The Cooperation Agreements with Maghreb Countries

A Contribution to the Study of Consistency of EEC Development Cooperation Policy

Francesca Martines
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Francesca Martines

European University Institute, Florence
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This work is dedicated to Camilla, my daughter, who was born a few months after the thesis was completed.
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<th>Description</th>
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<tbody>
<tr>
<td>ACP</td>
<td>Africa-Carribean-Pacific State (Lomé Convention)</td>
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<td>AFDI</td>
<td>Annuaire Français de Droit International</td>
</tr>
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<td>ASEAN</td>
<td>Association of South-East Asia Nations</td>
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<tr>
<td>CDE</td>
<td>Cahiers de Droit Européen</td>
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<tr>
<td>Com. Int.</td>
<td>Comunità Internazionale</td>
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<tr>
<td>CMLRev.</td>
<td>Common Market Law Review</td>
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<tr>
<td>DCSI</td>
<td>Diritto Comunitario e degli Scambi Internazionali</td>
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<tr>
<td>Dev. P. Rev.</td>
<td>Development Policy Review</td>
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<tr>
<td>EEC</td>
<td>European Economic Community</td>
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<td>EC Bull.</td>
<td>European Communities Bulletin</td>
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<td>EC Bull. Sup.</td>
<td>European Communities Bulletin, Supplement</td>
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<tr>
<td>ECR</td>
<td>European Court Reports (official reports of the European Court, English version)</td>
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<td>EFTA</td>
<td>European Free Trade Association</td>
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<td>EFTA Bull</td>
<td>European Free Trade Association Bulletin</td>
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<tr>
<td>EJIL</td>
<td>European Journal of International Law</td>
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<tr>
<td>ELRev.</td>
<td>European Law Review</td>
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<td>Ford. JIL</td>
<td>Fordham Journal of International Law</td>
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<td>Code</td>
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<td>Foro it.</td>
<td>Foro Italiano</td>
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<tr>
<td>ILO</td>
<td>International Labour Organization</td>
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<td>Int. Aff.</td>
<td>International Affairs</td>
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<tr>
<td>Interec.</td>
<td>Intereconomic</td>
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<td>Int. Spec.</td>
<td>The International Spectator</td>
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<tr>
<td>LIEI</td>
<td>Legal Issues of European Integration</td>
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<tr>
<td>MJIL</td>
<td>Michigan Journal of International Law</td>
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<tr>
<td>JCMS</td>
<td>Journal of Common Market Studies</td>
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<tr>
<td>JWTL</td>
<td>Journal of World Trade Law</td>
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<tr>
<td>O.J.</td>
<td>Official Journal of the European Communities</td>
</tr>
<tr>
<td>RCADI</td>
<td>Recueil des Cours de l'Academie de Droit International</td>
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<tr>
<td>RDE</td>
<td>Rivista de Diritto Europeo</td>
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<tr>
<td>RDI</td>
<td>Rivista di Diritto Internazionale</td>
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<td>Rev. Dr. Rur.</td>
<td>Revue du Droit Rural</td>
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<td>Rev. Dr. Suisse</td>
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<td>Riv. Dir. Eur.</td>
<td>Rivista di Diritto Europeo</td>
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<tr>
<td>RIDPC</td>
<td>Rivista Italiana di Diritto Pubblico Comunitario</td>
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<tr>
<td>RGDIP</td>
<td>Revue Générale de Droit International Public</td>
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<td>RMC</td>
<td>Revue du Marché Commun</td>
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Object of this work are the Cooperating Agreements and related instruments such as the Protocols which integrate and modify them concluded by the Community and its Member States with the so-called Maghreb countries, i.e. Morocco, Tunisia, and Algeria. Although these agreements were concluded separately by the Community with each Maghreb country, they were negotiated as part of the same system and pursue the same objective.

The agreements are considered as the main instrument used by the Community to encourage economic and social development of the countries of this geographic area.

The keystone of the agreement is the preferential treatment based on the theory whereby developments can be rationalized by an increase of exports. On this basis, Maghreb countries are granted most-favored-nation free entry of their products in the market of the EEC.

There exist, however, a substantial incompatibility to the Mediterranean policy of the EEC: the Community is both a exporter and a competitor with Mediterranean countries.

In fact, on the one hand, the EEC Member States and Mediterranean countries are mutually dependent, from the point of view of economic and security. On the other hand, they have a varying balance 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 overall development of this market can guarantee the absorption of Community exports.

The economic map between the EEC and Maghreb States underlies many of the social problems currently encountered in the Maghreb. High unemployment, disorganization of labor, and a demographic explosion which increases food requirements and depletes the natural-goods reserves. Moreover, the economic division between Maghreb countries and the Community may be further extended 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 Mediterranean countries are not only producers of raw materials, like natural gas and oil, but their territories are passages for Community energy supplies. On the other hand, the
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Introduction

Object of this work are the Cooperation Agreements and related instruments such as the Protocols which integrate and modify them concluded by the Community and its Member States with the so-called Maghreb countries, i.e. Morocco, Tunisia and Algeria. Although these 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.

The agreements are conceived as the main instrument used by the Community to encourage economic and social development of the countries of this geographic area.

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.

There exist, however, a fundamental inconsistency in the Mediterranean policy of the EEC: the Community is both a partner and a competitor with Mediterranean countries.

In fact, on the 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 demographic explosion which increases food requirements and exacerbates the unemployment situation. Moreover, the economic division between Maghreb countries and the Community may 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 gas 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\(^1\).

As an example of complementary and conflicting aspects of the economic relationships between the EEC and Maghreb one can mention the case of agriculture. As has been noted 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 comprises olive oil, wine, tomatoes. The very narrow or even non-existent inter-regional market\(^2\) makes the Community a fundamental outlet for these products.

Furthermore the cultivation of some of these products was introduced during colonialism for the exclusive use of 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: it represents 80 per cent of agricultural exports for this country and only a very limited percentage of the production is locally consumed\(^3\).

Agricultural exports, however, are in competition with Community agricultural production. It should be remembered that the EEC, particularly since the entry of Spain and Portugal\(^4\), is self-sufficient for the majority of Mediterranean products.

Thus, competition for Community producers is tougher due to the fact that the mechanisms of common agricultural policy applied to Mediterranean products are less protective than those applied to milk and cereal 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

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2. Trade between Algeria and Morocco was interrupted in 1974 and was resumed only recently.
3. Efforts of reconversion in Algeria led to a decrease of vineyards from 365,000 ha. in 1962 to 245,000 in 1979. The objective is 210,000 ha. See DUPOUY, A., *Le statut juridique de la coopération entre l’Algerie e la CEE*, *Rev. algérienne des sciences jur. ec. et pol.*, 1979, p. 2 ff.
4. The adaptation of mechanism required by Spanish and Portuguese memberships will be discussed in Part II, Chapter I.
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 reach approximately 80 million people in 2000 with a high percentage of people below 25 years of age (65 per cent of the population in 1986) and an unemployment rate of 35 per cent.

Food requirements, in particular cereals as the basic dietary intake 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 population growth has led to a rise in imports, with negative consequences in the balance of payments of these countries. The consequent increases in prices have 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.

A further illustration of competition is provided by industrial relationships. Exports from Maghreb States to the Community (textile products) are in 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 for Maghreb countries seek an improvement in productivity and a strengthening of exports, which would be fostered by a low-cost labour force. Likewise, the development of a national chemical industry could take advantage of raw materials which to date have primarily been exported. This industry could, prospectively, enter in competition with a Community industry.

Finally, one could also consider the question of migration. Algerian, Moroccan and Tunisian workers have traditionally emigrated to the Community, and to certain Member States in particular. For Maghreb countries, emigration means guaranteeing a cheap work force for these countries and an outlet for the high levels of unemployment. Moreover,

5 See KHADER, B., ‘Le debolezze dell’industrializzazione nel mondo arabo’ Politi­ca int., 1988, pp. 135-144.
salaries sent to the countries of origin are an important entry source in the balance of payments of these countries.

Recently, however, the deterioration 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. They are therefore less inclined to open their doors to developing countries' workers whose presence triggers social tensions which may have remained quiescent in periods of economic stability.

From these remarks, it may be observed that the level of competition between the economies of the EEC and the Maghreb is not the same in all economic sectors. In some cases, competition is not present but rather latent and can develop 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 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 enhanced competition between Maghreb and the Community. On the other hand, it should also be recalled that the development of Maghreb countries respond to a fundamental interest of the EEC and is the declared objective of its policy.

Therefore, the Community is faced with a dilemma: the opening of its markets to foster Maghreb development on the one hand, and the existence of competitive production which pushes towards the adoption of protectionist instruments; on the other hand, an awareness of the need to develop complementarity between the economies.

This is obviously a simplified description of the relationships, but one which can serve as a key in examining the various provisions of the Cooperation Agreements concluded by the Community with each Maghreb country in order to see whether the texts reflect conflicts and, if that is the case, where inconsistencies is revealed in the agreements.

Some of the provisions of the Cooperation Agreements and of the Protocols seem, at least apparently, to show rather clearly the existence of conflict; for other provisions (elimination of charges and measures of equivalent effect for industrial products, for example) the existence of competition or the will to enhance cooperation and complementarity can

---

7 One should consider, for example that within the Community the position of the Member States as regards the relationships with third Mediterranean countries are far from being homogeneous. Thus industrialized countries of northern Europe are more eager to develop trade relationships, in particular as far as agricultural preferences are concerned, than the southern Member States which, due to competitive agricultural produce, do certainly prefer to develop financial cooperation.
affect their interpretation. This leads to a further observation. It is not the intention of this work to propose a new classification of these agreements or a new typology of conventional external relations of the Community. On the contrary, the type of studies which have been carried out seem to indicate that the various attempts made to classify the agreements of the Community do not give any insight into the relationships which the Community intends to establish with its partner(s) if the scale of value on which typologies are based is used only as a method of description of the relationships.

Moreover, typologies tend to be too rigid since the treaty-based relationships between the Community and third countries are framed in a fixed pattern which does not correctly represent their complexity.

It seems on the contrary that an evaluation of the relationships established between the Community and third countries should be based on other elements: the acknowledgement of a direct effect of the agreements and of their provisions, flexibility, that is the ‘reaction’ to situations of crisis, the possibility of adjusting their instruments to new realities or needs without recourse to amendments, the competence of the institutions which they may create, their power to modify the Agreement and the limits of this power, the competence to interpret the Agreement’s provisions.

8 See for a most sophisticated theory of classification of Community agreements FLAESCH-MOUGIN, C., *Les accords externes de la CEE. Essai d’une typologie*, Ed. Université de Bruxelles, Bruxelles, 1979. In her classification, Community agreements are set up on an axis the opposite ends of which are represented, on the one hand, by the absence of relationships with third countries and on the other by accession to the Community. Agreements are thus classified on the basis of the links they establish between the Community and the third state. Other typologies, although elaborated to a lesser extent than that of Flaesch-Mougin, have been proposed by, MISHLANI, P., PROBERT, 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. Their classification only concerns the relationships of the Community with developing countries. 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 represented by the image of concentric circles. The centre represents the Community and the circles represent the agreements concluded by the Community with third countries: the closer the circle to the centre, the stronger the link established with the Community. See PESCATORE, P., ‘La constitution, son contenu, son utilité’, *Rev. Dr. Suisse*, 1992, p. 64.
These questions will be discussed in this work according to the following plan:

Part I will analyse the legal framework of the Agreements, starting from the question of reasons leading to the choice of the legal basis of the Cooperation Agreements and related conventional instruments. Chapter 2 of Part I will deal with the creation of common institutions, their competence and the status of the agreement and of derived legislation in the Community legal order.

Part II will discuss the provisions regulating the relationships between the parties in the field of trade. 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.

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 Agreements 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.

Chapter I of Part II will verify, firstly, the interpretation of provisions regulating trade in industrial goods, taking as its reference point the relevant Community case-law. 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 then be analysed in relation to the rules governing the origin of products. These are, although often neglected, very important provisions since they establish which criteria are applied to classify a product as originating, classification which gives access to preferential treatment.

The provisions of the Cooperation Agreements and the Financial and Technical Protocols, discussed in chapter I of Part III, 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 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.

See for example the system of generalized preferences and financial aid to non-associated developing countries of Asia and Latin America.
The Cooperation Agreements with Maghreb countries also contain provisions in the field of labour, whereby workers of the Contracting Parties are granted non-discriminatory treatment as regards pay, working conditions and social security.

The questions examined in Chapter II of Part III concern the range of application of the non-discrimination principle, in particular the interpretation given by the Court to some of the provisions contained in the Agreements and the consequences for the conditions of Maghreb workers in relation to workers of other third countries in the Community.

Part IV of the thesis will discuss the possibility of deviating from the provisions of the Agreements by means of safeguard and derogating rules allowing the parties to deviate, temporarily or for an unlimited period, from the provisions of the agreements without taking recourse to amendments.

The choice of examining Cooperation Agreements with Maghreb is not coincidental.

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 tested 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 as a passage for the Community's oil supplies;
- the level of complementarity and competition between the economies is very high.

As seen above, all the Cooperation Agreements with Maghreb countries respond to the same project; 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 Community has a comprehensive system for the provision of financial assistance to enterprises, which includes the European Investment Bank (EIB), the European Bank for Reconstruction and Development (EBRD), and the European Investment Fund (EIF). These institutions provide loans, equity investments, and guarantees to enterprises, especially small and medium-sized enterprises (SMEs), to help them overcome financial difficulties. The AIF and the EIB also play a role in supporting research and development, as well as innovation.

The EIB, in particular, has a mandate to support projects that contribute to the objectives of the European Union, such as the promotion of sustainable development, energy efficiency, and renewable energy sources. The AIF, on the other hand, focuses on financing projects that have a significant impact on the environment and climate change, such as the development of low-carbon technologies and the promotion of energy efficiency.

The EIB and the AIF are also involved in the management of the European Union's Structural Funds, which are used to support economic growth and social cohesion in the regions of the European Union. The EIB and the AIF are also involved in the management of the European Union's Structural Funds, which are used to support economic growth and social cohesion in the regions of the European Union.

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PART I
Chapter I

The Legal Framework of the Cooperation Agreements

A) Article 238 as Legal Basis of the Cooperation Agreements concluded with Maghreb Countries, the Reasons and Questions of the Choice

The agreements concluded between the Community and the Maghreb and Mashrak countries find their legal basis in Article 238 of the EEC Treaty which endows the Community with the competence of concluding association agreements (see infra for an interpretation of this provision).

It is to be clarified firstly that the term 'cooperation' used in the title of these agreements is not used to describe a specific type of relationship. The term 'cooperation' has in fact been used very commonly and extensively by the Community in its treaty relationships with third countries, in particular after 1972\(^1\), although it does not appear in any of the Treaty provisions laying down the Community competence to conclude agreements with third countries\(^2\).

1 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) O.J., L 244, 1973 (legal basis 113, 114). More recently the term has been more commonly used. 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 O.J., L 153, 1984 and O.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, O.J., L 281, 1982 and O.J., L 328, 1981); the Commercial Cooperation Agreement with Bangladesh (113) and Sri Lanka (113) (O.J., L 319, 1976 and O.J., L 247, 1975); the Framework Agreement for Commercial and Economic Cooperation with Canada (see O.J., L 260, 1976).

2 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
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.

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 rejection of the colonialist implication contained in this term arising from 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.

We can presume that, with the term 'cooperation', the Contracting Parties also wished 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.

The question discussed in this chapter is whether Article 238 is a correct legal basis for the Cooperation Agreements concluded with Maghreb countries.

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 involving 'reciprocal rights and obligations, common action and special procedure'.

opposed to cooperation. This suggests that the term cooperation has a very generic meaning. In practice cooperation with those organizations has taken the form of the exchange of information, establishment of contacts and the creation of permanent delegations of the EEC to these organizations.

3 See for instance the recent agreements concluded with some East European countries called 'Europe Agreements'. 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.


5 When the 'precedent' of association under Part IV of the Treaty does not exist, the association may be opposed to the term 'cooperation' to indicating a closer form of relationship. 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, C.W.A., VÖLKER, E.L.M. (eds), Divisions of Powers between the Community and its Member States, Kluwer, Deventer, 1981, p. 71. TORRELLI, M., 'L'Association avec la Grèce', L'Association avec 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, J., 'The Association with Nigeria', Ibidem, p. 237.
Reciprocal rights and obligations. This seems to be a feature 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 detail, 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 are placed upon the Maghreb countries relative to 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 Community partners concern the consultation or notification obligations laid down in certain provisions, as in the case of a derogation from the most-favoured 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, are 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 cooperation between the parties, although this leaves room for very 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 may take different forms, including 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 as-

6 CAPOTORTI, F., 'Relazione introduttiva', La politica Mediterranea..., p. 125, op. cit.
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\(^7\) (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).

It is commonly agreed in the literature that these features are not capable \textit{per se} of providing a basis for distinguishing association agreements from other agreements founded on a different legal basis\(^8\). While in other cases the legal basis identifies the field of action which is the object of the agreement\(^9\) there is nothing in Article 238 which indicates the possible content of association agreements.

Therefore it can be concluded that Article 238 does not lay down a competence for the Community to act in a specific area, but only indicates a category of agreements\(^10\).


\(^9\) Under Article 113 or in another area in which the Community has competence where external competence is based on internal competence (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 encoun ters the only limit laid down in this provision.

\(^10\) According to FLAESCH-MOUGIN, C., the association is a 'frame' that can have a different content according to the Community's partner(s). \textit{Les accords externes de la CEE. Essai d'une typologie}, Ed. Université de Bruxelles, Bruxelles, 1979, pp. 33-41, DE NOVA, R., \textit{op. cit}. It is therefore significant that the interpretations of
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.

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. 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. Moreover, a ‘deterrent’ against the use of Article 113 lies in the exclusivity of common commercial policy which would have precluded the conclusion of similar agreements by Member States.

Article 238 proposed by the various commentators are based on 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. See PESCATORE, P., ‘Les relations externes de la CEE’, RCADI, 1961, vol. II, pp. 9-224, p. 139 ff. See LUCHAIRE, F., ‘Les Associations à la CEE’, RCADI, 1975, I, pp. 245-308. See BISCOTTINI, G., op. cit. Attempts have also been made, on the basis of actual practice, to create a ‘typology’ of association agreements. Verloren Van Theemat 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. See KAPTEYN, P.J.G., VERLOREN VAN THEMAAT, P., Introduction to the Law of the EC, Kluwer, Deventer, Boston, 1989, p. 828. 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. 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. 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. See case 12/86 Demirel v. Stadt Schwäbisch Gmünd, 30.09.1987, 1987, ECR, p. 3719, report for the hearing p. 3730.

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.

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.

See opinion 1/75, op. cit., p. 1363.
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 23514 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 agreement15.

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 adopt-

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14 The possibility of referring 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.

15 The reference to Article 235 alone would not be correct since an important part of the agreement concerns 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 Bremerhaven 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 been raised in the case of the alternative with Article 238 since both the provisions provide for the consultation of the Parliament and for the voting by unanimity in the Council.
This therefore means that the subject matters that can be covered by the Agreements are not defined a priori. It seems that the choice of Article 238 as legal basis for the Cooperation Agreements with Maghreb countries can be justified for the following reasons: a) the flexibility of the provisions; b) the symbolic meaning of Article 238; c) the unanimity in the Council.

1) Flexibility

Article 238 allows the conclusion of agreements covering a large number of subject matters. The determination 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, that is concluded by the Community and by the Member States. The few exceptions are limited to the first associations agreements (Morocco and Tunisia). The correlated problem is therefore whether the


17 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 Hungary (Europe Agreements). 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 a 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, 14.12.1991, ECR (1991), p. 6079, 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, GUCE, C 136, 1992, p. 1. 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 cooperation in various fields between the Community and some Eastern European countries with the scope of helping them towards the market economy and with the ultimate aim of integrating these countries into the process of European integration. The agreements establish a political dialogue between the parties (on the Community side using the mechanisms of European Political Cooperation), a free trade area (to be created 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.

18 The literature on the subject is vast, see, inter alia, O'KEEFFE, D., SCHERMERS, H.G. (eds), Mixed Agreements, Kluwer, Deventer, 1983.
Community could conclude the Cooperation Agreements with Maghreb countries alone, or if the ratification by Member States was necessary.

In order to clarify this question it is necessary to ascertain which subject matters can be covered by a ‘pure’ Community Agreement based on Article 238. As regards this question, 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.

The Court has never specified which areas can be included in an agreement based on Article 238, it should be asked if some indications can be gathered from the Court jurisdiction to interpret these agreements.

The technique of mixed agreements is based by the division of competencies between the Community and the Member States, 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 unclear. 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, CML Rev, 1986, pp. 157-176. See NEUWAHL, N., ‘Joint Participation in International Treaties and the Exercise of Power by the EEC and its Member States: Mixed Agreements’, CML Rev, 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).


In Haegeman 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 it affirmed its competence to interpret these agreements. It was, however, 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. Case 181/73, R & U Haegeman v. Belgium, 30.04.1974, (1974) ECR, p. 459. The agreement in question was the Association Agreement concluded with
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.

On the other hand, it can be submitted that the Court can interpret all the provisions of an agreement, even those within the competence of the Member States, and consequently the interpretation by the Court of these areas cannot be laid on to draw any conclusion on the division of competence between the Community and Member States under an agreement based on Article 238. The interpretative competence of the Court extending to all the provisions of the agreements finds its ratio in the obligation undertaken by Member States when concluding such agreements to fulfil the duties deriving from the agreement as regards the Community, which is therefore authorized to determine the extent of those obligations. The interpretation by the Court would assure uniform interpretation across the whole Community territory, even of the provisions outside the Community's competence. When the agreement becomes part of Community law, it enters in the Community legal order in its entirety.

In *Demirel* the Court seems to provide some clarification on the subject matters which can be covered by Association Agreements. Germany and the United Kingdom considered that the Community could interpret Greece. For the question of the competence of the Court to give a preliminary ruling on the interpretation of agreements see ADAM, R., 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 favourable 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.

22 In the cases *Razanatsimba* 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). *Case 65/77 Razanatsimba* 24.11.1977, (1977) *ECR*, p. 2229. *Case 18/90 Kziber v. Onem*, 31.01.1991, (1991) *ECR*, p. 139.


24 See NEUWAHL, N., 'Joint Participation ...', *op. cit.*


only those provisions falling within its exclusive competence, which exclud- ed the Articles on the free movement of Turkish migrant workers.

The Court dismissed the question, 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 is an association agreement creating special, privileged links with a non-member country which must, at 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.' (para 9).

It should first be asked whether the extensive interpretation given to Article 238 only applies to pre-accession agreements justifying the participation of third countries in the Community system.

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 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

27 Weiler points out 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.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.

28 Emphasis added.

29 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.
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 in the Treaty this applies to all Association Agreements.

Second, it should be clarified how the expression ‘fields covered by the Treaty’ is to be interpreted.

It can be argued that this does not make reference only to the four freedoms but also to subject matters like competition.

Some doubts may arise in this respect in the light of a recent Court’s case-law. In Opinion 1/92, on the compatibility of the EEA Agreement with the EEC Treaty founded on Article 238, the Court held that the Community is competent, on the basis of the internal competence on competition, to conclude international agreements in this field. Why did not the Court refer to article 238 instead of making reference to the theory of parallelism? It is submitted that this decision of the Court should be read not in connection with the case-law on Article 238 but in the framework of the theory of parallelism. In other words, according to this interpretation, the Court intended to underline that the Community can conclude international agreements in the field of competition, even if these are not based on Article 238.

Even if one adopts an extensive interpretation of the expression ‘fields covered by the treaty’, further questions may arise in the case that the Community does not have the power to implement within the Community provisions contained in agreements which it has concluded. This is the case for instance for provisions on social security when the Community competence extends only to workers of Community Member States. Therefore, the Community cannot implement the commitments deriving from the agreements, like the Association Agreement with Turkey or the Cooperation Agreements with Maghreb countries. 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. The


solution to this problem seems to be indicated in 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 …’ (para 10). This seems to indicate that external competence can exist without an internal power to enact common rules. In practice, the Community would have treaty-making power but not the power to enact internal rules. This is not inconsistent with the construction of the external competence of the Community, based on the theory of parallelism. In fact, one should consider that in Demirel the Court did not apply the theory of parallel powers to Article 238.

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.

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.

2) Symbolism

Article 238 symbolized the provision founding the Treaty relationships with ‘privileged’ developing countries.

Besides technical-legal and political-institutional considerations the choice of the legal basis may in fact also have a symbolic significance.

32 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


34 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.

35 The choice of legal basis determines the instruments available to the Community (regulations, directives, programmatic acts, consultation, agreements with third
Article 238 has been used as a legal basis for contractual relationships only with some developing countries. The contractual-based relationships of the Community with developing countries are distinguished in two areas, ‘area 238’ and ‘area 113-235’. The different choice of legal basis are more the symbol of different types of relationships than of the different contents of the agreements.

At the end of the sixties the Community concluded (Association Agreements) with Morocco and Tunisia based on Article 238. Despite their name and their legal basis both the agreements only regulate trade relationships between the contracting parties and, it is submitted, could have been based on Article 111. The choice of Article 238 can be

countries) and the procedures which must be followed (voting majority in the Council, consultation of other institutions).

36 The EEC Treaty does not confer on the Community a competence in the field of development cooperation. 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. A Community competence to act in the field of development cooperation has been included in the Maastricht Union Treaty (Article 130W and ff.).

37 Concluded with Latin American and Asian countries. The main features of these agreements it that they do not provide for a preferential customs duties treatment for their exports to the Community and do not include financial aid.


39 A similar evolution concerns the relationships with African countries which were 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. Once the countries which were associated with the Community became independent, the association Convention, was first 'transformed' in the Yaoundé Conventions and finally, in 1975 in the first Lomé Convention. The legal basis of Lomé Conventions, The fourth Lomé Convention was concluded in 1990 (O.J., L 229, 1991) for a period of application of 10 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. See IACCARINO, U.M., Articles 131-136 QUADRI, R., MONACO, R., TRABUCCHI, A., Commentario CEE, Giuffré, Milano, 1965, pp. 1025-1046. ORLANDO, P.R., La Cooperazione dell'Europa comunitaria allo sviluppo dei paesi ACP, Ed. scientifiche italiane, Perugia, 1991.

40 At the time of negotiations and the conclusion of the agreement Article 111 applied (the transitional period expired on 31 December 1969). The question of vot-
explained by the provisions contained in the Treaty relating to association of these countries to the Community and by the fact that these two countries belonged to the ‘Franc Area’ and had very close relationships with their former ‘mother country’, France\textsuperscript{41}.

It is interesting to compare the agreement with Israel\textsuperscript{42} 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; there is also one, Article Art.18, on technical and economic cooperation. Although in the agreement, 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 (those with Morocco and Tunisia on the one hand and with Israel on the other) were concluded on a different legal basis, perhaps more on the basis of political considerations than on legal consistency. Presumably, this may be due to the reticence of the Council to conclude an Association Agreement with Israel as suggested by the Commission and the Parliament\textsuperscript{43}.

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,\textsuperscript{44} 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 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\textsuperscript{45}.

\textsuperscript{41} See 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’.

\textsuperscript{42} \textit{O.J.}, L 136, 1975.


\textsuperscript{44} \textit{O.J.}, L 270, 1978.

\textsuperscript{45} 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. The modification of the legal basis of the agreements with European countries,
Another illustration of the symbolic relevance of the legal basis can be provided by the case of Yugoslavia. A five-year non-preferential trade agreement was concluded for a duration of three years in 1973 with Yugoslavia\(^46\) 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\(^47\). 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 the EEC Treaty\(^48\). 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\(^49\). 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\(^50\), respectively, which confirms the option to avoid Article 238.

The development of 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\(^51\).


\(^{47}\) See Articles 4 and 5.

\(^{48}\) O.J., L 41, 1983.

\(^{49}\) It should be taken into account that a high number of joint-venture contracts linked European and the 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.

\(^{50}\) See O.J., L 130, 1980.

\(^{51}\) See O.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 O.J., L 315, 1991.
3) Procedure

A final, although not less important, issue which shall be discussed in relation to the choice of Article 238 as legal basis of the Cooperation Agreements is the procedure which is to be followed by the Community under this provision. It has been submitted above that the procedure followed within the Community for the negotiation and conclusion of Association Agreements is an element which should be considered when discussing the reasons beyond the choice of the legal basis of Cooperation Agreements.

Besides the unanimity required in the Council for conclusion of Association Agreements, the role played in the procedure by the European Parliament should also be considered.

52 Article 238 shall be supplemented by Article 228 which establishes the procedures that have to be followed by the Community when it concludes agreements with third countries. 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. 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. 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 case of the Cooperation Agreements with Maghreb and Mashrat countries the Commission negotiated on the basis of the authorization by the Council and of a mandate by Member States.


53 The acts whereby the agreement is 'concluded' do not transform the agreement in Community law. For an examination of the different opinion in legal doctrine see JACOT-GUILLARMOD, 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. Thus, the power vested by the Treaty in the Council 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. See GAJA, G., 'Fonti comunitarie', Digesto Uiet, 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. 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 concluded (Article 60 Cooperation Agreement with Morocco).
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 Article 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, while 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. It was held that the opinion of the Parliament 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. WEILER, J.H.H., 'The European Parliament and its Foreign Affairs Committees', in CASSESE, A. (ed.), *Control of Foreign Policy in Western Democracies* in, Cedam, Padova, Oceana, New York, 1982, Vol. II, p. 90. 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' meant signature; therefore a literal interpretation required the opinion of the Parliament before signature. For the Council conclusion meant ratification; whereby the practice of consulting the Parliament after the signature was correct. See COSTONIS, J., 'The Treaty-Making ...', op. cit., pp. 442-443. However, the issue is not modified by the fact that the opinion of the Parliament is given before or after the signature. 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. For the permanent link between the Parliament and the Commission and the Council set up by the so called Luns procedures (Luns I for Association Agreement and Luns II (or Westerterp) for commercial agreements) see WEILER, J.H.H., 'The Transnational Setting. The European Parliament and its Foreign Affairs Committees', in 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.

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 external relations, 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. See the cooperation procedure introduced by Article 7 of the SEA (see Article 149 EEC Treaty). The picture will be more
The ‘power of co-decision’\textsuperscript{56} of Parliament in the adoption of Community binding acts has been recognized only in the field of external relations and is however limited. First, it only concerns Article 238\textsuperscript{57}; secondly, its a ‘negative power’\textsuperscript{58}: the Parliament can only make the adoption of the act more difficult but is not involved in the negotiations. Nonetheless, the possibility of a veto from the Parliament should at least theoretically require closer cooperation between the Parliament, the Council and the Commission\textsuperscript{59}. ‘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 … ’\textsuperscript{60}.


\textsuperscript{57} 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 binding provisions. Therefore the Council could suspend this practice without any legal consequence. 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 ask for the Parliament's opinion, the requirement implies that the Parliament actually expresses its opinion. See case 138/79 \textit{Roquette v. Council}, 29.10.1980, (1980), \textit{ECR}, p. 3333.


\textsuperscript{59} 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’, \textit{RDI}, 1988, pp. 601-605.

\textsuperscript{60} See \textit{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. 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). 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 were defined as 'significant international agreements' ('significant within the terms of the solemn
What happens if Parliament does not deliver an 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 deliver of its opinion was a more pertinent problem. At present the Parliament has a more important instrument for blocking the conclusion of an agreement: it does so 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 way61. In the case described above, the Council had not exhausted all the possibilities of obtaining the Parliament's 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 of refusal 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 may adopt the act without the Parliament's opinion62.

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 le-

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61 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.

gal basis of agreements, made worse by the problem of defining the notion of association and of trade policy63.

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 and fourth financial Protocols with Mediterranean countries 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. It is clear however that this was a political choice64.

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 favour of giving its assent to the conclusion, but Parliament refused. It has been observed that this seems to contradict the assumption that consultation between the Parliamentary Committees and the Council during negotiations could avoid the risk of refusal of assent from Parliament65.

This is only partly true. In fact one should consider that consultations are unlikely to prevent the Parliament from denying its assent if the object of consultations is limited to the content of the agreement. It is submitted, therefore, that consultation between the Parliament and the Council during the negotiating stage cannot be limited to the technical aspects of the agreement which is being negotiated; on the contrary, Parliament should be consulted 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

63 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.

64 See the Resolution of the European Parliament which indicated Articles 238, 113 and 235 as a basis for the agreement with the Gulf countries. O.J., C 12, 1989, p. 80. See also the 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, O.J., C 231, 1990, p. 216.

65 See ADAM, R., ‘I protocolli...', op. cit.
human rights) confirms that an examination by the Parliament cannot be limited to the content of the agreement itself.

It should also be considered that, although the Community does not have competence in the field of foreign policy, it cannot be denied that the Community's actions in the field of external relations cannot be politically neutral (see for instance the freezing of trade and association agreements between the Community and Spain, Greece and Turkey due to political considerations). 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.

4) Mixity in the Cooperation Agreements

The participation of Member States in the conclusion of the Cooperation Agreements with Maghreb countries has always been explained by the fact that cooperation was financed through contributions from Member States. This interpretation seems on first sight consistent with the fact that subsequent to the entry in the EEC budget of funds to finance cooperation with Mediterranean countries, Financial Protocols of these agreements (see infra) 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 in Cooperation Agreements with the Maghreb countries seems due more to the fact that cooperation is established in fields which are not within the competence of the Community, such as technical cooperation in the field of the environment.

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66 In the case of Israel, assent was refused because of the political situation in the occupied territories, though assent was later given. See SILVESTRO, M., 'Les protocoles...', op. cit., p. 462.

67 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 of the Treaty establishing the Community. Declaration annexed to the Cooperation Agreement, op. cit., p. 109.

68 Before the entry into force of the Single European Act, which added to Part Three of the the Treaty Articles 130R, 130S, 130T laying down a Community competence in this field, the Community actions were based on Article 235.
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 and not the reverse. This interpretation also seems to be confirmed by the fact that the Protocols with Israel are mixed, though the source of financing is not the Member States but rather the Community budget. On the other hand, 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.

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

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 were 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 external powers, once the Community has exercised its competence Member States are not allowed to act on the same subject matter. The conclusion

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69 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.


71 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 préemption’, in DEMARET, P. (ed.), Relations extérieures..., op. cit., pp. 37-62.
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 from concluding agreements with third countries in these areas.

It is not, however, clear to what extent are national measures still allowed once the Community has adopted common rules; that is, whether Member States are prohibited to adopt any act or only those which negatively affect the common rules adopted by the Community. And it is not clear either whether the whole area is preempted or only to the extent of the Community intervention. These 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.

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 has 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. 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.

NEUWAHL, N., 'Joint Participation', op. cit., p. 720. For the case-law on preemption see case 22/70 AETR, paras. 17 and 22.

Would it be possible to avoid, in the case of an Association Agreement which only concerns the fields covered by the Treaty, pre-emption without recourse to mixity\textsuperscript{73}?

It can be useful to draw a comparison with the agreements concluded by the Community with developing countries in Asia and Latin America\textsuperscript{74} regulating trade, economic and development cooperation, based on Articles 113 and 235 and covering a large number of fields. All of these agreements include the so-called ‘Canada clause’\textsuperscript{75}, whereby the Member States are free to conclude with third countries agreements in the same fields as those covered by the agreements. The introduction of this clause should avoid pre-emption but the consequences of this clause seem to go further than is legally correct, since Member States reserve the right to act even when the Community has concretely acted. In other words, Member States would be pre-empted only in the case of a concrete action by the Community and not by the mere fact of the Community having concluded the agreement. This distinction may be made because a feature common to the framework cooperation agreements with Asian and Latin American countries and to the Cooperation Agreements with Maghreb countries 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 Association Agreements covering only the fields included in the Treaty would not be considered necessary if it were the concrete exercise of a competence (and therefore not the conclusion of a framework agreement) which pre-empted Member States treaty-making power.

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\textsuperscript{73} I refer to the case where mixity is not justified; my observations are not dictated by a negative judgement of mixed agreements \textit{per se}.

\textsuperscript{74} 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, \textit{O.J.}, \textit{L} 260, 1976.

\textsuperscript{75} From the first agreement containing such clause, see footnote supra.
B) Article 238 and its Application in the Convention-based Relationships Between the Community and Maghreb Countries

1) Interim Agreements

The legal basis of the ‘first generation’ Association Agreements with Tunisia and Morocco has been discussed above. As regards the Cooperation Agreements currently in force, which as discussed in depth above, are founded on Article 238, it should be noted that their ratification procedures, requiring approval by national Parliaments (the agreements are mixed), delayed their entry into force. It was therefore decided to conclude interim agreements with the Mediterranean partners for the application of the rules governing agricultural and industrial trade. 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. 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) Additional Protocols

Additional Protocols were negotiated between the Community and Maghreb countries in order to take into account the accession, on January 1986, of Spain and Portugal to the Community. These Protocols lay down rules exclusively concerning trade in agricultural goods since the application of the common agricultural policy, as a consequence of the accession, to the competitive agricultural products of the two new Member

76 O.J., L 141, 1976, p. 97
78 The content of these agreements will be discussed in Part II of this work when examining the trade regime applicable to agricultural products imported from Maghreb countries to the Community.
States could lead to a deterioration of the terms of exchange between the Community and its Mediterranean partners. The legal basis of the decision for the conclusion of these agreements is Article 23879.

It may be submitted that Article 113 could have provided a sufficient legal basis, since, as has already been noted, the content of the Protocols pertaining to trade (they provide for the phasing out of customs duties, and the conditions of application for certain products of tariff quotas and reference prices).

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 adaptation to the regime laid down in the agreement in order 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 Agreement and the other co-related contractual instruments80.

A second reason can be cited in justification of the 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 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 consultation81, would have showed a lack of respect, to say the least, for the new power of the Parliament. 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 Protocols82.

81 It shall be remembered that the Luns procedure, discussed infra, is a development of the practice.
82 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
3) **Decisions of the Cooperation Council**

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

As will be discussed in a later section of this work, these acts do not have to be transposed into Community law since they are an integral part of the Community legal order. 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?

Such a solution would apply the theory of parallelism by inverting the terms on which it is founded: an external power based on Article 238 would justify the adoption of internal acts based on the same provisions. The theory of parallelism has seldom been used because of its pre-emption effect. A similar resistance on the part of Member States would probably derive from the ‘inverted’ parallel power theory, which would result in an extension of the Community's internal norm-setting power.

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. Such a choice would at present require the European Parliament to give its assent according to the new procedure laid down in Article 238. (supra).

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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.

83 An application can be found in the fishing sector. See the agreements with Sweden and Norway in O.J., L 226, 1981 (based on Article 43).

Chapter II

The ‘Institutionalization’ of the Cooperation Agreements

A) 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 their 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. Other trade agreements which are more ambitious in scope, such as the free trade agreements with EFTA, creating 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.

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. In other cases, an even more general task of the Joint Committee is to

1 See for instance the Consultative Committee in the voluntary restraint agreement with Argentina, O.J., L 275, 1980.
2 See for example the trade agreement concluded with Finland in O.J., L 328, 1973.
3 See the agreement for commercial and economic cooperation between the EEC and India, O.J., L 328, 1981 Article 10 creating a Joint Commission. The framework on scientific and technical cooperation with Austria in O.J., L 216, 1986 creating a Joint Committee and the COST agreement creating a concertation committee, O.J., L 388, 1981.
‘promote and keep under review the various cooperation activities envisaged between the Parties in the framework of the Agreement’.4

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 a 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 Convention5, 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.6 In the Europe Agreements, the Association Council, 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 the exchange of views between the Contracting Parties.

1) 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

4 See the Cooperation Agreement between the EEC and the member countries of ASEAN, O.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 O.J., L 172, 1986, Article 7 (power to recommend solutions to differences that may arise on interpretation of agreement). See Framework Agreement for cooperation between EEC and Brazil, O.J., L 281, 1982, Article 4.

5 The Convention sets up a Council of Ministers, a Council of Ambassadors (executive tasks), a Committee and groups of work and a Parliamentary Assembly.

6 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 created by the agreement are the EEA Council, the political body responsible for giving political impetus to the implementation of the agreement and which takes the political decision for amendments, a Joint Parliamentary Committee and an EEA Consultative Committee composed of representatives of the EEC Economic and Social Committee and of the analogous EFTA Committee with consultative competencies.
organs include a Cooperation Committee (Article 47.1) and other committees which may be created by the Cooperation Council itself to assist 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. 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 the annex on new potatoes (it shall be remembered that the Additional Protocols are an integral part to the Cooperation Agreements). One should also 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 the one hand members of the Council and of the Government of Morocco. The rules of procedure 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 of 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 detail 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 meets 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 of 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 Morocco7.

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 Mediterranean countries concerned (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).

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 meeting takes 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).

2) Competencies of the Institutions

The competence of the Cooperation Council may be summed up as followed:

(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 (Articles 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 with a view to 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\(^8\) on the specific cases provided for in the

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agreement: social cooperation, financial cooperation and commercial cooperation (rules of origin and tariff nomenclature).

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 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 procedure (Article 14), its duties are not much more specific: 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 forecasting. The duty of the ‘potatoes working party’ (1987 Additional Protocol Joint Declaration) is more specifically that of setting up timetables for the exporting of potatoes to avoid the concentration of deliveries in 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 carries out the specific executive tasks conferred by the Cooperation Council. It has no 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.
B) Acts Enacted by the Common Institutions

1) Their Legal Value in the Community Legal Order

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 decisions enacted by the Cooperation Council may be qualified in the international legal order as agreements in simplified forms. However, it shall also be clarified whether they can be considered Community acts or as acts having effects of Community acts even in the absence of an act operating the transformation of the decisions in the Community legal order.

It shall be noted that 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’.

In case 30/88 Greece brought an action of annulment 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 was not a sufficient legal basis for implementing payments, but that an act of the Council was required for this purpose. Greece invoked Article 2(1) of the Intergovernmental Agreement laying down rules for the procedures to be followed in the implementation of the Association Agreement with Turkey, which establishes 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 decision need be transposed.

The Court accepted this interpretation on the basis of the following reasoning. After having recalled its previous judgement in case 12/86

(Demirel) where it ruled that the agreements concluded under Articles 238 and 228 are, from the 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. The transformation of any decision in the community legal order takes place automatically through the act of adaptation of the Cooperation Agreement which contain provisions conferring a normative power to the Cooperation Council (see supra).

The practice followed by the Council has often proved inconsistent with this interpretation since this institution adopted regulations declaring explicitly that these acts were necessary for transposing the decisions in the Community legal order.

2) Competence to Interpret the Decisions of the Cooperation Council

This question was examined for the first time by the Court in Sevince. This case concerned the interpretation of some provisions contained in two decisions of the Association Council created in the framework of the Association Agreement with Turkey. These provisions have been referred to 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 for a preliminary ruling whether, inter alia, the decisions referred to above fall under the scope of Article 177 and whether certain provisions of these decisions have direct effect.

As regards the first question, it should be remembered that the Court held in Haegemeann that agreements concluded with third countries are acts of the institutions of the Community and are therefore covered by Article 177. The Court recognizes its competence to interpret the decisions of the Association Agreements under Article 177 on the basis of its com-

15 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 estab-
petence to interpret the provisions of the agreement. It is, in other words, the link between the agreement and the act of the Association Council which is relevant for the Court\textsuperscript{16}.

It also clear that the interpretation of the Court of the Decisions of the Cooperation Council is binding only for Member States and not for the other Contracting Party of the agreement. The Cooperation Council does not have any competence in this respect.

It remains to be clarified whether the interpretative competence of the Court extends as well to decisions regulating subject matters which do not fall within the Community competence.

Since in the case of agreements the Community did not restrict its competence to interpret provisions of Community competence, an analogous solution should be applied to the Cooperation Council's decisions, moreover, the Court does not make any distinction between the decisions whose subject matter falls within the sphere of Community competence and those covered by Member States' competence. Once established that the decisions of the Cooperation Council are integral part of the Community legal order, they enter into this order in their entirety\textsuperscript{17}.

3) Effects of Decisions in the Community Legal Order

The fact that the decisions are part of the Community legal order is finally relevant for the question of direct applicability. 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 only if the latter is part of the Community legal order can the question of its having direct effect be raised.

\textsuperscript{16} '... 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, K., 'Regulating ...', op. cit., p. 20.

\textsuperscript{17} The Court affirming its interpretative competence operates a sort of 'communitarization' of mixed agreements. See TIZZANO, A., 'Lo sviluppo delle competenze materiali delle Comunità europee', Riv. Dir. Eur., 1981, pp. 139-210, in particular footnote 169, p. 207.
The Court has acknowledged that in some cases the provisions contained in an agreement concluded by the Community can be invoked by private persons.

A provision contained in an international agreement has direct effect\(^{18}\) 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 meets a number of requirements whereby it directly creates subjective rights or if the action of the legislative organs is necessary. It seems clear that when the invokability of the provision of an international agreement is raised before a Court the two questions that the latter shall examine concern first, the possibility of enforcing it and then the merit of the question, that is the interpretation of the rights invoked\(^{19}\). The direct effect of a provision is important because its acknowledgement is one of the means of assuring its enforceability\(^{20}\).

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\(^{21}\) when two criteria have been satisfied.

One is the so-called ‘preliminary question’\(^{22}\); that is, the capacity of the agreement to have direct effect. To ascertain this the Court examines the

\(^{18}\) 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’, *EC Rev.*, 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 Comunitarie’, *op. cit.*

\(^{19}\) It shall be remembered that in *Polydor* the Court first gave an interpretation of the provision of the agreement with Portugal to avoid ruling on the agreement’s direct effect. See *infra*, Part II, chapter I.

\(^{20}\) See BOURGEOIS, J., ‘Direct Effect... *op. cit.*, p. 94


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'nature' and the 'purpose' of the agreement. 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.

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. This concerned the daughter of a Moroccan worker established in Belgium who was refused the granting of unemployment benefits paid to Belgium nationals because of her Moroccan nationality. Ms. Kziber relied on the principle of non-discrimination established by Article 41 of the Cooperation Agreement to (eligibility for) 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.

On this basis it would have seemed logical that the Court 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. On the contrary, the Court examined the nature and the purpose of the agreement only after having positively solved the question of direct effect of Article 41. I will then start 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 prove the existence of direct effect but by a negative approach: 'the direct effect is not contradicted by the examination of the nature and the object of the Agreement ...'

23 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)

24 It is therefore clear, as shown by Demirel, that the fact that the provision of an agreement has not direct effect does not imply that other provisions cannot create rights upon individuals which are directly enforceable.

25 An analogous form of reasoning was followed by the Court in case 192/89 Sevince, op. cit., where one of the questions 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 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, ground 27, Kupferberg cit., ground 22.
The Court then affirmed that the objective of the agreement\textsuperscript{26}, was to promote global cooperation between the Contracting Parties, in particular regarding the labour force. The fact that the agreement essentially aims at the economic development of Morocco and is limited to establishing 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). \textit{Kziber} seems consistent with the case-law cited above as regards the criteria laid down by the Court\textsuperscript{27}. One question is worth mentioning as it is related to what has been discussed in other parts of this work as regards the links which are established by the Cooperation Agreement. Even if in \textit{Kupferberg}\textsuperscript{28} 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, ‘impose une certaine prudence quant aux conclusions à tirer de l'arrêt Kupferberg’\textsuperscript{29}.

The reference made by the Court to the ‘global cooperation’ between the parties as the main aim of the agreement seems to indicate that the tightness of the links is a relevant criterion to judge whether an agreement has direct effect.

As regards the capacity of Article 41.1 to have 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: ‘\textit{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).

\textsuperscript{26} The aim and the nature of the Agreement are analysed at the very beginning of the Court’s Decision, but with the scope of making the object of the preliminary question submitted to the Court more precise (see paras 8 and 9).

\textsuperscript{27} 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.

\textsuperscript{28} Case 104/81, \textit{Kupferberg}, on the agreement concluded with Portugal (legal basis Article 113 EEC Treaty) establishing a free trade area between the Contracting Parties.

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\(^{30}\). For the other questions of social security, the non-discrimination principle remains unconditional (ground 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 as a condition of application of the non-discrimination principle.

Finally, the Court specified that Article 40 and 41\(^{31}\) 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\(^{32}\) were denied direct effect on the ground, *inter alia*, that they had a programmatic character\(^{33}\).

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

It should be asked whether the criteria applied by the Court of justice in its case-law on direct effect of Community agreements can also provide a parameter to determine the direct effect of decisions of the Cooperation Council. The Court's answer is univocal: in acknowledging direct effect to the provisions contained in the decisions of the Cooperation Council, the Court applies the case-law on the direct effect of agreements. Account is taken of the object and the nature of the Decisions of the Association

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\(^{30}\) For an analysis of these rules, see *infra*, Part III, Chapter II.

\(^{31}\) 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... cir.’ *RTDE*, 1979, 466-478, p. 474, NADIFI, A., ‘Le statut juridique ... cir.’ *RMC*, 1989, pp. 289-295, p. 291.

\(^{32}\) Cited, see *supra*.

\(^{33}\) Case 12/86, *Demirel*, op. cit., para. 23.
Agreement and of the features of the obligation which must be clear, precise and not subordinated to any further act.

Once clarified that the decisions of the Cooperation Council are part of the Community legal order it would not be possible to exclude in principle their direct effect. To decide on the question, therefore, the criteria identified by the Court in its case-law on the direct effect of agreement will be applied.

The link between the decisions of the Cooperation Council and the agreement which establishes the normative power of this organ shall be evaluated under two points of view.

If the agreement cannot have direct effect (the preliminary question seen above) the decisions of the Cooperation Council will not have direct effect; however, if the provision of the agreement laying down the competence of the Cooperation Council does not have direct effect, this is not an obstacle to their direct applicability. See for example in Sevinç where the Court acknowledged the direct applicability of provisions contained in decision 1/80 of the EEC-Turkey Association Council, although this was based on Articles 12 and 36 of the Additional Protocol, which, having a programmatic character, could not be invoked by individuals.

Finally, the reference to national measures, contained in the decisions of the Cooperation Council or in the provision of the agreement establishing the power of the Council to adopt decisions, is not a condition of their applicability, but it makes clear the obligation for Member States to fix, whenever necessary, the modalities of their application.

Thus, when the decision enters into force it binds the Community and does not require the adoption of a Community act unless supplementary measures are required (modification of EEC rules). Therefore, the specification contained in Article 44.1 second paragraph whereby the Contracting Parties ‘... shall take such measures as are required to implement them’ does not require that the Contracting Parties adopt implementing acts for every Decision of the Cooperation Council, but lays down the principle of the obligation of executing agreement in good faith.\(^{34}\)

In Sevinç, 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.\(^{35}\) In the event that the Court annuls such decisions, its ruling would obviously apply only within the

\(^{34}\) See Sevinç para 23.

\(^{35}\) See HARTLEY, T.C., European Community ..., op. cit., p. 253; see also LE-NAERTS, K., 'Regulating ...', op. cit., p. 20, footnote 57.
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.

4) Status of the Agreement and the Decision of the Cooperation Council within the Community Legal Order

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 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

Article 228.2 establishes the rule that an agreement concluded according to the procedures laid down in paragraph 1 is binding for the Community institutions and for the Member States. As has already been mentioned, the ‘conclusion’ is the process whereby the Community approves the agreement and expresses 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 integration by internal rules for their application. 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.

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37 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.

These provisions take priority over ‘derivative’ Community legislation but have the same status as the EEC Treaty. This means that the Community institutions are obliged not only to adopt 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 should also 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 to fulfil 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 State. However, this is possible only when the division of competencies between Member States and the Community is 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 resolved prior to the insertion of the agreement in the legal order of the Community, either through a Treaty amendment or an amendment to the provisions of the agreement which are incompatible.

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40 Article 5 of the EEC Treaty.


42 This latter solution requires the agreement to be re-negotiated with the Community partners as was the case with the EEA Agreement. From Opinion 1/91, 14.12.1991, it can be inferred that the amendment of certain provisions of the EEC Treaty is excluded. See para. 45/46.
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 or over the Treaty.
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 annulled by the Court under Article 179.

This should also 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 to fulfill all the provisions of a mixed agreement).

In theory, the states of a mixed agreement, for the subject matters which fall within Member States' competence, should be the states that international agreements bind in each Member State. However, this is possible only when the division of competencies between Member States and the Community is 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 override the rules contained in the Treaty. This can be inferred from Article 238 (1) which states 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 resolved prior to the incorporation of the agreement in the legal order of the Community, either through a Treaty amendment or an amendment to the provisions of the agreement which are incompatible.


40 Article 5 of the EEC Treaty.


42 This same solution required the agreement to be re-negotiated with the Community partners as was the case with the EEA Agreement. From Opinion 1/91, 17.12.1994. It can be inferred from the amendment of certain provisions of the EEC Treaty concluded, see note 44.
PART II
Chapter I
Trade Cooperation

A) The Objectives of Trade Cooperation

1) 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, and non-tariff barriers.

1 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) at the moment of the customs declaration and (ii) ‘specific’ duties when they are calculated per unit or quantity of the good, thus they do not vary with the price of the goods. See DECHELOTT E, M., ‘Les Droits des Douanes sont-ils encore un element efficace de protection?’ RMC, 1982, pp. 544-551. Customs duties are indicated in the Community common customs tariff (CCT). This came into force in the Community in July 1968, 18 months before the deadline for its scheduled implementation established by the Treaty; that is at the end of the transitional period fixed as 1 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 Novissimo Digesto, 1987, pp. 982-992. VAULONT, N., The Customs Union of the European Community, European Perspectives, Brussels, 1985. 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 and (b) the rate which is applied to the goods. 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
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 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'. This is a very extensive notion which covers many practices, including quantitative restrictions, subsidies, state monopolies, anti-dumping duties, restrictive administrative and technical regulations and voluntary restraint agreements.

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 result 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 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.

2 Customs duties are, together with agricultural levies and a percentage of value added tax, a source of Community finance. However, their importance as a source of revenue has decreased noticeably for industrial countries, 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 in the Community with Decision 70/423 O.J., L 94, 1970 ex Article 201 of the EEC Treaty.

3 SLOT, P.J., Technical and Administrative Obstacles to Trade in the EEC, Sijthoff, Leyden, 1975, p. 9.

4 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,
Quantitative restrictions or quotas are measures which limit, in part or totally, the quantity of goods that can be imported into a country.

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. Article 3 of EFTA provides for the elimination of customs duties and ‘other charges having equivalent effect’. 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.


5 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 goods can be imported into the Community at a reduced customs duty, when this quantity is exhausted the normal tariff is reintroduced. Tariff quotas are covered by the prohibition of Article 12 EEC Treaty.

6 It may be submitted that this is a ‘borrowing’ from the EEC Treaty.

7 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.
2) ...as Instrument of Development Cooperation

The elimination of obstacles to trade, more than an 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 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.8 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 19.

The absence of the requirement of reciprocity distinguishes the Cooperation Agreement (which is the subject of discussion) from the agreements with Mediterranean countries of Maghreb and Mashrak are considered, together with the Lomé Convention, as the cornerstone of the Community development cooperation policy.

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8 The agreements with Mediterranean countries of Maghreb and Mashrak are considered, together with the Lomé Convention, as the cornerstone of the Community development cooperation policy.

Association Agreement, concluded with Morocco\(^\text{10}\) 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 favourable than the most favoured 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 favoured nation clause’, is contained in Article 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 favour the development of trade between developing countries, in particular between those belonging to the same region or sub-region\(^\text{11}\).

**B) Products Covered by the Trade Provisions of the Cooperation Agreement**

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 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,\(^\text{12}\) 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

\(^{10}\) For the text of the Association Agreements concluded with Morocco and Tunisia see O.J., L 239, 27.08.1973.

\(^{11}\) The creation of an economic integration of the Maghreb is no longer hypothetical since the creation of the Union of Arab Maghreb created on 17 January 1989 by Algeria, Morocco, Tunisia, Libya 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.

first-stage processed products listed in Annex II of the Treaty and processed agricultural products which are those not contained in Annex II. The Cooperation Agreement reproduces 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.

13 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.

14 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 contains 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 Customs Tariff. Case 77/83 CILIFT v. Ministero della Sanità, 29.02.1984, (1984), ECR, p. 1257, p. 1265, para. 7.

15 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 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.
1) 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\(^{16}\) regarding oil products other than crude oil and natural gas. These tariff ceilings\(^{17}\), which were subject to an annual increase based on a fixed percentage, were abolished at the end of 1979\(^{18}\).

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 consider that a specific trade system has been devised\(^{19}\) 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).

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\(^{16}\) A tariff ceiling means that a specific quantity of product can be imported free of customs duties, but when this quota has been exhausted the customs duties may be reintroduced.

\(^{17}\) The higher ceiling provided for in the Agreement with Algeria (1,100,000 tons) is 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).


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)\(^\text{20}\).

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 interpretation was given to these provisions\(^\text{21}\) – 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 if so 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.

\(^{20}\) See for a comparison Article 17 of the EEC Treaty.

a) A Preliminary Question: The Interpretation of Provisions Contained in Agreements Concluded with Third Countries in the Case-law of the Court of Justice

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 the implications of this question should not be under-estimated. 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, then the central issue will be whether the prohibition of the agreement also covers 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 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

22 However, this logic had not always been followed by the Court, which, in *Polydor*, see *infra*, did not examine the question of direct effect since it considered that the different interpretation given to the provision of the agreement with Portugal and the EEC Treaty rendered pronouncement unnecessary on the question.

23 An exception can be found in *BOURGOIS, J.H.J.*, ‘Effects of International Agreements …’, *op. cit.*, p. 1268.
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*\(^2\)\(^4\), although the Court had already given a ruling on the subject in *Bresciani*\(^2\)\(^5\).

In this case 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 Yaoundé 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, 14, 15 and 17 of the Treaty\(^2\)\(^6\). It was thus easy for the Court, which expressly referred to the wording of the provision\(^2\)\(^7\), to rule that the two notions had the same meaning.

In *Polydor*, 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.

\(^2\)\(^4\) Case 270/80 *Polydor*, op. cit.

\(^2\)\(^5\) 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, *EMI Records* v. *CBS Gramophon*, (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’s opinion where he points out that the same words in a different context must be interpreted differently.

\(^2\)\(^6\) ‘...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.

\(^2\)\(^7\) 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’. 
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 market. Therefore, the doctrine developed in the Community as regards copyrights is justified only within the Community 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 conclusion reached in Polydor has been confirmed by two subsequent judgements. 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 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 conclusion of the Court therefore is that, since Article 53.1 of the agreement fulfils 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 to Polydor was rendered in Kupferberg; here, as regards the analogy of Article 21(1) of the agreement with Article 95 of the EEC Treaty, 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

29 The reference to the harmonization of agricultural policies and freedom of movement of workers was criticized by Demaret 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. DEMARET, P., 'Le régime des échanges internes et externes de la Communauté à la lumière des notions d’union douanière et de zone de libre échanges', Du Droit international au Droit de l’intégration, Nomos, Baden-Baden, 1988, pp. 139-165.
31 It should moreover be noted that the wording of the two provisions is not identical.
given to Article 95 of the EEC Treaty could not be applied by analogy to Article 21 of the agreement 32.

The Court was again confronted with the question of interpretation of a provision of an external agreement in the Demirel 33 and Kziber 34 cases concerning, respectively, the Association agreement with Turkey and the Cooperation Agreement with Morocco. In Demirel the Court did not examine the question of the notion of free circulation of workers because it excluded the direct applicability of the relevant provision 35.

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 36, but in its ruling, in practice, it applied the same interpretation given in the framework of the free movement of workers in the Community 37.

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) 38. Could such a link justify an extensive

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32 The Court gives an interpretation of Article 21 and of the notion of like products contained in that provision. See para. 47.
33 Case 12-86, op. cit.
35 In this case, however, the Court was not confronted with a question of analogy between provisions contained in the agreement and in the Treaty. The Court would have, in that case, been required to pronounce on the parallelism between the notion of free circulation in Community law and in the agreement and in particular on the link established between free circulation of workers and the right of establishment for the spouse and children of the worker.
36 See Advocate General Van Gerven who discusses the question of interpretation at length arriving at a different solution.
37 See infra Part III, Chapter II, Social Cooperation.
38 See the preamble of the Yaoundé Convention where the Contracting Parties express their ‘desire to maintain the association’ and to ‘pursue their efforts together for
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 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 be 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. 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.

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 agreements whose aim is the 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 into 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 a pre-accession agreement.

The Court has examined the Association Agreement with Turkey in two cases. However, as seen above, Demirel does not raise issues on 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.

On the various stages of association see TWITCHETT, C.C. *Europe and Africa 'From Association to Partnership'* , Farnborough, Saxon House, 1978, pp. 147 ff.
questions of interpretation of trade provisions which are analogous to Treaty Articles, but concern 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.

Thus, 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. 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 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 concluded on the one hand, between the Community and its Member States and on the other hand, the States Parties of the Free Trade Association Agreement and Liechtenstein.

The agreement, which aims at establishing a 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, capital and of competition. The idea is that of applying 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 the EEC Treaty and through the creation of a particular jurisdictional system. Article 6 of the EEA Agreement as presented to the Court read as follows: ‘Without

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40 See observations of Advocate General Darmon in Sevinse, op. cit.
41 Compare with Article 44 of the Association Agreement with Greece.
42 Opinion 1/91, op. cit.
43 In the first version of the agreement a Court (EEA Court) and a Court of First Instance were established. The EEA Court was 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 have been competent not only for questions of EC law but also for cases arising in relation to the application of the EEC-EFTA agreement.
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 to conclude that the difference between the objectives of the two instruments prevents the homogeneous interpretation of the provisions 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 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, including the principle of direct effect and supremacy which are not compatible with the EEA Agreement. A second Opinion 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 provi-

44 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.

45 Opinion 1/92, op. cit..
sions 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)\textsuperscript{46}.

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 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 homogeneous 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\textsuperscript{47}.

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

\textsuperscript{46} 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 an EFTA Court (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).

\textsuperscript{47} It shall be noted that in Bresciani, Pabst, and Polydor, the comparison established between identical provisions contained in the Treaty and in the agreements, meant, if the identity of the meaning was acknowledged, that the interpretation of Community law would have provided a model for the interpretation of the agreement. This would not have modified in any way the relationships established among the Member States, since the ‘transposition’ of the interpretation given to the notions of community law would have taken place in one direction and the consequence would have been the widening of the scope of the agreement. On the contrary, in the case of the EEA Agreement, the mechanism of the analogy would take place in both directions, from the Community towards the legal system established by the agreement between the EEC and EFTA countries but, also, with consequences which cannot be accepted for the Community, from the agreement to Community law.
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 on Tariff and Trade (GATT)\(^48\), 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 allow it. The agreement, however, does not contain any express provision for the establishment of a free trade area\(^49\), not even as a long-term objective. Therefore, the provisions of the agreement should be interpreted as 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 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 those 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 provisions contained in the above cited Articles of the EEC Treaty cannot be transposed \textit{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.

\(^{49}\) Article 3 of the Cooperation Agreement refers to the 'strengthening of existing economic links on as broad a basis as possible \textit{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.
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.

b) 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 country imports. This prohibition extends to charges of equivalent effect 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 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.

50 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, or 13.12.1973, (1973), ECR, p. 1609. The Court has ruled on 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, p. 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.

It should be considered that the main purpose of having a common customs tariff is to seek to secure the uniformity of treatment at the external borders as regards goods imported from third countries. However, 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 a wide interpretation of the notion of charges of equivalent effect contained in the Cooperation Agreements with Maghreb countries. 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 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. In the case of charges levied for a service rendered to the importer or imposed as payment of sanitary or phytosanitary inspections, the fees levied should be allowed provided that they are proportionate to the service rendered.

One more complex question concerns the interpretation of Article 33 of the Cooperation Agreement with Morocco on fiscal discrimination.


53 Charges imposed for sanitary, veterinary and phytosanitary inspections, etc. could be considered as fees levied in consideration of a service rendered. As is well known in Community law the Court of Justice has adopted a very restrictive view on the issue stating that when such activities are services rendered for the general interest the corresponding fees fall under the prohibition of Article 12 of the EEC Treaty (see case 39/73, Rewe – Zentralfinanz v. Direktor 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), whereas they are permitted when the activities are services specifically rendered to the importer ('specific individualizable service actually rendered'). BARENTS, R., 'Charges of Equivalent Effect to Customs Duties', CML Rev, 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 this case, however, the charge must be proportionate to and not exceed the cost of the service rendered.

54 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.
This prohibits ‘any measures or practice of an internal fiscal nature establishing, whether directly or indirectly\(^5\), discrimination between the products of one Contracting Party and like products originating in the territory of the other Contracting party’\(^6\).

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 this 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 Provisions’ 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 to like domestic goods. If compared with Article 95 of the EEC Treaty\(^7\), it is clear that Article 33 has a more

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\(^5\) The distinction between direct and indirect taxation lies in relation to 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.

\(^6\) 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 State is remitted, that is the good is exported free of tax and the importing Member State will then apply the tax 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 a Member State was 10%, while the Moroccan tax was 7%.

\(^7\) Under Article 95.1 of the EEC Treaty Member States are allowed to impose internal taxes 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,
limited application. What is not clear is whether Article 33.1 corresponds to Article 95.1.

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’, ‘similar’ ...), but especially by the observation that such an interpretation would excessively limit the application of Article 33. 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’.

This case concerned the interpretation of Article 21 of the agreement with Portugal, which is identical to Article 33 of the 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 covers only products having a high value of cross elasticity. This economic concept indicates the variation of the demand of a product at the raising or lowering of the price of another good.

are in a competitive relationship with domestic goods. Based on the principle of non-discrimination on grounds of nationality, Article 95 performs three functions in the Community system: it prevents distortion of competition, it assures border tax adjustment, and it complements the prohibition contained in Articles 9-13. 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.

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59 It was the case of wines fortified with spirits and wines of natural fermentation. See case 104/81 *Kupferberg*, *op. cit.*, p. 3669.
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 rises, the demand for A increases). Similar goods therefore have a high cross elasticity, and hence even a marginal difference of prices between them would modify the choice of consumers\textsuperscript{60}.

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\textsuperscript{61}, 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\textsuperscript{62}. This is not always easy to ascertain. It could be argued that when only domestic products can qualify

\textsuperscript{60} Under Article 95 of the EEC Treaty, 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 that the case-law of the Court of Justice shows a ‘globalization’ of article 95. See EASSON, A., ‘Fiscal discrimination...’, \textit{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. This means that the distinction between ‘similar’ and ‘other products’ has lost part of its relevance. Globalization also implies that the different fiscal treatment required under paragraph 1 and paragraph 2 is not differentiated any longer. See DANIELE, L., ‘Il divieto di discriminazione fiscale nella giurisprudenza comunitaria’, \textit{Forolt.}, 1989, Part IV, pp. 201-223. According to the authors who submitted the theory of globalization of Article 95, the Court focuses in particular on the question of protectionism. 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.

\textsuperscript{61} See for Article 95 case 55/79 \textit{Commission v. Ireland} 27.02.1980, (1980), \textit{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.

\textsuperscript{62} In a case reproducing the facts of ‘regenerated oil’, case 21/79 \textit{Commission v. Italy}, \textit{op. cit.}, p. 1, where only domestic regenerated oil was granted a preferential fiscal treatment, whereas imported regenerated oil was taxed as fresh oil was clearly discriminatory on the basis of nationality.
for the preferential fiscal treatment, there is a presumption of discrimi-
nation\textsuperscript{63}.

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.

c) 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.

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
\textit{equivalent effect} are those rules which apply to imported goods and
whose effect is to reduce\textsuperscript{64} the quantity of products which would other-
wise be imported or which make the imports more onerous. Rules of this
type are those requiring that imported products satisfy specific require-
ments as regards composition, presentation or 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 infringe-
ment 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 specifica-
tions 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 pro-
duced goods, or if it requires domestic industries to use a percentage of

\textsuperscript{63} This would be the case of a situation like that examined in the \textit{Marsala} case, case 277/83 \textit{Commission v. Italy} 3.07.1985, (1985), \textit{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 \textit{Commission
v. Denmark} 1986 (1986), \textit{ECR}, p. 833, (Danish fruit wines) where the products
object of the higher tax were only imported goods.

\textsuperscript{64} A total ban is considered a quantitative restriction which is also prohibited under the
agreement.
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 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 965.

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? 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 effect66.

Let us, however, examine also the hypothesis of a broad interpretation of the notion of measures of equivalent effect extending the prohibition of Article 9 to measures which do not formally discriminate between two products (imported and domestic)67 but which in practice are applied only to imported goods, unless these measures are 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).

A possible justification of the application of this broad interpretation of measures of equivalent effect is that in the relationship between the Co-

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65 Since under the Cooperation Agreement, preferential treatment is granted only to products originating in Morocco, the requirement of a certificate of the origin for these goods is obviously legitimized. See *infra* on rules of origin.

66 It shall be remembered that in Community law, in the landmark decision in case 8/74 *Procureur du Roi v. Dassonville* 11.07.1974 (1974), *ECR*, p. 837 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 also made 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 case 120/78 *Rewe-Zentral AG v. Bundesmonopolverwaltung für Brennwein* 20.02.1979 *ECR*, (1979), p. 649, (*Cassis de Dijon*), concerning national legislation applicable to both domestic and imported goods, the Court confirmed that even equally applicable measures are covered by Article 30.

67 Conditions of use or marketing would be excluded.
munity 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 where every Member State is obliged, in its trade with another Member State, to eliminate measures which could restrict trade.

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 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 for the system of derogations, the Cooperation Agreement provides for the possibility of derogating from the prohibition of imposing quotas and measures of equivalent effect\(^68\), such a system 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

\(^68\) 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 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. In 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; in fact, the Court has admitted the legitimacy of restrictive measures in the case of environmental protection, protection of working conditions, and culture in general. See, respectively, case 302/86 Commission v. Denmark 20.09.1988 (1988), ECR, p. 4627, case 155/80 Oebel (night baking) 14.07.1981 (1981), ECR, p. 1993, case 95/84 Borello 10.07.1986 (1986), ECR, p. 2453. In Community law the theory whereby Article 36 and the rule of reason are separate exceptions seems more consistent with the Court case-law which had applied the rule of reason only to indistinctly applicable measures (See 113/80 Commission v. Ireland 17.06.1981 (1981), ECR, p. 1625) and had always affirmed that Article 36, being an exception to a fundamental Treaty rule, must be narrowly interpreted, see case 71/68 Commission v. Italy, op. cit., 229/83 Association des centres de distribution EL 'Au blé vert', 10.01.1985 (1985), p. 17.
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.

(i) 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. 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 trade. 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.

(ii) 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.

69 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.

70 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 to 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.
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. 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.

d) Maghreb Exports and the Single European Market

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.

It shall be remembered that Articles 31-35 set up a timetable for the progressive abolition of quotas.
In *Donckerwolke*, 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 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*. This case concerned a system of import licences 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. 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* principle) remains open. Another question is

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74 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, par. 26.
whether the prohibition of discriminatory taxation is also extended to goods in free circulation.

As for the first question, in the *EMI v. CBS* 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, 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 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.

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, provided that the product was marketed into 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. Could the finished product be exported to Italy even if the part of

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77 It should be noted that EMI owned Columbia in all the Community Member States.


79 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.
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 product 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 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’,\(^8\)\(^0\) 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 lowerst standard. The application of the *Cassis de Dijon* ruling to the free circulation of third country goods could lead to a ‘reverse discrimination’\(^8\)\(^1\) 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.

\(^8\)\(^0\) BOURGEOIS, ‘Panel 1992 ...’, *op. cit.* p. 549.

Therefore the importation into 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 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 a 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 was made in the so-called banana case. 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 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).

Let us consider now 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 country 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 country 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 question 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\textsuperscript{83} made reference to the exclusive Community competence in the field of commercial policy, to rule that Member States are not allowed to apply discriminatory taxation on products of third country origin but in free circulation in the Community\textsuperscript{84}.

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 the import of this good; it is then imported into another Member State which, on the contrary, applies 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 into 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

\textsuperscript{83} Co-Frutta op. cit., para. 28.
\textsuperscript{84} See DANIELE, L., ‘Il divieto di discriminazione...’, op. cit., p. 204.
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 significant 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 increased competitiveness. This takes place between, on the one hand, EEC Member States and, on the other, third countries exporting to the Community, including developing countries85.

The question of harmonization of standards and regulations for imports from third countries86 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 State. 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 countries87.

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


86 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’, Interrec., 1990, pp. 193-201.

87 See DAVENPORT, M.W.S. and STEVENS, C., op. cit.
in the EEC. For example, the possibility of marketing chocolate with a lower cocoa content could influence the demand of cocoa, which is a key export, from some ACP countries.

2) Trade in Agricultural Products

The central question of this chapter is the meaning of preferential treatment on agricultural trade 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 have been highly influenced by the common agricultural policy of the EEC which consists of a set of binding rules, instruments and mechanisms governing trade of agricultural products within

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89 The most important are common market organizations, 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. Common principles at the basis of all common market organizations are community preferences and unity of the market. 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. 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. Within each market organization several prices are 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 or norm price in some common market organizations - 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. The second important idea is that of the minimum price guaranteed. This is called intervention price in many market organizations and 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. 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. A minimum import price is also established. This is the term used for the calculation of import levies and will be discussed in relation to mechanisms applied at external borders.
the Community and of mechanisms applying at the Community's external borders mostly conceived as a way of stabilizing and supporting the internal market in agricultural produce and which has important repercussions in the world food market.

a) The Cooperation Agreements

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.

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

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90 As regards the political and economic reasons explaining the inclusion of agriculture in the Treaty see Spaak Report cited by FENNELL, 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 Conférence 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 organizations 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*, London, Penguin, 1988, p. 205, and HINE, R., *The Political Economy of European Trade* New York, Martin's Press, 1985, p. 101.

91 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.
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 Articles. 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 reductions of the duties 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\(^2\) to the Community and its exports are mainly concentrated in the first period of the year\(^3\). The reduction of the customs duties (50%) is granted in the period from the 1 January to the 15 April, when competition in the Community is lower.

This leads to a more general consideration concerning calendars. The limitation of tariff preferences during specific periods of the year can receive a different evaluation. On the one hand it can be considered that the agreement encourages harmonization of the production calendars in the Mediterranean area; on the other hand, the provisions examined could be interpreted as a way of ‘encouraging’ the producers of Maghreb countries

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92 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 customs duties. It is interesting to note that a proposal of the Commission for a common regime included the establishment of a reference price for new potatoes. HARRIS, S., SWINBANK, A., WILKINSON, G., The Food and Farm Policies of the European Community, Chichester, Wiley & Sons, 1983, p. 143.

to specialize in the production of first fruits and vegetables in order to protect the Community market in the other periods.  

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 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. 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.

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 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 (Article. 19).

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95 No quota is provided for Algeria, whilst for Tunisia the quota is fixed at 4300 tons.

96 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) O.J., L 169, 1977. For a more extensive discussion of voluntary restraint agreements see *infra* Part Four, Chapter on Safeguard Measures.
What is to be noted is that these countries are not exporters of tomato concentrates\(^97\), 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\(^98\), 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 litres, which are granted an exemption of duties within the quotas established in the agreements\(^99\). The tariff suspension is to be applied after the conclusion of an exchange of letters\(^100\) 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\(^101\). The reference price cannot be

\(^{97}\) 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 méditerranéens*, ... op. cit., p. 56.

\(^{98}\) *Ibidem.*

\(^{99}\) Morocco and Tunisia, 50 000 hectolitres, Algeria 50 000. 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 consumption in the mother country.

\(^{100}\) *O.J.*, L 65, 1977, Regulation 482/77.

\(^{101}\) A supplementary means of protection which is provided for in regulation 1035/72 creating a common market organization for fresh fruits and vegetables (see *O.J.*, L 118, 1972, p. 1). Such mechanism seems to confirm that customs 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 into account producer prices (the average producer price in each Member State), transport costs from production to consumer regions and production cost trends of the Community. For each product subject to a reference price, 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 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
organizations. First of all, import levies are established on imports without
distinction among exporting countries (see case 58/86 Coopération agricole
d'approvisionnement des avirons v. Receveur des douanes de St. Denis,
26.03.1987, (1987), ECR, p. 1525, paras. 5-10) 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 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 important to understand is that this calculation and the ensuing conse­
quences are also applied to preferential countries. To understand more clearly what
the preferential treatment consists in as regards products object of the reference-en­
try price regime it seems useful to depict the mechanism in a different way (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). If full customs duties applied by the Community for the product con­
cerned are added to the reference price, the result is a Community minimum whole­
sale price for each imported product.
The products exported to the Community by third countries (including those enjoy­
ing customs duties reductions) cannot go below this wholesale price. The advan­
tage of having to pay reduced customs duties does not mean therefore that prefer­
cential countries are more competitive (in terms of lower prices) on the Community
market in relation with other third country 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 country com­
petitors and thus they can obtain higher import earnings. In the case of a minimum
wholesale price of, let us say, 10, and a full rate of customs duties of 3, non-pref­
ferential 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 mini­
mum wholesale price and remaining competitive in relation with third countries
selling at 7. 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. The levying of
countervailing charges on products imported into the EEC at a price below the
reference has important consequences. 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 would trigger the application of countervailing
charges on subsequent exports. See HARRIS, S., SWINBANK, A.,
WILKINSON, G., op. cit., p. 159. 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.
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
undercut. Why then is expressly provided 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 announced by Morocco during the Cooperation Council of April 1989).

The obligation to respect the Community reference prices is provided for lemons and wine in bulk102. 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 prices that have to be observed by countries exporting to the EEC (otherwise countervailing duties are applied).

Import levies103 are applied to very few products covered by the Cooperation Agreement. These are olive oil, products deriving from their exports to the Community. 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.

Wine in bulk is also forced to respect certain requirements concerning containers (closing, labelling, capacity).

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 organizations. This means that import levies apply only to the extent that they are expressly provided for in common market organizations, 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 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 organizations 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. See VON CRAMON-TAUBADE, S., KÜHL, R., ‘Turning Point for European Agricultural Policy? The Agricultural Negotiations and the Uruguay Round’, Interec., 1990, pp. 280-288. The European Court of Justice, in one of its earlier judgements on
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\textsuperscript{104}.

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, within the limit of 10 units of account\textsuperscript{105} 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

common agricultural policy, defined import levies as ‘a charge regulating external trade connected with a common price policy’; see case 17-67 Neumann \textit{v. Hauptzollamt H.S.} 13.12.1967 (1967), \textit{ECR}, p. 441. 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 Community...’ See for instance, Regulation 2727/75 establishing a common market for cereals \textit{O.J.,} L 281, 1975 and Regulation 804/68 setting up a common market for dairy products \textit{O.J.,} L 148, 1968. 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 favourable purchasing opportunities on international trade 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 on the world market and in the Community do not correspond perfectly and world transactions are usually made in dollars – while the levy is calculated in ECU – coefficients are applied for the ‘transformation’ of qualities and prices into EEC values.

The second term of reference, the EEC price, is a minimum import price.\textsuperscript{104} See Regulation 2727/75 and in particular Article. 13 which has replaced regulation 120/67 cited in the agreement.

\textsuperscript{105} The ECU has replaced the unit of account since the 1 January 1981.
exports, a charge which shall be reflected in the import price. If this condition is not met no reduction is granted\textsuperscript{106}.

b) Additional Protocols\textsuperscript{107}

The entry of Spain and Portugal into the EEC had important consequences for the Mediterranean third countries\textsuperscript{108}: the self-sufficiency\textsuperscript{109} 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 losing the trade preferences they enjoyed over Spanish and Portuguese exports\textsuperscript{110}.

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\textsuperscript{111}.

\textsuperscript{106} See exchange of letters O.J., L 169, 1976.
\textsuperscript{108} See Commission des CEE, La Communauté européenne face au Bassin méditerranéen (Duchene, Bourrinet, Musto e Tizzano), Luxembourg, 1984.
\textsuperscript{110} 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 was excluded for budgetary reasons, the choice turned towards a policy of investment under the integrated Mediterranean programmes 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 depend 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 programmes. See TOVIAS, 'Les effets extérieurs…’, op. cit., pp. 62-63.
\textsuperscript{111} 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 the case of 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 Article 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\textsuperscript{112}.

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 country exports of agricultural produce to the Community which aimed at maintaining the traditional flow of trade with the Community\textsuperscript{113}. The Member States more exposed to the competition of non-member Mediterranean countries, such as Italy and Greece, were more favourable to finding a compensation in the form of a higher financial cooperation rather than granting new trade concessions\textsuperscript{114}. 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 maintainence of the existing one.


\textsuperscript{113} 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 calculation favours the countries with higher production and that in a certain sense ‘freeze’ the possibility of increasing exports at preferential treatment.

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 have been phased out enter the Community market free of customs 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 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 customs 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\textsuperscript{115}. In the case of orange juice, the sub-quota concerns 4,500 tons imported in packaging with a capacity not exceeding two litres. The tariff quotas which were applied in the agreement (for apricot pulp or fruit salads\textsuperscript{116}) continue to be applied to the phasing out.

Reference quantities are established for a second group of products. Reference quantities are not quotas\textsuperscript{117}, 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 cus-

\textsuperscript{115} This provision can be explained by the will of protecting the greenhouse production of Netherlands which is concentrated in this period. See ‘Les accords...’, op. cit., p. 38.

\textsuperscript{116} The tariff quota for fruit salad was to be agreed by exchange of letters.

\textsuperscript{117} 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 customs duties is automatic, whereas for tariff ceiling it is possible.
toms 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 into a tariff quota if the conditions set out for the 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 the Cooperation Agreement (for Moroccan products see Article. 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 customs duties is also extended to certain products which had not originally been included in the Cooperation Agreements, 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 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.

118 In a Joint Declaration annexed to the Cooperation 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’.
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.

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 flower 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 State does not use up the quantities drawn within 14 days it is obliged to return the unused portion to the Community.

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 Article 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


120 See Regulation 3552/88 O.J.,L 311, 1988 at p. 12, in particular Art. 1.3.
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 (Article. 32). The Commission decision could be repealed by the Council voting with 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 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 litres or less entitled to (i) a designation of origin and (ii) not entitled to a designation of origin c)wine produced in containers of more than two litres.

a - Imports of wine are subject to the phasing out of customs duties within the limit of a tariff quota¹²¹ 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 Article. 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 costs¹²². Wine may be granted the application of a special

¹²¹ 85 000 hl for Morocco, 200 000 for Algeria and 160 000 for Tunisia.
¹²² 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.
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.

The rules established for wine are especially designed to favour the exports of Maghreb bottled wines. It should be noted, and this is another example of the limit of the preferential treatment, that Maghreb countries export wine in bulk and that the advantage they may take from the preferential treatment granted is very limited.\textsuperscript{123}

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 46,000 tons and during the period between the entry into force of the Protocol and 31 December 1990, a special levy was 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 1 January 1991.

c) 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, 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 in 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 nego-

\textsuperscript{123} \textit{Les accords méditerranéens..., 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. \textit{Ibidem.}
tiable\textsuperscript{124} and that the instruments applied to imports coming from third countries are functional to the objectives set up in Article 39. It should be asked, however, if there is not a contradiction between these internal objectives 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 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\textsuperscript{125}. These are the application of quantitative restrictions which are admitted, under certain circumstances, for agricultural trade (Article XI.2) and the possibility of applying export subsidies to agriculture (Article 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.

\textsuperscript{124} 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, S., SWINBANK, A., WILKINSON, G., \textit{op. cit.}, p. 278. The character of not being negotiable is confirmed by the above-mentioned provision on CAP contained in the Cooperation Agreements with Maghreb countries (Art. 25 for Morocco).

\textsuperscript{125} See TANGERMANN, S., ‘Will Agriculture Always Remain a Problem in GATT?’, \textit{Interrec.}, 1987, pp. 163-167.
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.\textsuperscript{126}

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 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\textsuperscript{127} 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 taken place with Algeria, Morocco, Tunisia and Egypt) whereby the Community would have undertaken the obligation to 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 contribute to the security


of food supply for the Community's partners. The interest of this type of agreements went 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\textsuperscript{128}.

Trade preferences, however limited, cannot solve these specific problems of Maghreb and Mashrak countries which require the application of other instruments\textsuperscript{129}. 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 magnitude, comparable to those granted to Mediterranean countries. The preferential treatment concerns 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 products such as oranges or temperate-zone fruits and vegetables.

\textsuperscript{128} See COM(82) 73 Final, p. 15.

\textsuperscript{129} 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 \textit{New Directions in European Community Law}, Weidenfeld and Nicolson, London, 1990, pp. 146-176.
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. With few exceptions these countries export 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, the agreements 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 reduced or levy-free quotas.

It can be concluded that the Maghreb and Mashrak countries seem to enjoy a relatively preferential position even in relation with other third developing countries.

130 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’.
131 HARRIS, S., op. cit., p. 271.
Chapter II

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 provenance, which refers to the place from where the goods have been shipped to their final destination.

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 Tunisia1.

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 considered that the number of such products is limited, whereas it is often necessary to establish the origin of goods2 which are produced with parts and materials man-

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1 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 fewer problems of interpretation as compared with that applicable to industrial goods produced with imported materials.

2 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. A number of measures such as quotas, safeguard measures, anti-dumping duties exist which are implemented on the basis of origin. Statistical
ufactured 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 alleged origin – it will be more difficult for those countries to export goods at a preferential duty rate. On the contrary, if the rules of origin are loose more exports will be possible and, consequently, the highest export profit will be obtained.

On the other hand it should be considered that there exists a conflict of interests 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 analyses and statistical surveillance are made taking into account the origin of the products. 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, pp. 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. 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. Such a common definition was not even thought as desirable; see JACKSON, J.H., 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 harmonized 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. One should however mention the International Convention on the Simplification and Harmonization of Customs Procedures which contains two Annexes (D.1 and D.2) on rules of origin. O.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. The Community adopted the Convention in 1975, together with the Annex on customs warehouse O.J. L 100 21.04.1975. In 1977 it adopted Annexes on origin, making reservations for certain standards. The Annexes have been accepted in the Community by Council Decision 77/415 O.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.
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 components 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 in the end discourage investments by third country 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* the Court was requested to pronounce on the validity of a Commission regulation 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 sales under the contested regulation, applied to the system of generalized preferences, are stricter than those required for sales 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’. It seems that this 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.

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2) Rules of Origin Applied to Maghreb Country’s Exports to the Community

These are classified as ‘preferential’ rules of origin and are to be distinguished from ‘commercial’ rules of origin.

The latter are governed by regulation 802/68 which applies when required by the uniform application of the Common Customs Tariff, quantitative restrictions or any other measures concerning the import of goods by the Community or Member States (Article 1). 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 Article 115 EEC Treaty.

The former are those applied to the Lomé Convention, the Trade Agreements concluded with EFTA countries and the Cooperation Agreements with Mediterranean countries (Maghreb, Mashrak, Cyprus, Malta, Israel and Yugoslavia). Although in many respects 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). As mentioned above, the rules of origin applied to 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 are used, although they may differ according to the purposes of the application of the rules of origin.

6 *O.J. L 148, 1968.*
7 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.
8 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 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) 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.
Rules of Origins

a) Substantive Rules

For the definition of originating products Article 31 of the Cooperation Agreement with Morocco refers to a Protocol annexed to the Agreement.

The general notion of originating products is contained in Article 1 of the said Protocol. These are i) products ‘wholly obtained’ in Morocco and ii) products obtained in Morocco from the manufacture of third country 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 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.

Of course, not all the products which are completely obtainable in a single country are described, the ten-item list analysed 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.

These three methods can be used individually or cumulatively.

9 Protocol 2 concerning the definition of the concept ‘originating products’ and methods of administrative cooperation.

10 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 Lomé IV and Article 4 for Regulation 802/68.
The continental shelf of a coastal state is defined by Article 76 of the Convention of Montego Bay as the portion of seabed and subsoil extending beyond its territorial sea which constitutes the natural prolongation of the land.

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 (Article 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 (Article 77), whereas in the exclusive economic zone this right extends to living and non-living resources of superjacent waters (Article 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 of a coastal state.

Minerals extracted from the seabed are originating even if the plants and equipment used for extraction are not originating or are owned by a third country’s company or firm. In other words, since no specification is made, the ‘neutral elements’ rule 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

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11 Signed 10 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, Giuffrè, 1983. The text of the Convention is reproduced there. It should be recalled that the institution of the continental shelf was the specific object of one of the four Conventions on the law of the sea concluded in Geneva in 1958. See CONFORTI, B., Diritto Internazionale, Napoli, Ed. Scientifica, 1987, pp. 234-256.

12 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 Mediterranea Sea, Giuffrè, Milano, 1987.

13 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.
as far as Maghreb Agreements are concerned, but also in the case of the autonomous rules applied by the Community.\(^{14}\)

- ‘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)’

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’.\(^{15}\)

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 operations. 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.\(^{16}\)

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%\(^{17}\) by nationals of the Member States, Morocco, Algeria or Tunisia or by a company with its

\(^{14}\) See List C of the Protocol of origin annexed to Maghreb Cooperation Agreements and Regulation 802/68 statement of reasons para. 12, *op. cit.*.

\(^{15}\) The same applies, *mutatis mutandis*, to Algeria and Tunisia.

\(^{16}\) FORRESTER, I.S., ‘EC Customs Law ...’, *op. cit.*, p. 258.

\(^{17}\) 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 the Lomé IV Convention as regards fishing. The Community will consider as
head office in a Member State, Morocco, Algeria or Tunisia, of which the 
manager, managers, chairman of the board of directors or of the supervi-
sory 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 
phones or nationals of the Member States, Morocco, Algeria or Tunisia, 
– of which at least 50% of the crew, captain and officers included, are na-
tionals 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 simulta-
neously) deviates from the neutral elements general rule illustrated above 
and concerns only preferential trade18.

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 differentiation19. It should be considered how-
ever 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?

‘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, mas-
ters 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 observations of McQUEEN, M., ‘Lomé and 
the protective effect of Rules of Origin’, JQTL, 1982, pp. 119-132, op. cit., p. 130, 
arguing that the conditions laid down for fishing have, as a consequence to favour 
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.

18 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 regis-
tered in different countries (in the case, Polish and English).

19 This is the definition given in the explanatory notes of the Lomé 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.
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 in this sea is beyond 200 miles from the baseline of any coastal state.

Finally, the exclusive economic zone is to be proclaimed by 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 the used article could be utilized in any other way than recovery of materials and still be considered as originating: for instance a tyre of a (non-originating) wrecked car could only be melted down and not re-employed for its original use.20

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’.

- ‘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:

21 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’.
(i) distinct by-products or (ii) products requiring further processing to be utilized. According to Forrester 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. 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, for example, agricultural products 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 country goods are considered as originating if a ‘sufficient working or processing’ has taken place in Morocco, Algeria or Tunisia.

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 …’ (Article 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.

Paragraph 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 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

22 FORRESTER, I.S., ‘Customs Law …’ op. cit., p. 179.
23 Cumulation rules will be discussed infra.
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 (Article 3, para. 3 under (e))24.

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 to 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 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 contains the CCT heading corresponding to the products of column 2. Column 3 contains the description of the operations which do not confer origin, notwithstanding the change of tariff heading. Column 4 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 04.0325) 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 manu-

24 The formulation describing mixing operations has been modified in the case of Lomé since 1979. See comments in FORRESTER, I.S., 'Customs Law ...', op. cit., p. 186.

25 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.
facture 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 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, and so on). 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, which 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 4 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 3. 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 fulfilment 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 lists A and B. In these cases the percentage rule has to be co-ordinated. Article 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’ (Article 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 product26. This is not a marginal question since a 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 purposes27.

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

26 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 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.

27 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.
exceed 40% of the value 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 has acquired German origin. Thus, let us suppose that the value added test requires that the non-originating part must not exceed 40% of the final value of the product. If this is 100 and the value of the 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 (Article 1.4). Insufficient working or processing as listed in Article 3.3 (see above) is 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 is 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 use 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 fulfilment of the above-mentioned conditions is to be proved with appropriate documentation (Article 5.2).

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 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.
Rules of Origins

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 Article 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. The EUR.2 certificate is used for products of modest value shipped by post (Article 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 (Article 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 (Article 24) or when inquiries take place (Article 26). 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 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 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’ (Article 29).

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28 This is the certificate used with all other Mediterranean partners of the Community, with ACP countries and in the case of agreements with EFTA countries.
The annual examination of the Protocol is, however, the task of the Cooperation Council, which may make the ‘necessary changes’ (Article 28).

The imposition of penalties is provided for in case of fraud (Article 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.

3) 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 the above discussion.

If the stricter requirements that preferential products have to fulfil are explained by the will of the importing countries to limit 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 investments29 from industrial countries other than European, whose industries will take advantage of the cumulation rules even if the products they offer are less competitive than other third country products. 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 components from third countries were used instead.

As regards cumulation, the aim of this rule is to foster a degree of regional cooperation and the division of labour among the countries concerned and this should encourage the creation of a processing industry in the Maghreb. However, it should be taken into account that cooperation

between Maghreb countries is almost non-existent and a serious limit exists 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. Another significant limit are the strict rules established for certain textile products, which are the most important exports for Maghreb. Although the Protocols of the Maghreb agreements do not contain a general rule providing for the possibility of derogation from the origin rules derogations are possible.

As far as Morocco is concerned, for example, a derogation has been provided for by Regulation 528/79. 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 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, particularly, if one considers that the derogation was only temporary (the regulation applied from 1 July 1978 to 30 June 1980) and applied to a limited number of products (2,500 tons 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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31 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, O.J., L 80, 31.03.1979.
32 See Article 31 of the Protocol annexed to the Lomé IV Convention.
33 O.J., L 71, 22.03.1979.
PART III

Chapter I

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.

Financial cooperation is the transfer of capital through aid or loans.

Provisions regulating financial and technical cooperation are 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

1 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 O.J., L 270, 1978.

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.

As far as Maghreb countries are concerned, financial and technical cooperation was included in the agreements only in 1976.

The principles governing financial and technical cooperation are contained in Title I of the Cooperation 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, the beneficiaries of the financing and the priorities of cooperation.

Regulation 1762/92 lays down the rules for application and administration of the aid by the Community.

A) 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.

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3 Financial and technical cooperation was provided for, for the first time, in the Yaoundé Conventions and later in the Lomé Conventions. In this case, aid is financed through the European Development Fund made up by contributions from 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.

4 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 founds its legal basis on a Community Regulation, 442/81 O.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. 386-407.

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 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 that it is 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).

B) The Protocols Annexed to the Agreement:
   The Structure and Content

1) Duration, Amount of Aid and Allocation

While the Cooperation Agreements were concluded for an unlimited duration, the length of application of the Protocol is five years. 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

The first Protocol was due to expire in October 1981.
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 on 26 May 1988 and entered into force on 1 November 1988. Thus the actual period of application of the third Protocol was three 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 considerably reduced. This means, in other words, that the distribution of aid on a multiannual basis is of little application. This also implies that it is very difficult to evaluate the results of the cooperation in order to adjust the cooperation objectives and to adapt projects to the changing requirements of the recipient developing countries.

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.

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7 However, funds which have not been committed at the end of the implementation period can be used after the expiry of the Protocol, I. E. funds can in principle be spent during an indefinite period.


Each Protocol sets up the distribution of the commitment. The main distinc-
tion is between financial assistance from (i) the European Investment
Bank and (ii) 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, and 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 spe-
cific 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 \(^{10}\).

Grants are used to finance non-profit projects like technical assistance
(see Article 5.2 of the fourth Financial Protocol with Tunisia \(^{11}\)) or to fi-
nance 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 \(^{12}\) 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 adminis-
tered 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 con-
ditions 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 approaches to lending are different. The Bank acts as a credit
institutions, whilst the Community applies a development cooperation ap-
proach.

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 subor-
dinated to the fulfillment of the conditions laid down at the time of grant-

\(^{10}\) Only once for Morocco (industrial development office). See annual report BEI
1980, p. 63, see BOURIN, P., op. cit.

\(^{11}\) O.J., L 18, 1992.

\(^{12}\) For Morocco 11, for Algeria 4 and for Tunisia 6 million ecu. The fourth Protocol
provides for a substantial increase. In the case of Tunisia, the amount is 15 million
ecu.
ing 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, to financial institutions (Article 2).

Project 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 particularly 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. The role of the Community and other international institutions should be 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, and part of the grant could be used for interest rate payments 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.

Co-financing has been undertaken successfully in the ACP countries and has the advantage of harmonizing development aid at the international level, thus avoiding waste and overlap, and facilitating the financing of projects which requires large investments. In the Mediterranean, co-financing has taken place in conjunction with the World Bank, the Arab Funds and other bilateral aid institutions.


14 See on the contrary the more detailed rules contained in Lomé Conventions. Lomé III Article 200, Lomé IV Article 251.
2) 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 the main fields of cooperation economic infrastructure, technical cooperation complementary or preliminary to capital projects (like marketing, sales promotion, participation in fairs, exhibitions) and cooperation for training (such as the organization of seminars or granting of scholarships ...).

These priorities were modified by the third Protocol which states the objectives of financial cooperation in Article 3 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 to increase the complementarity of the different Mediterranean regions. As seen in Chapter 2 of Part II preferential treatment does not seem to be an adequate instrument to solve the serious problems of food deficiency faced by these countries. 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 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 fields 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 neighbouring 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, sup-
port small and medium-sized enterprises and finance actions preliminary to 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, and 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.15

The financing of projects with funds provided for in the 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

15 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-favoured nation clause by Morocco in the case of measures adopted for the economic integration of Maghreb, or in the case of measures benefiting 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., Perspectives d'intégration maghrébine et relations CEE-Maghreb', op. cit., 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 économiques de Tunis, Tunis. See also LECA, J., (ed.), Le Grand Maghreb, Economica, Paris, 1989.
Mediterranean countries focusing on intervention of regional interest and financing of projects concerning the environment\textsuperscript{16}.

In the fourth Protocols environmental protection has become one of the priority fields for projects to be financed. The term 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 31 October 1996\textsuperscript{17}) 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\textsuperscript{18}.

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 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.

\textsuperscript{17} The original proposal of the Commission was 600 million ecu.
\textsuperscript{18} Aid linked to structural adjustment was introduced in the fourth Lomé Convention. The Parliament expressed 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.
3) Beneficiaries of Financial and Technical Cooperation

The principal beneficiary is the Moroccan state and other potential beneficiaries which have some institutional links with Morocco. These include 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 the 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' as regards fiscal and customs arrangements applied to contracts awarded for the execution of projects or operations financed by the Community (Article 14).

4) Programming

One of the new features brought into being by the third Protocol was the introduction of the 'indicative programme'. 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. This list did not commit the parties.

20 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, J., Droit de la CEE, vol. 13, 1990, pp. 270-275.
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 priorities sectors of intervention and the action envisaged. Before drawing up such a programme, the parties examine the priority of development for 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 economic situation of Morocco or of its development objectives and priorities.

C) 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 (roads, 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).

22 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.

23 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.
1) The European Investment Bank\textsuperscript{24} and its Role in the Management of Financial Aid

Although the role of the Bank was originally limited by statute to interventions within the Community, the actions of the Bank were later 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\textsuperscript{25}.

The legal basis for this intervention was provided for by Article 18 of the Statute\textsuperscript{26} which 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\textsuperscript{27}.

Since the Bank is not a part of the above-mentioned Conventions and Agreements, it is the Community which assumes an obligation \textit{vis-à-vis} the ‘associated’ countries\textsuperscript{28}.

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


\textsuperscript{25} 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’, \textit{RMC}, 1965, p. 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.

\textsuperscript{26} The Statute, concluded by Member States, is an international agreement having the same rank as the EEC Treaty.

\textsuperscript{27} As has been observed, 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. MOSCONI, F., \textit{La banca...}, \textit{op. cit.} p. 278. It has therefore been submitted that the actions of the Bank in the Cooperation Agreements with the Mediterranean countries find their legal basis in the internal agreement concluded between the Member States which determines the financial means of the Bank in its interventions in the Association or Cooperation Agreements ratified by the Member States (Maghreb). See KÄSER, J., ‘The European Investment Bank: Its Role and Place within the Community System’, \textit{Yb. Eu. Law}, 1984, pp. 303-322, p. 310.

\textsuperscript{28} 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.
the object of a decision by the Board of Governors upon 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\(^ {29}\).

The commitment is authorized by the Board of Governors, acting unanimously on a proposal from the Board of Directors.

EIB intervention takes the form of loans made from its own resources\(^ {30}\). 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\(^ {31}\) (Article 6.1, third Protocol).

This means that the Bank acts as a financial institution 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\(^ {32}\).

Loans are not 'tied': this means that there is no 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,\(^ {33}\) but the rate depends on the cost of borrowing, although in

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\(^ {30}\) The sources of EIB funds are its own resources and what it borrows on the capital market. See Statute Articles 4 and 6 and Article 22. The capital of the Bank consists of the contributions of the Member States.


\(^ {33}\) Mashrak countries enjoy more favourable conditions as compared with Maghreb countries due to their lower level of development.
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 the promoters of the project.

When loans are granted to beneficiaries other than the associated States the Bank requires a guarantee from the State 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 mediumsized undertakings, first experienced within the Community when it was introduced in 1968. 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.

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 ordinary Bank activities.

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.

34 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, F., *La banca...,* op. cit., p. 37.


36 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 *Bet Information*, 1988, n°.57, p. 7.

37 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, C., *op. cit.*, p. 66.
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, thereby requiring 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 proposal to the Commission and to a special Committee, made up of representatives of Member States (Article 9, Committee38). The Committee issues 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 may the Bank 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 of aid for the second and third Protocols39.

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 an unfavourable opinion by the Committee and the Commission, the question was brought before the Council. Only when the Council confirmed the Committee opinion did the Bank have 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 agriculture40.

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).

38 It is interesting to note that in the proposal of the Commission the Article 9 Committee had disappeared.

39 In reality, Regulation 3973/86 was the correct legal basis only for the second Protocol (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.

In the energy sector loans have financed the expansion of electricity generating capacity. Loans from the third Protocol have been used to improve the sewage 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 Économique de Tunisie and the Banque Nationale de Développement Agricole (44 and 50m ecu 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 million ecu financed global loans41.

2) The Community Budget

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 budget42 means that the Community has the exclusive competence to conclude the Protocols and that it is the sole party responsible for the administration of funds43.

42 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
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 multiannual activities, are distinguished in commitment and payment appropriations. 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 the credits which allow the obligations undertaken in that financial year or in previous financial years to be met. 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 financing proposals of the 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 no 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.

43 '... 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 holds 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 contains 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, O.J., C 277, 1977, p. 7.


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, while the appropriations in the budget corresponding to the financial Protocols laying down the specific financial commitments of the Community towards its Mediterranean partners are compulsory expenditures. 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 aid, but this does not mean that just any projects could be financed.

3) 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 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

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46 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 (O.J. C 194, 1982) 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’. 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 (third countries, individuals, corporations or Member States). 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-; DANKAERT, P., ‘The Joint Declaration by the Community Institutions of 30 June 1982 on the Community Budget Procedure’, CMLRev, 1983, pp. 701-712. 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.

47 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, O.J., L 370, 1986. The Legal basis is 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.
Mashrak countries although it was also applied to third Protocols. A new Regulation for the application of the Protocols was adopted, 29 June 1992\textsuperscript{48}.

The task of the Commission, which is the competent institution for the administration of aid\textsuperscript{49}, 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 rights.

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\textsuperscript{50}. More generally, these organs can be compared to the so-called ‘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.

\textsuperscript{48} Regulation 1762/92, see \textit{O.J.}, L 181, 1992.

\textsuperscript{49} 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.

\textsuperscript{50} Regulation 442/81 \textit{O.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’, in MEGRET, J., \textit{Le droit de la CEE}, vol. XIV, \textit{op. cit.}, pp. 128-178, spec. 149 ff; and ‘L'aide financière et technique aux pays en voie de développement non associés’, \textit{Ibidem}, pp. 114-127, spec. p. 120 ff.
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.

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 budget. If Regulation 1762/92 is compared 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. 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 unfavourable 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

51 See O.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 (variant 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.

52 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 (Articles 6 and 9). In its proposal for Regulation 3973/86, the Commission indicated as the only legal basis Article 209. See O.J., C 99, 1977. In the case of the new regulation, the Commission as well indicated Article 235 alone.
negative opinion of the Committee and/or the Council) could furthermore be used as an instrument of pressure in the case of existing dispute between one Member State and a recipient country53.

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 Commission54, 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 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 unfavourable 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 decisions55.

One should ask what kind of power the Commission is exerting under Regulation 1762/92. The approval of individual financing of 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 30/8856 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 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

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53 See European Parliament A3-0016/92, p. 22.
55 BRODIN, J., op. cit., pp. 268-270
projects, the Council, which exerts control through the Article 6 Committee, has the final say on the projects. 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 aid 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. 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 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.

57 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’ (para. 22).

Both the Bank and the Commission proceed 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 forward by the Court of Auditors in its Special Report n° 3/91 concerning the necessity of continuous evaluation (during and after the implementation of projects) to assess the effectiveness of the Community aid\(^{59}\)(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\(^{60}\).

Regulation 1762/92 takes into account the structural adjustment programmes 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 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, to finance measures to offset the detrimental consequences which can derive from the structural adjustment programmes.

D) Other Operations of Financial Cooperation Outside the Protocols

1) '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\(^{61}\).

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 the environment.

\(^{59}\) Special Report, p. 17.

\(^{60}\) Ibidem.

The financing programme is multiannual (five years). The amount committed is 230 million ECU, which is 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.

Measures of regional interests which can be financed are technical cooperation, in the form 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, pilot and demonstration projects, for instance, 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 this aid 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.

2) 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 the Mediterranean. The idea 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 of promotion of investment and regional cooperation are non-compulsory expenditures.

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62 See COM (86) 603 final.
63 According to STRASSER, D., 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.
### Table 1

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<th>Country</th>
<th>Eib Loans</th>
<th>Budget Resources</th>
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<td></td>
<td>Amount</td>
<td>Growth %</td>
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<tr>
<td></td>
<td>Amount</td>
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The financing programme is implemented over five years. The amount committed is 730 million ECU, which is qualified under compulsory expenditure.

The programme is divided into three main parts:

1. Financing of investment projects in the category of the budgetary non-compulsory expenditure.

2. Financing of management costs of the national and supranational management bodies.

3. Financing of regional investment projects that can be financed under the 'Euro-Mediterranean' objective.

These operations should lead to the Mediterraneanising of European development projects.

The funds approved in the budget under the objective of financing these projects, for instance, can be used for:

- Financing of investment projects in the Mediterranean region.
- Financing of management costs of the national and supranational management bodies.
- Financing of regional investment projects that can be financed under the 'Euro-Mediterranean' objective.

This instrument, which is not provided for in the Regulations on the budget of the European Union, is aimed at stimulating the economic and social development of the Mediterranean region, particularly in the South and the Mediterranean countries, and promoting the establishment of closer links between the European Community and its Mediterranean neighbours.

The funds approved in the budget under the objective of financing these projects, for instance, can be used for:

- Financing of investment projects in the Mediterranean region.
- Financing of management costs of the national and supranational management bodies.
- Financing of regional investment projects that can be financed under the 'Euro-Mediterranean' objective.

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- Financing of management costs of the national and supranational management bodies.
- Financing of regional investment projects that can be financed under the 'Euro-Mediterranean' objective.
Chapter II

Social Cooperation

Among all the agreements concluded by the Community in the Mediterranean area\(^1\), only the Cooperation Agreement with Maghreb countries, the Cooperation Agreement with Yugoslavia and the Association Agreement with Turkey\(^2\) contain rules applicable to migrant workers who are nationals of these countries and employed in one EEC Member State\(^3\).

At first sight it may seem contradictory to the global policy that the 'volet' on social cooperation was not included in the other Cooperation Agreements concluded with Mashrak\(^4\) countries, Malta, Cyprus or Israel.

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. 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 European Agreements, for instance, establish that the spouse and children of legally employed workers have access to the labour 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 labour market only if already legally resident in the Community.

However, the Association Agreement with Turkey can be considered as a special case because it establishes Turkish membership of the Community 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.


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 re-
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 Morocco5, 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 Agreements6. Moreover, workers' salaries have represented an important item in the Maghreb external balance (for Morocco, 22% in 1987)7 and migration is a way of easing a high level of unemployment, also due to strong demographic pressure. It is not surprising, therefore, that Maghreb countries urged8 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 excluded9 from the agreements.


7 See SEC(89) 1958 10.11.1989 Bilan de la politique méditerranéenne de la CEE.


9 DUPOUY, A., ‘Le statut juridique de la coopération entre l’Algérie et la CEE’, *Revue algérienne des Sciences juridiques, économiques 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
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\(^{10}\), as noted above, contains provisions identical to those of the Cooperation Agreements with Maghreb countries. It has been submitted\(^{11}\) that, as regards social cooperation, Yugoslavia has benefited from 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 seems 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’\(^{12}\). 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 members 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 favourable.

Some doubts may arise as to whether the Joint Declaration is legally binding or has only a programmatic character. The second solution seems more accurate when one considers that the 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

\(^{10}\) O.J., L 41, 1983, Articles 43-47.


\(^{12}\) The text of the Convention is reported in *The Courier*, n°120, March-April 1990.
Parties, declaring in the Final Act\textsuperscript{13} their intention to conclude the Convention, the 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\textsuperscript{14}. In paragraph 4 of the Declaration ‘The Parties agree that the matters referred to in the declaration shall be resolved satisfactorily, and, \textit{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 ...)\textsuperscript{15}.

However, the content of the Joint Declaration is more limited than the chapter on social cooperation of the Cooperation Agreements with Maghreb countries \textit{(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\textsuperscript{16}.

\textsuperscript{13} 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 finals contiennent des engagements conventionnels des 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’, \textit{AFDI}, 1974, pp. 129-154, p. 131 and 132.


\textsuperscript{15} 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.

\textsuperscript{16} It is clear that an evaluation of the content of the social cooperation provisions depends on the terms of comparison applied. Member States legislation, 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 advanced. 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 favourable 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, 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. On the contrary these provisions of the Cooperation Agreements 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. 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. See the 1974 Commission's programme of action for migrant workers and their families., O.J., C 13, 1974, p. 1. 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, the only third country migrant workers granted, at least in theory, some of these rights. The question which remains open is their effective application. See also the 1985 new programme (Guidelines for a Community policy on migration) adopted by the Commission (EC Bull. Supp. 9/85). 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.

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
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 con­
ditions, remuneration, social security and education.  

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 con­
trol on immigration policy.

Article 40 establishes the principle of non-discrimination based on na­
tionality between Moroccan workers and the nationals of the Member
State where they are employed as regards working conditions and remu­
neration.

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 labour force could be an important element in the development of these countries. 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. 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.

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.

It has already been noted that in the 1970 Protocol concluded with Turkey non-discrimination was to be applied as regards other Member States’ migrant work­
ers. The reference to Member State nationals in the Maghreb Cooperation
Agreements seems to reflect the desire to apply a higher standard.

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 es­
tablished 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 estab-
These provisions do not establish one relationship between the 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 in the Member State where he/she has found a job.

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 step forward, in comparison with bilateral agreements.

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 does have the right to receive these family allowances.

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 States'.

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21 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.


23 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.
Some questions of interpretation of Article 41 have recently been the object of a decision 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 Belgian national labour 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.

1) 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 that of Regulation 1408/71 which explicitly refers to unemployment benefits. In other terms, the notion of social security shall be read in 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 on unemployment benefits cannot be interpreted, in the absence of a clearly expressed intention of the

24 Case 18/90, Bahia Kziber, op. cit.
25 The consolidated version of this Regulation is reported in O.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...’.
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 seems 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) 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 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 and then confirmed in Deak, 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

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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 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. 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 himself, Therefore the decision of the Court would imply a regime for third country nationals which is more advanced than that 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 raised 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.

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28 See above, *Polydor*, *op. cit.* paras. 14-15; *Bresciani, op. cit.*., para. 25 and discussion in Part II, Chapter I.
The notion of family could be limited to the spouse and minor children, but could also be enlarged to include relatives in the ascending lines of the worker or spouse.

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 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 dependent, and dependent 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 dependent 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 Regulation seeks to achieve: guaranteeing the freedom of movement for Community workers.

In Regulation 1408/71, 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.

29 '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, T., '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.

30 See ILO recommendation 151 which refers to spouse, children and ascendants.


32 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 ...'

The provisions of Articles 40 and 41 also apply to Community workers employed in Morocco. 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, this provision requires that Morocco shall not discriminate among nationals of Member States. He affirms that ‘Il appartient ... aux Etats Maghrébins de prendre les mesures propres à assurer le traitement le plus favorable accordé jusqu’ici aux nationaux d’un État 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 favoured 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 members 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 man-

34 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.

agement 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 though a proposal for a Council Cooperation decision was submitted by the Commission in 1980. This proposal concerned the application of the social security regimes to Moroccan workers employed in the Community and to their families. Morocco considered the project insufficient as compared with the more favourable 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 découlant des conventions bilaterales’.

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 favourable 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 favourable 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 (a maximum of four) of Algerian workers established in France, even if the children reside in Algeria.

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 of 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

37 See BRODIN, J., ‘La politique d'approche…’, op. cit., p. 271.
38 See SEC(89), 1958, op. cit.
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\(^{40}\). Social and cultural questions are very general terms which may indicate matters such as vocational training, education, housing\(^{41}\). So far, however, this declaration has not been followed by any concrete initiatives.

\(^{40}\) As remarked by DUPOUY, A., 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'.

\(^{41}\) See the opinion given by the Commission of Social Affairs of the European Parliament on 24 September 1976 on the Cooperation Agreements concluded with Maghreb countries, cited by DUPOUY, A., op. cit., p. 28, and the Declaration of Algeria annexed to the Cooperation Agreement as regards the interpretation of the term 'social and cultural matters'.
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 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’1) without recurring to revision or amendments of the agreement2. It emerges from this definition that the two types of clause differ with respect to the reasons justifying the

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2 The problem of adaptation of international agreements to changing circumstances has been discussed by WEILER, J.H.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 one of the mechanisms of flexibility provided for in the agreement.
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 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, favour 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. 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 measures which 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 treaties. They are contained, for instance, in GATT, in the EEC Treaty, and in most agreements concluded by the Community with third countries in the field of trade.


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 restrictions (both in quantity or value) to safeguard the balance of payments; 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 JACKSON, J.H., *World Trade ...*, op. cit., pp. 81-99.

It is to be noted 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
1) Derogation Clauses

a) The ‘Common Agricultural Policy’ Clause
(Article 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 opens the possibility of a permanent modification of
the agreement. In substance, the clause permits amendment of the agree­
ment 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 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

in Article 226 is, however, no longer applicable, since the provision only applied
during the transitional period. According to Pescatore, safeguard clauses are an el­
ement 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 by PESCATORE, P. in L’Union douanière
256. On the utility and necessity of having a general safeguard clause after the ex­
piry of the transitional period see OPPERMANN, M.T. ‘La légitimité et l’oppor­
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 jus­
tifies the adoption of protective measures against third countries’ products which
are in free circulation within the Community due to differences between the com­
mercial 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.

6 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
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, aubergines 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.

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 favoured nation clause (Article 27.1). The Cooperation Agreements in Article 27 paragraphs 2 and 3 provide for the possibility 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 provision does not require a specific comment since the derogation from the most favoured nation clause is provided for in Article XXIV of GATT7.

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 takes 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 favoured 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 countries8.

7 The derogation provided for in this Article is justified by 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 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, J.H, ‘World trade’, op. cit., p. 603.

8 See for comparison the Association Agreement concluded with Morocco in 1969, Article 4.3, where it was specified that the establishment of customs unions or free
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 Moroccan 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 Morocco⁹.

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 favour 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 agreement⁰, 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’s 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 Article 28, consultations shall be held within the Cooperation Council if requested by the other Contracting Party. This possibility is provided for only by Article 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 and information exchanged to make the application of the measures less onerous for the other contracting party.

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⁹ 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.

⁰ 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.
c) ‘Non-economic’ and Security Derogating Clauses

Article 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’.

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 into instruments of protectionism. Therefore Article 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 an exchange of letters annexed to the agreement.

The principle of non-discrimination is further specified in the agreement in Article 54 which prohibits any discrimination by Morocco between Member States, their nationals, companies or firms and by the Community between Moroccan nationals, companies or firms.

According to Morocco, Articles 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 are applied in such a way as to ensure compliance with Article 51.111 of the Agreement’. In its declaration, the Community affirms the expectation of 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 Israel12 (a discrimination justified on the ground that

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11 ‘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’.

12 The boycott was also applied to firms whose managers were Jewish or even in cases where the David star was applied on the packing as reported by RUZIE, D., ‘Le principe de non-discrimination dans les accords de coopération conclus entre
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 that 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 in Article 54 on the general prohibition of discrimination.

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 but be negative when one considers that the Community clearly expresses its disagreement on the interpretation given to Articles 35 and 54 by Maghreb countries.

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 requires 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

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13 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 way to express consent over the content of the declaration. See in this sense, RUZIE, D., ‘Le principe de non-discrimination ...’, op. cit., p. 232.
equilibrium between the advantages obtained by the agreement and the obligation deriving from it.

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\textsuperscript{14} 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 the domestic economy is one of the conditions 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 anti-dumping policy is indistinguishable, as far as its effects are concerned, from those deriving from the application of safeguard measures\textsuperscript{15}.

Dumping and subsidies are not prohibited \textit{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\textsuperscript{16}.

\textsuperscript{14}See JACKSON, J.H., \textit{Legal problems ...}, \textit{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’, \textit{JWTL}, 1989, pp. 73-91, p. 80.


\textsuperscript{16}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
The safeguard clauses (for simplification, this term will include anti-dumping and anti-subsidies measures) of the Cooperation Agreement with Morocco are contained in Articles. 36-38(39).

For each Cooperation Agreement concluded with Maghreb countries the Community has enacted a regulation\textsuperscript{17} laying down rules for the implementation of safeguard clauses (including anti-dumping and anti-subsidies clauses and measures that can be taken under Article 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 Article 38 which concern the phase of consultation (before and after the adoption of the measures) within the Cooperation Council.

a) Anti-dumping and Subsidies Measures

The first indent of Article 36 provides 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 Article VI of the General Agreement on Tariffs and Trade’\textsuperscript{18}.

The agreement mentioned in Article 36 is the GATT anti-dumping code\textsuperscript{19} 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 Article 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 no distinction between the rules applied by the Community against exports from Morocco, Algeria or Tunisia to the Community and those applied against dumping or subsidies from other ex-


\textsuperscript{17} Regulation 1662/77 for Morocco, Regulation 1663/77 for Algeria and Regulation 1664/77 for Tunisia. All are published in O.J., L 186, 266.07.1977, pp. 9-15. For further comments see infra.

\textsuperscript{18} 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., \textit{Legal Problems} ..., \textit{op. cit.}, p. 664.

\textsuperscript{19} The first code was adopted in 1967, replaced by a new version in 1979.
porting 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 to its Maghreb partners or whether it is linked 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, the Community is legitimate in applying 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.

b) Safeguard Measures

i) Regional and sectorial disturbances: Article 37

The circumstances allowing the adoption of safeguard measures provided for in Article 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 Article 37 justifying the application of safeguard measures are very general and liable to be the object of different interpreta-

20 At present regulation 2423/88 O.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 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 the 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.

21 See NORALL, C., Ibidem. In the Uruguay Round negotiations, complaints had been advanced by some countries like Japan or newly 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.
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The same applies to the measures that can be adopted. In the 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 adoption of the safeguard measures and the type of measures that can be adopted is explained by the impossibility of foreseeing all the situations 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 suitable 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 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 sensitive 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 and/or 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 distur-
bances due both to the application of the agreement and/or to causes inde-
pendent from it.  

As a second element of specification provided for in Article 37, one
should mention the case of serious disturbances in a sector of the economy
or in the economic situation of a region.

Both these notions are left undetermined. The term sector of the econ-
omy may indicate a branch of the 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 in-
stance, still in agriculture, the production of citrus fruits.

For the application of these criteria to safeguard measures applied in
1977 by the Community within the framework of the Cooperation
Agreements with Morocco and Tunisia, it could be observed that the safe-
guard measures (import authorization within certain quota limits) were
justified by the ‘market disruption’ and by ‘substantial injury to Com-
munity producers’ due to the increase of imports of specific textile
products such as woven fabrics of cotton, men's and women's trousers, jer-
seys, men's suits, and dresses and skirts. The increase of imports were par-
ticularly 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.

22 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 re-
quired 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.

23 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 économique européenne dans ses relations avec les Etats tiers,

24 Regulation 1860/77, 10.08.1977, O.J., L 207, 13.08.1977, p. 30, applied until
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It can be submitted that both the terms 'region' and 'sector' mean that the economic deterioration should be determined and specific enough so that a safeguard measure could be effective. It would 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 safeguard measures in general, it should apply in particular in the case of Cooperation Agreements 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. 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 (Articles 15.3.a. and 16.2.).


For the application of safeguard measures limited to one Member State see Regulation 1087/84 18.04.1984 for quartz clocks imported in France, O.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 Imbroglio, VÖLKER, E.L.M., Protectionism and the European Community, Kluwer, Deventer, 1987, pp. 159-183, p. 168. One should note that according to
As 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).

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 of commercial policy, 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, the application of a ‘safeguard clause of a transitional nature’, 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 the Tezi case, however, the Court of Justice has admitted recourse to Article 115 for the application of national sub-quotas provided for in a Community regime for the application of the MFA on the basis of the lack of uniformity of the regime established by the Community. Article 37 of the Cooperation Agreement with Morocco the assessment of disturbances is made on a regional or sectoral basis.

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.

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).

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 O.J., L 238, 21.08.1987. This decision applies to imports in a Member State of third countries’ products which are not the object of a common regime.

This expression is used by TIMMERMANS, C.W.A., ‘Community Commercial Policy on Textile …’, op. cit., p. 170.

Case 59/84, op. cit., p. 64.

The Multi Fiber Agreement. Global ceilings 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 restrictions 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 agreements to this purpose.

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 TIM-
The case discussed in Tezi is different from that of safeguard measures, but both MFA national sub-quotas and safeguard measures: a) are established by the Community, b) maintain a regime of disparity among the Member States and c) may be undermined by the application of the principle of 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.

The application of Article 115 in these cases, if admitted, is to be criticized, in particular in the perspective of 1992 because it would maintain national differences and delay the establishment of a common commercial policy.

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 measures.
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 require 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 at Community level would have the same effect as regional ones with the advantage of avoiding recourse to Article 115. It should, however, also be considered that safeguard measures adopted by a Member States 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 (for example, a quota on textiles 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 flows of trade) could result in an increase of the competition on the Community market.

ii) Balance of payments (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 balance of payments.

It should be observed that the adoption of safeguard measures provided for in Article 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 made without making reference to the Treaty rules adopted in the field of the balance of payments.

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 payments (an objective set up in Article 104). Such an equilibrium is a requisite for the correct function-

38 TIMMERMANS, C.W.A., speaks in this context of 'relevant market', admitting in this particular case that regional protection would be more suitable and easier to administer, p. 168.

39 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 mone-
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...ing 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 are no longer under the control of the Member States). 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 payments of a Member State. Under Article 108, the 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 is 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). 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 such as that described in Article 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 payments is invoked, Member States can adopt restrictive measures against third countries without requiring the prior 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 maintains or reintroduces quantitative restric-

42 These may be revoked or modified by the Council acting by a qualified majority (Article 108.3).
tions against third countries'. This seems to confirm that the measures taken against third countries fall outside the application of Article 108.

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.

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 paragraph 1 lays 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. 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 for 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 on 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 with all relevant information.

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43 See for example Article 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 Article 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 added).
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Council\(^44\), of the question. The information that it has provided to the Cooperation Council obviously concerns the abnormal situation which it denounced and which, in its opinion, justifies 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 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, disagrees (over the examination of the situation, 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\(^45\). 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 payments (Article 39) where prior consultation is not required.

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

\(^44\) It is the common institution created by the agreement; see Articles 44-46 of the Cooperation Agreement.

\(^45\) TALGORN, C., Les mesures..., op. cit.
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, and the conformity of the measures adopted with the criteria established in the agreement.

ii) Rules of procedure within the EEC

The question that 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 ...’46. 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 refer to the regulations on common rules for imports and on anti-dumping that were then in force47. 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

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46 See on the contrary Article 177 of the Lomé IV Convention which establishes that ‘the Community can take or authorize the Member State concerned to take safeguard measures ...’

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.

3) Safeguard Clauses and Agricultural Products

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 provide for specific mechanisms which are applied to agricultural trade aiming at the protection of the EEC market. Within the framework of trade relations with Morocco, the conditions of application established in Article 38 apply. It should be noted 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.


49 Safeguard clauses are general provisions applying to all market organizations. 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
submitted 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 common market organization 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 common market organization 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 common market organization regulations; see article 18 of the regulations establishing a common market organization 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 is due to the very general aims listed in Article 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, also because the application of the safeguard measure consists of a suspension of the agreement. A consultation procedure, taking place within the Cooperation Council, is 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 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’.

adoption of the safeguard measures, may amend or repeal them. 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 licences, 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.
4) Safeguard Measures and Voluntary Restraint Agreement (VRA)

Since 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 textiles, the Community concluded voluntary restraint agreements with several of its Mediterranean partners, among which Morocco and Tunisia.

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, whose use has increasingly expanded in sensitive sectors such as textiles and steel.

Voluntary restraint agreements consist in a formal undertaking between 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 includes voluntary restraint agreements in the number of the so-called grey-area measures that are ‘beyond the reach’ of GATT obligations. They seem 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 of voluntary restraint agreements is that of protecting the importing country industry against competitive products of third country origin.

The reason for their development is strictly related to this observation. They provide importing countries with a new instrument of protection which allows circumvention of GATT rules and in particular avoids recourse to safeguard measures.

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50 Egypt, Malta, Cyprus, Yugoslavia, and before accession Spain and Portugal. See Les accords méditerranéens en 1989, pp. 175-184. The Turkish government refused to conclude a restraint export agreement, safeguard measures were applied in 1982.


53 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 tend to replace the ap-
The application of Article XIX of GATT requires a number of criteria to be respected, including advanced notification, compensation and prerequisites like serious injury to the domestic industry caused by the increased imports. Moreover, safeguard measures should have temporary application. Further object of discussion is the possibility of applying selective safeguard measures; that is if the restrictions can target only one exporting country or if this selectivity, which is not expressly prohibited by Article XIX, is inconsistent with the GATT system and with the non-discrimination principle.

Voluntary export agreements have the advantage of not appearing like restrictions imposed by the importing country. They are often negotiated between the relevant industries without the formal involvement of governments, allow selectivity and can be applied with indefinite duration. Exporting countries agree 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. 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).

Their specific features seemed to render safeguard measures unfit to offset a chronic situation of economic difficulties for the textile sector due in particular to the growing exports in the Community of textile products from developing countries. As for the specific features of the voluntary ex-


55 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’, *Interec.*, 1990, pp. 18-24, p. 21 ff.
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Port 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 textiles 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 memoranda and have not been published in the EEC Official Journal. As regards the content of these agreements, 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). It should be noted that a comparison between the voluntary export restraint agreements concluded with Morocco and Tunisia provide for a much higher growth rate of quotas 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 of its policy on imports of textile products.

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 during 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 agreements in the field of textiles concluded with Morocco and Tunisia as well as with Egypt can be questioned. As seen above, exports of industrial products from Maghreb to the Community are free from quotas, customs duties and measures having equivalent effect (see Article 9 of the Morocco Cooperation Agreement), whilst trade restrictions are allowed only through the application of the

56 Notice is given in the Annual General Report of the Commission and in the EC Bulletin.
59 *Ibidem*, p. 22.
safeguard clauses discussed above, therefore these voluntary restraint agreements seem to conflict with the Cooperation Agreements.

It is however difficult, as 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, while formally respecting the preferential treatment accorded to Morocco and Tunisia.

The granting of some advantages as regards competitive exporters if the impact of the agreement on textile exports can be diluted, does not modify the fact that these agreements are contrary to the spirit and the scope of the Cooperation Agreement as examined in the Part I 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.

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 mutandis, to the Mediterranean textile policy.

5) Infringement of Cooperation Agreement Provisions: Article 51

A final case to be discussed concerns the hypothesis of the consequences deriving from the infringement of provisions of the Cooperation Agreement.

As mentioned above, derogating and safeguard clauses allow the temporary deviation from the regime established in the agreement. What happens when one Contracting Party considers that the other party has infringed the provisions contained in the agreement? This hypothesis is considered in Article 51. More precisely, after having established in the first paragraph that 'The Contracting Parties shall take any general or specific measures

60 The textile policy towards Mediterranean countries is part of the global policy on textile imports aiming at restricting/controling 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 Multi Fiber Agreement.


63 If export self restraints are agreed on an industry-to-industry basis, recourse to Article 115 is not possible. This provision applies when the self restraint agreement is negotiated between governments and provided that the Commission approves them. See O'CLEIREACAIN, S., 'Europe 1992 and Gaps ...', op. cit., p. 211.
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required to fulfil their obligations under the Agreement" paragraph 2 pro-
vides for the possibility open to either Contracting Party to take ‘appropri-
ate measures’ when it considers that the other Party ‘has failed to fulfil an
obligation under the Agreement’.

Article 51 does not qualify the type of infringement. As seen above a
certain level of gravity was required for the application of safeguard mea-
sures, 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 rea-
son to invoke safeguard measures, but that in the application of these mea-
sures the principle of proportionality between the violation and the mea-
sures 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 re-
spect concerns the possibility of suspending the agreement. In other terms,
it could be questioned as to whether it is possible to consider this provision
as the codification in this agreement of the rule of general international law
providing for the right of a Contracting Party to suspend or terminate, to-
tally or in part, a treaty in the case of its breach by another Contracting
Party (‘inadimpleti non est adimplendum’)

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 2 of Article 51
establishes that ‘In the selection of measures, priority must be given to
those which least 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 agree-
ment; 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 not mean that the suspension or the termination of the agree-
ment is excluded; the principle of *non adimpleti* being a rule of customary
law, may be invoked if the circumstances so required, even if it is not ex-
pressly provided for in the agreement.

This rule has been codified in Article 60 of the Vienna Convention on the law of
treaties of 1969. This Article establishes procedural rules and sets up the require-
ment of a material breach (sostanziale) to invoke the right of termination or sus-
pension of the treaty. See for comments, PISILLO MAZZESCHI, R., *Risoluzione
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
12-14.
The scope of these safeguard measures should be 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, particularly 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, 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 hands of the party adopting the measures.

From the scope of these measures it follows that the 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 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 applies 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.

65 See TALGORN, C. Les mesures de..., op. cit., p. 178.
66 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 requires a certain celerity of action.
Concluding Remarks

This work has discussed the main provisions of the Cooperation Agreement with Morocco to examine whether 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.

As regarding trade, 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 agriculture, preferential treatment means a reduction or, for certain products, abolition of customs duties. However, as seen above, the 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.

However, some of the instruments used to limit trade could also be applied to encourage complementarity. Thus, although EEC Mediterranean Member States grow the same type of products as Maghreb countries, harvest periods are different. It would therefore be possible to apply calendars to encourage harmonizing programmes of the two productions.

As for rules of origin, they are certainly applied in the case of textile products, that is to an industry which is in competition with that of the Community, in such a way as to limit preferences to a restricted number of products. However, rules of origin can even protect or promote the development 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.

As far as industrial trade is concerned, the provisions establishing the abolition of customs duties, charges of equivalent effect, quotas and measures of equivalent effects 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 it is possible to advocate an interpretation of this notion covering all charges imposed on imported products unless they are justified as services rendered to the importers and provided that the charges are proportionate to the service rendered.

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, in which case they should certainly be covered by the prohibition contained in Article 9 of the Cooperation Agreement. 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 regulations even if this could have a discriminatory effect.

A broad interpretation of the notion of measures of equivalent effect could be moderated by the possibility of the importing State having recourse to the system of derogations contained in Article 35 of the agreement interpreted in such a way as to include the mandatory requirements identified by the Court in the Cassis de Dijon.

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.

As for the prohibition of discriminatory measures and fiscal practices between imported and national ‘similar’ products, it has been remarked that if one interprets the notion of ‘similarity’ as covering only identical products or products having minor differences this 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. A further example of the influence of Community interests over the agreement lies the fact that some of the provisions in the field of labour cooperation have not, so far, been implemented.

The agreement establishes that it is the task of the Cooperation Council to adopt the measures for the implementation of the principles established in the agreement, such as 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 labour 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, 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 the 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 the 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 grandparents 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 Cooperation Agreement have not been enforced.

The relationships established in the agreement 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 guaranteeing 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 ef-
flect. 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 effect).

Finally, the Cooperation 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 renegotiating 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 was 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 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 (quotas have often 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 is 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 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 flexibil-
ity 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 the environment.

It should be considered that the execution of projects financed by such cooperation is often commissioned to Community 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 aid.

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 sector, between the Community and Maghreb countries could be the key to many of the provisions of the Cooperation 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.

A correct interpretation must be based on the aim pursued by 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 very restrictively once Maghreb countries have developed an industry capable of competing with that of the Community.

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 that it 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 a partner in international relations will depend on this choice.
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