be annulled by the Court under Article 173).

The agreement takes priority, as an act of Community law, over Member States' legislation, regardless of the relations which the national legal orders establish between national and international law. The infringement by a Member State of the agreement concluded by the Community can be censured by the Court under Article 169.

This also should apply in the case of infringement of an obligation undertaken by the Member State in a mixed agreement and falling within its sphere of competence (Member States undertake an obligation as regards the Community<sup>176</sup> to fulfill all the provisions of a mixed agreement).

In theory, the status of a mixed agreement, for the subject matters which fall within Member States' competence, should be the status that international agreements have in each member States<sup>177</sup>. However, this is possible only when the division of competencies between Member States and the Community are clearly established. When this is not the case and when the obligations of Member States and the Community are closely related the agreement should have in the member States' legal order the same rank as Community legislation.

Agreements concluded by the Community cannot prevail over the rules contained in the Treaty. This can be inferred from Article 228.1 which establishes that if the Court finds the agreement incompatible with provisions of the Treaty, the agreement may enter into force only after amendment of the Treaty. In practice an incompatibility between the Treaty and an agreement has to be

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<sup>176</sup> Article 5 of the EEC Treaty.

<sup>177</sup> See PESCATORE Mélanges offerts à P.H. Teitgen; SCHERMERS, H.G. Internal Effect of Community Treaty-Making O'KEEFE, SCHERMERS, H.G. Essays on European law and Integration Kluwer, Deventer, 1982, pp. 167-178.

resolved prior to the agreement insertion in the legal order of the Community, either through a Treaty amendment or an amendment to the provisions of the agreement which are incompatible<sup>178</sup>.

The observations made above as regards the rank of international agreements concluded by the Community should also apply to the decisions of the Cooperation Council. These, as rules of international law, (agreements of simplified forms) prevail over "derivative" community law, they do not prevail over the agreement and over the Treaty.

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<sup>178</sup> This latter solution requires the agreement to be re-negotiated with the Community partners as it was the case with the EEA Agreement.



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*PART II*



## A) TRADE COOPERATION.

## 1) The Objectives of Trade Cooperation.

## 1.a) The Elimination of Obstacles to Trade.

The objective of the trade cooperation established between the Community and Morocco is that of promoting trade between the Contracting Parties with a view to increasing the rate of Morocco's trade and improving the condition of access of its products to the Community market (article 8 Cooperation Agreement with Morocco). This means that at least some of the obstacles to imports of Moroccan products to the Community shall be eliminated.

Generally speaking, barriers to trade can be distinguished by tariffs, that is customs duties and levies<sup>179</sup> (which are peculiar to the common agricultural policy of the Community and will be discussed more thoroughly in the second chapter of part two) and non-tariff barriers.

Customs duties are charges imposed on goods at the moment of their importation. Customs duties are (i) "ad valorem" duties, when they are calculated as a percentage of the good value (price)<sup>180</sup> at the moment of the customs declaration and (ii) "specific" duties

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<sup>179</sup> Although the importance of customs duties as a source of revenue has decreased noticeably for industrial countries, customs duties are, together with agricultural levies and a percentage of value added tax, a source of Community finance. See USHER, J.A. The Financing of the Community Thirty Years of Community Law European Perspectives, Bruxelles, 1981, pp.195-217. The system of self-financing was adopted with Decision 70/423 O.J. L 94 1970 ex Article 201 of the EEC Treaty.

<sup>180</sup> By regulation 1224/80, O.J. L 134 31.05.1980, the Community replaced the criterion of the "normal price" as an element to be taken into account for the calculation of customs duties established by regulation 803/68 with that of the "transaction price", i.e. the price actually paid or payable for the goods when sold for export on the customs territories of the third country. The main difference with the former system is that even a symbolic payment may be considered as the basis for the calculation (the price declared may be inferior to the market price). For the conditions of application see Article 3 of regulation 1224/80.

when they are calculated per unit or quantity of the good, thus they do not vary with the price of the goods<sup>181</sup>.

Although customs duties have lost most of their relevance as obstacles to trade, the general economic function of the customs tariffs is the protection of the internal market against imports from third countries.

Customs duties are indicated in the Community common customs tariff<sup>182</sup>. The CCT is a constituent element of the customs union and the main instrument of trade policy for the European Community. It is made up of two elements: a) a nomenclature, i.e. a description of the goods subject to the duty<sup>183</sup> and b) the rate which is applied

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<sup>181</sup> See DECHELOTTE *Les Droits des Douanes sont-ils encore un element efficace de protection?* RMC 1982 pp. 544-551.

<sup>182</sup> The common customs tariff came into force in the Community in July 1968, eighteen months before the deadline for its scheduled implementation established by the Treaty, that is at the end of the transitional period fixed as 1st January 1970. See J.O. L 172 1968 p.1, for the English version see Special Edition 1968 p. 275. MATTERA RICIGLIANO, A. *Unione doganale nella CEE* Appendice al Nuovissimo Digesto pp. 982-992. VAULONT, N. The Customs Union of the European Community European Perspectives, Brussels, 1985.

<sup>183</sup> The nomenclature is not only an element of the customs tariff but is also used by the Community to identify the products covered by the common market organizations and those listed in Annex II to the Treaty. The change of tariff heading is an important criterion which is taken into account for the application of the rules of origin. The application of non-tariff measures, such as safeguard provisions and surveillance measures also refer to the nomenclature. The Customs nomenclature originally adopted by the Community was the Brussels Nomenclature for the Classification of Goods and Customs Tariffs, which has recently been replaced by the Harmonized System of Customs Classification. See Decision 87/369 O.J. L 198 1987 and OLIVIER, P., YATAGANASA, X. The Harmonized System of Customs Classification YbEur.Law 1987 pp.113-129. The modification of the Customs Nomenclature implies, at least in theory, a corresponding adaptation of the instruments referring to it. In the case of agreements, it is clear that any adaptation shall be decided jointly by the parties and not unilaterally by the Community, as a results of Art. 15 of regulation 2658/87 (O.J. L 256 1987 and O.J. L 341 1987) where the Commission's competence to amend legislation in relation to the introduction of the new nomenclature excludes international

to the goods.

Customs duties may be subject to variations only as a consequence of an agreement providing for a reduction for the benefit of imports from a third country (the agreements with Maghreb countries subject of the present research), of a unilateral measure adopted to respond to a particular aim (the system of generalized preferences) or of multilateral negotiation (the tariff rounds under the aegis of GATT). The exclusive competence to modify customs duties belongs to the Community since the adoption of a Common Customs Tariff substitutes the customs tariffs applied at frontiers by member States.

Non-tariff barriers may be defined as "any law, regulation, policy or practice other than import duty that has a restrictive effect on international trade"<sup>184</sup>. This is a very extensive notion which covers many practices, like, besides quantitative restrictions, subsidies, state monopolies, anti-dumping duties,

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agreements concluded before the entry into force of the said regulation. In the cooperation agreement with Maghreb countries, it is specifically provided that in case "of a modification to the nomenclature of the customs tariffs of the Contracting Parties affecting products referred to in the Agreement the Cooperation Council may adapt the tariff nomenclature of these products to conform with such modification, subject to the maintenance of the real advantages resulting from this Agreement". However, the provision of the Additional Protocols concluded with Maghreb countries still refer to the Brussels Nomenclature. This can be explained by the fact that only a short period of time has elapsed between the entry into force of the Harmonized System for the Community and the conclusion of the said Protocols; besides the Protocols explicitly refer to the provision of the Cooperation Agreement and, therefore, the two treaties had to use the same nomenclature; finally, such an adaptation gives rise to complex and technical problems requiring a longer period of time for their resolution.

<sup>184</sup> SLOT, P.J. Technical and Administrative Obstacles to trade in the EEC Sijthoff, Leyden, 1975, p.9.

restrictive administrative and technical regulations<sup>185</sup> and voluntary restraint agreements.

Quantitative restrictions or quotas are measures which limit, in part or totally, the quantity of goods that can be imported into a country<sup>186</sup>.

A comparison with other international trade agreements such as EFTA and GATT clearly suggests that the elimination (or reduction) of customs duties and quotas is not sufficient. In fact the rules concerning customs duties and quotas also refer to "other" charges and measures. These are differently defined: in EFTA an expression identical to that used in the EEC Treaty is utilized<sup>187</sup>. Article 3 of EFTA provides for the elimination of

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<sup>185</sup> On the question of the definition of non-tariff barriers see DAM, K.W. The Gatt: Law and International Economic Organization University of Chicago Press, Chicago, London 1977, p.19. See also JACKSON, J.H., DAWNEY W.J. Legal Problems of International Economic Relations West Publishing, St. Paul, 1986, p.483 ff.

<sup>186</sup> In case 2/73 Geddo v. Ente Nazionale Risi 12.07.1973 (1973) ECR p. 865 the Court defined quantitative restrictions as measures which amount to a total or partial restriction on imports. In other words quantitative restrictions do not cover only quotas but also absolute import prohibitions. Case 34/79 Regina v. Henn and Derby 14.12.1979 (1979) ECR p.3795, where the Court ruled that quantitative restrictions also cover absolute import bans. For discussion of this issue, with reference to the Treaty see OLIVER, P. Free Movement of Goods in the EEC European Law Centre, London, 1988 p.62. Quotas are distinguished from tariff quotas. A tariff quota is established when a specific quantity of good can be imported in the Community at a reduced customs duty, when this quantity is exhausted the normal tariff is re-introduced. Tariff quotas are covered by the prohibition of Article 12 EEC Treaty.

<sup>187</sup> It may be submitted that this is a "borrowing" from the EEC Treaty.

customs duties and "other charges having equivalent effect"<sup>188</sup>." Article 10 requires the Member States not to introduce or intensify their quantitative trade restrictions which are defined as "prohibitions or restrictions on imports from the territory of other Member States whether made effective through quotas, import licenses or other measures with equivalent effect, including administrative measures and requirements restricting imports." Article I of Gatt provides for the application of the MFN clause to customs duties and "other charges of any kind". Article II provides, for bound products, for the exemption from all other duties or charges of any kind. Article VIII refers to "fees and other charges of whatsoever character". In relation to quotas Article XI also mentions "import licenses and other measures."

The question of the definition of measures of equivalent effects to customs duties and to quotas will be discussed in the chapter concerning trade on industrial products.

#### 1.b) Development Cooperation.

The elimination of obstacles to trade, more than a aim in itself, could be considered as an instrument serving a further objective. Article 8 in fact makes clear that the provisions on trade have been conceived as a way of "increasing the rate of growth of Morocco's trade" and "to improve the conditions of access for its products to the Community market". Reference is also made in the same Article to the "different level of development" of the contracting parties which has to be taken into account in their trade relations.

This echoes the words of the preamble of the Agreement, where the contracting parties declare themselves resolved to promote

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<sup>188</sup> EFTA does not contain a definition of those charges. A Committee established by the EFTA Council prepared in 1968 a list of "other border charges" which mentioned phytosanitary, veterinary, statistical fees and fees for licenses. Building EFTA Geneva, December 1968, p. 78.

economic and trade cooperation between them having regard to their respective levels of development. This and perhaps even more clearly, the express reference to "a new model of relations" and to the new economic order, also contained in the preamble, express the will of the Community to conceive its relationship with its Mediterranean partners taking into account the principles developed within the international community and applying them in the economic relations between industrialized and developing countries<sup>189</sup>. Thus, the absence of reciprocity in the preferential treatment which the Community grants to its Mediterranean partners, the main feature of the agreement, is founded on the principle - championed by developing countries in UNCTAD (United Nations Conference for Trade and Development) - that a different level of economic and social development requires a different economic treatment of developing countries in their commercial relations with industrialized countries. The underlying principle is the so-called dualism of rules. Application of this principle is the system of generalized preferences. The principle has been included in GATT where a derogation (Part IV) was introduced to the basic rule of reciprocity and non-discrimination contained in Article I<sup>190</sup>

The absence of the requirement of reciprocity distinguishes the Cooperation Agreement (which is the subject of discussion) from

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<sup>189</sup>. The agreements with Mediterranean countries of Maghreb and Mashrak are considered, together with Lomé' Convention, as the cornerstone of the Community development cooperation policy.

<sup>190</sup> See for a critical examination of this principle BENCHIKH, Droit international du sous-développement Berger-Levrault, Paris 1983, pp.63-114, STERN, B. Un nouvel ordre international? Economica, Paris 1983, Vol.I introduction sp.p.LIV, THIERRY, H., COMBACAU, J., VALLEE, S. Droit International Public, Paris 1986, pp.738-739, GROSS-ESPIELL, H. La clause de la nation la plus favorisée, la Communauté et l'aide aux pays en voie de développement RMC 1971, pp. 411-421.

the Association Agreement, concluded with Morocco<sup>191</sup> in 1969, which required reciprocity. In the Cooperation Agreement, on the contrary, it is established that imports to Morocco coming from the Community are subject to a treatment "no less favorable than the most favored nation treatment". Two exceptions are established in the application of the clause: in the case of the creation of customs unions or free trade areas and in the case of measures aiming at the economic integration of Maghreb, or benefiting developing countries. The first exception can be considered a general rule. This is, for instance, the case in GATT, where one of the exceptions to the application of Article I, "the most favored nation clause", is contained in Art. XXIV, contemplating precisely the case of the creation of free trade areas or customs unions between contracting parties. The second exception relates to development cooperation considerations in so far as it should favor the development of trade between developing countries, in particular between those belonging to the same region or sub-region<sup>192</sup>.

## 2) The Products Covered.

A very important distinction is made in the Cooperation Agreement regarding trade in industrial and agricultural products. Title II (trade cooperation) of the Agreement is in fact divided

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<sup>191</sup> For the text of the Association Agreements concluded with Morocco and Tunisia see O.J. English Version L 239 27.08.1973.

<sup>192</sup> The creation of an economic integration of the Maghreb is no longer hypothetical since the creation of the Union of Arab Maghreb created on the 17th of January 1989 by Algeria, Morocco, Tunisia, Libia and Mauritania. The Treaty establishing the Union, together with cooperation in the field of security and diplomacy, provides for agricultural, industrial commercial and social development action. The long-term objective is the total integration of the five countries.

into Section A (industrial trade), and Section B (agricultural trade).

Article 9 of the Cooperation Agreement gives a "negative" definition of industrial products. These are the products "which are not listed in Annex II to the EEC Treaty." This means that all goods,<sup>193</sup> with the exception of primary agricultural products listed in Annex II, are included.

The general notion of industrial products includes oil products and processed agricultural products.

What are the products referred to as processed agricultural products? In the Community agricultural products are distinguished in basic and first-stage processed products<sup>194</sup> listed in Annex II<sup>195</sup> of the Treaty and processed agricultural products which are those not contained in Annex II<sup>196</sup>. The Cooperation Agreement reproduces

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<sup>193</sup> For the definition of goods in the EEC see case 7/68 Commission v. Italy 10.12.1968 (1968) ECR p.423.

<sup>194</sup> For the interpretation of this notion see case 185/73 Hauptzollamt Bielefeld V. Offene Handelsgesellschaft 29.05.1974 (1974) ECR p.607, p.618. A "clear economic interdependence between basic products and products resulting from a productive process, irrespective of the number of operations involved therein" must be established.

<sup>195</sup> Agricultural products covered by the common agricultural policy are broadly defined in Article 38 of the EEC Treaty: products of the soil, stock farming, fisheries and products of first stage processing directly related to these products. Annex II contain a more detailed list of products, the Council can add new products to it. See Regulation ..O.J. L 1961 p. 71. For the interpretation of Annex II recourse should be made to the established interpretation and method of interpretation relating to the Common Custom Tariff. Case 77/83 CILIFT v. Ministero della Sanita', 29.02.1984 (1984) ECR p. 1257, p. 1265 para. 7.

<sup>196</sup> For a critique of the distinction between agriculture and industry see SNYDER, F. New Directions in European Community Law, Weidenfeld and Nicolson, London 1990, pp. 120-121. "As legally defined, agriculture includes both the production of raw materials and the products of first stage processing. The legal concept of agriculture...borrows selectivity from the common sense conception

this distinction. Agricultural provisions are applied only to the products listed in Articles 15 and following. Processed agricultural products are not defined but since they are covered by the provisions of industrial trade, the above cited rule contained in Article 9 applies to them as well.

The distinction between processed and basic agricultural products is not without relevance, since processed agricultural products are the object of different trade rules under the Agreement. It should be noted that wine, olive oil and fruit juices are considered as basic agricultural products. If they were classified as processed agricultural products they would have been entitled to a different customs regime.

Finally one should note that the distinction made in the Cooperation Agreements between industrial and agricultural products does not correspond to the distinction between basic and processed products, since, as has been seen above, oil products are covered by the Title covering industrial products, although the regime applied differs from that contained in Article 9-11 of the Cooperation Agreement.

Finally, textile products are industrial products and should, therefore, in principle, be covered by Article 9.

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of agriculture. Though including some aspects of the common sense conception, it omits other elements". The author also suggests that in completing the internal market the Community and the Court of Justice should minimize the legal distinction between agriculture and industry as two distinct sectors, and the use of Article 100A instead of Article 43. See case 68/86 UK v. Council 23.02.1988 (1988) ECR p. 855 where it has been confirmed that the rules on agricultural policy prevail over those concerning the creation of the common market. See also case 131/86 UK v. Council 23.02.1988 (1988) ECR p. 905 para 15.

## B) Trade in Industrial Products.

Industrial trade in the Cooperation Agreement is based on a single and apparently straightforward provision which states that industrial products originating in Morocco "shall be imported into the Community free of quantitative restrictions and measures having equivalent effect, and of customs duties and charges having equivalent effect." (Article 9.1).

Special rules are established for oil products and processed agricultural products.

Article 12 establishes a provisional system of tariff ceilings<sup>197</sup> regarding oil products other than crude oil and natural gas. These tariff ceilings<sup>198</sup> which were subject to an annual increase based on a fixed percentage, were abolished at the end of 1979<sup>199</sup>.

As for processed agricultural products, Article 14 reads "for goods resulting from the processing of agricultural products listed in Annex A, the reduction specified in Article 9 shall apply to the fixed component of the charge levied on imports of these products into the Community." To better understand this provision one should

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<sup>197</sup> A tariff ceiling means that a specific quantity of product can be imported free of customs duties, but when this quota has been exhausted then the customs duties may be reintroduced.

<sup>198</sup> The higher ceiling provided for in the Agreement with Algeria (1.100.000 tons) are explained by the importance of this product for the Algerian economy. See, by way of comparison the ceiling established in the Agreement with Morocco (175,000) and Tunisia (175,000).

<sup>199</sup> See EL MALKI H., JAIDI, L., KETTANI, O. *Accords Cee Maroc et Commercialisation des Produits de Base Industriels et Agricoles NABLI, M.K. Cooperation CEE Maghreb* Colloque, Tunis, Centre des Etudes de Recherche et Publication de la Faculté de Droit, Science Politiques et Economiques de Tunis, Tunis 1979, pp. 99-144. See for a survey of the energy policy of the Community MC GOWAN, F. *EC Energy Policy EL-AGRAA A.M. The Economics of the EC* St. Martin Press, New York 1990, pp.243-266.

consider that a specific trade system has been devised<sup>200</sup> for processed agricultural products in the Community. The Community imposes a charge on imports made up of two components: a fixed one, which aims at the protection of the processing industry (which is in practice an "ad valorem" customs duty), and a variable one to offset the difference between world and Community prices (for the EEC the threshold price) of the relevant basic agricultural product which was used in the manufacture of the processed good (in practice a levy). When processed agricultural products are imported from Morocco into the Community, only the variable element of the duty is levied. One can explain this more limited advantage with the different set of rules governing trade on agricultural products (*infra*).

Article 10 specifies that "in the case of customs duties comprising a protective and a fiscal element, Article 9 shall apply only to the protective element." Customs duties of a fiscal nature are imposed when no domestic production exists. When the taxed products are also produced in the importing Member State, fiscal customs duties are allowed only if the conditions established in Article 33 of the Cooperation Agreement are fulfilled (see *infra*)<sup>201</sup>.

The EEC Treaty provides for the elimination among Member States of customs duties and charges having equivalent effect (Articles 9, 10 and 12) and of quantitative restrictions and measures having equivalent effect (articles 30-36). These provisions are at the core of the system of market integration. In the absence of a definition - which would have hardly covered all the possible forms of restrictions assimilated to customs duties and quantitative restrictions, especially if a dynamic

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<sup>200</sup> See Regulation 3033/80 O.J. L 323 1980 and SWINBANK, A., WILKINSON, G., HARRIS, S. The Food and Farm Policy of the European Community Chichester, Wiley 1983, p.243 ff.

<sup>201</sup> See for a comparison Article 17 of the EEC Treaty.

interpretation was given to these provisions<sup>202</sup> - the Court of Justice has constantly been asked to rule whether the measures adopted by Member States could be classified as measures of charges of equivalent effect and consequently whether they were covered by the prohibition contained in the cited Treaty Articles.

The main questions in this chapter concern the interpretation of the notion of charges and measures having equivalent effect, to custom duties and quantitative restrictions. More precisely, the problem analysed hereafter is whether and in case to what extent, the criteria established by the EEC Court of Justice's case-law could be applied to the notions of charges and measures having equivalent effect contained in the Cooperation Agreement. The reasons why attention should be paid to such matters are that (i) these notions are not defined in the agreement and (ii) the extent of liberalization of trade that the Cooperation Agreements seek to attain can be evaluated only after the interpretation of these provisions.

Before discussing this problem, however, a preliminary question shall be examined. This concerns the possibility of transposing the interpretation of Community Treaty Articles to provisions contained in Agreements concluded with third countries which are formulated with identical wording.

1) *The Interpretation of Provisions Contained in Agreements Concluded with Third Countries in the Case-law of the Court of Justice. From Bresciani to Opinion 1/92.*

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<sup>202</sup> "...é ragionevole immaginare che gli autori del Trattato vollero in tal modo ottenere che la nozione di misura di effetto equivalente fosse via precisata in maniera empirica e che non fosse quindi immutabile, ma strettamente dipendente dal grado di integrazione man mano raggiunto" CORTESE PINTO, E. Ostacoli non tariffari agli scambi nel diritto comunitario P. Angeli, Milano 1985 p.23. The same idea is expressed by VISCARDINI-DONA' W. *Les mesures d'effet equivalents à des restrictions quantitatives* RMC 1973 pp. 224-233.

The question of the interpretation of provisions of agreements with third countries has always arisen in connection with the question of their direct effect.

On the cases discussed hereafter, the Court had to resolve two questions: can an economic operator invoke a rule of an Agreement concluded with a third country against a measure adopted by a Member State and which he believes runs contrary to the rule contained in the agreement? Secondly, how should this provision be interpreted? It is clear that the two questions are closely connected and logical that the second should follow from the first. The interpretation of the provision of the Agreement is relevant only if it has been ascertained that the same rule can be invoked before a judge. Although in the discussion of the direct effect of agreements concluded with third countries, very little attention is usually given to the question of interpretation of the provision<sup>203</sup> the implications of this question should not be underestimated. Once it has been verified that the provision contained in an Agreement can be invoked before a national jurisdiction, the relevance of the ruling on the direct applicability will depend on the interpretation given to the provision of the Agreement. Let us for example consider the case of an agreement requiring the abolition of charges of equivalent effect on customs duties, and let us imagine also that a Member State adopts a legislative measure imposing a levy for statistical analysis on imports from third countries. If it is established that the prohibition contained in the agreement can be invoked before a national Court, than the central issue will be whether the prohibition of the agreement also cover measures such as the national levy in question. In the case of a negative answer, the possibility of invoking the agreement provision is of little significance for the importer who has to pay the import levy for statistical reasons. On the contrary, if the agreement provision can be invoked this

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<sup>203</sup> An exception can be found in *BOURGEOIS Effects of International Agreements..op.cit.* p. 1268.

will enable the national measure to be quashed.

Since the rules contained in agreements with third countries are often similar to those contained in the Treaty it is clear that in cases involving agreements with third countries, reference was made to the Court of Justice's interpretation of EEC Treaty provisions corresponding to those set up in the relevant agreement.

When dealing with these cases, the Court has, except in two cases, first examined the question of the direct effect and then, in the event of a positive response, interpreted the relevant provision of the agreement.

The landmark decision is Polydor<sup>204</sup>, although the Court had already given a ruling on the subject in Bresciani<sup>205</sup>.

In this case an importer of raw cawskin from Senegal contested a charge imposed on the importation of these goods levied as payment for health inspections, on the ground that it infringed Article 2(1) of the Yaounde' Convention concluded by the Community and African States and the State of Madagascar. The Court was, inter alia, asked to rule whether the notion of "charges of equivalent effect to customs duty" contained in Article 2(1) of the above Convention was the same as that contained in Article 13(1) of the EEC Treaty.

The question was however, not too problematic since Article 2(1) of the Convention made express reference to Articles 12, 13,

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<sup>204</sup> Case 270/80 Polydor op.cit.

<sup>205</sup> Case 87/75 Conceria Daniele Bresciani v. Amministrazione Italiana delle Finanze 05.02.1976 (1976) ECR p. 129. The issue came up also in case 51/75 EMI Records Limited v. CBS United Kingdom Limited 15.06.1976 (1976) ECR p. 811. See also the other EMI cases 86/75 (1976) ECR p. 871, and 96/75 (1976) ECR p. 913. The Court did not discuss the question at length, ruling that there is no obligation on the part of Member States to extend the prohibition of measures of equivalent effect to third countries. See Advocate General opinion where he points out that the same words in a different context must be interpreted differently.

14, 15 and 17 of the Treaty<sup>206</sup>. It was thus easy for the Court, which expressly referred to the wording of the provision<sup>207</sup>, to rule that the two notions had the same meaning.

The Polydor case arose out of a dispute between, on the one hand, RSO and Polydor (in the UK owner and exclusive licensee, respectively, of a copyright for sound recordings of the Bee Gees band) and, on the other hand, Harlequin and Simon, a retail record shop selling the recordings in the UK, and a wholesaler importing from Portugal copies of records produced there by Polygram and Phonogram, the RSO licensee in Portugal. If the same situation had occurred within the Community, the owner of the rights in the UK, RSO, would not have the right, under the "exhaustion of rights" doctrine<sup>208</sup> to prevent the importation of such records in the UK.

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<sup>206</sup> "goods originating in Associated States shall, when imported into Member States, benefit from the progressive abolition of customs duties and charges having equivalent effect to such duties, resulting between Member States under the provisions of Articles 12, 13, 14, 15, and 17 of the Treaty and the decisions that may be adopted to accelerate the rate of achieving the aims of the Treaty." In paragraphs 6 to 11 the Court gives an interpretation of Article 13(2) of the EEC Treaty.

<sup>207</sup> The same conclusion was reached by Advocate General Trabucchi who noted that although "...in the Community's international relationships, which are the subject of the article, it is not possible to read into the provision all the implications which affect relationships within the common market and which are justified only on the basis of the process of integration which the EEC Treaty has established between Member States."

<sup>208</sup> See case 78/70 Deutsche Gramophone v. Metro 08.10.1971 (1971) ECR p. 487 "...it would conflict with the provisions regarding the free movement of goods in the Common Market if a manufacturer of recording exercised the exclusive right granted to him by the legislation of a member-State to market the protected articles in order to prohibit the marketing in the member State of products that had been sold by him himself or with his consent in another member State solely because this marketing had not occurred in the territory of the first member State" para. 13. See also the cases cited in the judgment by the plaintiffs and the Court itself.

According to the Court, the same terminology used in Articles 30-36 of the Treaty and in Articles 14 and 23 of the Agreement with Portugal is not sufficient to transpose to the latter the case-law developed for the Community to copyrights. Each provision must be interpreted in the light of the objectives and the purposes pursued as well as its wording.

The Court makes a clear distinction between the objectives of the Treaty and those of the Agreement with Portugal.

While the aim of the Agreement is the consolidation and extension of the economic relations existing between the Community and Portugal the aim of the Community is the unification of national markets into a single market having the characteristics of a domestic markets. Therefore, the doctrine developed in the Community as regards copyrights is justified only within the Community<sup>209</sup> and cannot be applied to the relationships between Portugal and the Community where the prohibition of measures having equivalent effect to quantitative restrictions have a different purpose.

The Court gave a second reason why the interpretation of the Agreement and the Treaty must be different: the instruments at Community's disposal for achieving uniform application of Community law and the progressive abolition of legislative disparities are absent in the Agreement with Portugal. The reference is not clear although the Court probably refers to Article 100 and 101 of the EEC Treaty (harmonization of legislation) and to the procedure under Article 177 of the EEC Treaty to assure the uniform interpretation of the Community law<sup>210</sup>.

It can be noted that in Polydor the Court reverses the reasoning followed in Bresciani. The first step made by the Court was the interpretation of the provisions contained in the

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<sup>209</sup> See UBERTAZZI, L.C. Esaurimento comunitario della proprieta' industriale ed importazione dai paesi terzi Foro Italiano 1982, pp.250-255.

<sup>210</sup> BEBR, G. Agreements concluded...op.cit. p. 55.

commercial agreement with Portugal. The Court examines the question whether the protection of industrial and commercial property (copyright) (article 23 of the agreement) could justify the prohibition on the importation of the records from Portugal into UK (a measure which runs counter Article 14 of the agreement laying down the elimination of restrictions of trade between the contracting parties)<sup>211</sup>.

The Court then, having concluded that the national measure preventing the importation and selling of the records in the UK was justified by the protection of the copyright<sup>212</sup>, did not examine the direct effect of the provisions, as it considered that this was rendered unnecessary by the reply given to the first question.

Although it is clear that had the Court adopted a different interpretation the defendants would have had an interest in invoking the direct effect of the prohibition contained in Article 14 of the Agreement with Portugal, it seems that it is more logical to interpret the provision only once it has been ascertained that the provision of the agreement can actually be invoked. The reason why the Court reverses the reasoning followed in the other cases<sup>213</sup> seems to be to avoid giving a ruling on the sensitive question of the direct effect of the agreement with Portugal.

The conclusion reached in *Polydor* has been confirmed by two subsequent judgments. In *Pabst* the Court acknowledged that Article 95 of the EEC Treaty and Article 53(1) of the Association Agreement with Greece had the same meaning. This conclusion was drawn not

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<sup>211</sup> Articles 14 and 23 of the Agreement with Portugal corresponds to Article 30 and 36 of the EEC Treaty.

<sup>212</sup> It has been noted that the Court "did not state whether or not its interpretation of Article 30 of the EEC Treaty alone, i.e. not in connexion with Article 36, would also be relevant to the interpretation of Article 14 of the Agreement" *BEER Agreements Concluded by.. op.cit.* p. 56-57

<sup>213</sup> The only other case in which the Court first interprets the provision of the agreement is case 17/81 *Pabst & Richarz v. Hauptzollamt Oldenburg* 29.04.1982 (1982) *ECR* p. 1331.

only from the fact that the provisions were identically worded, a consideration that we have seen is not conclusive, but also from the objective and nature of the Association Agreement, whose purpose is to prepare for the entry of Greece in the Community.

The reference to the harmonization of agricultural policies and freedom of movement of workers<sup>214</sup> was criticized by Demaret<sup>215</sup> as having no relation to the prohibition of fiscal discrimination. It is however submitted that the reference made by the Court to these principles has the scope of proving that the Association Agreement with Greece pursues the same aim of integration pursued by the Treaty (even if at an earlier stage) and therefore that its provisions can be interpreted in the same way as those contained in the Treaty.

The conclusion of the Court therefore is that, since Article 53.1 of the Agreement fulfills the same purpose as Article 95 of the Treaty, they have the same meaning and can be interpreted in the same way.

The second ruling on the question subsequent Polydor was rendered in Kupferberg<sup>216</sup>. Under the law on the Monopoly of spirits, a monopoly equalization duty was levied on imports into Germany of spirits, amongst which port wine. If a similar product existed in Germany it would have qualified for a tax reduction which was, on

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<sup>214</sup> See para. 26 where the Court hold that Article 53 of the Association Agreement "forms part of a group of provisions the purpose of which was to prepare for the entry of Greece into the Community by the establishment of a customs union, by the harmonization of agricultural policies, by the introduction of freedom of movement for workers and by other measures for the gradual adjustment to the requirements of Community law".

<sup>215</sup> DEMARET.P Le regime des echanges.. Du Droit International Au Droit de L'integration 1988, p.165. In the same article Demaret criticizes the restrictive interpretation given by the Court of Justice to the agreement of free trade as contrary to Article XXIV.8 of GATT.

<sup>216</sup> Case 104/81 Hauptzollamt Mainz v. C.A. Kupferberg 26.10.1982 (1982) ECR p. 3641.

the contrary, not extended to imported spirits. This amounted to potential discrimination. The importer of Portuguese port wine claimed that the refusal to extend such a reduction to imported spirits was contrary to Article 21(1) of the Agreement concluded by the Community with Portugal. As regards the analogy of Article 21(1) of the Agreement with Article 95 of the EEC Treaty<sup>217</sup>, the Court applied the same reasoning used in *Polydor*. The Court held that although Article 21 of the agreement with Portugal and Article 95 of the EEC Treaty had the same object, the elimination of tax discrimination, the provisions were to be "considered and interpreted in their own context". Since the EEC Treaty and the Agreement pursue different objectives the interpretation given to Article 95 of the EEC Treaty could not be applied by analogy to Article 21 of the Agreement<sup>218</sup>.

The Court was again confronted with the question of interpretation of a provision of an external agreement in the *Demirel*<sup>219</sup> *Sevince*<sup>220</sup> and *Kziber*<sup>221</sup> cases concerning the Association agreement with Turkey and the Cooperation Agreement with Morocco. The cases are different from those referred to above because the provisions under discussion did not concern trade but social cooperation. In *Demirel* and *Sevince* the Court had to interpret the notions of free movement of workers and "regularly employed" worker contained in the provisions of the agreement and of the Association Council decision. In *Demirel* it did not examine the

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<sup>217</sup> It should moreover be noted that the wording of the two provisions is not identical.

<sup>218</sup> The Court gives an interpretation of Article 21 and of the notion of like product contained in that provision. See para. 47.

<sup>219</sup> Case 12-86 op.cit.

<sup>220</sup> Case 192-89 Sevince v. Staatssecretaris van Justitie op.cit.

<sup>221</sup> Case 18/90 Bahia Kziber v. Office National De l'Emploi 31.01.1991 (1991) ECR p.I-199.

question because it excluded the direct applicability of the relevant provision. In Sevince the Court interpreted the notion of regular employment. Kziber concerned the interpretation of Article 41 of the Cooperation Agreement and the question of application of the case-law developed in the Community on the issue. The Court did not enter into this question<sup>222</sup>, but in its ruling, in practice, it applied the same interpretation given in the framework of the free movement of workers in the Community<sup>223</sup>.

It could be concluded that the EC Court's ruling on this issue is that the equivalence of terminology between a provision contained in an Agreement concluded with a third country by the Community and a provision contained in the EEC Treaty is not sufficient to enable a conclusion to be drawn on the identity of the notion contained in the two articles. It is, on the contrary, the scope and the nature of the agreement which should be considered.

One exception, however, is Bresciani, where the Court did not make reference to the aim of the Yaoundé Convention but based its interpretation on the will of the Contracting Parties in this case to interpret the provisions of this agreement in the same way as the corresponding Treaty Articles.

The scope of the Yaoundé Convention was the continuation, on a different basis, of the Convention of Association provided for in the EEC Treaty (articles 131-136)<sup>224</sup>. Could such a link justify

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<sup>222</sup> See Advocate General Van Gerven who discusses the question of interpretation at length arriving at a different solution.

<sup>223</sup> See *infra* Part III, Chapter II, Social Cooperation.

<sup>224</sup> See the preamble of Yaoundé Convention where the Contracting Parties express their "desire to maintain the association" and to "pursue their efforts together for economic, social and cultural progress of their countries". See also Article 1 where it is specified that the object of the Agreement is "to provide cooperation to further economic and social development by increasing trade and by implementing measures of financial intervention and technical cooperation. See O.J. Special Edition II Series Vol.1, p.5

an extensive interpretation of the provisions contained in the Convention? It could be argued that the reference made in Article 2 of the Convention to Articles 12 to 15 and 17 of the EEC Treaty could be considered, more as the expression of the close link established between the Contracting Parties than the basis to justify the analogy of the notions contained in the said Articles with the corresponding Convention's provisions and that this link is the real justification of the equivalence of the notion of charges of equivalent effect.

If one pushes the bounds of this interpretation it could even been argued that the interpretation of the notions contained in the EEC Treaty could be extended to the provisions of Lomé Conventions which can be regarded for their part as the continuation of Yaoundé Conventions<sup>225</sup>. Moreover, the same link with the Treaty, and the aim of maintaining the special relations with the former colonial territories was also established with Morocco and Tunisia. In a Declaration annexed to the Treaty<sup>226</sup> the Member States proposed, to the independent countries of the franc area<sup>227</sup>, the conclusion of an association convention whose aim was "to maintain and intensify traditional trade flows and to contribute to the economic and social development" of these countries. Trade Agreements (called Association agreements and based on Article 238 of the Treaty) were concluded in 1967. These were then replaced by the Cooperation Agreement when the "Global Policy" was launched.

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<sup>225</sup> On the various stages of association see TWITCHETT, C.C. Europe and Africa "From Association to Partnership" Farnborough, Saxon House, 1978, pp. 147 ff.

<sup>226</sup> The Association in Articles 131-136 concerned "countries and territories" which were not yet independent, and was unilaterally granted by the six Member States. The Declaration in the Annex is a proposal for the conclusion of an agreement made with independent countries, although they were former colonies with which the Community (France) had important commercial relationships.

<sup>227</sup> Algeria was still a Department of France at the time of the conclusion of the Treaty.

However, such an interpretation seems excluded by the fact that the instruments applied in the relationships between the Community and the ACP countries and Maghreb and Mashrak countries and the political and ideological background are completely different from the instruments used and the setting which framed the Association Convention and even the first association/cooperation agreements with these countries.

As for the scope of the agreement, the Court has considered justified the application of the interpretation given to Treaty provisions to rules contained in agreement whose aim is future membership in the Community, as seen in Pabst.

The same reasoning was not however applied to the agreement with Portugal which was conceived primarily as a commercial agreement and did not envisage the future entry of this country in the Community.

One must therefore ask whether the provisions contained in the association agreement with Turkey could be interpreted as the corresponding EEC Treaty articles in the light of the Pabst ruling, which, as seen above concerned the association agreement with Greece, and which, like the latter, was conceived as pre-accession agreement.

The Court has examined the association agreement with Turkey in two cases. However, as seen above, Demirel and Sevince do not rise issues on questions of interpretation of trade provisions which are analogous to Treaty Articles, but concern a questions of social cooperation.

It seems that the application of the interpretation by analogy could be justified, not only in relation to the aim of the agreement, but also on the basis of the scope of the provision. In the case of the association agreement with Turkey the scope of the provision is much more restricted than that of the comparable provision of the Community free circulation of workers in the Community. Therefore, the final scope of the entry of Turkey in the Community does not seem to justify the analogy of the provisions

which, for their part, do not pursue the same objectives as the counterpart EEC Treaty provisions<sup>228</sup>. It should be noted, moreover, that there is no perfect analogy of terminology between the provisions of the Treaty and of the Agreement since Article 12 of the Association Agreement<sup>229</sup> refers to Articles 48 and 50 of the EEC Treaty as merely providing a "guide".

Another important ruling that can be referred to in relation to the question of the transposition of the EEC Court's case-law to provisions contained in agreements with third countries is Opinion 1/91 rendered on the basis of Article 228 second paragraph of the EEC Treaty on the compatibility of the agreement on the one hand, between the Community and its member States and on the other hand, the States party of the Free Trade Association Agreement and Liechtenstein and the EEC Treaty<sup>230</sup>.

The Agreement, which aims at establishing an European Economic Area, contains a number of provisions which are identical to those contained in the EEC Treaty in the fields of free circulation of goods, services, persons, capitals and of competition. The idea is that of applying the Community law to the area constituted by the territories of EEC and EFTA countries. This objective should be achieved through the "duplication" in the EEA agreement of terms identical to those contained in EEC Treaty and through the creation of a particular jurisdictional system<sup>231</sup>. Article 6 of the EEA

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<sup>228</sup> See observations of Advocate General Darmon in Sevince cit.

<sup>229</sup> Compare with Article 44 of the association agreement with Greece.

<sup>230</sup> Opinion 1/91, 14.12.1991, nyr.

<sup>231</sup> A Court (EEA Court) and a Court of First Instance are established. The EEA Court is competent for the settlement of disputes arising between the Contracting Parties of the EEA agreement, actions in the fields of surveillance procedures and as Court of appeals against decisions of the Surveillance authority. See EC-EFTA Court? Editorial Comment, CMLRev 1989 pp.341-344 where there was a suggestion to expand the composition of the Court of Justice to include EFTA judges. The Court would be competent not only for question of EC law but also for cases arisen in relation

Agreement as presented to the Court read as follows: "Without prejudice to the future development of case law, the provisions of this Agreement, in so far as they are identical in substance to corresponding rules of the Treaty establishing the European Economic Community..and to acts in application of these two treaties, shall in their implementation and application be interpreted in conformity with the relevant rulings of the Court of Justice of the European Communities given prior to the date of signature of this agreement." As regards the question of identity of the terms of the provisions contained in the EEC Treaty and the EEA agreement the Court reaffirms its previous case-law whereby provisions of an international agreement shall not be interpreted only on the basis of its terms but also in the light of the objectives they pursue. The Court then examines the aims of the EEA agreement and of the EEC Treaty<sup>232</sup> to conclude that the difference between the objectives of the two instruments prevents the homogenous interpretation of the provisions<sup>233</sup> of the Agreement corresponding to those of the EEC Treaty. The application of the case-law of the Court of Justice to the interpretation of the provisions of the EEA agreement, established by Article 6 of the

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to the application of the EEC-EFTA agreement.

<sup>232</sup> The Court examines first the objective of the two instruments. The EEA agreement provides for the establishment of a regime of free trade and of competition between the contracting parties, whereas in the case of the Community the free circulation and the competition rule are only means to reach a further integration (internal market and economic and monetary union) and as a long-term objective the European Union. It is interesting to note that the Court also considers the different context of the objectives of the two instruments. The objective of the EEA is to be achieved by means of an international agreement providing for reciprocal rights and obligations while the EEC Treaty is defined as the constitutional chart of the Community whose legal order is founded on the supremacy of the law of the Community over that of Member States and on the direct effect of a range of provisions.

agreement is not sufficient to guarantee the homogeneity of interpretations. Not only does this provision make scant reference to the case-law developed by the Court before the entry into force of the EEA agreement but further still it fails to cover essential elements of this case-law like the principle of direct effect and supremacy which are not compatible with the EEA agreement. A second Opinion<sup>234</sup> was rendered by the Court on the compatibility of some of the provisions of the modified EEA Agreement with the Treaty. The new version of the EEA Agreement maintains the principle whereby the provisions of the Agreement have to be interpreted according to the case-law of the Court of Justice on the corresponding EEC Treaty provisions as developed before the signature of the Agreement but assigns the task of ensuring the homogeneity of the interpretation to the Joint Committee whose decisions do not (impinge) upon the Court's case-law (Article 105 and proces-verbal). In the case that a dispute arises on the interpretation of the provisions of the Agreement, the Court of Justice is competent to interpret the disputed provisions. According to the Court this solution is compatible with the Treaty because the relevant provisions of the Agreement and, in particular, the "procès-verbal" between the parties guarantee the autonomy of the Community legal system and the binding character of the Court's case-law (paras.17-30)<sup>235</sup>.

However, Opinion 1/92 does not seem to modify the previous case-law of the Court as regards the interpretation of expressions contained in agreements concluded with third countries identical

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<sup>234</sup> Opinion 1/92 10.04.1992 nyr.

<sup>235</sup> The new competence of the Court of Justice (interpretation of the provisions of the Agreement) is also compatible with the Treaty as far as this interpretation is binding. The same applies to the competence of the Court of Justice to give an interpretation on the provisions of the Agreement at the demand of a EFTA Courts (para 37). The provisions on the division of competences in the field of competition between the EEC Commission and the EFTA Surveillance Authority are also compatible with the EEC Treaty (paras. 38-42).

to those of the EEC Treaty. It should be noted that the Court rules on the compatibility of the above mentioned provisions of the EEA Agreement with the EEC Treaty on the basis of considerations on the autonomy of the Community legal system which was on the contrary not guaranteed by the system established by the first version of the EEA Agreement. However, it seems that the objective of homogenous interpretation between the corresponding provisions of the EEA Agreement and the EEC Treaty cannot be pursued because the scope of the Agreement is different from that of the EEC Treaty.

In other words, the new version of the EEA Agreement does not change this basic difference between the aim of the two instruments. It could therefore be submitted that when asked to interpret the provisions of the EEA Agreement which are identical in terminology to the rules of the EEC Treaty the Court will apply the principles identified in its case-law.

How can this case-law be applied to the Cooperation Agreements with Maghreb countries?

The notions of charges and measures of equivalent effect should be interpreted in the light of the scope of the provisions on trade cooperation and of the general aim of the Cooperation Agreement.

As discussed in the introduction to this chapter, from an analysis of the Preamble, Article 1 and Article 8, the aims of the Cooperation Agreement are the socio-economic development of Morocco, the strengthening of relations between the parties and the promotion of an overall cooperation. However, economic, financial, trade and social cooperation should be conceived as instruments for the promotion of the development of Morocco. As for the strengthening of relations between the Contracting Parties, this hardly seems a distinctive objective, but rather a consequence of the agreement.

When the Cooperation Agreement was presented in the General Agreement of tariff and trade (GATT)<sup>236</sup>, the Contracting Parties defended its compatibility with the General Agreement alleging that the elimination on the part of the Community of trade restrictions met the conditions laid down in Article XXIV for the creation of a free trade area. The absence of a requirement of reciprocity on the part of Morocco was justified by the gap in the economic development between this country and the Community Part IV of GATT was invoked. It was also declared that the creation of a free trade area was the ultimate aim of the agreement as soon as the economic conditions of Morocco would have allowed it. The Agreement, however, does not contain any express provision for the establishment of a free trade area<sup>237</sup>, not even as a long-term objective. Therefore, the provisions of the Agreement should be interpreted having regard only to the development cooperation aim.

The rationale behind the provisions on industrial trade is that the free access (without reciprocity) of industrial products to the Community market would promote industrialization in Morocco which would contribute to the economic growth and development of this country.

As it will be discussed later, the prohibitions contained in Articles 9-13 and 30-36 are instruments of integration. The principle underpinning the case-law of the Court concerning these provisions is that the aim of the Treaty is the creation of conditions as close as possible to that of an internal market, and the cited rules are interpreted in line with this objective.

It seems, at first sight, that the interpretation given to the

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<sup>236</sup> See Gatt L/4560 31 October 1977. BISD 23 Supp. 88.

<sup>237</sup> Article 3 of the Cooperation Agreement refers to the "strengthening of existing economic links on as broad a basis as possible for the mutual benefit of the parties". This reference provision, however, is contained in Title I, Economic, Technical and Financial Cooperation and could hardly be considered as an objective, even long term, for the establishment of reciprocity on trade.

provisions contained in the above cited Articles of the EEC Treaty cannot be transposed "in toto" to the notion of charges and measures of equivalent effect contained in the Cooperation Agreement. The question is, however, to what extent the interpretation given by the Court can be extended to the agreement.

Two possible interpretations can be submitted. A transposition of the interpretation is admissible only when the interpretation of Articles 30-36, 9-12 is functional to the elimination of protective measures.

Alternatively, it could be argued that one purpose of development cooperation is to justify a broad interpretation of the prohibition of charges and measures of equivalent effect. As for this latter issue one should note that, in the cases discussed before the Court, the agreement with developing countries has only been examined in relation to social cooperation provisions. In Kziber the Court interpreted the notion of social security as applied to migrant workers in the same way as it applies this notion in the Community. The Court has held that the interpretation of a provision depends on the aims of the instrument in which it is contained, but it has never stated that the creation of the internal market alone justifies a broad interpretation of the notion of charges or measures of equivalent effect.

Finally, although the level of economic integration sought through the Cooperation Agreement for the economies of the Contracting Parties is more limited in comparison with those aimed at by the Treaty, closer integration seems to be established than in the case of GATT. It will be remembered that the aim of GATT is the "substantial reduction<sup>238</sup> of tariffs and other barriers to trade and (...) the elimination of discriminatory treatment in international commerce".

It is thus suggested that GATT could be taken as a reference for minimum standards applying between the EEC and Morocco.

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<sup>238</sup> Emphasis supplied.

2) Charges Having Equivalent Effect to Customs Duties and the Prohibition of Fiscal Discrimination in the EEC Treaty.

The relevant EEC Treaty Articles discussed in this section are Articles 9, 12 and 95.

Article 9, first paragraph, prohibits the levying of customs duties and charges of equivalent effect on imports and exports between Member States. Article 12 specifies the obligation on Member States to refrain from introducing new customs duties and charges of equivalent effect and increasing those already in force. This prohibition is functional with regard to the achievement of the free circulation of goods within the Community.

The customs union, which plays a crucial role in the construction of the common market, is based on this prohibition<sup>239</sup>.

Article 95 allows Member States to impose internal taxation on imported goods, provided that there is no discrimination between imported and domestic products (see under section 2)

2.a) The Court of Justice Case-Law on Charges of Equivalent Effect.

The Court's interpretation of the EEC Treaty concerning charges of equivalent effect to customs duties is based on the idea that Article 9 is a fundamental provision of the Treaty, and therefore the prohibitions contained in that Article, and in Article 12, have an absolute character and any exception must

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<sup>239</sup> GUAZZARONI La libera circolazione delle merci motore di fondo dell'integrazione europea DCSI 1973, p.173. PANICO, G. Tariffa doganale comune e tariffe di effetto equivalente Riv.Dir. Eur. 1974, pp. 69-78. See WOOLDRIDGE, F. PLENDER, R. Charges having an Effect Equivalent to Customs Duties: a Review of the Cases ELRev. 1978, pp. 101-115. "The principles for the realization of a unified market among the member states ..are laid down in the Title the free movement of goods, in the second part of the Treaty devoted to the Foundations of the Community and in Article 3 (f) of the Treaty..".

therefore be strictly construed<sup>240</sup>.

On the basis of the long tradition of case-law<sup>241</sup> on charges the following definition of charges having equivalent effect to customs duties can be summarized<sup>242</sup>: charges of equivalent effect to customs duties are pecuniary charges other than customs duties imposed unilaterally by Member States. They are levied only on imported products, when they cross the frontier or even afterward by reason of their movement across the border.

When all these conditions are fulfilled a charge falls under the prohibition under Article 12 regardless of its name, its amount and mode of application, the aim for which is established, its protectionist or discriminatory effect. Some of the notions referred to above need to be clarified.

Unilaterality of the imposition means that while a Member State is forbidden from imposing charges on imported products acting on the basis of its legislation, charges are admitted when they are levied on the basis of Community legislation or of

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<sup>240</sup> "It follows..from the clarity, certainty and unrestricted scope of Articles 9 and 12, from the general scheme of their provisions and from the Treaty as a whole, that the prohibition of new customs duties, linked with the principles of the free movement of products, constitutes an essential rule and that in consequence any exception, which moreover is to be narrowly interpreted, must be clearly stipulated". Joined case 2-3/62, Commission v. Luxembourg and Belgium 14.12.1962 (1962) ECR p. 425, p. 432.

<sup>241</sup> In this paragraph only some of the most significant cases discussed before the Court will be referred to. For a complete list of cases see SMITH, H. & HERZOG P.E. The Law of the European Economic Communities A Commentary of the EEC Treaty, Matthew Brender New York, 1991 and references in VERLOREN VAN THEMAAT, Kapteyn P.J.G. Introduction to the Law of the EEC Gormley, 1990, pp.359-375, MATTERA RICIGLIANO A. Il Mercato Unico... op.cit. pp.33-39.

<sup>242</sup> The Court of Justice has provided several definitions of charges having equivalent effect to customs duties. Some of these definitions, although consistent, emphasize different aspects of the notion under consideration according to the specific problems that the Court was asked to resolve on the various cases.

international agreements binding all Member States<sup>243</sup>.

On the basis of this reasoning the fees demanded for these inspections were not considered as charges of equivalent effect: "they are not prescribed by each Member State in order to protect some interest of its own but by the Council in the general interest of the Community. They cannot therefore be regarded as unilateral measures which hinder trade but rather as operations intended to promote the free movement of goods.." <sup>244</sup>.

Although the charge in question in Bauhuis was a charge on export, it is important to understand the rationale behind the Court's reasoning. In the absence of a common rule, a double test or control would result (by the exporting and importing State) with the prohibition of levying charges for these inspections. On the other hand, if a common standard is accepted, only one test is carried out and the Member State responsible for it is allowed to receive a monetary compensation for this service. Intra-Community trade would therefore be facilitated. Another means to expedite trade would be through the mutual acceptance of control by the Member States. If the inspections carried out by the exporting Member State are recognized by the importing Member State, multiple control at frontier is avoided. This implies a single integrated market where there is mutual trust among Member States<sup>11</sup>.

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<sup>243</sup> See Case 46/76 Bauhuis v. Netherlands 25.1.1977 (1977) ECR p.5. This was the case of the levy of fees for veterinary inspections on exported goods prescribed by Council Directive 64/432. Analogously, in case 89/96 Commission v. Netherlands 12.07.1977 (1977) ECR p. 1355, the fees charged for phytosanitary inspections were considered legitimate because they aimed at the issuing of certificates provided for by the International Plant Protection Convention, of which all Member States are contracting parties. These inspections were not considered by the Court as unilateral measures hindering trade, but operations designed to foster the free movement of goods. See paragraphs 14 and 15. For comment on these cases see BARENTS, R Charges of Equivalent Effect to Customs Duties CMLRev 1978 pp.415-434. BURKI, S.J. L'Affaire Bauhuis c/Etat néerlandais ou un nouveau problème posé par les taxes d'effet équivalent à des droits de douane RTDE 1977, pp.313-315.

<sup>244</sup> See Bauhuis, op.cit. paras. 29 and 30.

Scope and service rendered. The emphasis placed by the Court on the absolute character of the prohibition laid down by articles 9 and 12 does not allow any distinction between charges according to the aims Member State pursue when applying them. Therefore, charges levied for sanitary inspections, statistical purposes, or even financing a fund providing social benefits to workers employed on the sector relating to the imported good, fall under the prohibition of article 12<sup>245</sup>.

A related question concerns the charges imposed for sanitary, veterinary and phytosanitary inspections, etc. which could be considered as fees levied in consideration of a service rendered. The Court has adopted a very restrictive view on the issue,<sup>246</sup> stating that when such activities are services rendered for the general interest the corresponding fees fall under the prohibition of Article 12, whereas they are permitted when the activities are services specifically rendered to the importer<sup>247</sup>. In this case,

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<sup>245</sup> See case 24/68 Commission v. Italy 18.11.1970 (1970) ECR p.193, case 8/70 Commission v. Italy 18.11.1970 (1970) ECR p.961; case 2-3/69, Social Fonds voor de Diamantarbeiders v. Sa Ch. Brachfeld 1.07.1969 ECR (1969) p.211. The scope of the imposition is irrelevant because the abolition of customs duties and charges of equivalent effect is not only the elimination of the protection among Member States but it is functional to the free movement of goods. See Diamantarbeiders paras. 11-14 and 15-18 pp. 221-222.

<sup>246</sup> See case 39/73, Rewe - Zentralfinanz v. Director der Landwirtschaftskammer 11.10.1973 (1973) ECR p.1039. 29/72 Marimex v. Italian Fiscal Administration 14.12.1972 (1972) ECR 1309; case 251/78 Firma Denkavit v. Minister für Ernährung 8.11.1979 (1979) ECR p.3369.

<sup>247</sup> "specific individualizable service actually rendered" BARENTS, R. Charges of Equivalent Effect to Customs Duties CMLREV 1978, pp. 415-434, p. 423. See case 132/82 Commission v. Belgium and case 133/82 Commission v. Luxembourg 17.05.1983 (1983) ECR p. 1649 and 1669. In both cases the Court stated that although the storage of goods in a public warehouse represents a service rendered to the exporter, the charge imposed by the two Member States infringed the prohibition laid down in Articles 9 and 12 because it was levied even if no storage was required by the importer completing customs formalities at the public warehouse. The charge would be justified if they were part of a general system

however, the charge must be proportionate to and not exceed the cost of the service rendered<sup>248</sup>.

## 2.b) The Court Case-law on the Prohibition of Fiscal Discrimination.

Under Article 95.1 of the EEC Treaty Member States are allowed to impose internal taxes<sup>249</sup> on imported products provided that these are not in excess of those applied to similar domestic products.

This provision is completed by the rule laid down in paragraph 2, whereby Member States are prohibited from affording, through internal taxation, indirect protection to imported products which, although not similar, are in a competitive relationship with domestic goods<sup>250</sup>. Based on the principle of non-discrimination on ground of nationality, Article 95 performs three functions in the

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of internal taxation.

<sup>248</sup> Case 158/82 Commission v. Denmark 9.11.1983 (1983) ECR p.3573, case 32/80 Officier van Justitie (1981) ECR p. 251.

<sup>249</sup> A comparison between the charges imposed on domestic and imported products requires the application of identical criteria. The rates, the basis of assessment and the detailed rules of levying the tax are taken into account. See case 148/77 Hansen v. Hauptzollamt Flensburg 10.10.1978 (1978) ECR p. 1787, case 74/76 Iannelli v. Meroni 22.03.1977 (1977) ECR p. 557.

<sup>250</sup> In paragraph two no exact standard of reference is established, but two requirements need to be fulfilled: unequal treatment and protective effect. See observations of Advocate General Reischl in case 170/78 Commission v. United Kingdom 27.02.1980 (1980) ECR p. 441. See also case 27/67 Finck Frucht v. Hauptzollamt Munchen-Landsberger (1968) ECR p.223, case 169/78, Commission v. Italy 27.02.1980 (1980) ECR p. 385; 168/78 Commission v. France 27.02.1980 (1980) ECR p. 347; case 171/78 Commission v. Denmark, 27.02.1980 (1980) ECR p. 437, 385, 447. Case 216/81, Cogis. v. Amministrazione delle finanze 15.07.1983 (1983) ECR p.2701. See BARENTS, R. The Prohibition of Fiscal Discrimination in Article 95 of the EEC Treaty CMLRev 1980 pp. 437-449, p. 442.

Community system<sup>251</sup>: it prevents distortion of competition<sup>252</sup>, it assures border tax adjustment, and it complements the prohibition contained in Articles 9-13<sup>253</sup>. It is clear that the imposition of higher taxation on an imported good would have the same effect on price as the imposition of a customs duty or of a charge of equivalent effect<sup>254</sup>.

Internal taxes and charges of equivalent effect, however, must be distinguished. According to the Court the concepts of charges under Article 12 and of internal taxation under Article 95 are separate and their application mutually exclusive<sup>255</sup>.

As for the question of whether charges imposed on both imported and domestic products, but benefitting only the latter, should still be regarded as being covered by Article 95, or should

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<sup>251</sup> See EASSON, A. Fiscal Discrimination: New Perspectives on Article 95 of the EEC Treaty CMLRev 1981 pp. 521-551, p. 523. MARESCA, M. Le "Tasse.. op.cit., p. 57 ff. Case 27/67 Finck Fruit op. cit. p. 233. See also case 169/87 Commission v. Italy op.cit.

<sup>252</sup> See case 73/79 Commission v. Italy 21.05.1980 (1980) ECR p.1533 and the parallelism drawn with Articles 92 and 93 which for the Court indicates that these provisions pursue the same aim in avoiding the distortion of competition with in the internal market.

<sup>253</sup> "Article 95 is intended to fill in any breaches which a fiscal measure might open up in the prohibition laid down, by prohibiting the imposition on imported products of internal taxation in excess of that imposed on domestic products" Case 24/68 Commission v. Italy 1.07.1969 (1969) ECR p.193.

<sup>254</sup> "Imposizioni fiscali piu' onerose sulle importazioni violano le concessioni tariffarie per cui si annulla o riduce l'efficacia degli accordi che avrebbero dovuto portare an incrementare il commercio internazionale" STAMMATI, Articolo 95 QUADRI, R. MONACO R., TRABUCCHI, A. Commentario CEE Vol. II, p.776.

<sup>255</sup> Case 45/75 Rewe Landau Pfalz 17.06.1976 (1976) ECR p. 181. case 57/65 Lütticke v. Hauptzollamt Saarloms, 16.06.1966 (1966) ECR p.205; 27/74 Demag v. Finanzamt Duisburg-Sud 22.10.1974 (1974) ECR p. 1037, 20/76 Schottle 16.02.1977 (1977) ECR p. 247. Therefore when a charge falls under Article 12 it cannot be considered an internal taxation.

be classified as charges of equivalent effect<sup>256</sup>, in several cases the Court has ruled that when the sole purpose of the charge is to finance activities to the exclusive advantage of the taxed internal product, the charge must be considered as a charge of equivalent effect<sup>257</sup>. In the case where only a part of the tax benefits the domestic products, the advantage is evaluated under Article 95.

A primary question concerning Article 95 relates to the interpretation of "similar products" (paragraph 1) and "other products" (paragraph 2). The distinction is important since the fiscal treatment which Member States must apply is different in the two cases<sup>258</sup>.

Paragraph 1 requires that imported products are not the object of a higher tax treatment as compared with that imposed on similar domestic products<sup>259</sup>. Under the second paragraph a different form of taxation is allowed, provided that it does not have a protective effect for domestic products. In this case, if the different

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<sup>256</sup> These are the so-called parafiscal taxes. See case 77/72 Capolongo v. Maya 19.06.1973 ECR (1973) 611. 78/76 Steinike v. Weinlig 22.03.1977 (1977) p.595 Cucchi v. Avez 25.05.1977 (1977) ECR p.987, case 94/74 IGAV v. Ente Nazionale per la Cellulosa 18.06.1975 (1975) ECR p.699. Interzuccheri Spa v. Ditta Rezzano 25.05.1977 (1977) ECR p. 1029.

<sup>257</sup> See EASSON Fiscal Discrimination..op.cit. p. 529. See DANIELE,L. Il divieto di discriminazione fiscale nella giurisprudenza comunitaria (1980-1987) ForoIt 1989 pp.202-224,sp. p.208, for this author the Court ruling in case 73/79, Commission v. Italy 21.05 1980, is inconsistent with the previous case-law. In case 73/79 in fact the Court the tax in question was to be considered as covered by Article 95 although it went to the exclusive advantage of domestic products, whereas according to the previous rulings, see case 77/76 Cucchi v. Avez 25.05.1977 (1977) ECR p. 987, the destination of the tax to the exclusive advantage of the national products was considered as a tax of equivalent effect.

<sup>258</sup> See TIZZANO,A. Sul divieto di discriminazioni fiscali nella Comunità economica europea ForoIt. 1976, Part IV, pp.318-324.

<sup>259</sup> Imported goods could be taxed at lower rate than domestic goods which are similar. See case 34/67 Firma Lúck v. H. Koln 4.04.1968 (1968) ECR p. 334.

taxation imposed on products which are in competition is justified (by the different procedures of manufacture<sup>260</sup>, the materials used or other objective criteria<sup>261</sup>) the fiscal discrimination is compatible with Article 95.2 unless the criteria which justify the different treatment are not laid down with the purpose of discriminating imported products<sup>262</sup>.

According to the Court, similar products are those which are comparable as regards the origin, the composition, the processing and the substantive qualities<sup>263</sup> and from the point of view of the consumer<sup>264</sup>. Both these conditions should be fulfilled because recourse to the criterion of consumer's preferences can be inaccurate since it can be the result of the difference in price between two products.

In order to clarify this point, reference can be made to the

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<sup>260</sup> See case 21/79 Commission v. Italy 08.01.1980 (1980) ECR p.1 (regenerated oil), the difference in taxation was justified because production cost of regenerated oils are higher than those of fresh oil.

<sup>261</sup> On differences between luxury goods see case 319/81 Commission v. Italy 15.03.1983 (1983) ECR p.601 and case 277/83 Commission v. Italy 11.07.1985 (1985) ECR p.2053 where the different taxation was quashed because only imported luxury goods were taxed with a higher burden.

<sup>262</sup> See case 112/84 Humblot v. Directeur des Services Fiscaux 09.05.1985 (1985) ECR p. 1373.

<sup>263</sup> The Court also had recourse to customs classification even if it also recognized that the fact that the products had the same customs classification, which, although an important element, could not be conclusive. See Fink-Frucht op.cit. and case 28/69 Commission v. Italy op.cit. Products which bear a different classification may be covered by the same tax and be considered similar for this purpose. See MCGOVERN, E. International Trade Regulations Exeter, Globefield Press 1986 pp. 242-249.

<sup>264</sup> See case 106/84 Commission v. Denmark 04.03.1986 (1986) ECR p. 867 and case 243/84 Jhon Walker v. Ministeriet for Skatter 04.03.1986 (1986) ECR p. 877 where the products in question were not considered similar since their characteristics are substantially different (absence of the first type of criterion mentioned).

economic concept of cross-elasticity which indicates the variation of the demand of a product at the raising or lowering of the price of another good.

The percentage variation of demand for a product (A) is divided by the percentage variation of the price of the other product (B): the result is the cross-elasticity. A high cross elasticity means that the difference in prices will modify the choice of consumers (when the price of B raises, the demand for A increase). Similar goods therefore have a high cross elasticity, and hence even a marginal difference of prices between them would modify the choice of the consumers: this explains why the same fiscal treatment is required.

Products coming under paragraph 2 have a lower cross-elasticity (they have different characteristics but are competitive). Therefore, a different tax treatment is allowed, but only if it is justified by such differences and provided that the preferential treatment granted to domestic goods is not based on conditions that cannot be fulfilled by imported goods (they do not have to be established with a protectionist aim).

It has been argued<sup>265</sup> that the case-law of the Court of Justice shows a "globalization" of article 95<sup>266</sup>. This means that the distinction between "similar" and "other products" has lost part of its relevance. If one applies the concept of cross-elasticity, the "globalization" means that in a hypothetical scale of cross-elasticity going from 1 to 10, Article 95 covers the hypothesis of products with a cross elasticity going from 4 to 10 (the higher values being those of similar goods).

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<sup>265</sup> See EASSON *Fiscal discrimination... op.cit.* and DANUSSO, M. DENTON, R. Does the European Court of Justice Look for a Protectionist Motive under Article 95? *LIEI* 1990, pp.67-120.

<sup>266</sup> See EASSON *New perspectives...cit.* p. 535. This view is developed by DANUSSO, M. DENTON, R. Does the European Court... *op.cit.* p.74.

Globalization also implies that the different fiscal treatment required under paragraph 1 and paragraph 2 is not differentiated any longer<sup>267</sup>. According to the authors who submitted the theory of globalization of Article 95, the Court focuses in particular on the question of protectionism<sup>268</sup>. In other words the Court considers the objectives of the different tax regime. If the reason is legitimate the difference is allowed, if the aim is protectionist, the national measure is quashed.

### 3) The Notion of Charges Having Equivalent Effect to Customs Duties and Fiscal Discrimination in the Cooperation Agreement.

It has already been seen that customs duties imposed on goods imported from third countries in the Community are indicated in the Common Customs Tariff and that Member States cannot impose customs duties unilaterally on third countries imports. This prohibition extends to charges of equivalent effect<sup>269</sup> which should require a common notion of charges of equivalent effect. It is clear, in fact, that a charge imposed by a Member State on a good imported from a third country is legitimate if it is not qualified as charge

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<sup>267</sup> See DANIELE, L. Il divieto di discriminazione fiscale nella giurisprudenza comunitaria ForoIt. 1989, Part IV, pp.201-223.

<sup>268</sup> "It appears...that Article 95, taken as a whole, may apply without distinction to all the products concerned. It is sufficient therefore to examine whether the application of a given national tax system is discriminatory or, as the case may be, protective" case 319-81 Commission v. Italy para.13.

<sup>269</sup> Member States will not be allowed to introduce or modify customs duties and charges of equivalent effect as regards third countries 37-38/73 Diamanterbeiders v. Indiamex 13.12.1973 ECR (1973) p.1609. The Court has ruled that the prohibition of maintaining them in case 266/81 SIOT v. Ministero delle finanze 16.03.1983 (1983) ECR p.731. In case 144/77 Hansen v. Hautzollamt Flensburg 10.10.1978 (1978) ECR 1787 the Court ruled that, in the absence of agreement providing for such a rule, there is not a prohibition of discrimination in taxation imposed on goods imported from third countries.

of equivalent effect and a different notion adopted by the various Member States could distort the trade flow in the Community.

The Court has expressly recognized the analogy of the notion of charges of equivalent effect contained in Articles 9 and 12 with the notion of charges of equivalent effect (as well as measures of equivalent effect) contained in the regulations establishing common market organizations. These usually contain rules concerning trade with third countries prohibiting the levying of customs duties and charges of equivalent effect<sup>270</sup>.

It should be considered that the main purpose of having a common customs tariff seek to secure the uniformity of treatment at the external borders as regards goods imported from third countries<sup>271</sup>. Whereas in the case of the Cooperation Agreements with Maghreb countries the aim of Article 9 is that of eliminating some of the obstacles to trade, amongst others, customs duties and charges of equivalent effect.

Although the ultimate aims of the EEC Treaty and of the Cooperation Agreement are different, it seems possible to give an interpretation of the notion of charges of equivalent effect contained in the Cooperation Agreements with Maghreb countries which is the same as that adopted in Community law. The two most relevant questions are the scope of the charge and the charges levied for a service rendered to the importer. It can be submitted that the reference to the purpose of the charge is too subjective and can lead to abuses. It would be relatively simple for the importing Member State to allege that the charge is not imposed as

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<sup>270</sup> Case 34/73 Variola v. Amministrazione delle finanze 10.10.1973 (1973) ECR p.981; case 43/71 Politi v. Ministero delle finanze 14.10.1971 (1971) ECR p. 1039; case 84/71 Marimex v. Ministero delle finanze 7.03.1972 (1972) ECR p.89 ; case 21/75 Firma Schroeder v. Oberstadtdirektor der Stadt Koln 9.07.1975 (1975) ECR p. 905.

<sup>271</sup> See observations of Advocate General Werner in Marimex cit. p. 916 and case 70/77 Simmenthal v. Amministrazione delle Finanze 28.06.1978 (1978) ECR p. 1453.

a means of protection but has a different purpose, such as the reimbursement of post stamps or expenses for statistical analysis. If the charge is levied for the reason that the good has moved across the border this should be classified as charges of equivalent effect and therefore prohibited. An exception exists in the case of a charge imposed as payment of sanitary or phytosanitary inspections, or for any service rendered to the importer. In this case the fees levied must be proportionate to the service rendered. An analogous interpretation can be found in GATT where charges and fees are allowed (Article VIII) if they are levied in consideration of a service rendered to the exporter. As in EEC law GATT requires proportionality between the cost and the service.

One more complex question concerns the interpretation of Article 33 of the Cooperation Agreement with Morocco on fiscal discrimination. This prohibits "any measures or practice of an internal fiscal nature establishing, whether directly or indirectly<sup>272</sup>, discrimination between the products of one Contracting Party and like products originating in the territory of the other Contracting party"<sup>273</sup>.

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<sup>272</sup> The distinction between direct and indirect taxation lies in relation whether tax is imposed on products (indirect taxation) or on the producer (income taxation, e.d. direct taxation) See in Community law case 45/64 Commission v. Italy 1.12.1965 (1965) ECR p. 857. This is a well known distinction in international trade, it is particularly relevant as regards border adjustment tax and also applies in GATT. See JACKSON J.H. National Treatment Obligations and non-Tariff Barriers MJIL 1989 pp. 207-224.

<sup>273</sup> Article 33 sets up the "destination principle" that is guaranteed in the Community by Articles 95 and 96. The function performed in the EEC by Article 96 is accomplished by the second paragraph of Article 33 which reads "products exported to the territory of one of the Contracting Party may not benefit from the repayment of internal taxation in excess of the amount of direct or indirect taxation imposed upon them". This means that the turnover tax applied by Morocco to a good which is exported to a Community Member States is remitted, that is the good is exported free of tax and the importing Member State will then apply the tax

What is the role of Article 33 in relation to the prohibition of customs duties and charges of equivalent effect? How should the term "like products" and the prohibition of discrimination be interpreted?

The rationale behind of the rule is that of sanctioning discriminatory taxation which would result, if admitted, in an obstacle to trade. It should however be noted that Article 33 is not part of the provisions contained in Title II, Trade Cooperation, for industrial products, but is one of the "Common Provision" applying to both industrial and agricultural trade.

While the prohibition of customs duties and charges of equivalent effect only concerns industrial trade from Morocco to the Community, the prohibition laid down in Article 33 also applies to the Community originating products imported into Morocco. Therefore, on the one hand, there is non-reciprocal preferential treatment as regards customs and quotas, and on the other, the principle of non-discrimination on nationality applying both ways.

In other words, products imported from the Community to Maghreb countries are subject to customs duties but they must not be discriminated, as regards taxation, in relation with like domestic goods. The second aim of Article 95 of the EEC Treaty, which is to assure fair conditions of competition, does not seem to be pursued by Article 33. First, there are no other provisions on competition in the Cooperation Agreement (such as those on State aids of the EEC Treaty) and, second, there is not reference to "products in competition" in Article 33.

Since Article 95 of the EEC Treaty and 33 of the Cooperation Agreement are worded differently it seems clear that Article 33 has a more limited application. What is not clear is whether Article 33.1 corresponds to Article 95.1.

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which is applied on the same product. A different tax, in fact, would be a further obstacle to trade, if, let us suppose the tax imposed by Member State would be a 10%, while the Moroccan tax would be a 7%.

It should in fact be noted that Article 33 establishes a comparison between "like" products, whereas Article 95.1 refers to "similar" products. In addition, Article 33.1 prohibits "discrimination" whereas Article 95 paragraph 1 more specifically prohibits the imposition of a higher tax burden on imported goods.

As far as the notion of "like products" is concerned it seems that the provision does not require perfect correspondence between the products whose tax burden is being compared. This seems to be excluded first by the term used (like, "similari"..), but especially by the observation that such an interpretation would excessively limit the application of Article 33<sup>274</sup>. A little divergence would in fact be sufficient to circumnavigate the prohibition of discrimination.

Analogously, one can exclude the possibility of products which are in competition but differ for their characteristics being covered by Article 33. In Kupferberg the Court ruled that "products which differ inter se both as regards the method of their manufacture and their characteristics may not be regarded as like products"<sup>275</sup>. This case concerned the interpretation of Article 21 of the Agreement with Portugal, which is identical to Article 33 of Morocco Cooperation Agreement. The absence of a corresponding provision to Article 95.2 in the Cooperation Agreement meant that it was not in the intention of the contracting Parties to extend the prohibition of fiscal discrimination to this type of products. The different aims of the two international instruments should also confirm such an interpretation.

It could be submitted that the application of the prohibition of discrimination laid down in Article 33 cover only products

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<sup>274</sup> See in the EEC case 148/77 Hansen & Balk v. Hauptzollamt Flensburg 10.10.1978 (1978) ECR 1787. case 45/75 Rewe v. Hauptzollamt Landau-Pfalz 17.02.1976 (1976) ECR p.181, case 169/78 op.cit.

<sup>275</sup> It was the case of wines fortified with spirits and wines of natural fermentation. See case 104/81 Kupferberg, op.cit. p. 3669.

having a high value of cross elasticity (on the scale from 1 to 10 values comprised between 8 and 10).

As for the tax rates which are being compared, the prohibition contained in Article 33 concerns "measures and practice of an internal fiscal nature". Tax rates, based on the same assessment basis and concerning products at the same stage of production or marketing are covered.

This would be, however, a too restrictive interpretation covering, in practice, only formal discrimination. It is submitted that method of payment<sup>276</sup>, tax reimbursement and exemptions should be calculated to verify the compliance of the tax treatment imposed by the importing Member State with Article 33.

A different fiscal treatment between "like" products, whereby a State is free to decide whether to pursue economic and or social policy objectives, should, however, not be discriminatory<sup>277</sup>. This is not always easy to ascertain. It could be argued that when only domestic products can qualify for the preferential fiscal treatment, there is a presumption of discrimination<sup>278</sup>.

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<sup>276</sup> See for Article 95 case 55/79 Commission v. Ireland 27.02.1980 (1980) ECR p.481 "...even when the rate of tax is equal the effect of that tax may vary according to the detailed rules for the basis of assessment and levying thereof applied to national production and imported products respectively" para. 8.

<sup>277</sup> In a case reproducing the facts of "regenerated oil", case 21/79 Commission v. Italy op.cit. p.1, where only domestic regenerated oil was granted a preferential fiscal treatment, whereas imported regenerated oil was taxed like fresh oil was clearly discriminatory on the basis of nationality.

<sup>278</sup> This would be the case of a situation like that examined in the Marsala case, case 277/83 Commission v. Italy 3.07.1985 (1985) ECR p. 2049, where Marsala wine was taxed less heavily than liqueur wines, and imported liqueur wines could never be qualified for the preferential treatment. See also case 106/84 Commission v. Denmark 1986 (1986) ECR p. 833, (Danish fruit wines) where the products object of the higher tax were only imported goods.

In support of this interpretation, it could be held that its application would in any case be limited by the first part of the provision, that is by the fact that the tax only concerns "like" products and it is not extended to products which are in competition. This means, in other words, that the narrower interpretation given to Article 33, as compared with Article 95, is maintained.

The prohibition of fiscal discrimination is also contained in Article III of GATT. This provision establishes, in general, the principle of national treatment between domestic and imported like products as regards not only fiscal discrimination but also other measures and regulations applying to domestic goods.

Thus, if parallelism can be drawn with EEC Treaty provisions this will concern Article 95 and Article 30.

The aims of Article III GATT are to remove discrimination as an obstacle to trade and also to assure equal conditions of competition<sup>279</sup>. The interpretation of like products is also controversial in GATT, although it seems that the comparable use of the products is not sufficient to qualify them as like products<sup>280</sup>.

Article III is also interpreted as sanctioning all the measures which although not discriminatory "prima facie" discriminates between domestic and imported goods.

A comparison can hardly be made between Article III GATT and Article 33 of the Cooperation Agreement. It has been seen that the objective of the former provision is more extensive than that of

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<sup>279</sup> See the Italian discrimination against imported agricultural machinery case where the Panel stated that the intention of the drafters was to provide equal conditions of competition between imported and domestic goods once they have been cleared through customs. See JACKSON, DAVEY *op.cit.* p.486 ff. spec. p.488 and JACKSON, J.H. National Treatment...*op.cit.* p.210.

<sup>280</sup> See the milk protein case where the Panel concluded that although animal and vegetable and synthetic proteins were used to add protein to animal feed that could not be considered as like products. JACKSON, DAVEY *op.cit.* p.493.

Article 33. However, we should also consider that Article 9 of the Cooperation Agreement prohibits the application of measures of equivalent effect to quantitative restrictions. The interpretation of this provision will be discussed in the following section.

#### 4) Measures of Equivalent Effect to Quantitative Restrictions.

##### 4.a) The Case-Law of the Court of Justice.

As has been seen above, besides the prohibition on applying quantitative restrictions to imports of Moroccan industrial goods into the Community, the Agreement also provides for the elimination of measures<sup>281</sup> of equivalent effect in relation to quantitative restriction<sup>282</sup>.

In the EEC, the interpretation of this concept is of an extraordinary complexity and is still the subject of many cases

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<sup>281</sup> In the EEC Treaty a "measure" under Article 30 cannot concern the behavior of an undertaking but must be imputed to the State. It is also clear that an EEC legislation setting up a system of import licence for importation in the Community could not be applied to Moroccan imports. See Commission Directive 70/50 O.J. L 13 1970 defining measures for the purpose of Article 30 "laws, regulations, administrative provisions, administrative practices and all instruments issuing from a public authority, including recommendation" (second consideranda). "National practice" introduced by the government of a Member State, although not binding is considered a measure under Article 30. See Buy Irish case 249/81 Commission V. Ireland 24.11.1982 (1982) ECR p.4005.

<sup>282</sup> See Article XI and Article III of GATT. The first is concerned with quotas and other measures which apply only to imported products and which are forbidden. Article III concerns measures such as regulations and legislation which do not make a distinction between imported and domestic goods. In this second case Article III requires that imported goods are treated no less favorably than domestic goods. The Community is going further because it considers that these measures are prohibited when they have a restrictive effect on trade.

brought before the Court of Justice<sup>283</sup>.

Before the important ruling in Dassonville<sup>284</sup>, part of the doctrine<sup>285</sup> considered measures of equivalent effect those which discriminated between imported and domestic goods. According to other scholars, however, measures of equivalent effect were those which, although formally non-discriminatory, had the effect of restricting trade between Member States.

The Commission, in its Directive 70/50, differentiated between "distinctly" and "indistinctly applicable" measures. While the effect of the former was considered equivalent to that of quotas, which were per se prohibited, the latter's effect was considered "inherent" to the difference of regulations applied by Member States and thus in principle not covered by Article 30 unless the restrictive effects of these measures were not proportional to the aims and when the same objective could be attained by less restrictive means<sup>286</sup>.

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<sup>283</sup> On the most recent development see GORMLEY, L. Recent Case Law on the Free Movement of Goods: Some hot Potatoes CMLRev. 1990 pp. 827-857. On the question of which measures are prohibited under Article 30 see also WHITE, E.L. In Search of Limits to Article 30 of the EEC Treaty CMLrev 1989, pp. 235-280; MORTELMANS, K. Article 30 of the EEC treaty and Legislation relating to Market Circumstances: Time to Consider a new Definition? CMLRev 1991, pp. 115-136. STEINER, J. Drawing the Line: USes and Abuses of Article 30 CMLRev. 1992, pp. 749-774.

<sup>284</sup> Case 8/74 Procureur du Roi v. Dassonville 11.07.1974 (1974) ECR p. 837.

<sup>285</sup> See for reference OLIVER, P. Free Movement.. op.cit. p.83-86; GORMLEY, L. Prohibiting Restrictions on Trade within the EEC North-Holland, Amsterdam, 1985 pp.8-20.

<sup>286</sup> It is worth noting that Advocate General Capotorti in case 120/78 Rewe-Zentral AG v. Bundesmonopolverwaltung fur Brenntwein 20.02.1979 ECR (1979) p.649, (Cassis de Dijon) qualified the limited interpretation of measures of equivalent effect given by the Commission in Directive 70/50 as an expression of a "prudent attitude" which could be explained only if seen in the context of a stage of progressive abolition of quotas. The Advocate General considered, in other words, that the definition contained in the directive was insufficient to guarantee the free movement of goods

In Dassonville the Court did not distinguish between equally and non-equally applicable measures, but it broadly defined "measures" within the meaning of Article 30, as "all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade". The Court in this ruling made it clear that, in order to qualify as a measure of equivalent effect, the key criterion would be the restrictive effect it has on trade between Member States. In the Cassis de Dijon ruling, concerning national legislation applicable to both domestic and imported goods, the Court confirmed that even equally applicable measures are covered by Article 30.

Subsequent case-law established that it is not necessary for a measure to advantage domestic goods to come within the scope of Article 30<sup>287</sup>.

A distinction can be made between those measures which concern the characteristics of the goods (labelling, packaging, composition..) and measures which regulate the circumstances on which goods are used or sold<sup>288</sup>.

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at a more advanced stage of integration.

<sup>287</sup> See case 60/61-1984 Cinéthèque v. Fédération National des Cinemas Francais 11.07.1985 (1985) ECR p.2605. See WHITE op.cit.

<sup>288</sup> See case 155/80 Oebel (night baking) 14.07.1981 (1981) ECR p. 1993; 286/81 Oosthoek 15.12.1982 (1982) ECR p.4574 (promotional gift); case 75/81 Blesgen 31.03.1982 (1982) ECR p.1211 (sale of alcoholic beverage in public places); 382/87 Buet 16.05.1989 (1989) ECR p. 1235 (door step selling). Different interpretations have been submitted as regards these second type of measures. For WHITE, Article 30 does not cover rules regulating circumstances in which goods are sold or used, in so far as they have a neutral effect on goods legally produced or marketed in another Member State. According to Advocate General Van Gerven in Torfaen it is the partitioning of the market which should be considered in deciding whether a measure falls under Article 30. See comments by GORMLEY, L. Note to Case 145/88 CMLRev 1990 pp.141-150. For MORTELMANS, K. Article 30... op.cit. are covered by Article 30 those measures which lack a "territorial element", that is which regulates the marketing of products but are not connected with activities taking place in a fixed location (e.g. shop hours) since the former only may threaten the completion of the internal market

In Dassonville and more precisely in the Cassis de Dijon, however, the Court qualified the broad definition given to measures of equivalent effect introducing a "rule of reason", that is laying down the conditions under which a measure, which would be considered prohibited under Article 30 because of its effect to restrict trade between Member States, is on the contrary admissible. The conditions are the following: the measure must pursue a legitimate objective<sup>289</sup> which is not regulated at Community level<sup>290</sup>; it must be necessary and proportional<sup>291</sup> and cannot constitute a means of arbitrary discrimination or a disguised restriction on trade (Dassonville, para.7<sup>292</sup>).

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whereas for the other goods they are a secondary consideration. He admits however, the existence of a "grey area". See pp. 130-131.

<sup>289</sup> In the language of the Court "mandatory requirements". The burden of the proof lays on the importing Member State. See 178/84 Commission v. Germany 12.03.1987 (1987) ECR p. 1227.

<sup>290</sup> See in Dassonville para. 6 "In the absence of a Community system guaranteeing consumers the authenticity of a product's designation of origin.." and in Cassis de Dijon the reference to the absence of common rules relating to the production and marketing of alcohol.." (para 8). The compatibility with Article 30 of measures hindering trade can be also admitted when Member State adopt measures to regulate a subject which is only partially covered by Community law or where the Community itself allow the intervention of national regulation. See case 4/75 Rewe-Zentralfinanz v. Landwirtschaftskammer 8.07.1975 (1975) ECR p. 843; 65/75 Tasca 26.02.1976 (1976) ECR p. 291; 148/78 Ratti 5.04.1979 (1979) ECR p.1629.

<sup>291</sup> Proportionality for equally and non-equally applicable measures. See 190/73 Officer van Justitie v. Van Haaster 30.10.1974 (1974) ECR 1123. It could be equally applicable under Article 30 even if proportionate.

<sup>292</sup> It could be noted that the Court seems to make a contradiction in this paragraph, since on the one hand it states that it will not examine whether the contested measures fall under Article 36, but on the other it asserts the necessity for these to meet the requirements laid down in the second paragraph. If Article 36 does not apply, why should its second paragraph apply?

In the Cassis de Dijon the Court lists, as an example of a "mandatory requirement", "effectiveness of fiscal supervision (which will disappear in subsequent cases), the protection of public health, the fairness of commercial transactions and the defence of the consumer". It is clear from the use of the term, in particular at the beginning of that sentence, that the list is not exhaustive<sup>293</sup>, in fact the Court has admitted the legitimacy of restrictive measures in the case of environmental protection<sup>294</sup>, protection of working conditions<sup>295</sup>, and culture in general<sup>296</sup>... A second question is the relationship between Article 36 and the rule of reason. It should be noted that the Court mentions the protection of health, which is one of the grounds contained in Article 36 allowing Member State to derogate from Articles 30-34<sup>297</sup>. It has therefore been argued Cassis de Dijon<sup>298</sup> has filled a lacuna, amplifying Article 36 with reasons, which at the time of the conclusion of the Treaty had not been included in that provision. This interpretation could be justified by the observation, that the effect of the rule of reason of Article 30 is the same as Article 36, viz. derogation from the prohibition contained in Articles 30-

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<sup>293</sup> Cassis de Dijon, para 8, emphasis supplied.

<sup>294</sup> Case 302/86 Commission v. Denmark 20.09.1988 (1988) ECR p. 4627.

<sup>295</sup> Oebel op.cit.

<sup>296</sup> Case 95/84 Borello 10.07.1986 (1986) ECR p.2453.

<sup>297</sup> "The provisions of Articles 30 to 34 shall not preclude prohibitions or restrictions on imports, exports or good in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archeological value; or the protection of industrial and commercial property. Such prohibition or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States"

<sup>298</sup> It will be remembered that the Court in Cassis quite surprisingly did not even mention Article 36.

34. The requirements to be fulfilled by both the conditions under Article 36 and the rule of reason are the same, e.g. necessity, proportionality, no arbitrary discrimination and disguised restriction on trade. This interpretation, however, does not maintain a distinction between distinctly and indistinctly applicable measures. In other words, both may be justified under Article 36 and mandatory requirements.

The second theory, that Article 36 and the rule of reason are separate exceptions seems more consistent with the Court case-law that which had applied the rule of reason only to indistinctly applicable measures<sup>299</sup> and always affirmed that Article 36, being an exception to a fundamental Treaty rule, must be narrowly interpreted<sup>300</sup>.

A restriction on trade is not justified if the good is lawfully produced and marketed in another Member State. This is the principle of mutual acceptance or of equivalence whereby a Member State cannot, for instance, claim protection of the consumer to justify the adoption of a measure restricting trade if this alleged aim has already been complied with in the exporting Member State.

The broad interpretation given by the Court to measures of equivalent effect, the question of the mutual acceptance and the possibility of derogation through the application of the rule of reason of Article 36 EEC Treaty should be considered in the light of the aim of creating a single market.

Faced with a prohibition which has been given very wide application, with a very limited possibility of derogation (Article 36 and the rule of reason have both been narrowly construed and are subject to the further condition of necessity and proportionality), Member States are faced in fact with a double

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<sup>299</sup> See 113/80 Commission v. Ireland 17.06.1981 (1981) ECR p.1625.

<sup>300</sup> See case 7/68 Commission v. Italy op.cit., 229/83 Association des Centres de distributions EL "Au ble vert" 10.01.1985 (1985) p. 17.

choice: either to endorse the harmonization of standards applicable to goods or to accept the standard applied by the exporting Member State.

This does not mean that all measures and regulations of Member States have to be harmonized at Community level. The "new approach" adopted in 1985 by the Commission<sup>301</sup> distinguishes between those measures which require harmonization<sup>302</sup> and those which can be regulated by the principle of mutual acceptance. The application of this principle allows the Community to concentrate on those measures where harmonization seems more urgent (health and safety in particular) and to avoid, at the same time, that the absence of harmonization could be interpreted as allowing Member States to apply their national legislation to imported goods, which would have resulted in the creation of obstacles to the free circulation within the Community<sup>303</sup>.

The mutual acceptance principle has other implications. A Member State can export a product in another Member State which complies with the standards of the country of destination but which could not be marketed in the country of origin. The products could then be exported in other Community countries since they have been legally marketed in one of them.

#### 4.b) Measures of Equivalent Effect in the Cooperation Agreement.

Let us now consider the notion of measures of equivalent effect in Article 9 of the Cooperation Agreement.

It is clear, from what has been observed above, that the interpretation given by the Court of Justice in Dassonville cannot

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<sup>301</sup> See O.J. C 136 1985 and MATTERA RICIGLIANO Il mercato.. pp.93 ff.

<sup>302</sup> Such as plant protection, animal health, pharmaceutical products.

<sup>303</sup> See GORMLEY, L.W. Some Reflections on the Internal Market and Free Movement of Goods LIEI 1989 pp. 9-20 spec. p. 12.

be applied to measures of equivalent effect in the relationships between the Community and Maghreb countries.

The aim of provisions prohibiting measures of equivalent effect in the Cooperation Agreements is to eliminate protectionist measures which are applied by the Community on imports from Maghreb countries.

In discussing which national measures can be applied to imports from Maghreb countries we shall first consider the definition given in Article 9. Since equivalence is established in relation to quotas, measures of equivalent effect are those rules which apply to imported goods and whose effect is to reduce<sup>304</sup> the quantity of products which would otherwise be imported or which make the imports more onerous. Rules of these type are those requiring that imported products satisfy specific requirements as regards its composition, presentation or its characteristics. When such rules formally discriminate, that is apply only to imported products and not to domestic goods, the measures should be considered as an infringement of Article 9. This would apply, for instance, if the sale of a product in the market is made conditional to its conformity to certain specification which are not required for domestic products.

It could be asked whether the prohibition of formal discrimination should be limited to the characteristics of the products or should also be extended to the use of the products or the conditions of marketing.

This would be the case, for example, if the national rule requires a compulsory destination, such as the assembly only with domestically produced goods, or if it requires domestic industries to use a percentage of Community produced goods. If the destination is limited to imported products it seems that an infringement of Article 9 could be postulated.

Other cases of measures prohibited by Article 9 are those

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<sup>304</sup> A total ban is considered a quantitative restriction which is also prohibited under the Agreement.

applied at borders, which make the importation of goods more difficult. Therefore any unjustified delay in the clearance of goods at customs (due to limited opening hours for example) should be covered by Article 9. Analogously, one could argue that the formal requirement of an import licence could be admitted under Article 9. However, if the issuing of the licence is subject to delay or formalities which make the importation more difficult this requirement falls under Article 9. Finally, since under the Cooperation Agreement, preferential treatment is granted only to products originating in Morocco<sup>305</sup>, the requirement of a certificate of the origin for these goods is obviously legitimized.

Would it be possible to enlarge this definition of measures of equivalent effect to include also those, which, although not formally, de facto discriminate between imported and domestic goods?

A possible solution would be to extend the notion of measures of equivalent effect to measures which do not formally discriminate between two products<sup>306</sup> but which in practice are applied only to imported goods, unless a measure is justified by one of the grounds contained in Article 35 (corresponding to Article 36 of the EEC Treaty) and interpreted in such a way as to include a "mandatory requirement" (see below).

As discussed above, the broad interpretation given by the Court to measures of equivalent effect in the Community can be justified in the light of the possible harmonization and the creation of the common market. It seems, therefore, that the scope of the Cooperation Agreement cannot justify an interpretation of measures of equivalent effect applying the sole criterion of discriminatory effect.

A possible justification of the application of a broad

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<sup>305</sup> See *infra* the chapter on rules of origin.

<sup>306</sup> Conditions of use or marketing would be excluded.

interpretation of measures of equivalent effect is that, in the EEC, the prohibition on measures of equivalent effect applies in a reciprocal way. Every Member State is obliged, in its trade with another Member State, to eliminate measures which could restrict trade. In the relationship between the Community and Morocco, only the Community is required to do so. If, therefore, a wider concept is applied the effect would be in any case more limited than within the EEC.

It should also be remembered that in all the cases where the Court has ruled on the interpretation of provisions contained in Agreements concluded with third countries it has been confronted with reciprocal provisions (free trade areas) and never with a preferential trade agreement.

However, Member States would probably be more inclined to open their borders and apply a wide concept of measures of equivalent effect if reciprocity was foreseen, and therefore it could also be argued that the notion of measures of equivalent effect should be interpreted restrictively because of the non-reciprocity set up in the Cooperation Agreement.

As has been seen above, the Cooperation Agreement provides for the possibility of derogating from the prohibition of imposing quotas and measures of equivalent effect.

A system of derogations is envisaged in the Common market to balance the interests of the importing state with the requirements of the free movement of goods. Such a system of derogations from the prohibitions of quotas and measures of equivalent effect (Article 30 of the EEC Treaty) is laid down in Article 36 and in the so-called "mandatory requirement" as identified by case-law of the Court of Justice.

In the Cooperation Agreement, a system permitting derogation is contained in Article 35 reading as follows: "The Agreement shall not preclude prohibition or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of

humans, animals or plants; the protection of national treasures of artistic, historic or archeological value; the protection of industrial and commercial property, or rules relating to gold or silver. Such prohibition or restrictions must not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between the Contracting Parties"

It could be asked (i) whether the grounds for derogation of the Cooperation Agreement with Morocco only apply to the prohibition contained in Article 9 or if it has a more extensive application and (ii) whether there exist "mandatory requirements", and in this case, on which basis they can be founded, even in the Cooperation Agreement.

One could submit that Article 35 could be invoked by way of derogation from the prohibition not only to impose quotas and measures of equivalent effect but also customs duties, charges of equivalent effect and even discriminatory taxation<sup>307</sup>.

This hypothesis could be founded on the following observations.

Article 35 is contained in Title II, trade cooperation, letter C: Common provisions, this means that the application is not limited to trade in industrial products, but it lays down a general derogation also applicable to agricultural trade. A broad interpretation of Article 35 is also supported by a literal argument. If a prohibition on trade means the establishment of a total ban, an import restriction has a wider meaning than a partial ban, viz., a quota. A charge of equivalent effect and even discriminatory taxation could be considered restrictions of

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<sup>307</sup> In Community law it is well established that Article 36 can be invoked only to justify a derogation from the prohibition set up in Article 30 and never as a derogation from Articles 9, 12, 13 and 16 (see case 7/68 Commission v. Italy 10.12.1968 (1968) ECR p. 423. not even in the case of pecuniary charges corresponding to measures (like for instance sanitary inspections) which are justified under Article 36. According to the Court, the place of Article 36 and its express reference to Articles 30-34 (prohibiting quantitative restrictions and measures having equivalent effect in trade among Member States) excludes any different interpretation.

trade<sup>308</sup>. The grounds invoked must, however, not be out of proportion and must be necessary, that is if various instruments could be used to attain the objective pursued by this measure the less restrictive for trade should be applied

The wide interpretation given to Article 35 could also be invoked to enlarge the ground of justification. The "public policy" notion could be interpreted as covering protection of the consumer, of the environment and fairness of trade.

It should also be emphasized that the derogation in the Cooperation Agreement does not have provisional application, as in EEC law.

Article 9 of the Cooperation Agreement with Morocco does not specify whether this prohibition applies to the measures in force at the time of the conclusion of the Agreement or if it forbids the introduction of new quotas and measures<sup>309</sup>. It is submitted that the character of absolute prohibition established in the Article, the absence of any further specification, and in particular, the aim of the agreement could lead to an affirmation that all quotas and measures should be abolished as between Morocco and the Community.

This enlarged system of derogation could be applied to "moderate" the effects of a broad interpretation of the notions of measures of equivalent effect as the one suggested above.

5) Maghreb Exports and the Single European Market.

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<sup>308</sup> In Demag the Court considered that charges of equivalent effect have a "restrictive consequence on free movement of goods", while in Commission v. Italy, (art treasures), it seems to consider a restriction a quota., but it was helped in this interpretation by the reference in Article 36 EEC Treaty to Articles 30-34 which only concern quotas and measures of equivalent effect. See also Advocate General Capotorti in case 225/78 Bouhelier where he criticizes the drafting technique consisting in reproducing Article 36 of the Treaty in International Agreement concluded by the EEC without amendment and adaptation of the content "according to the varying scope of the individual agreements". p. 3166.

<sup>309</sup> It shall be remembered that Articles 31-35 set up a timetable for the progressive abolition of quotas.

The relationship between the internal market and exports from Maghreb countries in the Community can be discussed from two different perspectives. The first concerns the regime which is applied within the Community to products of third country origin, whilst the second is more generally related to the effect that the establishment of a Community integrated market can have on third countries' exports.

As regards the first problem, one should consider which is the regime applied within the Community to products originating in third countries once they have been cleared at Community borders, and whether this regime differs according to the origin of products imported in the Community, or, alternatively, whether the privileged treatment applied to Maghreb products when imported in the EEC extends to the regime applied once they circulate within the Community.

Goods imported into the Community are in free circulation when they have been cleared at customs and have paid customs duties. More precisely Article 10 specifies that "Products coming from a third country shall be considered to be in free circulation in a Member State if the import formalities have been complied with and any customs duties or charges having equivalent effect which are payable have been levied in that Member State..." Article 9.2 extends the provisions contained in Articles 12-17 (elimination of customs duties and charges of equivalent effect) and in Articles 30-37 (elimination of quotas and measures of equivalent effect) to products of third countries in free circulation. This has been confirmed by the Court of Justice.

In Donckerwolke,<sup>310</sup> the Court had to decide whether a French import quota applied to products imported from Belgium whereas they had previously been imported from Syria and Lebanon. The importer was also required to declare the actual origin of the goods. The

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<sup>310</sup> Case 41/76 Susanne Criel nee Donckerwolke v. Procureur de la Republique 15.12.1976 (1976) ECR p. 1921.

Court ruled that "the result of this assimilation is that the provision of Article 30 concerning the elimination of quantitative restrictions and measures of equivalent effect are applicable without distinction to products originating in the Community and to those which were put into free circulation in any one of the Member States, irrespective of the actual origin of these products" (para 18).

Another example of this argument is evidenced in the case of Commission v. Ireland<sup>311</sup>. This case concerned a system of import licenses for potatoes imported into Ireland coming from countries outside the Community. A measure imposing restrictions on imports was applied to potatoes from Cyprus regardless of the fact that they had first been imported via the United Kingdom.<sup>312</sup> The Court declared that this measure infringed Article 30. "In accordance with those principles, laid down in Article 9, 10 and 30 of the Treaty, the measures intended to free intra-Community trade are applicable...without distinction to products originating in the Member States and to those coming from non-member countries which have been put in "free circulation" in the Community..".

The cases mentioned above on measures of equivalent effect, however, concerned "classical" measures. The question whether there is a total and definitive assimilation of third countries goods as regards the extensive interpretation given by the Court to the concept of measures of equivalent effect (Cassis de Dijon

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<sup>311</sup> Case 288/83 Commission v. Ireland 17.05.1985 (1985) ECR p. 1761. See also case 119 /78 Peureux 13.03.1979 (1979) ECR p. 975.

<sup>312</sup> The importation of potatoes was taking place under a tariff quota provided for in the Association Agreement concluded between Cyprus and the Community. This circumstance however is not relevant for the resolution of the case: "it is of little importance whether that measure concern products subject to the general rules laid down in the applicable provisions relating to tariffs and trade or products subject to special rules under an agreement, such as the quota accorded to the Republic of Cyprus" p. 1775 para. 26.

principle) remains open<sup>313</sup>. Another question is whether the prohibition of discriminatory taxation is also extended to goods in free circulation.

As for the first questions, in the EMI v. CBS<sup>314</sup> case, the Court seems to make a distinction between goods originating in the Community and third countries' products. The EMI case arose out of a dispute between EMI and CBS when the former, holder of the trade mark "Columbia" in all the Community Member States, claimed infringement of its rights by the subsidiary of CBS, holder of the same trade mark Columbia in the US before Danish, German and British Courts. If the same situation had occurred in the Community without involving non-EC countries, EMI could not have prevented the imports of Columbia records from a Member State where Columbia was held by a different owner,<sup>315</sup> in the present case, Columbia CBS records. Thus, products bearing a trade mark applied in a third country, even if put in free circulation in the Community, were not assimilated to records bearing a trade mark applied in the Member States. According to the Court, "neither the rules of the Treaty on the free movement of goods nor those on the putting into free circulation of products coming from third countries nor finally the principles governing the common commercial policy prohibit the proprietor of a mark in all Member States of the Community from

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<sup>313</sup> See BOURGEOIS, J. Panel: Europe 1992 MJIL 1990 pp. 531-549. See DAVENPORT, M.W.S. The External Policy of the Community and its effects upon the Manufactured Exports of the Developing Countries JCMSt. 1990, pp. 181-200. p. 194 where he argues that once the requirements of one Member States have been satisfied products from third countries can freely circulate throughout the Community. Doubts are expressed by STEVENS, C. The Impact of Europe 1992 on the Maghreb and Sub-Saharan Africa JCMSt. 1990, pp. 217-241 p. 224.

<sup>314</sup> Cases 51, 86, 96/75 EMI Records Limited v. CBS United Kingdom Limited 15.06.1976 (1976) ECR p. 811. See HAY, P., OLDEKOP, D. EMI/CBS and the Rest of the World: Trademark Rights and the European Communities Am.Jour. Comp. Law 1977, 120-151.

<sup>315</sup> It should be noted that EMI owned Columbia in all the Community Member States.

exercising his right in order to prevent the importation of similar products bearing the same mark and coming from a third country".

One of the arguments for the application of the Cassis de Dijon principle to goods in free circulation is that any Member State is obliged to accept the product imported from another Member State if it has been "lawfully produced and marketed" there<sup>316</sup>.

This means therefore that if, for example, a product is imported in Spain from Morocco and then re-exported to France, the latter is obliged to accept it even if it does not meet its national standard,<sup>317</sup> provided that the product has been marketed in Spain, because this means that the imported product satisfies Spanish standards. The same could also be applied to a product which is incorporated in a Community good, as for example in the case of a part of a motor installed in a German-produced machine. The finished product could be exported to Italy even if the part of Moroccan origin does not satisfy Italian requirements? In the event that the product acquires German origin, it would not seem to differ from the case of a German product exported to Italy and the ruling of Cassis could thus apply since there is no distinction in the final product between the German and the Moroccan component. In the event that the product has not acquired German origin however, could Italy require compliance with its standards? In other words, is the mere inclusion of a foreign part into a product of Community origin sufficient to say that the products has been "produced" in Germany? Again it could be submitted that if the imported part satisfies German standards the Cassis principle applies, whereas if the product does not satisfy German standards and has merely been assembled in Germany without being put on the market and then immediately exported to Italy, Italy could require

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<sup>316</sup> MATTERA, A. *L'achèvement du marché intérieur et ses implications sur les relations extérieures* DEMARET, P. (ed.) cit. p.201-224 sp. p.214.

<sup>317</sup> See GORMLEY, L.W. *Some reflections...* op.cit. spec. pp. 17-18; WHITE, E.L. *In Search of the Limits...* op.cit. spec. p. 239.

the imported product to satisfy its requirements.

On the other hand, it has been argued that the Cassis de Dijon doctrine "is a product of the EC's constitution, is based on the underlying solidarity between Member States, and it is justified by the automatic reciprocity which is inherent to the EC's constitution",<sup>318</sup> and therefore should not apply to products in free circulation originating in third countries. It is clear that the danger of the application of the Cassis de Dijon principle is that third countries' goods could be imported into the Community via the Member State applying the easiest regulation or the lower standard. The application of the Cassis de Dijon ruling to the free circulation of third country goods could lead to a "reverse discrimination"<sup>319</sup> against domestic products, which are required to comply with the national standards, whereas such conformity would not be required for products originating in third countries put on the market in another Member State. However, this "discrimination" is a consequence of the mutual recognition principle which is not limited to goods of third country origin and applies to products of Community origin as well.

However, the marketing of a Moroccan product in a Member State means that this state accepts the product according to its standards and "assimilates" it to products produced and marketed in its territory. On the other hand, in the above example, France could prevent the importation of the Moroccan good even if it has been cleared through customs in Spain without being marketed there. In this case there has not been any verification of the conformity of the products to the standards applied in Spain.

Therefore the importation in to France of a product which is legally produced and marketed in Morocco but which does not meet the requirements applied by France (and provided that these are

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<sup>318</sup> BOURGEOIS Panel 1992.. op.cit. p. 549.

<sup>319</sup> See MICHAELIS, J. Mutual Recognition of National Regulations in the EC Interec 1990 pp.215-219.

applied without discrimination to both domestic and imported products) can be stopped. If, however, the same product is imported into Spain and put on the market there, France cannot prevent the subsequent importation into its territory because the Moroccan product can be considered assimilated to a good having Community origin.

A different interpretation would result in an hindrance to trade among the Member States and would seem inconsistent with the approach followed by the Court as regards the interpretation of free movement of goods.

In the light of the above remarks, the importance of a system of harmonization of requirements and standards in the Community seems even more evident when reference is made to goods in free circulation as regards the elimination of deviation of trade. It could also be argued that a system of harmonization at Community level would, presumably, be more welcome by third states than a system based on the mutual recognition principle, since it is not evident that a Member State would allow a product originating from a third country and in free circulation in another Member State access to its territory if it did not comply with its standards.

As for the prohibition on discriminatory taxation, the Court has acknowledged that third countries' goods are assimilated to Community goods for the purpose of applying Article 95. This decision made in the so-called banana case<sup>320</sup>. This case concerned a consumption tax imposed by Italy on imports of bananas originating in Columbia but imported into Italy from Belgium. The fourth question submitted by the national Court was whether Article 95 applied also to products in free circulation. The Court, while recognizing that Article 95 only mentions products of "other Member States", referred to the aim of Article 95 and to the system of the Treaty and concluded that "...any interpretation of Article 95 which

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<sup>320</sup> Case 193/85 Cooperativa Co-Frutta Srl. v. Amministrazione delle Finanze dello Stato 07.05.1987 (1987) ECR p. 2085.

precluded it from applying to products in free circulation would lead to a result which would be contrary both to the spirit of the Treaty expressed in Article 9 and 10 and to the system of the Treaty. Consequently, Member States cannot remain free to charge discriminatory taxation to products which originate in non-member countries but are in free circulation in the Community" (para 28).

As for the question of whether a distinction should be made between products originating in third countries to which the Community grants a preferential regime on imports. This would mean that the broad interpretation whereby measures of equivalent effect could apply only to such products cannot be held. Once a product originating in a third country is admitted to the Community no distinction should be made on account of its origin. The application of the prohibitions contained in Articles 12-17 and 30-37, in Article 95 and the interpretation given to these provisions should be extended without discrimination to all third countries goods because the rationale behind the free circulation responds to a logic of internal market integration and has nothing to do with the treatment of third countries goods. If a preferential regime is applied to goods originating from a certain country this shall be limited to treatment at borders. Free circulation in the Community cannot be used to establish further privileges but to avoid distortion of competition within the internal market.

It seems, in other words, that the questions of free circulation within the Community and the regime applied at Community borders as regards third countries exports follow a different logic and the rules governing them shall be based on a different rationale.

It is therefore not clear why the Court in the banana case<sup>321</sup> made reference to the exclusive Community competence in the field of commercial policy, to rule that Member States are not allowed to

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<sup>321</sup> Co-Frutta op.cit. para. 28.

apply discriminatory taxation on products of third country origin but in free circulation in the Community<sup>322</sup>.

Finally, it should be asked whether the free circulation of goods from third countries would make the prohibition of measures of equivalent effect or of a higher taxation on products from preferential third countries meaningless. Let us imagine that a product originating in State A (non-preferential) enters the Community via a member State which applies a low tax on import of this good and is then imported in another Member State which on the contrary apply a high tax on the same product if imported from outside the Community but which has to impose the lower tax levied on domestic goods on the product of "A" origin because it is in free circulation. If compared with a good originating in "M" with preferential treatment, which enters directly in the second Member State which is required on the basis of an agreement not to discriminate against M with regard to domestic products, the final result (the domestic tax applied to A and M) would be the same for both M and A. The same could be applied to measures of equivalent effect. It should, however, be considered that "M" would probably enjoy a preferential position if compared to "A". First, the latter should look for a Member State where there is effectively a lower tax and then move to the lower tax Member State bearing the transport costs which may be relevant if the two Member States are far away from each other.

The second problem of this section concerns the effect of the Community integration on Maghreb countries.

Whether the creation of the internal market will have a positive or a negative impact on third countries' economies is still open to question. Economic analysis is in fact divided over the prediction of expected growth in productivity on imports from third countries, on the issue between a "trade creation" effect and on the increased competitiveness. This takes place between, on the one

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<sup>322</sup> See DANIELE, L Il divieto di discriminazione... op.cit. p.204.

hand, EEC Member States and, on the other, third countries exporting to the Community, including developing countries<sup>323</sup>.

The question of harmonization of standards and regulations for imports from third countries<sup>324</sup> and the mutual acceptance have been discussed above.

Another important effect for third country exports to the Community is the elimination of quotas assigned to Member States under the Multifiber Arrangement, The Generalized System of Preferences and those deriving from the application of Article 115 of the EEC Treaty. This provision allows a Member State, which applies a quota to products of a third country to impose restrictions on trade against other Member States in order to avoid its quota being circumvented by indirect exports through another Member States. The elimination of national quotas will result in a more or less protective Community according to whether national quotas will be replaced by Community quotas which will be the cumulation of national ones or if Community quotas will be directed only towards certain countries<sup>325</sup>.

The impact of the internal market will also depend on the type of exports of third countries. Since developing countries like the ACP and Mediterranean States are mostly exporters of raw materials, they should not be as affected as those countries exporting principally industrial products. However, the imports of raw materials could decrease or increase according to the standards applying to some of the goods produced in the EEC. For example, the possibility of marketing chocolate with a lower cocoa content could

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<sup>323</sup> See the analysis of DAVENPORT, M.W.S. *The External Policy .. op.cit.* p.194 and STEVENS, C. *The Impact of Europe...op.cit.* pp.217-241.

<sup>324</sup> It has been argued that Member States will be compelled to harmonize trade regulations as regards imports from third countries see BRÜNE, S. *The EC Internal Market, Lomé IV and the ACP Countries Interec.* 1990, pp.193-201.

<sup>325</sup> See DAVENPORT and STEVENS *op.cit.*

influence the demand of cocoa which is a key exports from some ACP countries.

## C) AGRICULTURAL TRADE.

The central question of this chapter is what preferential treatment on agricultural trade means and, in particular, within which limits this is applied to Maghreb countries.

The Cooperation Agreement provisions on agriculture are a rather technical and complex set of norms applied to Maghreb exports on products such as fresh and processed fruits and vegetables, live plants, olive oil, wine, fish and cereals.

These provisions cannot be clearly understood without a basic knowledge of the mechanisms governing the common agricultural policy of the EEC by which they have highly been influenced. Although this policy, - which consists of a set of binding rules, instruments and mechanisms governing trade of agricultural products within the Community and of mechanisms applying at the Community's external borders - has been mostly conceived as a way of stabilizing and supporting the internal market in agricultural produce it has important repercussions in the world food market<sup>326</sup>.

## 1) The Common Agricultural Policy in the EEC Treaty.

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<sup>326</sup> The basic norms of the CAP are to be found in the Rome Treaty (Arts. 38 to 47) but the rules governing agriculture have been set up by subsequent secondary legislation which has completed and made the framework drawn up in the Treaty more precise. Agricultural products covered by the common agricultural policy are broadly defined in Article 38 of the Treaty: products of the soil, stock farming, fisheries and products of first stage processing directly related to these products. For the interpretation of this notion see case 185/73 Hauptzollamt Bielefeld v. Firma König 25.05.1974 (1974) ECR p. 607, p.618. A more detailed list is to be found in Annex II to the Treaty. With Regulation 7a, the Council has exercised the power conferred by the Treaty of adding products to this list. See O.J. L 1961 p. 71, English Version Spec. Edition Vol. I p.68 For the interpretation of Annex II recourse should be made to the established interpretation and method of interpretation relating to the Common Custom Tariff. Case 77/83 CILIFT v. Ministero della Sanità 29.02.1984 (1984) ECR p. 1257, p. 1265 para 7.

The existence of special provisions governing trade<sup>327</sup> in agriculture, as distinct from those concerning the free circulation of goods in the Community, finds its basis in the idea that the mere extension to agriculture<sup>328</sup> of the norms of the free circulation of goods, would probably have resulted in a cut in prices and would have depressed farmers' income<sup>329</sup>.

The objectives of the common agricultural policy as listed in Article 39 are the increase of agricultural productivity, a fair standard of living for the agricultural community, the stabilization of markets and the stability of supplies for

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<sup>327</sup> Treaty provisions governing the establishment of the common market apply to agriculture "save as otherwise provided in Articles 39 to 46" (Art. 38.2). This means that the common market rules only apply to agricultural trade in the absence of a diverging provision in the chapter on agriculture. This derogatory system is to be interpreted restrictively. See case 2/3-1962 Commission v. Luxembourg and Belgium, 14.02.1962 (1962) ECR p. 796; case 68/86 (hormones) op.cit. and 131/86 (hen kept in battery)op.cit..

<sup>328</sup> As regards the political and economic reasons explaining the inclusion of agriculture in the Treaty see Spaak Report cited by FENNEL, R. The Common Agricultural Policy of the European Community Second Edition BSP Professional Books, Oxford 1987 p. 5 see Commission of the EEC Recueil des travaux de la Conference consultative sur les aspects sociaux de la politique agricole Bruxelles 1961. Several reasons required the setting up of specific rules governing this field. These were the particular characteristics of agricultural produce, the high level of intervention of the original member States in the agricultural field with the existence of national agricultural market organisations adopting divergent policy principles, the different level of prices in the various original member States and the interest of France in a common market for agriculture. For the "trade-off" (opening of French markets to German competition) with Germany see SWANN, D. The Economics of the Common Market, Penguin, London 1988 p. 205, and HINE The Political Economy of European Trade New York, Martin's Press 1985 p. 101.

<sup>329</sup> See MARSH J.S. "The Common Agricultural Policy and the Mediterranean Countries in SHLAIM, A., YANNOPOULOS, G.N.(eds.) The EEC and Mediterranean Countries, Cambridge, Cambridge University Press 1976 pp.75-97.

consumers<sup>330</sup>.

It should be noted that all these objectives, including the clearance of Community production shall be secured against the consequences of low priced imports into the Community and against the trends of internal production and demand. The Community thus applies an "import substitution strategy" whereby import levies make the import of lower priced products from third countries impossible while Community farmers are in substance encouraged to produce<sup>331</sup>

The most important mechanisms used to attain the objectives set up in Article 39 are common market organisations.

#### 1.a) Common Market Organisations and Price Mechanisms.

Common market organizations are a set of binding rules (issued by the Council by regulations) applying to certain categories of agricultural products fixing prices, providing for intervention measures to be applied and regulating imports and exports between the Community and third countries<sup>332</sup>.

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<sup>330</sup> On the difficulty of reconciling these partially contradictory aims see case 5/67 Beus v. Hauptzollamt Munchen 13.03.1968 (1968) ECR p. 83, p. 98. Case 5/73 Balkan Imp. v. Hauptzollamt Berlin 24.10.1973 (1973) ECR p. 1091 where the Court held that "The Community Institutions must harmonize the various objectives of the CAP which, taken separately, appear to conflict with one another and, where necessary, allow temporary priority to one of them in accordance with the demands of those economic factors or conditions in view of which their decisions are made". In this case Community preference was given priority over the other CAP objectives.

<sup>331</sup> See HARTMANN, M. Old Wine in New Bottles: Agricultural Products in the EEC Interrec. 1991 pp.58-63.

<sup>332</sup> Regulations establishing CMO, after having listed the products covered, are mainly divided into three titles: one concerning internal price fixing to intervention measures such as buying-in and storage aid and to quality standards; a second concerns trade with third countries; a third sets out "general provisions" such as rules on state aid, the obligation of information between member States and the Community and the

Mechanisms, instruments and criteria applied within common market organisations - established for each main category of products<sup>333</sup> - are far from homogenous, and the differences are often remarkable. The terminology itself may be misleading, where the same term used in two different common market organizations may refer to completely different concepts. There are, however, some common principles at the basis of all common market organisations<sup>334</sup>: community preferences and unity of the market<sup>335</sup>. The first means that the agricultural products of the Community have priority on the market over products imported from third countries; the second that prices of products have to be harmonized within the Community (unity of prices). These factors, combined with the principle that agricultural producers' income should derive from the selling of their products on the market, may explain why price mechanisms are at the heart of the agricultural régime in the Community and why direct financial support or reimbursement, in this respect, play only a very marginal role.

Since a study of the mechanisms applied at borders cannot be carried out without a basic knowledge of the internal price system, an outline of the main mechanisms applied within the most relevant common market organisations will be provided in the following.

Within each market organization several prices are

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establishment of a management committee. See written question 71 in J.O.C.E. 1960 p.1531. For a definition of CMO case 90/91-1963 Commission v. Luxembourg 13.11.1964 (1964) ECR p.1203, p. 1216.

<sup>333</sup> Cereals; milk and milk products; beef; eggs; pigment; poultrymeat; sugar; wine; tobacco; fruits and vegetables; oils and fats, products processed from fruits and vegetables, live plants etc.

<sup>334</sup> For an indication of the sources of these principles see SNYDER, F. Law of the Common Agricultural Policy Sweet and Maxwell, London 1985 p. 15.

<sup>335</sup> A third principle usually referred to is financial solidarity, meaning that the financing of the common agricultural policy has to be assured by all member States regardless of the benefits they receive.

established. Their role in the stabilization of the market explains why the common agricultural policy is defined as a price policy.

Broadly speaking a reference price - called target price for cereals or milk products, basic price for fruit and vegetables, or norm price for wine - is established by the Council for each marketing year. This price is the "ideal price", i.e., the price which agricultural producers should obtain from the sales of the product on the market. Often this price is used as a basis for calculating the other prices provided for in the same common market organizations. The second important idea is that of the minimum price guaranteed. This is called intervention price in many market organisations (but here, as well, the terminology changes - withdrawal, buying-in price..) and it acts as a sort of "alarm system": when market prices go below the intervention price a range of intervention measures are foreseen to raise market prices, such as, for instance, the buying of certain quantities of the products concerned. Since the reference price (target) is always higher than intervention price, the two are often called as the upper and lower ends of a bracket (or band) within which the prices of the products may fluctuate. The major internal market support mechanisms are buying-in or withdrawal of products taking place when prices go below the level established by the Community. Their application, however, differ from one common market organization to the other.

Firstly, not all market organizations provide for such measures. Secondly, buying-in is not always mandatory. There is, for instance, an obligation to purchase butter, cereals, olive oil, and sugar, whilst such intervention is not always possible with respect to pigmeat. In the case of fruit and vegetables, buying-in is not obligatory. In this latter case, instead of intervention agencies, authorized producers organisations perform such an operation.

A minimum import price is also established (threshold price for cereals and milk, sluice-gate price for eggs, poultrymeat or pigmeat). This is the term used for the calculation of import

levies and will be discussed in relation to mechanisms applied at external borders.

Besides internal price mechanisms, common market organizations set up two specific instruments applied at the Community external borders, these are variable levys and countervailing charges<sup>336</sup>.

Even if they are not directly related to the provisions of the Cooperation Agreements and in general to exports of Maghreb countries, it should be remembered that mechanisms are also applied to exports of agricultural trade from the Community whereby Community's producers receive a subsidy equal to the difference between prices within the Community and world market prices. This system have repercussions on the trend of world market prices.

#### 1.b) Import Levies.

As a peculiar instrument of the common agricultural policy, import levies are provided for in Article 40(3) of the Treaty as one of the measures which can be included in common market organisations. This means that import levies apply only to the extent that they are expressly provided for in common market organisations, which, in other words, means that not all agricultural products are covered by this mechanism.

It is thus clear that the creation of a supplementary instrument to be applied at Community external frontiers means that the general protection supplied by customs duties had not been considered adequate for agriculture.

To understand why a new mechanism was necessary one has to make reference to the common agricultural policy objectives (Article 39) and, in particular, to the rigid internal price system adopted by the Community with its main feature of guaranteeing the

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<sup>336</sup> Customs duties as instruments of protection and obstacles to trade are not, as seen above, peculiar to agricultural trade but apply to both industrial goods and agricultural products. Therefore, they will not be discussed here. For reference see the introduction to this chapter.

producers the sale of their products at a certain price established by the Community itself. It is not by chance that import levies are usually provided for in the common market organisations establishing internal price support schemes.

To prevent prices within the Community being undercut by supplies of products offered by third countries at lower prices, the Community had recourse to the mechanism of import levies which cover the difference between Community and world prices. The same result could not have been achieved by customs duties, since these are a fixed element and cannot therefore respond to the requirement of following the price trends. The variation of the import levy can be considered per se a protective means since this prevents the adoption of an export strategy and of planning by exporters. Quite significantly one of the proposals advanced by the (US) negotiators in the Uruguay Round has been the "tariffication" of import levies, that is their transformation in a fixed tariff as a prelude for its dismantling<sup>337</sup>

The European Court of Justice, in one of its earlier judgments<sup>338</sup> on common agricultural policy, defined import levies as "a charge regulating external trade connected with a common price policy". In the statement of reasons of those regulations providing for import levies this link is also clearly defined "whereas a trading system including levies and export refunds, combined with intervention measures, also serves to stabilize the Community market, in particular by preventing price fluctuations on the world market from affecting prices ruling within the

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<sup>337</sup> VON CRAMON-TAUBADE, S., KÜHL, R. *Turning Point for European Agricultural Policy? The Agricultural Negotiations and the Uruguay Round* Interrec. 1990 pp. 280-288.

<sup>338</sup> Case 17-67 Neumann v. Hauptzollamt H.S. 13.12.1967 (1967) ECR p.441.

Community.."<sup>339</sup>.

As seen above, the system of import levies does not apply to all agricultural products. In fact the products covered are cereals, milk and milk products, olive oil, and, to a different extent, pigment, poultrymeat, eggs and beef. Olive oil and milk are modelled on the archetypal cereal system - the first market organization to be established - and are thus almost identical<sup>340</sup>: for these products, import levies are the difference between cif<sup>341</sup> price and the minimum import price called threshold price (see infra).

These above mentioned common market regulations provide for a system of internal support measures such as support prices (target, intervention and threshold), buying-in by intervention agencies, storage payment or aids, premiums (in the case of milk for the slaughter of cows) consumption and production aids. In these cases import levies are supplementary support measures.

Let us now see how the import levy is calculated. For the first term of reference, account is taken (for olive oil, cereals and milk) of the most favorable purchasing opportunities on international trade<sup>342</sup> as the first term of reference. The collection of this data may be complicated by the fact that various quotations may be available for the same product. The Community, however, enjoys a certain discretion in the choice of the price to which it makes reference. Since the quality of a product sold

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<sup>339</sup> See for instance, Regulation 2727/75 establishing a common market for cereals Q.J. L 281 1975 and Regulation 804/68 setting up a common market for dairy products Q.J. L 148 1968.

<sup>340</sup> The olive oil system of import levies was modified in 1976.

<sup>341</sup> The price of goods which covers cost, insurance and freight.

<sup>342</sup> In some cases - olive oil for instance - when the offer price is lower than the world price, the cif price is substituted by a price determined on the basis of the offer price (Art. 14 of the market organisations for oils and fats).

on the world market and in the Community do not correspond perfectly and world transactions are usually made in dollar - while the levy is calculated in ECU - coefficients are applied for the "transformation" of qualities and prices into EEC values<sup>343</sup>.

The second term of reference, the EEC price, is a minimum import price. As seen above, it has a different denomination, and in the case of cereals, dairy products and olive oil is called threshold price and is calculated on the basis of the target price for the same common market organisations. The relationships between internal and external price support is particularly evident in these cases. Threshold prices are in fact the result of subtracting from target prices the cost of transport from Community ports and particular Community areas of high price production costs<sup>344</sup>.

Some market organizations applying import levies prohibit custom duties and measures having equivalent effect, quantitative restrictions and equivalent measures<sup>345</sup>.

2) Basic Features of Common Market Organisations Relevant for the Cooperation Agreements.

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<sup>343</sup> See HARRIS, S., SWINBANK, A., WILKINSON, G. The Food and Farm Policy of the European Community Chichester, Wiley & Sons 1980 p. 74 for a comprehensive explanation of these calculations.

<sup>344</sup> It could be remarked that market organisations like those created for eggs and poultrymeat do not provide for a system of internal price support but only for import levy. This seems to contravene the idea that import levies are linked with a system of internal pricing. The marginal importance of these productions for the Community market and the industrial type of production they require may explain the absence of internal support mechanisms, moreover, these two products are considered as "processed cereals". Since it is the price of feed grains which influences the price of the product, the introduction of a levy on feed grains should maintain the level of price within the Community.

<sup>345</sup> See Article 18 of Regulation establishing a common market for cereals; Article 19 for dairy products and Article 21 of the regulation 1785/81 establishing a common market for sugar. See O.J. L 177 1.07.1981 p. 4.

Fresh fruits and vegetables<sup>346</sup>.

This common market organization provides for an internal support mechanism which applies only to certain products "which are of special importance to the income of producers" (preamble of regulation) listed in Annex II of the regulation<sup>347</sup>. For each of these products a basic price and a buying-in price are fixed for each marketing year, or for each period in which the marketing year may be subdivided. Similar to intervention mechanisms in other market organisations, these two prices are relevant to the operation of intervention measures. Buying-in takes place when the market price remains below the buying-in price, a percentage of the basic price which, in its turn, is calculated on the basis of the average of the prices recorded the three preceding years on the most representative Community markets.<sup>348</sup>

Regulation 1035/72 provides for the establishment of "quality standards". The products to which they apply cannot be sold, delivered or marketed unless they are in conformity with these standards. Quality standards also apply to imported products (Art. 9). In this respect it can be observed that the application of the quality standards to imports coming from third countries should not be considered a barrier to trade because they apply to Community products as well. The same could be concluded in the case of the

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<sup>346</sup> Reg. 1035/72 Q.J. L 118 20.05.1972 p. 1.

<sup>347</sup> Cauliflowers, aubergines, tomatoes, sweet oranges, mandarins, lemons, peaches, table grapes, apples, pears, apricots, This is a limited number of products if compared with those covered by the market organization which includes all temperate zone agricultural products with the exception of olive oil, wine grapes and potatoes.

<sup>348</sup> In the market support mechanisms a central role is played by established producer organisations which may fix a withdrawal price below which products supplied by their members will not be sold. The granting of an indemnity is assured for Annex II products which remain unsold. Producers' organisations receive financial compensation for the indemnities paid to their members.

adoption of sanitary or phytosanitary measures which would apply, without distinction, to domestic (Community) and to imported products. These measures would be considered trade barriers only in cases of discriminatory application.

As a general rule, only customs duties are applied to imports of the products covered by this organization (see Article 1 of Regulation 1035/72) while charges having equivalent effect to custom duties and quantitative restrictions or measure having equivalent effects are prohibited.

The only exceptions to this principle are national quotas applied before 1970 which continue to be in force and to apply for the periods and the products listed in Annex III of Regulation 1035/72 (art. 22). As regards Mediterranean countries, national quantitative restrictions should be abolished following the enlargement of the Community to Spain and Portugal at the same rates applied to the new members<sup>349</sup>. It should be noticed that these quotas apply during the periods when Community production is at its highest (for instance for melon from the first of July to the 15th of October). In the periods during which the duty reductions are granted to Mediterranean exports to the EEC (out of season periods) no quotas apply<sup>350</sup>.

The regulation provides for a supplementary means of protection which seems to confirm that custom duties are not sufficient to avoid disturbances which may be caused by produce offered by third countries "at abnormal price", which in practice means at a price lower than that established within the Community. This supplementary mechanism works as follows: a reference price is established. The method of calculating the reference price - modified in 1983 - is rather complex. For the sake of simplification it could be said that such calculation takes

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<sup>349</sup> COM(85) 405 final 17 July 1985 Communication of the Commission to the Council p.9 footnote 4.

<sup>350</sup> See Joint Declaration by the Contracting Parties on Art. 15 Annexed to the Cooperation Agreement.

into account producer prices (the average producer price in each member States), transport costs from production to consumer regions and production cost trends of the Community.

For each product subject to a reference price<sup>351</sup>, an entry price is calculated daily for each country exporting in the Community: this is the price of third country produce (the lowest price, or the arithmetic mean of lowest prices recorded at the import /wholesale stage) for at least 30% of the quantity) offered in the Community less customs duties and of any import charges.

When the entry price for an imported product remains below the reference price for two consecutive market days a countervailing charge is applied, equal to the difference between the reference price and the arithmetic mean of the last two entry prices calculated for this country. This charge does not replace the customs duty applying to the product concerned but is added to it. The charge is withdrawn when the entry prices of two consecutive market days are at a level at least equal to the reference price.

The reference price is thus in practice a minimum entry price and these countervailing charges are a supplementary means of protection which vary according to the entry price variation. However, there are some differences between such charges and the import levies applied in other common market organisations. First of all, import levies are established on imports without distinction among exporting countries<sup>352</sup> or of the level of the single offer price - import levies have to be paid even if the offer price of an exporter is higher than those registered to calculate the levies -. Countervailing charges may be applied only

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<sup>351</sup> Not all products are submitted to a reference price. The period of application may vary. Prices are protected by internal intervention mechanisms and import measures.

<sup>352</sup>. See case 58/86 Cooperation Agricole d'Approvisionnement des Aviron v. Receveur des Douanes de St. Denis, 26.03.1987 ECR (1987) p. 1525, paras. 5-10.

to a single country and only when the entry price is below the reference price. If the offer price is equal or higher than the reference price only custom duties are levied.

What is very important to understand is that this calculation and the ensuing consequences are also applied to preferential countries. To understand more clearly in what consists the preferential treatment as regards products object of the reference-entry price regime it seems useful to depict the mechanism in a different way<sup>353</sup>. If full customs duties applied by the Community for the product concerned are added to the reference price, the result is a Community minimum wholesale price for each imported product.

The products exported to the Community by third countries (including those enjoying a customs duties reductions) cannot go below this wholesale price. The advantage of having to pay reduced customs duties does not mean therefore that preferential countries are more competitive (in terms of lower prices) on the Community market in relation with other third countries exporters. The combination of having to respect the minimum wholesale price and the advantage of reduced customs duties implies therefore that they can charge higher prices than other third countries competitors and thus they can obtain higher import earning. In the case of a minimum wholesale price of, let us say, 10, and a full rate of customs duties of 3, non-preferential countries will be able to supply the EEC market at the price of 7 without triggering countervailing charges, whereas preferential countries paying a reduced rate of 2 will be able to sell the same product for 8 without going above the minimum wholesale price and remaining competitive in relation with third countries selling at 7.

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<sup>353</sup> *The Community Regulations only refer to entry and reference prices. See Agra Europe Special Report EEC Fruit & Vegetables Policy in an International Context n. 32 1986 p.22.*

Products processed from fruits and vegetables<sup>354</sup>.

It has been argued that this organization provides more for an integration of the common market organisations for cereals, sugar, fresh fruits and vegetables than for a set of autonomous rules. It is certainly true that the price system established for fresh fruits, vegetables and sugar, cannot but influence the regime applied to these processed products.

Thus, since prices of fresh products are higher in the Community than those applied in third countries, a production aid system has been established for certain sensitive products (Annex I, part A) to make up this difference and to render Community products competitive<sup>355</sup>. The granting of such aid to Community processors is conditioned by respect for the minimum price which they have to pay for raw materials<sup>356</sup>. This minimum price is calculated on the basis of the minimum price applied during the previous marketing year, the movement of basic prices for fresh fruits and vegetables and the need to ensure normal market outlets of fresh products for the various uses.

Market protection is mostly ensured by the system applied at external borders.

As a general rule ad valorem custom duties apply.

A minimum import price is also established every marketing year for certain products listed in Annex I B, for which the Community is a major importer. The price is established taking account of free-at-frontier prices, world market prices, the situation within

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<sup>354</sup> Regulation 426/86 24.02.1986 Q.J. L 49 1986.

<sup>355</sup> This regime was introduced in 1978 as part of the so-called Mediterranean package. See Regulation 1152/78 Q.J. L 144 1978 p.1. See HARRIS op.cit. pp. 147-151.

<sup>356</sup> A guarantee threshold to limit production aid was introduced for certain products in 1984. The production aid is reduced if the threshold is exceeded. See Regulation 1989/84 Q.J. L 103 16.04.1984.

the Community and the trend of trade in non-member countries. Minimum import prices should encourage market stability and facilitate the operation of the aid system. If this minimum import price is not observed a countervailing charge is applied. This charge is calculated on the basis of the prices of the main non-member supplier countries and is levied in addition to custom duties. This charge however is not levied on imports coming from third countries which guarantee that the import price of the products originating and exported from their territory is lower than the minimum import price.

A supplementary levy is charged in the case of products containing sugar. This levy corresponds to 2% of ad valorem customs duties for products listed in Annex II; it is equal to the difference between threshold and cif prices for 1 kilo of white sugar for those products listed in Annex III.

The issuing of a licence is required for imports of a number of processed fruits and vegetables listed in Annex IV of regulation 426/86. The issuing of the licence is conditional to the lodging of a deposit guaranteeing that the import will take place during the period indicated in the licence. If the import is not accomplished the deposit is not refunded.

Import licenses are surveillance measures applied to sensitive products. They are a way for the Community to monitor the quantities of products entering the common market<sup>357</sup> and may constitute potential trade barriers since their refusal will lead to the stopping of imports<sup>358</sup>. However, they can be considered a real obstacle to trade if their extreme complexity is taken into account.

Olive oil.

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<sup>357</sup> See HARRIS *op.cit.* p. 162.

<sup>358</sup> HARRIS reports that this happened once in 1978 for canned mushrooms. *Ibidem* p. 162.

The rules applied to olive oil are contained in the CMO for oils and fats<sup>359</sup>.

This CMO provides a target price for olive oil representing the price at which producers should sell their olive oil and an intervention price. Two other prices are established in this CMO : a selling price, above the intervention price, and a representative market price, fixed at such a level as to allow olive oil to compete with cheaper oils. Two subsidies are applied, the first, called production aid, makes up the difference between the selling price and the target price: the second, called consumer aid, should bridge the gap between the representative market price and the selling price.

A threshold price is established for imports equal to the representative market price. Import levies are applied when the c.i.f. price - calculated on the basis of the most favorable purchasing opportunities on the world market - is lower than the threshold price. Since the determination of this representative world market price has proved rather difficult<sup>360</sup> a new system applies. Importers have to submit to a tender the import of the levy they are prepared to pay. This levy is confronted with a minimum import levy established by the Commission. Imports of olive oil (at the quantity and at the level submitted at the tender) will be allowed if the import levy is higher or equal to the Community fixed level.

It should be taken into account that the Community has reached complete self-sufficiency (esteemed at around 109%<sup>361</sup>) after the entry of Spain and Portugal.

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<sup>359</sup> Regulation 136/66 22.09.1966 O.J. L 3025/66 p. 221.

<sup>360</sup> See HARRIS op.cit. p. 168 and FENNELL op.cit. p. 174.

<sup>361</sup> See Commission of the EEC Les nouveaux accords méditerranéens de la Cee a partir de 1988 Bruxelles Agence Europe, Promethee 1989 p. 30.

Wine<sup>362</sup>.

Guide and activating prices are fixed for each representative type of Community table wine. Intervention measures are applied when market prices are below the activating prices which are fixed as a percentage of the guide prices. Storage and distillation aids are the main internal market support regimes.

As a general rule customs duties are applied at external borders.

A reference price is fixed on the basis of the guide price for red and white wine and for other products such as grape juice and liqueur wine. The reference price is calculated on the basis of the guide price with the addition of the cost of bringing Community wine to the same marketing stage as imported wine. For the same products for which a reference price is fixed, a free-at-frontier price is also established. Although the mechanism governing countervailing charges for wine is similar to that for fruits and vegetables, it is important to note that reference prices are calculated by a different method. It is to be remembered that the entry price and the free-at-frontier price, in the case of fruits and vegetables, are calculated for each importing country, whereas for wine they are calculated for the product. Customs duties applying to wine are added to the free-at-frontier price: when this price is lower than the reference price, countervailing charges are levied.

Thus, in the case of wine countervailing charges seem more similar to levies, depending on the price of products and thus apply to all imports.

Fishery products<sup>363</sup>.

This organization provides for an internal support system comparable to that established for fresh fruits and vegetables. Guide prices are established for certain products (similar in

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<sup>362</sup> Regulation 822/87 Q.J. L 84 27.03.1987.

<sup>363</sup> Regulation 3796/81 Q.J. L 379 31.12.1981.

concept to the basic price for fruit and vegetables). Withdrawal is carried out by producer organizations at a withdrawal price fixed on the basis of guide price . Common quality standards are included in the system. On the import side, custom duties are applied. A reference price is also established for certain species (Annex I-IV). In this market organization, however, no countervailing duties are provided for.

Live plants, bulbs, cut flowers<sup>364</sup>.

The application of common quality standards - referring to quality grading, wrapping, presentation and marketing - is the only internal measure. Products cannot be sold if they are not in accordance with the standards. Provision is made to ensure that these standards are applied. While a minimum price is established for exported products only customs duties apply to products imported in the Community.

As seen above, it clearly emerges that import levies and customs duties are not the only obstacle which third countries have to face when exporting into the Community.

An important element which must be taken into account (as will be seen below for Maghreb countries' exports in the Community) is the reference price. The levying of countervailing charges on products imported into the EEC at a price below the reference has important consequences. The difference between these charges and import levies has already been underlined above. It should be taken into account that countervailing charges are applied not on the shipment whose import price is lower than the reference price, but on the subsequent shipments coming from the same country. This means that the exporter country should control supply to prevent the selling of a shipment at lower prices triggering the application of

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<sup>364</sup> More precisely, common organization in live trees and other plants, bulbs, roots and the like, cut flowers and ornamental foliage Regulation 234/68 27.02.1968 Q.J. L 55 2.03.1968.

countervailing charges on subsequent exports<sup>365</sup>.

Countries enjoying preferential treatment, that is a reduction of customs duties, will not be able to sell at a lower price on the Community market. As seen above, the calculation made to check whether the import price is lower than the fixed reference price takes into account, for all countries, the full amount of ad valorem duty. With respect to the import price of the countries having to pay the full custom duty rate, the cif price of a country which has been granted duty preferences could be higher - the reduced customs duties compensating for this higher import price - without becoming less competitive. The preferred country thus has an advantage in terms of sale proceeds, but the results for the Community market will not change: the system of reference price and countervailing duties ensures that Community prices are not undercut by the offer of products at lower prices coming from third countries.

Preferential countries have therefore an interest in having relatively higher prices. In order to maintain such a price level they would probably rather prefer to reduce their exports to the Community.<sup>366</sup>

### 3) The Régime of Agricultural Imports from Maghreb Countries.

As mentioned in the introduction to this chapter, the discussion over the provisions of the Cooperation Agreement with Maghreb on agricultural trade will focus on the question of the preferential treatment granted to agricultural products imported by the Community from Maghreb and on the limits of such preferences.

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<sup>365</sup> HARRIS *op.cit.* p. 159.

<sup>366</sup> See TOVIAS, A. *Les effets extérieurs des politiques internes des Communautés Européennes sur les pays tiers: le cas des pays Méditerranéens* *Rev.Int.Eur.* 1988 pp.51-70.

### 3.a) The Cooperation Agreements.

The rules applied to agricultural imports are established in Articles 15 to 25 of the Cooperation Agreement, in the exchange of letters annexed to the Agreement or annually concluded between the Contracting Parties and in the declarations also annexed to the Agreement. Both the exchanges of letters and the Joint Declarations contained in the Final Act form an integral part of the Agreement (Art. 56). The exchange of letters concluded in subsequent periods are Agreements in simplified form which define in more detail the particular conditions to which certain products are submitted (infra).

The preferential treatment granted by the Community to imports of agricultural products from Maghreb countries is the reduction of customs duties covering 80, 90 % of the exported products.

The products and the rate of reductions, varying from 20% to 100%, are indicated in Art. 15, 20 and 21.

It should however be considered that this advantage has been limited by other instruments or conditions which have to be met by the exporting Maghreb country.

These are: calendars, tariff quotas, reference prices and import levies.

Calendars. For some products (potatoes, tomatoes, aubergines, courgettes and berries), the reduction of duties applies only during certain periods of the year: Morocco is free to export to the Community during the other periods, but in this case, it will not be granted a reduction of duties which apply at full rate.

For instance, tariff reductions concerning aubergines, courgettes and berries are limited to the periods December-April, December-February and November-March respectively, that is when the production of the same products in the Community is at its lowest. This means that the duties' reductions are granted when the imported products do not compete with Community production.

Let us consider, for instance, the case of potatoes. Morocco is one of the principal exporters of this produce<sup>367</sup> to the Community and its exports are mainly concentrated in the first period of the year<sup>368</sup>. The reduction of the customs duties (50%) is granted in the period from the first of January to the 15 of April, when competition in the Community is lower.

This lead to a more general consideration concerning calendars. The limitation of tariff preferences during specific period of the year can receive a different evaluation. On one hand it can be considered that the Agreement encourage the planning of production in the Mediterranean area harmonizing the production calendars, on the other hand the provisions examined could be interpreted as away of "encouraging" the producers of Maghreb countries to specialize in the production of first fruits and vegetables in order to protect the Community market in the other periods<sup>369</sup>

A second relevant condition which applies to certain products are tariff quotas.

When a tariff quota is established the reduction of customs duties is granted within the limits of a given quantity which can be exported in one year. When this quantity has been used up, the full customs duty rate is re-established. It shall be remembered that when quotas are established, on the contrary, only a fixed amount of a product may be exported and when this quantity is

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<sup>367</sup> Potatoes are not included in the common market organization for fruits and vegetables (see Regulation 1035/72 Art. 1). The protection towards imports from third countries is limited to the application of custom duties. It is interesting to note that a proposal of the Commission for a common regime included the establishment of reference price for new potatoes. HARRIS op.cit. p. 143.

<sup>368</sup> See Agence Europe Les nouveaux accords en Méditerranéenne en 1989 Bruxelles, 1990 p. 33-36.

<sup>369</sup> See Discussions de la communication de M. Dammak NABLI, M.K. Coopération Cee-Maghreb op.cit.

exceeded no more imports may be accomplished.

Tariff quotas are established in the Agreement with Morocco for apricot pulp whose tariff reduction of 30% applies within the limit of a quota, which for Morocco is of 8250 tons<sup>370</sup>. A second kind of product covered in the Agreement by tariff quotas are fruit salads. The duties reduction is 55%. In this case, however, the quota is not provided for directly in the Agreement but reference is made to an Agreement in the form of an exchange of letters which is to be concluded annually by the Community and its associated partner in which such quota (literally "the conditions and detailed rules for such reduction") shall be established<sup>371</sup>.

The reduction of duties, however, does not always compensate for the limitation in the quantity of the exported product. This is the case for tomato concentrates. Among Maghreb countries Morocco is the biggest exporter of this product, but the Agreement concluded with this country does not contain any article providing

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<sup>370</sup> No quota is provided for Algeria, whilst for Tunisia the quota is fixed at 4300 tons.

<sup>371</sup> It has already been mentioned that the exchange of letters are agreements concluded by the Contracting Parties defining the conditions which are applied to certain products. What should be noticed is that some of these exchanges of letters - and, more precisely, those referring to fruit salads - are voluntary self restraint agreements. These could be defined as the modern instrument of trade protection used by industrialized countries, in particular in the textile sector, to limit the import of competitive products from third countries. For the exporting countries the advantage of such agreements lies in the certainty of being able to export the fixed quantity of product without triggering other measures of protection on the part of the importing countries. The difference between an import tariff quota and a self-limitation agreement lies in the fact that the former is administered by the importing country (the Community in this case) whilst the latter is under the control of the exporting country. In the exchange of letters between Morocco and the Community, it is specified that the exports to the Community of fruit salads "will be effected exclusively by exporters whose operations are controlled by the 'Office de commercialization et d'exportation (OCE)' (Marketing and Export Office) Q.J. L 169 1977. For a more extensive discussion of voluntary restraint agreements see *infra* Part Four, the Chapter on Safeguard Measures.

for a reduction of the duties conditioned to the application of a tariff quota, whereas such a clause exists in both the Agreements concluded with Algeria and Tunisia (Art. 19). What is to be noted is that these countries are not exporters of tomato concentrates<sup>372</sup>, and that the only country concerned, that is Morocco, has refused to limit its exports of tomato concentrates to the Community, even if this would have meant a tariff reduction for its exports, which are therefore exported to the Community without any customs duty reduction. This seems to indicate that under certain conditions, in this case a high exporting potential<sup>373</sup>, tariff quotas are mainly conceived as an instrument of protection.

The third case in which tariff quotas are applied is that of wine of designation of origin put up in bottles of less than two liters, which are granted an exemption of duties within the quotas established in the Agreements<sup>374</sup>. The tariff suspension is to be applied after the conclusion of an exchange of letters<sup>375</sup> containing the list of wines entitled to the designation of origin under Moroccan legislation. Such an Agreement was to be concluded after verification of the equivalence of Moroccan and Community legislation.

A third main limit to the preferential treatment granted to Maghreb countries is that of the reference price. It has been underlined above that for the calculation of reference prices the

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<sup>372</sup> The established quota of 100 tons established for Algeria has never been used, while Tunisia has never concluded the exchange of letter provided for in the agreement. Les nouveaux accords Mediterraneens.. op.cit. p. 56.

<sup>373</sup> Ibidem.

<sup>374</sup> Morocco and Tunisia 50 thousand hectoliters, Algeria 500 thousands. The much higher quota for Algeria is explained by the fact that wine accounts for a very high percentage of Algerian agricultural exports and that there is a very limited internal demand for wine. Vineyards were in fact planted when Algeria was part of France for the consumption in the mother country.

<sup>375</sup> Q.J. L 65 1977 Regulation 482/77.

full rate of customs duties is taken into account, even for those countries enjoying preferential treatment and that this means that their import price can be higher in respect to those countries having to pay full custom duties. The reference price cannot be undercut. Why then provide expressly that the prices of certain imported products shall not be below the reference price ? It is, in practice, the import price (the price of the products offered for imports into the EEC) which has to be at a certain minimum level.

The system of protection created by reference prices may be tightened by technical formalities of application (as denounced by Morocco during the Cooperation Council of April 1989).

The obligation to respect the Community reference prices are provided for lemons and wine in bulk<sup>376</sup>. A comparable provision is that applied to preserve sardines which are granted duties exemption if a minimum price, annually agreed by exchange of letters, is observed. The comparison can be made because reference prices are in practice minimum price that have to be observed by countries exporting to the EEC (otherwise countervailing duties are applied).

Import levies are applied to very few products covered by the Cooperation Agreement. These are olive oil, products deriving from the milling of cereals (with the exclusion of rice and maize), such as bran and sharps, and durum wheat. For the latter, and this provision is not included in the Agreement with Algeria and Tunisia, Morocco has been granted a reduction of the import levy<sup>377</sup>. The provision on olive oil is much more complex. The import levy on non refined olive oil is reduced provided that Morocco levies a special charge on its exports. The amount of the reduction,

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<sup>376</sup> *Wine in bulk is also forced to respect certain requirements concerning containers (closing, labelling, capacity).*

<sup>377</sup> *See Regulation 2727/75 and in particular Art. 13 which has replaced regulation 120/67 cited in the Agreement.*

within the limit of 10 units of account<sup>378</sup> per 100 kilograms, corresponds to that of the special export charge. This means that Morocco's olive oil import price does not undercut the Community's price. This is a sort of financial aid to Morocco which does not therefore constitute an advantage for Moroccan exporters. If Morocco does not levy this special charge, the import levy is reduced by a minimum amount of 0.5 unit of account per 100 kilograms. For certain agricultural products having undergone a manufacturing process, the import levy is made up of two components, a fixed element which should protect the processing industry and a variable component which is applicable to the basic agricultural product. In the case of refined olive oil and with respect to the cereals mentioned above, the fixed component is not imposed. For cereals, a reduction of the variable component is also provided on conditions similar to those applying to non refined olive oil, that is, provided Morocco levies a special charge on its exports, a charge which shall be reflected on the import price. If this condition is not met no reduction is granted<sup>379</sup>.

(wine for Algeria, different provisions. Importance of this export for Algeria. To note that there exist other regulation in the EEC with protectionist effects: the prohibition of (coupage) of eec wine with imported ones. See Tunis colloque p. 123)

### 3.b) Additional Protocols<sup>380</sup>.

The entry of Spain and Portugal into the EEC had important consequences for the Mediterranean third countries: the self-

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<sup>378</sup> The ECU has replaced the unit of account since the first January 1981.

<sup>379</sup> See exchange of letters Q.J. L 169 1976.

<sup>380</sup> Additional Protocol with Morocco Q.J. L 224 13.08.1988; with Algeria Q.J. L 297 21.10.1987 p.1; with Tunisia Ibidem p.36.

sufficiency<sup>381</sup> which the Community was going to attain for the great part of Mediterranean type agricultural produce could lead, to say the least, to a decrease of the associated Mediterranean countries traditional agricultural exports to the EEC; secondly, as a result of the extension of the common agricultural policy mechanisms to the two new entrants, Maghreb countries risked to lose the trade preferences they enjoyed over Spanish and Portuguese exports<sup>382</sup>.

However, the enlargement could not occur to the detriment of the Community Mediterranean policy for a number of political and economic reasons. A deterioration of the economic situation in third Mediterranean countries could, in fact, lead to social and political upsets which may have particularly dangerous consequences in this region; it should be remembered moreover, that Mediterranean non-member countries are the third external market for Community exports<sup>383</sup>.

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<sup>381</sup> See for an analysis of the various productions concerned European Parliament Report On Economic and Trade Relations between the EEC and the Mediterranean Countries Following Enlargement of the Community Rapp. GALLUZZI, C.A. A 2-325/88 19.12.1988.

<sup>382</sup> Mediterranean Member States (Greece and Italy) required a form of compensation from the entry of Spain and Portugal which would have implied an increase of competition for Mediterranean producers. Since tightening of the external protection for excluded for budgetary reasons the choice turned towards a policy of investment under the integrated mediterranean programs whereby the Community finances re-structuring to further new types of productions which should not be concurrent with classical mediterranean ones. The consequences for third Mediterranean countries are not clear and largely depends on the success of the programmes and on the effective re-structuring of the productions. A reduction of classical Mediterranean products could be positive for the exports of Maghreb. On the other hand competition would increase for third countries producing the products which should be financed within the Mediterranean integrated programs. See TOVIAS *Les effets extérieures.. op.cit.* p.62-63.

<sup>383</sup> COM (85) 405 final op.cit p. 6-10 and COM (85) 517 final Communication by the Commission to the Council The Community and the Mediterranean Countries: Guidelines for Economic Cooperation 26.09.1985 pp.1-4.

One could ask whether Maghreb countries may invoke a right for a re-examination of the cooperation Agreement in case of the enlargement of the Community. Article 50.2 of the Agreement concluded with Morocco establishes that "In the event of a third State acceding to the Community, appropriate consultations shall be held within the Cooperation Council so that the interests of the Contracting Parties as defined in the Agreement may be taken into consideration". More specifically, in an exchange of letters annexed to the Agreement, the Contracting Parties agree to re-examine the Agreement in the event of an enlargement to other Mediterranean countries in order to safeguard the advantages which Morocco derives from the implementation of Art. 15. Although the reference made to imports of citrus fruit could be interpreted as an obligation to limit the re-examination of the Agreement provisions related to these products, it should be pointed out that the commitment is very precise, especially if compared with the consultation procedure provided for in Article 50.2. The non application of these provisions in the case of the enlargement to Greece could then be considered a violation of the Agreement in the presence of an express request made in this respect by Morocco<sup>384</sup>.

In the case of the enlargement to Spain and Portugal the solution adopted was the conclusion of an Additional Protocol to the original Cooperation Agreements providing for a set of rules to be applied to Maghreb countries exports of agricultural produce to the Community which aimed at maintaining the traditional flow of trade with the Community<sup>385</sup>. The Member States more exposed to

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<sup>384</sup> See COM (80) 495 final, COM (81) 485 final cited by Raux "Chronique des Accords Externes de la CEE" RTDE 1981.

<sup>385</sup> The calculations of the "traditional trade flow were based on the period from 1980 to 1984 which was one of lower export growth. It is clear, moreover, that this type of calculations favor the countries with higher production and that in a certain sense "freeze" the possibility of increasing exports at preferential treatment.

the competition of non-member Mediterranean countries, such as Italy and Greece, were more favorable to find a compensation in a higher financial cooperation rather than granting new trade concessions<sup>386</sup>. The reason seems obvious since financial protocols are financed through the Community budget the costs are partitioned among all the Member States whereas trade concessions are "paid" in terms of competition only by Mediterranean Member States. It should be underlined that the scope of the Protocol is not the improvement of the terms of trade for the exporting countries but the maintaining of the existing one.

The cornerstone of the Protocol is the phasing out of the customs duties for certain products (listed in Annex A) paralleling the phasing out of customs duties of the same products imported in the Community by Portugal and Spain (as provided in their respective Act of Accession). Thus, at the end of the transitional period provided for Spain and Portugal, Maghreb products which are phased out enter the Community market free of custom duties. The granting of this concession is, however, limited by a range of conditions.

The first is related to the parallelism established with Spain and Portugal and is twofold: 1) in case of a divergence between the customs duty rates of Spain and Portugal, the phasing out is carried out with reference to the higher of the two, 2) for certain products, Maghreb countries were granted a more preferential treatment by the Cooperation Agreement with respect to that applied to Spanish and Portuguese exports to the EEC before accession. In these cases, the phasing out begins once the Spanish and Portuguese duties have fallen below Maghreb customs duty rates.

The second condition is a more complex version of the tariff

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<sup>386</sup> See RAUX, J. "Le maintien des échanges traditionnels de produits agricoles entre la C.E.E. élargie et les pays méditerranéens tiers" *RTDE* 1987 pp. 633-648 p. 634.

quotas applied in the Agreements. The phasing out shall take place within the quotas indicated in the same Annex A. When the quotas are exceeded the custom duties as provided for in the Cooperation Agreements are applied.

Tariff quotas are established for the most sensitive products. For two of them, tomatoes and orange juices, sub-quotas are also provided. In the case of tomatoes, out of a quota of 86,000 tons only 10,000 tons can be exported during the month of April<sup>387</sup>. In the case of orange juice, the sub-quota concerns 4,500 tons imported in packaging with a capacity not exceeding two liters. The tariff quotas which were applied in the Agreement (for apricot pulp or fruit salads<sup>388</sup>) continue to be applied to the phasing out.

Reference quantities are established for a second group of products. Reference quantities are not quotas<sup>389</sup>, but surveillance measures. The exhaustion of reference quantity does not result in a re-introduction of customs duties but in the establishment of a tariff quota. Thus the normal regime applied to this second group of products is the phasing out of customs duties, if exports exceed these reference quantities, the Community may decide to establish a tariff quota.

For the remaining products, (also listed in Annex A) which thus constitute a third group, no quantitative limits are provided, but the Community is free to establish reference quantities in case the volume of imports threatens to cause difficulties in the Community market. The reference quantities thus established could be transformed in a tariff quota if the conditions set out for the

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<sup>387</sup> This provision can be explained by the will of protecting the greenhouse production of Netherlands which are concentrated in this period See Les accords.. op.cit. p. 38.

<sup>388</sup> The tariff quota for fruit salad was to be agreed by exchange of letters.

<sup>389</sup> They do not seem to be a tariff ceiling either. (see Art. 12 of the Agreement). Tariff ceilings are similar to tariff quotas, yet in the case of tariff quotas the re-introduction of custom duties is automatic, whereas for tariff ceiling is possible.

second group of products are met.

A sort of pyramid of progressive restrictions is thus established. What should be noticed is that the annual review of trade flow, on which the introduction of tariff quotas or of reference quantity, for products of the second and third group respectively, is based, is the sole responsibility of the Community.

An examination of Annex A shows that the products phased out are those listed in Cooperation Agreement (for Morocco products see Art. 15) with the obvious exclusion of the products for which duty free entry was already granted in the Cooperation Agreement.

Only few products, such as certain fresh fruits, pectin substance and grapefruits are excluded from the phasing out. For them the provisions of the Cooperation Agreement are applied. These provisions, although representing an advantage with respect to the tariff reductions provided in the original Agreement, show that the new mechanisms cannot constitute an additional charge for the Community agricultural production.

The phasing out of custom duties is also extended to certain products which had not been originally included in the Cooperation Agreements<sup>390</sup>, but for which a trade flow has since developed. Since no preferential treatment was applied in the Cooperation Agreement, when the tariff quotas are exceeded the full customs duty rates apply. In the case of fresh cut flowers and flower buds, the elimination of the customs duties are subject to further conditions established in an exchange of letters annexed to the Protocol. Here the Contracting Parties agree to suspend the tariff preference if the Moroccan import price level falls below 85% of the Community price level during two successive marketing days. The two prices are calculated taking into account, for Morocco, the price of

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<sup>390</sup> In a Joint Declaration annexed to the Agreement the Contracting Parties declared their readiness "to foster, so far as their agricultural policies allow, the harmonious development of trade in agricultural products to which the Agreement does not apply".

imported products from which customs duties are not deducted. For the Community, the price is based on the prices registered on the representative producer markets of the main producer Member States.

An important question related to the establishment of tariff quotas concerns their administration at Community level.

When a tariff quota is set up by the Community two possibilities are open. One is the division of the quota into national shares (sub-quotas), the other is the administration of the quota by the Community. The consequence deriving from these two regimes are rather different both for Member States and for importers. In the first hypothesis, when the national sub-quota is exceeded the full rate of customs duty is re-introduced and there can be no other import of the product subject to the quota in that member state even if the total Community quota is not exceeded. On the contrary, in the case of the administration of the quota by the Community, the unused sub-quota or sub-quota shares can be re-allocated to the obvious advantage of importers<sup>391</sup>.

The system of national sub-quotas has not been applied to tariff quotas provided for in the Additional Protocol (whereas the allocation of quotas among member States did take place for tariff quotas set up in the Cooperation Agreements). In the case of the tariff quota established for fresh cut flowers and flowers' buds (see above) Member States draw an amount corresponding to their requirements, to the extent permitted by the available balance of the quota (300 tons in this case). In the event that a Member States does not use up the quantities drawn within 14 days it is

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<sup>391</sup> The system of national sub-quotas has been sanctioned by the Court of Justice in case 51/87 Commission v. Council 29.09.1988 (1988) ECR 5476 although within the limits of quotas concerning industrial products. The existence of national sub-quota has important consequences concerning the free circulation of goods within the Community and the application of Art. 115 of the Treaty. See case 59/84 Tezi Texitel v. Commission 5.03.1986 (1986) ECR p.887 and comments by CREMONA, M., *The Completion of the Internal Market and the Incomplete Commercial Policy of the European Community* E.L.Rev. 1990 pp. 283-297.

obliged to return the unused portion to the Community<sup>392</sup>.

Besides the phasing out, the second type of measure which is provided for in the Additional Protocol is the adjustment of entry price for certain sensitive products listed in Art. 3 of the Protocol. The adjustment consists of a reduction of the customs duties in the calculation of the entry price for each of these products. It should be remembered that the entry price is a theoretical price which is calculated daily for each imported product for which a reference price has been established for the corresponding products produced within the Community; when the entry price is below the reference price, countervailing charges are applied. The entry price is calculated on the basis of the lowest price recorded from the exporting country concerned from which custom duties are deduced. If customs duties are diminished in such a calculation a higher entry price will result as compared to the reference price and as a result, a lower countervailing charge will be paid.

This modulation of entry price is, however, only a possible measure which can be applied only in 1990 (two years after the entry into force of the Protocol) and it is decided by the Community on the basis of an evaluation based on statistical review and analysis of the Moroccan exports situation for the products concerned and within the limits of the quotas established in the Protocol. The procedure followed by the Community is that of the Management Committee created by the Regulation on the common market organization for fruit and vegetables (Art. 32). The Commission decision could be repealed by the Council voting by a qualified majority, (Regulation 1035/72 Art. 33) which cannot be reached by the votes of the four Member States most concerned (Spain, Portugal, Greece and Italy).

Wine, a product which is very important for the economy of Maghreb countries, and Algeria in particular, is the object of

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<sup>392</sup> See Regulation 3552/88 Q.J. L 311 1988 at p. 12 in particular Art. 1.3.

detailed provisions replacing the rules of the Cooperation Agreement applicable to this product. The access of wine to the Community market is, to a certain extent, improved by the extension of the preferential treatment. A different regime applies to a) wine in bulk b) wine bottled in containers holding two liters or less entitled to a designation of origin (i) and not entitled to a designation of origin (ii) c) wine presented in containers of more than two liters.

a) Imports of wine are subject to the phasing out of customs duties within the limit of a tariff quota<sup>393</sup> and provided that - as established in the Cooperation Agreement - the import price plus customs duties actually levied are not less than the Community reference price . b) (i). This wine is exempt from customs duties within the limits of a tariff quota. A second condition to the application of the tariff exemption is the equivalence between the legislation of the two contracting parties as regards the designation of origin of wine. An exchange of letters should be concluded for this purpose. (ii) within an annual quota this wine is granted the progressive elimination of the fixed amount provided in Art. 53 of regulation 822/87 on the common organization of the market for wine and which is added to the reference price (the rate of the reduction is indicated in the Protocol). This fixed amount corresponds to the normal packaging costs<sup>394</sup>. Wine may be granted the application of a special frontier price in case of a fall in the level of exports of these wines. This special price also applies within the limits of a quota.

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<sup>393</sup> 85 thousand hl for Morocco, 200 thousand for Algeria and 160 thousand for Tunisia.

<sup>394</sup> See Regulation 3488/89 21/11/89. O.J. L 340 1989. The adjustment of entry price for certain fruits and vegetables is taken by the Commission in accordance with the relevant management committee procedure.

The rules established for wine are especially designed to favor the exports of Maghreb bottled wines. It should be noticed, and this is another example of the limit of the preferential treatment, that Maghreb export wine in bulk and that the advantage they may take from the preferential treatment granted is very limited<sup>395</sup>.

Special rules, derogating from those established in the Cooperation Agreement, are applied in the Protocol concluded with Tunisia as regards unprocessed olive oil wholly obtained in this country and directly exported to the Community. This specific preferential treatment has been granted on the basis of the vital importance of olive oil exports for this country. Within the limits of a quota of 46 thousand tons and during the period between the entry into force of the Protocol and 31 December 1990, a special levy is charged on exports of unprocessed olive oil equal to the difference between the threshold price and the cif price. The regime is particular in so far as the free-at-frontier price is fixed by the Community, taking into account the price guaranteed by the Tunisian Government to its producers and the transport costs to the Community borders. The regime should be revised from the first of January 1991.

#### 4) Final Observations.

From the above discussion it seems clear that the common agricultural policy mechanisms and the need to maintain prices within the common market at a certain level, heavily condition, together with the application of a range of non-tariff measures,

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<sup>395</sup> Les Accord Méditerranéen.. op.cit. p. 131. The difficulties for Maghreb countries to profit from the preferential treatment is illustrated by the fact that the EC had applied the preferential treatment provided for wine of designation of origin in the Cooperation Agreement to wine exported in bulk for the first two years of application of the Agreement, within certain quotas, "until such time as Morocco has sufficient plant to bottle the wines referred to in Art. 21(2) of the Agreement. Ibidem.

the tariff preferences granted by the Community to the agricultural exports of Maghreb countries. It seems, in other words, that the objectives of the CAP and, in general, the protection of the EEC market, do prevail over the objectives of the cooperation with maghreb and Mashrak countries.

The reasons are to be found on the very special status of agriculture in the Community.

The result of CAP is the protection of the Community market from imports of agricultural products coming from third countries. It has already been said that CAP is an internal policy and as such is not negotiable<sup>396</sup> and that the instruments applied to imports coming from third countries are functional to the objectives set up in Art. 39. It should be asked, however, if there is not contradiction between these internal objective and the consequence they have on trade with third countries if one considers that "by establishing a customs union between themselves the member states intend to contribute to the harmonious development of world trade, the progressive abolition of restrictions on international exchanges and the lowering of customs barriers" (Article 113 EEC Treaty) where no distinction is made between trade in agricultural and in industrial products.

It can be observed that it is expressly provided in the chapter on agriculture that the common market provisions apply to agriculture, unless otherwise stated. It can be imagined that this derogation was conceived more for the application of rules such as competition, free circulation of goods or state aids than for the external dimension of the common market.

On the other hand, the rules governing trade in agricultural

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<sup>396</sup> This was expressed in clear terms in the Kennedy Round where it was affirmed in the Community's negotiating mandate that CAP's 'principles and mechanisms shall not be called into question and therefore do not constitute a matter for negotiations' Cited in HARRIS, SWINBANK.. *op. cit.* p. 278. The character of nor being negotiable is confirmed by the above mentioned provision on CAP contained in the Cooperation agreements with Maghreb countries (Art. 25 for Morocco).

products should be analyzed in the general framework of international trade.

The main instrument governing trade at international level is the General Agreement on Tariff and Trade (GATT). No distinction is made, in this Agreement between industrial and agricultural exchanges and in theory the rules established in GATT apply to both industrial and agricultural products. There are, however, rather important exceptions which testify to the special status of agriculture<sup>397</sup>. These are the application of quantitative restrictions which are admitted, under certain circumstances, for agricultural trade (Art. XI.2) and the possibility of applying export subsidies to agriculture (XVI.3). Duties bound in GATT are very limited (they apply to maize gluten, oilseeds, sheepmeat decided in the Dillon round as a compensation for the trade diverting effect caused by CAP). Moreover, it should be considered that in the field of agricultural trade, the negotiations on customs duties have lost much of their importance because, in order to protect national markets, non-tariff barriers are more widely applied than customs duties.

There are two other consequences of CAP which are worth noticing : the uncertainty effect caused by some CAP mechanisms and the influence that CAP has on the flow of trade between the Community and its Mediterranean partners<sup>398</sup>.

Uncertainty is due to the system of import levies and to reference prices. Import levies for some products are calculated daily, such as in the case of cereals or sugar and this may constitute a further difficulty for exporters, making advanced

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<sup>397</sup> See TANGERMANN, S. *Will Agriculture Always Remain a Problem in GATT?* Interec. 1987 pp.163-167.

<sup>398</sup> See YANNOPOULOS, G.N. "The Impact of the Common Agricultural Policy on Developing Countries Following the Enlargement of the European Community" Development Policy rev. 1983 pp.197-218; BEIBNER, K.H., HEMMER, H.R. "The Impact of the EC's Agricultural Policy on Its Trade with Developing Countries" Interec. 1981 pp.55-60.

planning more difficult. The uncertainty may, however, be overcome thanks to the possibility of fixing the levy in advance.

Reference prices may be subject to periodical variations and this means that an exporting country is faced with the possibility of paying countervailing charges even if it monitors its offer price.

As for the flow of trade, it has been argued<sup>399</sup> that Mediterranean countries tend to orient their agricultural production toward those products which they can sell in the Community market. Mediterranean agricultural produce is, in fact, much less protected in the Community than other products such as cereals, sugar or milk. On the other hand, the over-production of this second category of products (itself a consequence of the high level of protection and internal support) has led to an increase of their exports towards third countries and, in particular, towards developing countries which are facing a situation of food deficiency, due to their growing population and to a consequent high food dependency from the Community.

In 1982 a proposal for the conclusion of multiannual agricultural supply was submitted by the Commission to the Council. This proposal concerned more precisely the conclusion of long-term framework agreements between the Community and the countries of Maghreb and Mashrak (exploratory talks had place with Algeria, Morocco, Tunisia and Egypt) whereby the Community would have undertaken the obligation of supply specific quantities of food produce (either raw materials, like cereals, sugar and products for direct consumption, eggs, butter, rice, pasta) to these countries which would have imported the same quantities of products from the EEC. The interest of these agreements for the Community would have been to provide an outlet for Community products in excess and at the same time contributed to the security of food supply for the Community's partners. The interest of this type of agreements went

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<sup>399</sup> BASILE, E., CECCHI, C. Modelli commerciali e scambi agricoli. Analisi dei rapporti tra CEE e Paesi Mediterranei. Milano, F. Angeli 1988.

beyond trade since they would have also ensured regular supply of raw materials for the food processing industry. The agreements were conceived as distinguished from the Cooperation Agreement although Morocco interpreted them as a way of restoring the balance with the Community "since infringements or distortions by the Community of some of the provisions of the (Cooperation Agreement)...could be offset by favorable terms of sale of Community agricultural products" The proposal was not followed by the Council and these agreements have never been negotiated<sup>400</sup>.

Trade preferences, moreover limited, cannot solve these specific problems of Maghreb and Mashrak countries which require the application of other instruments<sup>401</sup>. When discussing financial and technical cooperation it will be very interesting to examine which projects, if any, have been financed in the agricultural field, which specific problems have been considered and if they aim at balancing the limits deriving from the CAP.(rural development).

Finally, the advantages of tariff preferences cannot be discussed in absolute terms and the preferences granted to other countries, especially if having a production in competition, should be taken into consideration. Although such a comparative analysis is not the object of this study, to set the Cooperation Agreements concluded with Maghreb countries in context, a short reference to the regional and international context is necessary.

Besides the Cooperation Agreements with Maghreb and Mashrak countries the Community has concluded preferential agreements concerning agricultural trade with ACP countries under the Lomé Conventions. Only these preferences are, in terms of their

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<sup>400</sup> See COM(82) 73 Final, p.15.

<sup>401</sup> An instrument of development cooperation, outside the Cooperation Agreement, is the food aid policy of the Community. For discussion see SNYDER, F. *The European Community's New Food ... op.cit.* or in *New Directions in European Community Law* Weidenfeld and Nicolson, London 1990, pp. 146-176.

magnitude, comparable to those granted to Mediterranean countries. The preferential treatment concern a free duties entry, Stabex system and Protocols guaranteeing the access of important products like bananas, rum and sugar. Without going into the details of the arrangements, it should be remarked that the majority of agricultural products exported to the Community from ACP countries are not in competition with Community production. For instance preferences do not cover the products such as oranges or temperate-zone fruits and vegetables.

It is well known that the Agreements concluded with Maghreb countries are part of a network of agreements concluded by the Community with Mediterranean countries, in particular with Mashrak countries, Cyprus, Malta, Israel and Yugoslavia<sup>402</sup>. With few exceptions these countries exports the same kind of products to the Community and the preferences granted by the Community are limited by the same mechanisms that have been discussed above for Maghreb countries. However, since the agreement with Malta and Cyprus and the agreement with Israel provide for some form of reciprocity.

Agricultural trade preferences are also granted by the Community to developing countries within the (autonomous) scheme of the SGP. These are rather limited, especially if compared with the preferences granted to industrial products. This can be explained by the fact that the SGP has mainly been conceived as a means of encouraging industrialization. The preferences granted to sensitive agricultural products are limited by quotas. Other trade preferences are granted in agreements concerning beef to certain Latin America countries in the form of a reduced or levy-free quotas<sup>403</sup>.

It can be concluded that the Maghreb and Mashrak countries seem to enjoy a relative preferential position even in relation

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<sup>402</sup> We leave aside Spain and Portugal for obvious reasons and the Association Agreement with Turkey which should lead to membership, although it seems for the moment "frozen".

<sup>403</sup> HARRIS *op.cit.* p. 271.

with other third developing countries.

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## D) RULES OF ORIGIN

## 1) General Considerations on Rules of Origin.

The origin of goods indicates the place where these have been produced, a concept which shall be distinguished from that of provenence, which refers to the place from where the goods have been shipped to their final destination.

The relatively large space devoted in this thesis to the rules of origin is explained only in part by the complex and technical nature of these rules. The main reason is founded on the observation that rules of origin are a crucial question for the application of trade preferences. The rules of origin applied to trade with Maghreb countries will be discussed to see whether their application can limit the preferences granted in the Cooperation Agreement or if these can be used to enhance some of the scope of the Agreement.

As established by each Cooperation Agreement concluded by the Community with Maghreb countries, tariff preferences are granted only to products - both industrial and agricultural - originating in, respectively, Morocco, Algeria and Tunisia<sup>404</sup>.

Goods exported from Maghreb countries could enjoy preferential duty treatment only if, on the basis of the criteria laid down by the rules of origin, they are produced therein.

If the determination of origin may be rather easily made when the products are completely obtained in one country, it shall be

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<sup>404</sup> See, for example, Art. 9 of the Agreement with Morocco applying to industrial products "...products originating in Morocco..shall be imported into the Community free of quantitative restrictions..". and Art. 15 for agricultural products "Customs duties on imports into the Community of the products originating in Morocco which are listed below shall be reduced..".The question of origin is particularly important as far as industrial products are concerned, agricultural products, in fact, are covered by the category of "wholly obtained" goods, which presents less problems of interpretation as compared with that applicable to industrial goods produced with imported materials.

considered that the number of such products is limited, whereas it is often necessary to establish the origin of goods which are produced with parts and materials manufactured in other countries.

For preferential trade, it shall be considered that if the criteria laid down by rules of origin are very restrictive - viz. a high domestic input is required, in terms of originating products used in the manufacture of the final good, or of processing carried out in the country of alledged origin - it will be more difficult for those countries to export goods at preferential duty rate. On the contrary, if the rules of origin are loos more export will be possible and, consequently, the highest export profit will be obtained.

On the other it should be considered that there exist a conflict of interest between the EEC (granting preferences) and Maghreb. The former has an interest in laying down rules of origin strict enough to avoid that other third countries could profit from preferences by, for instance, setting up a stage of production in one of the Maghreb countries but using a very limited amount of domestic labour or originating parts and materials.

On the other hand, too restrictive rules of origin may have a negative effect for Maghreb because non-originating component used in the manufacture of the final product exported by Maghreb countries may have a higher quality and/or a cheaper price than originating components, and may therefore affect the cost and quality of the final product. Moreover, Morocco, Algeria and Tunisia are developing countries and they may simply lack the technology and the know how to produce certain materials used in the manufacture of goods. The result of too restrictive rules of origin may at the end discourage investments by third countries' firms and consequently limit the transfer of technology.

The fact that rules of origin are applied to both preferential and non-preferential trade does not mean that identical rules are applied in both cases, in fact an examination of the rules of

origin applied by the Community to trade with preferential countries (contained in Protocols annexed to Cooperation or Trade Agreements providing for a preferential access to the EEC market, are stricter than those governing trade with third countries in general. In S.R. Industries v. Administration des douanes<sup>405</sup> the Court was requested to pronounce on the validity of a Commission regulation (3749/83) for the definition of rules of origin for the application of the system of generalized preferences. The criteria laid down for the definition of the origin of goods under the contested regulation, applied to the system of generalized preferences, are stricter than those required for goods for the application of common rules (under regulation 802/68). The Court held that "...in the field of general tariff preferences, the Commission may apply the concept of the origin of goods in a different and stricter manner than in the framework of the common rules drawn up by regulation 802/68. Such an application may, in fact, be necessary to attain the objective of the general tariff preferences of ensuring that the preferences benefit only industries which are established in developing countries and which carry out the main manufacturing processes in those countries" p. 2929. This seems could be applied, *mutatis mutandis*, to the rules of origin of preferential agreements. It has been observed, as regards textile products, that certain criteria that shall be met by preferential countries are more restrictive if compared with the "last substantial process" requirement laid down by Article 5 of Regulation 802/68<sup>406</sup>.

Before reviewing the rules of origin applied to the imports of Mediterranean products in the Community it seems necessary to make a few general observations on the question of the rules of origin and, in particular, those applied by the Community.

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<sup>405</sup> See case 385/85, S.R. Industries v. Administration des douanes 8.10.1985, (1986) ECR p.2929.

<sup>406</sup> FEENSTRA, J. Rules of Origin and Textile Products: recent Case-Law of the Court of Justice CMLRev. 1985, pp.533-559, p.557.

Rules of origin are a common feature of all customs legislation, to be more precise these are, together with the norms on the customs value and some specific customs regime (warehouse, inward and outward processing), the main instruments of customs legislation. (see in *Fordham Journal Int.Law on rules of origin US*)

A number of measures such as quotas, safeguard measures, anti-dumping duties exists which are implemented on the basis of origin<sup>407</sup>. Statistical analyses and statistical surveillance are made up taking into account the origin of the products.

Notwithstanding the important consequences for international trade of rules of origin no binding rules have been enacted so far at international level. Although the concept of the originating product is present in various GATT Articles (Arts. I, VIII, IX), the Contracting parties are not bound by a common definition of origin<sup>408</sup>.

One should however mention the International Convention on the Simplification and Harmonization of Customs Procedures<sup>409</sup> which

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<sup>407</sup> On the relevance of the determination of origin during the process of anti-dumping investigation and after the proceeding see VERMULST, E., WAER, P. "European Community Rules of Origin as Commercial Policy Instruments?" *JWTL* 1990, pp.55-99, p. 74-91. During investigation it is to be ascertained whether dumped products are originating in the third country exporting them and whether domestic EEC products alleged to be damaged are originating in the Community after the investigation origin rules are relevant to determine whether circumvention has taken place.

<sup>408</sup> Such a common definition was not even thought as desirable see JACKSON, *World Trade... op.cit.* p. 468. More recently, rules of origin have been discussed within the framework of the Uruguay Round. Proposals have been submitted by the United States, Hong Kong, Japan and the EC. Some of the difficulties and obstacles hampering the way towards a harmonised system of rules of origin are illustrated by PALMETER, N.D. The U.S. Rules of Origin proposal to GATT: Monotheism or Polytheism? *JWTL* 1990, pp.25-36.

<sup>409</sup> *Q.J.* L 100 21.04.1975 p.1 the decision adopting the Convention is based on the Treaty without express reference to any Treaty Article.

contains two Annexes<sup>410</sup> (D.1 and D.2) on rules of origin.

The purpose of these Annexes is to propose "those rules for the determination of origin which is felt can be most easily applied and controlled, with least risk of misunderstanding and fraud and the least interference with commercial activities". The provisions of these Annexes are conceived in the form of standards<sup>411</sup> and recommended practices<sup>412</sup> but this seems to leave open the choice of methods which states can apply<sup>413</sup>. These, however, vary within limited categories since the problems to be solved are analogous for all of them.

The Community adopted the Convention in 1975, together with the Annex on customs warehouse<sup>414</sup>. In 1977<sup>415</sup> it adopted Annexes on origin, making reservations for certain standards.

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<sup>410</sup> Other Annexes concern customs warehouse, customs transit (E.1), temporary admission for inward processing (E.6) and temporary exportation for outward processing (E.8).

<sup>411</sup> Standards are "provisions the general application of which is recognized as necessary for the achievement of harmonization and simplification of customs procedures".

<sup>412</sup> These are "provisions which are recognized as constituting progress towards the harmonization and the simplification of customs procedures, the widest possible application of which is considered to be desirable" Ibidem.

<sup>413</sup> For instance, the description of the methods which can be applied to determine origin is accompanied by consideration of their advantages and disadvantages. Moreover, no preferences among the standards are established "Nor does (the Annex) impose on its Contracting Parties obligations in the form of acceptance of general principles, such as, for example, most-favoured nation treatment, transparency, etc." VERMULST, E., WAER, P. European Community Rules of Origin as Commercial Policy Instrument? JWTL pp.55-95, .p.60.

<sup>414</sup> Q.J. L 100 21.04.1975.

<sup>415</sup> Ibidem. The Annexes have been accepted in the Community by Council Decision 77/415 Q.J. L 166 4.07.1977.

The definition or origin may be more or less complex depending on the product taken into consideration. Two categories of products are usually distinguished:

a) products completely obtained in a country ("wholly produced"), in which case the origin may be more easily verified (e.g. agricultural products);

b) products for whose manufacture more countries are involved (e.g. their production entails the use of imported materials or components coming from third countries). In this case, the definition of origin is a much more complicated process and the problem is to determine the contribution of the local economy to consider the product as originating.

The criterion commonly referred to is that of the "substantial transformation" which the product has to undergo in the beneficiary country to be deemed as originating therefrom. Various methods may be applied to verify that the criterion has been fulfilled and these can be summarized<sup>416</sup> as follows:

a) detailed rules concerning single products describing the processing operations which have to be performed in a country to acquire origin.

b) reference to the tariff heading of the finished product which is to be different from that of each of the materials utilized. This method is usually accompanied by a list of exceptions: change of tariff heading not conferring origin, or conferring origin if further criteria are also satisfied, operations which do not result in a change of tariff heading but which confer origin. It is clear that this procedure requires that donor and recipient countries make use of the same customs nomenclature.

c) ad valorem percentage. This method may be applied having regard to the materials utilized (the non-originating materials cannot exceed a given percentage of the value of the finished product)

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<sup>416</sup> The detailed rules and conditions will be examined *infra* when applied to the rules of origin concerning Maghreb exports to the EEC.

and/or to the processing operations performed in the beneficiary country (the valued added has to reach a given percentage). This technique requires, in its turn, the setting up of criteria for the definition of the value of the products.

These three methods can be used individually or cumulatively.

## 2) The Community Rules of Origin.

Although rules of origin are an important element of customs legislation, the Treaty of Rome does not provide for an express power to legislate in this field<sup>417</sup>. The establishment of a Common Customs Tariff requires, however, the setting up of common rules of origin to avoid deflection of trade which could possibly take place towards the member State applying more liberal rules of origin. The correlation between the CCT and the rules of origin is confirmed by the fact that the basic Community instrument establishing rules of origin (Regulation 802/68<sup>418</sup>) has been adopted in concurrence with the entry into force of the CCT (1 July 1968).

Community rules of origin may be distinguished in (a) "commercial" origin rules and (b) "preferential" origin rules<sup>419</sup>.

### 2.a) "Commercial" Rules of Origin.

The most relevant instrument is regulation 802/68<sup>420</sup> which applies when required by the uniform application of the Common Customs Tariff, quantitative restrictions or any other measures

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<sup>417</sup> In this respect it is worth noticing that an express competence is not provided for any of the elements of customs legislation. This explains why the acts enacted in this field by the Community are founded, besides other provisions such as Art. 113, and for rules of origin Articles 155 and 227, on Art. 235.

<sup>418</sup> Q.J. L 148 1968.

<sup>419</sup> These terms are used by GIFFONI, M. *Il Consolidamento dell'Unione Doganale in vista della Realizzazione del Mercato Unico DCSI* 1990, pp.259-285, p.274.

<sup>420</sup> Q.J. L 148 1968.

concerning the import of goods by the Community or Member States<sup>421</sup> (art.1). The Regulation distinguishes between wholly obtained products and goods for whose production "two or more countries.. (are) concerned". Article 4, wholly obtained products, has not given raise to particular problems. In 1985 the Court has clarified the meaning of the phrase "products of sea fishing" holding that origin of fish is attributed to the country of the vessels performing the essential part of the operation, that is locating the fish and separating them from the sea by netting<sup>422</sup>.

Art. 5 provides that goods for whose manufacture more countries are involved "..shall be regarded as originating in the country in which the last substantial process or operation that is economically justified was performed, having been carried out in an undertaking equipped for the purpose, and resulting in the manufacture of a new product or representing an important stage of manufacture"<sup>423</sup>. This very general formulation<sup>424</sup> of the rule can be explained by the need to cover the widest range of cases and to take into account technological progress.

In practice it may be of some difficulties to establish when the last substantial process" has effectively taken place. The

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<sup>421</sup> As mentioned above, these rules of origin do not apply to customs duties of the Common Customs Tariff but to other duties such as anti-dumping, measures such as quotas or for the application of Art.115 EEC Treaty.

<sup>422</sup> Case 100/84, Commission v. United Kingdom, 28.03.1985, (1985) ECR p.1169.

<sup>423</sup> These two criteria do not seem to have played a very important role in the definition of origin, see case-law reported *infra*.

<sup>424</sup> This has been the object of some criticisms : "The explanation, as with some of the other obscurities of the origin rules, lies in the fact that the rule when first formulated was a pastiche of several Member States' different rules, which were pressed into one rule which was not altogether internally consistent" FORRESTER, I.S. EEC Customs Law: Rules of Origin and Preferential Duty Treatment - Part I Eur. Law. Rev. 1980 p. 167, p.174.

Court of Justice, with a consistent line of cases, has clarified the criteria laid down in Article 5 of regulation 802/68. Even if the majority of the cases refer to rules of origin applying to specific goods (contained in regulation adopted on the basis of regulation 802/68<sup>425</sup>) the holding of the Court are of general application to clarify the criteria contained in Article 5.

The Court has first held that a comparison shall be made between what existed before the processing of manufacturing and the outcome of this one. The criterion applied is that of significant qualitative change between raw materials and processed products.

In Gesellschaft für Überseehandel mbH (casein case)<sup>426</sup> the Court affirmed that "the determination of the origin of goods must be based on a real and objective distinction between raw material and processed product, depending fundamentally on the specific material qualities of each of these products." Excluding that a change of tariff heading could be considered a sufficient criterion, the Court asserts that "the last process operation referred to in Art. 5 ..is only substantial if the product resulting therefrom has its own properties and a composition of its own, which it did not possess before that process or operation" (ground 6)<sup>427</sup>.

In the important Yoshida case<sup>428</sup> an excessive local content condition in the manufacture of slide-fastener was considered as exceeding the Commission competence under regulation 802/68. (The

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<sup>425</sup> See Articles 5 and 14.

<sup>426</sup> case 49/76 ECR (1977), p.41.

<sup>427</sup> This interpretation is confirmed in case 93/83 Zentralgenossenschaft v. Hauptzollamt Bochum 23.02.1984 (1984) ECR p. 1095 para 13, and case 162/82, Directeur des Douanes v. Cousin, 23.03.1983 (1983) ECR p.1101 .

<sup>428</sup> case 34/78, Yoshida v. Kamer van Koophandel en Fabrieken, 31.09.1979 (1979) ECR p. 115, case 114/78 Yoshida GmbH v. Industrie und Handelskammer Kassel, 31.01.1979 (1979) ECR p.151.

Commission required the slider being of Community origin to confer Community origin to the finished product). The Court held that "the requirement that all component of a product must be of Community origin, even those of little value are of no use in themselves unless they are incorporated into a whole, would amount to a repudiation of the very objective of the rules on the determination of origin".

2.b) "Preferential: Rules of Origin.

These are the Lome' Convention, the Trade Agreements concluded with EFTA countries<sup>429</sup> and the Cooperation Agreements with Mediterranean countries (Maghreb, Mashrak, Cyprus, Malta, Israel and Yugoslavia). Although with respect to many aspects they are very similar, these rules of origin constitute separate groups of norms which can be modified only by agreement between the Community and its Partner(s). Within this group it is possible to include the rules applied to imports of the products enjoying preferences under the Community System of Generalized Preferences. Although these preferences are autonomously granted by the Community the rules of origin (equally autonomously enacted by the Community) have the same scope and are founded on the same criteria as those applied to preferential trade agreements.

The rules of origin applied to the system of generalized preferences are contained in a separate Regulation<sup>430</sup>.

As mentioned above, the rules of origin applied to

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<sup>429</sup> Rules of origin are also contained in a Protocol annexed to the Agreement establishing an European Economic Area concluded with EFTA countries and in the Cooperation Agreements concluded with some Eastern European Countries.

<sup>430</sup> At present Reg. 693/88 is in force. See Q.J. L 77 4.03.1988. It takes into account the adoption of the International Convention on the Harmonized Commodity Description and Coding System. It applies to the annual scheme and provides for derogations (in favor of the least developed countries). See introductory notes Annex A and B. It refers to the Treaty as its legal basis.

preferential trade are stricter than those contained in regulation 802/68 and in the other regulations concerning specific products.

The Community does not refer to a single criterion to determine the origin of imported goods. On the contrary, the whole range of possible criteria, mentioned above, are used, although they may differ according to the purposes of the application of the rules of origin.

The rules of origin applied to preferential trade with Maghreb countries will be more deeply analysed under 3). References to the rules applied to other preferential agreements will be made in the course of the discussion only when relevant.

### 3) Rules of Origin Applied to Maghreb Countries' Exports to the Community.

#### 3.a) Substantive Rules.

For the definition of originating products Art. 31 of the Cooperation Agreement with Morocco refers to a Protocol annexed to the Agreement .

The general notion of originating products is contained in Art. 1 of the said Protocol<sup>431</sup>. These are i) products 'wholly obtained' in Morocco and ii) products obtained in Morocco from the manufacture of third countries goods provided that 'sufficient working or processing' has taken place.

The definition of the concept of originating products is extended to Community products: the criteria applied are identical to those applying to Morocco. Products considered as originating in the Community are products "wholly obtained" there and those obtained in the EEC by "sufficient working or processing" of non-originating goods.

The determination of origin of Community products could be required for the application of cumulation rules (see *infra*). When

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<sup>431</sup> Protocol 2 concerning the definition of the concept 'originating products' and methods of administrative cooperation.

a product is manufactured, say, in Tunisia, with Community parts, these do not count against origin if originating in the Community. (a microchip of Community origin for the manufacture of a computer).

(i) Wholly obtained products.

With respect to the goods classified under (2), wholly obtained products are, as mentioned above, easier to identify as it emerges from the list provided for in the Cooperation Agreements Protocols on the rules of origin<sup>432</sup>. Of course, not all the products which are completely obtainable in a single country are described, the ten item list analyzed hereafter identifies the categories to which these goods can be referred.

- "mineral products extracted from their soil or from their seabed".

The distinction between soil and seabed is rather new, it did not exist in the Protocol on origin annexed to the Association Agreement concluded with Morocco in 1969.

In the absence of any qualification of the term "seabed", it is not clear to what extent minerals extracted from the seabed can be considered as originating products.

It is suggested that originating status should be conferred on minerals extracted from the seabed to which the state concerned can legally claim an exclusive right of exploitation. In this respect two concepts of the international law of the sea are relevant: the continental shelf and the exclusive economic zone.

The continental shelf of a coastal state is defined by Art. 76 of the Convention of Montego Bay<sup>433</sup> as the portion of seabed and

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<sup>432</sup> A virtually identical list is contained in the other contractual and autonomous instruments on origin taking the criterion of 'wholly obtained' products into account. See Art. 2 of Lome' IV and Article 4 for Regulation 802/68.

<sup>433</sup> Signed the 10th of December.1982 at the end of the third United Nations Conference for the codification of the law of the sea, the Convention has not yet entered into force. See TREVES, T. La Convenzione delle Nazioni Unite sul Diritto del Mare del 10 Dicembre 1982 Milano, Giuffre' 1983. The text of the Convention is

subsoil extending beyond its territorial sea which constitutes the natural prolongation of the land. For the definition of the external limit, reference is made either to a geological criterion (the outer edge of the continental margin) or to a conventional limit of 200 miles from the baseline applied when, following the first criterion, the continental shelf would be inferior to a breadth of 200 miles from the baseline.

The exclusive economic zone, the most important institution of the new law of the sea, is the area beyond and adjacent to the territorial sea which extends up to 200 miles from the baseline from which territorial sea is measured (Art. 57 of the Montego Bay Convention).

The coastal state has sovereign rights of exploitation of mineral resources and living organisms of sedentary species on the continental shelf (art.77), whereas in the exclusive economic zone this right extends to living and non-living resources of superjacent waters (Art. 56).

It can be concluded that originating status should be granted to the minerals extracted from the continental shelf or from the exclusive economic zone<sup>434</sup> of a coastal state.

Minerals extracted from seabed are originating even if the plants and equipments used for extraction are not originating or are owned by a third country's company or firm. In other words,

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reproduced there. It should be reminded that the institution of the continental shelf has been the specific object of one of the four Convention on the law of the sea concluded in Geneva in 1958. See CONFORTI, B. Diritto Internazionale, Napoli, Ed. Scientifica 1987 pp.234-256.

<sup>434</sup> The two institutions coincide as far as the rights over minerals are concerned up to a distance of 200 marine miles. It is necessary to mention an important question related to the continental shelf and the exclusive economic zone, that of the delimitation between states with opposite and adjacent coasts. See Arts. 74 and 83 of the Montego Bay Convention. For an exhaustive treatment of the question relating to the Mediterranean sea, see LEANZA, U. (ed.) The International Legal Regime of the Mediterranean Sea, Giuffre', Milano 1987.

since no specification is made the "neutral elements" rule<sup>435</sup> applies.

To conclude, one is reminded that oils and petroleum products - of which one could instinctively think when considering this category of products - are excluded from the application of the rules of origin, not only as far as Maghreb Agreements are concerned, but also in the case of the autonomous rules applied by the Community<sup>436</sup>.

- "vegetable products harvested there"
- "live animals born and raised there"
- "products from live animals raised there"
- "products obtained by hunting or fishing conducted there"

These classifications do not seem to raise any particular problems. Since sea fishing is mentioned under f), fishing mentioned under e) seems to refer to internal waters such as lakes or rivers.

- "products of sea fishing and other products taken from the sea by their vessels"
- "products made aboard their factory ships exclusively from products referred to in subparagraph (f)"

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<sup>435</sup> See Annex I Explanatory Notes Note 2 "In order to determine whether goods originate in the Community, Morocco, Algeria or Tunisia it shall not be necessary to establish whether the power and fuel, plant and equipment, and machines and tools used to obtain such goods originate in third countries or not". The rule applies as well to products obtained by the manufacture of non originating goods ("sufficiently processed" products) on condition that the above mentioned elements do not enter into the final composition of the goods.

<sup>436</sup> See List C of the Protocol of origin annexed to Maghreb Cooperation Agreements and regulation 802/68 statement of reasons par. 12 op.cit..

Although the term "sea" used under f) is very general it shall be remarked that two other notions are contained in the Protocol (explanatory note 1), more specifically, those of "territorial waters" and "high seas" . As regards territorial waters, it is established that: "the terms 'Community' or 'Morocco' also cover the territorial waters of the Member States of the Community or of Morocco respectively"<sup>437</sup>.

This assimilation implies that sea products fished in this area would unquestionably be considered as originating in the coastal state regardless of the characteristics of the vessels performing fishing operation. Thus, in the (although unlikely) hypothesis of country A fishing in the territorial water of country B, the catch of A would be considered as originating in B<sup>438</sup>.

Beyond territorial waters sea products are originating only if the conditions concerning vessels, illustrated below, are fulfilled.

Explanatory note 6 provides that "The term 'their vessels' shall apply to vessels:

- which are registered or recorded in a Member State, Morocco, Algeria or Tunisia,
- which sail under the flag of a Member State, Morocco, Algeria or Tunisia,
- which are owned to the extent of at least 50%<sup>439</sup> by nationals

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<sup>437</sup> The same applies, mutatis mutandis, to Algeria and Tunisia.

<sup>438</sup> FORRESTER, I.S. EC Customs Law..op.cit. p. 258.

<sup>439</sup> The condition regarding ownership for Maghreb and ACP countries are less stringent than that applied to the SGP (70%). An interesting provision has been added to Lome' IV Convention as regards fishing. The Community will consider as "their vessels" those third countries' vessels chartered or leased by ACP countries provided that a fishing agreement has been offered to the Community and that the latter has not availed itself of such an opportunity and that 50% of the crew, masters and officers included, are nationals of ACP states and that the charter or lease contract has been accepted by the Commission as providing adequate opportunity for developing the capacity of ACP states to fish on its own account. This seems to answer, at least in part, to the critical

of the Member States, Morocco, Algeria or Tunisia or by a company with its head office in a Member State, Morocco, Algeria or Tunisia, of which the manager, managers, chairman of the board of directors or of the supervisory board, and the majority of the members of such board are nationals of the Member States, Morocco, Algeria or Tunisia and of which, in addition, in the case of partnerships or limited companies, at least half the capital belongs to the Member States, Morocco, Algeria or Tunisia or to the public bodies or nationals of the Member States, Morocco, Algeria or Tunisia,

- of which at least 50% of the crew, captain and officers included, are nationals of the Member States, Morocco, Algeria or Tunisia".

The same conditions are to be met by factory ships where sea products are processed.

This strict requirement (the four conditions have to be satisfied simultaneously) deviates from the neutral elements general rule illustrated above and concerns only preferential trade<sup>440</sup>.

Ignoring the distinction between high sea and exclusive economic zone the Protocol seems to indicate by the term high sea, sea beyond territorial waters without any further

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observations of McQUEEN Lomé and the Protective..op.cit.. 1982 p. 130 arguing that the conditions laid down for fishing have, as a consequence to favor the use of EEC vessels on the part of ACP states which do not possess their own fishing fleet. This should not apply to Maghreb countries due to the importance of fishing for their economies and to their tradition.

<sup>440</sup> In Regulation 802/68 only the conditions regarding registration and flag shall be met (Art. 4.f). In case 100/84 Commission v. United Kingdom 23.03.1985 (1985) ECR p.1169 the Court of Justice has indicated the criteria to be followed in the case of fishing operations conducted by vessels flying different flags and registered in different countries (in the case Polish and English).

differentiation<sup>41</sup>. It should be considered however that at the time of the conclusion of the Cooperation Agreements with Maghreb countries (1976), the exclusive economic zone was a developing notion in the international law of the sea (the Montego Bay Convention was concluded in 1982).

Should the rules contained in the Protocol be interpreted in a different way in the light of the new provisions of the law of the sea?

It is here submitted that the establishment of the exclusive economic zone as an institution of customary international law should not modify the rules set up in the Protocols as far as the origin of sea products is concerned. It is true that the coastal state has sovereign rights over living resources of sea waters in the exclusive economic zone, but this does not mean that these resources, and specifically fishing, shall be considered as originating in the coastal state. The rationale of the origin rule establishing the conditions regarding vessels is that of assuring a connection between the vessels operating beyond territorial waters and the tariff preferences' beneficiary country. Furthermore, it ensures that origin is conferred on sea products (including living organisms of sedentary species) only on this basis, excluding consideration of the place where fishing operations take place.

The application of the rule concerning vessels only in the high seas would, moreover, be meaningless in the Mediterranean sea due to the fact that no point on this sea is beyond 200 miles from the baseline of any coastal state.

Finally, the exclusive economic zone is to be proclaimed by

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<sup>41</sup>This is the definition given in the explanatory notes of the Lome' Convention (O.J. C 185 09.08.1976, Chapter II, C, p.4-5). It is clear that these notes, which do not have legal status, apply only to ACP products and could not be extended to other EEC trade partners. However, although the contractual rules of origin are a distinct set of norms. They are very similar in many respects, especially when the general criteria applied are concerned.

the coastal state. This means that different regimes could be applied before and after such a proclamation.

- "used articles collected there fit only for the recovery of raw materials".

This is the case, for example, for imported bottles of beer which, once empty, can be used for the recovery of glass. The letter of the provision seems to exclude that used article could be utilized in any other way than recovery of materials and still be considered as originating: e.g. a tire of a (non-originating) wrecked car could only be melted down and not re-employed for its original use<sup>442</sup>.

In the case of the first example given to the contrary, bottles could be employed as containers of a locally produced beer since "packing shall be considered as forming a whole with the goods contained therein.."<sup>443</sup>

- "waste and scrap resulting from manufacturing operations conducted there".

It seems clear that this is a matter of waste resulting from the manufacture of non-originating goods. In the other case, in fact, the waste would irrefutably be originating. After the manufacturing operation (which is not further defined) waste and scrap become: (i) distinct by-products or (ii) products requiring further processing to be utilized. According to Forrester<sup>444</sup> only the second type of scrap and waste is to be considered as originating. It is submitted, on the contrary, that in both cases waste and scrap are to be regarded as originating.

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<sup>442</sup> See contra FORRESTER Customs Law.. op.cit. pp.178-179.

<sup>443</sup> Explanatory note 5 which continues "...This provision, however, shall not apply to packing which is not of the normal type for the article packed and which has intrinsic utilization value and is of a durable nature, apart from its function as packing".

<sup>444</sup> FORRESTER Customs Law..op.cit. p.179.

In fact by-products would not have come into existence without the processing operation which has taken place in the country deemed of origin.

- "goods produced there exclusively from products specified in subparagraph (a) to (i)".

No specific questions seem to emerge from this category of goods. It seems clear that when e.g. agricultural product obtained in Morocco are processed there (when, for instance, orange juice is produced from oranges) the product obtained is considered as originating in Morocco.

(ii) Sufficiently Processed Products.

Products obtained in Morocco, Algeria or Tunisia by manufacturing or processing of third countries goods are considered as originating if a "sufficient working or processing" has taken place in Morocco, Algeria or Tunisia<sup>445</sup>.

What is considered as "sufficient working or processing" ? A common criterion has been identified in the change of tariff heading. More precisely, products obtained must "receive a classification under a heading other than that covering each of the products worked or processed.." (Art. 3 of Protocol). In other words a comparison is established between the materials used before the processing operation and the outcome of such an operation: the change of tariff heading means that the country has contributed to the transformation of the materials in such a way that the resulting product may acquire originating status.

Par. 3 of the same Article enumerates the working or processing operations which, regardless of the fact that the product obtained has a different tariff heading, do not confer origin. In practice, the common feature of these operations is that they do not alter significantly the nature and the qualities of the

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<sup>445</sup> Cumulation rules will be discussed infra.

products since they are rather simple operations not requiring particular skills or the use of complex techniques. Such activities comprise operations of packaging (labelling, marking, breaking up and assembly of consignment included), preservation (ventilation, placing in salt, removal of damaged part..) and simple operations of assembly of part of the article, mixing products and lastly, the slaughter of animals.

It is clear that the rule establishing that such operations do not confer origin only applies to non-originating products. Thus, while the labelling of a product wholly obtained in Morocco would not change the origin status of those goods, the assembly in Tunisia of third countries articles would not confer Tunisian origin on the assembled product. On the contrary, in the case of the mixing of products the status of originating product of one or more components seems sufficient to confer origin on the product obtained (Art. 3, p.3 under (e))<sup>446</sup>.

The Protocol provides for two categories of exceptions to the general rule illustrated above. For a number of products, contained in List A annexed to the Protocol, the change of tariff heading is not sufficient and origin is conferred if, together with the change of tariff heading, the conditions laid down in List A are fulfilled.

Products of list B are entitled originating status on the basis of criteria different to that of the change of tariff heading which is therefore not required.

It should be remarked that there is no direct link between products exported by Maghreb countries and those contained in list A and B of the Protocols of origin. This means, in other words that these lists may contain articles which would never be produced or exported by Morocco, Algeria or Tunisia. At the same time, one

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<sup>446</sup> The formulation describing mixing operations has been modified in the case of Lome' since 1979. See comments in FORRESTER Customs Law.. op.cit. p. 186.

should notice that lists A and B are very similar, if not identical, in all Protocols of origin annexed to preferential trade agreements. As compared with the general rule of the change of tariff heading the conditions laid down in lists A and B are more restrictive which could mean that these are sensitive products for the Community.

List A.

This list is divided into four columns. The first one contains the CCT heading corresponding to the products of column two. Column three contains the description of the operations which do not confer origin, notwithstanding the change of tariff heading. Column four describes the operations which confer origin if, together with a change of tariff heading, the conditions indicated therein are met.

Thus, for instance, butter (CCT heading 04.03<sup>447</sup>) manufactured in Algeria from imported milk (tariff heading 04.01) would not be considered as originating although a change of tariff heading results from such a manufacturing operation, and this because list A provides that the manufacture of butter from milk or cream is not considered an operation conferring origin .

The criteria laid down in the fourth column of list A, where manufacturing or processing operations conferring origin are described, are not always the same, but it is possible to identify a common denominator in the fact that a significant contribution on the part of the country concerned is required. This contribution can be evaluated in the terms of the processing required to obtain certain products. Thus, to establish that origin is granted only if the product is obtained by the manufacturing of

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<sup>447</sup> Reference is made here to the old tariff classification since the Protocols on origin have not yet been modified as a consequence of the adoption of the harmonized system of customs classification (see above chapter on agriculture). In the case of a modification of tariff heading, however, the criterion we are referring to here would not be modified.

specific products means that particular processing operations have to take place in the country concerned. For instance, macaroni, spaghetti and similar products are originating in Morocco only if manufactured from durum wheat, which implies that a number of operations have to be performed in Morocco (grinding of wheat into flour, manufacturing of flour into pasta..). Likewise, in the case of men's and boys' outer garments origin is warranted only if those products are manufactured from yarn, which means weaving operations to transform yarn into fabric and making up garments from the latter .

A second important type of condition is the ad valorem percentage rule. The method may be applied in different ways: (i) materials and parts used cannot exceed a given percentage of the value of the final product, this means that manufacturing operations carried out in that country shall make up for the remaining value. (ii) a minimum percentage of originating products have to be used as a percentage of the final value of the product. (iii) the value of non-originating components cannot exceed a minimum fixed percentage of the value of the final product. In certain cases conditions (ii) and (iii) have to be met simultaneously. See, for instance, the case of refrigerators and refrigerating equipment (electrical and other) (CCT tariff heading 84.15) which are considered as originating only if "the value of the non-originating materials and parts used does not exceed 40% of the value of the finished product, and provided that at least 50% in value of the materials and parts used are originating products".

In other cases the condition laid down in column four regards the quantity of originating product that shall be used. Thus cigarettes, cigars and smoking tobacco (CCT heading 24.02) manufactured from raw tobacco (CCT heading 24.01) are not considered as originating unless the product meets the condition that at least 70% of these products is originating.

List B

The products enumerated under List B are considered as originating even if no change of tariff heading results from the operation described in column three. This means that these operations are considered significant enough to consider the outcoming product as originating. Thus, for instance, prepared mustard (cct tariff heading 21.03) is considered originating if manufactured from mustard flour (same CCT heading) because this transformation is considered as a qualifying operation. Articles of mother of pearl (CCT heading 95.02) are originating if they are manufactured from worked mother of pearl although the two have the same tariff heading.

In some cases List B also requires the fulfillment of percentage criteria regarding non-originating and/or originating parts and materials. In these cases the specific conditions established have to be fulfilled to confer the final product origin status. Thus, for instance, certain chemical products (cct tariff heading 28 to 37) are originating only if the non-originating products used do not exceed 20% of the value of the finished product. Engines and motors, excluding reaction engines and gas turbines (CCT heading 84.08) are originating if working, processing or assembly has taken place "in which the value of the non-originating materials and parts used does not exceed 40% of the value of the finished product and provided that at least 50% in value of the materials and parts used are originating products". With regard to sewing machines (84.41), besides a double percentage rule concerning originating and non-originating parts, the thread tension, crochet and zigzag mechanisms are required to be originating products.

Some products are contained in both list A and B. In these cases the percentage rule has to be co-ordinated. Art. 3.2 of the Protocol provides that when the two rates are identical the common rate applies, when they are different the higher applies. In practice this means that the two lists have to be read together.

In the case of motor vehicles, for instance (CCT heading 87.06), in List A the value of the imported materials used cannot exceed 40% of the value of the finished product, whilst in List B the fixed percentage is 15 %. Thus, no more than 40% of imported materials can be used (the highest percentage). Of this 40%, however, 15% can be made up of imported products which have the same tariff heading as the final product (87.06).

The application of the percentage rule requires a definition of the value of both the materials and parts used in the manufacturing of a product and of the final product. For the value of materials and components, reference is made to the customs value at the time of importation as laid down in the Convention concerning the Valuation of Goods for Customs Purposes, or, when the origin of the parts and articles cannot be determined, to the "earliest ascertainable price paid for such products in the territory of the Contracting Party where manufacture has taken place". For the evaluation of the finished product "ex-works price" is taken into account, that is "the price which is paid to the manufacturer in whose undertaking the last working or processing is carried out, provided the price includes the value of all the products used in manufacture" less "internal taxes refunded or refundable on exportation" (art. 4 and explanatory note 7).

When the components used for the manufacture of a product have third country origin and thus their value is expressed in foreign currency, the exchange rate applicable is that in force at the time of the importation in the country where the manufacturing operation takes place and not that applicable at the time of the importation of the final product<sup>448</sup>. This is not a marginal question since a

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<sup>448</sup> This question has been dealt with by the Court of Justice in case 218/83 Les Rapides Savoyards v. Directeur General de Douanes 12.07.1984 (1984) ECR p.3105. This case concerns the free trade agreement concluded in 1972 between Switzerland and the Community and the rules of origin applied to their trade. However, it can be affirmed that - due to the identity of the norms concerning the determination of the value, to the relationship

different exchange rate applied to the components of the final product may modify their value and consequently the relationship with the value of the final product with the consequence that this latter may not comply with the conditions established in List A or B of the Protocol of origin.

iii) Cumulation Rule.

Cumulation is the exception to the general rule which confers origin taking exclusively into account products obtained or processing operations performed in a single country.

The protocols of origin annexed to the Cooperation Agreements concluded with Morocco, Tunisia and Algeria consider these countries and the Community as constituting a single territory for origin purposes<sup>449</sup>.

Thus, taking Morocco as an example, products wholly obtained in Tunisia, Algeria or in the Community undergoing working or processing in Morocco are considered as wholly obtained in Morocco. Processing operations taking place in Algeria, Tunisia or in the Community are considered as being carried out in Morocco when products are successively processed in Morocco.

In practice the origin of a product is defined in relation to Maghreb (Morocco, Tunisia and Algeria).

A few examples could help to clarify this definition.

As seen above, one of the conditions required to consider a sewing machine (CCT 84.41) as originating is that the value of non-originating materials and parts does not exceed 40% of the value

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between the customs authorities of the exporting and importing states and to the purpose of the rules - the same conclusion applies to the rules for the calculation of value provided for in the protocols of origin of the Agreement with Maghreb countries.

<sup>449</sup> For Mashrak countries only bilateral cumulation applies, that is between the Community and one of these countries. Bilateral cumulation is also provided in the Agreement with Israel, Cyprus and Malta.

of the finished product. Furthermore, at least 50% in value of materials and parts of the head must be originating as well as the thread tension, crochet and zigzag mechanisms. Let us imagine that a sewing machine is obtained in Morocco from parts and materials imported from Japan and Germany (EEC). If the value of Japanese originating parts does not exceed the established percentage the product is considered of Moroccan origin even if the value of the materials of Japanese and German origin together exceeds these percentages and even if the thread tension and the other mechanisms are of German origin.

The calculation is much more complex when third country components are incorporated in the German part which is successively manufactured in Morocco. When a value added test must be fulfilled the third country part will count against origin, unless the German part have acquired German origin. Thus, let us suppose than the value added test requires than non-originating part must not exceed 40% of the final value of the product. If this is 100 and the value of Moroccan parts is 50, the German is 40 (incorporating 25 USA value) and 20 is Japanese, the product will be considered as originating in Morocco (the country of last processing operation) only if the German parts have acquired German origin (according to the rules set up in the Protocol), otherwise the 25 value of USA origin will count against origin, and, since they shall be added to the Japanese value, the final product could not meet the 40% value added rule. If paper is manufactured in the Community from paper pulp, cut to size (CCT 48.15) then sent to Tunisia where it is rolled in sheets (48.06) it will be considered originating in Tunisia although under the normal rule, Tunisian origin would have been granted only if the paper had been manufactured from paper pulp in Tunisia.

When processing takes place in more than one country the final product is considered as originating in the country where the last working or processing operation has taken place (Art. 1.4). Insufficient working or processing as listed in Art. 3.3 (see

above) are not considered as "last working or processing" in the sense referred to above.

Cumulation allows the various phases of a working processing to be split among the countries to which the rule applies. Thus men's and boys' outer garments (tariff heading 61.01) may be made up in Tunisia from fabric originating in Algeria using Moroccan yarn and, in conformity with the rule set up in List A, (manufacture from yarn) may be considered as originating in Tunisia.

The rule may also be illustrated with reference to the percentage rule. Let us suppose that a rolling machine (tariff heading 84.16, list B) (calendar) whose final value is 100 is manufactured in Morocco and that the value of the parts originating in the Community are 10, that the value of USA components is 20 and that the value of materials originating in Tunisia is 5. The final product has Moroccan origin since it conforms to the percentage rule laid down in the list which provides that non originating parts cannot exceed 25% of the value of the final product. In this case non-originating parts are those imported from the USA, EEC and Tunisian products do not count against origin.

#### iv) Direct Transportation.

One of the conditions laid down in the origin Protocols is that originating products have to be transported directly from the country of origin to the Community. For the application of this rule Morocco, Algeria, Tunisia and the Community are considered a single territory. Thus, if a good originating in Morocco is transported into Algeria before being shipped to the Community the good is considered as transported directly from Morocco. The only exception to this rule is the possibility of transporting the originating product through a territory of a third state when "the crossing of the latter territory is justified for geographical

reasons" and a number of conditions are met. These concern the operations which are allowed to be performed on the goods which are: unloading or reloading and those aiming at maintaining the goods in good conditions. Commercial and home used are prohibited. The surveillance of customs authorities in the country of transit is also required. These provisions aim at avoiding any fraud which could change the status of originating products and the fulfillment of the above mentioned conditions is to be proved with appropriate documentation (Art. 5.2).

### 3.b) The Proof of Origin.

Once the criteria conferring the status of originating products have been defined, it must be proved that the products exported conform to the said criteria and are therefore eligible for preferential customs treatment.

To this end it is established that the customs authorities of the exporting state have the responsibility of issuing a certificate of origin guaranteeing that the product exported is originating. The reason why this charge has been conferred on the exporting state's customs authorities is that they are the best suited to take into account all the elements determining the origin of a product. The usual procedure is the following: the exporter submits to the customs authorities a formal request (a specimen is given in the in Annex V of the Protocol) for the issue of a certificate attesting the originating status of the product to be exported. The application shall be accompanied by all the documents proving the origin of the product.

The verification of the originating status is the responsibility of customs authorities which have the right to request any documentary evidence which they may need from the exporter. When the goods qualify as originating under the cumulation rule, customs authorities shall take into account the declaration issued by the exporter of the materials and parts from

which the final products have been produced (see supra) and where further information is necessary, they may require as well the information certificate for parts and materials issued to the exporter by the customs authorities of the state from which these materials have been exported.

This provision explains why Art. 1.6 makes the application of the cumulation rule between the three Maghreb countries conditional on the establishment of the necessary administrative cooperation between them.

The movement certificate is issued only when the customs authorities consider that the product is originating according to the rules laid down in the Agreement.

In the case of Maghreb countries the movement certificates used are of the type EUR.1 and EUR.2<sup>450</sup>. The EUR.2 certificate is used for products of modest value shipped by post (art.6). A sample of both certificates is reproduced in Annex V of the protocol and specific rules are established as regards their form and conditions of printing (Articles 9 and 16).

The movement certificate is, as a rule, issued when the goods are exported even if, in specific cases, a delayed issue is admitted (art.7.2). The document is then submitted to the importing state within five months from the date of issue.

The cooperation and mutual assistance between customs authorities of the exporting and importing states required for the ordinary administration of the system becomes more imperative when the contracting parties are called to assist each other in checking the authenticity of the certificates, the exactness of the information (Art. 24) or when inquiries take place (art. 26). The disputes over the authenticity or accuracy of the information and of the movement certificates are submitted to the Customs Cooperation Committee which is also competent to interpret the

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<sup>450</sup> This is the certificate used with all other Mediterranean Community's partners, with ACP countries and in the case of agreements with EFTA countries.

Protocol. This institution is composed of customs experts of the member States, officials of the Community responsible for customs questions and Moroccan (Algerian, Tunisian) customs experts. The Committee's competence is not only limited to that mentioned above but it is very extensive being "charged with carrying out administrative cooperation with a view to the correct and uniform application of this Protocol and with carrying out any other task in the customs field which may be entrusted to it" (art. 29).

The annual examination of the protocol is, however, the task of the Cooperation Council, which may make the "necessary changes" (Art. 28).

The imposition of penalties is provided for in case of fraud (Art.25).

The issue of a movement certificate is not requested for the export of small packages, goods used for personal use, or products part of a traveller's luggage (Arts.17).

Products which, after having been sent to a third country to be shown in an exhibition are afterwards sold for importation into the Community (or in one of the three Maghreb countries if these are Community goods) are eligible for preferential treatment upon issuing of the movement certificate EUR.1, indicating name and address of the exhibition, provided that the goods are originating and that the other conditions laid down in the Article are respected.

#### 4) Concluding Remarks.

To evaluate if the domestic value added requirements that products exported from Maghreb countries have to meet to be considered originating is greater than that required to avoid deflection of trade, a deep knowledge of the industrial processing required to produce certain goods would be necessary. Some general observations can however be drawn from what discussed above.

If the stricter requirements that preferential products have to fulfill are explained by the will of the importing countries of limiting preferences to products really originating in the exporting countries it could be asked whether this is consistent with the scope of fostering trade. The result of severe rules of origin may be to discourage investments<sup>451</sup> from industrial countries other than European, whose industries will take advantage from the cumulation rules even if the products they offer are less competitive than other third countries'. In fact Morocco, Algeria and Tunisia will prefer to use intermediate materials of Community origin for the manufacture of their goods, since the utilization of these intermediate products would not modify the status of originating goods of the finished products, whilst this could happen if third countries components were used instead.

As regards cumulation, the aim of this rule is to foster a degree of regional cooperation and the division of labor among the countries concerned and should encourage the creation of a processing industry in the Maghreb. However, it should be taken into account that the cooperation between Maghreb countries is almost non-existent and a serious limit exist in the fact that the rules of origin and, therefore, cumulation are not extended to oil products (Article 1) which means that an integrated industry of transformation of these products - which constitute the greatest percentage of exports in particular for Algeria - cannot profit from cumulation<sup>452</sup>.

Another significant limit are the strict rules established for certain textile products which are the most important exports for

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<sup>451</sup> KALER, M. Europe and Its 'Privileged Partners' in Africa and in the Middle East" JCMS 1982/1983 Vol.XXI pp. 199-226.

<sup>452</sup> DAMMAK, A. Perspectives d'integration maghrebine et relations Cee-Maghreb NABLI, Coopération.. op.cit. pp. 201-207.

Maghreb. Although the Protocols<sup>453</sup> of the Maghreb agreements do not contain a general rule providing for the possibility of derogation from the origin rules<sup>454</sup> derogations are possible.

As far as Morocco is concerned for example a derogation has been provided for by regulation 528/79<sup>455</sup>. This concerns the provisions of List A and, more specifically, products under the tariff heading 61.01-61.04 (boys, men's, women's and girls' outer and under garments). The derogation concerns a modification of the conditions laid down in the list which confer the status of originating products. The original version of the list (see example above) provided, in fact, that these products were to be considered as originating if manufactured from yarn, whilst the modified version provides for their manufacture from unbleached cloth. This means that a less complex processing operation is required from Moroccan textile industries (the transformation of yarn into fabric is not required). The derogation was motivated by the need to take into account "Morocco's special situation" and of enabling "the industries concerned to adapt their production to the conditions required by the protocol..".

The example is significant, in particular, if one considers that the derogation was only temporary (the regulation applied from the 1 July 1978 to 30 June 1980) and applied to a limited number of products (2,500 t. per year). This may be interpreted in the sense that the conditions laid down in the Protocol are restrictive and that the rules of origin may constitute an obstacle to trade.

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<sup>453</sup> The Protocol has been amended to take into account the modifications of the nomenclature of the Customs Cooperation Council as regarding sets, which are regarded as originating "provided that the value of the non-originating articles does not exceed 15% of the total value of the set" Regulation 561/79 Q.J. L 80 31.03.1979.

<sup>454</sup> See Art. 31 of the Protocol annexed to Lome' IV Convention.

<sup>455</sup> Q.J. L 71 22.03.1979.

**PART III**



## A) TECHNICAL AND FINANCIAL COOPERATION

Article 2 of the Cooperation Agreement specifies that "The Community and Morocco shall institute cooperation with the aim of contributing to the development of Morocco by efforts complementary to those made by Morocco itself, and of strengthening existing economic links on as broad a basis as possible for the mutual benefit of the Parties."

The two instruments of this cooperation are technical and financial assistance.

Technical cooperation indicates a range of activities relating to the transfer of know-how, such as the preparation of specific projects (pre-investment), the sending of experts, the organization of workshops, vocational training and the granting of scholarships<sup>456</sup>.

Financial cooperation is the transfer of capital through aid or loans<sup>457</sup>.

Provisions regulating financial and technical cooperation are

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<sup>456</sup> See for comparison the IV Lomé Convention where technical and financial cooperation are the object of different chapters. See Articles 275 and following. The case of the Agreement concluded with Israel in 1975 can be taken as an illustration of the distinction between the two instruments. The Agreement (O.J. L 136 1975) concluded by the Community under Article 113 of the EEC Treaty contains a single provision on "cooperation" (Article 18). This Article institutes cooperation as a factor complementary to trade in fields of mutual interest for the Contracting Parties. Mention was made of transfers of technological know-how, contact and cooperation between industries and promotion of trade. In 1978 the Agreement was supplemented by an Additional Protocol laying down the principles of economic, financial and technical cooperation and by a Protocol relating to financial cooperation establishing the amount of financial aid to be given through loans from the European Investment Bank. See Q.J. L 270 1978.

<sup>457</sup> See for a distinction MARCHISIO, S. La cooperazione allo sviluppo nel diritto delle Nazioni Unite Jovene, Università di Camerino, 19.., p.33 and FEUER, G. Les aspects juridiques de l'assistance technique dans le cadre des Nations Unies et des institutions spécialisées LGDJ, Paris, 1957 p.5.

contained in Title I "Economic, Technical and Financial Cooperation".

The idea of contributing financially to the development of developing countries is contained in the Treaty itself. More precisely, among the objectives of the Association, Article 132 (Part Four, Association of the Overseas Countries and Territories) mentions the financing of investments "required for the progressive development of these countries and territories." Provisions on financial cooperation were contained in the Association Convention annexed to the Treaty.

Financial and technical cooperation later became an element of the Community's development cooperation policy.

For the first time, financial and technical cooperation was provided for in the Yaounde' Conventions and later in Lomé Conventions.

In this case, aid is financed through the European Development Fund made up by contributions by Member States. The principles governing financial assistance of Lomé, such as the multiannual basis of aid, certain types of financial instruments, planning, co-financing and structural adjustment had first been experienced in the framework of Lomé and then applied by the Community in its relations with Mediterranean countries.

As far as Maghreb countries are concerned, financial and technical cooperation was included in the agreements only in 1976<sup>458</sup>.

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<sup>458</sup> Financial and technical cooperation and preferential trade have also been established with non-associated developing countries. See the system of generalized preferences and technical and financial aid to so-called non-associated countries. Financial and technical aid to Asian and Latin American developing countries finds its legal basis in a Community Regulation, 442/81 *Q.J.* L 48 1981. The budget allocation is however very limited (1986 280 million ecu, for a region covering more than 1,5 billion people). See NTUMBA, L.L. *L'aide financière et technique de la Cee aux pays en voie de développement d'Asie et Amérique latine (PVD-ALA)* *RMC* 1989 pp.336-346. For an analysis of technical cooperation with Latin American countries see MARCHISIO, S. *Cooperazione tecnica della Cee con l'America Latina* *Comunità Internazionale* 1984, pp.386-

The principles governing financial and technical cooperation are contained in Title I of the Agreement, while the detailed rules of application are contained in a Financial and Technical Protocol annexed to the Agreement which specifies the amount of the financial commitment, its division (apportionment) among the different financial instruments, its application and the beneficiaries of the financing and the priorities of cooperation.

Regulation 1762/92<sup>459</sup> lays down the rules for application and administration of the aid by the Community.

1) Title I of the Cooperation Agreement (Articles 2-7).

The provisions contained in Title I do not regulate economic and technical cooperation in detail, they are rather conceived of as framework rules laying down the general principles which should govern the cooperation.

The reference to the "complementarity of efforts" made in Article 2 (see above) means that financial aid is conceived as the Community's contribution to supplementing the financial intervention and actions of Morocco itself.

It seems that the Contracting Parties wished to emphasize the fact that the financial aid has no neo-colonialist connotations. The same concern appears in Article 3, where it is specified that the cooperation shall take into account the objectives and priorities of Morocco's development plans and programmes.

Article 4 contains a list of fields and activities where cooperation can take place. It mentions: production and economic infrastructure, in particular connected with industrialization and modernization of Moroccan agriculture; marketing and sales promotion; acquisition of patents and industrial property; removal of non-tariff and non-quota barriers; science and technology and

<sup>459</sup> Q.J. L181 1972.

protection of the environment; fisheries sector; private investment and the exchange of information on the economic and financial situation.

The list is not exhaustive since according to Article 4 paragraph 2, the Contracting Parties "may decide on further areas of cooperation". This allows in practice intervention and financing of any project provided its being consistent with the scope of the Agreement.

The Cooperation Council has the task of periodically revising cooperation guidelines. It is also responsible for "seeking ways and means" of cooperation and as such is empowered to take decisions.(Article 5).

2) The Protocols Annexed to the Agreement. The Structure and the Content.

2.a) Duration, Amount of Aid and Allocation.

While Cooperation Agreements were concluded for an unlimited duration, the length of application of the Protocol is five years<sup>460</sup>. This does not mean, however, that the actual period of application corresponds to this term. From the date of entry into force to the date of expiry the medium period of application is three years.

Each Protocol in fact establishes its date of expiry which is calculated on the basis of the date of expiry of the previous Protocol and is independent from the date of entry into force of the Protocol itself. Thus, for instance, the third Protocol with Morocco provides in Article 2 that the period of application expired on 31 October 1991. It should be noted that the second Protocol expired on 31 October 1986 and therefore the five years of application of the third Protocol were calculated with reference to the second Protocol. However, the third Protocol was signed only

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<sup>460</sup> The first protocol was due to expire in October 1981.

on 26 May 1988 and entered into force on the first November 1988. Thus the actual period of application of the third Protocol was 3 years.

These delays are caused by several factors.

Each Protocol provides that negotiations for renewal shall begin one year before its expiry date. However, negotiations are very slow and progress is often closely linked to negotiations of other international instruments. Such was the case of the third Protocols whose entry into force were slowed down by questions connected to the entry of Spain and Portugal in the Community and by negotiations for the renewal of the provisions concerning trade cooperation.

Moreover, ratification procedures further delay the date of entry into force of the Protocols.

This happened in the case of Israel (third Protocol) and more recently for Morocco and Syria. The Protocols negotiated with these countries were blocked by Parliament which refused to give its assent, according the procedural requirements of Article 238, for political considerations linked to violations of human rights committed by these countries.

As a result the cooperation, which is supposed to extend over a five year period is reduced to a much shorter one. This means, in other words, that the spreading out aid on a multiannual basis is of little application<sup>461</sup>. This also implies that it is very difficult to evaluate the results<sup>462</sup> of the cooperation in order to adjust the cooperation objectives and to adapt the projects to the changing requirements of the recipient developing countries.

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<sup>461</sup> However, funds which have not been committed at the end of the implementation period can be used after the expiry of the Protocol, e.g. funds can in principle be spent during an indefinite period,

<sup>462</sup> See BOURIN, P. La troisième génération de protocoles financiers avec les pays du Maghreb et du Mashrak *RMC* 1989 pp.19-24.

The first two Protocols are, apart from the amount committed, very similar. With the third Protocol, some innovations regarding instruments and priorities, were introduced. The fourth Protocols take into account the so-called renewed Mediterranean policy.

The amount of financing provided for in the Protocols varies from country to country and has been the object of a steady increase at any renewal of the financial cooperation. (see table).

The criteria applied to decide the amount of funds are probably not only objective (population, geographical extension, pnb, level of development) but are also political<sup>463</sup>.

Each Protocol sets up the distribution of the commitment. The main distinction is between financial assistance from the (i) European Investment Bank and (ii) from the EC budget. The financial contribution of the European Investment Bank is in the form of loans. Aid from the Community budget took the form of loans on special terms and grants in the first two protocols, in the third and fourth protocols aid was provided in the form of grants and contributions to risk capitals.

The loans on special terms were a form of financing granted over a long period of time (40 years). The reimbursement was due after 10 years at an interest rate of 2% (see Article 6.2 second Protocol). In practice these loans were 80% subsidized. They have since been replaced by grants. With the third Protocol, the loans on special terms were abolished and now a specific amount is committed as a contribution to risk capital formation. The contribution to risk capital was also envisaged in the first two Protocols, where it was charged on the amount committed for the loans on special terms, but this form of financing was seldom used<sup>464</sup>.

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<sup>463</sup> BRODIN, *La politique d'approche globale.. op.cit.* p.232

<sup>464</sup> Only once for Morocco (industrial development office. see annual report BEI 1980, p.63, see BOURIN *op.cit.* .

Grants are used to finance non-profit projects like technical assistance (see Article 5.2 of the fourth Financial Protocol with Tunisia<sup>465</sup>) or to finance interest rate subsidies to the EIB loans in order to reduce the interest rates that recipient countries must pay to the EIB.

The amount for risk capital<sup>466</sup> should be used for the establishment of equity capital available to Moroccan private and public undertakings and undertakings with State participation. Risk capital is granted and administered by the European Investment Bank but it forms part of the budget of the Community.

A co-financing between the EIB and the Community is thus established. The advantage, at least in principle, of this form of lending is that the conditions and terms of Community aid are more flexible than those applied by the Bank to the loans from its own resources. However, the EIB and the Community approach to lending are different. The Bank acts as a credit institutions, whilst the Community applies a developing cooperation approach.

Risk capital can take different forms: (i) subordinate loans, which are granted by the EIB and must be paid back after all other creditors have been reimbursed and (ii) conditional loans, where the repayment is subordinated to the fulfillment of the conditions laid down at the time of granting of the loan. In practice, reimbursement depends on the success of the project financed. The conditions of the loan, such as interest rate and methods of reimbursement can be modified if the project is not as profitable as expected.

Risk capital can be used for the acquisition of temporary minority holdings in the capital of undertakings established in Morocco, for the acquisition of holdings, in the form of conditional loans granted to Morocco or, with the latter's consent,

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<sup>465</sup> Q.J. L 18 1992

<sup>466</sup> For Morocco 11, for Algeria 4 and for Tunisia 6 million ecu. The fourth Protocol provides for a sensible increase. In the case of Tunisia, the amount is 15 million ecu.

to financial institutions (Article 2).

Projects feasibility can also be financed and if the outcome is negative, the promoter is not obliged to reimburse the expenses incurred in the carrying out of the study.

The introduction of risk capital must be seen in the light of an effort by the Community to foster private investment and in particular joint ventures between the Community and Moroccan undertakings.

The idea is that private investments should become a primary instrument of development since the intervention of the Community and other bilateral and multilateral providers of funds is limited and developing countries are faced with enormous problems of debt<sup>467</sup>. The role of the Community and other international institutions should that of stimulating the flow of investments. The various financing instruments provided for in the Protocols could be used to finance the same project. Thus grants from the Community budget could finance the technical or feasibility studies and projects, part of the grant could be used for interest rate payment to the loans from the Bank.

Article 7 of the third Protocol with Morocco provides that certain projects could be financed by Community aid together with intervention of Moroccan credit or development bodies and institutions, member States, third States or international organizations. It is not, however, further specified which kind of projects could be co-financed and what form this type of intervention could take<sup>468</sup>.

Co-financing has been experienced successfully in the ACP countries<sup>469</sup> and has the advantage of harmonizing developing aid at

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<sup>467</sup> GAZZO, Y. *Le monde Arabe face à l'endettement: le cas des pays du Maghreb*, Maghreb Mashrak 1986, pp.30-43.

<sup>468</sup> See on the contrary the more detailed rules contained in Lomé Conventions. Lomé III Article 200, Lomé IV Article 251.

<sup>469</sup> See *Les co-financements* Le Courier 1978 n.50.

the international level, thus avoiding waste and overlap, facilitating the financing of projects which requires large investments. In the Mediterranean, co-financing took place in conjunction with the World Bank, the Arab Funds and other bilateral aid institutions.

## 2.b) Fields of Application.

As has been seen above, Article 4 of the Cooperation Agreement with Morocco contains a very general and non-exhaustive list of projects that can be financed with the priority objectives of the cooperation being identified in each Financial Protocol.

Protocols I and II indicated as a main field of cooperation economic infrastructure, technical cooperation complementary or preliminary to capital projects (like marketing, sales promotion, participation in fairs, exhibitions etc) and cooperation for training (such as the organization of stages or granting of scholarships..).

These priorities were modified by the third Protocol which states in Article 3 the objectives of financial cooperation as:

(i) Cooperation in agriculture.

Projects in this field should aim at the diversification of agricultural production in order to reduce the food dependence of Morocco and increasing the complementarity of the different Mediterranean regions. As seen in chapter II of Part II preferential treatment does not seem to be an adequate instrument to solve the serious problems of food deficiency which these countries face. The Protocols thus indicate as the priority of the cooperation the reduction of food dependency. Another question is that of complementarity to avoid direct competition between Community and Mediterranean productions. Emphasis has been put on the development of food crops and on the development of the production through mechanization, stockage and transformations of primary products.

(ii) Cooperation in the fields of industry, training, research, technology commerce and other services.

Paragraph 2 of Article 3 specifies the priorities in each of these sectors. In reality this provision very generally mentions financing of economic and social infrastructure and industrial capital projects. It should be noted that in the first two Protocols, priority was given to the financing of capital projects in the field of industry and infrastructure.

It is well known that one of the problems in the Mediterranean region is the low level of private investment. This is explained by the economic policies of these countries, which are perceived as inadequate by the investors, by the low levels of productivity and by the dimension of national markets which are too small, accompanied by a low level of economic integration with the neighboring countries (due for example to the poor quality of transport communication).

The primary scope of industrial cooperation, as renewed by the third protocols, is therefore to foster investments, promote joint-ventures, support small and medium-sized enterprises and finance actions preliminary to the investments, such as promotion of contacts with investors, exchange of information and research.

In the service and industrial sector priority is given to the promotion of joint ventures between firms from Member States and Moroccan firms, promotion of investment, contribution of private capital. In the field of science and technology financing should be used to expand training and research capability.

In the trade sector financing aims primarily at developing contacts between firms and research institutions.

(iii) Regional and multilateral cooperation.

Regional cooperation is not a new field of intervention but rather a way of operating through the financing of projects involving more than one country.

Financing of projects at regional level was introduced with the third Protocol. However, promotion of regional cooperation is provided for in other Articles of the Cooperation Agreement<sup>470</sup>.

The financing of projects with funds provided for in Protocols concerns the preparation of projects, transport, telecommunication, energy, to be financed also by other sources (BEI, World Bank); technical assistance to regional action, regional institutions, vocational training institutions, environment, interest rate subsidies and loans of the EIB.

The reference to regional cooperation as a financing priority has, peculiarly, disappeared in the fourth Protocols. This can be explained by the fact that the financial cooperation provided for in the Protocols has been supplemented by another form of financial support for all the third mediterranean countries focusing on intervention of regional interest and to finance projects concerning the environment<sup>471</sup>.

In the fourth Protocols environmental protection has become one of the priority fields for projects to be financed. The term

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<sup>470</sup> Article 3 mentions regional cooperation as one of the elements to be taken into account in achieving the aim of contributing to the development of Morocco. Article 27 provides for the possibility of derogating from the application of the most-favored nation clause by Morocco in the case of measures adopted for the economic integration of Maghreb, or in the case of measures benefitting the developing countries (cooperation south-south) Finally, the definition of rules of origin takes into account the possibility of a transformation of products taking place in the three countries. It should be remembered that in February 1989, Tunisia, Algeria, Morocco, Libya and Mauritania signed the Treaty establishing the "union du Maghreb Arabe" (for Mashrak CCA). This regional cooperation was viewed with interest by the Community as a way for each Maghreb country to enlarge its market. For an analysis of these provisions with reference to the integration of Maghreb see DAMMAK, A. *op.cit.* Perspectives d'integration Maghrebine et relations CEE-Maghreb and the discussion on this report NABLI, M.K. Coopération CEE-Maghreb Colloque, Tunis 1979, Centre d'Etudes et de Recherches et de Publication de la Faculté de Droit et des Sciences Politiques et Economiques de Tunis, Tunis. See also LECA, J. (ed.) Le Grand Maghreb Economica, Paris 1989.

<sup>471</sup> Regulation 1763/92 Q.J. L 181 1992.

environment is used in a broad sense and includes demographic policy and family planning programmes. In this field, financing attempts in particular to support technical assistance and contribute to investments (see Article 3.2 fifth indent).

An important innovation introduced with the fourth Protocols is the contribution to projects in the framework of a "structural adjustment programme" (the reform of economic structures and policies undertaken by the Mediterranean countries). In other words, the Community commits a specific amount (300 million ecu for a period ending the 31 October 1996<sup>472</sup>) to support economic reforms in the form of grants to finance technical assistance and the programmes accompanying the reforms (to moderate the social consequences of the reforms. However, this finding is conditional upon the recipient country engaging in specific economic policy reform<sup>473</sup>).

The Protocol indicates two criteria for eligibility: i) the carrying out by the country concerned of a reform programme which shall be approved by the Bretton Woods institutions and ii) the economic situation of the country evaluated on the basis of level of indebtedness and debt service burden, balance of payment situation and availability of foreign currency, budgetary situation, monetary situation, gross national product (per capita) and level of unemployment.

The financing aims in particular at supporting import programmes to strengthen production capacity and to minimize

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<sup>472</sup> The original proposal of the Commission was 600 million ecu.

<sup>473</sup> Aid linked to structural adjustment was introduced in the fourth Lomé Convention. The Parliament express its doubts whether Community financing in the context of development cooperation should be used for supporting structural adjustment programmes, especially because it causes "a diversion of resources from the neediest sectors of society". European Parliament Report A3-0016/92 p.10.

negative consequences deriving from this reform and to finance technical assistance.

The contribution of the Community is not financed with funds provided for in the Protocol but rather with a specific amount which is committed in the budget. A limited proportion of the aid committed in the Protocols, however, can be used for this purpose (Article 4.3)

The principles to be applied while implementing projects in the framework of structural adjustment programmes are laid down in Regulation 1762/92.

## 2.c) Beneficiaries of Financial and Technical cooperation.

The principal beneficiary is the Moroccan state and other potential beneficiaries, which have some institutional links with Morocco such as official Moroccan development agencies, private agencies working in Morocco for economic development, undertakings carrying out their activities in accordance with industrial and management methods and set up as legal persons according to Moroccan legislation; groups of producers who are nationals of Morocco and, exceptionally, when such groups do not exist, the producers themselves; scholarship holders and trainees sent by Morocco under training schemes financed by the Community (see Article 3).

Until the third Protocol, requests for financing were only presented by the government of Morocco acting either on its own account or on behalf of the other beneficiaries.

The fourth Protocol establishes that requests for financing can be submitted directly by the other possible beneficiaries with the approval of the government of the country. When a loan by the Bank is granted to a beneficiary other than Moroccan state, the latter has to provide a guarantee as a condition to the granting of the loan.

The decision regarding the request for financing is the responsibility of the Commission which "shall appraise the requests ..with the competent Moroccan authorities and other beneficiaries in accordance with the objectives referred to in Article 3..".

Morocco shall accord the "regime of the most favored bilateral donor or development organization"<sup>474</sup> as regards fiscal and customs arrangements applied to contracts awarded for the execution of projects or operations financed by the Community (Article 14).

#### 2.d) Programming.

One of the new features brought into being by the third Protocol was the introduction of the "indicative programme"<sup>475</sup>. According to the first two protocols, the Community and Morocco were to agree on the specific objectives to be financed. In practice, a list of projects was drawn up by the Cooperation Council<sup>476</sup>. This list did not commit the parties.

The third Protocol, in Article 9, established that by mutual agreement the Community and Morocco are to draw up an indicative programme containing the specific objectives of the financial and technical cooperation, the priority sectors of intervention and the action envisaged. Before drawing up such a programme, the parties examine the priority of development of Morocco and the sectors of Community contributions, considering financing of other bilateral and multilateral providers of funds. The programme can be revised by mutual agreement if there is any change in the

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<sup>474</sup> See RAUX, J. *Chronique des accords externes de la Cee* RTDE 1984 p. 489.

<sup>475</sup> Programming was provided for in the Association set up in the Treaty (article 132) and in the Yaoundé and Lomé conventions. In the case of Lomé the indicative programme is submitted by each ACP State to the Community and it is object of an exchange of views. It is then adopted by mutual agreement. See MAGANZA, G. La Convention de Lomé MEGRET Droit de la CEE Vol. 13, pp.270-275.

<sup>476</sup> See BOURIN, P. *La Troisième génération de protocoles financiers avec les pays du Maghreb et du Mashrak* RMC 1989, pp.

economic situation of Morocco or of its development objectives and priorities<sup>477</sup>.

### 3) Sources of Financing.

As mentioned above the sources of financial cooperation in the framework of the Protocols with Maghreb countries are the European Investment Bank and the Community. This system has the advantage of offering the Maghreb countries different financial facilities to respond more flexibly to the various requirements of development.

The softer form of assistance, granted from the EC budget, aims at financing technical assistance, while the Bank loans are mainly addressed to economic infrastructure (road, ports, water supply), projects for the development of energy resources and for the expansion of productive sectors (agro-industry projects, small and medium sized enterprises)<sup>478</sup>.

#### 3.a) The European Investment Bank.

##### 3.a.i) The Legal Status of EIB Financial Aid to Developing Countries.

Article 3(j) and, more particularly, Article 129 (Part III of the Treaty, Policy of the Community) provide for the establishment

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<sup>477</sup> Programming was introduced in Lomé III. According to Article 215 an indicative programme is to be submitted by the ACP countries on the basis of their development objectives and it is adopted by mutual agreement between the Community and the ACP States. It seems that the programme in the third Protocol with the Mediterranean countries is drawn up by mutual agreement whereas in Lomé III at least the draft is prepared by the ACP countries.

<sup>478</sup> See for comparison in Lomé I Article 43 where it was specified that Bank loans and risk capital should finance projects of investments in the productive sector, industry, transportation and mines.

of the European Investment Bank. The Bank is an independent and non-profit making organization whose task is that of contributing to the development of the Community<sup>479</sup>. The structure of the Bank and the technical rules governing its functioning are defined in the Statute annexed to the Treaty.

The Bank, which has its own legal personality distinct from that of the Community (Article 129 of the Treaty), has its own institutional organization<sup>480</sup>, budget and sources of financing which are separate from those of the Community and it is cannot considered an organ of the EEC<sup>481</sup>. Its institutional task is

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<sup>479</sup> Article 130 reads "The task of the European Investment bank shall be to contribute, by having recourse to the capital market and utilizing its own resources, to the balance and steady development of the common market in the interest of the Community.."

<sup>480</sup> Members of the Bank are all the Member States of the Community. The organs of the Bank are the Board of Governors, composed of the Ministers of Finance of each Member State, the Board of Directors and the Management Committee. The Board of Governors is the chief organ of the Bank whose task is to lay down general directives of the Bank credit policy. The Board of Directors, composed of officials chosen on the basis of their competence and professional qualifications among high officials of financial institutions, or financial, industrial and economic ministries, has the responsibility of taking decisions for the granting of loans, guarantees, raising loans, fixing the interest rate of loans and ensuring that the Bank's administration conforms to the Treaty, Statute and directives of the Board of Governors. The Management Committee fulfills executive tasks and prepares the decisions of the Board of Directors. See SPIROU, C. La banque européenne d'investissement Schulthess Polygraphischer Verlag, Zurich, 1990, pp.45-49.

<sup>481</sup> MOSCONI, F. La Banque Européenne d'Investissement in MEGRET Droit des CEE Vol. VIII, p. 5. ID. La banca europea per gli investimenti Cedam, Padova 1976 p.15; the mandate given to the Bank by the Community for the administration of aid in the EC budget is proof of the distinction between the Bank and the Community; PUGLISI La Banca Europea per gli Investimenti Pennacchini, Monaco, Ferrari Bravo (ed) Manuale di diritto comunitario Utet, Torino, 1984, p. 235. See also LEANZA Banca europea per gli investimenti QUADRI, MONACO, TRABUCCHI Commentario Cee Milano, Giuffrè, 1965, pp.996. See case 85/86 Commission v. EIB, ECR (1988) p.1281 paras. 28-30.

functional to the scope of the Community<sup>482</sup>.

The Bank is first mentioned in Article 3.j of the EEC Treaty. Article 130 EEC Treaty specifies that the Bank shall contribute to the development of the common market in the interests of the Community. In particular the activities of the Bank were directed towards the financing of projects in less developed regions in the Community, for the conversion of undertakings and for projects of common interest to several Member States. The resources of the Bank come from the capital provided by the Member States and from the funds it borrows from the international capital markets.

If the role of the Bank was originally limited by statute to interventions within the Community, later, the actions of the Bank were extended to financing projects outside the Community in the framework of the Association and Cooperation Agreements concluded by the Community with ACP and Mediterranean countries<sup>483</sup>.

It could be questioned whether the role of the Bank has been modified by these interventions outside the Community.

It should be noted that the Statute of the Bank has not been amended<sup>484</sup>. One of its provisions, Article 18, mentions the possibility for the Bank to grant loans to finance investment projects carried out, in whole or in part outside the territory of the Community. This provision could therefore constitute the legal basis for the Bank's interventions in third countries. As it has

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<sup>482</sup> See TIZZANO, A. Sulla natura giuridica della BEI foro It. 1988, pp. 236-242. "...la Banca é un segmento specifico ed autonomo dell'apparato organizzativo comunitario" p. 240.

<sup>483</sup> The first interventions of the Bank outside the Community took place in the context of the Yaoundé conventions. See ALBERT, M., *La Banque Européenne des investissements: évolution et continuité RMC* 1965, 448, where the author emphasizes that the Bank action in these countries had the effect of limiting the financial burden on the Member States' or Communities' budgets since the Bank operates having recourse to capital market resources.

<sup>484</sup> The Statute was concluded by Member States, is an international agreement having the same rank as the EEC Treaty.

been observed<sup>485</sup>, the Agreements concluded with ACP and Mediterranean countries certainly require a more extensive and systematic intervention of the Bank if compared with the financing of single investment projects as provided for in Article 18 of the Statute. It has been therefore submitted that the actions of the Bank within the framework of the Lomé conventions and in the Cooperation Agreements with the Mediterranean countries, find their legal basis in the internal agreement concluded between the Member States<sup>486</sup> which determines the financial means of the Bank in its interventions in the ACP countries<sup>487</sup> (Lomé) and in the Association or Cooperation Agreements which have been ratified by the Member States<sup>488</sup> (Maghreb).

Since the Bank is not a part of the above mentioned Conventions and Agreements, is the Community which assumes an obligation vis-à-vis the "associated" countries<sup>489</sup>.

However, in the practice, Article 18 of the Statute is still referred to as the basis of the action of the Bank in third countries. This is confirmed by the Europe Agreement with some Eastern European countries. Article 98 of the Agreement with Hungary reads; "Hungary shall benefit from temporary financial assistance..including loans from the EIB according to the provisions of Article 18 of the Statute of the Bank..".

Article 130W.2 of the Treaty on European Union, as approved

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<sup>485</sup> MOSCONI La banca.. op.cit. p. 278.

<sup>486</sup> It should be remembered that only the Member States of the Community are members of the Bank.

<sup>487</sup> MOSCONI, La Banca.. op. op.cit. p.278-279. For the methods and principles of EIB intervention in the ACP countries in Lomé IV see the internal agreement creating the seventh EDF Q.J. L 229 1991

<sup>488</sup> See KÁSER, J. The European Investment Bank: Its Role and Place within the Community System Yb.Eu.Law 1984 pp.303-322 p.310.

<sup>489</sup> If the EIB was an organ of the Community this would not be necessary, since the act of the organs are attributed to the Community.

in Maastricht in December 1992, confirms that the legal basis of the EIB actions with developing countries is its Statute when it establishes that the Bank shall contribute to the implementation of the measures in the field of development cooperation (see Article 130U) "according to its Statute".

This Article would codify the inclusion of the Bank in the development cooperation policy of the Community.

An agreement is concluded between the Bank and the Community where the Bank commits itself to provide the funds required. More precisely the amount which is to be committed for each Financial Protocol is the object of a decision by the Board of Governors upon a request of the Council of Ministers. There is a limit which is established by the Board of Governors for the total amount of EIB resources that can be committed outside the Community<sup>490</sup>.

The commitment is authorized by the Board of Governors, acting unanimously on a proposal from the Board of Directors.

### 3.a.ii) The Bank's Role in the Management of Financial Aid.

EIB intervention takes the form of loans made from its own resources<sup>491</sup>. The criteria and the rules followed by the Bank in the granting of loans to Maghreb countries are those laid down in its Statute and which apply for the Bank's intervention within the Community<sup>492</sup> (Article 6.1 third Protocol).

This means that the Bank acts as a financial institution

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<sup>490</sup> For the period 1985-1991 3000 million ECU. See EIB Information n.57 1988.

<sup>491</sup> The sources of the EIB funds are its own resources and what it borrows on the capital market. See Statute Article 4 and 6 and Article 22. The capital of the Bank is made of the contributions of the Member States.

<sup>492</sup> See BERMEJO, R. BEI: Banque Européenne de développement Rev.Int. Droit Econ. 1987 pp.447-530, p.501 and 1988 pp.37-67.

although it remains a non-profit making organization. Therefore, every project undergoes an examination by the Bank's experts to verify its financial and economic viability and the impact on the environment. The appraisal of the impact on the environment is the approach followed by the Bank in its actions within and outside the Community. The role of the Bank in this respect in developing countries is significant especially in cases where the country concerned has not developed environmental standards, or where the pressure for economic growth is stronger and where there is limited experience in examining the consequences of projects in depth<sup>493</sup>.

Loans are not "tied": this means that there is not obligation on the beneficiary to purchase certain supplies or services in the Community. Competitive bidding, at national or international level is established. Undertakings from the EEC Member States and Mediterranean countries may participate in international tenders,

. The financing of projects in these countries is subject to a maximum amount defined in each Financial Protocol. This is a ceiling and does not mean that the whole amount has to be spent.

The duration of the loans varies and depends on the characteristics of the projects financed. It can vary from 10-12 years to 15-20 years for infrastructure projects.

The conditions of loans and the rates of interest are also fixed on a case by case basis,<sup>494</sup> but the rate depends on the cost of borrowing, although in the first two protocols it was provided that part of the grants were to be used to provide for an interest subsidy of 2% on the EIB loans in order to soften the conditions applied by the Bank.

The Bank does not finance a project in its entirety, in fact EIB loans are part of a financial scheme which includes the participation of other development banks and the contribution of

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<sup>493</sup> EIB 25 Years (1958-1980) p.51.

<sup>494</sup> Mashrak countries enjoy more favorable conditions as compared with Maghreb countries due to their lower level of development.

the promoters of the project.

When loans are granted to beneficiaries other than the associated States the Bank requires a guarantee from the State<sup>495</sup> or from other adequate guarantors. The Community provides for a "blanket guarantee" for loans contracted in ACP and Mediterranean countries.

The global loan scheme is a form of intervention, which aims in particular at fostering the activities and development of small and medium sized undertakings, first experienced within the Community where it was introduced in 1968<sup>496</sup>. In this case the Bank opens a line of credit to financial institutions which divide up the credit in smaller amounts to finance small and medium sized ventures. The advantage is that the institutions and the banks which receive the credit are better suited to evaluate, according to financial, technical and economic criteria the single projects to be financed<sup>497</sup>.

For each project a loan contract is signed between the Bank and the beneficiary. The contract contains a clause indicating the Trade Tribunal of Zurich as the competent forum in the case of a dispute between the Bank and the beneficiary of financing.

Besides the ordinary operations financed by the Bank on its own resources, the Bank also manages other funds from the EC budget. These operations are accounted for separately from the

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<sup>495</sup> See Article 18.3 , the granting of credits to member States is considered as the granting of credits to undertakings, the Bank is required to obtain special guarantees for loans to subjects different from Member states, See also Article 29.1 Statute and MOSCONI, La banca.. op.cit. p.37.

<sup>496</sup> SPIROU, op.cit. p.54.

<sup>497</sup> Global loans have been granted in Morocco to the Office pour le développement industriel, to the Banque Nationale pour le Développement Economique and to the Caisse Nationale du Crédit Agricole. See Bei Information 1988 n.57, p.7.

ordinary Bank activities<sup>498</sup>.

In this respect, the Bank is responsible for the granting and the administration of the funds from the Community's budget committed for risk capital formation, for the administration of interest rate subsidies and for special loans.

As mentioned above, by means of these operations the EIB and the Community carry out a form of co-financing, with the EIB granting loans subsidized by the Community, which requires cooperation between the two institutions.

Regulation 1762/92 establishes two different procedures for financing decisions which are related, respectively, to interest-rate subsidies and risk capitals.

For interest-rate subsidies, the Bank submits a financing proposals to the Commission and to a special Committee, made up of representatives of member States (Article 9 Committee<sup>499</sup>). The Committee issue an opinion on the Bank's proposal. On the basis of this consultation the Commission adopts a draft decision authorizing (or refusing) the funding of interest-rate subsidies and submits it to the Med Committee (as set up by Article 6). Only in the case of a positive decision, the Bank may grant the loan.

For risk capital financing projects, the procedure is simplified, since the decision is taken, after consultation with Article 9 Committee, by the Commission.

Regulation 1762/92 modifies considerably the procedures applied under Regulation 3973/86 which governed the administration

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<sup>498</sup> In a special section created in 1962 by a decision of the Board of Governors, when for the first time the Bank acted on a Commission mandate in Turkey. See SPIROU op.cit., p.66.

<sup>499</sup> It is interesting to note that in the proposal of the Commission the Article 9 Committee had disappeared.

of aid for the second and third Protocols<sup>500</sup>.

Under that Regulation a draft financing decision for risk capital and for interest-rate subsidies was submitted by the Bank to the Committee of Article 9. The Commission merely expressed its opinion. In the case of unfavorable opinion by the Committee and the Commission, the question was brought before the Council. Only when the Council confirmed the Committee opinion the Bank had to withdraw its proposal. For interest-rate subsidies the last decision was taken by the Board of Directors of the Bank.

The financing of the Bank takes place in the field of infrastructure and in particular of transport (to improve communications between the countries of the region and to promote trade), energy and agriculture<sup>501</sup>.

For instance, in Algeria, in the framework of the first and second Protocols EIB loans were granted to help finance the road linking Jijel and the city of Constantin and the motorway between Alger and Blida (135 million ecu).

In the energy sector loans have financed the expansion of electricity generating capacity. Loans from the third Protocol have been used to improve the sewerage system of Algiers and irrigation facilities in the Mitidja plain. In Tunisia in the framework of the first and second Protocols the loans were employed in particular in the agricultural and agro-industrial sector with the financing of farm complexes for the improvement of the production of milk and meat and the construction of a dairy building fertilizer storage centre. Global loans for the development of small and medium-sized ventures were channelled through the Banque de Développement Economique de Tunisie and the Banque Nationale de Développement

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<sup>500</sup> In reality, Regulation 3973/86 was the correct legal basis only for the second Protocols (see preambles, where express reference to these protocols was made). The new regulation has been enacted for the implementation of financial and technical protocols with third mediterranean countries, without further specifications.

<sup>501</sup> See Annual Report 1985 p.66.

Agricole (44 and 50 mecu respectively). Thirty-two million ecu helped to finance the railway line between the Gafsa phosphate deposits and the port of Gabes.

In the third Protocol loans were used in the tourism sector. For Morocco loans committed in the first two protocols financed the construction of facilities in the ports of Jorf Lasfar, Safi and Agadir and Mohammedia, to improve shipping, and therefore trade, in phosphate rocks. Eighteen million ecu were used to help finance the building of the dam of Ait Chouarit to provide irrigation and water supplies to the city of Marrakech and 34 million were allocated to the hydroelectric power station of the same dam. Eight and a half millions ecu financed global loans<sup>502</sup>.

### 3.b) The Community Budget

#### 3.b.i) The Distinction Between Compulsory and Non-compulsory Expenditures.

Since the entry into force of the "second generation" of Protocols with Mediterranean countries, the second source of financing of cooperation in Maghreb countries is the Community whose contributions have replaced those from the Member States which financed cooperation under the first Protocols.

The amounts committed by the Community budget take the form of grants and risk capitals, which in the third Protocol have replaced loans on special terms.

The entry of these amounts in the EEC budget<sup>503</sup> means that the

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<sup>502</sup> See EIB Information n.57 1988, EIB Annual Report 1989.

<sup>503</sup> It should be noted, by way of comparison, that cooperation within the framework of Lomé is financed by loans of the European Investment Bank and by contributions from the Member States through the European Development Fund. This was set up by an agreement concluded by the Member States which had the same period of application as the Convention. The EDF is administered by the Commission on the basis of a Regulation which also provides for the setting up of two Committees of representatives of Member States who give their opinions on the financing proposals of the

Community has the exclusive competence to conclude the Protocols and that it is the sole party responsible for the administration of funds<sup>504</sup>.

In relation to the presentation of the funds in the budget, a first distinction should be made between the funds committed in the Protocols, which are compulsory expenditure and the funds "hors Protocols" which are classified as non-compulsory expenditure.

The funds of the financial Protocols enter the budget without distinction among the Mediterranean countries but under the heading "Financial Protocols with the southern Mediterranean countries". The Protocols with Malta and Cyprus, on the contrary, constitute two separate headings. The differentiation among the countries, with the indication of the specific sums allocated for each single country are reported in the column entitled "remarks".

Each year a specific commitment appropriation is authorized. This is contained in the remarks column together with the amount of payment appropriations expected to be needed.

The funds under the Protocols, in fact, as all the appropriation for multi-annual activities, are distinguished in commitment and payment appropriations<sup>505</sup>.

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Commission and the EIB. As for financing to developing countries in Asia and Latin America, aid is financed by the Community budget (chapter 93) but there is not multiannual programming.

The entry of the EDF in the EEC budget was proposed by the Commission in 1973 and again in 1979, but has not been so far accepted by the Member States.

<sup>504</sup> "...in so far as aid granted to a non-member country by an Agreement with that country is financed from the Community budget, only the Community has the authority to conclude such an Agreement. This hold true whatever the source of the funds contributing to the Community budget. However, it may transpire that Agreement between the Community and non-member countries also contain provisions falling within the competence of member States requiring..Member States' participation in the Agreement in accordance with their respective constitutional procedures." See Written question 396/77 Q.J. C 277 1977 p.7.

<sup>505</sup> See SOPWITH, C. *Legal Aspects of the EC Budget CMLRev.* 1980, pp.315-347, STRASSER, D. *Les finances de l'Europe LGDJ*, Paris 1990.

Commitment appropriations cover the total cost of the legal obligations entered into. In practice they indicate a ceiling of expenditure that can be authorized in the financial year.

Payment appropriations are<sup>506</sup> the credits which allow to meet the obligations undertaken in that financial year or in previous financial years. This explains why the appropriations for payment can be higher than commitment appropriations.

Within the framework of cooperation with Mediterranean countries other appropriations enter the budget, but under a different heading and article (in 1991 budget B7-408, former item 8670). These are the operations to promote the implementation of an overall approach in the Mediterranean and are to be distinguished from operations to promote regional cooperation and operations to promote investments. As mentioned above these can be described as non-compulsory expenditures.

The distinction between compulsory and non-compulsory expenditure is of fundamental relevance in the procedure of adoption of the EEC budget. The power of the European Parliament to make changes in the budget is based on this distinction introduced by the Budget Treaty of 1970 with an amendment of Article 203.4 and applied for the first time in the 1975 budget<sup>507</sup>.

The European Parliament has in fact the power to amend the so-called non-compulsory expenditure but only to propose modifications for compulsory expenditures<sup>508</sup>. In amending non-compulsory expenditures the Parliament must respect the maximum rate of increase annually fixed by the Commission on the basis of

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<sup>506</sup> See financial regulation 21 December 1977 applicable to the general budget of the European Communities, Q.J. L 356 1977, Article 1

<sup>507</sup> The second budgetary Treaty of 22 July 1975 maintained the distinction between compulsory and non-compulsory expenditure.

<sup>508</sup> EHLERMANN, C.D. Applying the New Budgetary procedure for the First Time (article 203 EEC Treaty) CMLRev. 1975 pp.325-343 and KAPTEYN, The European Parliament, the Budget and Legislation in the Community CMLRev. 1980, pp.386-405.

economic data<sup>509</sup>.

According to Article 203 compulsory expenditure is that "necessarily resulting from the Treaty or from acts adopted in accordance therewith". This definition is not sufficiently clear and has given rise to conflicting interpretations on the part of the three institutions involved. A compromise was finally reached in the Joint Declaration of the Commission, Council and Parliament adopted in 1982<sup>510</sup> where the three institutions defined as compulsory expenditure "such expenditure as the budgetary authority is obliged to enter in the budget to enable the Community to meet its obligations, both internally and externally, under the Treaties and acts adopted in accordance therewith"<sup>511</sup>.

This means that the adoption of a legal act is not per se sufficient to classify the expenditure it provides for as compulsory, but the act must in addition contain precise financial commitments and the principles and criteria of its use, by this act the Community undertakes an obligation as regards third parties

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<sup>509</sup> These are trends in gross national products in the EEC, the average variation in national budgets and trends in the cost of living in the preceding financial year (article 203.9). The rate can be increased by agreement between the Council and the Parliament on the majority determined in Article 203.

<sup>510</sup> Q.J. C 194 1982

<sup>511</sup> The Court of Justice in case 204/86 Greece v. Council 27.09.1988 (1988) ECR p. 5323 was required to pronounce on a question involving the power of Parliament in the budgetary procedure (Greece argued that the transfer of credits from chapter 100 to the chapter cooperation with Turkey required the assent of the Parliament since the credits in article 100 were classified as non-compulsory expenditures whereas in the new chapter they were classified as compulsory expenditures). The Court did not enter in the merit of the question and made reference to the Joint Declaration holding that the problem of classification must be solved in the framework of the conciliation procedure. See JAQUE, J.P. Le parlement européen RTDE 1989 pp. 225-243, spec. pp. 237-239.

(third countries, individuals, corporations or Member States)<sup>512</sup>.

In practice the act which constitutes the legal basis of the expenditure must provide for a financial commitment which does not give the authority competent for its administration any discretionary power over whether to engage the funds.

A related question is whether the entry of an appropriation in the budget is sufficient for the execution of the funds.

It is clear that this is not merely a question of terminology but one involving the power of the institutions in matters of the budget and, in a certain way, of legislative initiative.

According to the Parliament the budget is a sufficient legal basis to spend the credits which are entered therein. In other words, the creation of an item is sufficient to initiate a new action.

For the Council, on the contrary, the budget is a record of engagements taken by the Community, it is the expression of a policy and the payments are possible only if based on an act of the Council.

For the Commission the budget is not in itself a complete legal basis since another legal act is required which lays down the conditions and use of the funds.

If the theory of the European Parliament was correct, this institution would have a power of initiative, with the creation of new items, albeit limited to non-compulsory expenditure<sup>513</sup>.

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<sup>512</sup> DE WOST, J.L., LEPOIVRE, M. La déclaration commune du Parlement Européen du Conseil et de la Commission relative à différentes mesures visant à assurer un meilleur roulement de la procédure budgétaire, signée le 30 juin 1982 RMC 1982, pp.514-; DANKERT, The Joint Declaration by the Community Institutions of 30 June 1982 on the Community Budget Procedure CMLRev 1983 pp.701-712.

<sup>513</sup> This question arose in the context of aid to non-associated countries. In 1976 a new line of credit for financial aid to non-associated countries was entered into the budget. According to the Commission this was enough to allow the execution of the programme of aid, whereas the Council held that legislative intervention by the Council was required, in this case a Regulation based on Article 235. An ad hoc procedure, whereby the Council approved the

The financial Protocols lay down the specific financial commitments of the Community towards its Mediterranean partners. The corresponding appropriations in the budget are therefore compulsory expenditure. This does not mean, in the case of financial and technical cooperation that the Community is obliged to utilize the funds committed. In other words if the criteria laid down in the protocols are met, the Commission would not have any discretion in granting the aids, but this does not mean that just any projects could be financed.

3.b.ii) The Administration of Aid by the Commission.

For the implementation of the financial and technical Protocols concluded by the Community with Mediterranean countries, in 1986 the Community adopted Regulation 3973/86<sup>514</sup> laying down the detailed rules for the administration of aid by the Community. As mentioned above this Regulation referred explicitly to the second Protocols with Maghreb and Mashrak countries although it was also applied to third Protocols. A new Regulation for the application of the Protocols was adopted the 29 June 1992<sup>515</sup>.

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aid programme of the Commission, was then adopted until the adoption of Regulation 442/81 of the Council (Q.J. L 48 1981, p.8. See the Commission point of view regarding the Commission's competence on the basis of Article 205 in Q.J. Débat du Parlement Q.J. Annex 221 1977 75-76.

<sup>514</sup> Regulation 3973/86 concerning the application of the Protocols on financial and technical cooperation concluded between the Community and Algeria, Morocco, Tunisia, Egypt, Lebanon, Jordan, Syria, Malta and Cyprus. Q.J. L 370 1986. Legal basis Articles 235 and 209. Israel is not included because this country does not receive aid from the Community budget, only loans from the Bank. The reason is to be found in the more advanced level of development of this country as compared with the other Mediterranean countries.

<sup>515</sup> Regulation 1762/92, see Q.J. L 181 1992.

The task of the Commission, which is the competent institution for the administration of aids<sup>516</sup>, is that of preparing the decisions on projects to be financed. These decisions shall contain an explanation of the relevance of the project in the framework of the development objectives of the recipient country, the effects that such projects should produce in relation to the resources invested in the project and the measures aimed at promoting the participation of undertakings of the recipient country.

The Commission is assisted by a Committee, set up by Article 6 of Regulation 1762/92 and hence designed as "Article 6 Committee", consisting of representatives of the governments of Member States and chaired by the Commission. A representative of the EIB takes part in the proceedings without voting right.

The Committee votes by qualified majority and the votes of the Member States are weighted according to what is established in Article 148.2 EEC Treaty.

The task of this Committee is to provide an opinion on draft decisions submitted to it by the Commission.

The Committee created by Article 6 of Regulation 1762/92 is not peculiar to the administration of aid to Mediterranean countries. Similar Committees also exist in the framework of financial aid to non-associated developing countries and food aid<sup>517</sup>. More generally these organs can be compared to the so-called

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<sup>516</sup> The general rule is that the Commission cannot delegate to an external agency the administration of the budget. An exception is provided for in the Financial Regulation (Article 105.3) applicable to the Community budget whereby the Commission confers a mandate to the EIB to administer risk capitals and interest-rate subsidies.

<sup>517</sup> Regulation 442/81 Q.J. L 48 1981. The procedure followed by the Committee of Article 11 is very similar. However, when the Council has not expressed its position on the decision of the Commission within the period established (two months) the Commission may submit a new project to the Committee. For food aid see Regulation 3331/82 Article 5. For comments see CRETIEN, Y. La politique d'aide alimentaire de la Communauté européenne MEGRET, Le droit de la CEE, Vol. XIV, op.cit. pp. 128-178, spec. 149 ff. and L'aide financière et technique aux pays en voie de développement

"management Committees" which were first created in the Community in the field of agricultural policy, whose task is that of giving an opinion on the projects of Regulations submitted by the Commission acting on powers delegated by the Council. In practice, through these Committees Member States exert a control over the Commission.

Council Decision 87/373 of 13 July 1987 lays down the rules governing the procedures followed by the Commission when exercising implementing powers conferred by the Council. Three different procedures are established but it is not specified to which cases the different procedures apply<sup>518</sup>.

The procedure followed in Regulation 1762/92 corresponds to the second procedure, variant b, of "comitology".

The Commission adopts the draft measures submitted to the Committee when the latter opinion is positive. In the case that the Committee does not give an opinion or when this is negative, the draft measures are submitted to the Council which shall act within a period of three months. If the Council has not acted within this period, the Commission's proposal is adopted.

Some doubts can be expressed as regards this procedure if one considers that the Commission alone has the power to implement the

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non associés Ibidem pp. 114-127, spec. p.120 ff.

<sup>518</sup> See Q.J. L 197 1987. Thus in the case of Procedure I the Committee has advisory nature and its opinion is not binding. When procedure II is applied the Committee cannot block the decision of the Commission which may (variant a) or shall (variant b) defer the application of its decision until the Council has expressed its opinion. Under a third procedure the Committee can block the decision of the Commission. Two variants are provided for whereby the Commission can adopt its decision if the Council has not made a different decision within a certain time limit (a) while (variant b) if the Council has not taken a decision, the Commission decision is revoked. The third procedure and in particular the second variant (contre filet) has been the object of many critiques because the decision is not referred back to the Commission. NICOLL, W. Qu'est-ce que la Comitologie? RMC 1988, pp. 185-187. See also BRADLEY, K. Comitology and the Law: Through a Glass, Darkly CMLRev. 1992, pp. 693-721.

budget. If one compares Regulation 1762/92 to Regulation 3973/86, one notices that the former does not mention Article 209 of the EEC Treaty any longer, the only legal basis of the regulation remains Article 235<sup>519</sup>. Moreover, the Regulation at present in force seems to emphasize the intergovernmental aspect of the procedure. For example, Regulation 3973/86 established that the financing decisions of the Commission entered into force immediately, in the event of an unfavorable opinion of the Committee the decision was suspended until the final decision of the Council.

The alternative, enhancing the community aspect of the financial aid, could have been the adoption of the first variant of "comitology". The role played by Member States, which can block the financing, (through the negative opinion of the Committee and/or the Council) could furthermore be used as instrument of pressure in the case of existing dispute between one member State and a recipient country<sup>520</sup>.

It should be noted that the Committee's competence had been the object of an inter-institutional dispute which delayed the entry into force of Regulation 3973/86.

When the proposal for this Regulation was first submitted by the Commission<sup>521</sup>, the Member States and the Commission could not agree on the competence of the Committee that was to be established. According to the Commission the final decision on the projects to be financed was within its competence. If the

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<sup>519</sup> Article 209 provides for the Council's competence to adopt financial regulations. Why is the recourse to Article 235 required? The regulation lays down, as seen above, detailed rules for the administration of the aid to associated Mediterranean countries listed in the Regulation, and creates two Committees (article 6 and 9). In its proposal for regulation 3973/86 the Commission indicated as the only legal basis Article 209. See Q.J. C 99 1977. In the case of the new regulation the Commission as well indicated Article 235 alone.

<sup>520</sup> See European parliament A3-0016/92 p.22.

<sup>521</sup> Q.J. C 99 1977.

Committee's opinion was negative, its decision would only be suspended to allow the intervention of the Council. According to some Member States, in the case of an unfavorable opinion by the Committee, the Commission projects were to be submitted to the Council which was competent to take the final decision.

Until the adoption of Regulation 3973/86 an "ad hoc" procedure was followed: the projects were examined by an ad hoc group of the Council and then transmitted to the Council for approval. A declaration was however written into the minutes (verbal) where the Commission stated that such an approval was not necessary for the adoption of the financing decisions<sup>522</sup>.

One should ask what kind of power the Commission is exerting under Regulation 1762/92. The approval of individual financing projects could be considered covered by the Commission's competence to implement the budget. It could, however, be questioned whether the adoption of substantive decisions on the choice of projects that can be financed by the funds made available under the financial Protocols does not go further than a mere implementing power. As pointed out by Advocate General Tesauro in case 30/88<sup>523</sup> the solution adopted in Regulation 3973/86 (similar to Regulation 1762/92) is a compromise between the exclusive power of the Council to implement association agreements and the exclusive power of the Commission to implement the EEC budget under Article 205.

The question of the competence of the Commission seems in fact to find its resolution in the framework of the procedure for adoption of the projects. In fact, while the Commission is competent to adopt decisions on specific projects, the Council, which exerts control through the Article 6 Committee, has the final

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<sup>522</sup> BRODIN *op.cit.* pp. 268-270

<sup>523</sup> Case 30/88 Greece v. Commission 14.11.1989 ECR (1989) p. 3711, p. 3731.

say on the projects<sup>524</sup>.

An exchange of information takes place between the Bank, the Commission and the Member States on the financing they envisage granting (article 2 of Regulation 1762/92), the three institutions shall also communicate all relevant information as regards other bilateral or multilateral aids granted to the recipient countries, within the framework of the Article 6 Committee.

The question of coordination with Community action has been a Community concern since the adoption of the Commission memorandum on the development cooperation policy of the Community<sup>525</sup>. The preamble of Regulation 1762/92 refers to the Council's resolution of 5 June 1984 and 16 May 1989 on harmonization and coordination of Member States cooperation policy.

It is not clear how effective the coordination could be if limited to an exchange of information, it should however, be noted that in the new Regulation the exchange of information should take

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<sup>524</sup> The case referred to above is significant in this respect. In adopting financing projects as special aid for Turkey the Commission consulted the Article 6 Committee created by Regulation 3973/86. This procedure was contested by Greece which submitted that the "ad hoc" procedure which applied before the entry into force of Regulation 3973/86 continued to apply to Turkey since this country was not covered by this Regulation. The Commission on the contrary submitted that the ad hoc procedure did not apply any longer, not even to Turkey even though Regulation 3973/86 did not apply to this country. The Commission submitted that it had consulted the article 6 Committee "by analogy" (p.3716). It shall be noted that the Article 6 Committee expresses its opinion by qualified majority, while the ad hoc group voted by unanimity. The Court has recognized the competence of the Commission "to lay down the detailed rules and arrangements for the use of the aid and for the approval of specific projects. That power involves the possibility of using specific procedures for examining specific projects. The commission may therefore seek, from both the Council and the member States, any opinion necessary for the management of the aid, it may consult experts and it may have recourse to procedures laid down in similar fields" (ground 22)

<sup>525</sup> EC Bulletin Supp. 5/1971. See also Communication of the Commission Com(75) 94 final; guidelines for a development cooperation policy for the decade 1980-1990 EC Bull.Supp. 5/82.

place in the phase of adoption of financing interventions, whereas in Regulation 3973/86 member States were required to inform the Commission when the decision to provide aid had already been taken, no involvement of the Bank was provided for.

At least once a year the Commission reports to the Council and to the Parliament. The Council holds, on the basis of a report submitted by the Commission, an annual policy debate on the future course of the cooperation.

Both the Bank and the Commission proceeds to an evaluation of each project completed to see whether the objectives established in the projects have been achieved and to establish guidelines for future interventions. Such evaluation reports are available to all Member States.

This provision seems to respond to the critiques put forwards by the Court of Auditors in its Special Report n. 3/91 cited above concerning the necessity of continuous evaluation (during and after the implementation of projects) to assess the effectiveness of the Community aid<sup>526</sup>. (Article 10) The same conclusion can be drawn as regards the joint examination of projects by the Commission and the Bank in order to establish whether the objectives set up by the financing interventions have been achieved. The very limited control of the Commission as regards aid from the Community budget administered by the EIB was seriously criticized by the Court of Auditors<sup>527</sup>.

Regulation 1762/92 takes into account the structural adjustments programme introduced in the fourth Protocol (see supra), Article 3 indicates the principles that should govern operations financed by the Community in the framework of this programme. It is specified that aid must be linked to the adjustment operations and measures of the recipient countries and

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<sup>526</sup> Special Report p. 17.

<sup>527</sup> Ibidem.

that the procedures for the awards of contracts must be sufficiently flexible to be adapted to the practices in force in the recipient country.

Interventions aim in particular finance measures to offset the detrimental consequences which can derive from the structural adjustment programmes.

#### 4) Other Operations of Financial Cooperation Outside the Protocols

##### 4.a) "Horizontal" Financial Cooperation

With the scope of integrating financial and technical cooperation contained in the Protocols, the Council, in the framework of the renewed Mediterranean policy, adopted a Regulation concerning financial cooperation for all Mediterranean non-member countries<sup>528</sup>.

This financial intervention does not have as legal basis the technical and financial Protocols concluded with third Mediterranean countries. Although conceived as funds supplementing those committed under the Protocols, they are specifically provided for financing actions in the field of regional integration and environment.

The financing programme is multiannual (five years). The amount committed is 230 million ECU, which are qualified as non compulsory expenditures. The creation of this budgetary line for non-compulsory expenditure is important insofar as it enlarges the power of the European Parliament in the field of cooperation with Mediterranean countries. The Parliament can modify the amount committed to this form of expenditure although it is not involved in the procedure of decision making for the administration or management of these funds.

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<sup>528</sup> Regulation 1763/92 Q.J. L 1992.

Measures of regional interests which can be financed are technical cooperation, in the forms of seminars, training measures, studies and missions. These operations should involve Mediterranean non-Member Countries or Mediterranean non-Member Countries and the Community. The amount committed should also finance feasibility projects for regional infrastructure.

In the field of environment measures with a "catalytic" effect, like pilot and demonstration projects, can be financed.

The form taken by the Community financing are interest-rate subsidies, which are managed by the EIB, risk capital and grants.

Different procedures apply for the administration of these aids by the Commission and the EIB. In practice the rules governing the adoption of financing measures are identical to those established for the management of funds provided for in the technical and financial Protocols and discussed above.

#### 4.b) EC International Investment Partners.

This instrument, which is not provided for in a Regulation, is addressed not only to Mediterranean countries but more generally to the more developed countries in Asia, Latin America and Mediterranean. The idea<sup>529</sup> is to encourage private investments and industrial cooperation in the form of the creation of joint-ventures between European enterprises and enterprises from those developing countries. Financing is directed mainly towards the identification of partners, technical assistance for management and training. Financing is not provided directly by the Community but through the intermediary of development banks or international financial institutions. Financing can take various forms.

The funds entered in the budget under the title promotion of investment and regional cooperation are non-compulsory

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<sup>529</sup> See COM (86) 603 final.

expenditure<sup>530</sup>.

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<sup>530</sup> According to STRASSER Les finances.. op.cit. the funds for the promotion of investments in Mediterranean countries (Asia and Latin American countries) (facilité Cheysson) have no legal basis p.140.

	<i>EIB LOANS</i>		<i>BUDGET RESOURCES</i>	
	<i>Amount</i>	<i>Growth %</i>	<i>Amount</i>	<i>Growth%</i>
<b>ALGERIA:</b>				
1° protocollo:	70		44	
2° protocollo:	107	+ 53%	44	
3° protocollo:	183	+ 71%	56	+ 27%
4° protocollo:	280	+ 53%	70	+ 25%
<b>MAROCCO:</b>				
1° protocollo:	56		74	
2° protocollo:	90	+ 61%	109	+ 47%
3° protocollo:	151	+ 68%	173	+ 59%
4° protocollo:	220	+ 46%	218	+ 26%
<b>TUNISIA:</b>				
1° protocollo:	41		54	
2° protocollo:	78	+ 90%	61	+ 13%
3° protocollo:	131	+ 69%	93	+ 52%
4° protocollo:	168	+ 28%	116	+ 25%
<b>EGITTO:</b>				
1° protocollo:	93		77	
2° protocollo:	150	+ 61%	126	+ 64%
3° protocollo:	249	+ 66%	200	+ 59%
4° protocollo:	310	+ 24%	258	+ 29%
<b>GIORDANIA:</b>				
1° protocollo:	18		22	
2° protocollo:	37	+105%	26	+ 18%
3° protocollo:	63	+ 70%	37	+ 42%
4° protocollo:	80	+ 27%	46	+ 24%

**SIRIA:**

1° protocollo:	34		26	
2° protocollo:	64	+ 88%	33	+ 27%
3° protocollo:	110	+ 72%	59	+ 79%
4° protocollo:	115	+ 5%	43	+ 19%

**LIBANO:**

1° protocollo:	20		10	
2° protocollo:	34	+ 7%	16	+ 60%
3° protocollo:	53	+ 56%	20	+ 64%
4° protocollo:	45	- 15%	24	+ 20%

**B) SOCIAL COOPERATION****1) Introduction.**

Among all the agreements concluded by the Community in the Mediterranean area<sup>531</sup>, only the Cooperation Agreement with Maghreb countries, the Cooperation Agreement with Yugoslavia and the Association Agreement with Turkey contain rules applicable to migrant workers who are nationals of these countries and employed in one EEC Member State<sup>532</sup>.

However, the Association Agreement with Turkey can be

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<sup>531</sup> Outside this area the new EEA Agreement provides for the free circulation of EFTA workers in the Community (see Article 28) contained in the EEC Treaty Article 48. The possibility of adopting measures in the field of the mutual recognition of diplomas is also provided for (Article 30 and Annex VII). EFTA workers certainly enjoy the most privileged position in the Community as compared with workers of other third countries which have concluded with the Community agreement of association or cooperation. The Agreement creates in fact a very close integration defined as an European Economic Area where the four basic freedoms of the Treaty (goods, persons, services and capitals) and the rules of competition are applied. As regards the European Agreements, concluded with Hungary, Poland and Czechoslovakia, the provisions on social cooperation are similar to those contained in the Cooperation Agreements with Maghreb countries with some improvement. The Europe Agreements for instance establish that the spouse and children of legally employed workers have access to the labor market of the EEC Member States during the period of the worker's authorized period of employment, this does not mean, however, that the right of family reunion is established since the members of the family of the worker can accede to the labor market only if already legally resident in the Community.

<sup>532</sup> To be more precise two other agreements concluded with Mediterranean countries contained rules on migrant workers: the Association Agreement with Greece concluded in 1961 (English version in *Q.J.* Sp. Edition, 2nd. Series, I, Ext. Rel.) and the Additional Protocol to the Agreement between the EEC and Portugal, (*Q.J.* L 274 1978). See RAUX, J. *La mobilité des personnes et des entreprises dans le cadre des accords externes de la CEE RTDE* 1979, pp.466-479, p.473. Since Greece and Portugal have become Member States of the EEC, the agreements concluded with them will not be discussed here.

considered as a special case because it establishes Turkish membership of the Community<sup>533</sup> as the ultimate goal of the association. The provisions concerning Turkish migrant workers are conceived to be in preparation for possible integration of Turkish workers in the Community. Therefore, these rules can hardly be compared with the social cooperation provisions of the Cooperation Agreements with Maghreb countries and Yugoslavia, which only aim at "contributing to the economic and social development" of the EEC partners<sup>534</sup>.

It is in fact only the Agreement with Turkey which provides, albeit as a long term objective, for the free circulation of Turkish workers, for the freedom to provide services and of establishment<sup>535</sup>.

At first sight it may seem contradictory to the global policy that the "volet" on social cooperation was not included in the

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<sup>533</sup> See Arts.2 to 5 of the Association Agreement providing for a preparatory, a transitional and a final stage. Q.J. L 217 1964, English Ed. Q.J. C 113 1973.

<sup>534</sup> See Article 1 of the Cooperation Agreement with Morocco.

<sup>535</sup> Articles 12, 13 and 14 of the Association Agreement provide that the freedom of movement, of establishment and to provide services for Turkish workers shall be guided by the corresponding provisions of the EEC Treaty. See also Article 36-42 of the Additional Protocol concluded in 1970 creating the competence of the Council of Association for the progressive application of the circulation of workers. Q.J. L 293 1972. "Le régime juridique qui découle des accords est envisagé à la lumière du modèle communautaire dans la perspective plus ou moins avouée d'une admission ultérieure, sans que pour autant il puisse y avoir une adoption rigoureuse de ce modèle.." RAUX, la mobilité..op.cit., p. 168. The Protocol of 1970 also establishes the principle of non-discrimination based on nationality as regards working and living conditions in relation to other Member State migrant workers. The situation of Turkish workers legally employed in the Community is regulated by Council Association decisions 1/80 and 3/80 Q.J. C 110 1983.

other cooperation agreements, concluded with Mashrak<sup>536</sup> countries, Malta, Cyprus or Israel.

A first explanation is that a high number of the third country workers employed in the Community who come from the Mediterranean area are nationals of Algeria, Tunisia or Morocco<sup>537</sup>, whereas Mashrak countries, Malta or Cyprus are not traditional countries of migration to the EEC. This consideration has been judged to be a sufficient reason for excluding the social cooperation chapter from these latter Cooperation Agreements<sup>538</sup>. Moreover, workers' salaries have represented an important item in the Maghreb external balance (for Morocco 22% in 1987)<sup>539</sup> and migration a way of easing a high level of unemployment, also due to strong demographic

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<sup>536</sup> Within the framework of the Euro-Arab Dialogue a declaration on the principles governing working and living conditions of migrant workers living in the two regions was adopted in 1978. The principles affirmed therein are very advanced in respect to those contained in the Cooperation Agreements (for instance the right to family reunion and vocational training), but the declaration is not binding. The text is reported in BOURRINET, J. Le dialogue Euro-Arabe Paris, Economica, 1979, pp. 341-342.

<sup>537</sup> Within the EEC Maghreb workers are concentrated in Belgium (Moroccans), France (Algerians, Moroccans and Tunisians) and Netherlands (Moroccans), see Commission report on the social integration of third country migrants residing on a permanent and lawful basis in the Member States, SEC(89)924 final. For a statistical analysis of the presence of migrant workers in Europe see LEBON, A. "Resortissants communautaires et étrangers originaires des pays tiers dans l'Europe des douze" Rev. Eur. Mig. Intern. 1990, pp.185-202; for data regarding the presence of Maghreb workers in the Community in the 70s see SAFAR, H. Problèmes des travailleurs arabes en Europe KHADER, B. Cooperation Euro-Arabe, symposium organized by the Centre d'Etude et de Recherche sur le Monde Arabe Contemporain de l'Université Catholique de Louvain 1982, Vol. I, pp.153-175, the same author analyses the reasons of migration from Maghreb countries. Ibidem, pp.155-160.

<sup>538</sup> BRODIN, J. "La politique d'approche globale méditerranéenne de la Communauté" MEGRET, J. Le Droit des Communautés Economiques Européennes Vol. XIV, pp. 197-298. p.259

<sup>539</sup> See SEC(89) 1958 10.11.1989 Bilan de la Politique Méditerranéenne de la CEE.

pressure. It is not surprising, therefore, that Maghreb countries urged<sup>540</sup> the inclusion in the Cooperation Agreements of provisions granting certain rights to their nationals employed in the Community. Their demands were, however, only partially met; in particular access to the Community and the principle of the free circulation within the Community for Maghreb workers were excluded<sup>541</sup> from the Agreements.

One may ask whether the limited number of workers from Mashrak countries in the Community should be considered as a sufficient reason to exclude social cooperation rules from the Cooperation Agreements concluded with them. It seems that coherence in global policy would have required the inclusion of those principles in the Cooperation Agreements, especially if one considers that those Agreements were concluded for an unlimited period and the presence of migrant workers originating from these countries may increase in the future.

The Cooperation Agreement with Yugoslavia<sup>542</sup>, as noted above, contains provisions identical to those of the Cooperation Agreements with Maghreb countries. It has been submitted<sup>543</sup> that,

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<sup>540</sup> "C'est la pression des Etats d'origine qui a conduit la CEE à accepter l'insertion d'un volet social dans certains de ces accords" TORRELLI, M. La coopération sociale: bilan et perspectives TOUSCOZ, La CEE élargie et la Méditerranéenne.. 1982, op.cit., pp.163-188, p.179. See also EC Bull. 1/1976, p.16.

<sup>541</sup> DUPOUY, A. Le statut juridique de la coopération entre l'Algérie et la CEE Revue Algérienne des Sciences Juridique, Economiques et Politiques 1979 pp.7-36, p.27. Among the considerations that weighed against the inclusion of free circulation in the Maghreb Cooperation Agreements, Torrelli points to the "effet d'entraînement" that these agreements could have on future agreements with other third countries (see Yugoslavia), and the possibility that Turkey required improvement of the social provisions contained in its association Agreement if those of Maghreb were aligned to its regime. TORRELLI La coopération.. op.cit., 1982, p.173.

<sup>542</sup> O.J. L 41 1983, Articles 43-47.

<sup>543</sup> TORRELLI, M. "La coopération sociale..." op.cit., 1982 p.165.

as regards social cooperation, Yugoslavia has benefitted of a sort of "effet d'entraînement" produced by the Maghreb Cooperation Agreements and that, at the same time, the inclusion of these provisions is a sign of the Community's will to develop social cooperation in the Mediterranean area. However, some doubts can be expressed about this second observation: there seem to be no sign of a Community policy on migration from third countries, even restricted to the area of its Mediterranean preferential policy. It seems significant, in this respect, that some of the provisions of the Cooperation Agreements, requiring action by the Community, have not yet been applied (see *infra* for Article 41.2).

Outside the Mediterranean area, the Final Act of the IV Lomé Convention contains a Joint Declaration "on workers who are nationals of one of the Contracting Parties and are legally resident in a territory of a Member State or an ACP State"<sup>544</sup>. The Declaration establishes the principle of non-discrimination between the ACP and nationals of each Member State as regards working conditions, pay and social security benefits linked to employment (extended to the member of the worker's family).

It is also established that these provisions do not affect the rights and obligations deriving from bilateral conventions when these are more favorable.

Some doubts may arise as to whether the Joint Declaration is legally binding or only has a programmatic character. The second solution seems more accurate when one considers that Lomé Convention establishes that annexed Protocols "form an integral part of the Convention", while Joint Declarations are not mentioned. On the other hand, the contracting parties, declaring in the Final Act<sup>545</sup> their intention to conclude the Convention, the

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<sup>544</sup> The text of the Convention is reported in The Courier, n.120, March-April 1990.

<sup>545</sup> In international law a Final Act is an instrument indicating the contracting parties of a treaty or of a conference, the conventions concluded, the resolutions adopted. "Certaines Actes Finaux contiennent des engagements conventionnels des

Protocols and the Joint Declaration, seem to give all these instruments the same legal value. However, some of these Declarations do undoubtedly have a programmatic character and further acts are required for the application of the principles outlined. This does not seem to apply to the Declaration of Annex VI<sup>546</sup>. In paragraph 4 of the Declaration "The Parties agree that the matters referred to in the declaration shall be resolved satisfactorily, and, if necessary, through bilateral negotiations with a view to concluding appropriate agreements" (emphasis added). This seems to imply that the adoption of agreements is not a prerequisite for the application of the principle of non-discrimination. Moreover, in particular, if compared with the other Joint Declaration (Annex IV) which also concerns migrant workers, the wording used is a form used for binding rules (each Member State shall accord..shall enjoy..) <sup>547</sup>.

However, the content of the Joint Declaration is more limited

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signataires. En droit, il faudra alors considérer que les dispositions qui contiennent ces engagements produisent ces effets qui s'attachent à un traité international." PREVOST, J.F. Observations sur la nature juridique de l'Acte Final de la conférence sur la sécurité et la coopération en Europe AFDI 1974, pp.129-154, p.131 and 132.

<sup>546</sup> See contra NADIFI, A. Le statut juridique des travailleurs maghrébins résidant dans la CEE RMG 1989, 289-295, p. 289 footnote (4) "...ces dispositions sont formulées en des termes assez vagues et généraux figurant à l'annexe de ces conventions d'où la spécificité des dispositions sociales des accords de coopération CEE-Maghreb".

<sup>547</sup> Annex V contains a Joint declaration on ACP migrant workers and ACP students in the Community. The Member States and ACP States "will grant workers who are nationals of the other Party legally carrying out an activity in its territory, and the members of their family residing with them, the fundamental freedoms as they derive from the general principles of international law." The Community also declares that it is prepared to support the financing of programmes to train ACP nationals returning to their countries and to encourage the training of ACP students in their country of origin or in another ACP country. ACP countries declare that they will take the necessary measures to discourage illegal immigration to the Community.

than the chapter on social cooperation of the Agreements with Maghreb countries (*infra*). The Joint Declaration does not lay down rules for the transfer of pensions and annuities or for the addition of insurance periods.

At first sight, therefore, Maghreb workers employed in the Community enjoy a privileged status compared with other third country workers. To check this one should look both at Community action as regards third country migrant workers and to national legislation. Before reaching any conclusions, however, it is necessary to analyze the provisions contained in Title III of the Cooperation Agreements.

## 2) Articles 40-43.

The norms applicable to third country migrant workers by the "host" country may be distinguished from norms concerning a) entry into the territory and access to employment and b) conditions provided to workers when they are already employed, which relate to working and living conditions, remuneration, social security and education<sup>548</sup>.

As seen above, the question of entry to a Member State's territory and access to employment is excluded from the Chapter on Social Cooperation. This can be considered as a limit on the provisions of social cooperation, and it may be explained by a desire of the Member States to maintain control on immigration policy<sup>549</sup>.

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<sup>548</sup> For this distinction see HAMMAR, T.(ed) European Immigration Policy A comparative Study. Cambridge, Cambridge University Press, 1985, pp.6 ff. For this author immigration policy has two elements: immigration regulation ("the rules governing the selection and admission of foreign citizens") and immigrant policy (which "refers to the conditions provided to resident immigrants"). The author emphasizes the reciprocal influence of these two components.

<sup>549</sup> See in this sense BRODIN *La politique.. op.cit.* p.359.

Article 40 establishes the principle of non-discrimination based on nationality between Moroccan workers and the nationals<sup>550</sup> of the Member State where they are employed<sup>551</sup> as regards working conditions and remuneration.

These provisions do not establish one relationship between Community and Morocco, but rather twelve bilateral relationships between Morocco and each Member State.

In Article 41.1 the principle of non-discrimination is extended to social security, which also covers members of the workers' family living with the worker. This does not, however, imply the right of a member of a worker's family to join the worker

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<sup>550</sup> It has already been noted that in the 1970 Protocol concluded with Turkey non-discrimination was to be applied as regards other Member State's migrant workers. The reference to Member State nationals in the Maghreb Cooperation Agreements seems to reflect the desire to apply a higher standard.

<sup>551</sup> This excludes the guarantee of equality of treatment to self-employed Maghreb nationals. There exist no provisions in the Cooperation Agreements with Maghreb countries which are related to services or to establishment. As regards the right to provide services and the right of establishment, Maghreb nationals could enjoy, like other third country nationals, the general rights established in the EEC Treaty. In particular Article 59 establishes that "The Council may, acting by a qualified majority on a proposal from the Commission, extend the provisions of the Chapter to nationals of a third country who provide services and who are established within the Community", and Article 58 provides that once they have set up in a Member State according to the requirements of Article 58, "Companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States". It shall be noted that in these cases, as well as the question of entry remaining a competence of Member States, Community legislation would, in any case, only intervene after the establishment of third country nationals: "...it is at the discretion of each Member State to permit the first leap towards its territory.." KAPTEYN, P.J.G., VERLOREN VAN THEMAAT, P. Introduction.. op.cit. p.443.

in the Member State where he/she has found a job<sup>552</sup>.

The second and third paragraphs of Article 41 add a Community dimension to the relationship established between Morocco and each Member State which can be considered to be a progress, in comparison with bilateral agreements<sup>553</sup>.

Article 41.2 establishes that all periods of insurance, employment or residence that Moroccan workers have accumulated in each Member State shall be added for the calculation of pensions and annuities for old age, invalidity, death and medical care. This means that for the calculation of pensions Member States are considered as a single territory. It ought to be noted that periods which Moroccan workers may have completed in their own country are not counted.

Paragraph 3 of Article 41 establishes that Moroccan workers will receive family allowances for the members of their families who are resident in the Community. This means that the member of a worker's family will receive family allowances even if he/she resides in a State different from the one where the worker is employed. On the contrary if a member of a Moroccan worker's family resides in the country of origin of the migrant worker he/she has not right to receive these family allowances<sup>554</sup>.

Finally, Article 41.4 establishes that pensions or annuities in respect of old age, death, industrial accident, occupational disease and invalidity resulting from industrial accident or occupational disease may be transferred freely to Morocco "at the rates applied by virtue of the law of the debtor Member State or

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<sup>552</sup> On the question of the right of family reunion see LEBEN, C. Le droit international et les migrations des travailleurs Les travailleurs étrangers et le droit international, Colloque, Paris, Pedone, 1979, pp. 45-107, p.95.

<sup>553</sup> NADIFI Le statut... *op.cit.* p.292.

<sup>554</sup> On the basis of the European Agreements family allowances are paid to members of the family of a worker regardless of their being resident in the Community or in another country.

States".

Some questions of interpretation of Article 41 have recently been the object of a decision<sup>555</sup> of the Court of Justice. It will be remembered that the case arose out of a dispute between Ms. Kziber, the child of a Moroccan national legally established in the territory of Belgium, and the Belgium national labor office (Office National du Travail (ONEM)). Ms. Kziber was refused - by reason of her nationality - unemployment benefits that Belgian legislation provides for young national workers who are unemployed after their studies or a period of apprenticeship.

In considering whether Article 41.1 is to be interpreted to mean that a member State cannot refuse unemployment benefits to a member of the family of a worker of Moroccan nationality, the Court had to decide, besides the question of direct effect, discussed above: a) if the notion of social security contained in this Article covers unemployment benefits, and b) on the basis of what entitlement could Ms. Kziber apply for these unemployment benefits provided for young persons seeking employment.

## 2.a) The Notion of Social Security.

The question was to interpret the notion of social security as inscribed in Article 41.1 to see whether it covered unemployment benefits.

The silence of Article 41 and the fact that unemployment benefits do not exist in Morocco were the two arguments submitted by France, which were seriously considered by Advocate General Van Gerven, to deny that unemployment benefits could be covered by social security under Article 41.1.

The Court rejected this reasoning by first making an analogy between the notion of social security contained in Article 41 and

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<sup>555</sup> Case 18/90, Bahia Kziber op.cit..

that of Regulation 1408/71<sup>556</sup> which explicitly refers to unemployment benefits. In other terms the notion of social security shall be read at the light of Regulation 1408/71. It should be remembered that the question of the analogy of expressions contained in agreements concluded by the Community with third countries and in the Treaty depends on the context and on the scope of the rules. The Court affirmed that the fact that unemployment benefits are not included in Article 41 paragraph 2, creating the principle of the addition of insurance periods, is relevant only for the application of this principle: that is, that unemployment benefits are not taken into account for the calculation of pensions. The silence of Article 41 about unemployment benefits cannot be interpreted, in the absence of a clearly expressed intention of the parties, as excluding, from the concept of social security, unemployment benefits, which are traditionally considered a branch of social security.

The reference to Regulation 1408/71 seem to have been made with the purpose of indicating that "traditionally" unemployment benefits are part of social security and that there is no reason, based on the scope of the Agreement or of the provision, to give a different interpretation to the notion of social security in the Community law and in the Cooperation Agreement.

## 2.b) The Sphere of Application of Article 41.1.

The other point discussed was whether Ms. Kziber could apply for unemployment benefits on the basis of the non-discrimination principle established in Article 41.1.

The question was whether the members of a Moroccan worker's family could enjoy non-discriminatory treatment only as regards the rights that are granted to the members of a family of a worker who

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<sup>556</sup> The consolidated version of this Regulation is reported in *Q.J. C 138 1980 p.1* See Article 4 which reads "This Regulation shall apply to all legislation concerning the following branches of social security:...(g) unemployment benefit..".

is national of a Member State, or, if non-discrimination also applies to rights they may claim on their own.

As seen above, the unemployment benefits in question were provided by national Belgian legislation for young persons who, after their studies or a period of apprenticeship, were unemployed. Therefore, the status of member of a worker's family did not seem relevant to the application of this legislation.

Advocate General Van Gerven denied the right of Ms. Kziber to be granted unemployment benefits based on Article 41. His reasoning was based on the distinction, made by the Court of Justice in Kermaschen<sup>557</sup> and then confirmed in Deak<sup>558</sup>, between the rights that workers can claim as rights of their own and derived rights granted to the members of their families. According to the Advocate General this distinction, made for Community workers, applies to Article 41 as well.

Even if in Deak the Court recognized the right of the child of a Community migrant worker (regardless of the nationality of the child) not to be discriminated as regards unemployment benefits compared with nationals, the decision of the Court was based on considerations related to the free movement of workers. "A worker anxious to ensure for his children the enjoyment of the social benefits provided for by the legislation of the Member State for the support of young persons seeking employment would be induced not to remain in the Member State where he had established himself and found employment if that State could refuse to pay the benefits in question to his children because of their foreign nationality" (para 23).

The Advocate General submitted that since the scope of the Cooperation Agreement with Morocco is not to assure free access to employment in the EEC but to guarantee equality of treatment for

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<sup>557</sup> Case 40/76 Kermaschen 23.10.1976, (1976) ECR p.1669.

<sup>558</sup> case 94/84 Office national de l'emploi v. Josef Deak, 20.05.1985 (1985) ECR p. 1873.

workers already employed, the reasoning of the Court in Deak could not be applied to the case at hand.

It should be noted that the Advocate General made reference to the object and nature of the Cooperation Agreement to arrive at his conclusion. As already mentioned, this is a form of reasoning that the Court has used in previous case-law where it had to pronounce on the interpretation of provisions contained in agreements concluded with third countries having a formulation identical to certain Treaty Articles<sup>559</sup>. In this case, however, the question was even more complex, since it was not the identity of two Articles contained in two different instruments which was at stake, but rather a matter of transposing to a Cooperation Agreement a Court decision on Community (derived) legislation. However, if one applies the same reasoning used in the case-law and if a provision is to be interpreted according to the objective it pursues, the reasoning of Advocate General seems correct. The reason given by the Court in Deak to justify the granting of unemployment benefits can hardly be applied to Kziber.

The Court did not follow the reasoning of the Advocate General. It simply stated that the prohibition on discrimination of Article 41 implies that Ms Kziber, who met the other requirements provided for in the national legislation, could not be refused unemployment benefits on the basis of her Moroccan nationality.

What seems to imply from the Court decision is that Ms. Kziber shall not be discriminated not as a member of the family of a Moroccan worker but as the direct addressee of the prohibition of non-discrimination. This is not very convincing because in the Community context the prohibition of non-discrimination for the members of the family of a Community worker derives from the prohibition of non discrimination of the worker itself, therefore the decision of the Court would imply a regime for third countries

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<sup>559</sup> See above, Polydor, op.cit. paras.14-15;  
Bresciani, op.cit., para 25.

nationals which is more advanced than applied to Community workers. On the other hand the extension of the Court's case-law to members of the family of the Moroccan worker would meet the objections arisen by the Advocate General.

Another question which may be relevant in the light of case 18/90, even if it was not discussed by the Court, is the interpretation of the notion of family of a worker contained in Article 41.

The notion of family could be limited to the spouse and minor children<sup>560</sup>, but could also be enlarged to include relatives in the ascending lines of the worker or spouse<sup>561</sup>.

How should the notion of family be interpreted in the Cooperation Agreement in the absence of any specification? As regards EEC law, for the purpose of family reunion, Article 10 of Regulation 1612/68<sup>562</sup> on the freedom of movement for workers within the Community adopts a notion of family which includes spouse, children under the age of 21 or who are dependant, dependant relatives in the ascending lines of spouse and worker. It is also established that "Member States shall facilitate the admission of any member of the family not coming within the provisions of paragraph 1 if dependant on the worker referred to above or living under his roof in the country from whence he comes". This wide notion of family can be explained by virtue of the purpose this

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<sup>560</sup> "family is generally defined as husband, his wife and any minor children. There is, however, no agreement as to whether other dependents should be included within the concept of family" ANSAY "Legal Problems of Migrant Workers" *op.cit.* p.24. For instance, in the European Convention on the Legal Status of Migrant Workers of the Council of Europe family is composed of the spouse of the migrant worker, his unmarried children, who are minors according to the legislation of the receiving State and who are dependent on the worker, see Article 12 on family reunion. The Convention is reproduced in International Legal Materials 16, 1977, p.1381.

<sup>561</sup> See ILO recommendation 151 which refers to spouse, children and ascendants.

<sup>562</sup> Q.J. L 257 1968, English Sp. Ed. p. 475.

Regulation seeks to achieve: guaranteeing the freedom of movement for Community workers<sup>563</sup>.

In Regulation 1408/71<sup>564</sup>, adopted for the application of social security schemes, it is specified that "members of family" means "any person defined or recognized as the member of the family or designated as a member of the household by the legislation under which benefits are provided..". The solution adopted in regulation 1408/71 could be applied to the notion of family contained in the Cooperation Agreements with Maghreb countries. Therefore, if a Member State's legislation grants to a worker's ascendant certain benefits, the principle of non-discrimination requires that, if all the conditions are met, the same benefits are granted to a Moroccan worker's ascendant as well.

The provisions of Articles 40 and 41 also apply to Community workers employed in Morocco<sup>565</sup>. Article 40.2 provides that "Morocco shall accord the same treatment to workers who are nationals of a Member State and employed in its territory." According to RAUX<sup>566</sup> this provision requires that Morocco shall not discriminate among nationals of Member States. He affirms that "Il appartient...aux

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<sup>563</sup> See the statement of reason of regulation 1612/68 "Whereas the right of freedom of movement, in order that it may be exercised, by objective standards, in freedom and dignity, requires that equality of treatment shall be ensured..and also that obstacles to the mobility of workers shall be eliminated, in particular as regards the worker's right to be joined by his family ...".

<sup>564</sup> Consolidated version in O.J. C 138 1980 p.4.

<sup>565</sup> It should be noted that reciprocity of rights and duties is provided for only in this chapter. It is well known that one of the distinguishing features of the Cooperation Agreements with Maghreb countries is the granting of non-reciprocal preferences. However, the principle of applying different rules to compensate a different level of development would not make sense if applied to working conditions.

<sup>566</sup> RAUX "La mobilité des personnes et des entreprises.." 1979, op.cit. p.474.

Etats Maghrébins de prendre les mesures propres à assurer le traitement le plus favorable accordé jusqu'ici aux nationaux d'un Etat membre". It can be submitted that if Article 40, paragraph 2 provides for reciprocity, the term "same treatment" refers to the principle of non-discrimination and that Morocco is obliged under Article 40.2 not to discriminate, as regards pay and working conditions, between its nationals and Community workers employed in its territory. It is not clear why the treatment granted to Member States' nationals working in Morocco should be that granted to the most favored Member State nationals and not that of Moroccan nationals. This interpretation seems to be confirmed by the fact that the principle of reciprocity is also established in Article 41.5 providing that "Morocco shall accord to workers who are nationals of a Member State and employed in its territory, and to the member of their families, treatment similar to that specified in paragraphs 1, 3 and 4".

This rule may raise some problems of interpretation. For example, should social security benefits be granted to workers of EEC Member States even if the same benefits do not exist in Morocco ?

As seen above, the absence of unemployment benefits in Morocco was used by France in case 18/90 as an argument to deny that the notion of social security in Article 41 could cover unemployment benefits. In other words, since Article 41.5 provides reciprocity in the application of the rules contained in paragraphs 1,3 and 4, Moroccan workers could not claim the granting of unemployment benefits when these would not be given to Community workers employed in Morocco. This argument was not examined by the Court which, therefore, seemed, implicitly, to reject it when it recognized the right of Ms. Kziber to receive unemployment benefits.

According to Article 42.1 the principles outlined in Article 41 should be implemented before the end of the first year following entry into force of the agreement, by the Cooperation Council, which shall also adopt "detailed rules for administrative

cooperation providing the necessary management and control guarantees for the application of the provisions referred to in paragraph 1" (second paragraph). This provision has not so far been applied even if a proposal for a Council Cooperation decision was submitted by the Commission in 1980<sup>567</sup>. This proposal concerned the application of the social security regimes to Moroccan workers employed in the Community and to their families<sup>568</sup>. Morocco considered the project insufficient as compared with the more favorable regimes established by bilateral conventions between Morocco and some Member States. For the Commission the project was certainly advantageous for Moroccan workers "sans porter atteinte aux dispositions plus favorables decoulant des conventions bilaterales"<sup>569</sup>.

An element of disparity of treatment among the workers coming from Maghreb is contained in Article 43, which establishes that the provisions set up by the Cooperation Council under Article 42 "shall not affect any rights and obligations arising from bilateral agreements linking Morocco and the Member States where those agreements provide for more favorable treatment of nationals of Morocco and of the Member States". This means that Moroccan workers may receive different treatment if they are employed in a Member State having concluded an agreement with Morocco favorable to its nationals. The agreements concluded by Member States (France in particular) regulate aspects of the life of migrant workers that are not mentioned in the Cooperation Agreement and are, in general terms, more advanced. For instance France pays family allowances to the children (up to a maximum of four) of Algerian workers established in France, even if the children reside in Algeria<sup>570</sup>.

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<sup>567</sup> Doc. CEE-MA 2707/81 cited in SEC(89) 1958.

<sup>568</sup> See BRODIN *La politique d'approche..op.cit.* p.271.

<sup>569</sup> See SEC(89) 1958 op.cit.

<sup>570</sup> See Dossier et Documents Les négociations France-Algérie Maghreb, Mashrak 1980 p.83-88, p.83.

Even if the rights of Maghreb workers are limited in respect of those granted by bilateral conventions, the advantage of the Cooperation Agreement is that it created rules which are applied in all Community Member States. The fact that the rights guaranteed constitute a minimum common denominator in respect of those granted by a single Member State may be considered the obvious consequence of an extension of social cooperation provisions to the whole Community. Some Member States are ready to guarantee specific benefits only to workers coming from certain third countries because the historical origin of that immigration and of the particular links they have with those third countries.

The provisions examined so far are completed by an exchange of letters annexed to the agreement. The Community and the Member States affirm that they are ready to hold exchanges of views as regards Maghreb workers employed in the Community with the purpose of examining the "possibilities of making progress towards the attainment of equality of treatment for Community and non-Community workers and the members of their families in respect of living and working conditions...". It is also specified that these exchanges of views would pertain to social and cultural questions and "would not be concerned with matters covered by the Agreement".

The merit of these declarations is that they open the possibility of filling in the gaps of the Agreement<sup>571</sup>. Social and cultural questions are very general terms which may indicate matters such as vocational training, education, housing<sup>572</sup>. So far,

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<sup>571</sup> As remarked by DUPOUY op.cit. p.22 the exchange of views shall not necessarily take place within the Cooperation Council. In the exchange of letters referred to above, it is specified that those exchanges of views will be held "in the context of talks to be arranged for that purpose".

<sup>572</sup> See the opinion given by the Commission of Social Affairs of the European Parliament on the 24th September 1976 on the Cooperation Agreements concluded with Maghreb countries, cited by DUPOUY op.cit. p.28, and the Declaration of Algeria annexed to the Cooperation Agreement as regards the interpretation of the term

however, this declaration has not been followed by any concrete initiatives.

3) *An Evaluation of the Social Cooperation Provisions in the Light of Community Action Towards Third Country Migrant Workers.*

An evaluation of the content of the social cooperation provisions depends on the terms of comparison applied. Member States legislation<sup>573</sup>, for instance can be restrictive as regards third country migrant workers and, therefore, in comparison, the rights granted in the Cooperation Agreement may be considered more progressive<sup>574</sup>.

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'social and cultural matters'.

<sup>573</sup> For Member State national legislation on residence, family reunion and employment see Commission report on social integration..op.cit., pp.8-13.

<sup>574</sup> As regards, for instance, the question of non-discrimination, in Italy the principle of equal treatment of migrant workers in relation to national workers was introduced in 1986 by an act of Parliament (Legge 943, 30 dicembre 1986). This legislation set up the norms for the effective application of the ILO Convention 143 (5 June 1975) on migration in abusive conditions and the promotion of equality of opportunity and treatment of migrant workers. Therefore, it can be said that before the entry into force of this legislation, Maghreb workers enjoyed preferential treatment as compared with other workers coming from other third countries. See, for comments, PANICO.G. "L'estensione agli stranieri extracomunitari del trattamento nazionale in materia di esercizio di attività lavorative autonome" DCSI 1989, pp.17-38, p.19; ADINOLFI,A. "La nuova normativa sul collocamento dei lavoratori stranieri" RDI 1987, pp.73-100. Those who consider the principle of equal treatment as a minimum guarantee for migrant workers, should consider that The European Social Charter (ratified in Italy by an act of Parliament (legge 929/1965 GU 123, Suppl. 3 August 1965) provides for "no less favorable treatment" for migrant workers of the area of the Council of Europe. The Charter of Fundamental Social Rights of Workers, adopted by the European Council in December 1989, establishes, in the preamble, that extra-Community migrant workers shall be accorded "treatment comparable with that granted to the nationals of the Member State concerned": "Non si sancisce, quindi, il principio della parità di trattamento,

On the contrary, as seen above, these same provisions may be considered very modest if compared to some bilateral conventions that certain Member States have concluded with one or more of the Maghreb countries.

As regards the Community, general rules applicable to third country workers employed in one of the Community Member States do not exist.

However, the Commission has dealt with the question of third country migrant workers in the resolutions and programmes that it has adopted in the field of migration policy<sup>575</sup>.

These resolutions and action programmes are not binding for the institutions and the member States, but aim to set up guidelines and principles for a future Community migration policy<sup>576</sup>. Based on a Council resolution adopted in 1974<sup>577</sup>, the Commission adopted a programme of action for migrant workers and their families. In the 1974 programme the Commission indicated, as the main objective of a migration policy, the application to third country migrant workers of the principle of equality of treatment with Community workers. Other actions proposed were the elimination

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ma si 'legittimano' gli Stati membri a mantenere, o ad introdurre, un trattamento meno favorevole - sia pure di natura comparabile - per i lavoratori cittadini di Stati terzi"... ADINOLFI, A. Quale progresso con la Carta comunitaria dei diritti sociali? RDI 1989, pp.907-911, p.909, 910. In the words it allows the possibility of "levelling down".

<sup>575</sup> See Commission Communication to the Council on an action programme for migrant workers and members of their families, submitted on 18 December 1974, EC Bull. Supp. 3/76; the Commission's guidelines for a Community policy on migration, EEC Bull. Supp. 9/85.

<sup>576</sup> The Commission Decision for a procedure of preliminary consultation on migration policies as regards third countries will be discussed when examining the question of competence.

<sup>577</sup> Q.J. C 13 1974 p.1. The Council expressed its political will of adopting measures to achieve equality of treatment of Community and extra-Community workers as regards working and living conditions, and other economic rights.

of the requirement of nationality for the granting of certain services; the right of transferring pensions to the country of origin, the addition of insurance periods completed in the country of origin and in one or more Member States for the calculation of pensions, the application to third country workers of the treatment provided for in Community social security legislation for the period they reside in the Community.

Even if the Commission's proposals were for some aspects more ambitious than those contained in the Cooperation Agreements, it should be noted that Maghreb (with Turkish and ACP) nationals employed in the Community were, before the conclusion of agreements with EFTA and some Eastern European countries (see below) the only third country migrant workers were granted, at least in theory, some of these rights. The question which remains open is their effective application.

On the basis of Article 118<sup>578</sup> of the EEC Treaty the Commission adopted Decision 85/381 in 1985 setting up a prior communication and consultation procedure on migration policy in relation to non-member countries<sup>579</sup>. It is worth noting that Commission Decision 85/381 did not set up substantive rules in the field of migration policy concerning third country workers but rather provided only for a compulsory procedure of consultation and communication in this field<sup>580</sup>. More precisely, Decision 85/381 required Member

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<sup>578</sup> This Article, contained in Title III of the EEC Treaty, social policy, empowers the Commission to promote close cooperation between Member States in the matters listed therein. It also establishes that the Commission shall act in close contact with Member States "by making studies, delivering opinions and arranging consultations".

<sup>579</sup> Q.J. L 217 1985, p.25.

<sup>580</sup> It should be noted that consultation on migration policy as regards third country migrant workers was envisaged by the Council in its resolution of 1974, and in the action programme of the Commission, op.cit. p.25-27, and in the guidelines for a Community policy on migration op.cit. p.14. "...promotion of consultation is only a first, esitant step in the direction of concertation and common action.." DUYSSSENS, D. Migrant Workers from

States to provide advance information on the measures they intend to take concerning third country migrant workers as regards "the entry, residence and employment, including illegal entry, residence and employment, as well as the realization of equality of treatment in living and working conditions, wages and economic rights, the promotion of integration into the workforce, society and cultural life, and the voluntary return of such persons to their countries of origin" (Article 1).

In joined cases 281, 283 to 285 and 287/85<sup>581</sup>, five Member States, Germany, France, Netherlands, Denmark and the United Kingdom, asked the Court of Justice to declare this decision void on the grounds, *inter alia*, that the Commission lacked the competence to a) enact binding acts under Article 118 and b) deal in its Decision with the question of migration policy from third countries<sup>582</sup>.

The argument that Article 118 does not cover the field of migration policy in relation to non-member States<sup>583</sup> was rejected by

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Third Countries in the European Community *CMLRev.* 1977, pp.501-520, p.514.

<sup>581</sup> Federal Republic of Germany and Others v. Commission, 9.07.1987, (1987) *ECR* p. 3203.

<sup>582</sup> The second main argument submitted by the parties was infringement of essential procedural requirements, since the Commission failed to consult the Economic and Social Committee as provided in Article 118: "Before delivering the opinions provided for in this Article the Commission shall consult the Economic and Social Committee". This argument was rejected by the Court on the ground that consultation of the Social and Economic Committee is not compulsory when the Commission arranges studies and consultations (para 39).

<sup>583</sup> The reasons behind the proceedings were clearly explained by Advocate General Mancini: "...the Member States are genuinely - or better, vitally - interested in preserving full control over the admission to their territory of workers from non-member countries, *inter alia* because of its obvious political and public-policy ramifications. Hence, their fear that in time this section will come within the ambit of the Community is a genuine one." "Community social policy has an individual role to play and should make an essential contribution to achieving the aforementioned

the Court<sup>584</sup>, which stated: "...the employment situation and, more generally, the improvement of living and working conditions within the Community are liable to be affected by the policy pursued by the Member States with regard to workers from non-member countries" (para 16)<sup>585</sup>.

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objectives by means of Community measures or the definition by the Community of objectives for national social policies, without however seeking a standard solution to all social problems or attempting to transfer to Community level any responsibilities which are assumed more effectively at other levels "Council Resolution for a social action programme Q.J. C 13 1974 p.1, emphasis added. "...matters relating to the access, residence and employment of migrant workers from third countries fall under the jurisdiction of the governments of the Member States, without prejudice to Community agreements concluded with third countries" Council Resolution of 16 July 1985 EEC Bull. S 9/85 p.18. The Commission speaks of the overlapping of competencies between Community and national competence for migrant problems. EEC Bull. Supp. 9/85 p.9. See HEYNING, E. RMC 1974, p.112.

<sup>584</sup> The Court has, however declared Decision 85/381 void on the ground that the a) it extended the scope of consultation to cultural integration, whereas its links with employment and working conditions is too vague and b) it required Member States to draft national measures and agreements to be in conformity with Community policies and actions (grounds 22 and 35). See critical comments of SIMMONDS, K.R. The Concertation of Community Migration Policy CMLRev. 1988, pp.177-200, DECAUX, E. Note Arrêt 9 Juillet 1987, aff.jtes 281,283,284,285 et 287/85 RTDE 1987 pp.701-716, who remarks that the Court's decision emphasized the economic-centred conception of social policy, p.715. The Commission adopted on June 1988 a new Decision which took into account this decision of the Court of Justice. See Q.J. L 183 1988 p.35.

<sup>585</sup> The Court also rejected the argument that Article 118 does not empower the Commission to adopt binding decisions to arrange consultations among Member States. "Where an article of the EEC Treaty - in this case Article 118 - confers a specific task on the Commission it must be accepted, if that provision is not to be rendered wholly ineffective, that it confers on the Commission necessarily and per se the powers which are indispensable in order to carry out that task" According to TRAVERSA, E. Il coordinamento delle politiche migratorie nazionali nei confronti degli stranieri extracomunitari Riv.Dir.Eu. 1988, pp.5-22. p.15-16, the Court applied the principle of "effet utile" and not the theory of implied powers, since what was implied was not the power but the legal instrument. Contra see HARTLEY, T. The Commission as

The decision of the Court does not seem to enlarge Community competence to the field of non-member States' migration policy<sup>586</sup>. However, its decision seems important for future development of the competence.

Improvement of living and working conditions are objectives pursued by the Community, as confirmed by the Court in *Defrenne*<sup>587</sup>. Migration policy, the entry of third country migrant workers in the Community and the working and living conditions which are granted to them have important consequence in the functioning of the common market: the free movement of persons, which is one of the features of the internal market (see Article 8a EEC Treaty), could be jeopardized by the absence of harmonization of the rules applied at the Community external borders to third country migrant workers. The different treatment granted to third country workers as regards working conditions, pay, social security can affect the labor market and lead to distortion of competition (social dumping)<sup>588</sup>.

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Legislator under the EEC Treaty *ELRev.* 1988, pp.122-125, p.124, and *PLENDER, R.* Competence, European Community Law and Nationals of Non-Member States *ICLQ* 1990, pp.599-610, p.606.

<sup>586</sup> The Court acknowledged the competence of the Member States in this field when it stated that "...in the present stage of development of Community law the subject-matter of the notification and consultation falls within the competence of the Member States" (para 30). Member States' exclusive competence to act in the matter of migration policy seemed to be confirmed by the Court when it stated that Decision 85/381 could not require Member States agreements and measures to be in conformity with Community policies (para 33).

<sup>587</sup> Case 43/75, *Defrenne v. Sabena* 8.04.1976 (1976) *ECR* p.455.

<sup>588</sup> The question was emphasized by the European Parliament in its resolution on migrant workers from third countries "whereas the absence of a common immigration policy may have adverse consequences and provoke increasingly acute tension on the European labor market, particularly as regards the illegal entry of manpower, clandestine employment, non-contractual working and pay conditions, the absence of social security protection and the development of a precarious economy based on social dumping" *Q.J. C* 175 1090 p.180 (E). For the consequences of the discrimination between Community and third countries workers on the labor market

It could then be submitted that the Commission, on the basis of the link (established by the Court) between the improvement of living and working conditions within the Community and migration policy as regards third country workers could enlarge its competence to regulate this matter<sup>589</sup>.

In 1985 a new programme (Guidelines for a Community policy on migration)<sup>590</sup> was adopted by the Commission. Some of the questions concerning third country migrant workers (equal protection in the field of social security in relation to Community nationals, equality of treatment, aggregation of the insurance periods) seem to indicate that little progress has been achieved in this field since the 1976 Commission action programme<sup>591</sup>.

One of the issues arising from the Communication of 1985 has been the question of the policies of return migration. In this respect the Commission in its Guidelines for a Community policy on migration affirms that action in this field "should equally form one of the elements of the Community policy on cooperation and be implemented within the framework of the agreements concluded between the Community and those states, several of which contain

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See GAJA *La normativa comunitaria.. op.cit.*, pp.153-154. The Social and Economic Committee of the Community in its opinion of 24 October 1979 affirmed that "la mise en place d'un marché communautaire de l'emploi devra comporter le transfert progressif à la compétence de la Communauté de la politique migratoire vis-à-vis des pays tiers" cited by TORRELLI, *op.op.cit.*, p.181.

<sup>589</sup> For the competence of the Community to enact directives regulating those aspects of migration policy as regards third countries related to the free circulation in the Community see ADINOLFI, A. I lavoratori extracomunitari. Norme interne e internazionali, Bologna, il Mulino, pp.445-500.

<sup>590</sup> EC Bull. Supp. 9/85

<sup>591</sup> The proposal for a directive on the education of children of migrant workers was, according to the proposal of the Commission, addressed to the children of third country migrant workers as well (Q.J. C 213 1975). Directive 77/486 only concerned the children of Member States workers, see Q.J. L 199 1977.

social provisions"<sup>592</sup>.

It is possible, in a perspective of developing cooperation policy, to link this question with the issue of vocational training. The return to their country of origin of a specialized labor force could be an important element in the development of these countries<sup>593</sup>.

The EEA Agreement with EFTA countries and the Europe Agreements with Poland, Hungary and Czechoslovakia contain provisions on workers. The former Agreement provides for a freedom of movement for workers among EEC Member States and EFTA States.

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<sup>592</sup> The question of vocational training may be very relevant in the framework of the reintegration of third country workers to their country of origin. As noted above, this matter is not regulated in the Cooperation Agreement. Bull EEC Supp. 9/85 1985 p.11

<sup>593</sup> There is of course an interest on the part of industrialized countries to foster the return of migrant workers to their countries of origin in a period, like the present, of high unemployment. The question of the relationship between migration and development cooperation policy is obviously much more complex, and because it goes beyond the scope of this section will not be discussed here. It is sufficient to observe that it would be necessary to intervene at the root of the problem, with the elimination or the abatement of the necessity and interest of emigration by the creation of new jobs. It is, in the last analysis, a question which involves all the sectors of the economy. See PIERUCCI, A. Spunti per un'analisi del problema dell'emigrazione dai paesi mediterranei verso la Comunità Europea TIZZANO, A. La politica mediterranea... op.cit., p.436.

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**PART IV**



**DEVIATION FROM THE COOPERATION AGREEMENT PROVISIONS: DEROGATING AND SAFEGUARD CLAUSES.**

The object of this section is to discuss the provisions of the Cooperation Agreements that authorize the contracting parties to deviate from certain rules established in the Agreement.

Under these rules the contracting parties are allowed to take measures which would, "per se", be in breach of the regime, but are, on the contrary, lawful for the reasons and within the limits which are going to be discussed in more detail hereafter.

A distinction may be made between a) derogation clauses which permit one or more contracting parties to depart, even permanently, from certain rules of the agreement to protect interests or values which have priority over the rules established in the agreement and b) safeguard clauses, allowing the contracting parties to deviate temporarily from the established regime to face certain events harmful to their economy. The insertion of such clauses in an agreement may be justified by the fact that the "normal life" of an agreement may be hampered by several circumstances which can be anticipated only approximately, in particular if the agreement is concluded for an unlimited period. When the equilibrium of the regime is perturbed by such facts, safeguard clauses are a means available to a contracting party to modify, even if for a limited period, contractual obligation to protect its own interests ("safety valves"<sup>594</sup>) without recurring to revision or amendments of the Agreement<sup>595</sup>.

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<sup>594</sup> The expression seems to have been used for the first time by Advocate General Dutheillet de Lamothe in case 37/70 ECR (1971) p.43. See TALGORN, C. Les accord externes de la C.E.E.. Les mesures de sauvegarde dans le cadre des accords externes de la C.E.E. RTDE 1978 pg. 695-727, pp.697.

<sup>595</sup> The problem of adaptation of international agreement to changing circumstances has been discussed by WEILER, J.H. Obsolescence and adaptability in Mediterranean Cooperation Agreements: a Case Study in TIZZANO, A. (ed) La Politica mediterranea .., op.cit. pp.476-490. According to this author derogations are

It emerges from this definition that the two types of clause differ with respect to the reasons justifying the deviation, the extension of the deviation and the subjects which can legitimately invoke them.

What then is the common denominator and what is the value of discussing these provisions ? As regards the first question, it should be noticed that, with perhaps one exception, these articles allow for deviation from those trade rules established in the Agreement which are at the core of the relationships between the Community and its the Mediterranean Partners.

Besides, both types of clauses have the effect of conferring a certain degree of elasticity on the system which provides for them (in particular if this is established, as in this case, by an agreement of indefinite duration) and, as a consequence, favor the conclusion of the agreement. In other words, each contracting party is more disposed to accept the contractual obligations deriving from the agreement because it has the possibility of revoking them<sup>596</sup>. The agreement is thus not perceived as a permanent limitation to its sovereignty. On the other side of the coin, safeguard clauses may be perceived as introducing an element of uncertainty in the relations and rules of procedure governing the adoption of the measures may be adopted to water down this feature. Second, these clauses may be used as a means of protection or to evade at least some of the advantages granted to Maghreb countries, but can also be applied consistently with the scope of the Agreement.

Derogations and safeguard clauses are a common feature of international trade agreements and economic treaty. They are

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one of the mechanisms of flexibility provided for in the agreement.

<sup>596</sup> See LEJEUNE, M.A. Un droit de Temps de crise: les clauses de sauvegarde de la cee Bruylant, Bruxelles, 1975, MANIN, A. "A propos des clauses de sauvegarde", RTDE 1970 pp.1-42, p.16.

contained for instance in GATT<sup>597</sup>, in the EEC Treaty<sup>598</sup>, and in most agreements concluded by the Community with third countries in the

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<sup>597</sup> The distinction between safeguard clauses and derogation measures could be applied as well to GATT which contains several clauses allowing the contracting parties to deviate from the provisions of the Agreement. Safeguard clauses are contained in Article XIX, permitting the partial or total suspension of the obligation or the withdrawal or modification of the concessions in the case of market disruption; Article XII allowing the adoption of import restriction (both in quantity or value) to safeguard the balance of payment; derogation provisions are Article XVIII providing for deviations from GATT provisions justified for economic development reasons; Article XXIV allowing derogations in the case of the establishment of free trade areas and customs unions, Article XX establishing the compatibility with the Agreement of measures taken to protect public morals, human, animal or plant life or health, importation or exportation of gold and silver, Article XXI authorizing the adoption of measures necessary for security reasons; Article XXV where departure is justified by exceptional circumstances. See J.H.JACKSON World Trade ..., op.cit. pp.81-99.

<sup>598</sup> It is to be noticed that a certain parallelism exists between the articles of GATT and the EEC Treaty providing the possibility of deviating from the regime established by the two instruments. The general safeguard clause of the EEC Treaty, contained in Article 226 is, however, no longer applicable, since the provision only applied during the transitional period. According to Pescatore safeguard clauses are an element of unpredictability in a system of permanent integration and this one would be undermined by the maintenance of national safeguard clauses after the end of the transitional period. See intervention P.PESCATORE in L'Union Douanière à l'Union Economique Institut d'Etudes Juridiques Européennes, Liège, 1970 p.256. On the utility and necessity of having a general safeguard clause after the expiry of the transitional period see OPPERMANN, M.T. "La légitimité et l'opportunité des clauses de sauvegarde dans un régime de marché commun" *Ibidem.* pp.209-217. Specific clauses of derogation are contained in Articles 108 and 109 in the case of difficulties regarding balance of payments, and Article 115, which justifies the adoption of protective measures against third countries' products which are in free circulation within the Community due to differences between the commercial policies of member States. (see *infra* for an extensive analysis of this article). Other clauses are contained in the EEC Treaty permitting the derogation from certain articles for non-economic reasons: Article 36 (see *supra* Part I, Chapter 1), 48(3), 56(1) and 224.

field of trade<sup>599</sup>.

1) Derogation Clauses.

1.a) The "common agricultural policy" clause.

(Art. 25 of the Cooperation Agreement with Morocco).

This clause considers the possible modification which may take place in the field of the common agricultural policy of the Community. In the event that specific rules are adopted by the Community, as a consequence of the modification, implementation or development of the common agricultural policy, the Community is allowed to unilaterally modify the provisions of the Agreement which deal with the products concerned.

It should be observed that this clause does not provide for a temporary deviation from a given regime (trade in agricultural products) to give a contracting party time to adjust to new circumstances, as is the case for safeguard clauses, but open the possibility of a permanent modification of the agreement. In substance, the clause permits amendment of the Agreement without reopening negotiations. As discussed above in the section on agriculture, the common agricultural policy constitutes a severe limit as far as agricultural trade preferences offered by the Community to Maghreb exports are concerned. This clause seems to guarantee the prevalence for this policy over the provisions on agricultural trade.

The Community enjoys a large discretionary power under this clause and can decide to modify the agreement even without

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<sup>599</sup> A comparative study of the various safeguard measures contained in the Agreement concluded by the Community indicates that the more complex are the relationships established, the more numerous and specific are these type of clauses. See TALGORN, C. *Les mesures de sauvegarde dans le cadre des accords externes de la CEE RTDE* 1978 p.695-727, p.711.

consulting the other party if the latter does not require it expressly. The only condition that the Community has to respect is to maintain the balance of the regime. It is in fact established that the Community shall in the case of modification of the arrangements made in the Agreement accord the other contracting party advantages comparable to those conferred by the Agreement. Such a comparison seems however rather difficult to establish in particular as regards the criteria that shall be applied: could a restriction on imports of, say, aubergine be compensated by a reduction of the reference price for artichokes, or a prolongation of a high season for oranges?.

Moreover, the advantages that the Community can grant under Article concern "imports originating in Morocco" and it could therefore be argued that the Community could balance the modified arrangements on agriculture with advantages on products other than agricultural ones.

1.b) "Development" clauses.

These are contained in Articles 27 and 28.

As already discussed above, Maghreb countries apply to trade with the Community the most favored nation clause (Art.27.1). The Cooperation Agreements in Art. 27 paragraphs 2 and 3 provides for the possibility open to Maghreb countries to derogate from such provision for two reasons. The first is the creation of more integrated systems such as free trade areas and customs unions.

This provisions does not require a specific comment since the derogation from most favored nation clause is provided for in Article XXIV of GATT<sup>600</sup>.

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<sup>600</sup> The derogation provided for in this article is justified with the fact that customs unions and free trade areas are a means of increasing freedom of trade. It is obvious that these forms of commercial integration may as well be the origin of trade diversion, this is why the contracting parties in Article XXIV.4 affirm that the "purpose of customs union or of free-trade area should be to facilitate trade between the constituent territories

The second reason justifying the derogation, the economic integration of Maghreb or the application of measures benefiting developing countries, is more original. The two reasons may overlap if the integration of Maghreb take the form of a customs union or of a free trade area, but the fact of keeping the integration of Maghreb as a separate hypothesis seems to mean that this may take different forms and that it is considered a sufficient reason to justify the derogation from the application of the most favored nation clause. It should be remembered that the integration of Maghreb should be enhanced by other provisions of the agreement such as those establishing specific rules of origin for these countries<sup>601</sup>.

Article 28 does not provide for a deviation from a specific rule of the Agreement but establishes the possibility of introducing new customs duties, charges having equivalent effect to customs duties, new quantitative restrictions or measures having equivalent effect to imports and exports of the Community when these are justified by Morocco industrialization and development requirements. Articles 27 and 28 should be read together because, although the specific reasons for which derogation is admitted listed in both the provisions are different they all respond to the same concern, the development of Morocco<sup>602</sup>.

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and not to raise barriers to the trade of other contracting parties with such territories", paragraph 5 lists the requirements that have to be fulfilled to this hand. It is interesting to note that the impulse for a regional integration clause in GATT came from developing countries. See JACKSON, World trade.. op.cit. p.603.

<sup>601</sup> See for comparison the Association Agreement concluded with Morocco in 1969 Art.4.3 where it was specified that the establishment of customs unions or free trade areas, which could justify a derogation from the most favored nation clause, could, on the contrary, not have "the effect of modifying the trade arrangements laid down in this Agreement, and in particular the rules of origin".

<sup>602</sup> This can be extended to the creation of customs unions and free trade areas, which are likely to be concluded with countries of the same geographical areas, thus developing countries.

The main reason for two parties to conclude an agreement is that of regulating certain aspects of their relationship to achieve a common goal. In the case of conflicting interests the agreement should secure an equilibrium between them. The derogatory clauses tend, on the contrary, to alter this equilibrium in favor of one contracting party, (although this "alteration" may be in certain cases only temporary), with the risk of deferring the achievement of the main scope of the agreement.

If applied, both articles 27 and 28 would undoubtedly modify the balance of the Agreement<sup>603</sup>, but in these cases the derogation does not aim at protecting a specific interest of a contracting party despite the aim of the agreement. On the contrary, the derogation takes place for the attainment of the Agreement ultimate goal.

The measures adopted for the economic integration of Maghreb and for the benefit of developing countries shall be notified to the Community. For new charges adopted under Art. 28 consultations shall be held within the Cooperation Council if requested by the other contracting party. This possibility is provided for only by Art. 28 and this may be explained by the fact that this article provides not for a derogation (non-application) of the rules but for the adoption of new charges and those may be discussed with the Community if it requires so. This consultation does not mean that the charges may be negotiated, but discussions may be held, information exchanged to make the application of the measures less onerous for the other contracting party.

#### 1.c) "Non-economic" and Security Derogating Clauses.

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<sup>603</sup> One should note that the Association agreement of 1969 was careful to establish that derogations were admitted on the condition that the balance of the agreement was maintained, see Articles 4.3 and 7.1.

Art. 35 of the Cooperation Agreement establishes that "The Agreement shall not preclude prohibition or restriction on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures of artistic, historic or archeological value; the protection of industrial and commercial property, or rules relating to gold or silver<sup>604</sup>.

The interpretation of this provision has been discussed in Part I of this thesis and reference can be made to this analysis. This section will consider only the question of non discrimination.

There is a risk of misuse in the application of these types of derogatory measures and the danger of their being transformed in instrument of protectionism. Therefore Art.35 established that prohibitions or restrictions shall not be used as means of arbitrary discrimination or disguised restriction on trade, which means that the restriction must not be disproportionate as regards the aim they pursue.

As regards the question of non discrimination Article 35 has caused a problem of interpretation and to an exchange of letters annexed to the Agreement.

The principle of non-discrimination is further specified in the agreement in Art.54 which prohibit any discrimination by Morocco between member States, their nationals, companies or firms and by the Community between Moroccan national, companies or firms.

According to Morocco Art.35 and 54 of the Agreement do not require the repeal of laws and regulations in force "in so far as they remain necessary for the protection of its essential security interests. Morocco will see to it that such laws and regulations

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<sup>604</sup> This reason is the only one which is not contained in Art.36 EEC Treaty.

are applied in such a way as to ensure compliance with Art.51.1<sup>605</sup> of the Agreement". In its declaration the Community affirms of expecting the full application of the principles of the Agreement, "including those in Articles 35 and 54..".

This question is related to the boycott of the Arab League against companies and undertakings which entertain relationships with Israel. In practice with this declaration Morocco intended to affirm that it is allowed to prohibit or restrict trade only against those Member States companies and firms trading with Israel<sup>606</sup>, (a discrimination justified on the ground that only those firms are a danger for its public security). However, prohibition of discrimination is clearly established in the Agreement and a breach cannot be justified by reasons of public security which only admits restriction of trade and cannot be invoked to justify a breach of any other provisions.

Thus in the case one Maghreb country prohibits trade with a specific European firm on the basis of its relationships with Israel, it breaches article 35, since the prohibition is not applied following the criteria set up in this provision, and Article 54 on the general prohibition of discrimination.

Leaving aside the question whether the fact of trading with Israel could constitute a threat for Arab countries security, one should ask whether the declarations annexed to the agreement modify the legal value of the obligations that the parties have assumed under the provisions here discussed. The answer could not be but

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<sup>605</sup> "The Contracting Parties shall take any general or specific measures required to fulfil their obligations under the Agreement. They shall see to it that the objectives set out in the Agreement are attained".

<sup>606</sup> The boycott was also applied to firms whose managers were Jewish or even in cases where the Davis star was applied on the packing as reported by RUZIE, D. "Le principe de non-discrimination dans les accords de cooperation conclus entre la CEE et les pays du bassin mediterraneen" in TOUSCOZ, La Communauté Economique Européenne élargie et la Méditerranéenne: Quelle Coopération ? Colloque CEDECE, Puf, Paris, 1982 PP.228-234.

negative when one considers that the Community clearly expresses its disagreement on the interpretation given to articles 35 and 54 by Maghreb countries<sup>607</sup>.

The Cooperation Agreement contains in Title IV (General and Final Provisions) Article 53 empowering the Contracting Parties to take measures they consider necessary "to avoid disclosure of information contrary to their essential security interests", measures related to "trade of arms, munitions and war materials, to research, development or production indispensable for defence purposes, provided that such measures do not impair the conditions of competition in respect of products not intended for specifically military purposes" and in general measures "essential to its security in time of war or serious international tensions". All these reasons allow deviation from any of the agreement provisions (the formula used is that "nothing in this Agreement shall prevent a Contracting Party from taking any measures.."). The competence of adopting these measures remains within the Member States in this case more clearly than in Article 35. Clearly in the field, of security and defence, the sovereignty of a state does not tolerate any constraint and require the highest freedom to act.

## 2) Safeguard Clauses.

As mentioned above safeguard clauses are "security valves" provided for in any trade agreement to allow contracting parties to protect their interests when certain events cause injury to their economy, perturbing the equilibrium between the advantages obtained by the agreement and the obligation deriving from it.

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<sup>607</sup> All the other exchanges of letters annexed to the agreement contain a specific formula that the parties add to their declarations respectively asking for and giving acknowledgement of receipt of the letter", which can be considered the standard ways to express consent over the content of the declaration. See in this sense RUZIE, D. *Le principe de non-discrimination..op.cit.* p. 232.

The specific features of safeguard clauses (distinguishing them from other derogation clauses also provided for in the cooperation agreement), is that they react against events harmful for the economy of the parties and that they have a temporary application.

A distinction is usually made in international economic law<sup>608</sup> between safeguard clauses and anti-dumping and anti-subsidies clauses. These latter are measures taken against practices of dumping and state aids. Dumping is the selling of products exported from a third country at a cheaper price than that paid in the country of origin for a like product. Bounties and subsidies are aids accorded by the state of origin of the product exported regarding its manufacturing, production or export and having an effect on its price.

Although the prejudice for the economy is also required for the application of safeguard measures, the two types of measures have different scope. Safeguard measures aim at isolating the market and protecting it from the competition, giving the contracting party having adopted such measures time to adjust to the situation of crisis.

In the case of dumping injury for domestic economy is one of the condition for the application of anti-dumping duties which aim at eliminating an unfair trade practice. Anti-dumping and countervailing duties can be considered as "counter-measures" and aim at the abolition of the discrimination between prices of the imported and the domestic products. However, it has been argued that the method of application of anti-dumping duties in the Community has the scope of alleviating injury and that the EEC

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<sup>608</sup> See Jackson, J.K. Legal problems.. op.cit. p.539. The criterion of distinction between safeguard and anti-dumping measures is the qualification of the commercial practices to which these measures respond as fair or unfair. This differentiation is opposed by Kleen which argues that the two concepts (fair and unfair) "are highly subjective and deeply rooted in Anglo-Saxon policy tradition" see KLEEN, P. The Safeguard issue in the Uruguay Round-A Comprehensive Approach JWTL 1989 pp.73-91, p.80.

anti-dumping policy is undistinguishable, as far as its effects are concerned, from those deriving from the application of safeguard measures<sup>609</sup>.

Dumping and subsidies are not prohibited per se, and are the object of anti-dumping and anti-subsidies duties only when dumped or subsidized imports cause injury to the domestic industry concerned<sup>610</sup>.

The safeguard clauses (for simplification this term will include anti-dumping and anti-subsidies measures) of the Cooperation Agreement with Morocco are contained in Arts. 36-38(39).

For each cooperation agreement concluded with Maghreb countries the Community has enacted a regulation<sup>611</sup> laying down rules for the implementation of safeguard clauses (including anti-dumping and anti-subsidies clauses and measures that can be taken under Art.51). These regulations contain the rules of procedure that the institutions concerned, EEC Council and Commission, have to follow when safeguard measures are applied by the Community.

The parties of the Cooperation Agreement are also bound by the rules of procedure established in Art.38 which concern the phase of consultation (before and after the adoption of the measures) within the Cooperation Council.

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<sup>609</sup> See NICOLAIDES, P. *Anti-dumping Measures as Safeguards: the Case of the EC Interdec.* 1990 pp.273-279, on the limitation of anti-dumping as instrument of protecting trade see WEIDEMANN, R. *The Anti-dumping Policy of the European Communities, Interdec.* 1990 pp. 28-35.

<sup>610</sup> See Article VI GATT "The contracting parties recognize that dumping...is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party ..." The same concept is expressed in Article 2 of EEC anti-dumping Regulation 2423/88 11.07.1988 Q.J. L 209 1988.

<sup>611</sup> Regulation 1662/77 for Morocco, regulation. 1663/77 for Algeria and regulation 1664/77 for Tunisia. All are published in Q.J. L 186 266.07.1977 pp.9-15. For further comments see *infra*.

## 2.a) Anti-dumping and Subsidies Measures.

The first indent of Art. 36 provided for the possibility open to any Contracting Party to adopt appropriate measures against dumping. This practice is not defined in article 36 which establishes that anti-dumping measures may be taken "in accordance with the Agreement on implementation of Art. VI of the General Agreement on tariffs and trade"<sup>612</sup>.

The agreement mentioned in Art.36 is the GATT anti-dumping code<sup>613</sup> laying down rules concerning the calculation of the normal value of a product and of the dumping margin (the difference between the price of the dumped product and that of the domestic product), the determination of injury, the procedure of the various phases of inquiries and for the application of anti-dumping duties.

The second indent of Art. 36 providing for the possibility of the adoption of measures against subsidies and bounties also refers to Article VI of GATT.

In the event of anti-dumping or anti-subsidies measures it seems therefore that there is not distinction between the rules applied by the Community against exports from Morocco, Algeria or Tunisia the Community and those applied against dumping or subsidies from other exporting countries. The only exceptions are the rules of procedures contained in the regulations cited above. It should however be asked whether the Community can apply its own anti-dumping regulation<sup>614</sup> to its Maghreb partners or it is linked

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<sup>612</sup> Article VI of GATT does not prohibit dumping, but authorizes the contracting parties to offset the effects of this practice. See JACKSON, J.H. DAVEY, W.J. Legal Problems.. op.cit. p.664.

<sup>613</sup> The first code was adopted in 1967, replaced by a new version in 1979.

<sup>614</sup> At present regulation 2423/88 Q.J. L 209 02.08.1988 p.1 is in force. The application of the community anti-dumping regulation to the anti-dumping measures that may be taken under the Morocco

only by the GATT anti-dumping code. It could be argued that the reference to this instrument in Article 36 of the Cooperation Agreement excludes the application of other rules. This does not seem a correct interpretation. Article 36 in fact does not say that the source of anti-dumping law is to be found in Article VI and in the Anti Dumping Code but that the measures will be taken "in accordance" with these instruments. It could therefore be submitted that since the anti-dumping regulation of the Community takes them into account<sup>615</sup>, the Community is legitimate to apply its regulation to Morocco, Algeria and Tunisia. This seems to be confirmed by the fact that regulation 1662/77 laying down the rules for the implementation of Articles 36, 37 and 51 of the Agreement refers to the Community anti-dumping regulation which was in force at that time.

## 2.b) Safeguard Measures.

### 2.b.i) Regional and Sectorial Disturbances. Article 37.

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Cooperation Agreement is established in regulation 1662/77 (o.J. L 186 26.07.1977) laying down rules for the implementation of Articles 36,37, and 51 of the Agreement. The regulation obviously refers to the anti-dumping regulation in force in 1977. The anti-dumping regulation (see preamble of regulation 2423/88) has been adopted taking into account GATT anti-dumping code even if as far as some elements are concerned the regulation "cut loose from this textual bond". See NORALL,C. The New Amendments to the EC's Basic Anti-dumping Regulation CMLRev. 1989, pp.83-101.

<sup>615</sup> See NORALL.C. Ibidem. In the Uruguay Round negotiations complaints had been advanced by some countries like Japan or new industrialized countries against the anti-dumping rules adopted by the Community. "Each country has its own procedures for dealing with alleged cases of dumping, though all are supposedly consistent with the broad rules of Article VI of the GATT and the GATT anti-dumping codes..However, since the GATT rules are framed in very broad terms, the national procedures may respect the letter but not the intention of those rules" DAVENPORT,M. The Economics of Antidumping and the Uruguay Round Interrec. 1990 pp. 267-273, p.268.

The circumstances allowing the adoption of safeguard measures provided for in Art.37 are rather indeterminate. Although in the case of application of dumping or subsidies the determination of the practice of dumping or state aid may be difficult to assess, the GATT anti-dumping code and GATT Article VI provide for specific criteria to be followed. The causes mentioned in Art.37 justifying the application of safeguard measures are very general and liable to be the object of different interpretations. The same applies to the measures that can be adopted. In case of dumping and subsidies these are anti-dumping duties and countervailing duties, whereas Article 37 leaves indeterminate the content of the safeguard measures. The article establishes that "If serious disturbances arise in any sector of the economy or if difficulties arise which might bring about serious deterioration in the economic situation of a region, the Contracting Party concerned may take the necessary safeguard measures under the conditions and in accordance with the procedures laid down in Article 38".

The indeterminateness as regards both the situations justifying the adoptions of the safeguard measures and the type of measures that can be adopted is explained by the impossibility to foresee all the situation of crisis that may arise and jeopardize the normal application of the agreement and that contracting parties should be free, within the limits established in the agreement itself, to adopt the measures most adapt to the particular situation.

The provision however, together with Article 38 - establishing the rules of procedure to be followed when safeguard clauses are applied - , gives some elements which may help to define the range of application of the rule and its conditions of application.

First, the market disturbance must be of a certain gravity, the provision speaks of "serious disturbances", "serious deterioration"; the injury caused to a contracting party adopting such measures is not explicitly mentioned but can be considered to be absorbed in the idea of gravity. In other terms if the market

disturbance does not cause injury to the economy of a contracting party it cannot be considered a serious deterioration of the situation. The market disruption it is not however necessarily actual: measures of safeguard are in fact admitted "if difficulties arise which might bring about a serious deterioration in the economic situation of a region..". It seems nevertheless that the criterion of gravity should apply in this case as well and that the menace of the deterioration shall be real, based on factual evidence and not only supposed (for instance a trend of increase of imports of sensible products with a parallel increase of stock or the closing down of firms producing these products) likely to cause injury if it is not stopped.

In the second place it could be asked whether the disturbances shall be caused by the application of the agreement or/and by reasons not directly connected to it. The answer cannot be univocal for all safeguard measures and depends on the single provisions.

Article 27 of the Cooperation Agreement does not specify and therefore it can be submitted that safeguard measures may respond to market disturbances due both to the application of the agreement and/or to causes independent from it<sup>616</sup>.

As a second element of specification provided for in Article 37 one should mention the case of serious disturbances in a sector

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<sup>616</sup> Article 27 may be compared with Article 177 of the IV Lomé Convention and with Article XIX of GATT. The former provision seems to require that the perturbation justifying the adoption of safeguard measures shall be caused by "the application of the present chapter". The text of the Convention is reported in The Courier n.120, March-April 1990. As regards Article XIX the conditions laid down in this provision are very definite, and for the application of safeguard measures it is required that the perturbation (that is the imports of any product into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten to cause serious injury to domestic producers in that territory of like or directly competitive products) is "a result of unforeseen development and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions..". See JACKSON, J.H. World Trade... op.cit. pp.553-573.

of the economy or in the economic situation of a region.

Both these notions<sup>617</sup> are left undetermined. The term sector of the economy may indicate a branch of economy like agriculture or industry, but it may also be referred to a "sub-sector" like the production of fruits and vegetables in agriculture or even a more specific sector like for instance, always in agriculture, the production of citrus fruits.

For the application of these criteria to safeguard measures applied in 1977 by the Community<sup>618</sup> within the framework of the Cooperation Agreements with Morocco and Tunisia it could be observed that the safeguard measures (import authorization within certain quota limits) were justified by the "market disruption" and by "substantial injury to Community producers" due to the increase of imports of specific textile products such as woven fabrics of cotton, men's and women's trousers, jerseys, men's suits, and dresses and skirts. The increase of imports were particularly relevant in the market of "one or more Member States" (the term "areas" of the Community is also used).

It seems thus to be confirmed that the notion of sector may cover very specific production and that the market disruption may be limited to one or more member states (the Annex of the regulation establishes the quantities of the products for which import authorization is issued automatically, and indicates the Member States to which these measures apply).

It can be submitted that both the terms region and sector mean that the economic deterioration should be enough determined and specific so that a safeguard measure could be effective. It would

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<sup>617</sup> For the question of the possible overlapping of disturbances in a region or in a sector of the economy see TALGORN, C. Les Mesures de Sauvegarde de la Communauté Economique européenne dans ses Relations avec les Etats Tiers, Université de Rennes, These 1979.pp.287-288.

<sup>618</sup> Regulation 1860/77 10.08.1977 Q.J. L 207 13.08.1977 p.30. applied until 31.12.1977.

be rather pointless to invoke a safeguard measure to face a general situation of difficulty. Evidence must be shown that the measures are effective to counteract the situation and to allow the return to the previous situation when possible. If this is true for safeguards measures in general, it should apply in particular in the case of Cooperation Agreement to avoid that the use of safeguard measures could be detrimental to the scope of the agreement.

The meaning of the term region may change if this is related to Morocco or to the Community. In the first case it cannot but designate a part of the State, whereas in the second case it may indicate a geographical area covering more member States, a single State or even a part of a member State.

Do regional disturbances imply the adoption of regional safeguard measures?

The question is relevant for the Community when the region is identified with a Member State and not in the case of disturbances arising in a territorial part of a Member State: this second hypothesis shall be identified with that of safeguard measures limited to one member State.

A declaration by the Community annexed to the Cooperation Agreement specifies that the application of the measures taken under Articles 36 and 37 "may be limited to one of its regions by virtue of Community rules".

It should first be considered that the possibility of adopting a regime applicable to the whole Community in the case of regional disturbances has been admitted by the Court of Justice<sup>619</sup>. Such a solution seems moreover more in conformity with the establishment of the common market than the application of regional protective measures which is on the other hand expressly provided for by the Community in its regulation 822/82, on common rules for imports

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<sup>619</sup> Case 40/72 Shroeder 7.02.1973 (1973) ECR p.125.

(Articles 15.3.a.) and 16.2.)<sup>620</sup>.

As it is well known products imported in a member State from a third country which have complied with customs duties and charges having equivalent effect are free to circulate within the common market as any other product which is produced in the Community (see EEC Treaty Article 10)<sup>621</sup>.

Thus, according to this principle regional protective measures could be sidestepped by third countries importing via other member States to which safeguard measures do not apply.

In reality the possibility for a member state to deviate from the principle of free circulation is admitted in the Treaty. It was in fact (correctly) assumed that even after the transitional period a common commercial policy would have not been fully achieved, therefore, to avoid that national measures<sup>622</sup> of commercial policy,

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<sup>620</sup> For the application of safeguard measures limited to one member State see regulation 1087/84 18.04.1984 for quartz clock imported in France , Q.J. L 106 1984 p.31. See DEMARET, P. La politique commerciale commune: perspectives d'évolution et faiblesses présentes. SCHWARZE, J. SCHERMERS, H.G (eds.) Structure and Dimensions of European Community Policy Nomos, Baden-Baden 1988 pp.69-110 p.88. According to Timmermans measures of regional protection are incompatible with a common commercial policy "Protective import arrangements under Article 113..should be based...on an overall assessment of the situation of Community producers", regional protection could be successful only in particular cases such as perishable goods or goods with high transport costs. TIMMERMANS, C.W.A. Community Commercial Policy on Textiles: a Legal Imbroglia, VÖLKER, E.L.M. Protectionism and the European Community Kluwer, Deventer 1987, pp. 159-183, p. 168. One should remark that according to Article 37 of the Cooperation Agreement with Morocco the assessment of disturbances is made on a regional or sectorial basis.

<sup>621</sup> To avoid traffic deviation the principle of free circulation requires that a uniform regime is applied at the Community external borders, hence the establishment of a Common Customs Tariff and of a common commercial policy.

<sup>622</sup> As an example the national quotas applied by the member States before the establishment of the Community and those permitted under regulation 288/82 (annex I).

maintained after the transitional period, and authorized by the Community, could be threatened by deviation of traffic causing economic difficulties in the member State concerned<sup>623</sup> the application of a "safeguard clause of a transitional nature"<sup>624</sup>, contained in Article 115, was admitted.

Article 115 however, does not seem applicable to measures established by the Community even if these set up a different regime between Member States.

In a recent case however, the Court of Justice has admitted recourse to Article 115 for the application (case Tezi 59/84 (87) p.64) of national sub-quotas provided for in a Community regime for the application of the MFA<sup>625</sup> on the basis of the lack of uniformity of the regime established by the Community<sup>626</sup>.

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<sup>623</sup> See for the requirements to be fulfilled and the procedures to be followed in the case of the application of Article 115, Commission Decision 87/433 22.07.1987 Q.J. L 238 21.08.1987. This decision applies to imports in a member state of third countries's products which are not the object of a common regime.

<sup>624</sup> This expression is used by TIMMERMANS, Community Commercial Policy on Textile.. op.cit. p.170.

<sup>625</sup> The Multi Fiber Agreement. Global ceiling are set up for imports of textile products. These ceilings are divided into national sub-quotas. Extended several times it provided for the possibility of applying restriction on textile trade to protect the industry of importing countries when these are threatened by market disruption. Article 4 of the MFA provided for the possibility of concluding bilateral agreement to this purpose.

<sup>626</sup> The Court justified the application of Article 115 on the basis of the non uniformity of the regime established by the Community. As underlined by TIMMERMANS the question of uniformity of a regime would require further specification for the application of this case-law to other measures, such as those of regional protection. See TIMMERMANS C.W.A. La libre circulation des marchandises et la politique commerciale commune in DEMARET, P. Relations Exterieures de la Communauté Européenne et marché interieur: aspects juridiques et fonctionnels Colloque 1987, Collège d'Europe, Bruges, Story-Scientia pp.91-108, on p.102. This judgment of the Court has been criticized by many authors see TIMMERMANS, C.W.A. The Community Commercial Policy on Textiles.. op.cit. pp.174-177, CREMONA, M. The Completion...op.cit. pp. 293-297. For a positive evaluation of these cases see LENAERTS, K. Les

The case discussed in Tezi is different from that of safeguard measures, but both MFA national sub-quotas<sup>627</sup> and safeguard measures: a) are established by the Community, b) maintain a regime of disparity among the member state and c) may be undermined by the application of the principle of the free circulation. Therefore the reasons justifying the adoption of Article 115 in the case of national sub-quotas discussed in Tezi could be justified the application of this provision to regional safeguard measures as well<sup>628</sup>.

The application of Article 115 in these cases, if admitted, is to be criticized, in particular in the perspective of 1992<sup>629</sup> because it would maintain national differences and delaying the establishment of a common commercial policy<sup>630</sup>.

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répercussion des compétences de la Communauté européenne sur les compétences externes des Etats membres et la question de 'preemption' DEMARET, P. Relations Extérieures.. 1987 pp.37-62 on pp. 44-45.

<sup>627</sup> There are in fact other cases in which the Community quotas are split up into national sub-quotas which are justified as method of administer import restrictions. See regulation 1023/70 Q.J. L 124 1970. See VERLOREN VAN THEMAAT Introduction to the Law of the EEC pp. 809, and TIMMERMANS, C.W.A. Community Commercial Policy on Textiles.. op.cit. p.167 who submits that the national sub-quotas under the MFA are national protective measures.

<sup>628</sup> Article 115 has been applied as a consequence of a measure of regional protection concerning France against Turkish imports of textile products. See decision 82/577 Q.J. L 243 1982 (July 1982). Cited by Timmermans in Community Commercial Policy on Textiles.. p. 177.

<sup>629</sup> See MATTERA RICIGLIANO, A. Il Mercato Unico.. op.cit. pp.643-644.

<sup>630</sup> See CREMONA, M. The Completion..op.cit... A very convincing explanation of the reasons behind the Court of Justice case law has been given by Timmermans who has underlined that this leave the possibility for member states of following a protectionist or liberal trade policy according to their interests. TIMMERMANS, C.W.A. La libre circulation .... op.cit. p.105. This applies to regional safeguard measures as well which are "une solution facile de compromis qui permet de réconcilier en matière de politique commerciale les points de vue souvent diamétralement opposés des

To avoid recourse to Article 115 but at the same guarantee the effectiveness of safeguard measures it would be necessary to extend them to all Member States. For third countries exporting to the Community, regional safeguard measures have the advantage of closing only a part of the market, leaving this country free to export in the other member States, and this would be consistent with the Cooperation Agreements which requires the adoption of safeguard measures "which least disturb the functioning of the Agreement".

Even if the production of goods object of safeguard measures is concentrated in one market the application of safeguard measures<sup>631</sup> at Community level would have the same effect than regional ones with the advantage of avoiding recourse to Article 115. It should, however, also be considered that safeguard measures adopted by a Member State against one third country can indirectly advantage third countries whose products are not the object of the restrictive measures and which are in competition with the former third country. (like for example a quota on textile from India would advantage the exports of the same products from Tunisia). In this case the elimination of national quotas (which also aimed at protecting traditional flow of trade) could result in an increase of the competition on the Community market.

#### 2.b.ii) Balance of Payment (Article 39).

Article 39 justifies the adoption by one or more Member States or Morocco of safeguard measures in the case of serious difficulties or of serious threat of difficulties as regards their

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Etats membres, certaines preconisant une politique de libre-échange, d'autres étant plus séduits par des approches protectionnistes" Ibidem p.104.

<sup>631</sup> TIMMERMANS speaks in this case of "relevant market" admitting in this particular case that regional protection would be more suitable and easier to administer p.168.

balance of payment.

It should be observed that the adoption of safeguard measures provided for in Art.39 is the competence of the Community Member States and that *prima facie* they may act outside any Community control. This seems confirmed by the fact that the Community rules of procedure applying in the case of safeguard measures provided in the Cooperation Agreement do not cover the case of Article 39.

A correct analysis of this question cannot be done without making reference to the Treaty rules adopted in the field of the balance of payment.

The economic policy is the competence of Member States and the EEC Treaty requires in this respect a coordination of national economic policies aiming at the equilibrium of the balance of payment (an objective set up in Art.104<sup>632</sup>). Such an equilibrium is a requisite for the correct functioning of the common market and therefore the Community cannot remain indifferent as regards the policies and the instruments used by Member States in the case of a crisis regarding their balance of payments (some of the instruments that can be used to this end<sup>633</sup> are not any more under the control of the Member States<sup>634</sup>). Therefore Articles 108 and 109 provide for the intervention of the Community institutions in the case of difficulties (actual or seriously threatened) in the balance of payment of a Member State. Under Article 108 the

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<sup>632</sup> This article establishes that "Each member States shall pursue the economic policy needed to ensure the equilibrium of its overall balance of payment and to maintain confidence in its currency, while taking care to ensure a high level of employment and a stable level of prices". See also Article 102a, introduced by the Single European Act "In order to ensure the convergence of economic and monetary policies which is necessary for the further development of the Community, Member States shall cooperate in accordance with the objectives of Article 104..."

<sup>633</sup> RICOSSA, S. *Bilancia dei Pagamenti Dizionario di Economia*, UTET, Torino 1982, pp.37-42.

<sup>634</sup> MEGRET, J. (ed) *Le Droit de la CEE*. Vol. VI *Politique Economique*.

Commission is empowered to urge the adoption of certain measures which may be combined with the actions that the Member State concerned may take "in accordance with Article 104" (article 108.1). If these measures prove insufficient the Council, on recommendation of the Commission, shall grant "mutual assistance" which can take different forms (Article 108.2.a.b.c.). It is when mutual assistance is not granted or proved insufficient that the adoption of safeguard measures is authorized by the Commission which shall determine as well the conditions and details of their application (Article 108.3<sup>635</sup>). As established by Article 109 Member States may take protective measures in the case of a "sudden crisis" making the immediate application of Article 108 impossible. These measures have a precautionary character and the intervention of the Community institutions shall follow (Article 109.2.3).

When a Member State faces a situation as that described in Art.39 the Community may intervene according to Articles 108 EEC Treaty: does this mean that these provisions apply in the case of safeguard measures adopted against third countries? The actions that the Community may suggest to the Member States or the safeguard measures do concern only the relationships between Member States and therefore, when the crisis of the balance of payment is invoked, Member States can adopt restrictive measures against third countries without requiring the previous authorization of the Community.

The intervention of the EEC institutions may take place as a consequence of measures established in Article 108.2.b where it is established that among the measures that the Council may take to help the member State concerned are those "needed to avoid deflection of trade where the State which is in difficulties maintain or reintroduces quantitative restrictions against third countries". This seems to confirm that the measures taken against third countries fall outside the application of Article 108.

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<sup>635</sup> These may be revoked or modified by the Council acting by a qualified majority (article 108.3).

2.b.iii) Infringement of Cooperation Agreement Provisions. Article 51.

Some doubts could be expressed about the classification of Article 51 as safeguard clause.

After having established in the first paragraph that "The Contracting Parties shall take any general or specific measures required to fulfil their obligations under the Agreement" Art.51.2 provides for the possibility open to either Contracting Party to take "appropriate measures" when it considers that the other Party "has failed to fulfil an obligation under the Agreement".

It should be observed that unlikely other safeguard clauses examined above, Article 51 is not contained in Titles II and III providing for rules applying to trade but in Title IV "General and Final Provisions". The place of the Article however does not seem to be relevant as far as its classification as safeguard clause is concerned: the infringement does not necessarily concern trade and consequently the measures that can be adopted might not concern trade measures either.

The reason justifying the adoption of "appropriate measure", viz. the non-fulfillment of an obligation, cannot exclude the insertion of this provision in the category of safeguard clauses either.

As seen above, safeguard measures are admitted in the case of an abnormal situation injuring the interest of one Contracting Parties, and the infringement of the agreement can be considered a disturbance detrimental for the contracting party victim of the violation. It should be reminded moreover that also in the case of dumping measures were adopted against an illicit behavior of the counterpart.

Art.51 does not qualify the type of infringement. As seen above a certain level of gravity was required for the application of safeguard measures both in the case of regional and monetary

safeguard measures (Articles 37 and 39) whereas in the case of Article 51 the violation of the agreement is not qualified. It can be suggested that, in the absence of any practice, the violation of the agreement is per se considered a serious reason to invoke safeguard measures, but that in the application of these measures the principle of proportionality between the violation and the measures taken should be applied.

Article 51 allows the adoption of "appropriate measures" without any further specification of the type of measures. A question arising in this respect concerns the possibility of suspending the agreement. In other terms it could be questioned whether is possible to consider this provision as the codification in this agreement of the rule of general international law providing for a right of a contracting party to suspend or terminate, totally or in part, a treaty in the case of its breach by another contracting party ("inadimpleti non est adimplendum")<sup>636</sup>.

It is here submitted that the measures allowed under Article 51 do not cover this hypothesis.

It should be noticed that the second indent of paragraph two of Article 51 establishes that "In the selection of measures, priority must be given to those which last disturb the functioning of the Agreement". This criterion is common to all safeguard measures (see above Articles 38 and 39) whose scope is exactly that of permitting the continuation of the agreement: it seems that the suspension of the agreement (not to speak of its termination) could hardly be consistent with this requirement. This of course does

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<sup>636</sup> This rule has been codified in Article 60 of the Vienna Convention on the law of the treaties of 1969. This article establishes procedural rules and set up the requirement of a material breach (sostanziale) to invoke the right of termination or suspension of the treaty. See for comments PISILLO MAZZESCHI, R. Risoluzione e sospensione dei trattati per inadempimento Giuffrè, Milano 1984 pp.111-116. The analogy of this type of safeguard clause with this rule has been underlined by TALGORN, C. Les mesures de sauvegarde.. Thèse, 1979 pp.177-183 and by MANIN, A propos de clauses de sauvegarde RTDE 1970 pp.1-42 on pp.12-14.

not mean that the suspension or the termination of the agreement are excluded, the principle *non adimpleti* being a rule of customary law may be invoked if the circumstances so required even if it is not expressly provided for in the agreement.

The scope of these safeguard measures should that of allowing the parties invoking them to cope with the difficulties arising as a consequence of the breach of the obligation. However, the fact that these measures are adopted as a consequence of the infringement of an obligation of the agreement means that the measure taken under Article 51, consisting in a deviation from the rules of the agreement, may be perceived as a sanction against the contracting party author of the breach. The risk of an escalation is real<sup>637</sup>, in particular if the breach is contested by the party that has been considered the author of this violation or if a measure adopted, for example under Article 27 is considered unjustified and thus evaluated as a breach of the agreement by the other contracting party.

It should moreover be observed that the breach is not declared by a common institution<sup>638</sup>, such as the Cooperation Council, but is declared unilaterally by the contracting party concerned ("If either Contracting Party considers that the other Contracting Party has failed to fulfil an obligation under the Agreement.."). Although consultation is provided for within the Cooperation Council before the adoption of these measures, the final decision lies in the hand of the party adopting the measures.

From the scope of these measures it follows that the

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<sup>637</sup> See TALGORN, C. Les Mésures de.. op.cit. p.178.

<sup>638</sup> In the case of a dispute the arbitration clause provided for in Article 52 may apply. This establishes the possibility of placing the dispute before the COoperation Council and, in the case of a failure on its part to settle the dispute, for the possibility of appointing an arbitrator. This procedure seems however rather long in particular if one considers that the effective protection of the interests of the party invoking safeguard measures require a certain celerity of action.

contracting parties allowed to adopt them are those which can claim to be injured by the breach of the obligations. As regards the Community, the procedures to be followed for the adoption of the safeguard measures under Article 51 are provided for in regulation 1662/77 and are the same rules which apply for the application of regional and sectorial safeguard measures. The application of these rules seems to exclude an independent competence by the Member States. If national competence is excluded as regards commercial policy measures, it could be asked whether the exclusive competence of the Community also apply in the case of a breach of obligation in a field of the agreement different from trade and if in this case the measures may be adopted by Member States.

#### **2.c) Rules of Procedures for Safeguard Measures.**

The rules of procedures will be distinguished in i) rules set up in the agreement concerning the relationships between the Contracting Parties in the case of application of safeguard measures and ii) rules set up at Community level and concerning the procedure which is to be followed in the adoption of safeguard measures by Community institutions and, in certain cases, by Member States.

##### **2.c.i) Rules of procedures between the Contracting Parties.**

Before establishing the rules of procedure that the parties shall follow when adopting safeguard measures Article 38 first paragraph lay down the obligation for each contracting party to inform the other parties of surveillance measures it adopts. Surveillance measures may be adopted when there exist in a domestic market a situation of difficulty which has not reached the level of gravity requiring the adoption of safeguard measures but which demands that the trend of imports of the product concerned is

attentively controlled<sup>639</sup>. In this case imported products are required to obtain an import document (licence) whose issue however is not subject to quantitative limits. Although safeguard measures do not require the previous application of surveillance measures it is probable that in practice the former follow the latter since it is likely that a market disruption is preceded by some sign of progressive deterioration of the situation. Thus, the reason of keeping the other Contracting Party informed is that this one may act to prevent a further deterioration of the situation (for instance imposing a quota to its exports to prevent stricter protective measures by the other party).

The second paragraph of Article 38 provides for the consultation between the contracting parties before the adoption of safeguard measures. More precisely the contracting parties invoking the adoption of safeguard measures "shall supply the Cooperation Council with all relevant information required for a thorough examination of the situation with a view to seeking a solution acceptable to the Contracting Parties".?????????? It is thus an obligation of the contracting party concerned to invest the Cooperation Council<sup>640</sup>, of the question. The information that it has provided to the Cooperation Council obviously concern the abnormal situation which it denounced and which, on its opinion, justify the adoption of the safeguard measures.

The second step is the examination of the situation by the institution. The scope of the consultation is that of informing the other contracting party of the situation and discussing the

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<sup>639</sup> See for example Art.12 of the EEC regulation on common rules for imports establishing that "Where developments on the market in respect of a product originating in a third country covered by this Regulation threaten to cause injury to Community producers.."and Art.15 "Where a product is imported into the Community in such greatly increased quantities and/or on such terms or conditions as to cause or threaten to cause substantial injury to Community producers.." Emphasis supplied.

<sup>640</sup> It is the common institution created by the Agreement, see articles 44-46 of the Cooperation Agreement.

possible solutions that could be adopted without recurring to safeguard measures. Such discussion seems even more indispensable in the cases of infringement of an obligation by the other contracting party or of practices of dumping or subsidies, where the rectification of the situation depends on the action of the other contracting parties more than in the case of regional or sectorial disturbances.

The obligation of consultation does not mean however that an agreement must be reached with the other contracting party (when an agreement shall be reached it is expressly provided for in the agreement) although this could be considered a better solution. Thus even in the case that the contracting party, object of the safeguard measures, disagree (over the examination of the situation, like for instance its gravity or the opportunity of applying the measures proposed by the contracting party concerned) safeguard measures may be applied.

The prior consultation has the merit of moderating the unilateral character of safeguard measures and of reinforcing the conventional relationships. Which also means a verification of the abstract definition of the situation given in the agreement with the actual situation denounced by the contracting party adopting safeguard measures<sup>641</sup>. The phase of prior consultation may however be omitted when "exceptional circumstances" require "immediate action". The consultation is in this case postponed, but should take place "as soon as possible". The consultation in this case would focus more on the measures adopted and on their opportunity than on the circumstances having required their application. In both cases the contracting party is obliged to notify the measures to the other contracting party or to the Cooperation Council. This is a rule applying even in the case of measures adopted because of difficulties in the balance of payment (Art.39) where prior consultation is not required.

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<sup>641</sup> TALGORN Les Mésures.. op.cit.

Once safeguard measures are in force the consultation between the contracting parties continues, taking place within the Cooperation Council "with a view to their abolition as soon as circumstances permit". The object of the consultation would then be the evolution of the situation, and in particular if the reasons justifying the adoption of safeguard measures still exist, the effects of the measures adopted, the conformity of the measures adopted with the criteria established in the agreement.

2.c.ii) Rules of Procedures Within the EEC.

The question that it seems interesting to discuss is who is competent to adopt safeguard measures at Community level ?

It should be observed that the Cooperation Agreement does not make a distinction between the Community and the Member States. Article 37 for instance establishes that safeguard measures may be taken by "the Contracting Party concerned.." <sup>642</sup>. The answer is partially contained in the rules of procedure for the adoption of safeguard measures contained in the regulations that the Community has expressly adopted for each cooperation agreement.

These regulations do not set up detailed procedural rules but - after having established a general competence of the Commission to decide on the compatibility with the Agreement of practices liable to require the adoption of safeguard measures by the Community - provide for the application of the rules of procedure set up in the Community regulations on common rules for imports and on anti-dumping.

It should be observed however that the regulations for the application of safeguard clauses, which are still in force, were adopted in 1977 and therefore they refer to the regulations on common rules for imports and on anti-dumping that were then in

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<sup>642</sup> See on the contrary Article 177 of Lomé IV Convention which establishes that "...the Community can take or authorize the Member State concerned to take safeguard measures..".

force<sup>643</sup>. Since then these have been replaced and now regulations 288/82 (common rules for imports) and 2423/88 (anti-dumping) are in force. Therefore, when safeguard measures are to be applied the Community shall follow the rules of procedure of the regulations on imports and on anti-dumping that are now in force. According to regulation 822/82 the competence to take safeguard measures lies in the Commission and in the Council. Article 17 of this regulation admits the possibility for Member States to take conservatory measures in specific cases, providing for a successive intervention of Community institutions. The same Article 17 establishes that it will apply until 31 December 1984 and that before this date the Council shall act upon proposal of the Commission to amend it. Now it seems that no amendments have been made, and therefore that Member States are not allowed to act. Regulation 1662/77 provides for the possibility for Member States to take interim safeguard measures. Are Member States competent to act even if only to take conservatory measures? It should further be noticed that according to the procedural rules set up in regulation 822/82 the measures taken by the Member state should be replaced by those taken by the Commission, unless the Member State refers the matter to the Council which shall decide within one month following referral, with the possibility of extending this period up to three months. The national safeguard measures may thus apply for a period long enough to have important consequences for trade with the third country concerned. (footnote) If the national .. has been abolished for trade with third countries there seem to be no reasons why it should be maintained in the relations with Maghreb countries, especially if one considers that the commercial policy is a competence of the Community.

### 3) Safeguard Clauses and Agricultural Products.

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<sup>643</sup> Respectively 1439.74 Q.J. L 159, 15.06.1974, p.1 and 459/68 Q.J. L 93, 17.04.1968.

There exist on the subject a few points worth mentioning. The safeguard clauses of the Cooperation Agreements do not make a distinction between agricultural and industrial products, therefore safeguard measures also concern agricultural trade when the criteria indicated in the said provisions are fulfilled. As seen above in details, the Cooperation Agreements provides for specific mechanisms which are applied to agricultural trade aiming at the protection of the EEC market<sup>644</sup>. Within the framework of trade relations with Morocco the conditions of application established in Article 38 apply. It should be noticed that regulation 1662/77, on the application of safeguard clauses at Community level, cited above, provided in Article 4 that the regulation "shall not preclude the application of Regulations on the common organization of agricultural markets or of community or national administrative provisions resulting therefrom or of special Regulations adopted under Article 235 of the Treaty for processed agricultural products; it shall apply in addition thereto". All common agricultural market regulations contain a safeguard clauses allowing the Community to adopt appropriate measures when the Community market in one of the products concerned experiences or is threatened with serious disturbances which may endanger the objectives established in Article 39 EEC Treaty<sup>645</sup>. It is submitted

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<sup>644</sup> "...les instruments de regulation des échanges à l'importation ou à l'exportation sont de nature à éviter des perturbations sérieuses" TALGORN, C. "L'application à l'agriculture des mesures générales de sauvegarde" in RAUX, J (ed.) Politique Agricole Communautaire et Construction Communautaire Economica, Paris, 1984 pp.327-334 on p. 333.

<sup>645</sup> Safeguard clauses are general provisions applying to all market organisations. The wording of this provision is also very general and applies to imports and exports. "Appropriate measures" may be applied in case of serious disturbance or threat of disturbance caused by imports or exports to the Community market that could endanger the objectives of the common agricultural policy. These measures are decided by the Commission on its own initiative or at the request of a member state. The Council, to which the measures are referred within three days following the adoption of the safeguard measures, may amend or repeal them.

that Article 4 of regulation 1662/77 shall not be interpreted as allowing the Community to take safeguard measures when the conditions set up in the regulations establishing cmo are met. The trade relationships should in fact take place within the framework of the agreement, whereas in the case of application of safeguard measures as provided in the cmo regulations the Community would act autonomously. Article 4 should be interpreted in the sense that the rules of procedure for the application of safeguard measures for agricultural products should be those indicated in the cmo regulations. See article 18 of the regulations establishing a cmo for processed fruits and vegetables where the Commission is competent, on its own initiative or on request of a member State to adopt the safeguard measures which are immediately applicable. These measures may be modified or repealed by the Council.

It can be observed that the safeguard measures are only a potential obstacle to trade. Uncertainty due to the very general aims listed in art. 39. A safeguard clause is also provided in the cooperation agreements with Maghreb Countries. The main difference between the two safeguard clauses lies in the fact that the first is contained in a Community act. It is, in other words, an autonomous rule whose application is limited only by respect for the conditions laid down in the regulation. The safeguard clause contained in the agreement is a contractual measure and the freedom of action of one contracting party is therefore much more limited, in addition because the application of the safeguard measure consists of a suspension of the agreement. A consultation procedure, taking place within the Cooperation Council, is

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Member States may take protective measures within the limits and the conditions established by the Council. It is obvious that the so called "appropriate measures" are protective measures, such as quotas or, if the imports are subject to import licenses, the suspension of the latter. See regulation 1035/72 for fruits and vegetables Article 29, Regulation 426/86 for processed fruits and vegetables Article 18.

therefore provided. The Cooperation Council shall be provided with all relevant information before the adoption of the measures, unless due to "exceptional circumstances" prior consultation within the Cooperation Council is impossible and precautionary measures are taken to remedy the situation. Once the measure is adopted the Contacting Parties shall periodically consult within the Cooperation Council "with a view of their abolition as soon as circumstances permit". The measures which can be adopted are not specified (see Israel ), but shall respect the limits of what is "strictly necessary to counteract the difficulties which have arisen, in their selection "priority must be given to those which least disturb the functioning of the Agreement".

#### 4) Safeguard Measures and Voluntary Restraint Agreement (VRA).

After 1977 the Community has ceased to make recourse to safeguard clauses to protect its market from textile imports coming from its Mediterranean partners. As part of its trade policy on textile, the Community concluded voluntary restraint agreements with several of its Mediterranean partners, among which Morocco and Tunisia<sup>646</sup>.

The substitution of safeguard measures with voluntary restraint agreements in the Community textile policy towards Mediterranean countries is part of a more general trend which goes beyond this specific trade relations. These types of agreements have in fact become instrument of trade policy which, after the end of the sixties have known a growing expansion in sensitive sectors such as textile and steel<sup>647</sup>.

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<sup>646</sup> Egypt, Malta, Cyprus, Yugoslavia, and before accession Spain and Portugal. See Les Accords Méditerranéen en 1989 pp.175-184. The Turkish government refused to conclude a restraint export agreement, safeguard measures were applied in 1982.

<sup>647</sup> For an account on the origin and development of voluntary restraint agreements see JONES, K. Voluntary Export Restraint: Political Economy, History and the Role of GATT JWTL 1989, pp.125-

Voluntary restraint agreements consist on an formal undertaking between an exporting and an importing countries whereby the former engage to export only an agreed quantity of products. The key concept is the free-will character of the engagement since in theory the exporting country could terminate the self-restriction on exports. This specific character include voluntary restraint agreement in the number of the so-called grey-area measures that are "beyond the reach" of GATT obligations. They seems to escape for example for the application of Articles XI and XIII. The ratio of this provision is to prohibit export restraint as a discriminatory measure against importing countries whereas the scope case of voluntary restraint agreement is that of protecting the importing country industry against competitive products of third country origin<sup>648</sup>.

The reason of their development is strictly related to this observations. They provide importing countries with a new instrument of protection which allows circumvention of GATT rules and in particular it avoid recourse to safeguard measures<sup>649</sup>. The application of Article XIX of GATT requires a number of criteria to be respected like advanced notification, compensation and prerequisite like serious injury to the domestic industry caused by the increased imports. Moreover, safeguard measures should have temporary application. What is further object of discussion is the possibility of applying selective safeguard measures, that is if the restrictions can be target only one

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140, JACKSON, DAVEY Legal Problems.. op.cit. pp.609-615.

<sup>648</sup> See FIEVET, G. *Les accords d'auto-limitation, une nouvelle technique d'accords communautaires* RMC 1982 pp.597-608 and JONES, *Voluntary Export.. op.cit.* p. 132.

<sup>649</sup> Export restraints on the part of exporting countries have been defined as "extra escape clause" techniques. See JACKSON, J.H., DAVEY W.J. Legal Problems.. 1986 op.cit. p.609. According to KLEEN, "orderly marketing arrangements" or "voluntary export restraints" are "grey area" measures which tends to replace the application of Article XIX GATT. KLEEN, P. *The Safeguard Issue....* pp.75-76.

exporting countries or if this selectivity, which is not expressly prohibited by Article XIX, is inconsistent with the GATT system and with the non-discrimination principle<sup>650</sup>.

Voluntary export agreements have the advantage of not appear like restrictions imposed by the importing country, they are often negotiated between the relevant industries without formal involvement of governments, allow selectivity and can be applied with indefinite duration. Exporting countries accept to "volunteer" in the fear that a refusal could trigger stricter alternative measures. The most attractive feature of voluntary restraint agreements for the exporting countries is that they can charge higher prices on the exported products and that they are sure that within the period of application no further protective measures will be triggered against their exports<sup>651</sup>. Quotas are managed by the third country (the competent authorities shall deliver an export licence which allows them to control the flux of quotas). The replacement of safeguard measures with voluntary restraint agreements in the relationships between the Community and Maghreb countries seems to reflect the general trend of international trade relations. The rules regulating the adoption of safeguard measures in the Cooperation Agreement lay down very precise requisite for their adoption and application (serious deterioration of the situation, notification, periodic consultation, limits on the selection to the measures strictly necessary to counteract the situation, temporary application included in the obligation to abolish them as soon as circumstances allow). For their specific features, safeguard measures seemed unfit to

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<sup>650</sup> PETERSMANN, E.U. Economic, Legal and Political Functions of the Principle of Non-discrimination *The World Economy* 1986 pp.113-120 and Grey Area Trade Policy and the Rule of LAW *JWTL* 1988 pp.23-44.

<sup>651</sup> For an analysis of the effects of these agreements and in particular on the "collusion" they engender among companies in the exporting countries see NICOLAIDES, P. Safeguards and the Problems of VERs *Interrec.* 1990 pp.18-24, p.21 ff.

offset a chronic situation of economic difficulties for the textile sector due in particular to the growing export in the Community of textile products coming from developing countries. As for the specific features of the voluntary export restraint agreements with Morocco and Tunisia, these are concluded for a longer period if compared with the application of safeguard measures. In the case of Morocco, the safeguard clause for textile was applied from August to December 1977, whereas the restraint agreement was first applied for three years.

These restraint agreements have been concluded as verbal notes or memorandum and have not been published in the EEC Official Journal<sup>652</sup>.

As regards the content of these agreements<sup>653</sup> a distinction is made between quotas of products which are completely manufactured in the exporting country and those produced by third countries with raw materials which are produced in the Community (outward processing quotas (OPT quotas)<sup>654</sup>. It should be noted that a comparison between the voluntary export restraint agreement concluded with Morocco and Tunisia provide for a growth rate of quotas much higher than that applied to other developing countries which are Community suppliers. This seems to indicate the EC's intention to grant the Mediterranean countries a preferential status as compared with other developing countries in the framework

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<sup>652</sup> Notice is given in the Annual General Report of the Commission and in the EC Bulletin.

<sup>653</sup> Les Accords Méditerranéens en 1989 op.cit. pp.175-184.

<sup>654</sup> The rules governing the management of these quotas are established in regulation 636/82 Q.J. L 76 20.03.1982, which also applies to Mediterranean countries. See VAN DARTEL, R.J.P.M. The Conduct of the EEC's Textile Trade Policy and the Application of Article 115 EEC VÖLKER, E.L.M. Protectionism... op.cit. pp.121-156 p.117 and footnote 58. OPT quotas are particularly important for Mediterranean countries, since "most of the EC's outward processing is done with this area" ASHOFF, G. The Textile policy of the European Community towards the Mediterranean Countries: Effects and Future Options JCMS, vol. XXII, 1983 pp.16-45, p.24.

of its policy on imports of textile products<sup>655</sup>. Another important principle applied is flexibility: the possibility of using in the present year a part of the quota established for the coming one (carry forward); the possibility of using the part of the quotas which has not been used the previous year (carry over); the transfer of quotas between outward processing quotas and normal ones (swing).

The legality of voluntary export restraint agreement in the field of textile concluded with Morocco and Tunisia as well as with Egypt can be questioned.

As seen above exports of industrial products from Maghreb to Community are free from quotas, customs duties and measures having equivalent effect (see Article 9 of the Morocco Agreement) whilst trade restrictions are allowed only through the application of the safeguard clauses discussed above, therefore these voluntary restraint agreements seem to conflict with the Cooperation Agreements<sup>656</sup>.

It is however difficult, as it happens in GATT, to conclude on the infringement of a specific Cooperation Agreement provision due to the "voluntary" nature of the export restraint undertaking. The informal feature of these agreements aims precisely at avoiding any conflict with the Cooperation Agreements<sup>657</sup> while formally respecting the preferential treatment accorded to Morocco and Tunisia.

The granting of some advantages as regards competitive exporters

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<sup>655</sup> Ibidem p. 22.

<sup>656</sup> The textile policy towards Mediterranean countries is part of the global policy on textile imports aiming at restricting/controlling imports of these products from low cost suppliers which compete with Community industry. Voluntary restraint agreements have been concluded between the EEC and many of these countries within the MFA.

<sup>657</sup> VAN DARTEL, R.J.P.M. *The Conduct of the EEC's textile Trade Policy and the Application of Article 115 EEC* VÓLKER, E.L.M. *Protectionism...* cit. pp.121=156.

if can dilute the impact of the agreement on textile exports does not modify the fact that these agreements are contrary to the spirit and the scope of the Cooperation Agreement as examined in the first Part of this study.

It should also be considered that textile products are the most important exports for Tunisia and the second for Morocco after phosphate<sup>658</sup>.

It should finally be noticed that the quotas are split up among the member States of the Community. The observations made above about the compatibility of national sub-quotas with the common commercial policy apply, *mutatis mutandi*, to the mediterranean textile policy<sup>659</sup>.

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<sup>658</sup> STEVENS *The Impact of 1992..op.cit* p. 229.

<sup>659</sup> If export self restraints are agreed on a industry-to industry basis, recourse to Article 115 is not possible. This provision apply when the self restraint agreement are negotiated between governments and provided that the Commission approves them. See O'CLEIREACAIN *Europe 1992 and Gaps.. op.cit.* p.211.

**CONCLUDING OBSERVATIONS**



**CONCLUDING OBSERVATIONS.**

This thesis discussed the main provisions of the Cooperation Agreement with Morocco.

The legal framework of the Agreement was the object of the first part of the thesis: the legal basis, the Community competencies, the role of the common institutions and the legal value of their acts and of the Agreement.

I then proceeded to analyze the rules governing industrial and agricultural trade, provisions in the field of financial and technical aid, social cooperation and safeguard measures.

In the following section I will return to these provisions to discuss them in the light of the two hypothesis proposed in the introduction.

Those two research questions related to (a) whether the Community interests prejudice the provisions of the Agreement leading, for example, to a watering down of preferences to protect the Community economy in the areas where it competes with Moroccan economy and (b) how the Agreement provisions should be interpreted, in other words, how can one verify to what extent the meaning of these provisions can be modified through different interpretation, which, in turn, leads to the modification of the type of relations between the parties.

It should be remembered that the Cooperation Agreement is founded on the principle of non-reciprocal preferences granted by the Community to exports of goods originating in Morocco.

In the case of agricultural trade, preferential treatment means a reduction, or for certain products, abolition of customs duties. However, as seen above, preferential regime is limited by a number of mechanisms such as quotas, reference prices, import levies and calendars (preferences are granted only during some periods of the year).

It can be submitted that the reason for the application of these instruments lies in the competition between Community and

Maghreb productions.

The amendments set up in the Additional Protocols, as a consequence of the Community extension to Spain and Portugal, show that the improvement of the commercial regime is highly conditioned by the common agricultural policy.

On the other hand, one should consider that complementary relationship exists between Community and Moroccan agricultural production. Although EEC Mediterranean Member States grow the same type of products as Maghreb countries, ripeness periods are different. It would therefore be possible to apply some of the instruments to enhance the complementary nature of the two agricultural productions. Calendars could be applied to encourage harmonizing programmes of the two productions.

Rules of origin seem to limit the preferential treatment. Rules of origin are the provisions which lay down the criteria for the identification of products which can be considered as originating from Maghreb and which can take advantage of the references granted to them.

The relevance of these rules is too often neglected. However, their impact on preferential treatment is quite remarkable. A restrictive interpretation of origin, i.e. excessively strict rules of origin, means that the preferential treatment is limited to a restricted number of products.

This seems to occur in the case of the rules applied to textile products, that is to an industry which is in competition with that of the Community.

Rules of origin can even protect or promote the developing of industries of the importing countries.

Let us consider for instance rules allowing a so-called cumulation, whereby in order to calculate the origin of products, the three Maghreb countries and the Community are considered as a single territory. This possibility is very seldom used as regards the inter-relation between Maghreb industries due to the lack of complementary production between them. This rule can, however,

benefit European industries since the use of their materials by Maghreb countries does not compromise the origin of the finished products. The use of materials (spare parts) from third countries is thus discouraged even if the latter are more competitive since the finished products could not qualify for cumulation.

A further example of the influence of Community interests over the agreement lies the fact that some of the provisions in the field of labor cooperation have not, so far, been implemented.

The Agreement establishes that it was the task of the Cooperation Council to adopt the measures for the implementation of the principles established in the Agreement like the summation of the periods of employment and insurance for the counting of pensions of old age, death and medical care and for the possibility of freely transferring pensions and salaries to Morocco.

One can submit that the non-implementation of these provisions is due to the difficult circumstances encountered in respect of the labor markets in almost all Member States. In other words, it is suggested that member States can consider that the application of the provisions set up in the Agreement could encourage emigration from these countries.

The preferences and advantages granted to Morocco under the Cooperation Agreement change according to the interpretation given to some of the notions contained therein.

This is so in the case of trade provisions concerning industrial products and those setting up the prohibition of discrimination between Maghreb workers and Member States' nationals.

As far as industrial trade is concerned, preferential treatment means that customs duties, charges of equivalent effect, quotas and measures of equivalent effects are abolished.

The consequences of this provision on the regime actually applied to products exported from Morocco to the Community can be evaluated only on the basis of the interpretation given to the

notion of charges and measures of equivalent effect.

As far as the notion of charges of equivalent effect is concerned, once it is clarified that these are charges applied to imported products only by reason of their crossing a border, the main question is to verify whether their application can be somehow justified.

The effects of the rule are more limited where charges can be applied providing that the purpose of their application is not to protect national goods (but is levied, for example, as a contribution to statistical analysis). On the contrary, the prohibition of charges of equivalent effect has a different connotation if the notion includes any charge regardless of the scope it pursues.

In the first case, however, the declaration that the purpose is legitimate would be sufficient to avoid the prohibition.

It is, therefore, possible to advocate a narrow interpretation of the notion of charges of equivalent effect for the Cooperation Agreements.

Measures of equivalent effect to quantitative restrictions can refer to national regulations concerning the characteristics of products and their sale and usage. They can be exclusively addressed to imported goods, thus establishing that only imported goods need to conform to certain requirements. Alternatively, the national measures do not distinguish between imported and national goods but make "de facto" the situation for imports more perilous (for example when a national measure establishes the requirement which only domestic goods are capable of meeting).

The effect of the prohibition will be limited if measures of equivalent effect only prohibit national regulations which overtly discriminate between imported and domestic goods. On the other hand, in the framework of the relationships between the Community and Morocco, Member States can require imported goods to meet the requirements laid down by national regulation which may also apply to national goods, even if this could have a discriminatory effect.

An intermediate solution could be to adopt an interpretation of measures of equivalent effect which prohibits "de facto" discrimination of imported goods, but only as regards the characteristics of the goods, unless the importing State could justify the application of the restrictive measures for one of the reasons provided for in the Agreement itself (i.e. non economic derogating clauses, Article 35) interpreted in such away as to include the mandatory requirements identified by the Court of Justice in Cassis de Dijon.

In practice, a broad interpretation of this notion would be mediated by a broad notion of derogating reasons.

Similarly, a broad interpretation of the notion of charges of equivalent effect could be moderated by the possibility of the importing State having recourse to the same system of derogations, which, as has been submitted, can be applied in the framework of the Agreement to charges of equivalent effect and to the prohibition of tax discrimination.

Finally, the question of whether the preferential regime should be extended to products imported from Morocco and in free circulation within the Community has been discussed. In this case, it has been submitted that the treatment applied to Moroccan products in free circulation in the Community does not differ from that applied to goods imported from other third countries and in free circulation in the Community. In other words, the preferential regime only concerns treatment applied at borders.

The second provision whose effects are determined according to its interpretation, concerns the prohibition of discriminatory measures and fiscal practices between imported and national "similar" products.

If one interprets the notion of "similarity" as covering only identical products or products having minor differences then creates the possibility of applying differential fiscal treatment to products which satisfy uniform consumer requirements.

On the other hand, this would be inconsistent with the provision's aim of extending the prohibition of fiscal discrimination to products which have different characteristics.

A possible solution would be to apply the concept of "cross elasticity". "Similar" products in this respect would be those satisfying a medium-high value of cross elasticity. If a lower value of cross elasticity is applied the effects of the prohibition would be extended, since this would cover a larger number of products.

Similarly, if the notion of "fiscal measures" does not include methods of payments and reimbursements, the rule prohibiting discrimination would be remarkably restrictive.

Let us now consider the provisions set up in the field of social cooperation and the different effects which could be derived from a diverse interpretation of the notion contained therein.

In this case, the scope of application of some of the relevant notions was clarified by the Court of Justice.

The prohibition of discrimination between Moroccan workers and nationals of EEC Member States was generously construed by the Court, which applied an interpretation by analogy, thereby establishing parallelism with the notion applied in Community law.

Had the provision been interpreted restrictively, a Member State would have been able to apply discriminatory treatment as regards unemployment benefits to Moroccan workers.

The most remarkable outcome of this decision is its enlargement of the beneficiaries of the provision.

The Court examined in fact the situation of Kziber (a Moroccan national) focusing more on the prohibition of discrimination based on nationality than on her status of family member of a Moroccan worker.

The interpretation contended by Advocate General, whereby the members of the family of a migrant worker enjoy only "derived rights", would have prevented Kziber from obtaining unemployment benefits as a right ensuing from the prohibition of discrimination.

A further problem of interpretation concerns the notion of the "family" of a worker. The position of migrant workers as regards nationals of the host state can vary according to the inclusion, within the members of the family, of the parents or grand-parents of the worker or of his/her spouse.

A possible solution could be found through an interpretation of the notion of "family" which establishes a parallelism between the notion of family as set forth in the Agreement and that applying in the legislation of the host state.

In similar fashion, a broad interpretation of the notion of "pay" could be adopted.

It should be considered that a broad interpretation of the rule prohibiting discrimination as regards pay, working conditions, and social security could weigh against the fact that other provisions provided for in the Agreement have not been enforced.

The relationships established in the Agreement do not depend exclusively on the interpretation given to its provisions, but also depend on the effect they have in the legal order of the Contracting Parties.

The possibility of individuals invoking a provision contained in an agreement contributes to guarantee its effective application.

Let us consider for example the rule prohibiting discrimination in the field of social security.

Kziber could only claim her right to unemployment benefits before the Belgian Court if the provision of the Cooperation Agreement had direct effect.

If this was not the case, enforcement of the rule would have been dependent on the intervention of Morocco on her behalf. Since diplomatic action is commonly conditioned by political considerations which, moreover, are often incompatible with the interests of nationals, one can assume that the rights of Kziber would not be pursued.

It should be considered, however, that in this case the violation of the prohibition of discrimination remained open to

question and depended on the interpretation of the provision.

Acknowledgement that the agreement can have direct effect has important consequences for the scope of application of its provisions. Let us imagine that country "A" concluded an agreement containing a provision identical to that established in the Cooperation Agreement with Morocco but that the Court denies that the Agreement with A could have direct effect. Workers from A would have a less privileged position than Moroccan workers.

The same reasoning reaching like conclusions can be applied to the rules of the agreements with the conditions indicated by the Court (such as the prohibition of charges, quotas, measures of equivalent effects).

Finally, the agreement contains provisions regulating the adoption of safeguard and derogating clauses.

These provisions allow the Contracting Parties to depart from the provisions of the Agreement without re-negotiating the Agreement itself.

Derogating clauses leave certain room for interpretation, as was discussed in relation to the clauses regarding common commercial policy. The safeguard clauses also contain general notions which need to be specified. However, they also set up rather strict procedural requirements.

Consequently, it may be difficult, and politically embarrassing, to have recourse to these clauses without meeting the conditions laid down for their application.

The adoption of safeguard clauses has been limited, and it has now been replaced by the practice of recourse to self-limitation agreements which are much more flexible (as regards duration and conditions of application) and are politically more preferable since they do not appear as limitations imposed unilaterally by the importing state.

Self-limitation agreements are, however, to be severely disapproved of since they infringe the provisions established in the field of industrial trade. This practice diminishes the

credibility of the Community and its developing cooperation policy to a greater extent than it effectively provides protection for the Community market (often quotas have not been exhausted).

These agreements have been applied mostly to textile exports, that is in one of the few cases where Morocco exports industrial goods to the Community. This means, paradoxically, that the Community can suspend the agreement where a conflict of interest takes place.

Financial and technical cooperation is the second pillar of the Agreement.

The issue under discussion are different from those concerning the provisions of trade and social cooperation. The problem relates not so much to the evaluation of the provisions concerning fields where there is, or there may be, a situation of competition, but rather to the evaluation of methods and instruments which can be applied to contribute financially and with technological support to the development of these countries.

Financial cooperation is a flexible instrument which made possible the replacement of the instruments which had previously proved unfit for attaining those goals. Financial sources have also contributed to the flexibility of this cooperation instrument allowing the introduction of new forms of financing such as funds allotted to all Mediterranean countries with a view to financing regional integration and projects in the field of environment.

It should be considered that the execution of projects financed by such cooperation are often commissioned to Community's firms which obtain therefore, considerable economic advantages.

The competition which exists in many economic fields gives rise to some doubts as regards the destination of financial or technical aids.

It should be asked, in other words, whether the Community is really prepared to finance or to contribute technologically (know-how) to the development of the economic sectors where there is competition or where conflicts of interests could become real (let

us take for instance commercial promotion in sectors of competitive production).

One might conclude that the existing competition in many economic sectors, between the Community and Maghreb countries could be the key to many of the provisions of the Agreement which limit the advantages granted to the partners.

It has also been submitted that the provisions of the Agreement can have a different effect depending on the interpretation given to them.

The criteria of interpretation then become the main issues.

A correct interpretation must be based on the aim pursued by the agreement.

In the case of prohibition of measures of equivalent effect, for instance, one should consider, on one hand, that the main aim of these provisions is the abolition of tariff and non-tariff protection which can make Moroccan importations of industrial products more onerous as opposed to leading to market integration as in the case of intra-Community relationships. On the other hand, it should also be considered that the provision is based on the principle that preferential access to exports from developing countries can stimulate their industrialization. The scope of the agreement seems to justify a broader interpretation of these rules.

However, there are other factors to be considered, which can influence the interpretation of the agreement.

The analysis carried out in this thesis seems to confirm that competition can lead to a restrictive interpretation of the rules. Thus, for example, Community policy, as regards trade in textile products, given the application of self-restraint agreements and suspension of the preferences granted by the Agreement, suggests that the notion of measures of equivalent effect would probably be interpreted more restrictively than is proposed in this thesis, once Maghreb countries have developed an industry capable of competing with the Community's.

The conclusions to be drawn from this analysis can also be applied to other agreements concluded with third countries and seem to corroborate the hypothesis that a classification or typology of external agreements must take into account the interpretation of the provisions of these agreements.

The Community is therefore faced with a choice.

It could interpret and apply the provisions of the agreement to intensify the instruments provided for and thereby stimulate complementary relationships and partnership, even if this means, in the medium term, increased competition. Alternatively the Community can interpret the provisions in such a way which restricts the advantages laid down in the Agreement.

Ultimately, it must be said that the credibility of the Community's developing cooperation policy and of the Community itself as partner in the international relations will depend on this choice.



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## SOMMARIO.

L'analisi degli accordi di cooperazione conclusi dalla Cee con i paesi del Maghreb, oggetto del presente lavoro, prende le mosse dall'osservazione che nella politica mediterranea della Cee esiste una contraddizione di fondo: la Comunità si trova ad essere ad un tempo partner e concorrente dei paesi mediterranei.

Se infatti si può riscontrare, da un lato, un rapporto di reciproca dipendenza dal punto di vista economico e di sicurezza tra Stati membri comunitari e paesi del Maghreb (Algeria, Tunisia, Marocco) dall'altra esistono tra di essi degli interessi divergenti ed elementi di concorrenzialità in molti settori economici.

I paesi mediterranei rappresentano il terzo mercato per le esportazioni comunitarie dopo quello costituito dai paesi EFTA e dagli Stati Uniti. Solo uno sviluppo costante del mercato mediterraneo, di cui il Maghreb costituisce parte rilevante, può garantire alla Cee l'assorbimento anche in futuro delle sue esportazioni.

Il divario economico con l'Europa (che rischia di essere accresciuto dall'integrazione tra Comunità e paesi EFTA e, in prospettiva, con i paesi dell'Europa dell'Est) contribuisce alla radicalizzazione dei movimenti religiosi e ad aggravare, a causa di una esplosione demografica senza freno apparente, il tasso di disoccupazione e i bisogni alimentari di questi paesi.

L'instabilità politica e sociale che ne deriva è tanto più temibile per la Comunità in quanto i paesi del Maghreb e Mashrak sono non solamente produttori di materie prime, tra cui gas naturale e petrolio, ma anche territorio di passaggio per gli approvvigionamenti energetici comunitari.

D'altra parte, la Comunità è un tradizionale punto di riferimento per questi paesi. Si pensi che essa assorbe i due terzi del commercio maghrebino<sup>1</sup>.

Si è detto che la Comunità rappresenta un mercato di primaria

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<sup>1</sup> RICCI, L. Il Maghreb e L'Europa Com.Int. 1990 pp. 549-567.

importanza per le esportazioni maghrebine composte essenzialmente da materie prime: prodotti minerari di base e prodotti agricoli. Questi ultimi si trovano però in concorrenza con la produzione agricola comunitaria.

Bisogna ricordare che quest'ultima, specialmente a seguito dell'ingresso della Spagna e del Portogallo<sup>2</sup>, é divenuta autosufficiente per la maggior parte dei prodotti mediterranei.

La conflittualità, dal punto di vista dei produttori comunitari, é inasprita dal fatto che i meccanismi protettivi della politica agricola comune applicati ai prodotti mediterranei sono piú deboli rispetto a quelli che garantiscono invece i produttori di cereali e latte.

Alla concorrenza sul piano comunitario, si deve aggiungere quella che i prodotti agricoli maghrebini si trovano a dover affrontare sui mercati dei paesi terzi. I prezzi offerti dai produttori comunitari infatti sarebbero piú elevati di quelli applicati sul mercato internazionale se non intervenisse un meccanismo previsto dalla politica agricola comune per cui ai produttori comunitari viene rimborsata la differenza tra prezzi applicati sul mercato comunitario e quelli internazionali.

Si deve inoltre segnalare che il mercato maghrebino costituisce una valvola di sfogo per le forti eccedenze cerealicole comunitarie.

A sua volta il Maghreb si trova ad essere fortemente dipendente dalle importazioni di beni alimentari. La crescita demografica e l'incidenza della spesa alimentare nel bilancio di questi paesi rendono la ricerca dell'autosufficienza una necessità assoluta per i paesi mediterranei. Progressi significativi in tale direzione non sembrano realizzabili a breve termine ma il raggiungimento di questo obiettivo si tradurrebbe per la Comunità nella perdita o nella contrazione di un mercato che assorbe almeno

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<sup>2</sup> Come si avrà modo di vedere questa adesione ha richiesto l'adattamento dei meccanismi preferenziali previsti negli accordi. See infra il capitolo sul commercio di prodotti agricoli.

parte delle eccedenze di quei prodotti.

Per quel che concerne i prodotti industriali<sup>3</sup> che il Maghreb esporta nella Comunità (si tratta soprattutto di tessili) sono in concorrenza sui mercati comunitari sia con l'industria nazionale, che si trova negli ultimi anni in uno stato di crisi permanente, che con le esportazioni provenienti da altri paesi in via di sviluppo soprattutto dell'estremo oriente. Bisogna inoltre tener presente che i piú recenti piani di sviluppo dei paesi maghrebini<sup>4</sup> prevedono una concentrazione degli sforzi in direzione di un miglioramento della produttività ed un rafforzamento del potenziale di esportazione. In questo i paesi arabi sarebbero avvantaggiati dalla presenza di mano d'opera a basso costo<sup>5</sup>.

La Comunità, ed in particolare alcuni stati membri, hanno da sempre rappresentato una terra di emigrazione per i lavoratori algerini, tunisini e marocchini. Per i paesi europei interessati questo flusso migratorio garantisce una disponibilità di mano d'opera a buon mercato, mentre per i paesi maghrebini il fenomeno migratorio comporta un alleggerimento del tasso di disoccupazione e costituisce, attraverso le rimesse degli emigrati una voce positiva nella bilancia dei pagamenti.

In tempi piú recenti tuttavia, il crescente aumento del tasso

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<sup>3</sup> KHADER, B. Le debolezze dell'industrializzazione nel mondo arabo Politica Intern. 1988 pp. 135-144.

<sup>4</sup> GAZZO, Y. Les économies arabes face à la crise: solutions libérales et limites Maghreb-Mashrak 1988, pp.48-67, HARIK, I. privatisation et développement en Tunisie Ibidem 1990, pp. 5-26. DAOUDI, Z. Privatisation à la marocaine: la loi sur le transfert au secteur privé de certaines entreprises publiques Ibidem pp.84-101.

<sup>5</sup> Per far fronte all'alto tasso di disoccupazione i paesi maghrebini si trovano a dover favorire un'industria ad alta intensità di mano d'opera. Sui piani di liberalizzazione economica nei paesi arabi cfr. GAZZO, Y. Les économies arabes face à la crise: solutions libérales et limites Maghreb, Mashrak 1988 pp. 42-67, HARIK, I. Privatisation et développement en Tunisie Maghreb, Mashrak 1990, pp. 5-26 e DAOUDI, Z. Privatisation à la Marocaine: la loi sur le transfert au secteur privé de certaines entreprises publiques Maghreb, Mashrak 1990, pp.84-101.

demografico e, conseguentemente, della disoccupazione, hanno condotto ad un aggravamento della pressione migratoria in direzione dei paesi dell'Europa comunitaria.

Questi si trovano a dover affrontare a loro volta un periodo di recessione economica e di crescita della disoccupazione per cui sono molto meno disposti ad accogliere emigrati provenienti dai paesi in via di sviluppo il cui afflusso tende ad aggravare le tensioni sociali rimaste latenti in periodi di crescita economica. La chiusura, anche parziale, di questa valvola di sfogo incide inoltre sulla bilancia dei pagamenti in quanto vengono appunto a diminuire le entrate costituite dalle rimesse.

Sembra quindi di poter affermare che i rapporti di concorrenzialità tra l'economia comunitaria e quella maghrebina non si realizzano con la stessa intensità in tutti i settori economici. Se in alcuni casi essi sono palesi, in altri settori sono solo potenziali e possono divenire attuali in seguito, ad esempio, ad una congiuntura economica sfavorevole (si veda il caso delle esportazioni tessili o quello dei lavoratori migranti).

Le osservazioni svolte sopra potrebbero condurre anche ad avanzare una ulteriore ipotesi, quella cioè che lo sviluppo economico dei paesi Maghrebini possa accentuare in alcuni settori posizioni di concorrenzialità già esistenti o, appunto, rendere attuali quelle latenti.

Se questa ipotesi fosse corretta si instaurerebbe una tensione tra lo sviluppo del Magherb - che risponde ad un interesse primario della Comunità ed è l'obiettivo dichiarato della sua politica mediterranea - e l'accentuazione degli elementi di concorrenzialità con la Comunità a cui questo può condurre.

Bisogna tener conto infatti che il principale strumento con cui la Comunità si propone di contribuire allo sviluppo economico e sociale dei paesi di quest'area geografica è l'accordo di cooperazione. L'asse portante dell'accordo è il trattamento preferenziale che si fonda sulla teoria per cui lo sviluppo può essere stimolato da un aumento delle esportazioni. Su questa base

ai prodotti originari dei paesi del Maghreb viene concessa l'abolizione, o, quanto meno, la riduzione unilaterale degli strumenti protettivi che possono ostacolarne l'ingresso sul mercato comunitario.

Ci si chiede come venga conciliata l'apertura alle esportazioni prevista dall'accordo con l'esistenza di produzioni concorrenti che potrebbero invece stimolare richieste di soluzioni di tipo protezionistico.

Questa ipotesi, tuttavia, deve essere temperata proprio dalla considerazione che esiste anche tra i due sistemi economici un rapporto di complementarità (partnership) ed è proprio questo che, se sviluppato adeguatamente, può contribuire alla realizzazione dello scopo prefissato.

Il presente lavoro si proponeva di esaminare, dal punto di vista strettamente giuridico, le singole disposizioni dell'accordo di cooperazione concluso dalla Comunità e dagli Stati membri con ognuno dei paesi del Maghreb. L'ipotesi da verificare è se la contraddizione si riflette nell'accordo, ovvero se l'esistenza di interessi concorrenziali incida negativamente sulle relazioni che esso si propone di stabilire tra i partners.

Ci siamo quindi chiesti come si pongono questi accordi nel quadro delle relazioni contrattuali della Comunità con i paesi terzi.

La più completa e strutturata teoria di classificazione degli accordi comunitari è stata compiuta da C. Flaesh-Mougin nel suo Les accords externes de la Cee. Essai d'une typologie<sup>6</sup>.

La prassi comunitaria indica chiaramente che la Comunità si è discostata dalla tipologia di accordi prevista dal Trattato - fondata sulla nota distinzione tra accordi di associazione e accordi commerciali e tariffari -.

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<sup>6</sup> Ed. Université de Bruxelles, Bruxelles, 1979.

Una serie di fattori politici, economici e giuridici hanno reso evidente l'insufficienza e l'inadeguatezza di questi strumenti ed hanno quindi condotto la Comunità a sviluppare le sue relazioni contrattuali sia in senso quantitativo che qualitativo.

Il risultato è quello di un insieme composito di accordi conclusi con paesi terzi di tutte le aree geografiche, dai contenuti più disparati e che utilizzano in maniera elastica sia gli strumenti espressamente offerti dal trattato in materia di relazioni esterne che altri non concepiti originariamente come tali ma avallati o addirittura individuati dalla Corte di Giustizia la cui giurisprudenza si trova ad essere particolarmente innovativa in questo settore.

La Flaesch-Mougin propone una ipotesi di classificazione di questi accordi.

Gli accordi comunitari vengono posti su di un asse le cui estremità sono rappresentate, rispettivamente, da una situazione di assenza di relazioni contrattuali tra Cee e stato terzo e dall'adesione dello stato terzo alla Comunità<sup>7</sup>.

Gli accordi vengono quindi classificati sulla base dei legami più o meno stretti che essi creano tra la Cee e lo stato terzo.

Gli accordi settoriali si troveranno quindi ad essere i più vicini all'estremità sinistra (assenza di accordi) in quanto le relazioni tra parti contraenti sono appunto limitate a disciplinare gli scambi di un prodotto o regolamentare uno specifico settore di attività. Invece, gli accordi di associazione che creano una unione doganale sono posti all'estremo opposto (vicini all'adesione) in quanto questo tipo di accordo istituisce il legame più stretto che la Comunità possa realizzare con uno stato terzo, estendendo la libera circolazione dei beni ai servizi, capitali e persone e prevedendo anche l'armonizzazione di alcune politiche come quella

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<sup>7</sup> Correttamente l'ipotesi dell'adesione non viene considerata dalla Flaesch-Mougin come componente delle relazioni esterne comunitarie, in quanto l'adesione significa appunto assunzione da parte dello stato terzo dello status di membro. Cfr. p. 215.

agricola.

Quello della Flaesch-Mougin, per quanto sia il piú elaborato, non é l'unico tentativo di classificare gli accordi conclusi dalla Comunitá con paesi terzi.

Una tipologia viene offerta anche da MISHLANI, ROBERT, STEVENS, WESTON<sup>8</sup>. Si tratta in questo caso di una classificazione che concerne le relazioni della Comunitá con i paesi in via di sviluppo<sup>9</sup>.

Il criterio di classificazione applicato da questi autori é quello del trattamento preferenziale offerto dalla Comunitá ai paesi in via di sviluppo. Graficamente la tipologia viene rappresentata in forma di piramide.

Gli accordi che prevedono un trattamento preferenziale occupano il vertice della piramide (Convenzione di Lomé ad esempio), mentre quelli che contemplanó un trattamento meno privilegiato si trovano in una posizione piú vicina alla base. Il criterio proposto dalla Flaesch-Mougin, per cui gli accordi vengono classificati in relazione all'intensitá dei rapporti tra Cee e stati terzi, si ritrova in una tipologia che viene rappresentata con l'immagine<sup>10</sup> dei centri concentrici.

Il centro rappresenta la Comunitá ed i vari cerchi rappresentano graficamente gli accordi conclusi dalla Comunitá con gli stati terzi: piú il cerchio si trova vicino al centro piú intenso sará il legame con la Comunitá.

Nessuna di queste tipologie, tuttavia, sembra offrire una corretta rappresentazione delle relazioni contrattuali della

<sup>8</sup> MISHLANI, P., ROBERT, A., STEVENS, C., WESTON, A. *The Pyramid of Privilege* STEVENS, C. (ed.) *EEC and Third World: a Survey*, Vol. I, Holmes & Meier, London, 1981, pp. 60-82.

<sup>9</sup> Benché questa classificazione comprenda anche le azioni autonome della Cee (quali il sistema delle preferenze generalizzate) non sembra che questo elemento possa indebolire la validitá dell'esempio.

<sup>10</sup> Cfr. PESCATORE, P. *La constitution, son conenu, son utilité* *Rev. Dr. Suisse* 1992, p. 64.

Comunità.

È chiaro che l'applicazione del criterio dell'intensità del legame e quello del trattamento preferenziale condurranno a tracciare due distinte classificazioni che rappresenteranno aspetti diversi della realtà.

La critica qui sostenuta non si appunta sul criterio di classificazione (intensità delle relazioni o trattamento preferenziale) quanto sulla metodologia applicata che sembra inficiare la validità di queste tipologie.

Per metodologia intendo riferirmi al modo in cui vengono selezionati gli accordi che rientrano in una stessa classe, ovvero alla scelta degli elementi che inducono la Flaesch-Mougín a considerare che un certo numero di accordi conclusi dalla Cee con partners diversi creino tra le parti delle relazioni di eguale intensità e siano pertanto riconducibili ad una stessa posizione nel suo ipotetico spettro di relazioni.

Sia la Flaesch-Mougín come gli altri autori citati classificano gli accordi sulla base delle disposizioni in essi contenute.

Così ad esempio, sono classificati dalla Flaesch-Mougín come accordi di libero scambio<sup>11</sup> quelli che prevedono disposizioni per l'eliminazione di ostacoli tariffari e paratariffari (dazi doganali, quote, misure di effetto equivalente), delle pratiche fiscali e di dumping nonché disposizioni relative alla concorrenza e in materia di pagamenti relativi agli scambi.

Benché il loro schema sia molto meno elaborato, Mishlani, Robert, Stevens e Weston sembrano applicare lo stesso metodo quando collocano gli accordi sulla piramide in base alle preferenze commerciali stabilite dagli accordi. Così ad esempio per situare, a partire dall'apice della piramide, gli accordi con i paesi del Maghreb dopo la Convenzione di Lomé e dopo quelli conclusi con

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<sup>11</sup> Cfr. p. 209.

Grecia, Spagna e Portogallo<sup>12</sup> e prima degli accordi con i paesi del Mashrak, sono considerate le disposizioni in materia di preferenze tariffarie (eliminazione dei dazi e delle quote e delle misure di effetto equivalente per i prodotti industriali e riduzioni dei dazi per i prodotti agricoli) e di aiuti finanziari contenute in questi trattati.

In realtà questo metodo, e le conseguenti classificazioni che ne derivano, inquadra le relazioni contrattuali tra la Comunità e gli stati terzi in uno schema troppo rigido inadatto a rappresentarne l'estrema complessità.

Tutti questi studi omettono infatti di considerare la questione dell'interpretazione delle disposizioni dell'accordo.

Se si basa infatti la classificazione degli accordi sul loro contenuto si avrà, come si è visto, una situazione per cui due accordi che contengono disposizioni identiche verranno inclusi nella stessa categoria.

Ma se le disposizioni di questi due accordi, pur aventi una identica formulazione, sono interpretate in maniera difforme, anche le relazioni che gli accordi rispettivamente stabiliscono tra la Comunità ed i due stati terzi possederanno una diversa valenza, sia in termini di intensità di legami, sia, se si tratta di disposizioni rilevanti in tal senso, di rapporti preferenziali.

La diversa interpretazione verrebbe così ad incidere sulla classificazione degli stessi.

Vi sono diverse disposizioni negli accordi di cooperazione la cui portata può variare notevolmente a seconda dell'interpretazione che esse possono ricevere.

Il secondo scopo della nostra analisi è stato pertanto quello di esaminare queste disposizioni per verificare come esse possano essere interpretate e come questa diversa interpretazione possa modificare la portata delle preferenze e dei vantaggi accordati dalla Cee ai partners mediterranei.

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<sup>12</sup> All'epoca in cui viene redatto l'articolo questi non erano ancora membri della Cee

Il presente lavoro si è fondato su due ipotesi. La prima è che la concorrenzialità tra Cee e Maghreb non può mancare di tradursi (negativamente) nell'accordo. La seconda è che l'interpretazione delle norme incide sul tipo di relazioni che l'accordo si propone di instaurare tra le parti contraenti.

Si può anche ritenere che le due ipotesi siano collegate. Relativamente alla seconda questione sollevata (interpretazione) bisognerà chiedersi quali elementi incidano sulla interpretazione di una norma. Quest'ultima dovrebbe correttamente essere determinata secondo lo scopo perseguito dall'accordo, ma si può anche supporre che l'interesse di una delle parti contraenti possa prevalere e quindi orientare l'interpretazione in senso favorevole a quest'ultima.

Benché gli accordi di cooperazione siano stati negoziati e conclusi separatamente dalla Comunità con ciascuno dei paesi del Maghreb, essi sono concepiti come parte dello stesso sistema e perseguono quindi gli stessi obiettivi. Questo implica che le loro disposizioni sono praticamente identiche. In questa tesi pertanto ho fatto riferimento agli articoli dell'accordo di cooperazione con il Marocco. Le disposizioni degli altri accordi sono state citate solamente quando queste differiscono sostanzialmente da quelle contenute nell'accordo con il Marocco.

La tesi è stata divisa in quattro parti.

Nella prima si sono è analizzato in quadro giuridico dell'accordo partendo dalla problematica della scelta della base giuridica, le procedure di conclusione, la creazione di organi comuni e lo status degli accordi e degli atti derivati nell'ordinamento giuridico della Comunità.

Si è passati quindi ad un esame delle norme che disciplinano i rapporti tra le parti in materia di commercio (seconda parte), di cooperazione tecnico finanziaria e cooperazione sociale (terza parte). Infine nell'ultima parte si sono discusse le disposizioni che regolano l'adozione di misure di salvaguardia e di deroga all'accordo.

In materia commerciale e di cooperazione viene trasfuso negli accordi il principio del "trade and aid" sostenuto in sede internazionale (UNCTAD) dai paesi in via di sviluppo e adottato dalla Comunità come asse portante della sua politica di cooperazione allo sviluppo<sup>13</sup>.

Sotto il profilo della cooperazione commerciale questo principio significa garantire senza reciprocità un trattamento preferenziale alle esportazioni dei paesi in via di sviluppo.

Nell'accordo il trattamento preferenziale si traduce nell'eliminazione degli ostacoli tariffari e nelle misure di effetto equivalente per i prodotti industriali e in una riduzione o eliminazione dei dazi doganali per quelli agricoli.

La prima parte del lavoro ha cercato quindi di verificare in primo luogo l'interpretazione delle norme fondamentali che regolano il commercio dei prodotti industriali, prendendo come riferimento la giurisprudenza comunitaria in materia tariffaria, paratariffaria e fiscale e in secondo luogo di discutere le disposizioni in materia agricola per appurare quale ruolo vi svolga la politica agricola comune.

Il regime commerciale è stato infine analizzato in relazione alle norme che regolano l'origine dei prodotti e quindi, l'accesso al regime preferenziale.

Le disposizioni dell'accordo e dei protocolli in materia di cooperazione finanziaria governano questioni quali la scelta dei beneficiari, i settori di applicazione e la preparazione dei progetti. Sulla portata di queste norme incide la problematica legata alle fonti di finanziamento costituite dal bilancio comunitario e dalle risorse della Banca Europea degli Investimenti.

Diversamente dagli altri accordi di cooperazione con i paesi del Mediterraneo, quelli conclusi con i paesi del Maghreb

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<sup>13</sup> Si vedano a tale proposito i principali interventi comunitari in materia, come, oltre alla Convenzione di Lomé, gli aiuti finanziari ai paesi non associati ed il sistema delle preferenze generalizzate.

contengono delle disposizioni in materia di cooperazione sociale, per cui viene garantito ai lavoratori delle parti contraenti un trattamento non discriminatorio in materia di retribuzione, condizioni di lavoro e sicurezza sociale. Le questioni esaminate in questa parte riguardano principalmente la sfera di applicazione del principio di non discriminazione in materia di sicurezza sociale e la posizione dei lavoratori maghrebini in relazione ai lavoratori di altri stati terzi impiegati nella Comunità..

Nell'ultima parte si sono infine discusse la questione della possibilità di deviare dalle disposizioni dell'accordo attraverso l'applicazione delle norme di deroga e salvaguardia.

A quali conclusioni siamo giunti?

Ricordiamo che in materia di relazioni commerciali l'accordo si fonda sul principio delle preferenze unilateralmente concesse dalla Comunità alle esportazioni provenienti dal Marocco.

Nel caso del commercio di prodotti agricoli il trattamento preferenziale si traduce nella riduzione o, in certi casi, sospensione dei dazi doganali. Tuttavia si è visto che il regime preferenziale è limitato dall'applicazione di una serie di meccanismi quali quote, prezzi di riferimento, prelievi all'importazione e calendari (le preferenze sono accordate unicamente in certi periodi dell'anno).

Il motivo del ricorso a questo tipo di strumenti va ricercato nel rapporto di concorrenzialità che si verifica tra produzioni comunitarie e maghrebine. Le modifiche apportate con i protocolli addizionali, a seguito dell'ingresso di Spagna e Portogallo nella Comunità, indicano come il miglioramento del regime commerciale rimane comunque condizionato pesantemente dalla politica agricola comune.

Si deve d'altra parte considerare che esistono anche elementi di complementarità tra le produzioni agricole comunitarie e quelle maghrebine. Benché infatti i paesi membri comunitari dell'area mediterranea coltivino gli stessi tipi di prodotti dei paesi del Maghreb, la posizione geografica di questi ultimi si riflette sui

periodi in cui le produzioni giungono a maturazione. Sarebbe quindi possibile concepire alcuni degli strumenti applicati in modo tale da migliorare gli elementi di complementarità che esistono tra le produzioni agricole. Ad esempio i calendari potrebbero essere applicati più che per limitare le preferenze ai periodi in cui la produzione comunitaria è bassa per favorire dei programmi di armonizzazione delle produzioni.

Il secondo caso in cui le disposizioni dell'accordo sembrano limitare il trattamento preferenziale è quello delle norme sull'origine. Si tratta delle disposizioni che stabiliscono i criteri per identificare quali prodotti si possono considerare originari dal Maghreb e quindi quali possono come tali fruire delle preferenze commerciali ad essi soli concesse.

L'importanza di queste norme è troppo spesso trascurata, in realtà il loro impatto sul trattamento preferenziale è notevole. Una interpretazione di origine restrittiva che si traduce in norme troppe severe può limitare di fatto il trattamento preferenziale ad un numero ristretto di prodotti.

È quanto sembra verificarsi nel caso sopra analizzato per le norme applicate ai prodotti tessili, cioè ad una industria in concorrenza con quella comunitaria.

Le norme sull'origine possono perfino proteggere o favorire le industrie dello stato importatore.

Si pensi alle norme che permettono il c.d. cumulo, per cui ai fini del calcolo dell'origine i tre stati maghrebini e la Comunità sono considerati come un singolo territorio. Vista l'assenza di complementarità tra le industrie maghrébine tale possibilità nelle relazioni intra maghrebine non viene praticamente sfruttata. Questa norma però può avvantaggiare le imprese europee in quanto l'utilizzo dei loro materiali da parte dei paesi maghrebini non incide negativamente nel calcolo dell'origine del prodotto finito. Si scoraggia quindi l'utilizzo di materiali di paesi terzi anche se questi possono rivelarsi più competitivi in quanto il prodotto finito rischierebbe di non essere considerato originario.

Una ulteriore illustrazione di come degli interessi comunitari possano aver inciso sull'accordo é il caso della mancata applicazione di alcune norme previste in materia di cooperazione sociale. (preoccupazioni di ordine economico sono alla base della interpretazione restrittiva del divieto di discriminazione avanzata da alcuni Stati membri nel caso Kziber, cfr. infra).

Si ricorderá che il Consiglio di Cooperazione avrebbe dovuto entro il primo anno dall'entrata in vigore dell'accordo adottare i provvedimenti necessari per l'applicazione dei principi in esso definiti, quali la possibilitá di cumulare i periodi di assicurazione e di impiego completati nei vari Stati membri dai lavoratori maghrebini per il calcolo delle pensioni o la possibilitá di trasferire liberamente in Marocco pensioni e salari.

Si puó immaginare che la mancata attuazione delle norme dell'accordo sia motivata dalla difficile situazione del mercato del lavoro in quasi tutti i paesi comunitari. Si ipotizza cioé che gli Stati membri possano ritenere che l'applicazione delle norme previste dagli accordi incoraggi l'emigrazione da questi paesi.

Vi sono altre disposizioni dell'accordo che possono mutare la portata delle preferenze o dei vantaggi accordati a seconda dell'interpretazione che ne viene data. Si tratta principalemnte delle disposizioni commerciali per i prodotti industriali e di quelle che prevedono la paritá di trattamento tra lavoratori maghrebini e cittadini degli stati membri.

Per le esportazioni di prodotti industriali originari dal Marocco il principio delle preferenze si traduce nella norma che proibisce l'applicazione di dazi doganali, tasse di effetto equivalente, quote, e misure di effetto equivalente.

Le conseguenze di questa disposizione sul regime applicato effettivamente ai prodotti esportati dal Marocco nella Comunitá puó essere valutata unicamente sulla base dell'interpretazione data alle nozioni di tassa e misura di effetto equivalente.

Relativamente al concetto di tassa di effetto equivalente ad un dazio doganale, una volta chiarito che si tratta di oneri

imposti ai prodotti importati in ragione del fatto che attraversano una frontiera, il problema centrale consiste nel vedere se sono consentite delle giustificazioni alla loro applicazione.

Gli effetti della norma saranno ridotti se sono ammessi ad esempio oneri imposti per fini non protezionistici (contributi alla redazione di una statistica). Diversamente la proibizione avrà una portata maggiore se la nozione di tassa include qualisiasi onere indipendentemente dallo scopo con cui esso è imposto.

Nel primo caso, tuttavia, basterebbe dichiarare che lo scopo è legittimo per aggirare la proibizione.

Si può pertanto sostenere una interpretazione ampia della nozione anche nel caso degli accordi di cooperazione. Questa interpretazione, inoltre, può essere temperata dalla possibilità di ricorrere ad un sistema di deroghe (cfr. infra).

Misure di effetto equivalente a restrizioni quantitative possono riferirsi a regolamentazioni nazionali relative sia alle caratteristiche dei prodotti che alle condizioni di utilizzo e di vendita degli stessi. Esse possono essere indirizzate esclusivamente ai prodotti importati stabilendo che solo questi ultimi debbano rispondere a determinati requisiti da cui sono invece esenti i prodotti nazionali. Oppure si può trattare di regolamentazioni che non distinguono tra beni importati e nazionali ma che impediscono o rendono di fatto più onerosa l'importazione (vengono ad esempio stabiliti dei requisiti che solamente i prodotti nazionali possono soddisfare).

L'effetto della proibizione sarà molto limitato quindi se viene accolta una interpretazione di misura di effetto equivalente che proibisca solamente le regolamentazioni nazionali che discriminano apertamente tra prodotti importati e non. D'altra parte è difficilmente immaginabile, nel quadro dei rapporti tra Comunità e Marocco, proibire agli Stati Membri della Cee di imporre ai prodotti importati il rispetto di regolamentazioni applicate anche ai prodotti nazionali anche se da ciò possa risultare un effetto discriminatorio. Una soluzione intermedia potrebbe essere

l'adozione di una soluzione esegetica che proibisca la discriminazione di fatto dei prodotti importati, ma solo relativamente alle caratteristiche dei prodotti, a meno che lo Stato importatore non adduca a giustificazione di una tale misura, uno dei motivi tra quelli contemplati dallo stesso accordo (deroghe non economiche, Articolo 35) interpretati in modo tale da includervi anche le "esigenze imperative" identificate dalla Corte nella giurisprudenza *Cassis de Dijon*. In pratica una interpretazione ampia della nozione verrebbe temperata da una nozione altrettanto ampia dei motivi di deroga invocabili.

Analogamente, una interpretazione ampia della nozione di tassa di effetto equivalente potrebbe essere moderata dalla possibilità per lo Stato importatore di fare ricorso allo stesso sistema di deroghe che, si è sostenuto, può essere applicato nel quadro dell'accordo anche alle tasse di effetto equivalente e alla proibizione di discriminazione fiscale.

Infine ci si è chiesti se il regime preferenziale si estende anche al trattamento riservato ai prodotti importati dal Marocco ed in libera circolazione nella Comunità. Non sembra, tuttavia che il regime di questi prodotti si distingua da quello applicato ai beni importati da altri stati terzi ed in libera circolazione.

Una seconda norma i cui effetti dipendono dall'interpretazione data ad alcuni dei termini in essa contenuti è quella che proibisce l'applicazione di misure e prassi fiscali discriminatorie tra prodotti importati e prodotti nazionali simili.

Ritenere che siano "simili" esclusivamente i prodotti identici o con differenze minime significa ammettere una diversa imposizione fiscale applicata a prodotti che soddisfino lo stesso bisogno dei consumatori. D'altra parte estendere la proibizione anche a prodotti con caratteristiche diverse sarebbe contrario allo scopo della norma. Una soluzione possibile sarebbe quella di ricorrere al concetto di elasticità incrociata facendo rientrare nella nozione di prodotti simili quelli con una elasticità medio alta. Inversamente applicando un valore più basso di elasticità si

estenderá la portata della proibizione contenuta in questa disposizione.

L'altro termine che richiede di essere specificato é quello di misure fiscali. Anche in questo caso limitare il divieto di discriminazione alle tasse senza includervi metodi di pagamento e rimborsi restringerebbe in misura notevole l'effetto della norma in questione.

Vediamo ora come le disposizioni in materia sociale possano variare a seconda dell'interpretazione che ne viene data.

Si tratta in particolare del principio di non discriminazione basato sulla nazionalità tra lavoratori marocchini e cittadini dello Stato membro in cui i primi sono regolarmente impiegati, in materia di condizioni di lavoro, remunerazione e sicurezza sociale (estesa anche ai membri della famiglia).

Contrariamente a quanto si é visto per le disposizioni in materia di commercio di prodotti industriali, non ci si limita in questo caso ad ipotizzare delle possibili soluzioni interpretative, in quanto la portata di alcune nozioni contenute in queste norme é stata recentemente chiarita dalla Corte.

Si é visto che quest'ultima ha riconosciuto ampia portata alla norma ricorrendo al criterio di interpretazione analogica e stabilendo un parallelismo con la nozione accolta nel diritto comunitario. Se il silenzio dell'accordo fosse stato interpretato in senso restrittivo, sarebbe stato invece lecito per uno Stato Membro applicare ai lavoratori marocchini un trattamento discriminatorio in materia di indennità di disoccupazione.

Il risultato piú considerevole della sentenza però é stato l'ampliamento della sfera dei beneficiari della norma.

La Corte ha infatti esaminato la situazione della Kziber dando rilievo alla proibizione di discriminazione sulla base della nazionalità e non alla qualifica della ricorrente come membro della famiglia del lavoratore.

L'interpretazione suggerita dall'Avvocato Generale, secondo il quale i membri della famiglia del lavoratore emigrato godono

solamente dei diritti derivati dal loro status, avrebbe invece precluso alla ricorrente il diritto di ottenere le indennità di disoccupazione come diritto proprio conseguenza diretta del divieto di discriminazione.

Un ulteriore problema interpretativo, che può ampliare o restringere la portata della norma, può essere sollevato in relazione alla nozione di "famiglia" del lavoratore. La posizione dei lavoratori migranti rispetto ai cittadini dello stato ospite muterà a seconda che tra i membri della sua famiglia siano o meno inclusi gli ascendenti a carico del lavoratore o del coniuge.

Nel caso di specie si potrebbe stabilire un parallelismo tra la nozione di famiglia dell'accordo e quella accolta nella legislazione dello stato ospite.

Analogamente, si potrebbe accogliere una ampia interpretazione del concetto di retribuzione.

Quello che preme rilevare è che l'espansione della disposizione che prevede il divieto di discriminazione in materia di retribuzione, condizioni di lavoro e sicurezza sociale può temperare la mancata applicazione delle altre disposizioni previste dall'accordo, rimasta, come si è avuto modo di rilevare sopra, lettera morta.

Le relazioni stabilite dall'accordo non dipendono solo dall'interpretazione che viene data alle norme materiali ma anche dall'effetto che viene riconosciuto loro nell'ordinamento giuridico delle parti contraenti.

La possibilità per il privato di invocare una norma contenuta in un accordo contribuir a garantirne infatti l'effettiva applicazione.

Si pensi alla norma che vieta la discriminazione in materia di sicurezza sociale. Se ad essa non fosse stato riconosciuto un effetto diretto, la signora Kziber non avrebbe potuto ricorrere davanti al giudice belga per veder riconosciuto il diritto ad ottenere i sussidi di disoccupazione. Il rispetto dell'obbligazione sarebbe così stato subordinato ad un eventuale intervento dello

stato di origine della Kziber (il Marocco). Poiché l'azione diplomatica è condizionata da preoccupazioni di ordine politico che spesso hanno poco a che fare con la preoccupazione di agire in difesa dell'interesse del privato cittadino, si può ipotizzare che il diritto della Kziber non sarebbe stato difeso.

Inoltre bisogna anche considerare che nel caso di specie la violazione del divieto di discriminazione non era affatto evidente, ma era subordinata ad una interpretazione della norma piuttosto liberale e anche, come si è visto, piuttosto discussa e discutibile.

L'aver riconosciuto la capacità dell'accordo ad avere effetto diretto è un risultato di rilievo che inciderà sulla portata delle singole norme.

Ipotizziamo che uno Stato A abbia concluso un accordo contenente una norma identica a quella qui discussa ma al quale venga negato effetto diretto. I lavoratori di A si troveranno in una posizione assai meno privilegiata rispetto ai lavoratori maghrebini.

Le stesse conclusioni si possono applicare naturalmente anche ad altre norme dell'accordo che possiedono i requisiti indicati dalla Corte (come potrebbe essere il caso per il divieto di imporre dazi doganali, quote e misure di effetto equivalente).

Infine. l'accordo contiene delle disposizioni che regolano l'adozione di clausole di salvaguardia e di deroga. Si tratta di strumenti attraverso i quali le parti contraenti possono deviare dalle disposizioni materiali dell'accordo senza tuttavia ricorrere ad una sua ri-negoziazione.

Le clausole di deroga lasciano anch'esse un certo margine all'interpretazione delle parti dell'accordo, come si è visto per la clausola "politica agricola comune". Anche le norme che prevedono l'adozione di misure di salvaguardia contengono alcune nozioni relativamente indeterminate. Tuttavia esse prevedono dei limiti procedurali abbastanza precisi per cui evadere le condizioni previste per la loro adozione non risulta sempre agevole e comunque

può essere politicamente imbarazzante.

L'adozione di misure di salvaguardia è stata molto limitata, ad essa si è sostituita la prassi di ricorrere agli accordi di autolimitazione che offrono una maggiore libertà di azione (in termini di durata e di condizioni di applicazione ad esempio) e sono politicamente preferibili in quanto non appaiono come restrizioni applicate unilateralmente dallo stato importatore.

Gli accordi di autolimitazione sono tuttavia censurabili in quanto costituiscono una violazione delle norme applicabili al commercio di prodotti industriali. Questa prassi più che costituire una effettiva protezione del mercato comunitario (le quote spesso non sono state esaurite) influisce negativamente sulla credibilità della Comunità e della sua politica di cooperazione.

Tali accordi sono stati applicati per lo più in relazioni alle esportazioni tessili, ovvero in uno dei pochi casi di esportazione di materie industriali dal Maghreb alla Cee.

Ciò significa che, paradossalmente, la Comunità ha di fatto sospeso l'accordo dove si è verificata una situazione di conflittualità.

Il secondo pilastro su cui si fonda la cooperazione con il Marocco è costituito dall'aiuto tecnico e finanziario. La problematica sollevata da queste disposizioni è molto diversa da quella discussa nel caso dei rapporti commerciali e in materia di cooperazione sociale. Non si tratta infatti in questo caso di valutare delle norme che vengono ad incidere in settori economici in cui esistono situazioni di concorrenzialità quanto piuttosto di valutare i mezzi con cui viene realizzato questo contributo unilaterale di beni e di tecnologia.

Come si è visto la cooperazione finanziaria è uno strumento flessibile che ha reso quindi possibile la sostituzione degli strumenti che si erano rivelati poco adatti al raggiungimento degli scopi prefissati. Le fonti di finanziamento comunitario hanno parimenti contribuito alla elasticità di questo strumento permettendo l'introduzione di forme di finanziamento nuove come

quelle destinate all'insieme dei paesi mediterranei per finanziare l'integrazione regionale o progetti in materia di ambiente.

Non sono comunque assenti interessi economici da parte della Comunità stessa in quanto bisogna considerare che la realizzazione delle opere finanziate dalla cooperazione è affidata ad imprese europee che ne traggono quindi dei vantaggi economici considerevoli.

Il rapporto di concorrenzialità che esiste in molti settori solleva allo stesso tempo degli interrogativi relativi alla destinazione degli aiuti tecnici e finanziari.

Bisogna chiedersi, in altri termini, se la Comunità è effettivamente disposta a finanziare o a contribuire con apporto tecnologico e, in generale di know-how, allo sviluppo di quei settori economici in cui quel rapporto di concorrenzialità si realizza o si potrebbe attuare (si pensi ad esempio agli interventi di stimolo della promozione commerciale in settori di produzione concorrente).

Si può quindi concludere che la concorrenzialità che si riscontra in molti settori economici tra Comunità e paesi del Maghreb può costituire una chiave di lettura di alcune disposizioni dell'accordo di cooperazione sopra esaminate che limitano i vantaggi accordati ai partners.

Si è anche visto che una diversa interpretazione può incidere in forte misura sulla portata delle norme.

Il nucleo centrale della questione diventa quindi quello del criterio interpretativo che deve essere applicato.

Una corretta interpretazione deve essere fondata sullo scopo che l'accordo intende realizzare. Nel caso della disposizione che proibisce l'adozione di misure di effetto equivalente ad esempio, si dovrà tener conto, da una parte, che lo scopo principale di queste disposizioni è quello di eliminare le forme di protezione tariffaria e paratariffaria che possono rendere più onerose le importazioni dei prodotti industriali marocchini e non, come avviene nel caso dei rapporti intracomunitari di realizzare una

integrazione dei mercati. D'altra parte bisognerà anche considerare che la teoria su cui questa norma si fonda è quella per cui l'accesso privilegiato alle esportazioni dei paesi del terzo mondo può agire da incentivo alla loro industrializzazione. Sembra quindi che lo scopo dell'accordo giustifichi una interpretazione non troppo restrittiva di queste norme.

Tuttavia, è pensabile che altre considerazioni possano incidere sulla interpretazione e applicazione dell'accordo.

L'analisi svolta nel presente lavoro sembra in effetti indicare che la presenza di elementi di conflittualità può condurre ad una interpretazione restrittiva delle norme.

Così, sempre in materia di commercio di prodotti industriali, la politica seguita dalla Comunità nel settore tessile, con il ricorso agli accordi di autolimitazione ed una sospensione delle disposizioni dell'accordo, induce a ritenere che le nozioni di misure di effetto equivalente potrebbero ricevere una interpretazione restrittiva, rispetto a quella qui proposta, una volta che i paesi maghrebini sviluppassero una industria concorrente con quella comunitaria.

Le conclusioni che si possono trarre da questa analisi possono essere, con le dovute modifiche, trasposte anche ad altri accordi e possono confortare l'ipotesi iniziale della tesi, secondo la quale la qualificazione degli accordi comunitari non può prescindere dall'interpretazione che viene data alle disposizioni in essi contenute.

Su quest'ultima e, quindi, sulla realizzazione dello scopo dell'accordo, peserà la scelta che la Comunità vorrà fare.

Essa potrà interpretare ed applicare le norme dell'accordo privilegiando le soluzioni che amplifichino gli strumenti utilizzati o stimolino la complementarità anche se ciò può significare accrescere la concorrenzialità almeno a breve termine.

Oppure la Comunità potrà optare per una soluzione interpretativa che se pur non costituisce una violazione dell'accordo, di fatto, limiti o restringere i vantaggi previsti

dallo stesso.

In ultima analisi da questa scelta dipenderá la credibilitá della politica di sviluppo della Cee ed in generale della Comunitá stessa come partner nelle relazioni internazionali.









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